

**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 13, 2009

PROCEEDINGS AT
HEARING (DAY 66)

COPY

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Vancouver, B.C.
October 13, 2009

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4 THE COMMISSIONER: Good morning, all.

5 MR. VERTLIEB: Good morning, Mr. Commissioner. We
6 recently came into possession of a training
7 bulletin from TASER International and the release
8 date at the top of it - I'm going to ask Ms.
9 McKeachie to pass them out to all of my colleagues
10 here - the release date says 10/12/2009, which I
11 take to mean release date of October 12th, 2009.
12 And the title of it is "New Medical Research
13 Disproves the Acidosis Theory of Liability Used in
14 the Heston Case." It's a release by TASER and
15 it's a number of pages long, 12 pages. And it's
16 something that I think might have some merit to
17 have it marked. Obviously if we had seen it
18 sooner, we could have dealt with it in a different
19 way. But I'm just wondering what the position of
20 my colleagues here is about having this marked as
21 an exhibit.

22 THE COMMISSIONER: Yes, I welcome any comments on this
23 because obviously the contents would not be under
24 oath, subject to cross-examination or individual
25 study.

26 MR. HIRA: Mr. Commissioner, obviously we haven't seen
27 it if it was released on Sunday and is being
28 produced a few minutes after 10:00 today and it's
29 12 pages. What can I say?

30 THE COMMISSIONER: Well, you're asking for some time to
31 consider it?

32 MR. HIRA: I would think that at least until after the
33 lunch break so we can read it.

34 THE COMMISSIONER: All right. I certainly agree with
35 that, if that's your request.

36 MR. HIRA: It is my request.

37 THE COMMISSIONER: Yes. All right, thank you. All
38 right, we'll revisit this after lunch.

39 MR. BUCHANAN: Good morning, Mr. Commissioner. Chris
40 Buchanan on behalf of the Public Service Alliance
41 of Canada as well as some specific individual CBSA
42 officers who came before you to testify. I've
43 handed up another copy of my written argument and
44 a brief of authorities. Those are no different
45 than what has already been filed with you before,
46 Mr. Commissioner. I won't be taking you through
47 my written argument but rather making oral

1 submissions in reply to the various written and
2 oral submissions made by Mr. Kosteckyj and the
3 Republic of Poland.

4
5 SUBMISSIONS BY MR. BUCHANAN ON BEHALF OF THE PUBLIC
6 SERVICE ALLIANCE OF CANADA:

7
8 MR. BUCHANAN: As you're aware, the PSAC represents
9 both the CBSA officers who came before you to
10 testify as well as a number of the Vancouver
11 Airport Authority employees employed directly by
12 the Airport, including the ERS and dispatchers and
13 ARCs like Mr. Ginter.

14 We will not be making any submissions on
15 behalf of those employees, that is those who were
16 employed directly by the Airport. Rather, we will
17 adopt in whole the submissions of Mr. Stewart, who
18 ably canvassed that area yesterday in his written
19 submissions.

20 Now, we will ask that in turning your
21 attention to the various submissions of counsel,
22 and in particular Mr. Kosteckyj, we say that there
23 are a number of material inaccuracies in the
24 statements of the evidence before you in relation
25 to our clients. I will take you to some of those
26 inaccuracies, but I trust that you will review all
27 statements by counsel as to whether or not they
28 accurately reflect the evidence before this
29 Commission.

30 We say that the officers acted reasonably,
31 with care, in how they dealt with Mr. Dziekanski,
32 Ms. Cisowski and Mr. Hutchinson. They discharged
33 their duties as expected by the Government of
34 Canada according to their policies and training,
35 and they utilized the resources available to them.

36 You'll recall, Mr. Commissioner, that the
37 CBSA are the frontline officers protecting Canada
38 and her citizens. They work at the various ports
39 of entry. Whenever the border is open they are
40 there guarding our country and our citizens from
41 those that would seek to come to our country and
42 cause harm or injury to our country and our laws.

43 Most people who'll deal with the CBSA
44 officers are arriving back from abroad and the
45 CBSA officers are the ones that you wait in long
46 lines or are interrogated by them about where
47 you've been, how long you've been away and what

1 you were doing. They work long hours, and we say
2 they demonstrate a public duty and the commitment
3 of their responsibilities.

4 And we'll ask you to review the evidence of
5 the various officers and how they came before you
6 and expressed their commitment to their job and to
7 their country.

8 And in particular you heard of one joyous
9 part of their job, and I think it was Ms. Zadravec
10 who testified to this, and that's when the CBSA
11 officer gets to assist a new immigrant to come to
12 Canada, by choice. It's something that the
13 officers take great pride in assisting and is
14 really, among the bad parts of their job, it's
15 among the good parts.

16 Now, we say the officers could not have
17 foreseen that such a joyous event that occurred
18 two years today could have become so tragic after
19 Mr. Dziekanski left the secure hall. And the last
20 interaction that the CBSA had with him was him
21 being calm, cooperative, bidding Mr. Chapin good
22 evening and thanking him in Polish, and Mr. Chapin
23 returning those words in his native tongue.

24 Now, what happened after he left the secure
25 hall was certainly shocking and was a tragedy. We
26 take no issue, and our clients unfortunately
27 cannot assist you in explaining what happened
28 after Mr. Dziekanski left the secure hall. We
29 don't know whether there was a medical explanation
30 or whether it was the encounter with Mr. Meltzer
31 that led to a change in behaviour. We take no
32 issue; we take no position.

33 Nor can we assist you, unfortunately, with
34 your determination of whether or not the actions
35 of the RCMP officers was warranted or not. Again,
36 our clients cannot assist you in that
37 determination.

38 But what we can tell you is that throughout
39 our dealings with him, he was calm, cooperative.
40 He appeared to be tired and in some opinions
41 slightly intoxicated. He understood little to no
42 English. But on the whole he was no different
43 than the hundreds and thousands of passengers and
44 travellers that the CBSA see each week.

45 You heard last day about human frailty, about
46 the inability to recollect accurately from
47 eyewitnesses. There's another human frailty and

1 that is we still do not have the ability to see
2 the future. And so all the CBSA officers could do
3 was exercise their best judgment acting in the
