

**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.

October 6, 2009

PROCEEDINGS AT
HEARING (DAY 63)

COPY

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1 Vancouver, B.C.
2 October 6, 2009
3

4 MR. ROSENBLOOM: Good morning, Mr. Commissioner.
5

6 SUBMISSIONS BY MR. ROSENBLOOM ON BEHALF OF THE
7 GOVERNMENT OF POLAND, continuing:
8

9 MR. ROSENBLOOM: Yesterday I was at the point in my
10 submission where I was dealing with what I call
11 the four segments of the interaction between the
12 four officers and Mr. Dziekanski. And you'll
13 recall, Mr. Commissioner, that I broke the four
14 segments down, and the first of those four
15 segments was the period from the officers' first
16 contact with Mr. Dziekanski until he reached the
17 counter. And I was in the midst of analyzing that
18 period and I was speaking in the context of
19 whether or not the police officers had any
20 justification to believe there was non-
21 cooperation, whether there was resistance, whether
22 there was defiance by Mr. Dziekanski in the course
23 of that exchange leading to Mr. Dziekanski
24 arriving at the counter.

25 Now, you'll recall further that yesterday,
26 late day, I was speaking about the alarming lack
27 of communication among the officers in respect to
28 what was transpiring in the orders to Mr.
29 Dziekanski. I suggest to you it's more than
30 simply a lack of communication. It's a lack of
31 observation. Observation because all four
32 officers were huddled in the presence of each
33 other and were there to see the various
34 instructions given first of all by Constable
35 Millington in respect to the request for Mr.
36 Dziekanski to get his passport, to the orders of
37 Corporal Robinson to have Mr. Dziekanski move over
38 to the counter. It's all there to be seen in the
39 video and I think it speaks for itself.

40 I'd like to move on the next step in the
41 sequence leading to Mr. Dziekanski going to the
42 counter. Evidence was given by Corporal Robinson
43 in these proceedings that one of the incidents of
44 this defiance of Mr. Dziekanski was that he failed
45 to put his hands on the counter. And you'll
46 recall, Mr. Commissioner, that Corporal Robinson
47 testified that as he pointed towards the counter,

1 he was ordering Mr. Dziekanski to place his arms
2 on the counter. And as we know, Mr. Dziekanski
3 did not do so.

4 Well, it's interesting that the Government of
5 Canada in its submission before you at page 38 and
6 39, it states at paragraph 169, in part, and I
7 quote:

8
9 By not placing his hands on the desk in
10 response to Cpl. Robinson's command and by
11 walking away, Mr. Dziekanski's actions were
12 perceived by the members to be non co-
13 operative and resistant.
14

15 Unquote. Now, there you have it. The Government
16 of Canada is saying, the fact that Mr. Dziekanski
17 failed to put his hands on the counter was an act
18 of resistance and defiance. Mr. Commissioner, of
19 the four attending officers who testified here at
20 this Commission, not one of the officers other
21 than Corporal Robinson made even the slightest
22 suggestion that Corporal Robinson had so ordered
23 Mr. Dziekanski to put his hands on the counter.
24 So how can the officers, other than Corporal
25 Robinson, have the slightest belief there was
26 defiance and resistance in respect to that order
27 when three of the officers never even were aware
28 that such an order had been directed to Mr.
29 Dziekanski to ask him to put his hands on the
30 counter?

31 But more important -- and my learned friend
32 Mr. Kosteckyj spoke about common sense and I keep
33 coming back to common sense about all this. The
34 witness, Corporal Robinson, testified in cross-
35 examination and acknowledged that he knew Mr.
36 Dziekanski didn't speak English. And if he didn't
37 speak English, to say to somebody without the most
38 elementary level of English to put your hands on
39 the counter and the person doesn't do it, one
40 would have expected that Corporal Robinson would
41 recognize that the lack of compliance wasn't
42 defiance. It was a lack of understanding what was
43 being ordered.

44 So in respect to that incident of so-called
45 defiance and resistance, three of the officers
46 didn't appear to even be aware of the order. The
47 fourth officer is aware of the order but

1 acknowledges that it didn't mean anything because
2 of the language shortcomings of Mr. Dziekanski.

3 Now I'm at the bottom generally of page 10
4 but I'm weaving in and out of my written
5 submission.

6 The witnesses generally speak to the fact
7 that Mr. Dziekanski was not responsive to their
8 orders, and they characterize Mr. Dziekanski's
9 movement towards his luggage as defiant when in
10 fact he had been asked for his identification. He
11 moves to his suitcase. He's told not to lean down
12 to his suitcase. He's ordered to go to the
13 counter. He shrugs his shoulders. He heads to
14 the counter. And all of that in the eyes of the
15 officers are acts of defiance.

16 I have provided in the appendices to my
17 submission many of the relevant quotes of the
18 officers where they speak of defiance. In fact,
19 Constable Rundel in his testimony spoke of Mr.
20 Dziekanski fleeing from their presence at the
21 luggage when he moved over to the counter.
22 Fleeing, as if he was taking off. He said -- and
23 I'm just doing this from memory. He at one time
24 spoke about how he got the impression Mr.
25 Dziekanski was saying, the heck with you, I'm
26 taking off. Again, Mr. Commissioner, you are the
27 eyewitness. You have the video. And I suggest
28 any reasonable viewing or interpretation of what
29 we witness with Mr. Dziekanski in those moments
30 was one of total compliance. And I might add,
31 total compliance in the face of conflicting orders
32 from the police.

33 And that should be emphasized because it's
34 one thing to comply with at least clear and
35 unequivocal orders from the authorities. It isn't
36 easy to comply when you're being told one thing by
37 one officer, something else by another officer.

38 As I said briefly yesterday, at least one is
39 comforted that Constable Bentley in his testimony
40 did acknowledge that after appreciating, through
41 the process of cross-examination, that Corporal
42 Robinson had pointed his finger at the counter,
43 Constable Bentley conceded that indeed in viewing
44 the video and appreciating what he then learned,
45 that the acts of Mr. Dziekanski could well have
46 been compliant as he went to the counter. And I
47 say that is the only reasonable interpretation

1 that can be made.

2 At the bottom of page 11, there is not a
3 single shred of evidence to suggest that during
4 this period, from first contact until Mr.
5 Dziekanski reached the counter, there was the
6 slightest act of resistance or non-cooperation.
7 To the contrary Mr. Dziekanski was calm with the
8 police on first contact, and he complied or tried
9 to comply with every police command, even though
10 those commands conflicted with each other.

11 I now would like to move to the second of the
12 four segments of Mr. Dziekanski's encounter with
13 police. That second period is the period of Mr.
14 Dziekanski's arrival at the counter until the
15 initial tasing, the first deployment.

16 During their testimony at this Commission
17 there was a remarkable retreat by all four
18 officers from the version of events that they had
19 provided to the investigators. And of course I'm
20 speaking of the IHIT statements and their
21 notebooks. Their initial version described Mr.
22 Dziekanski as swinging the stapler up above his
23 head, acting combatively and trying to hit the
24 officers with it. The officers claimed that he
25 had been stepping forward and yelling. There was
26 even the assertion that there had been a lot of
27 "articulation" - and these are words used, or a
28 word used by Corporal Robinson - before the
29 initial tasing. They claimed he was becoming
30 "more and more violent" and that this led to the
31 tasing.

32 But as with the events of the first period or
33 first segment that I have just spoken about, the
34 officers' versions of events provided in their
35 statements for this time period bear little or no
36 resemblance to what actually happened.

37 The retreat by the officers in their
38 testimony is stunning. They admitted that the
39 stapler was never raised high, and in fact Mr.
40 Dziekanski was clutching it at his chest. And I
41 say more about that in a few minutes. Not one
42 officer suggested in testimony any serious
43 movement forward or advancement by Mr. Dziekanski.
44 The evidence is that all four officers were six to
45 eight feet away from the subject.

46 Corporal Robinson conceded before this
47 Commission that there was in fact no

1 "articulation" or conversation with Mr. Dziekanski
2 before he was tasered, contrary to what he had
3 said in his IHIT statement. And at the inquiry he
4 claimed that the articulation he had meant to be
5 speaking about was before Mr. Dziekanski reached
6 the counter. Well, even if that was the case, I'd
7 love to know what that articulation was with Mr.
8 Dziekanski before he reached the counter. But in
9 any event, that --

10 THE COMMISSIONER: If I remember the evidence right,
11 Corporal Robinson did not know about the prior
12 conversation made by the two other RCMP policemen.

13 MR. ROSENBLOOM: Yes. *A fortiori*, if that is the case,
14 then obviously not only was there no articulation
15 at the time of tasering, but according to Corporal
16 Robinson, there was articulation previous to that
17 and there is no testimony of Corporal Robinson
18 knowing of any articulation before that fact.

19 Carrying on, contrary to RCMP policy, no
20 warning was given to Mr. Dziekanski before his
21 tasering. Now, let me stop there for a moment.
22 Mr. Commissioner, the warning may not have had any
23 meaningful input or consequence for the obvious
24 reasons of language deficiency. But the fact is
25 the policy of the RCMP required it unless
26 circumstances dictated otherwise. The RCMP
27 suggests that there was no time to provide a
28 warning, and I suggest that position is
29 preposterous. In reviewing the video, how it can
30 be suggested that there wasn't time to give a
31 warning to Mr. Dziekanski, I suggest it simply
32 doesn't add up. Although there was no
33 justification whatsoever to deploy the Taser, if
34 it had been necessary, there was ample time.

35 The video discloses that at no time did Mr.
36 Dziekanski ever brandish the stapler, he never had
37 it above his shoulders, he never swung it, and he
38 never took a posture of an attack, and he never
39 was in the slightest way threatening with it.
40 What he does, Mr. Commissioner, as we hear from
41 the witnesses *viva voce* - and I'm speaking of the
42 police witnesses - is he clutches the stapler at
43 his chest and appears to, according to some
44 witnesses, clench his left fist to his chest and
45 takes the stapler and clutches it to his chest
46 with his right hand.

47 Mr. Commissioner, I am submitting to you that

1 such a posture is a posture of defence, not of a
2 man about to attack. It is natural, by simple
3 reflex, that when you are faced with impending
4 danger or fear danger, that you immediately
5 protect yourself in your face and in your chest
6 area. It is a natural reflex. And it's
7 interesting that Mr. Dziekanski had good reason to
8 be in fear at that moment in time. He had just
9 been encircled. He had police with their hands by
10 their holster, and I'll speak to this in a moment.

11 And he had police officers, according to
12 their own testimony, that were of the belief that
13 at that moment in time they were dealing with a
14 man who was defiant. He was resistant. He was
15 non-cooperative. And so if there's body posture
16 of aggression, the body posture of aggression is
17 that of the four officers for their belief that
18 they were dealing with somebody who was not
19 cooperating with them. And I suggest the body
20 posture of Mr. Dziekanski, based upon what we even
21 hear in testimony from the police officers, in
22 clutching the stapler to the chest, is clearly a
23 posture of defence.

24 Now, I found one portion of evidence in this
25 Commission's testimony very, very telling and it
26 was from Constable Millington. Constable
27 Millington placed in his notes and made the
28 observation in his IHIT statement that, and I
29 quote, "He" - referring to Mr. Dziekanski -
30 "seemed more paranoid than angry that's what it
31 seemed like he was. Paranoid, agitated than
32 angry." I put a lot of weight on that, Mr.
33 Commissioner, because here is one officer who
34 doesn't observe a man who is angry - normally
35 angry people may well be poised to attack - but a
36 man who was paranoid. Paranoid people are people
37 in a state of defence. They're in fear. They're
38 in fear of something. And I found it significant
39 that one of the four officers made that
40 observation. You'll recall that I cross-examined
41 him in respect to that and he stood by that
42 observation of Mr. Dziekanski.

43 But I also found it significant in my cross-
44 examination of Constable Millington on this very
45 point that he could not understand why an
46 individual in these circumstances would have been
47 in fear or would have been paranoid. And at the

1 bottom of page 13, my submission reads: Yet
2 during his testimony Constable Millington claimed
3 to be unable to imagine how being encircled by
4 four uniformed officers with their hands in the
5 area of their holsters would lead anyone to be
6 paranoid or nervous, "if they hadn't done anything
7 wrong." In my cross-examination of the officer
8 the following exchange took place:
9

10 Q You don't think so, officer. You don't
11 think to be in a foreign country and to
12 be backed up against a wall, in this
13 case a counter, with four armed officers
14 encircling you and with their arms down
15 at their holsters, isn't traumatic?

16 A No.
17

18 Well, Mr. Commissioner, the witness surely isn't
19 being honest or has a total lack of appreciation
20 of human encounter. If any of us as Canadians
21 happened to be at an airport in Romania and we
22 hadn't done anything wrong and four uniformed
23 officers encircled us with the kind of mood and
24 presence and body posture that these officers
25 presented, and had their hands at their holster, I
26 suggest we would be trembling. And we'd be
27 trembling for good reason. We would not know what
28 was going on. We wouldn't understand what was
29 causing this. And quite frankly I think we'd fear
30 for our lives. And I think the officer's evidence
31 speaks to the lack of being candid and honest
32 before these proceedings.

33 He did concede in cross-examination during
34 this exchange that if a person did interpret the
35 events in such a way as to cause fear, the person
36 would naturally go into a defensive posture.

37 Now, there is significant evidence
38 corroborating that Mr. Dziekanski was in fact in
39 just such a mental state, fearing for his life or
40 well-being. On the enhanced audio of the video,
41 the Pritchard video, we are able to hear the
42 telling final words of Mr. Dziekanski as he was
43 about to be tasered by Constable Millington. And
44 I referred to this in my opening remarks, because
45 again, I consider this very, very significant.
46 You'll recall, Mr. Commissioner, I spoke of two
47 unique features to this case that is before you.

1 One, that you are the eyewitness. And secondly,
2 and importantly, that you have the benefit as the
3 adjudicator, as the decision maker of this matter,
4 of knowing the state of mind of Mr. Dziekanski,
5 and that state of mind is known through the
6 statement, the last words that we hear of Mr.
7 Dziekanski before his death. He says, "Leave me
8 alone. Leave me alone. Did you become stupid?
9 Why?" And the Polish interpreter said to us that
10 "Did you become stupid" could also be interpreted,
11 "Are you crazy?"

12 Now, as I said in my opening, and I don't
13 want to belabour this, those are words of a person
14 who clearly is in fear. He is paranoid at that
15 point. He is defensive. A man who is about to
16 attack four police officers doesn't talk about
17 "Leave me alone. Leave me alone. Have you become
18 crazy?" or "Are you stupid?" And I consider that
19 information that is before us, and is obviously
20 without challenge because it is the transcript of
21 what he said, to be an integral foundation block
22 to any analysis of what happened justifying or not
23 justifying the deployment of the Taser.

24 Now I'm at the top of page 15. We get to the
25 business of whether there was any forward movement
26 by Mr. Dziekanski before that first deployment.
27 And Mr. Commissioner, you heard the evidence of
28 Mr. Grant Fredericks called on behalf of the RCMP,
29 and you heard two rebuttal witnesses called on our
30 behalf, and I'll speak to that a little later on.
31 But I don't intend to spend very much time on it
32 because I'm going to suggest to you that Mr.
33 Fredericks' evidence was completely discredited in
34 the cross-examination and in turn with the
35 rebuttal witnesses that were called and their
36 cross-examination. I'll come to that briefly a
37 little further on.

38 However, I do want to draw to your attention
39 the statement found in Mr. Hira's submission, at
40 page 42 of Mr. Hira's submission. Just give me a
41 moment, please. And I put this before you for
42 your attention and for Mr. Hira's explanation.

43 As I read Mr. Hira's submission, he concedes
44 that there was not an advancement by the officers
45 prior to the tasing. I refer you to page 42. I
46 refer you to note 205. And if somehow or other I
47 have misrepresented what is said here, I will be

1 the first to apologize to Mr. Hira. He says, and
2 I quote -- I should go a couple of paragraphs
3 ahead, first of all 203. He's talking about
4 Constable Millington providing a third statement,
5 and then he's speaking about the statements that
6 were supplied or provided by Constable Millington.
7 204, Constable Millington also completed a Form
8 3996, reporting on the use of the Taser. And then
9 205, it says:

10
11 The notes, statements, and Form 3996, contain
12 errors regarding the following matters:
13

14 The sub-indent (b) of five sub-indent, sub (b):
15

16 Mr. Dziekanski advancing towards the officers
17 with a stapler, prior to the deployment of
18 the taser
19

20 Now, I have read it and reread it and reread it,
21 and as I read that, it sounds to me as if the
22 position of Mr. Hira is that indeed there was no
23 advancement. And of course Mr. Hira can speak for
24 himself and inform us otherwise. And I will come
25 back to the Grant Fredericks testimony in just a
26 moment or two.

27 I come now to the third phase or segment of
28 the incident, and the third segment is the period
29 from tasing of Mr. Dziekanski until he was
30 handcuffed.

31 There are, once again, a number of remarkable
32 aspects to the police officers' evidence in
33 respect of this period. Firstly, the officer in
34 charge, Corporal Robinson, didn't even have
35 certification to deploy the CEW and his last
36 course had been taken in 2003. So he was out of
37 date in respect to that training. But I of course
38 appreciate he is not the one who deployed the
39 Taser. The question is whether he was authorized
40 as officer in charge to order someone else to
41 deploy it when in fact he was without proper
42 certification or training.

43 THE COMMISSIONER: Well, now, just a moment. No doubt
44 your friends will comment on this. But my
45 understanding of that is not that it invalidated
46 his certification, but indeed he was not up to
47 date.

1 MR. ROSENBLOOM: That may be, and I seek comment from
2 my learned friends about it. Whatever the case,
3 the fact is he was out of date in terms of having
4 taken the necessary courses that he was supposed
5 to have taken for his right to use the Taser. In
6 cross-examination he acknowledged he was unaware
7 whether to be in that state would or would not
8 deprive him of the right to give the orders for
9 someone else to deploy the Taser.

10 He testified that he had recalled from his
11 training that there were medical issues
12 surrounding multiple deployments.

13 Secondly, the officers unanimously informed
14 the IHIT investigators that the first deployment
15 did not take Mr. Dziekanski down. They testified
16 that Mr. Dziekanski did not drop as they had
17 expected based upon training. Corporal Robinson
18 went so far in his IHIT statement as to say that
19 the first deployment "wasn't having any effect."

20 The Government of Canada in their written
21 submission at page 39, paragraph 173, reads:

22
23 Once the Taser was deployed, the members
24 expected that Mr. Dziekanski would be
25 immediately immobilized and fall to the
26 ground, as they are trained that the Taser
27 causes neuromuscular incapacitation. This,
28 however, did not happen as Mr. Dziekanski
29 initially remained upright, moving away from
30 the members.

31
32 Mr. Commissioner, if Mr. Dziekanski's moments
33 after tasing could be considered still upright,
34 I challenge that. I mean, the man was clearly in
35 the process of a fall, of a free fall. He had
36 clearly lost his muscular abilities to remain
37 upright.

38 THE COMMISSIONER: As I remember it, the fact that the
39 report said six seconds could have meant 5.01
40 seconds, and the timing is close. But if it was a
41 full six seconds, my recollection is Dziekanski at
42 that point was on his back with his feet in the
43 air.

44 MR. ROSENBLOOM: That is correct. And of course that
45 speaks to the issue of when a second deployment is
46 ordered and carried out. But I'm simply speaking
47 at this moment to whether or not it could ever be

1 said that after tasing, Mr. Dziekanski remained
2 upright. He was staggering to a fall from the
3 moment of deployment. That's my position.

4 Now, we have the issue of the second
5 deployment and the fact that it clearly was
6 ordered and was deployed after Mr. Dziekanski was
7 down and when he was writhing and screaming in
8 pain.

9 Anyone viewing the video cannot be left with
10 any impression other than that the first
11 deployment was effective - let me stop there for a
12 moment. It may not be to the RCMP's satisfaction
13 of effectiveness, but if the Taser deployment is
14 for the purpose of bringing down an individual for
15 purposes of then handcuffing him, the first
16 deployment was effective - that it caused Mr.
17 Dziekanski great pain, it caused him to
18 immediately lose voluntary control of his body,
19 and caused him to collapse to the ground. There
20 is no doubt that he was totally on the ground at
21 the time of the second deployment.

22 Then we come to this very curious set of
23 facts, and that is how all four officers testified
24 in their IHIT statements that they wrestled him to
25 the ground. You know, Mr. Commissioner, I don't
26 know what to make of that, and I don't know what
27 to make of the police suggestion that yes, they
28 made an error and they all made the error, but
29 they recognize now that there wasn't ever a
30 wrestle to the ground. One would have thought
31 when one gave statements to IHIT investigators
32 within a few hours of an incident, one would
33 remember whether one participated in a wrestle to
34 grab a man that's upright and to bring him down to
35 the ground. One would think that would be
36 something that you couldn't possibly forget in
37 giving your recollection of events. And yet all
38 four provide the evidence that there was this
39 wrestling to the ground. It's obviously patently
40 different than what actually happened.

41 Then we come to the question of multiple
42 tasing. One of the key questions before this
43 Commission is the appropriateness of those
44 multiple deployments. He was on the ground. The
45 second deployment takes place. We get to the
46 third, fourth and fifth. As the stun gun
47 application takes place when he's on the ground

1 and there is obviously tremendous reaction by Mr.
2 Dziekanski, which one should expect from somebody
3 being inflicted with tremendous pain in the course
4 of being pinned down. To remain mute without any
5 physical reaction whatsoever on a deployment of a
6 Taser with that severity of pain is simply
7 nonsense and explains, in my submission, why Mr.
8 Dziekanski was putting up the reaction that he did
9 with the officers while they were trying to
10 handcuff him.

11 I want to draw to the Commission's attention
12 that Constable Bentley in testimony acknowledged
13 that "perhaps" the second Taser deployment was not
14 necessary. So at least we have one officer
15 recognizing that there was an issue.

16 Now, I say in my last comments about the
17 tasing that there is never, from my observation
18 of the video, the slightest reason to suggest that
19 Mr. Dziekanski was going to overpower all four
20 officers, not to mention you had backup security
21 officers present. So we had at least six
22 officials who were there and could have all taken
23 on the battle if it had been necessary. But I
24 suggest in reviewing the video, it was never to
25 the point where one could imagine Mr. Dziekanski
26 taking on and succeeding in any struggle with the
27 four officers.

28 And I'll ask you lastly, in reviewing the
29 video, to observe that there is a diminished
30 exertion of Mr. Dziekanski as he goes in the
31 throes leading to unconsciousness.

32 I cite in my submission the RCMP Manual about
33 the CEW, which reads: "Avoid extended or repeated
34 CEW applications where practical."

35 I say the first deployment was not justified,
36 and obviously all the further deployments, the
37 following four, were unnecessary.

38 I come now, Mr. Commissioner, to the fourth
39 of the four segments of his encounter with the
40 police, and that is the period from handcuffing
41 until his death.

42 I'm going to suggest to you, Mr.
43 Commissioner, that the officers showed a reckless
44 and callous disregard for the life of Mr.
45 Dziekanski. Their evidence is distressing in many
46 respects.

47 First, Corporal Robinson clearly placed his

1 knee or shin on the back of Mr. Dziekanski's neck
2 for 24 seconds. Although he denied pressing down
3 on the neck, clearly the witness was not truthful
4 when he was confronted with the obvious. Corporal
5 Robinson's repeated denials fly in the face of
6 what can be seen on the video. Even Constable
7 Millington acknowledged this in his testimony.
8 There is ample evidence that such conduct is
9 contrary to RCMP policy, and that the medical
10 consequences are obvious. Both Constable
11 Millington and Corporal Robinson acknowledged the
12 potential harm to a person when pressure is
13 applied to the neck area.

14 It is dumbfounding that Corporal Robinson
15 would deny this conduct when he had even stated to
16 the IHIT investigators, twice I might add -- one
17 of them, here's the quote:

18
19 ...so hm, I said, I put him out, 'cause I was
20 the one positioned on top of him.
21

22 In fact, when confronted with these
23 statements in cross-examination, Corporal Robinson
24 testified that when he said "I put him out" he was
25 somehow not saying that he had rendered Mr.
26 Dziekanski unconscious. This evidence cannot be
27 given the slightest credibility. Clearly the
28 officer acknowledged to the IHIT investigators
29 that the state of unconsciousness was as a result
30 of how he had been positioned on Mr. Dziekanski's
31 body. No other reasonable interpretation can be
32 made of these statements.

33 I want to speak to the submission of Corporal
34 Robinson in these proceedings, in his final
35 submission, and so that of course being the
36 submission of Mr. Harris, and I'd like to refer to
37 page 31 and 32. At paragraph 77, Mr. Harris on
38 behalf of his client said:

39
40 During cross-examination Corporal Robinson
41 was challenged regarding the exact placement
42 of his knee. He was adamant that it was not
43 on Mr. Dziekanski's neck.
44

45 He goes on further in paragraph 79 of his
46 submission to say that if the incident occurred,
47 if indeed there had been this application of the

1 knee to the neck, "it was brief and accidental."
2 Well, let me stop there for a moment. Corporal
3 Robinson acknowledged that if it had happened,
4 because of looking at the video he acknowledged it
5 was 24 seconds. We had timed it. And in an
6 exchange of cross-examination with me he admitted
7 24 seconds. In any event, you, Mr. Commissioner,
8 could obviously confirm that in the course of
9 preparing your report. That's not brief. Twenty-
10 four seconds with the weight of a male on the back
11 of the neck of an individual. Where Mr. Harris
12 speaks of it maybe being accidental, it's not
13 accidental when somebody puts that kind of posture
14 and places their weight or shin on the back of the
15 neck of an individual. And I say it's
16 particularly not an accidental matter when the
17 officer later then says, "I put him out." "I put
18 him out." It seems to me that it was clearly with
19 forethought and was calculated and that he appears
20 to have been satisfied with the end result, which
21 is that he put Mr. Dziekanski to a state of
22 unconsciousness.

23 Now, there is something further to say on
24 this matter. This incident took place in an
25 international airport where emergency services,
26 the ERS, was readily available throughout the
27 terminal, including defibrillators and oxygen.
28 And my friend Mr. Kosteckyj and my friend Ms.
29 Pastine have spoken about this, and I don't want
30 to be too lengthy. But I do want to say that the
31 officers had first aid kits in their cruisers, and
32 yet the officers testified of knowing little or
33 nothing about the availability of these services
34 at the airport. I'm speaking of the location of
35 defibrillators, location of oxygen.

36 Staff Sergeant Wright, who testified recently
37 here, the officer in charge of the subdetachment,
38 testified that his officers received no training
39 on the availability of the first aid services at
40 the airport. Mr. Commissioner, I use the word
41 "stunning" too often in my comments about this
42 case, but I found that to be a stunning
43 revelation, that these are officers located at the
44 subdetachment at the airport. Their services are
45 exclusively, as I understand it, for the
46 international terminal area and the Sea Island
47 area and the small residential community at Sea

1 Island. And they're trained in that subdetachment
2 and nobody tells them when they come on to watch
3 that there are defibrillators throughout the
4 terminal and oxygen is available and the ERS, the
5 fire department at the airport, are ready, willing
6 and able to provide first response medical care?
7 I was shocked by Staff Sergeant Wright's
8 testimony. And I say that if in fact this is the
9 case, it is a shocking indictment of the training
10 program for officers assigned to the airport
11 subdetachment. And I invite you, Mr.
12 Commissioner, to make comment in due course.

13 The first aid certification of the commanding
14 officer, Corporal Robinson, had lapsed in 2002.
15 Yet notwithstanding his lack of certification, he
16 nevertheless chose to act as the only officer
17 caregiver administering the inadequate first aid
18 measures taken at the scene.

19 The medical observations here were in fact
20 ominous. It was evident immediately following
21 handcuffing that Mr. Dziekanski was unconscious.
22 Cyanosis was also immediately noticeable in Mr.
23 Dziekanski's face -- and let me stop there for a
24 moment. We heard comment by both my learned
25 friends who preceded me that there was evidence of
26 cyanosis seen by civilian witnesses that were on
27 the other side of the secured area in the meet-
28 and-greet area. How many feet away, I don't know,
29 but a lot further away than the officers, and even
30 they were able to observe the blue discoloration
31 of skin which is cyanosis. And then there was
32 observation of snoring and laboured breathing.
33 All that was heard.

34 The officers acknowledged that Mr. Dziekanski
35 was in serious medical distress. So let's stop
36 there for a moment. There is an acknowledgement
37 in the testimony that the officers acknowledged at
38 that moment that the man was in serious medical
39 distress. Yet, let's analyze what transpires from
40 when Mr. Dziekanski goes unconscious, they know he
41 is in serious medical distress, until
42 approximately ten minutes later when the first
43 responders, Richmond Fire, arrive. During those
44 ten minutes, when Mr. Dziekanski was unconscious
45 and while waiting, I'm going to submit to you
46 there was a reckless disregard for the care and
47 safety of Mr. Dziekanski. I say to you, Mr.

1 Commissioner, that what Mr. Dziekanski's condition
2 presented were all the precursors of cardiac
3 arrest. It was a classic case of the precursors
4 of cardiac arrest: unconsciousness, cyanosis of
5 the skin, and indeed laboured breathing.

6 So what medical care was provided during this
7 all important period? The ERS at the airport were
8 never called, for which both the police and YVR
9 officials must be to blame, and I adopt everything
10 said by my learned friend Mr. Kosteckyj in this
11 regard. No one called for a defibrillator nor
12 oxygen.

13 Now, I don't know how long the ERS would have
14 taken to get to the scene, but one can definitely
15 say with some confidence it would have been a lot
16 shorter a period than ten minutes from the
17 Richmond Fire Department's stations that are off
18 Sea Island. It took the police only a minute from
19 their substation to get to the scene. One
20 presumes that ERS would have been at the scene
21 within a minute or two. Those minutes are
22 precious. In the context of a person presenting
23 themselves with the medical condition of Mr.
24 Dziekanski, every second counted. And every
25 second counted to the extent that one would be
26 prepared for a cardiac arrest situation, which of
27 course would call for a defibrillator and for
28 oxygen and for the best care possible.

29 Well, what does happen? Corporal Robinson,
30 uncertified because his first aid training had
31 expired in 2002, decides to take control of the
32 medical care of the man. He claims he took pulse,
33 yet he cannot tell us in cross-examination how
34 many times he did take the pulse. He tells us Mr.
35 Enchelmaier did take the pulse and there's some
36 corroborative evidence of that to the extent of
37 video footage. And then he says that Mr.
38 Enchelmaier played a significant role in the care
39 from that point on. Mr. Commissioner, if I am
40 correct in my memory of this evidence, not one of
41 the other officers - Millington, Bentley or
42 Rundel - had any evidence that Mr. Enchelmaier
43 played any role whatsoever in the first aid or
44 first response or medical care of Mr. Dziekanski.
45 Not a word. Now, one would have thought these
46 three other officers present at the scene,
47 presumably troubled by the situation that was

1 before them, would have made some observations of
2 Mr. Enchelmaier's significant role if indeed he
3 did play a significant role.

4 No officer ever checked Mr. Dziekanski's
5 airway for obstruction, something expected to be
6 carried out with an individual exhibiting
7 cyanosis.

8 Unfortunately, one must conclude that there
9 was virtually no care provided to Mr. Dziekanski
10 during those critical minutes leading to Richmond
11 Fire's arrival. And to add further insult,
12 Captain Kirby Graeme of the Richmond Fire
13 Department testified that on his arrival three of
14 the officers were ten meters away from Mr.
15 Dziekanski on the chief's first observation and
16 one officer was five meters away from Mr.
17 Dziekanski. Now, I'm going to suggest, Mr.
18 Commissioner, the fire captain would have
19 absolutely no motive whatsoever to mislead this
20 inquiry with inaccurate evidence. There's no
21 suggestion that he harboured some resentment
22 against the RCMP or anything of the sort. That's
23 his testimony and it's troubling testimony because
24 it suggests that on the arrival of Richmond Fire,
25 the officers are not even kneeling at the side of
26 Mr. Dziekanski providing any assistance
27 whatsoever. He's been left to die. And in fact,
28 he was dead, and he was dead because the evidence
29 or Richmond Fire is he had no pulse.

30 So we know he had no pulse at the moment
31 Richmond Fire arrived, and we know that that was
32 confirmed when the ambulance service, B.C.
33 Ambulance Service arrived and so confirmed. So we
34 ask ourselves the question, well, when did Mr.
35 Dziekanski fall into a state of cardiac arrest?
36 Well, one could say that maybe it's a coincidence
37 that it just happened at the split second that the
38 Richmond Fire arrived. But I suggest to you, with
39 great respect, Mr. Commissioner, these officers
40 shouldn't be entitled to the benefit of the doubt
41 in suggesting it's just a coincidence that it
42 happened at that moment.

43 When a person falls into a state of cardiac
44 arrest, it is critical within a matter of a minute
45 or two that defibrillators are applied and there's
46 an attempt to revive the individual.

47 THE COMMISSIONER: Did not the -- maybe not Captain

1 Graeme but the female who took over -- I forget
2 her name.

3 SEVERAL SPEAKERS: Duranleau.

4 THE COMMISSIONER: Didn't one of other of them say that
5 when they first examined him, that the cyanosis
6 was quite prevalent?

7 MR. ROSENBLOOM: I believe that to be the case. I did
8 not cross-examine in that area, but I think that
9 can be confirmed by other counsel.

10 Mr. Commissioner, I'm stating something
11 pretty obvious. But when one is faced with an
12 individual with all the earmarks of a process
13 leading to cardiac arrest, you want to have the
14 handcuffs off, you want to have the defibrillator
15 ready, and you want to go into action
16 instantaneously of observing that there has been a
17 loss of pulse. And here what we have when there's
18 a loss of pulse are four officers, one five meters
19 away and the other three ten meters away according
20 to Captain Graeme.

21 Which takes me to the whole business of the
22 handcuffs. I keep using the term "troubled," but
23 I'm troubled by this as much as everything else.
24 Faced with this situation, faced with the first
25 responders arriving, they request immediately that
26 the handcuffs get removed so that they can carry
27 out a fundamental or elementary assessment of Mr.
28 Dziekanski and presumably immediately commence
29 CPR, which you obviously can't do with handcuffs
30 behind one's back. And what is the response that
31 the RCMP gives to the first responders? The
32 response is that they would not remove those
33 handcuffs. And what is the justification for not
34 removing the handcuffs when first responders are
35 there trying to revive a man who is in a state of
36 cardiac arrest? Their justification was they were
37 worried that Mr. Dziekanski was going to come to
38 and be aggressive again and maybe endanger
39 someone's life.

40 Mr. Commissioner, such evidence is
41 ridiculous. It is ridiculous because a person who
42 is unconscious could indeed possibly become
43 conscious. I won't deny that. But he was
44 cyanotic. And the fact he was cyanotic speaks to
45 a serious medical condition. It is confirmatory
46 of the fact that the unconsciousness isn't, for
47 example, hitting his head and having a brief state

1 of unconsciousness and suddenly coming to. The
2 state of cyanosis is the state of somebody that
3 has a serious oxygen deficit, that is clearly
4 facing a very concerning medical moment. And yet,
5 the RCMP take the position that it was perfectly
6 appropriate to deny the first responders their
7 request to remove the handcuffs.

8 Then the second team of first responders come
9 by way of the B.C. Ambulance Service, and
10 reluctantly Corporal Robinson then gives
11 permission to have the handcuffs released so that
12 CPR can be commenced, and as you know, it was
13 commenced, and regrettably it was a futile
14 exercise and it led to the demise of Mr.
15 Dziekanski.

16 I'm sorry to say that all this adds up, in my
17 submission, to a reckless disregard by all four
18 officers for the life of Robert Dziekanski.

19 I come now to the top of page 23 of my
20 submission, the evidence of Grant Fredericks.
21 Generally I let my written submission speak for
22 itself and I don't want to spend a great deal of
23 time on it, because quite frankly I submit that
24 Mr. Fredericks' evidence was totally discredited
25 before this tribunal. But I'll be brief in
26 speaking to it.

27 The four police officers testified that Mr.
28 Dziekanski advanced towards them shortly before he
29 was tasered. And I have already spoken to Mr.
30 Hira's submission where he appears to acknowledge
31 that no advancement took place. But no doubt, in
32 order to buttress their claim and to bolster their
33 overall credibility, the report of Grant
34 Fredericks was tendered, albeit late in the
35 inquiry process. And Mr. Commissioner, you will
36 recall that Mr. Fredericks spoke about applying
37 the science of photogrammetry.

38 THE COMMISSIONER: Well, your point is at the bottom of
39 24, there was not two fixed points.

40 MR. ROSENBLOOM: Right. And not having two fixed
41 points, it was submitted certainly by the two
42 rebuttal witnesses that we called, Mr. Hird-Rutter
43 and Mr. MacInnis, Duane MacInnis, that you simply
44 can't do an exercise in photogrammetry without
45 those two fixed points.

46 I'm suggesting that the evidence that Mr.
47 Fredericks gave was useless and of no probative

1 value whatsoever to these proceedings. I invite
2 you to note during your deliberations that I have
3 passages from both Mr. Hird-Rutter and Mr.
4 MacInnis in reply or I should say in rebuttal to
5 Mr. Fredericks' evidence, and unless invited to do
6 otherwise, I don't want to say a great deal more
7 because I don't think it deserves much more. And
8 neither of our rebuttal witnesses were seriously
9 challenged in cross-examination.

10 I do have at page 27 the interesting exchange
11 of my cross-examination with Mr. Fredericks about
12 the fact that if one could actually accept his
13 evidence that there was movement forward, could he
14 tell us how far he believed Mr. Dziekanski to move
15 forward before the tasing. And at one telling
16 moment, I said, "It could be an inch?" And he
17 answered, "I don't want to guess on how far he's
18 moved forward. I don't -- I can't say." And so
19 we're left with, if one felt that Mr. Fredericks
20 did bring some evidence of probative value, it
21 certainly gets reduced to insignificance if he
22 couldn't say even whether there was an inch of
23 advance movement towards the officers in question.

24 At the bottom of page 27, I say, but the
25 question surely must be that as Mr. Dziekanski
26 stood at the counter in those last few moments of
27 his life, did he take any actions that warranted
28 shooting him with the Taser? He was clearly in a
29 state of fear. Would it be so odd if he stepped
30 nervously from side to side, shifting his weight,
31 looking at the officers who were surrounding him?
32 If he shuffled forward an inch or three inches or
33 even a foot, what of it? Was that really an
34 indication of an impending attack on one of the
35 officers such that they were justified in
36 discharging the Taser?

37 We submit that to be the real question and
38 say that the entire evidence of Mr. Fredericks
39 amounted to nothing more than an unpersuasive red
40 herring that was intended unsuccessfully to
41 bolster the very questionable credibility of the
42 four officers. Whatever effect it did have, it
43 cannot be said to show any movement that would
44 justify the use of the Taser.

45 I come to my next chapter, which is the
46 police credibility. I want to read this portion
47 of my submission, which is two pages, verbatim

1 because I want to make sure there is no
2 misunderstanding of exactly what I am saying.

3 Among the most troubling aspects of this
4 incident is the lack of credibility of the four
5 police officers. Put bluntly, in light of all of
6 the evidence in this case, we allege that there
7 has been a self-serving collaboration by the
8 officers to fabricate an untruthful version of
9 events. Mr. Commissioner, we do not make such
10 allegations lightly.

11 During cross-examination, I confronted the
12 officers with a very curious fact. I asked each
13 of the officers if they could explain why all of
14 them had recounted erroneous versions of the
15 events that were almost identical on the crucial
16 issues. They all acknowledged that as police
17 officers they were professionally trained to be
18 astute observers and recorders of incidents. They
19 acknowledged that the innocence and guilt of
20 citizens often depended on the accuracy of their
21 accounts of the incidents in which they are
22 involved.

23 But most troubling here is that all four
24 officers remarkably advanced to the IHIT
25 investigators an almost identical and fictional
26 account of the most important aspects of the
27 incident.

28 From a review of the evidence, particularly
29 the IHIT statements, we established that the
30 erroneous accounts all share the following
31 similarities:

- 32
- 33 (a) Mr. Dziekanski was agitated and resistant on
 - 34 the officers' arrival: all four officers.
 - 35 (b) Mr. Dziekanski was resistant when he walked
 - 36 away from the luggage: three officers.
 - 37 (c) Mr. Dziekanski was yelling: all four
 - 38 officers.
 - 39 (d) Mr. Dziekanski was swinging the stapler: all
 - 40 four officers.
 - 41 (e) Mr. Dziekanski had the stapler raised high:
 - 42 three officers.
 - 43 (f) Mr. Dziekanski advanced on the officers after
 - 44 going to the counter: three officers.
 - 45 (g) The first Taser deployment did not take Mr.
 - 46 Dziekanski down: all four officers.
 - 47 (h) Mr. Dziekanski had to be wrestled to the

1 ground after the first Taser deployment:
2 three officers.
3

4 Of course, none of these claims is true.

5 What is one to make of these unanimous or
6 almost unanimous inaccuracies? One is forced to
7 the conclusion, I regret, that these officers
8 intentionally misled the investigators, and to the
9 extent that they denied fabricating their stories
10 at this inquiry, they lied under oath.

11 The officers' conduct can be construed as
12 nothing short of an intentional act to subvert the
13 course of justice. We appreciate that it is
14 beyond the reach of this inquiry to consider the
15 possible **Criminal Code** offences that obviously
16 arise from such conduct. But it is well within
17 your mandate to rule that the four officers were
18 not credible and that their evidence should be
19 discounted.

20 I'd now like to move on to the next chapter,
21 "The Misinformation Campaign."

22 Another very disturbing aspect of this whole
23 matter before you relates to the RCMP's
24 mishandling of their communications with the
25 public, with the media and in turn the public.

26 There is now ample evidence before the
27 inquiry that beginning shortly after October the
28 14th, the day of this incident, RCMP media
29 spokespersons disseminated false information to
30 the media, and in turn, to the public. Now, this
31 misinformation included the following:
32

- 33 (a) Despite efforts to calm Mr. Dziekanski down,
34 he remained aggressive and confrontational.
35 (b) When the police officers were trying to calm
36 Mr. Dziekanski down, he continued to throw
37 things around.
38 (c) Mr. Dziekanski continued to yell and scream
39 after the police officers' arrival.
40 (d) The first Taser deployment did not seem to
41 have any effect.
42 (e) There were only three officers involved.
43 (f) There were only two deployments of the Taser.
44 (g) In respect to the number of deployments,
45 Sergeant Lemaitre went so far as to publicly
46 rebuke witness Sima Ashrafinia, who had said
47 publicly that there had been four

1 deployments, and when he informed the media
2 that she was wrong, he said that the RCMP
3 would be proven right in stating that there
4 had been only two deployments.
5

6 Well, interestingly enough, the civilian witness,
7 Sima Ashrafinia, was right but not completely
8 correct. She had four deployments. In fact there
9 were five. But at least she was a lot more
10 accurate than the RCMP and she stood her ground
11 even though the RCMP went public to attempt to
12 discredit what she had said.

13 Now, I submit that all these
14 misrepresentations are inexcusable in that
15 accurate facts were easily obtainable by watching
16 the video, which at that point was in the custody
17 of the police. And I believe, Mr. Commissioner,
18 that Sergeant Lemaitre testified that he did see
19 the video but I think he said he only saw a minute
20 of it. I hope I'm accurate. Yes. And if that's
21 the case, one must ask the question, as a media
22 officer about to go out into the wilds of a media
23 scrum, you would expect that both Corporal Carr
24 and Sergeant Lemaitre would want to see the entire
25 video to ensure that they were at least cognizant
26 of what was depicted in that video so that when
27 they spoke to the media they at least would not
28 end up with egg on their face. And yet, according
29 to Sergeant Lemaitre, he only chose to view one
30 minute of the video in question.

31 Now, as to the number of Taser deployments,
32 even Constable Millington's notebook disclosed
33 four deployments, so presumably when Sergeant
34 Lemaitre goes out to the public forum to give his
35 pronouncements, the notebook of one of the four
36 officers acknowledged four deployments. And by
37 the end of October the Baltzer report was
38 available indicating that there had been in fact
39 five deployments.

40 Yet in the face of all this information, the
41 force, meaning the RCMP, deliberately or
42 negligently disseminated the misinformation and
43 then chose not to correct the record for more than
44 one year. And it's interesting, Mr. Commissioner,
45 that in fact they do not correct the record. It
46 isn't the force that corrects the record, but it's
47 the Criminal Justice Branch in their announcements

1 a year later, at which time they inform the public
2 that they were not laying any charges against the
3 four officers. It was in the course of that
4 presentation that the story comes out that indeed
5 the public had been misled for over a year in
6 respect to these critical facts.

7 Now, I found Sergeant Lemaitre somewhat
8 candid in cross-examination, and that was
9 refreshing. He was candid to the extent of
10 informing you, Mr. Commissioner, that after this
11 misinformation was given out, he was very
12 uncomfortable with the situation and he had some
13 animated - and I believe those were his words -
14 animated conversations in the caucuses of the RCMP
15 about the situation because he had a reputation to
16 maintain with the media and he recognized the
17 responsibilities that they have as media officers
18 to provide a truthful account to the public
19 regarding events that have transpired.

20 He testified in his evidence of being
21 frustrated and exasperated by the fact that he
22 could not get the truth out, that he was being
23 told that once recognizing there were statements
24 of misinformation that he had provided, that he
25 was to cease any further involvement and he was
26 not to participate in any way in clearing up the
27 public record. And you'll recall that he pointed
28 the finger, if I can put it that way, to Corporal
29 Carr. He said he got the misinformation from
30 Corporal Carr and he was also being told that the
31 record would not be corrected.

32 THE COMMISSIONER: Mr. Rosenbloom, at page 32, your
33 first sentence -- do you still stand by the word
34 "deliberately"?

35 MR. ROSENBLUM: The first sentence of what paragraph?
36 I'm sorry?

37 THE COMMISSIONER: Page 32, "Yet in the face of all of
38 this information..."

39 MR. ROSENBLUM: I certainly do. Just to put it in
40 context, the paragraph reads:

41
42 Yet in the face of all this information, the
43 force deliberately or negligently
44 disseminated the misinformation and then
45 chose not to correct the record for more than
46 one year.
47

1 My response to that is -- at the end of the day
2 that judgment of course is on your shoulders and
3 no one else's. But how could the officers who
4 disseminated this information not be aware that
5 what they were saying was in error? You know,
6 with Sergeant Lemaitre one might argue that as he
7 only watched a minute, he said, a minute of the
8 video, that maybe in his case it was negligence,
9 and I say it's negligence if he failed to view the
10 whole video before going out into the public forum
11 and speaking about it.

12 But when it comes to Corporal Carr, if my
13 memory is right of the evidence, and the record
14 will speak for itself, Corporal Carr, I believe,
15 did see the entire video. He was part of the
16 briefing back at the Richmond Detachment office in
17 the early morning hours of the day in question,
18 the 14th of October. And I suggest to you that
19 any viewing of that video would have led one to
20 believe that much of what I have written as being
21 the misrepresentations on the previous page could
22 not possibly be simply acts of negligence.
23 Rather, I will suggest that indeed it was
24 deliberate. But my wording there very clearly
25 says the force either deliberately or negligently.
26 And as I say, at the end of the day, that judgment
27 rests of your shoulders and only your shoulders.

28 If I may go on, and I'm speaking about
29 Sergeant Lemaitre pointed the finger at Corporal
30 Carr that that's where he got the misinformation.
31 Corporal Carr recognized early on that there was
32 this misinformation but he pointed the finger at
33 Superintendent Rideout and suggested
34 Superintendent Rideout had ordered a cease and
35 desist order in terms of any further relationship
36 with the media regarding what transpired out at
37 YVR.

38 And then we come to this very interesting
39 incident. We have the head of the IHIT
40 investigation team, Superintendent Rideout,
41 informing the RCMP media people they are not to
42 speak about this matter any more in light of how
43 things had been messed up with the erroneous
44 information to that point in time. And yet, in
45 spite of that, on October the 30th - and much was
46 made of this in cross-examination - the RCMP holds
47 a press conference, issues their press release,

1 and speaks to various issues pertaining to this
2 incident. They were focused on the issue of
3 whether the RCMP had provided proper medical care
4 to Mr. Dziekanski at the time he lay dying at the
5 airport. And they had a full press release, full
6 media strategy, to inform the media that in fact
7 the RCMP did do what they should have done. And
8 they defended themselves and they were defending
9 themselves because Richmond Fire Department, if my
10 memory is right, was about to go public with
11 expressing their concern about what they observed
12 on their arrival.

13 So October 30th, the RCMP breaches this very
14 cease and desist order that Superintendent Rideout
15 had imposed upon the media people. And I listened
16 as carefully as I could to Superintendent
17 Rideout's justification for going public on October
18 30th, in spite of the fact that he'd ordered
19 everybody to have their lips sealed. And quite
20 frankly, the only conclusion I can come to is that
21 they decided to do so on that occasion because it
22 was self-serving. It was helpful to their cause
23 to have that message out to the public.

24 Now, that leads to the fact that they were
25 prepared to make exceptions to the rule and to go
26 public when it was in their interest. And yet, in
27 respect to the erroneous representations made to
28 the media around the 14th of October and soon
29 after, they chose a strategy of remaining silent
30 for over a year. And there is an exchange in
31 cross-examination between myself and Corporal Carr
32 at page 33 of my submission that I've also found
33 very, very interesting. My question was:
34

35 Q Would you not agree with me that the
36 misinformation that was disseminated to
37 the media during the early days --

38 A Yes.

39 Q -- would have compromised the
40 investigation?

41 A It could have, absolutely. I would
42 agree with you.
43

44 So here we have Corporal Carr acknowledging that
45 by failing to correct the record with the public
46 regarding what had transpired that night, that
47 could compromise the investigation. And yet, in

1 spite of holding that viewpoint, they chose to
2 remain silent and they did nothing about it.

3 The excuses provided to the Commission for
4 initially misleading the public, and in turn
5 failing to correct the record, are totally
6 unconvincing. First, as was said above, they
7 broke their own rule on October 30th when it was
8 in their interest to do so. In fact, on the same
9 day Corporal Carr described their failure to
10 rectify the misinformation as an "oversight" in an
11 interview with CBC. That was quite an oversight,
12 Mr. Commissioner, especially with national and
13 international media focused on this tragic event.

14 The misinformation provided to the public
15 was, at best, gross negligence - having not
16 carefully reviewed the video - or more likely an
17 intention to favourably spin the events of
18 October 14th with a reckless disregard for the
19 truth.

20 The misconduct was then compounded when the
21 RCMP deliberately decided to remain silent and to
22 allow the fictional version, the one favourable to
23 the four officers, to remain on the public record,
24 knowing full well that the story was in all
25 relevant respects, simply untrue.

26 THE COMMISSIONER: I think we'll take a break now. And
27 Mr. Rosenbloom, I hope you'll wind up shortly.

28 MR. ROSENBLOOM: I want to deal with the Pritchard
29 video, so you know where I'm going. I have some
30 brief comments on reply to a few things in the
31 submission and then I have my conclusion. Thank
32 you.

33 THE REGISTRAR: The hearing will recess for ten
34 minutes.

35
36 (PROCEEDINGS ADJOURNED FOR MORNING RECESS)

37 (PROCEEDINGS RECONVENED)

38
39 THE REGISTRAR: Order. This hearing is now resumed.

40 MR. ROSENBLOOM: Thank you, Mr. Commissioner.

41
42 SUBMISSIONS BY MR. ROSENBLOOM ON BEHALF OF THE
43 GOVERNMENT OF POLAND, continuing:

44
45 MR. ROSENBLOOM: Dealing briefly with the Pritchard
46 video and its seizure. I'm suggesting the RCMP
47 overtly attempted to suppress Mr. Pritchard's

1 video from the public realm because the video did
2 not present the force in a very favourable light.
3 More particularly, it contradicted the public
4 statements that had been made by the RCMP
5 concerning what had happened. I'll be brief about
6 the video. We all know the facts.

7 After Mr. Pritchard took the video, the
8 police approached him. The police asked if they
9 could have the video for a temporary period of
10 time to make copies. Mr. Pritchard willingly
11 volunteered the video. He was told he would get
12 the video back within an hour or two. The police
13 then returned to the meet-and-greet area and
14 informed him there were problems having the video
15 copied there, and if Mr. Pritchard went off to
16 Victoria where he was planning as his final
17 destination, they would send the video within 48
18 hours. Mr. Pritchard then gets a call from the
19 RCMP that informs him that he is not going to get
20 it back for a year and a half to two and a half
21 years. He then retains a lawyer, Paul Pearson.
22 That lawyer sends a demand letter to the RCMP
23 demanding the return of the video. Mr. Pearson,
24 the lawyer, gets a call from the RCMP indicating
25 that they would return the video immediately.
26 Then the same day he gets a second call from the
27 RCMP indicating they changed their mind and that
28 it wasn't to be returned. A lawsuit is launched
29 and eventually the video is returned to Mr.
30 Pritchard.

31 I simply say at the bottom of page 36 that
32 what results from this incident can be nothing
33 other than a growing public mistrust with the
34 police. An effective police force depends on
35 public support. An incident such as this
36 undermines public confidence. A ruling of
37 misconduct should be made against Superintendent
38 Rideout in respect to this matter.

39 I'd like to go quickly to my reply of a few
40 comments that are made by my learned friends in
41 their submissions.

42 One theme that one hears from a number of
43 these submissions is about Mr. Dziekanski's
44 background, whether he was a smoker, whether he
45 had chronic alcoholism. One of the submissions
46 even speaks of how unfortunate it is, to use the
47 very words here, that the parties didn't have the

1 benefit of any real history of Mr. Dziekanski's
2 mental health or lack of conflict with law
3 enforcement in the past.

4 Mr. Commissioner, what does any of this have
5 to do with the matters before this inquiry? You
6 are the eyewitness to the events. And quite
7 frankly, had Mr. Dziekanski presented himself as a
8 convicted rapist, as a murderer, whatever it was,
9 it has no relevance whatsoever, in my submission,
10 to the events that transpired and the judgment
11 calls that must be made by you about the
12 appropriateness of behaviour. I say no more in
13 respect to that.

14 One of the submissions on behalf of Constable
15 Millington, my friend Mr. Hira, he said something
16 very curious in his submission. He's speaking
17 about the fact that the errors made by the
18 officers in their notes and in their IHIT
19 statements, a number of those errors were also
20 made by bystanders who were off in the meet-and-
21 greet area. And he goes so far at page 16 of his
22 submission to say, at paragraph 66, "No doubt
23 similar notices" -- speaking of notices of
24 misconduct:

25
26 No doubt similar notices have not been issued
27 to these certain witnesses who saw it
28 differently than the video.

29
30 With great respect to Mr. Hira, he doesn't
31 get it if he is suggesting that civilian witnesses
32 who might misinterpret or be inaccurate in their
33 observations of an incident could lead to notices
34 of misconduct at this inquiry. The notices of
35 misconduct relate to the duties of a police
36 officer to be accurate in reporting an incident.
37 And that is what the misconduct is about. It's
38 not about a civilian witness in the meet-and-greet
39 area that may have been doing their best in good
40 faith to give their version of events and may have
41 made some errors. There are no civilian duties on
42 these witnesses but there indeed is with the
43 officers in question.

44 The third thing to reply, comment very
45 briefly, is relating to my friends generally, and
46 it's a theme of most of these submissions. They
47 say the officers knowing the video existed, why

1 would they take the chance, why would they falsify
2 their evidence knowing that they would get caught?
3 And my response to that is, none of those officers
4 ever saw the video. That's been testimony that
5 was given and challenged in cross-examination.
6 None of those officers saw that video prior to
7 giving those statements. They had no clue what
8 was on it. They had no clue whether it might have
9 been still photography of a shot or two or whether
10 it was a moving picture. They had no clue whether
11 Mr. Pritchard took ten seconds of video or 30
12 seconds. They had no clue whether maybe he started
13 shooting the video once Mr. Dziekanski was
14 handcuffed. Who knows? But I suggest that the
15 suggestions of my friends that no officers would
16 falsify evidence in the face of knowing the video
17 existed implies that those officers knew about the
18 video in the sense of knowing exactly what was
19 depicted on the video, and there is no evidence to
20 suggest that they had a clue.

21 One of my learned friends speaks about how
22 these officers, to choose to falsify evidence,
23 would have had to have a crystal ball to have
24 known that this story would be going viral, that
25 it would become such a huge thing, and that's why
26 they'd falsify. No. The reason that one would be
27 motivated to falsify the story would be the motive
28 that there has been an in-custody death, and every
29 officer that comes out of training in Regina is
30 aware that in the situation where there is an
31 in-custody death, there are investigations that
32 are carried out to lead to obviously determining
33 whether there has been misconduct by the officers
34 in question.

35 Lastly in reply before getting to my
36 conclusion, Mr. Commissioner, is my learned friend
37 Grace Pastine. Ms. Pastine yesterday was speaking
38 about the business of independent police
39 investigation with in-custody deaths. And my
40 learned friend Mr. Kosteckyj at a point after he
41 had concluded reminded me of a fact that he would
42 otherwise have made. This investigation was by
43 IHIT. IHIT is an integrated police force. And I
44 find it interesting that even though it is an
45 integrated police force, meaning that it is made
46 up not only of the RCMP but of other Lower
47 Mainland municipal police forces, when it came to

1 this investigation, why at least wasn't there a
2 cross-pollenization of having police members of
3 other municipal forces that were part of the IHIT
4 group? I find it interesting that even though it
5 is an integrated force, when it came to this
6 investigation, the RCMP or IHIT chose to ensure
7 that it was an investigative team that was closed
8 to only RCMP members. And I'd like to take credit
9 for it, but it was Mr. Kosteckyj who made comment
10 to me during the course of Ms. Pastine's
11 submission, and I think it's an interesting
12 observation that should be put before the
13 Commission.

14 I'd now like to go to my conclusion, which is
15 found at page 37. I'll try to be brief.

16 Mr. Commissioner, Robert Dziekanski was an
17 immigrant to Canada for less than thirty minutes.
18 At the end of that short time, all of his dreams
19 of a new life in Canada with his mother fell to a
20 fatal end. And following his death an examination
21 of what happened reveals a dramatic trail of human
22 and institutional errors, all of which contributed
23 to his untimely death while lying at the feet of
24 the four RCMP officers.

25 It is easy to imagine that, but for the
26 release of the Pritchard video, this matter would
27 have been nothing more than small item in the
28 local media coverage. Rather, because of Mr.
29 Pritchard's video, the incident was seen
30 worldwide.

31 One mourns the tragic outcome of this
32 incident, but another reaction quickly overwhelms
33 the viewer of the video. One is left with a
34 strong sense that Mr. Dziekanski's death was
35 totally unnecessary, totally unjustified. Put
36 bluntly, Mr. Dziekanski was the victim of
37 incompetence, misconduct, and a reckless disregard
38 for his life.

39 The exhaustive review of the incident carried
40 out by the inquiry has only corroborated this
41 conclusion and magnified the series of fatal
42 misjudgements and actions that caused Mr.
43 Dziekanski's death.

44 Everything that could go wrong during Mr.
45 Dziekanski's eleven hours in Canada did go wrong,
46 from the YVR security in the airport luggage area
47 through to the moments of his death. If it had

1 not been for all the indifference to Mr.
2 Dziekanski during all the early period as he was
3 still within the secured area of the airport, he
4 would be alive today.

5 Yet it is the RCMP involvement that is by far
6 the most troubling. No reasonable interpretation
7 of the conduct of the four officers can lead one
8 to conclude anything but that they acted, at best,
9 with gross misconduct.

10 For the four officers to approach Mr.
11 Dziekanski, possibly with a pre-determined plan to
12 taser him, without carrying out even an elementary
13 assessment of the situation, is inexcusable.
14 Their failure to make the slightest accommodation
15 for the fact they were dealing with a person who
16 they knew could not speak English is inexcusable.
17 Their failure to deal with Mr. Dziekanski in a
18 civilized manner when he exhibited a cooperative
19 attitude is inexcusable.

20 Their willingness to deploy the Taser without
21 justification, without even reasonable perception
22 of a threat to their safety, within 22 seconds of
23 their meeting him, is obviously inexcusable.
24 Their unnecessary repeated deployment of the Taser
25 is inexcusable.

26 Their reckless and callous disregard for Mr.
27 Dziekanski's deteriorating medical condition and
28 their failure to provide the most elementary first
29 aid is inexcusable. Corporal Robinson's placing
30 his knee on Mr. Dziekanski's neck for 24 seconds
31 was inexcusable.

32 Corporal Robinson's refusal to release the
33 handcuffs from the back of Mr. Dziekanski when
34 requested to do so by the first medical
35 responders, thereby denying him critical medical
36 attention, was inexcusable.

37 The RCMP media initiative of disseminating
38 false information which attempted to cast the RCMP
39 officers in a favourable light, and then
40 deliberately failing to correct the public record,
41 was inexcusable. The RCMP effort to suppress the
42 release of the Pritchard video without legal
43 grounds or a sound rationale was inexcusable.

44 And finally, Mr. Commissioner, and most
45 troubling of all, the self-serving
46 misrepresentations by the four officers in their
47 notes and IHIT statements, and then in turn, while

Submissions by Mr. Rosenbloom (for Government of Poland)(cont'd)

Submissions by Mr. Taylor (for Government of Canada)

1 under oath at this inquiry concerning what
2 happened that night, was also totally inexcusable.

3 Mr. Commissioner, on page 40 I set out the
4 elements of what I believe to be wrongdoing
5 warranting Commission findings of misconduct.
6 There are seven areas where I allege misconduct.
7 They are there before you in the written
8 submission. I don't intend to repeat them to you
9 on the record. But they speak obviously to
10 misconduct issues with both the attending
11 officers, with Sergeant Lemaitre, with Corporal
12 Carr, and with Superintendent Rideout.

13 My final two paragraphs of my submission. We
14 are hopeful that as a consequence of this tragic
15 event where one of my client's citizens
16 unnecessarily lost his life, an opportunity arises
17 to ensure that such an event never reoccurs. We
18 anticipate that your report and recommendations
19 will go a long way to meet those expectations.

20 As noted in the letter from Ambassador
21 Ogrodzinski, which was read into the record in
22 oral submission at the commencement of my
23 presentation, the Government of Poland expresses
24 its appreciation to the Commission for this
25 exhaustive inquiry into Mr. Dziekanski's death.

26 Thank you very much.

27 THE COMMISSIONER: Thank you.

28 MR. TAYLOR: Mitchell Taylor for the Government of
29 Canada, Mr. Commissioner. I have two copies of
30 our written submissions, the citations to
31 evidentiary points and our authorities, which I'll
32 pass to Mr. Registrar.

33 THE COMMISSIONER: Well, I have a copy of your -- have
34 had for some little bit.

35 MR. TAYLOR: All right. Well, I'll leave two with Mr.
36 Registrar, then. I understood from yesterday that
37 we were to hand some up.

38 I'll be brief, Mr. Commissioner. Further to
39 your direction yesterday, I understand that there
40 will be posted on the Commission website following
41 me speaking here our submissions and the citations
42 to evidence and authorities.

43 Mr. Commissioner, the Government of Canada is
44 not intending to present formal oral closing
45 beyond the written submissions that were filed and
46 are now with you. In our written submission --

47 THE COMMISSIONER: Now, as I understand it, you're

Submissions by Mr. Taylor (for Government of Canada)

1 making these submissions on behalf of the citizens
2 of Canada?

3 MR. TAYLOR: Yes.

4 THE COMMISSIONER: Thank you.

5 MR. TAYLOR: And in particular, the federal entities,
6 the Canadian Border Service Agency and the RCMP.
7 But yes, for the Government of Canada as a whole.

8

9 SUBMISSIONS BY MR. TAYLOR ON BEHALF OF THE GOVERNMENT
10 OF CANADA:

11

12 MR. TAYLOR: The written submissions that we have
13 filed, Mr. Commissioner, highlight certain
14 evidence and issues that are of particular
15 importance and concern to the Government of Canada
16 and which we think will be of assistance to you in
17 preparing your report.

18 The Government of Canada has appreciated the
19 opportunity to be a participant before this
20 Commission and wishes to thank you, Mr.
21 Commissioner, and as well your counsel and staff
22 for the opportunity presented.

23 We look forward to the release of the report.
24 It will undoubtedly assist in identifying ways and
25 means of improving public safety for all Canadians
26 as well as visitors and immigrants to Canada.

27 The Government of Canada, Mr. Commissioner,
28 expresses its sorrow and its sincere regret over
29 Mr. Dziekanski's death, and in particular
30 expresses its sincere regret to Mrs. Cisowski in
31 the death of her son.

32 With that, Mr. Commissioner, we thank you for
33 the opportunity to present and we leave with you
34 our written submissions.

35 THE COMMISSIONER: Mr. Taylor, thank you very much for
36 those comments, and I appreciate your brevity.

37 I've read your report once, and rest assured that
38 despite your brevity, it will be given
39 consideration.

40 MR. TAYLOR: Thank you.

41 MR. BEAUBIER: Mr. Commissioner, Beaubier on behalf of
42 Constable Rundel.

43

44 SUBMISSIONS BY MR. BEAUBIER ON BEHALF OF CONSTABLE
45 GERRY RUNDEL:

46

47 MR. BEAUBIER: I'm going to approach this in two areas,

1 the first being -- and during the course of these
2 submissions addressing the issue of standard of
3 care and -- standard of conduct and misconduct.

4 The first portion of the submissions will
5 relate to the facts relating to the receipt of the
6 dispatch and then eventually arriving at the
7 airport and what happened there. In addition to
8 that, I'll comment on the statements that were
9 made with respect to -- or the allegations that
10 were made with respect to the fabrication or the
11 lying about any discussion before they went to the
12 airport.

13 The second part will deal primarily with the
14 statements themselves and the allegations that the
15 officers lied or fabricated in giving the
16 statements and making their notes.

17 I'll also just start, Mr. Commissioner, with
18 a comment on what standard should be applied in
19 this case with respect to the conduct of the
20 officers.

21 I would suggest that the standard is that of
22 an RCMP officer of the training and background of
23 Constable Rundel in this case. The question
24 becomes, what is the standard of conduct to which
25 the Commissioner will compare the conduct of
26 Officer Rundel. In this case it's submitted that
27 the standard should be that of a reasonable peace
28 officer with training and experience similar to
29 the training and experience of Officer Rundel.

30 You will note that the examination of
31 Corporal Gillis, who was called as an expert with
32 respect to police conduct, he was asked by Mr.
33 Kosteckyj:

34
35 Q Now, when an officer is judged on his
36 use of force, he is judged by an
37 objective standard, correct?

38 A Correct.

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

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

45
46 So the ultimate finding of whether or not there
47 was misconduct or whether Officer Rundel met the

1 standard of conduct that is expected in these
2 proceedings or at least in the discharge of his
3 duty will be the Commissioner's decision. But I
4 would suggest that, given the nature of the
5 circumstances that we're dealing with, that the
6 standard should be that of a reasonable peace
7 officer conducting himself in a similar situation,
8 and the application of common sense.

9 Now, this fact pattern that we're dealing
10 with has consumed a lot of time here. But when
11 you think about it as two minutes, three minutes,
12 four minutes of time that took place, from the
13 time that these officers received the dispatch to
14 the time that the Taser was discharged to the time
15 of the unfortunate death of Mr. Dziekanski, it's a
16 very short period of time. It's been alleged --
17 and the allegations against my client and all of
18 the officers are extremely serious, the
19 allegations of lying, fabricating evidence,
20 collaborating to do that, perjury. These are the
21 most serious of criminal charges and accusations,
22 and I would submit on behalf of Officer Rundel,
23 that the evidence is simply not there to support
24 these allegations.

25 Dealing with the first part of it, these
26 officers - Officer Rundel, and but for Corporal
27 Robinson - are basically junior officers. In the
28 scheme of the history of a police career, they're
29 inexperienced. Now, the situation they were
30 dealing with was within their experience, but
31 having said that, none of them had been actually
32 at a situation where a Taser had been discharged
33 before. None of them had had to deal with a
34 situation as this unfolded.

35 So let's just think about them sitting around
36 having lunch, receiving this dispatch, and getting
37 information that we're going to go to the airport
38 now for a complaint of an intoxicated person or
39 some damage that's going on. The evidence is
40 quite clear that from the time that they got that
41 call to the time that they arrived at the airport
42 was approximately one minute. They would have had
43 to receive the call. They got up from their
44 tables, got into their cars. They had to exit the
45 building, get into their cars and then drive to
46 the airport.

47 Now, my learned friends would have the

1 Commissioner accept and have urged in their
2 submissions that between the time that they
3 received the dispatch to the time that they
4 arrived at the airport, that they had time to
5 discuss what they were going to do, that in fact
6 they were going to taser this man no -- I can't
7 say no matter what, but it was certainly an open
8 option that this man would be tasered.

9 They simply didn't have the -- the evidence
10 doesn't support that at all. The only time that
11 they would have had to discuss this was from the
12 time that they received it as they were walking
13 out the door. I would suggest that given the fact
14 that it was a minute that passed by the time they
15 left to the time that they got there, they just
16 didn't do it. They certainly didn't do it in the
17 car. You can't move in those cars without it
18 being recorded. There was reference to the Bent
19 e-mail, which suggested that they had discussed
20 this going on their way to the airport. The
21 evidence doesn't support that at all.

22 We have all of the recordings of the officers
23 during the course of this travelling to the
24 airport. There is no evidence that they pulled
25 over to the side of the road, phoned each other,
26 and even if they did, they would have had their
27 cell phones. Their cell phone records always make
28 a recording. When they are shown to be arriving
29 at the airport and exiting and entering the
30 airport, it showed them coming in somewhat behind
31 each other. There is no dispute that they were in
32 separate cars. They simply didn't have the
33 opportunity to discuss what they were going to do.

34 I would ask you, Mr. Commissioner, to
35 consider this evidence and to make a finding of
36 fact that these officers simply did not have the
37 opportunity, could not and did not discuss whether
38 or not they would use the Taser before they got to
39 the airport.

40 This goes in addition to, I submit,
41 underlines some of the submissions of my learned
42 friends that these officers were reckless, callous
43 disregard for life. Those are highly inflammatory
44 statements and, I would submit, unwarranted again
45 by the evidence. When they arrived at the
46 airport, the officers came in, and you can see it
47 quite clearly, in a single line, one after the

1 other. They came through the meet-and-greet area.
2 There were people in the area. There were
3 comments made that they overheard, some of the
4 officers. He doesn't speak English. He's over
5 there. Words to that effect.

6 The officers approached Mr. Dziekanski and
7 there was immediate contact by Millington and, I
8 believe, Bentley. There was a comment as they
9 approached that is believed to be something like,
10 "Do you have a Taser?" or "Have you got a Taser?"
11 To that effect. I would also point out that why
12 would somebody make a statement like that if
13 they'd already discussed the fact that a Taser was
14 going to be used? It doesn't make sense.

15 In addition to that, beyond taking the series
16 of events to the point where the Taser has been
17 discharged, or just prior to it being discharged
18 and during the course of being discharged, you
19 observed Officer Bentley with his baton having
20 been taken out. Now, why would Officer Bentley do
21 that if he anticipated the fact that this Taser
22 was going to be used? I submit that he didn't
23 anticipate it at all, that when Mr. Dziekanski
24 moved, as he did, from the area of the luggage to
25 the centre of the console area, that's when
26 Officer Bentley thought, okay, we're going to have
27 to deal with arresting this man by physical force,
28 or that was at least a potential that could
29 happen. And that's why Officer Bentley took out
30 his baton.

31 All of those facts belie the allegations of
32 my friends that there were discussions by these
33 officers that they would taser Mr. Dziekanski
34 prior to him even being met by them. So the
35 combination of all of those facts, I submit, just
36 does not make sense and doesn't uphold the
37 allegations of my friends on that issue. So
38 whether the officers are -- my friends lean on or
39 hook onto the statements as a starting point to
40 show that these officers are liars and perjurers.
41 I submit hopefully that those points that I've
42 made in the submission would underscore that that
43 is simply not possible, and go the next step to
44 say, okay, well, if they're not lying on that
45 point, why would they lie on the subsequent
46 points. But I'll come back to that a little
47 later.

1 Now, with respect to the incident itself.
2 I'm addressing these comments with respect to
3 Officer Rundel. One of the facts or the issues or
4 the approach that my learned friends have made in
5 this hearing is to categorize all four officers
6 together -- these officers, those officers, the
7 officers, the four officers. It's over and over
8 and over again. There are situations when that
9 application is appropriate, but that global phrase
10 has been used continuously and, I would submit,
11 without being a little more appreciative of the
12 evidence, being a little more diagnosing the
13 evidence, if I can put it that way, as to the
14 individual actions of these officers.

15 When this Commission has to decide on the
16 issue of misconduct and whether or not there has
17 been misconduct by any of these officers, the
18 Commission is going to have to look at them
19 individually, not globally in the sense of all
20 four offices together. One has to look at the
21 individual actions of each of these officers to
22 determine whether that particular officer's
23 conduct amounts to a breach of a standard of
24 conduct that I say is how would a reasonable
25 officer act in this particular situation and how
26 should a reasonable officer with that training
27 have acted.

28 In the case of Officer Rundel we have an
29 officer of some two years' experience, and I would
30 submit that that is a junior officer. Officer
31 Millington was a junior officer. Officer Bentley
32 was a junior officer. The only one that had any
33 greater experience was Corporal Robinson, and I
34 believe his experience was ten or eleven years,
35 something to that effect.

36 The roles that these officers played are
37 different. Now, did they pre-plan how they were
38 going to deal with the situation? The answer to
39 that is no. Is that a breach of the standard of
40 conduct, and, I would submit, no. This is not --
41 it really isn't a complicated fact pattern that
42 they had to deal with. What I mean by fact
43 pattern is I mean the situation they faced with
44 respect to Mr. Dziekanski. His background and his
45 coming to the situation itself may have been
46 complicated in the sense of his lack of sleep, his
47 physical condition and various things like that.

1 But that's a situation that officers have to deal
2 with every day. You deal with people that are
3 mentally unstable. You deal with people that are
4 intoxicated. So this is not a situation that
5 should have caused any particular difficulty for
6 the officers. Did it require pre-planning? No.

7 Did it require all four officers? And the
8 answer, I would submit, is yes. They didn't know
9 what they were going to be dealing with when they
10 arrived there. They thought, okay, look, we know
11 that this -- they have some information that the
12 fellow might be intoxicated. They have some
13 information that he might have been damaging
14 furniture or throwing stuff around. Okay, so
15 there could be some violence and we might have to
16 physically restrain this guy. We don't know quite
17 what we're dealing with. So it required the
18 attention of four -- maybe they could have done it
19 with three, maybe they could have done it with
20 two, but certainly four was ample.

21 Should they have stopped as they approached
22 the secure area and spoken to civilians to gather
23 a little bit more information? Well, possibly.
24 But is that a flaw in the investigation of this
25 incident that's going to attract a misconduct
26 notice? I would submit, no. The four officers
27 get there. They all four come to the scene, speak
28 to Mr. Dziekanski, and we'll get into the detail
29 of that. But they're able then to all four
30 control the situation and assess what's happening.
31 All right. So now we get a situation of control,
32 and that is well within their training and the
33 proper manner in which they assessed what was
34 going on.

35 The approach was by Constable Millington and
36 Constable Bentley. Officer Rundel stood to the
37 back. Corporal Robinson stood to the side as
38 well. Perfectly sensible approach. The
39 investigation was -- nothing wrong with it,
40 nothing to be critical about at that point.

41 Then Officer Rundel took what is called the
42 role of a cover officer. Officers Millington and
43 Bentley took the role of the contact person.
44 Perfectly within their training, perfectly within
45 common sense of how this matter should unfold.
46 Corporal Robinson stood to the side, presumably as
47 an overseeing officer or perhaps also as a cover

1 officer. Again, perfectly within common sense,
2 perfectly within their training, and what one
3 would expect.

4 We have a communication that takes place
5 between Millington, Bentley and Dziekanski. There
6 seems to be a posture change as the officers
7 attend to Mr. Dziekanski. He seems to relax a
8 little bit. You see that on the video. The two
9 contact officers engage him in some conversation.
10 There is discussion and it seems to be words of
11 passport or words to that effect. You see Mr.
12 Dziekanski turn to his luggage. Focusing on
13 Officer Rundel, at this point he is simply acting
14 as a cover agent. You don't know at this point
15 what's going to happen. This might be something
16 that's going to unfold hopefully peacefully. On
17 the other hand, dealing with people is an
18 unpredictable business, particularly when you're
19 dealing with police officers and some history of
20 what has happened with respect to the damage. So
21 the officers are not quite sure how this is going
22 to unfold at this point.

23 My point is that this calls for caution. So
24 when Corporal Robinson, in seeing Mr. Dziekanski
25 reach for his luggage, makes a decision at that
26 point, presumably he then decides that this is not
27 a good thing to have him go into his luggage and
28 makes the command that he does, words "no," to
29 that effect, and directing him to the area of the
30 console.

31 Now, others will speak to that decision.
32 Others will speak to the unfolding of that
33 decision, whether that was proper, whether it fits
34 within the parameters of this investigation,
35 whether that's a decision that calls for comment.
36 Officer Rundel had no input into that decision.
37 Now from that point, things happen very quickly.
38 We're talking split seconds. From the time that
39 the officers arrived and made contact with Mr.
40 Dziekanski - if I recall correctly, it was a
41 matter of 30 seconds or something to that effect
42 till the Taser was deployed - Constable Rundel, as
43 the contact officer, had no control over what
44 happened. At this point one can't expect, given
45 the time and the superior actions of the superior
46 officer unfolding, you can, hey, time out, guys.
47 You know, look, I've got some comment on all of

1 this. No, that's just simply not realistic.

2 The events unfolded, the decision was made,
3 Mr. Dziekanski reacted to it, and again, how he
4 reacted to it is a matter of comment by others.
5 Officer Rundel reacted as he should have and he
6 reacted as the cover officer to protect or at
7 least to move off to the location where Mr.
8 Dziekanski had situated himself. At the same
9 time, the Taser is discharged almost at the same
10 time. Again, Officer Rundel has no input to this.
11 Officer Rundel reacts after the Taser has been
12 deployed, I think, once or twice. He moves in
13 with Corporal Robinson and Officer Bentley to try
14 to put handcuffs on him.

15 There's a struggle. The Taser is being
16 applied during the course of that struggle.
17 Again, Officer Rundel was not part of that.

18 There are a number of expert witnesses that
19 were called by the Commission --

20 THE COMMISSIONER: Just a moment. Just remind me.

21 Once Mr. Dziekanski is down and handcuffs are
22 attempting to be put on, was Officer Rundel at his
23 feet?

24 MR. BEAUBIER: On his feet?

25 THE COMMISSIONER: No, at his feet.

26 MR. BEAUBIER: I believe he was. And I believe he
27 actually moved over beside -- I think he actually
28 started up at the upper portion of Mr. Dziekanski
29 and then from there moved to the other part of his
30 body, I think to the left of Corporal Robinson.

31 Just observing that scene as a layperson, I
32 would submit that Officer Rundel's actions were
33 perfectly appropriate, that there's nothing one
34 can critically comment about his actions at that
35 point.

36 There were four, I believe, approximately
37 four expert witnesses that were called on behalf
38 of the Commission to assist the Commission with
39 respect to training of officers, to describe what
40 the officers in this type of a situation would be
41 obliged to do and what would be expected of them
42 to do, describe the role of a contact officer,
43 describe the role of a cover officer. Each of
44 those officers was examined and cross-examined
45 thoroughly by all counsel. In particular with
46 respect to Officer Rundel, they were asked with
47 respect to his role and how he discharged it as a

1 cover officer. And none of them were able to say
2 or criticized what Officer Rundel did or how he
3 discharged his duty. Each of them found no
4 criticism.

5 So with that evidence, I would submit that to
6 that point there is nothing that can be found to
7 be critical of Officer Rundel's discharge of his
8 duties up to that point. And again, it goes back
9 to the original comment with respect to whether or
10 not there was some decision or discussion with
11 respect to whether or not a Taser would be
12 discharged. I just repeat, there is no evidence
13 to support that, I would submit.

14 The only evidence, I would submit, and it's
15 questionable at best, is the Bent e-mail, and this
16 Commission has heard that evidence, some 18,000
17 documents tested. To suggest that there was a
18 conspiracy with respect to the four officers in
19 discussing this deployment prior to attending the
20 airport is, with the greatest of respect to my
21 friends, beyond ridiculous. If that is the case
22 and if there's any merit to be placed on the Bent
23 e-mail, one would have to suppose that not only
24 the four officers were part of this but a whole
25 series of subsequent people up the chain were also
26 going to be part of this conspiracy. That would
27 involve the IHIT investigating officers, their
28 superior officers, their reporting officers, and
29 the plethora of secretaries and helpers that went
30 through all of this information. There's nothing
31 to support that.

32 Sergeant Fawcett was asked -- and he was one
33 of the experts that was called. He concluded his
34 portion of the examination by testifying, in
35 considering the actions of Officer Rundel as seen
36 in the Pritchard video, and as described by
37 Constable Rundel's assumed facts, to be consistent
38 with RCMP training as Constable Fawcett knew it.
39 He was asked the question:

40
41 Q And is it your opinion that he
42 discharged a cover -- he acts as a cover
43 officer and subsequently the control
44 officer on fixing the handcuffs in the
45 correct manner?

46 A As I recall, yes, Mr. Commissioner. My
47 only criticism might be, I'd prefer the

1 Officers to -- would have moved in
2 sooner and tried to gain physical
3 control while the subject was under
4 current.
5

6 I think that that's a valid comment. When you see
7 the video -- the Taser, I think it was the first
8 or perhaps the second that took Mr. Dziekanski
9 down, indeed the officers could have moved in at
10 that point and the struggle may not have gone on
11 quite so long. But is that a criticism that
12 amounts to misconduct? I don't think it reaches
13 that level, Mr. Commissioner.

14 Mr. Orville Nickel was also called as a use
15 of force expert. He again described the roles of
16 a contact and cover officer. He described in
17 those roles -- he discussed the concept of
18 complacency being the biggest killer of police, as
19 one of the main factors that can cost people's
20 lives. He agreed that the twin of complacency is
21 vigilance, and given the nature of police work, a
22 cover officer would be trained to be vigilant with
23 respect to carrying out his role as a cover
24 officer, particularly because any contact had
25 potential to be very unpredictable. And I've
26 commented on that. In the first contact with Mr.
27 Dziekanski they didn't know what they were dealing
28 with. It was to that point an unpredictable
29 situation. It seemed to be calming down in the
30 sense that there seemed to be a positive reaction
31 between Bentley, Millington and Dziekanski.

32 He commented on Officer Rundel's
33 repositioning himself and he states that that
34 would be expected reaction from Officer Rundel and
35 that it would proper containment. He also
36 commented that it had the potential to be
37 unpredictable and there was an advantage to having
38 four officers present at that time.

39 He commented that in the repositioning of
40 Officer Rundel after Mr. Dziekanski had moved from
41 his luggage to the centre of the console in
42 response to the question:
43

44 Q Well, not just as to the repositioning
45 but as to the manner in which he
46 approached the --positioned himself as
47 the cover officer --

1 A Right.

2 Q -- and even up to the approach --

3 A Yeah.

4 Q -- at that point there's nothing that
5 you can criticize his conduct for?

6 A Oh, no. No. No, that's not a point
7 of -- that's not a point of criticism at
8 all.

9

10 He went on to comment on the handcuffs. It's
11 Officer Rundel and Officer Bentley having
12 difficulty with the handcuffs. Mr. Nickel
13 commented that officers were trained to keep their
14 handcuffs in their pouch until they were able to
15 restrain a subject's hands, allowing the arresting
16 officers to use both hands, and then, when control
17 had been obtained, to use the handcuffs. However,
18 Mr. Nickel noted that he didn't see that as a
19 criticism as such but commented on it, referring
20 to his report, because he had been asked about it.

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

23

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

27 A Well, it's not even a criticism. It's
28 just that it would have been more
29 effective for them to use two hands to
30 do the work that they were trying to do
31 with one hand.

32

33 Dr. Michael Webster, he also commented on
34 Officer Rundel's role, and he opined that he was
35 not critical of the officers up to the initial
36 contact with Mr. Dziekanski. He conceded that the
37 officers, on initial contact, would not know
38 whether they were dealing with the regular general
39 duty fare or an emotional crisis. That's the
40 point I made earlier is that the four officers
41 attending was a proper discharge of their duty and
42 with respect to what they may or may not have been
43 dealing with. So they have to make an assessment.
44 Okay, this is going to turn out all right. We've
45 got a communication happening here. We can send
46 some people out to find out what's going on,
47 interview the witnesses and check the situation

1 out a little more. Or does it turn into a
2 situation that it's an emotional crisis and we're
3 going to have to use emotional and/or just simply
4 a violent situation, either intoxication or
5 whatever might be causing the problem, and are we
6 going to have to apply force in this case?

7 In response to the question to Dr. Michael
8 Webster:

9
10 Q Right. So if I understood your -- some
11 of your answers that you gave to Mr.
12 Hira in his previous examination, you
13 felt that to that point, before -- just
14 prior to the -- being directed to the
15 luggage, what these four officers had
16 done was excellent, if I recall you
17 correctly.

18 A Yeah, I don't have a lot of -- yeah, I
19 liked it, it was good, yeah.
20

21 So all of the experts take the officers to that
22 point without criticism. Dr. Webster agreed
23 "something triggered him [Dziekanski] off" and
24 that "from that point things went very quickly,
25 within seconds." He further agreed that the
26 events did not provide time for the cover officer,
27 in this case Rundel, to advise or direct the
28 contact officers. He further agreed that Officer
29 Rundel's repositioning in response to Mr.
30 Dziekanski's movement to the centre of the console
31 was the proper course for him to take in the
32 circumstances.

33 And then there's the exchange:

34
35 Q So in reviewing the facts that -- as you
36 saw them, the video, the statements of
37 the RCMP, the transcripts, is there
38 anything that you can see in that -- or
39 bring to this Commission any criticism
40 of the cover officer, in this case
41 Officer Rundel?

42 A No, there isn't. I would -- in my mind,
43 I want to go back to the turning
44 point...
45

46 So he wants to diagnose or analyze what set
47 Dziekanski off.

1 Q Well, that's a whole different issue.
2 A I can't see him back there. I don't -- I
3 don't know what he said, I don't know
4 how he handled himself. I don't know how
5 he comported himself, what his body
6 posture was like. I don't know the tone
7 of his voice. I don't know what he was
8 doing with his eyes so --
9 Q But you did see the video. You've
10 seen -- had the opportunity to --
11 A But what I'm saying is I can't see that
12 in the video.
13 Q All right.
14 A I mean, this is the famous pillar --
15 Q But based on -- based on what you did
16 see --
17 A -- is in the way. Yes, based on what
18 I --
19 Q Thank you, sir.
20 A -- did see.

21
22 So he takes us back again to that contact between
23 Dziekanski, the contact officers and eventually of
24 Corporal Robinson as to what happened there.

25 But the point I'm making is that he finds no
26 criticism in what Officer Rundel did, either at
27 the contact or subsequent to that.

28 Is this a convenient time, Mr. Commissioner?

29 THE COMMISSIONER: Yes. All right, we'll break for an
30 hour.

31 THE REGISTRAR: The hearing is now adjourned until
32 1:30.

33
34 (PROCEEDINGS ADJOURNED FOR NOON RECESS)
35 (PROCEEDINGS RECONVENED)

36
37 THE REGISTRAR: Order. This hearing is now resumed.

38 MR. BEAUBIER: Thank you, Mr. Commissioner.

39
40 SUBMISSIONS BY MR. BEAUBIER ON BEHALF OF CONSTABLE
41 GERRY RUNDEL, continuing:

42
43 MR. BEAUBIER: I'm going to turn to the second part of
44 my submissions, and it's going to deal with the
45 alleged and real inconsistencies in the notes and
46 statements given by Officer Rundel and evidence
47 given by Officer Rundel. I'm going to suggest --

1 THE COMMISSIONER: Page 21?

2 MR. BEAUBIER: Page 21, yes, Mr. Commissioner. And
3 it's easier to follow, particularly with the
4 quotes and statements and excerpts that are going
5 to be referred to, by following along with the
6 written submission.

7 Indeed, as has been commented by others in
8 this proceeding, the Pritchard video in this case
9 is a constant that focuses everyone to the events
10 that unfold. And when I mean focus, I mean it's a
11 true recording of what actually happened there and
12 what was said, at least those parts that were
13 recorded.

14 Now, even having said that, the video itself
15 is not entirely complete. I mean, there are some
16 areas that are open for debate and discussion and
17 we had a lot of that debate and discussion in
18 these proceedings. For instance, where was
19 Corporal Robinson positioned when he interacted
20 with Mr. Dziekanski? That's very much an issue
21 and I'm sure that Mr. Harris will be speaking to
22 that because it affects the perception from
23 Corporal Robinson's viewpoint as to what happened.

24 What was the motion between Corporal Robinson
25 and Mr. Dziekanski and did Mr. Dziekanski obtain
26 the stapler from the counter or from the
27 countertop? And I think it's pretty much
28 established now that it was the countertop. But
29 that was certainly a point of some debate in these
30 proceedings.

31 Did Mr. Dziekanski take a step forward
32 towards the officers before the deployment of the
33 Taser or did he step from side to side, or did he
34 move at all? That was an issue of considerable
35 debate in these proceedings, and two experts with
36 respect to video.

37 These were legitimate questions that had to
38 be asked and explored by the Commission counsel.

39 There's no question that the events that took
40 place here unfolded extremely rapidly and often
41 within seconds. So given that, the notes and
42 recollections of the officers and other witnesses
43 besides the officers come into question.

44 The questions that arise out of the facts
45 that are stated in the notes and statements: Was
46 the Taser deployment justified? Was Mr.
47 Dziekanski resistant and combative? Did he raise

1 the stapler above his head before deployment of
2 the Taser or after? Did Mr. Dziekanski step
3 forward in a combative stance before the
4 deployment of the Taser?

5 There was considerable examination and cross-
6 examination of Rundel's point of view in the
7 various stages of Dziekanski's behaviour whether
8 at any particular point he was resistant and/or
9 combative. The meaning of those terms was debated
10 and Constable Rundel was asked to interpret and
11 define Mr. Dziekanski's behaviour.

12 Now, you'll see the comment that I make in
13 this submission was this somewhat academic
14 questioning of Officer Rundel. And the point I
15 make, and I submit that it's a weak statement and
16 it avoids the issue. But that being, that whether
17 Mr. Dziekanski was resistant, he is simply
18 offering an opinion, given the fact that he had no
19 input into whether or not the Taser was applied,
20 meaning that a constable who applies force is
21 required to justify the use of that force.
22 Officer Rundel was not the one that applied the
23 force; therefore is he required to justify it?
24 Well, I suppose, as I say, that's a stretch. In
25 other words, in these proceedings and I think
26 generally, one would expect him to respond to
27 that, and indeed he did.

28 And in any event, once an opinion is offered,
29 Officer Rundel might be asked in offering his
30 opinion, did he purposely misrepresent the
31 behaviours of Mr. Dziekanski in order to favour
32 his brother officers. In reply, Officer Rundel
33 would pose the rhetorical question, how would his
34 opinion of Mr. Dziekanski's behaviour be any
35 different than the conclusion, for example, of
36 Sergeant Fawcett, meaning in answer to the
37 question:

38
39 Q Given the video that you have seen and
40 the statements of facts that is now
41 before you, would you agree with Officer
42 Rundel's view or perception that Mr.
43 Dziekanski was combative?

44 A I can see how the officer could have had
45 that perception, yes, Mr. Commissioner.
46

47 In addition to that, on cross-examination by

1 Mr. Hira having reference to Exhibit 93 and the
2 behaviours identified in the Pritchard video,
3 Sergeant Fawcett was prepared to classify Mr.
4 Dziekanski's behaviour as assaultive/combative in
5 reference to Constable Millington's assumed
6 statement of facts.

7 Finally, in weighing Officer Rundel's
8 evidence with respect to his description of Mr.
9 Dziekanski's behaviour as resistive and combative,
10 even if one should not accept his conclusion, one
11 must consider the possibility that he actually
12 believed the interpretation to be true. This does
13 not make his evidence misleading or self-serving,
14 however possibly wrong, but does not mean that
15 he's lying or that he's favouring his brother
16 officers in any way.

17 On the third point, whether or not Mr.
18 Dziekanski had raised the stapler above his head
19 before the deployment or after, and on the fourth
20 point, did Mr. Dziekanski step forward towards the
21 officers in a combative stance before the
22 deployment of the Taser. Now we're going to take
23 a look at the notes of Officer Rundel, the two
24 statements, and his testimony.

25 In his notebook he notes that the he "held
26 stapler, yelling, arms up, not English, steps
27 towards us in front of counter, Constable
28 Millington deployed Taser." That's his note.

29 The statement of Officer Rundel on the 14th
30 of October '07 at page 5:

31
32 ...for lack of a better word. He picked up a
33 stapler, and he started... clenching his
34 fists and... and, putting the stapler up
35 above his head, mo- motioning... making
36 motions with it, uh... towards us. Um... and
37 then at that point, Constable Millington
38 had... pulled out his... taser, and...
39 activated it.

40
41 In his statement at page 6 -- this is the 14th of
42 October:

43
44 after the first... first taser, um, blow,
45 or... uh, trigger, he... he s-, he was still
46 clenching, and motioning towards, towards
47 us... and... so I th-... he was... Constable

1 Q Can you see it clearly?

2 A I saw it clearly when it was clenched in
3 his fist, when he had his right -- right
4 hand, as I described earlier, up to his
5 chest, clenched in his fist.
6

7 His evidence here is consistent with the
8 evidence in the video. It's inconsistent on some
9 points with respect to his statement and the note
10 that he made. But only on the points generally
11 speaking of whether the Taser (*sic*) being above
12 and whether he moved forward.

13 Page 27:

14
15 A All I recall is once he swung his arm
16 around and locked -- locked his right
17 arm into position, I observed the
18 stapler clenched in his fist at that
19 point. I observed him clench his left
20 fist, and move his left foot forward,
21 and I don't recall any other motion at
22 that point. Again we're talking split
23 seconds, so it would be a very short
24 period of time after that -- after that
25 observation that the Taser would have
26 been deployed.
27

28 Finally he says:

29
30 Q Did you see Mr. Dziekanski holding the
31 stapler above his head?

32 A I don't recall it ever being over his
33 head.
34

35 Those are, I think, germane points with respect to
36 evidence he gave in relation to the note he made
37 and the two statements.

38 From the nature of the questioning during the
39 inquiry, various counsel took issue with Constable
40 Rundel's description in his statement, that Mr.
41 Dziekanski held the stapler above his head before
42 the deployment of the Taser, and took issue with
43 Officer Rundel's statement that Mr. Dziekanski
44 took a step forward.

45 Officer Rundel was clearly wrong in his
46 statement that the stapler was above Mr.
47 Dziekanski's head before deployment. However,

1 this statement has to be viewed in conjunction
2 with the record in his notebook he made,
3 describing "arms up." He does not say "above the
4 head." Neither does he say "above the head" in
5 his statement of the 18th of October 2007.
6 Constable Rundel says "... he then picked up a
7 stapler, turned around, had both fists in the air
8 with a stapler." And further, Constable Rundel in
9 testimony stated in direct examination that he
10 never recalled the stapler being above his head
11 before the deployment of the Taser.

12 He explained the description of the 14th of
13 October - and the description is given there - in
14 his testimony of the 23rd of February '09 by
15 explaining that the statement of the 14th of
16 October had been given after a long shift, after
17 stressful events and he did not describe the
18 sequence of events very well. He was describing
19 something that was happening very fast and in a
20 short period of time. He was describing it as one
21 single event and as best he could at the time.

22 In my submission, that summarizes Officer
23 Rundel's position and evidence with respect to the
24 discrepancies of his notebook and statements and
25 the fixed record of the video. It's not
26 unreasonable in the circumstances. And we'll get
27 into a little bit more detail on that.

28 It's been said that these officers were
29 trained, trained with respect to observations.
30 Well, certainly they had training in Regina with
31 respect to becoming peace officers and taking
32 notes and making observations. But does that take
33 them beyond being human beings with respect to
34 being affected by a traumatic event that took
35 place in front of them, the recollection being
36 affected by the speed with which it took place?

37 And I draw the Commission's attention to the
38 obvious, that the two or three dramatic points of
39 the events that took place that evening were, one,
40 the movement of Mr. Dziekanski and the interaction
41 between Robinson and Dziekanski; the fact that the
42 Taser was deployed; and Mr. Dziekanski's arms
43 going up. Those are the visual impacts that
44 somebody would record in watching that unfold.
45 The immediate throwing up of the arms, and that's
46 something that obviously stuck in everybody's, all
47 of the witnesses' memories, including Ms.

1 Ashrafinia, Mr. Meltzer, Mr. Rudek and presumably
2 others as well. That is something that visually
3 stuck in their memories.

4 Now, it's a very reasonable explanation with
5 respect to why the officers, and particularly
6 Officer Rundel, noted the fact that his arms were
7 in the air. Getting the timing of that, whether
8 it was before or after the discharge of the Taser,
9 is a pretty fine point in terms of what was --
10 it's an important point, no question. A lot turns
11 on it. But it's a fine point in terms of
12 recollection. And again I stress the other
13 witnesses that were observing this event unfold
14 just as the officers were, and a number of them
15 had the same conclusion, that the hands and the
16 Taser were up in the air before the Taser was
17 discharged.

18 These pointed questions by my learned friends
19 with respect to the discrepancies were legitimate
20 and needed to be asked and needed to be
21 aggressively explored. Having said that, where I
22 part company with my learned friends is the
23 motivation, how that discrepancy took place.
24 Again, on these points with respect to the
25 statement and the notes and the testimony, some of
26 my learned colleagues are making very serious
27 allegations with respect to how these
28 discrepancies took place, and I'll address some of
29 that a little later.

30 I would submit that, set beside the constant
31 of the Pritchard video and the speed and stress of
32 the events, in testimony Officer Rundel's evidence
33 is very much on point, whether the stapler was
34 held above the head before deployment, whether he
35 stepped towards the officers and whether Mr.
36 Dziekanski was standing at the time of the second
37 deployment. In summarized form, when Mr.
38 Dziekanski moved in response to Corporal
39 Robinson's direction, Officer Rundel did not see
40 Mr. Dziekanski pick up the stapler at the time.
41 He did observe Mr. Dziekanski's hands swing above
42 his shoulders across his head and he didn't recall
43 seeing the stapler at this point. He recalled
44 seeing the stapler after Mr. Dziekanski brought it
45 to his chest area.

46 Prior to the Taser deployment, he did not
47 observe Mr. Dziekanski with the stapler above his

1 head making motions towards the officers. Prior
2 to the first deployment of the Taser, he observed
3 Mr. Dziekanski move his left foot forward, taking
4 up what he perceived to be combative style with
5 his fists and the stapler in his right hand. His
6 recollection is that it was during the second
7 deployment of the Taser that Mr. Dziekanski was
8 holding the stapler above his head and was coming
9 towards the officers.

10 It is clear that Officer Rundel was incorrect
11 on this last point. It was during the course of
12 the first deployment that Mr. Dziekanski held the
13 stapler above his head, not an unreasonable error
14 given the speed and the circumstances of events.

15 Mr. Commissioner, Officer Rundel had no
16 motive, no motivation whatsoever to describe the
17 events other than he best could recall them.
18 During the course of duty, Officer Rundel had
19 never deployed a Taser nor had he been present
20 during an arrest when the Taser had been deployed.
21 This was not a textbook deployment. It can only
22 be concluded that the probes did not make a clean
23 contact and it did not immediately immobilize Mr.
24 Dziekanski.

25 These are all factors that go, in my
26 submission, to his immediate recollection of
27 events subsequent to them taking place. Rather,
28 the result after deployment was Mr. Dziekanski
29 throwing his arms in the air and screaming with
30 continuous pain. Even after Mr. Dziekanski fell
31 to the ground, he continued to scream and twist
32 with pain. Those are dramatic events that, again,
33 would impact, in my submission, on the reliability
34 or otherwise and observations of the witness.

35 Now, I don't want to go into a great deal of
36 detail with respect to the evidence of -- and I'll
37 just highlight it a little bit. And the point I'm
38 making in this submission is that Ms. Ashrafinia,
39 Mr. Meltzer and Mr. Rudek had the same
40 observations. They reacted the same way as
41 Officer Rundel. And when I say acted, I mean
42 their memory was the same with respect to the
43 stapler being above the head and before the
44 deployment of the Taser.

45 At paragraph E.34, in her statement of the
46 19th of October, Ms. Ashrafinia also stated that
47 she felt the police had acted properly and did an

1 excellent job, that "he deserved to be tasered."
2 That's got to be based on her observation at that
3 time of what she thought was happening. In her
4 testimony before the inquiry, she justified these
5 statements by testifying that those viewpoints
6 were actually of her husband, not hers. Well, I
7 don't need to comment on that.

8 E.35. On the issue as to what Mr. Dziekanski
9 did with the stapler after he obtained it in his
10 possession, in her statement of the 19th of
11 October '07, she states the following:
12

13 Q Ok. And then you say that Robert moved
14 along the counter.

15 A - along the counter.

16 Q He grabs the sta - you see him grab the
17 stapler...

18 A Before he move along all the way, he
19 just took one step...

20 Q [...]

21 A ...or two a step. He had a stapler...

22 Q [...]

23 A That what I think, is was a stapler and
24 he had it on his [inaudible] kind of
25 short wave...

26 Q [...]

27 A ... wave at the police officer...
28

29 And then in her testimony - this is paragraph
30 E.36, middle of the paragraph:
31

32 And at one point I -- I saw Mr.
33 Dziekanski's arm went up...like a
34 stapler from the desk in his hand, like
35 that. Then I heard this sound of
36 electricity, like buzz...
37

38 So there she's got the hand going up and the Taser
39 going off.

40 Line 2:
41

42 Like in stapler, if it was here on the
43 desk, when Robert did this, his hand and
44 his head like that, walked away, I just
45 saw. I didn't see the grabbing motion.
46 But I saw when he raised his arm like
47 that he had a stapler, and doing like

1 at the constables.

2 Q Could you tell what the object was?

3 A Not right at first, but within five or
4 ten seconds after him waving it around,
5 then I was able to distinguish what it
6 was.

7 Q And what was it?

8 A It was a stapler.

9

10 Line 42:

11

12 A ...finished waving it around at the
13 constables, I was -- he held it directly
14 out in front of him (gesturing) and he
15 started to press the -- the stapler was
16 elongated, it was extended, and he
17 started pressing it and then the staples
18 started coming out.

19 Q This was before or after the tasing?

20 A Just before the tasing.

21

22 Now, Mr. Rudek, he stuck to his evidence no matter
23 what, his recollection no matter what. But again,
24 can this be found to be misleading evidence? No.
25 I think it's witnesses trying their best in each
26 of these examples I gave, including the officers.

27 Now, these are very, very serious allegations
28 that have been made against these officers, in
29 particular in this submission against my client.
30 They've been accused of collaborating with each
31 other, fabricating and lying. This amounts to
32 obstruction of justice, is what it amounts to.
33 Perjury. I can't think of in terms of the
34 administration of justice things that are more
35 serious.

36 It is submitted that these allegations are
37 made without a full appreciation of the frailty of
38 human recollection. I also submit that these
39 kinds of allegations, I'm submitting on behalf of
40 my client, are irresponsible. These facts have to
41 be tested in this courtroom. That's what's
42 happened here. But I submit that what has come
43 out of the evidence doesn't support the
44 allegations that have been made. I submit that
45 they pander to emotions, they're inflammatory,
46 and, I say, reckless.

47 To suggest that -- let's just follow this

1 through a little bit. The four officers -- the
2 allegation is that the four officers got together
3 and collaborated on this and decided that they
4 were going to say that, one, he was combative or,
5 two, that he had that stapler above his head
6 before he was tasered, therefore justifying their
7 position.

8 You know, these were junior officers. You
9 have to kind of speculate, okay, which one of
10 these officers would come up with this idea.
11 Officer Robinson? Millington? Bentley? Or my
12 client? It's, in my submission, almost
13 inconceivable that somebody would come up with
14 that kind of a cockamamie idea. Now, let's assume
15 they did and gathered the four guys in and said,
16 look guys, you know, we got a problem here. This
17 Mr. Dziekanski's been tasered. You know, it just
18 maybe didn't go the way we wanted. But there's
19 going to be an investigation here and we better
20 get our stories straight here.

21 Now, let's take Officer Rundel, in my
22 submission one of the officers who's got the least
23 involvement in this matter, and one has to ask
24 themselves, why on earth would he go along with an
25 idea like that. Now look, there's no question
26 that officers, RCMP officers in a paramilitary
27 type of an organization, they have structure, they
28 have bounds, they have orders, they have officers,
29 and it forms a bond. But likewise, within that
30 system, they are taught -- and I think that it's
31 not unreasonable that most of the officers, and I
32 think these officers as well, they join the RCMP
33 and police forces because they feel a duty to
34 community. They want to help. They generally
35 have a sense of purpose. And they're honest.

36 Now, having said that, are there officers
37 that would lie? There probably are. But I would
38 submit that they are few and far between. Are
39 there four officers all together that would get
40 together and lie in these circumstances? Highly
41 unlikely. Would Officer Rundel do that?
42 Exceedingly unlikely. Why would he put his
43 reputation, why would he put his family, why would
44 he get involved in a situation that would require
45 him to not only alter his notes in terms of what
46 the events took place, follow through with his
47 statement of the 14th, follow through with the

1 statement of the 18th of October, testify at these
2 proceedings, testify in a Coroner's inquest? He
3 knew that this process was going to go forward
4 with at the very least an in-custody death
5 investigation. It couldn't have been foreseen by
6 these officers that this matter would take on a
7 life of its own.

8 But there was simply -- Officer Rundel faced
9 with that? I think it's fair to apply common
10 sense in the situation. He'd say, The hell with
11 you guys. I'm not going to go near that. And I
12 think the other officers would likely say the same
13 thing if that proposition were put to them. No, I
14 think the more rational explanation is as I've
15 explained, that they recorded it, recorded their
16 events as they saw them and as they believed they
17 took place. They had an opportunity to see the
18 video just like Ms. Ashrafinia did, just like Mr.
19 Meltzer did, and changed their evidence to --
20 obviously with what had happened. That doesn't
21 make them liars, doesn't make them that they
22 collaborated or fabricated their statements.

23 If there had been any merit to the suggestion
24 that these officers were collaborating to alter
25 their evidence, they would have surely been shrewd
26 enough to say, you know what? I'm not going to
27 give my statement right away. They were offered
28 the opportunity to delay the statement if they
29 wanted to. They would have said, you know what?
30 We're just going to think about this. We're going
31 to get together in a week or so or two weeks and
32 really do a good job on this statement. And by
33 the way, we're going to take a look at that video
34 before we make our statements.

35 No. What they did is they felt that they had
36 nothing to hide. They were responsible. They
37 gave their statement on the 14th in the case of
38 Officer Rundel and again on the 18th, from the
39 recollections that they had.

40 Some of my learned friends want to have this
41 two ways. They want to say that these officers
42 were grossly incompetent in discharging their
43 duties, and at the same time that that they were
44 sufficiently sophisticated, shrewd and forward-
45 thinking to alter their statements in their
46 favour. The two are inconsistent.

47 In reviewing the evidence of the video -- and

1 I'm at page 39, Mr. Commissioner, at F.16. In
2 reviewing the evidence of the video, the dramatic
3 parts of the events are the directions given by
4 Corporal Robinson, Mr. Dziekanski's reaction to
5 those directions, the discharge of the Taser, and
6 Mr. Dziekanski, while clutching the stapler,
7 throwing his arms up in the air in reaction to the
8 Taser.

9 Mr. Grant Fredericks' analysis of the
10 Pritchard video clearly displays movement by Mr.
11 Dziekanski that is not easily discernible in the
12 Pritchard video. Whether Mr. Fredericks'
13 conclusion that Mr. Dziekanski took steps forward
14 or not is debatable. There was, at the very
15 least, movement from Mr. Dziekanski's left to his
16 right side in reaction to the repositioning of the
17 police officers; Officer Rundel saw it as making a
18 step forward.

19 One needs to recall the numerous times that
20 the Pritchard video was played by each of the
21 individual counsel involved in this matter, and
22 the numerous times the video was played in this
23 inquiry. It took playing and replaying and
24 sophisticated forensic analysis to determine and
25 record the exact sequence of events and movements
26 of the four officers and Mr. Dziekanski.

27 So it's not surprising that the officers, in
28 their earlier notes and in their earlier
29 statements, were incorrect on some of the aspects
30 of this case, particularly the dramatic aspects
31 that I've referred to.

32 Mr. Commissioner, this takes me to the
33 conclusion of my submissions, and the summary on
34 page 40 and through to 41 summarizes it. It is
35 clear that the incident to which Constable Rundel
36 was dispatched on the 14th of October 2007,
37 although unusual for YVR, was not a particularly
38 unusual or complicated incident for the officers
39 to handle. It called for a relatively quick
40 response and attendance to the scene. Given the
41 initial observation of the scene, the contact
42 approach by four officers was appropriate. The
43 officers had no idea what exactly they might be
44 dealing with. They did not know whether Mr.
45 Dziekanski was an intoxicated person, mentally
46 unstable, or simply under stress from his
47 circumstances.

1 The dispatch and the scene required an
2 initial cautious but friendly approach. Officer
3 Rundel assumed the role of a cover officer in the
4 event that Mr. Dziekanski should become
5 uncooperative and/or a threat to the officers.

6 As a result of the change in the dynamic of
7 the relationship between Mr. Dziekanski and the
8 officers, a change over which Officer Rundel had
9 no input or control, Officer Rundel, as a cover
10 officer, reacted exactly as he was supposed to.
11 As with the change in the dynamic of the
12 relationship between the contact officers and Mr.
13 Dziekanski, whether the decision was right or
14 wrong, Officer Rundel was not part of, nor did he
15 have any control over, the decision to discharge
16 the Taser.

17 It is submitted that in the totality of the
18 evidence, in particular considering how Officer
19 Rundel discharged his duty as the cover officer
20 and, given the opinions of the use of force
21 experts called in relation to Officer Rundel's
22 conduct, it meets the standard of conduct that one
23 would expect of a reasonable peace officer of
24 Constable Rundel's training and experience.

25 In conclusion, there is no merit or basis for
26 findings of misconduct by Officer Rundel on that
27 aspect.

28 With respect to the statements, summarizing
29 this question is a little more difficult, not
30 because the discharge of the duty was problematic
31 but rather that the fact pattern covers a broader
32 time span and is factually more complicated.

33 I've taken you through my argument with
34 respect to how the discrepancies between the
35 notes, statements and evidence should be dealt and
36 the reason for it. To make findings of misconduct
37 on that aspect, in my submission, would ignore or
38 unreasonably discount the absence of any motive
39 for Officer Rundel to misrepresent either his
40 recorded statements or his testimony, the frailty
41 of human recollection, the statements and evidence
42 given by other witnesses, and the circumstances
43 under which the recorded statements were given.
44 Inconsistencies in notes and written statements
45 are not surprising given the dramatic nature and
46 the speed with which the events unfolded. Officer
47 Rundel's recorded statements and notes are

Submissions by Mr. Butcher (for Cst. Bentley)

1 generally consistent with the evidence.

2 Thank you, Mr. Commissioner.

3 THE COMMISSIONER: Thank you, Mr. Beaubier.

4 MR. BUTCHER: Mr. Commissioner, I have a book of
5 authorities. I have reduced some of my
6 submissions in reply to writing and they are
7 included within some submissions that I'd like to
8 hand up now. I've simply added them in red to the
9 original submissions filed. I have two bound
10 copies for the registrar. Sorry, I thought
11 everybody had copies of those. They're probably
12 on Mr. Rosenbloom's desk. They are.

13

14 SUBMISSIONS BY MR. BUTCHER ON BEHALF OF CONSTABLE BILL
15 BENTLEY:

16

17 MR. BUTCHER: I am going to follow my submissions
18 fairly closely and at first make some introductory
19 comments about Constable Bentley. He was the most
20 junior officer in attendance that night. He was a
21 junior, enthusiastic and proud member of his
22 police force.

23

24 He attended a call for police assistance at
25 the airport because it was his sworn duty that and
26 every night to protect the public and property,
27 and to preserve the Queen's peace. This call was
28 ordinary but the scene that was unfolding at the
29 airport was bizarre and unprecedented. Bentley
30 and the other officers were confronted with an
31 irrational, agitated, exhausted, aggressive, and
32 frightened man who had lost his senses somewhere
33 during his long journey from Poland, who could not
34 understand police directions, and who could not
35 make himself understood. He quickly became
36 aggressive towards the police, who responded
37 equally quickly in the way that their training had
38 taught them was the best response in these kind of
39 circumstances. We all know the tragic outcome.

40

41 My client's role in this matter was finite.
42 He spoke briefly with Mr. Dziekanski in a polite
43 and calm manner, and then moved into a cover or
44 assist role. He moved quickly out of the way when
45 Mr. Dziekanski became combative. He assisted
46 briefly in the handcuffing and monitoring of Mr.
47 Dziekanski before being directed by the officer in
48 charge to commence an investigation.

49

 Despite that limited role, Constable Bentley

1 now faces allegations of misconduct which, if
2 substantiated, could destroy a reputation that has
3 already been compromised by intense media
4 coverage. The allegations focus on his
5 involvement at the beginning of the police
6 interaction with Mr. Dziekanski and his
7 credibility. Constable Bentley says, very
8 forcefully, that he did nothing wrong that night,
9 and that his actions did not in any way contribute
10 to Mr. Dziekanski's death. He says that he acted
11 in accordance with his training and RCMP policy.
12 He says further that he has done his best to
13 accurately record and report on the events at the
14 airport that night and that no adverse finding
15 about his credibility can be fairly made. He says
16 that a finding of misconduct is not justified, and
17 is certainly not required for this Commission to
18 fulfil its mandate.

19 My first point in reply is that Poland, the
20 BCCLA, and Ms. Cisowski have repeatedly stood
21 before you and said "the four officers did this,"
22 "the four officers did that." And as Mr. Beaubier
23 has said on behalf of Constable Rundel, those
24 comments are all not always correct. They have
25 cast collective aspersions upon the conduct of the
26 officers together.

27 And I've put at the bottom of page 1 some of
28 the examples. Poland's submission that begins
29 with the comment:

30
31 It is our position that the four police
32 officers who attended the incident at
33 Vancouver International Airport in the early
34 morning hours of October 14, 2007 used
35 excessive force with fatal consequences to
36 Robert Dziekanski.

37
38 Page 30 alleges that all four officers asserted
39 that Mr. Dziekanski was agitated and resistant on
40 the officers' arrival. And in oral submissions,
41 Mr. Rosenbloom submitted that the police were
42 collectively responsible for the failure to call
43 the ERS.

44 It is trite to say that there can be no
45 collective liability when assessing the conduct of
46 the officers. Constable Bentley cannot be found
47 to have misconducted himself with respect to use

1 of the Taser or the incorrect statements made by
2 other officers or for the failure by the airport
3 staff to call out the ERS.

4 I do want to spend a few minutes on the law
5 because it has been overlooked by my friends who
6 have spoken so far. I have set out in paragraph 5
7 what I submit are the most important parts of the
8 *Krever* case, and I'm not going to take you to that
9 case.

10 A commission of inquiry is neither a criminal
11 trial nor a civil action for the determination of
12 liability. Misconduct had been defined by the
13 Supreme Court of Canada as "improper or
14 unprofessional behaviour" or "bad management."

15 And then there's a commentary and I've
16 excerpted all of paragraphs 52, 53 and 54:

17
18 What then can commissioners include in their
19 reports? The primary role, indeed the *raison*
20 *d'être*, of an inquiry investigating a matter
21 is to make findings of fact. In order to do
22 so, the commissioner may have to assess and
23 make findings as to the credibility of
24 witnesses. From the findings of fact the
25 commissioner may draw appropriate conclusions
26 as to whether there has been misconduct and
27 who appears to be responsible for it.
28 However, the conclusions of a commissioner
29 should not duplicate the wording of the Code
30 defining a specific offence. If this were
31 done it could be taken that a commissioner
32 was finding a person guilty of a crime. This
33 might well indicate that the commission was,
34 in reality, a criminal investigation carried
35 out under the guise of a commission of
36 inquiry. Similarly, commissioners should
37 endeavour to avoid making evaluations of
38 their findings of fact in terms that are the
39 same as those used by courts to express
40 findings of civil liability. As well,
41 efforts should be made to avoid language that
42 is so equivocal that it appears to be a
43 finding of civil or criminal liability. [But
44 that said] commissioners should not be
45 expected to perform linguistic contortions to
46 avoid language that might conceivably be
47 interpreted as importing a legal finding.

1 Then this very important paragraph:
2

3 Findings of misconduct should not be the
4 principal focus of this kind of public
5 inquiry. Rather, they should be made only in
6 those circumstances where they are required
7 to carry out the mandate of the inquiry. A
8 public inquiry was never intended to be used
9 as a means of finding criminal or civil
10 liability.
11

12 That's because, as the rest of the paragraph sets
13 out, the rules of evidence are not the same. And
14 then there's a comment at the top of page 3 about
15 the suggestion that there be a comment in every
16 report about the rules of evidence and the limits
17 of commissioner's findings. And I would invite
18 you to include such a comment in your report.

19 There's been a long debate in our law over
20 whether or not the civil standard of balance of
21 probabilities varied according to the nature of
22 the allegations being made against a person.
23 There is certainly a lot of law that said if you
24 are alleged misconduct or fraud that the standard
25 is going to be higher.

26 That is no longer the case, thanks to the
27 Supreme Court of Canada's decision in **F.H. v.**
28 **MacDougall**. And we now have this one test with
29 respect to the balance of probabilities that
30 requires a case to be proven on clear, cogent and
31 convincing evidence, the sort of language that our
32 Court of Appeal used to use in discipline
33 proceedings.

34 I want to touch a little bit as well on the
35 law relating to the assessment of the conduct of
36 the police. It is my position that while the
37 Commission cannot make any findings that might
38 equate to civil or criminal liability, it cannot
39 ignore the special legal status of the police, and
40 cannot measure the officers' conduct against a
41 standard that is higher than that applied in the
42 civil and criminal courts.

43 I make the point in paragraph 8 that for a
44 very long time, hundreds of years, police officers
45 have enjoyed special legal protections. Those
46 legal protections are currently reflected in
47 section 21 of our **Police Act** that says that no

1 officer can be liable in a case of ordinary
2 negligence, cannot be liable in a civil case for
3 anything for anything other than gross negligence
4 or wilful misconduct or dishonesty.

5 There is an extensive and well-settled body
6 of case law confirming the special legal status of
7 police officers and the appropriate approach to
8 assessing their conduct. And if I may now just
9 quickly go to a few of those comments in the cases
10 before turning to the tests that our Court of
11 Appeal has said have to be applied.

12 I hope that in my copy of the cases that I
13 provided to you there are highlightings of the
14 parts that I wish to refer to. I want to go first
15 to the last tab, which I think is 14. On page 132
16 in paragraph 9, there is this comment from the
17 Saskatchewan trial judge's decision incorporating
18 a comment from the Saskatchewan Court of Appeal,
19 albeit a judgment in dissent:
20

21 There is an ever increasing level of
22 violence being exhibited in society which
23 makes the work of police officers more
24 stressful, dangerous and difficult.

25 Police are not in a position, nor is it
26 their duty, to determine guilt or innocence.
27 Police must react to what they see or
28 understand, usually in a matter of seconds,
29 and leave the course to determine who is
30 guilty and appropriately punished.

31 Innocent people are inevitably caught up
32 in the criminal investigative process and
33 those who prefer to be hostile and unco-
34 operative with the police in the conduct of
35 their duties are more likely to suffer
36 unfortunate consequences.

37 By the nature of their work, police are
38 often called upon to make reactive decisions
39 when adrenaline is running high. These
40 decisions ought not to be viewed by the
41 courts as though they were the product of an
42 unhurried deliberation after a full debate,
43 such as the process which leads to a trial
44 judgment.
45

46 I want to take you next to tab 9, a decision
47 of Judge Singh of the County Court, as he then

1 was, and to page 7 of that decision. This is a
2 police use of force case and allegations of
3 assault and battery. In the middle of page 7, the
4 judge says this:
5

6 I am not to take an armchair view of the
7 conduct of this officer. I am mindful also
8 that the officer is not carrying out a
9 judicial function but a ministerial or
10 administrative function when carrying out his
11 investigations and upholding the law. I
12 therefore must not look at this officer's
13 conduct judicially. I must consider the
14 officer's conduct, given the exigencies of
15 the circumstances as they presented
16 themselves to him at that time. Hindsight
17 reflection would not lead to a resolution of
18 my decision.
19

20 And two last comments of that kind, one at
21 tab 3, a decision of Mr. Justice Cohen sitting in
22 the trial court. Paragraph 40 on page 16. This
23 is the first trial decision of a personal injury
24 claim arising out of the use of an Arwen gun
25 during the Stanley Cup riot. I'll be taking you
26 to the Court of Appeal decision of Madam Justice
27 Southin soon because it's probably the leading
28 decision in this area.
29

30 Whichever section of the *Criminal Code* is
31 used to assess the actions of the police, the
32 court must consider the level of force that
33 was necessary in light of the circumstances
34 surrounding the event. In *Breen v. Saunders*,
35 the New Brunswick Court of Queen's Bench
36 considered the excessiveness of force which
37 the defendant police officer attempted to
38 justify under section 25.
39

40 That force was used is not disputed.
41 Was it more force than was necessary? A
42 policeman's job is not an easy one.
43 However, it is his lot to have to deal
44 with persons who, fortified by drink,
45 obstruct and provoke them while they are
46 carrying out their duties.
47

1 Then at the very last sentence:
2

3 Although the policy does not, in itself,
4 constitute the standard of care, compliance
5 with the policy, in my view, is a very
6 important factor to consider in determining
7 whether the standard of care has been met.
8

9 And that comment was agreed with by Mr. Justice
10 Finch, as he then was, in the Court of Appeal
11 decision attached at the back of that tab, in
12 paragraph 15, the very last page of that tab.
13 That paragraph is excerpted in Mr. Justice Finch's
14 decision and he simply ends his review of that by
15 saying, "I agree with that statement."

16 Before I turn to **Berntt**, I want to raise one
17 other point that I mentioned in my opening, and
18 that is this. The police officers are not simply
19 exercising a public or statutory function.
20 They're exercising a statutory duty. The most
21 famous expression of that is found in **Priestman v.**
22 **Colangelo**, which is at tab 10, and if I can just
23 take you to page 3 of 17, decision of Mr. Justice
24 Locke, saying:
25

26 ...I agree with Mr. Justice Laidlaw, who
27 dissented in the Court of Appeal, that the
28 evidence does not disclose a cause of action
29 against the appellant Priestman by reason of
30 the deaths of Columba Colangelo and Josephine
31 Shynall.
32

33 And you'll remember that they were two nursing
34 students who were caught in the crossfire of
35 police gunfire. And then in the middle of page 4,
36 about a third of the way down the page, after
37 reviewing section 25 of the Code, the Supreme
38 Court of Canada said this:
39

40 The officers were thus not merely performing
41 an act permitted by these statutes but
42 engaged in the performance of what was a duty
43 imposed upon them, a fact which, in my view,
44 has a vital bearing upon the question of the
45 liability of Priestman.
46

47 And I've included in my submissions, in

1 paragraph 13, section 18(1)(a) of the **RCMP Act**
2 that statutorily defines the duties of RCMP
3 officers as performing:

4
5 all duties that are assigned to peace
6 officers in relation to the preservation of
7 the peace, the prevention of crime and
8 offences, against the laws of Canada and the
9 laws in force in any province in which they
10 may be employed, and the apprehension of
11 criminals and offenders and others who may
12 lawfully be taken into custody.
13

14 The point that I want to make obviously is these
15 officers, unlike the security guards, could not
16 simply stand back and observe and report. They
17 had to act because they had a duty to act to
18 protect the property and to protect other people
19 in the airport.

20 I want now to turn to the last case I want to
21 refer to, which is Madam Justice Southin's
22 decision in the Court of Appeal, the last case I
23 want to refer to at the moment, which is tab 4.
24 This was the decision sending back the decision of
25 Mr. Justice Cohen for retrial on the issue of
26 liability in the Stanley Park riot case. As it
27 happens, in the retrial no liability was found.

28 Madam Justice Southin is dealing there with
29 the riot provision under section 32 of the Code.
30 But the language in the case would apply equally
31 to any of the other use of force provisions
32 anywhere from 25 through to 43.

33 If I can take you to paragraph 17 of that
34 decision, on page 7:

35
36 In my opinion, the present section requires
37 the judge to ask of himself or herself these
38 questions:
39

40 1. Did the peace officer believe that the
41 force he or she was about to use (and did
42 use) was necessary to suppress the riot?
43

44 2. Did the peace officer believe that the
45 force he or she was about to use (and did
46 use) was not excessive having regard to the
47 danger to be apprehended from the continuance

1 of the riot?
2

3 3. If the answer to the first question is
4 "yes", did the peace officer have reasonable
5 grounds for that belief?
6

7 4. If the answer to the second question is
8 "yes", did the peace officer have reasonable
9 grounds for that belief?

10
11 If all four questions are answered "yes", the
12 defence succeeds.
13

14 The first point to be made from that is the police
15 don't have to be right. They can have completely
16 misinterpreted what was happening here. But if
17 their belief was reasonable, then no misconduct
18 can be found against them.

19 Paragraph 24:
20

21 In a case such as this, if the first two
22 questions are answered "yes", the trial judge
23 must proceed to the third and fourth
24 questions. In so proceeding, he or she
25 should be a doppelganger to the peace officer
26 whose conduct is in issue.
27

28 The judge must go with the officer, at least
29 from the time the officer first was sent to
30 the place where the riot was in progress. I
31 say "at least" because the peace officer's
32 training, experience, the orders of the day
33 given to him, are all part of what goes into
34 the answer to the question of "reasonable
35 grounds".
36

37 And then in paragraph 27 she makes this very, very
38 important comment:
39

40 What a judge must not do in a case such as
41 this is take into account in determining the
42 issue of "reasonable grounds" what the person
43 injured was in fact intending to do, nor the
44 actual consequences of the force used, no
45 matter how tragic.
46

47 I don't say for a moment that Mr. Rosenbloom is

1 right when he says that Mr. Dziekanski was
2 brandishing the stapler in a defensive manner.
3 The point is it doesn't matter. What he was
4 intending to do is irrelevant in the assessment of
5 the conduct of the police officers, according to
6 this leading case in our province.

7 And that really is repeated in paragraph 34:

8
9 The question in this case is not whether the
10 appellant Hancock --

11
12 He was the shooter of the Arwen gun.

13
14 -- was wrong, but whether he lacked reason
15 for his belief if, in fact, he held the
16 belief the section requires as a foundation
17 for his defence of justification.

18
19 And then in paragraph 36 she criticizes the trial
20 judge by saying this:

21
22 Earlier, I spoke of the judge being a
23 doppelganger. The question might be posed
24 thus: Would the doppelganger, having also
25 been through the tumult of the evening, as
26 the appellant Hancock was about to fire,
27 think to himself, "His firing is wrong and
28 unnecessary and lacking in reason.", or, "I
29 wouldn't do it, but his doing it is not
30 lacking in reason.", or, "I would do it too."

31
32 It is only in the first case that the defence
33 under section 32 fails.

34
35 I've finished with the authorities for the
36 moment, and if I can return to paragraph 16 of my
37 written submissions.

38 The case law on assessment of police use of
39 force is important because this Commission now has
40 two separate functions. The first is to find out
41 and report on what actually happened. It is
42 completely appropriate to engage in a careful and,
43 if necessary or appropriate, microscopic analysis
44 of the video, frame by frame, and to carefully
45 consider all of the evidence of the eyewitnesses
46 and expert witnesses who gave evidence when
47 undertaking the process of fact finding.

1 The second subsidiary function is to consider
2 the allegations contained in the notices of
3 misconduct. I say it would be completely
4 inappropriate to undertake the same kind of
5 analysis when assessing the conduct of the police
6 officers. This Commission heard evidence over 20
7 days from the eyewitnesses to the police
8 involvement, when in real life about 100 seconds
9 passed from the first police contact with Mr.
10 Dziekanski to him being placed in handcuffs. The
11 assessment of that involvement has to take place
12 in the context of the officers' perceptions of the
13 events as they unfolded that night and in the
14 context of their knowledge, experience, and
15 training. You have to undertake the process of
16 being a doppelganger for each of them individually
17 and separately. You must ignore the calls to make
18 an armchair quarterback's assessment of the
19 circumstances with the benefit of tens, if not
20 hundreds, of reviews of the video, and thousands
21 of pages of evidence.

22 I have included in the next few pages a
23 summary of the early evidence that we heard with
24 respect to Mr. Dziekanski's background in Poland
25 and his travel to Vancouver and his travails in
26 the Immigration Hall. I do not intend to go
27 through those but to make a few comments.

28 The first comment I've made at the bottom of
29 page 5 is that your task is to be objective with
30 respect to the background of Mr. Dziekanski, and I
31 say you should be wary of submissions with respect
32 to his antecedents that are made through rose-
33 coloured glasses.

34 THE COMMISSIONER: And that's your submission, is it?

35 MR. BUTCHER: Yes.

36 THE COMMISSIONER: That point is your submission?

37 Thank you.

38 MR. BUTCHER: I've made some comments at the bottom of
39 page 8 about some criticisms that Mr. Kosteckyj
40 made of Ms. Hunter and Mr. Dore, and I've said
41 that it's my position that those criticisms are
42 not fair. They do have some importance because
43 they're the very first people who see Mr.
44 Dziekanski in Vancouver. I do make the point that
45 the criticisms that he made with respect to them
46 that they'd been tainted by the evidence were not
47 put to them.

1 Mr. Kosteckyj also said that, "Mr. Dziekanski
2 was seen coming down the escalator on the airport
3 video. He didn't act in any unusual manner and
4 appeared to be following other passengers." The
5 video doesn't disclose that, with respect. If you
6 go back and look at the video for the two minutes
7 prior to Mr. Dziekanski coming down the stairs, 38
8 out of 40 people go straight ahead towards the
9 PIL. Two out of 40 turn around and take a 180-
10 degree turn at the bottom of the escalators.
11 Mr. Dziekanski is the third of those people. For
12 some reason, as soon as he was here, he was unable
13 to follow the process, the funnel that exists at
14 the airport that takes people through the process
15 from plane to escalator to PIL to Point to the
16 exit.

17 I have at the bottom of page 10 made a
18 comment about some submissions that we heard that
19 all was fine with Mr. Dziekanski during the time
20 that he was in the airport. With respect, that
21 isn't a fair comment. You heard from a lot of
22 witnesses whose impression of him probably, almost
23 certainly incorrectly, was that he was impaired.
24 I say simply that this history is important
25 because when you have to come to assess whether
26 Mr. Rosenbloom is correct and he was being
27 defensive or the officers are correct and he was
28 being aggressive, you have got to take into
29 account all of Mr. Dziekanski's antecedents, up to
30 and including the moment that the police arrived.

31 I have provided a little more detail with
32 respect to the observations in the meet-and-greet
33 area because that's where the critical incidents
34 begin to unfold.

35 Paragraph 36. Lorne Meltzer works as a
36 corporate valet. He was at the airport to collect
37 a client off a Cathay Pacific flight from New
38 York. He is first seen on the video 1:10 a.m.
39 walking towards the IRL doors. I've documented
40 here the times that he comes and goes. He
41 remained at the doors until 1:14. At 1:13:46, he
42 scanned his prox card, which opened the IRL doors,
43 and it appears that it's at that time that Mr.
44 Dziekanski goes back into the IRL, having been out
45 in the public area for about 16 minutes.

46 Then Meltzer left to find security. He
47 returned at 1:16, and left again at 1:18. He gave

1 some detailed evidence about Mr. Dziekanski's
2 behaviour, but on my review of the evidence it is
3 difficult to determine when in the sequence of
4 events particular observations were made.

5 But he did say this about Mr. Dziekanski. He
6 described him as angry, distraught, holding a
7 chair, trying to smash the window at the doors.
8 Meltzer tried to get into the IRL but "he wouldn't
9 let me get past" because he had created a barrier
10 or barricade. Meltzer thought he was assuming
11 some sort of territoriality over the space he was
12 occupying. He told the police that he thought Mr.
13 Dziekanski was saying "This is my area. Don't
14 fuck with it." He said that he then got angry and
15 quantified his own anger as a "7 or 8 out of 10."
16 And he quantified Mr. Dziekanski's behaviour on an
17 "informal scale of sanity or insanity" as a 9 out
18 of 10 before the police officers arrived.

19 Meltzer reached into his left pocket with his
20 right hand. Dziekanski responded by putting a
21 fist in the air. He put his fist down when
22 Meltzer showed him the prox card. Now, if you
23 were ever to believe that the most likely
24 predictor of future behaviour is past behaviour,
25 you have Mr. Dziekanski ten or fifteen minutes
26 before the involvement with the police raising his
27 fists.

28 Meltzer says that he was about a foot or one
29 and a half feet away at the time. Then Meltzer
30 said, "I remember him looking at me and calming
31 down for a minute." However, he still wouldn't
32 let Meltzer through. He had used the chairs and
33 his suitcases as a barrier. Meltzer thought that
34 Mr. Dziekanski had been drinking.

35 Now, much has been made about the evidence of
36 Sima Ashrafinia, and I expect that Mr. Hira is
37 going to review her evidence in more detail. But
38 we certainly take the position that she is
39 supportive of much of the police version of events
40 here. She is first seen on the video at 1:09.
41 She noted Mr. Dziekanski soon after she arrived.
42 He was talking loudly to himself, visibly upset,
43 sweating, and breathing fast through his nose.
44 She incorrectly said that Mr. Dziekanski pushed
45 his luggage under the divider, but I think the
46 video shows that he threw it over. She then
47 reported that a "tall gentleman" who said he was a

1 limo driver was engaged with him and was indeed
2 shouting at him and telling him that, "You have to
3 move from this area." She reported that Meltzer
4 got really upset and started to use the F-word.
5 Ashrafinia attempted to calm him down and noted
6 that Meltzer was very loud and very angry.

7 Meltzer went to a Securiguard employee who
8 was guarding the primary security line at elevator
9 40. He told him, "You need to get down here
10 quick. There's a man freaking out." Meltzer had
11 called 911 but he'd been put on hold. He jumped
12 back over the railing into the meet-and-greet
13 area. At 1:25 a.m. he is seen on the video
14 calling 911. He said that he thought that this
15 was an emergency that needed police attendance.
16 Agraviador reported Mr. Meltzer's concerns to the
17 Airport Operations Centre at 1:18:06, saying
18 simply, "I receive a report that in IRL there is a
19 guy who are making trouble is there."

20 We've heard my friends talk about Dhari's
21 evidence. He agreed that the behaviour of Mr.
22 Dziekanski was bizarre. He described him as
23 "making noise, you know, himself, using bad words
24 for himself and not to anybody else...well, just,
25 you know, like mad." He asked the limo driver to
26 go and get security "because he was trying to
27 punch in the wall." This was later clarified to
28 mean the glass door and wall.

29 Dhari said that Dziekanski was flailing or
30 waving his arms and throwing a chair. However, he
31 did go on to say that Dziekanski wasn't
32 "threatening to anybody. He just himself is get
33 mad...and trying to open and close the door...the
34 people coming from Customs...he was right in the
35 middle of them and they can't go anywhere. He
36 thought Mr. Dziekanski was strong and agreed that
37 it was important that somebody deal with him and
38 get him moved from his location.

39 Canzon was a contract cleaner for the Royal
40 Bank. He swiped his prox card at 1:16:50 and
41 1:17:04 so that he could enter the IRL to clean an
42 ATM. He noted that Dziekanski had perspiration
43 running all over his face and he said that
44 Dziekanski was making an "rrr, rrr, rrr" noise.
45 Another man was talking loudly to Dziekanski, he
46 said. But he also said that Mr. Dziekanski wasn't
47 scaring him at all and he said he wasn't afraid

Submissions by Mr. Butcher (for Cst. Bentley)

1 "'cause he didn't do anything against me."

2 Rudek and --

3 THE COMMISSIONER: I think maybe we'll just pause now.

4 Now just ten minutes, gentlemen.

5 THE REGISTRAR: The hearing is now recessed for ten
6 minutes.

7

8 (PROCEEDINGS ADJOURNED FOR AFTERNOON RECESS)

9 (PROCEEDINGS RECONVENED)

10

11 THE REGISTRAR: Order. This hearing is resumed.

12

13 SUBMISSIONS BY MR. BUTCHER ON BEHALF OF CONSTABLE BILL
14 BENTLEY, continuing:

15

16 MR. BUTCHER: I'm at paragraph 41, referring to the
17 evidence of the security guards. This is at the
18 very bottom of the page.

19

20 Arora was concerned for his own safety and
21 the safety of people at the airport. Rudek said
22 that Dziekanski appeared "very, very stressed,
23 very eyes wide-open, very, very sweaty, skin very
24 pale, very, very aggravated." Rudek was concerned
25 about property damage and somebody possibly
26 getting hurt. He said that he tried to approach
27 Dziekanski with a low-key approach with dialogue,
28 and that did not work. This is not seen on the
29 video. Mr. Dziekanski responded by grabbing the
30 computer and smashing it to the ground. Rudek felt
31 it appropriate to wait for the RCMP.

31

32 And that evidence is, in my submission,
33 significant because we do see the security guards,
34 who have decided to stand back and not deal with
35 this individual and wait for the police.

35

36 You heard from three Horizon Air employees.
37 They arrived in the meet-and-greet area at 1:18.
38 Ms. Bosnjak adopted a statement to the police that
39 she'd given in which she said, "something happened
40 in the thing that...something make him...snap and
41 to me he was a sick man...who needed help."

41

42 Kula told the police that she "knew it was a
43 security hazard" and that "when he threw the chair
44 at the window...he was starting to get aggressive"
45 and that it was a good time to call the RCMP. And
46 Deziel thought that she heard him saying the words
47 "tutta" or "tuta."

47

 We then have the calls that are recorded on

1 the YVR tapes from Ms. Steckley, who was not
2 called as a witness. She reported that she
3 thought he was drunk.

4 I've then included at paragraph 46 my effort
5 to try to combine the times on the YVR tapes with
6 the Pritchard elapsed times. There is a common
7 time of 1:26:26 where the wooden table is seen on
8 the video being smashed against the glass wall and
9 is heard on the tape at the same time. So I hope
10 that the math there is correct.

11 But it doesn't hurt to go over again the
12 comments that Mr. Dziekanski was making in these
13 minutes before the police arrived. 1:21, "I will
14 trash this office." 1:22, "Fuck off." 1:22
15 again, "I will smash the glass, and I will smash
16 the glass here. And you will see." "What did you
17 say, you will not let me." "For fuck's sake I
18 will sue you and everybody else." "Fine, fine, we
19 are in a different country." "I will smash the
20 entire desk, I will smash the entire desk."
21 "Leave me alone, go away I said. For fuck's
22 sake."

23 There isn't much heard on the second tape
24 from Mr. Dziekanski. The only words that Mr.
25 Barski was able to translate are in the top box:
26 "How long do I have to wait." And then a comment
27 at 1:27, "So you will not let me go. You will not
28 let me out of here." And then we heard Mr.
29 Pritchard saying, "Why are the police not here?"
30 And then finally, the "Politzia, politzia."

31 I say that this short section of chronology
32 is important because the actions and words of Mr.
33 Dziekanski during this time period do not support
34 Mr. Rosenbloom's suggestion that he had done
35 nothing wrong - clearly he had - or that he was
36 merely unwell or paranoid. He had committed
37 offences, and his words and actions were clearly
38 very angry.

39 Now, at least three professionals gave
40 evidence about Mr. Dziekanski's mental state
41 during this time. The first of those, and the
42 witness that I say you should prefer, was Dr. Lu.
43 He expressed an opinion that Mr. Dziekanski was
44 demonstrating the symptoms of delirium, and he did
45 note, at the very bottom of page 16, that some of
46 the characteristics of delirium were as follows.
47 It can have a profound effect on a person's

1 strength. We know that to be true because we know
2 he was very strong in the resistance.

3 Patients with delirium will have rapid
4 breathing, sweating, increased heart rate, and
5 unstable blood pressure. Well, we know he had
6 rapid breathing and was sweating heavily. We can
7 see that clearly in the video.

8 They may be unable to follow instructions.
9 They tend to be frightened or scared and often
10 exhibit a "fight or flight" response. And that,
11 in my submission, is the most logical explanation
12 for Mr. Dziekanski's behaviour from the moment he
13 throws his arms up in the air, the time he grabs
14 the stapler and confronts the officers. He's
15 involved in first a flight response and then a
16 fight response.

17 He noted that people in delirium can be
18 aggressive or appear to be aggressive. He said it
19 is not a steady state. He noted that people in a
20 delirious state can be brought down or de-
21 escalated.

22 He opined in his report that there is a high
23 degree of certainty that Mr. Dziekanski was in a
24 state of agitated delirium prior to his death.
25 There are no other medical-psychiatric conditions
26 that could better account for Mr. Dziekanski's
27 behaviour and mental status. He demonstrated
28 classic features of delirium, including
29 psychomotor agitation and disorganized behaviours.
30 He appeared both frightened and defensively
31 threatening, although he didn't seem to threaten a
32 particular individual or try to achieve a specific
33 purpose. He had decreased awareness of his
34 surroundings. His efforts to barricade himself
35 and aggressive behaviours are easily understood in
36 the context of delirium. And he went on to say
37 that being confronted by the police was likely a
38 frightening experience and his aggressive
39 behaviours were likely defensive. He said that it
40 was impossible to determine the precise cause of
41 the delirium, although there were a range of
42 factors that were present that could have caused
43 it.

44 Dr. Di Maio's and Dr. Sloane's reports note
45 what they say are evidence of symptoms of alcohol
46 withdrawal.

47 Dr. Janke was called late in the day to say

1 that it was not proper to diagnose Mr. Dziekanski
2 with delirium from the video alone. And Dr.
3 Janke's words used to describe his behaviour or
4 psychiatric condition were "agitated, anxious, and
5 distressed." He described Dziekanski as having
6 "moderate to severe psychomotor agitation,"
7 meaning that facially he looked agitated and at
8 times was yelling and gesticulating. He thought
9 that Mr. Dziekanski "on repeated occasions
10 interacted appropriately." I'm not sure where he
11 could have got that opinion from. I say the
12 observation is also hard to understand, given his
13 behaviour.

14 He agreed that Mr. Dziekanski exhibited some
15 of the signs of delirium, but said they were not
16 sufficient to make the diagnosis. He agreed that
17 it was appropriate to call the police, given his
18 behaviour. He agreed that it was reasonable to
19 expect the police to deal with that behaviour.
20 And he agreed that picking up a stapler and
21 clenching one's fists was not a proper response to
22 the police.

23 Now, in my submission, the key difference
24 between the two practising psychiatrists when
25 assessing their two opinions is their history and
26 day-to-day experience. Dr. Lu deals with people
27 with delirium every day during his work at VGH.
28 Dr. Janke says that he may see one such person
29 once a year. Clearly two very different
30 professional experiences between the two men.

31 Dr. Webster, who is a PhD psychologist,
32 described Mr. Dziekanski as an emotionally
33 distraught individual and as being in a state of
34 hyperarousal, which he described as "a temporary
35 state of disorganization where an individual has
36 lost his mental balance as a result of being
37 unable to cope with some immediate situation."
38 When hyperaroused,

39
40 people are affected on several levels.
41 Cognitively, their ability to process
42 information is disrupted and disorganized.
43 They don't use good judgment, they don't make
44 good decisions, and they're not very good
45 problem solvers. Their emotions are labile
46 and their behaviour is random and
47 unpredictable.

1 But he then went on to say in his opinion Mr.
2 Dziekanski was not labile. That's another comment
3 that, in my submission, is hard to understand.

4 I say in paragraph 53 why you should prefer
5 Dr. Lu's opinion. And I make the comment, at the
6 bottom of paragraph 53, that Dr. Lu and Dr.
7 Webster seem to be describing a similar mental
8 status from the perspective of two different but
9 not unrelated disciplines.

10 I make the comment in paragraph 54 that there
11 is little history with respect to his mental
12 health or his lack of conflict with law
13 enforcement in the past. Mr. Rosenbloom was
14 critical of that comment, but I note underneath
15 paragraph 54 that the BCCLA seizes upon this
16 reported lack of history, at paragraph 154, to
17 bolster assertions that Constable Bentley's
18 observations are inaccurate. So they clearly seem
19 to think that the absence of history was
20 important.

21 I have then summarized what I say are the
22 important things for you to conclude with respect
23 to Mr. Dziekanski's circumstances at the time the
24 police arrived. He had:

- 25
- 26 - acted in a bizarre and emotional manner in
- 27 Poland;
- 28 - travelled a long distance, across 10 time
- 29 zones;
- 30 - arrived in Vancouver very tired and
- 31 confused;
- 32 - been acting in a bizarre, aggressive
- 33 manner at the IRL doors for about 15
- 34 minutes before the police arrived;
- 35 - he escalated his aggressive behaviour when
- 36 approached in a low-key manner by
- 37 uniformed security guards.
- 38

39 I might add, when approached in an aggressive
40 manner by Mr. Meltzer.

41 I say there is sufficient evidence to
42 conclude that Mr. Dziekanski was probably in a
43 state of alcohol withdrawal and was suffering a
44 mental imbalance which disrupted his cognition and
45 made him agitated and aggressive.

46 And then we have the fact that the police
47 were called by citizens who wanted Mr. Dziekanski,

1 and the threat he posed, removed from the IRL.

2 I should say as well before going on that
3 from the perspective of the police, it doesn't
4 really matter which of those opinions is correct
5 because, again, they're not there to diagnose his
6 mental condition. They're there to respond to the
7 behaviour that he presents. But whatever the
8 cause of it is, it was a bizarre, aggressive and
9 difficult behaviour.

10 Turning then briefly to the background of the
11 officers, I've set it out there. I think the only
12 important thing that I wish to mention is that
13 Bentley was the most junior of these officers. He
14 had about 15 or 16 months' experience at the time.
15 He'd had a Taser many times since he'd been
16 trained in July. He'd never even taken it out.
17 He'd never used it. He had taken the IMIM
18 training at the RCMP Depot.

19 In paragraph 61 I've excerpted the initial
20 dispatches of an "intoxicated male throwing
21 luggage around," and of the update in paragraph
22 62, "the male is now throwing chairs through glass
23 windows in the same area." Corporal Gillis
24 identified this as an escalation of the event and
25 Orv Nickel agreed with that. I say,
26 significantly, the dispatcher did not identify a
27 complainant on the call.

28 There was no process at the YVR subdetachment
29 for assigning regular calls to particular
30 officers. Millington said that he was simply the
31 first person to hit the button to answer the call.
32 By accepting the call, he assumed the role of lead
33 investigator on the file. Corporal Robinson said
34 that this was a general call to anybody who might
35 take it. He pointed out that it was a call which
36 required at least two members. He decided to
37 attend to supervise because he wasn't occupied
38 with anything else, and it was a good opportunity
39 to observe the other members. All four officers
40 testified that there was no discussion at the
41 detachment about who should take the call, who
42 should attend, or what should be done upon
43 attendance.

44 I want to turn now to the first of the
45 allegations of misconduct against my client that,
46 as you know, have been made very public.

47 The first allegation is that:

1 You failed to make a full and proper
2 assessment of the circumstances you were then
3 facing... In particular, you failed to make
4 reasonable efforts to ascertain whether the
5 information you had received...when you were
6 dispatched and/or en route...still applied
7 when you initially saw [Mr. Dziekanski] at
8 the airport.

9
10 You did not make reasonable efforts to
11 obtain, from people in the vicinity,
12 information about Mr. Dziekanski and/or his
13 previous actions and behaviours; you did not
14 develop, through communication with the other
15 RCMP officers there, an appropriate plan of
16 action; and

17
18 You acted inappropriately aggressively in
19 your initial approach, posture and dealings
20 with Mr. Dziekanski.

21
22 I deal at the top of paragraph 64 with the
23 suggestion that there was a plan to taser Mr.
24 Dziekanski, a suggestion that doesn't seem to be
25 able to go away, because Poland and Ms. Cisowski
26 have made reference to that in their submissions.
27 The only evidence of a plan came from that one
28 e-mail from Chief Superintendent Bent. Since that
29 time, three months have passed. We've received
30 18,000 pages of paper from the RCMP file. They've
31 been reviewed in detail by Commission staff, by
32 all of the lawyers here, and there is not a single
33 piece of paper to support that assertion. That, I
34 say, should be enough to put that e-mail and that
35 suggestion to bed for all time. There is simply
36 no evidence to support Chief Superintendent Bent's
37 comment, and what I say is very reliable, firm
38 evidence from Superintendent Rideout saying that
39 the Chief Superintendent had his note wrong. So I
40 say in paragraph 65 that there is no merit to any
41 of this initial set of allegations against
42 Constable Bentley.

43 Paragraph 66. The dispatcher categorized the
44 call as a priority 3 routine "assist other agency"
45 matter. This entry was made by a call taker and
46 was incorrect. According to Corporal Robinson,
47 the call should have been a "mischief in progress"

1 or "disturbance in progress" call, which would
2 have properly made it a priority 2 call. And I
3 think that makes common sense. That means that
4 the appropriate response is to "hurry up and get
5 there" but there is no need for a Code 3 emergency
6 response. Corporal Gillis, on the other hand -
7 who you remember is not only just a use of force
8 coordinator or trainer but also an occasional
9 supervisor of patrol shifts in Richmond - opined
10 that the call should have been categorized as a
11 priority 1 call.

12 Bentley said, "I think, based on the
13 information we received, we wanted to attend the
14 call as soon as we could" because it was an
15 in-progress call and he thought the safety of the
16 public may be in jeopardy.

17 Millington thought it was a high priority
18 call coming in with chairs and luggage being
19 thrown around. He wanted to "get there as soon as
20 possible, 'cause I haven't... dealt with anything
21 like that before."

22 Rundel said that it was the kind of call
23 where you would want as many members as were
24 available. He made the point that "we were up and
25 moving very quickly" because the call indicated
26 some level of violence, that somebody had been
27 disturbed by the behaviour, and that there was
28 some property damage. There was no discussion en
29 route between the officers.

30 Constable Bentley testified in chief that he
31 was the last officer to arrive on scene. In
32 cross-examination, he agreed that the video showed
33 that Robinson was in fact the last officer to
34 arrive in the terminal, evidence which was
35 confirmed by Robinson. A review of the YVR video
36 suggests that Bentley was actually the first
37 officer walking into the meet-and-greet area.
38 This, I say, is an example of an innocent and
39 inaccurate memory of the incident.

40 Bentley said that he was approached by a
41 female member of the Horizon Air staff who
42 "approached me and...seemed very excited. Her
43 tone of voice was very high, she was talking fast,
44 and she was pointing out to me the subject of
45 complaint, saying that 'He's over by the glass'.
46 Genevieve Deziel confirmed that she was the
47 Horizon Air employee and that she walked over to

1 the doors when the police arrived because she
2 wanted to "show them exactly where the situation
3 was."

4 Rundel said that one female said to him "he's
5 over there" and "he doesn't speak English."

6 It is clear from the video that someone said
7 to the officers, "He doesn't speak English, he
8 speaks Russian." Bentley does not recall hearing
9 that comment. And I say there are several
10 possible perfectly rational explanations for that.
11 He could have been experiencing auditory
12 exclusion, a phenomenon which occurs when a person
13 is stressed by or focussed on a particular part of
14 an event. Alternatively, he could be suffering
15 from a fragmented or inaccurate memory caused by
16 hyperarousal. It is clear from the video that the
17 officers walked purposefully, deliberately and
18 calmly towards Mr. Dziekanski's location. They
19 did not rush in like a SWAT team as suggested by
20 Mr. Kosteckyj. Bentley was the first officer over
21 the railing and to deal with Mr. Dziekanski.

22 En route to the IRL, Bentley asked if anyone
23 had a Taser. He said that he "wanted to see if we
24 had a CEW available to us as an intervention
25 option if he became combative." He described
26 elsewhere in his evidence that he considered this
27 to be a tool check. Bentley did not remember
28 getting a response, and I don't think a response
29 can be heard on the video.

30 Bentley then said:

31
32 As we were walking towards the male he was
33 just standing there just staring at us with
34 his eyes wide open, hands at his side, and
35 debris was around his feet. From my law
36 enforcement experience, my gut instinct told
37 me that he was going to start a fight with
38 us.
39

40 The BCCLA is critical of that evidence. They say
41 that this was an extreme view and suggests that
42 Constable Bentley's observations were
43 categorically wrong and internally inconsistent.
44 Constable Bentley says in response that the
45 opinion was formed on the basis of his law
46 enforcement experience. He clearly acknowledged
47 throughout, and this is a point I'm going to come

1 back to later, that Mr. Dziekanski appeared calm.
2 But calmness does not equate with non-aggression.
3 Sometimes the most aggressive people can present
4 as being very calm. Constable Bentley's
5 assessment of Dziekanski's -- it's really his gut
6 assessment, his police officer's intuition
7 assessment of Dziekanski's presentation is of
8 course confirmed by and consistent with his
9 behaviour immediately prior to and after the
10 police arrival.

11 Rundel said that Dziekanski was standing
12 behind a door. He had a "wide-eyed, glazed
13 focused look, but perhaps disoriented." He was in
14 an agitated state of some sort and was pacing. He
15 had the look that Rundel had seen in intoxicated,
16 drugged or distressed individuals. He was not
17 behaving as a normal person would.

18 Millington said he was walking back and
19 forth, pacing a bit.

20 Bentley -- and this is dealing now with one
21 of the first parts of the allegations. Constable
22 Bentley thought that the information received over
23 the radio was fairly reliable because the call was
24 related to breaking furniture and "that was
25 evident when you saw the debris surrounding his
26 feet." The information from Ms. Deziel, and her
27 tone of voice, was also significant.

28 Objectively, the following facts reported in
29 the initial dispatches were correct. There was a
30 middle-aged man - not 55, but I say looking older
31 than his real age - in the arrivals reception
32 lobby. He was disoriented. He did have dark hair
33 and was wearing a white coat. And the debris of
34 the broken table was visible.

35 The following facts reported in the initial
36 dispatches were incorrect. Mr. Dziekanski was
37 white, not non-white. There was no broken glass.
38 And he was not intoxicated.

39 That said, it's clear that furniture had been
40 thrown and broken. Mr. Dziekanski was not
41 intoxicated but he was clearly agitated and angry,
42 hyperaroused, or delirious, depending on which
43 opinion you accept, according to the various
44 professional lexicons of the experts who reviewed
45 the circumstances.

46 Bentley approached Mr. Dziekanski and said in
47 a very quiet and respectful voice: "Hi, how are

1 you sir? How's it going, bud?" Corporal Gillis
2 said that this was "completely appropriate,
3 socially appropriate language." He did not recall
4 getting a response. He noted that Mr.
5 Dziekanski's "demeanour seemed calm. His hands
6 were at his side. I'd classify it as
7 cooperative." He did not smell liquor. He said
8 the officers were also calm and relaxed. And I
9 say all of that is confirmed by the Pritchard
10 video.

11 Genevieve Deziel observed the police doing
12 exactly what she had expected and wished them to
13 do, which was to calm Mr. Dziekanski down and
14 control the situation. Meltzer observed that the
15 police approached Mr. Dziekanski calmly, exactly
16 the way he had initially approached him, and that
17 he did calm down.

18 Now, I'll pause there just to say that that
19 evidence, I say, completely answers the third tier
20 of the first set of allegations about my client:
21

22 You acted inappropriately aggressively in
23 your initial approach, posture and dealings
24 with Mr. Dziekanski.
25

26 That simply isn't a fair allegation. It's just
27 not true.

28 Then Millington took over as lead
29 investigator. He said that he used hand gestures
30 to tell Mr. Dziekanski to calm down. He asked for
31 his passport and identification. Bentley did not
32 recall seeing or hearing any hand gestures or
33 hearing Millington ask for his passport. I
34 suggest in this paragraph 84 that that may be
35 because he was moving from in front of Mr.
36 Dziekanski to behind him. And you'll remember
37 seeing that in the video, that Bentley moves from
38 being the primary contact officer to being a cover
39 officer standing somewhere between four and eight
40 feet behind Mr. Dziekanski.

41 Ms. Deziel confirmed that the calming hand
42 gestures were made.

43 The officers all acknowledged that there was
44 no plan in place and that they moved directly to
45 dealing with Mr. Dziekanski. Bentley's
46 explanation for this was:
47

1 I think, based on the information we
2 received, we wanted to attend the call as
3 soon as we could and make an assessment as to
4 what was going on before we decided any
5 appropriate action. ... A call like
6 this...quite frankly it's hard to plan for.
7

8 He said that the assessment he wanted to undertake
9 was to "speak with the subject of complaint,
10 analyze the area...see what his mental state was
11 at." He also wanted to start a mischief
12 investigation. He didn't think that there was any
13 time to speak to the complainants because there
14 was a sense of urgency to deal with the subject of
15 complaint first. This, he said, was good police
16 work. The need to talk quickly with the subject
17 was emphasized by the fact that the incident
18 occurred in the airport setting with "lots of
19 members of the public around". He thought that
20 the threat level was fairly high and that there
21 could be a threat to the public.

22 Rundel, paragraph 87, said that there was no
23 opportunity to develop a plan because of the quick
24 response needed to an offence in progress. He
25 said that the first priority in a call like this
26 was to identify and isolate the problem and
27 contain the threat.

28 Robinson said this was not the type of call
29 "where you sit back." It is where you get in
30 there and you start assessing from the other side.
31 Plans are for hostage takings, armed robberies.
32 This was not one of them. It was not an unusual
33 call for officers with this degree of experience.

34 These views or expressions of opinion from
35 the officers were supported by the two independent
36 police officers called to give evidence.

37 Fawcett had 19 years' experience as a patrol
38 officer and patrol supervisor as well as a use of
39 force instructor. He's a hands-on policeman, a
40 working policeman, but he's also been involved in
41 some of these national projects to develop the use
42 of force model. He was asked whether, with a call
43 like this, officers should go directly to the
44 subject of the complaint or start interviewing
45 eyewitnesses first. He said:

46
47 We contain first. You contain the problem

1 area right away, almost regardless of the
2 call.

3

4 We're going to insert as close to the problem
5 area as we can. Typically you want to contain
6 the scene first...you don't want to allow the
7 suspect to escape...or provide opportunities
8 to otherwise escalate their behaviour or
9 endanger anybody else. Once we've contained
10 it, then we're going to do what we can to
11 stabilize it. And we have to investigate,
12 report, and ultimately testify on it.

13
14 He was asked whether a plan was necessary in a
15 case like this:

16
17 In the grand scheme of policing...dealing
18 with an intoxicated person that's acting
19 out...who's causing mischief, is not an
20 uncommon occurrence. It's not the type of
21 call where I'd expect officers have to
22 convene prior to contact and formulate a
23 plan. ... It's the type of call they're going
24 to deal with almost daily in the Metro
25 Vancouver area.

26
27 Gillis's evidence at the bottom of paragraph

28 92:

29
30 When officers are faced with a rapidly
31 unfolding event, where there's a risk to
32 public safety or a risk to property, that the
33 first step is to re-establish a degree of
34 control or calm to that situation. Once the
35 situation is under control and there's a
36 degree of calm, then to revert to the
37 investigational phase, which would be the
38 collection of witnesses' names, gathering of
39 information, potentially taking statements,
40 seeing what people can report, what they
41 saw...it would not be appropriate for
42 officers to stop -- as the person was
43 actively engaged in behaviour that presented
44 a risk to public safety, to safety to
45 themselves or risk of property damage...

46
47 There was an issue about whether it was

1 appropriate to jump over the railing, and both
2 Fawcett and Gillis said that it was completely
3 appropriate and reasonable because it allowed the
4 police officers to maintain observation of the
5 person. Taking the longer route puts him further
6 away from the person of interest and places the
7 public potentially between him and the party he's
8 concerned with. He said:

9
10 It's appropriate for them to continue in a
11 direct path...by keeping the person under
12 observation they're able to gather more
13 information, they're able to assess the
14 person's actions, they're able to watch the
15 person's hands, see whether they approach or
16 go near other equipment or property.

17
18 It makes sense. The police can't turn their back
19 on this person.

20 Dr. Webster was a clinical psychologist who
21 was qualified to give expert evidence in the use
22 of force and the crisis intervention perspective.
23 He'd received no training in the use of force for
24 20 years and had no practical experience
25 whatsoever. He disagreed with Fawcett and said
26 that "all calls require a plan" and that the
27 officers should covertly rehearse the plan on the
28 way to the call. He said that this was "mentally
29 work it through in their heads," not actually
30 having a huddle. He then made the comment that
31 the officers should apply the "rule of ate":
32 locate, isolate, evacuate and communicate. Well,
33 that's what they did do. They located and
34 isolated him. He suggested that the officers
35 should have started on a low "intensity of
36 approach" and then went on to say they should have
37 approached the problem "low and slow." He said
38 that this was "something really tasty." And it's
39 my submission that at best, Dr. Webster can be
40 described as an eccentric witness.

41 He agreed that the vaulting over the railing
42 didn't really change Mr. Dziekanski's physical
43 presentation and that there was nothing in their
44 approach to the point Millington asked for
45 Dziekanski's passport that aggravated Dziekanski's
46 emotional circumstances.

47 Nickel also gave evidence, and in direct

1 examination suggested the police should have
2 stopped to formulate a plan or strategy, because
3 he said there was little evidence of immediate
4 danger to the public. But under cross-examination
5 he agreed that decisiveness and quick decision-
6 making is important and that an acceptable
7 alternative was to have begun questioning
8 witnesses after the situation was controlled. He
9 agreed that the decision of the four officers to
10 ensure the situation was calm and collected with
11 no ongoing threatening behaviour was an
12 appropriate judgment call.

13 Fawcett's response to Nickel's evidence was
14 that "the nature of the in-progress call was such
15 that it was entirely appropriate for them to
16 respond immediately to the scene" and said that
17 Dr. Webster's "low and slow" comments seemed to
18 ignore the circumstances of the call.

19 Paragraph 101. I say that the evidence of
20 Fawcett and Gillis is to be preferred over that of
21 Dr. Webster and Mr. Nickel for obvious reasons.
22 Both are current police officers with vast
23 experience in general duty policing. In contrast,
24 Mr. Nickel's experience is 26 years old, and Dr.
25 Webster has no practical experience at all.

26 And I've made reference there to a comment
27 made by Madam Justice Dillon in a case called
28 *Anderson v. Smith*, which is at tab 2 of my
29 authorities, in a case in which she had heard
30 evidence from Sergeant Johnson, one of Fawcett's
31 predecessors in the use of force instruction at
32 the Vancouver Police, over that of Mr. Nickel.
33 She said this:

34
35 On the whole, I prefer the evidence of the
36 defence expert who was familiar with the use
37 of pepper spray from its origin, had been
38 involved in the its use on patrol, and was
39 currently involved in assessment of
40 appropriate police use. Mr. Nickel had not
41 been a patrol officer for many years. When a
42 decision comes down to an individual
43 officer's assessment in a confrontational
44 situation, the expert with more realistic
45 experience is to be preferred, all else being
46 equal.
47

1 I say that that comment is far stronger today
2 because nine years have passed since that case and
3 Mr. Nickel is nine years further removed from
4 policing.

5 I make a point at the bottom of paragraph 101
6 that Mr. Kosteckyj complains in paragraph 34 that
7 the officers did not stop to talk to a
8 complainant. As noted earlier, there was no
9 identified complainant, and if they had stopped to
10 talk to witnesses, they would have been told about
11 what we've seen on the video. He says that
12 Bentley rushed into the scene, and I've again said
13 no, he didn't. He walked purposefully to deal
14 with the subject of the complaint. That was his
15 job. That was his duty.

16 Then in paragraph 102, I've set out some
17 findings that I say you should find from all of
18 this evidence.

19 On this evidence, the Commissioner should
20 find that:

21 Mr. Dziekanski was in a state of delirium,
22 hyperarousal, or agitation and anger, when the
23 police arrived, whichever expert you prefer.

24 The situation facing the police required an
25 immediate approach to contain and control the
26 potential threat posed by Mr. Dziekanski. That
27 was the response expected by the members of the
28 public who had contacted, or attempted to contact,
29 the airport or police.

30 The information learned at the airport from
31 the brief discussions with the eyewitnesses and
32 the initial observations of the officers confirmed
33 the objective need to deal quickly with Mr.
34 Dziekanski, and the public's request that he be
35 contained and controlled.

36 The most significant aspects of the complaint
37 were confirmed by the circumstances found by the
38 police. They correctly identified Mr. Dziekanski
39 as the subject of the complaint despite the
40 inaccuracy of the description of his skin colour.
41 They quickly learned that the report of damaging
42 property was correct, not because the glass was
43 not broken, but because the furniture and computer
44 were destroyed. The inconsistencies, I say, are
45 of no moment.

46 In these circumstances, the decision to
47 immediately engage Mr. Dziekanski was not only an

1 appropriate course of conduct or one of several
2 legitimate options available to the police; it was
3 the only approach that they were duty bound to
4 take.

5 The evidence of the officers is consistent
6 with that of the experts. The experts confirm
7 that there was a well-articulated justification
8 for not requiring the officers to make efforts to
9 confirm the information received from the
10 dispatcher, or to obtain further information about
11 Mr. Dziekanski or his previous conduct. This was
12 not a case involving a single, identified
13 complainant who might have been able to provide
14 details about the reason for the call because the
15 reason for the call was in front of the police.

16 At this stage, there was no need or
17 expectation to develop a plan. This was the kind
18 of call that all officers are trained to deal with
19 and do deal with on a regular basis. It was a
20 legitimate expectation that each of these trained
21 officers knew how to tackle the problem that had
22 been identified by the complainants

23 Had the police talked to the eyewitnesses,
24 they would have learned that Mr. Dziekanski had
25 been extremely irrational, agitated and angry.
26 The police response would likely have escalated,
27 not de-escalated.

28 The approach of the officers was professional
29 and calm. Bentley was polite and used appropriate
30 language. Their efforts appeared to calm
31 Dziekanski down, or at least did not escalate the
32 situation. That, of course, is only for a moment.

33 I say that from these facts, it is readily
34 apparent that the allegations with respect to the
35 failure to ascertain the facts, interview
36 witnesses and develop a plan have no merit
37 whatsoever. Any suggestion that the police should
38 have taken these steps reflects a naive
39 misunderstanding of the realities and
40 practicalities of police work.

41 The point can be illustrated by a rhetorical
42 question: What if the police had taken a few
43 minutes to speak to witnesses or walk around the
44 railing, and, during that time Mr. Dziekanski had
45 attacked a traveller or an airport employee or a
46 member of the public, or smashed the glass causing
47 injury to the citizens in the public area? There

1 would, in such circumstances, have been a
2 legitimate outcry that the police had failed to
3 act in their duty quickly enough to protect the
4 public.

5 Even if the Commission were to find that the
6 proper approach to this problem would have been to
7 take the steps suggested in the notice, that does
8 not equate to a finding that Constable Bentley
9 committed misconduct. If such steps were
10 necessary, if it was appropriate to send two
11 officers to go to speak to Mr. Dziekanski and two
12 officers to interview the witnesses, those steps
13 had to be taken by the senior officer on duty.
14 They had to be taken by Corporal Robinson. It was
15 not Bentley's responsibility or role to command
16 the police presence or to direct the other
17 officers. The Commission cannot evaluate his
18 conduct with hindsight from the armchair of the
19 Commissioner's Bench. The decision to approach
20 Mr. Dziekanski quickly was a reasonable one for
21 Constable Bentley and the others to make at the
22 time, given all of the circumstances.

23 Accordingly, it cannot be said that he, or any of
24 the others, acted improperly or unprofessionally.

25 In addition, it simply cannot be said that
26 Bentley or the others acted in an unduly
27 aggressive manner in their approach. The video
28 simply does not support this assertion.

29 Now, Mr. Kostekyj has argued that the police
30 did not have lawful authority to arrest Mr.
31 Dziekanski, and he relies on his interpretation of
32 section 495 of the **Criminal Code**. I say that
33 analysis has to be taken in steps. The steps are
34 these. Did they have lawful grounds to arrest
35 him, (a) upon first interaction, (b) when he
36 shrugged his shoulders and moved away, or (c) when
37 he confronted them with the stapler? Constable
38 Bentley says that he was arrestable upon first
39 contact to prevent continuation of the offence of
40 mischief - that is specifically permitted under
41 section 495 of the Code - and was certainly
42 arrestable by the time he confronted the officers
43 and was therefore found committing the offences of
44 assault, assault with a weapon and assaulting a
45 police officer.

46 I want to turn now to the credibility
47 allegations. I've set those out in summary form

1 in paragraph 107. And I've then made a comment
2 underneath those allegations that responds to
3 Poland's assertion that the officers colluded to
4 concoct a story for the purpose of avoiding the
5 consequence of their wrongdoing. I say that the
6 improbability of that happening is illustrated by
7 these facts.

8 Bentley knew that the incident had been
9 videotaped and observed by many witnesses. And
10 Poland tries to say, well, they didn't know what
11 was on the videotape. Well, they didn't know what
12 was not on the videotape either. But Robinson,
13 the officer in charge, directed that the videotape
14 be seized and directed that the witnesses be
15 interviewed. That's not an action of a supervisor
16 seeking to cover up.

17 Rundel and Bentley followed that direction
18 -- not actions of officers expecting or seeking to
19 cover up. And Constable Bentley then took brief
20 statements, and his notes contain the contact
21 information for 12 different people. His notes
22 are Exhibit 169. Somebody who wants to cover up
23 does not create a record of the eyewitnesses.

24 One last point that's not mentioned there but
25 was suggested by Mr. Beaubier. Had these officers
26 been intent on a course of conduct of covering up,
27 the very first thing they would have done is
28 lawyered up, to use the vernacular. None of them
29 sought the assistance of counsel. They readily
30 gave statements to the investigators. That is
31 something that police officers in other cases like
32 this have been seriously criticized for, going to
33 lawyers, taking months to provide statements.
34 That's just not what happened here.

35 And I make the point there that Constable
36 Bentley had nothing to hide and no way of hiding
37 anything, given the number of people who had seen
38 and recorded this incident.

39 We recognize that there may be errors in
40 Constable Bentley's statements and in his notes,
41 but we deny vehemently that he deliberately
42 misrepresented anything at any time. These
43 allegations require an analysis of the events
44 which unfolded after the first police intervention
45 and the description of those events by Constable
46 Bentley and the other witnesses.

47 Given the breadth of the misrepresentation

1 allegations and the absence of any particulars of
2 misconduct, the submissions will review each part
3 of the incident from the perspective of the
4 accuracy of the statements made and evidence
5 given. And not always, but some of the
6 subheadings that I have in the submissions that
7 follow are quotes from Officer Bentley's notes,
8 quotes that I anticipated would be considered
9 contentious.

10 I do want to make a point about the
11 usefulness of the video recordings in this case.
12 The YVR and CBSA videos are very useful in
13 establishing an accurate chronology of the
14 movements of people. The Pritchard videos clearly
15 capture much of what happened but they are out of
16 focus, unsteady and off target from time to time.
17 The recording is broken up into three significant
18 segments. All of the events occurred behind
19 glass.

20 Sergeant Fawcett said this:

21
22 The video provides a one-dimensional view of
23 the incident, and only that portions that are
24 available to the lens... Obviously it doesn't
25 record or capture details that are not facing
26 it.

27
28 He made the point that in this case that means
29 that the Pritchard video does not capture Mr.
30 Dziekanski's facial expressions or body movements
31 below the counter or in front of him, all of which
32 would have been seen by the police officers.

33 Corporal Robinson noted that watching the
34 video through glass did not give good depth
35 perception.

36 Grant Fredericks described the weaknesses of
37 the video as follows:

38
39 [W]e don't have infinite resolution, which
40 means we can't see the finest of detail...the
41 video is not stable, it's hand-held. It's
42 shaky as a result. It's moving on a number
43 of axes...left to right...up and down...in
44 and out...and it's also rotating.

45
46 Poland says that the video makes you an
47 eyewitness. With respect, I disagree. At the

1 very best it's only partially true because of the
2 limitations of the video. There were several
3 witnesses who had better views of the events,
4 including the four officers. The video cannot
5 replace the role of the Commissioner in finding
6 facts from all of the evidence.

7 I want to turn now to the first of the
8 controversial actions by Mr. Dziekanski, and that
9 is the shrugging of his shoulders and the walking
10 away.

11 I say in paragraph 114 that the sequence of
12 events immediately after Constable Millington
13 asked for Mr. Dziekanski's passport is not really
14 in dispute, although Dziekanski is off the
15 Pritchard II video for four seconds in that time.
16 By 03:38 it is clear that Constable Bentley has
17 taken up a cover position behind Dziekanski while
18 Millington tried to communicate with him.
19 Dziekanski looked at, then began to move towards,
20 his suitcases, probably to retrieve his passport.
21 Robinson then intervened and said, "No... You're
22 not going into your luggage." Corporal Robinson
23 then motioned to Dziekanski to put his hands on
24 the counter.

25 Bentley did not recall hearing Robinson's
26 instructions or seeing him point to the counter,
27 although he was able to see it on the video.
28 Millington did not see Robinson pointing or
29 Dziekanski going towards the suitcases. And
30 Robinson and Rundel both described this part of
31 the incident in detail.

32 Mr. Dziekanski's reaction, presumably to
33 Robinson's instruction, was to bend his head down,
34 spread both arms out, walk four or five feet away,
35 and grab a stapler. The officers followed him and
36 formed a semi-circle around him. This all
37 unfolded in five seconds or less.

38 Bentley's view was that Mr. Dziekanski "was
39 trying to evade us, was being defiant, didn't want
40 to listen to us." He thought perhaps he was
41 trying to flee. He said that at this point Mr.
42 Dziekanski's behaviour changed from calm to non-
43 cooperative.

44 Rundel interpreted this action as meaning,
45 "To hell with you guys, I'm out of here." He
46 interpreted the action as resistant behaviour. He
47 did not take it as a sign of resignation or

1 surrender. He too was concerned that he might run
2 off somewhere.

3 Millington also interpreted his act as
4 defiant and "not wanting to listen to what we had
5 to say."

6 Mr. Rosenbloom in particular challenged this
7 evidence, saying that Mr. Dziekanski's movements
8 suggest compliance with Robinson's direction, and
9 then a motion indicating surrender. Now, I make
10 the point there that many of the eyewitnesses saw
11 this, but that theory was never put to any of
12 them.

13 Two questions arise. Was Bentley's
14 interpretation correct? And if not, was it
15 reasonable? In order to answer the first
16 question, it is necessary to consider all of the
17 antecedent evidence to try to assess what was
18 happening in Mr. Dziekanski's mind, a difficult
19 task for a trier of fact dealing with any party,
20 but much more difficult when dealing with an
21 emotionally disturbed, delirious, or hyperaroused
22 individual. However, given his very recent
23 aggressive behaviour several minutes earlier and
24 the high degree of discomfort and frustration
25 being suffered, the police officers'
26 interpretation is probably correct, I say, and
27 certainly reasonable.

28 There is only Mr. Rosenbloom's interpretation
29 and, I say, no evidence - certainly not clear,
30 cogent, and convincing evidence - to suggest that
31 this was an act of surrender or that Constable
32 Bentley or others have deliberately placed a self-
33 serving interpretation on this aspect of
34 Dziekanski's behaviour. Therefore, I say that no
35 misconduct can be found with respect to Constable
36 Bentley's report or description of this incident.

37 Now, Poland has in its submissions made
38 reference to some of Constable Bentley's evidence
39 and asserted that he had said that Mr.
40 Dziekanski's shrug "could be interpreted as an act
41 of compliance and cooperation, and that he could
42 provide no other explanation than compliance."
43 And I make reference to the transcript references.
44 I say that in response, Constable Bentley's
45 evidence has to be read in totality. He
46 interpreted the action of Corporal Robinson
47 extending an arm up to be an order and said that

1 he was not certain that Mr. Dziekanski was
2 complying with the order, but conceded that he
3 could give no other interpretation.

4 We will never know what Mr. Dziekanski
5 actually meant or was thinking at the time of the
6 shrug. But we do know that for about ten minutes
7 before this movement, he had been aggressive and
8 destructive. I say it is entirely plausible that
9 his actions were in fact defiant and certainly
10 reasonable to think so.

11 THE COMMISSIONER: I think maybe this is a good time to
12 pause. We've had a pretty full day and it takes a
13 lot of concentration to listen to you carefully.

14 MR. BUTCHER: Yes.

15 THE COMMISSIONER: Okay, tomorrow at 10:00.

16 THE REGISTRAR: The hearing is now adjourned until ten
17 o'clock tomorrow morning.

18
19 (PROCEEDINGS ADJOURNED TO OCTOBER 7, 2009, AT
20 10:00 A.M.)
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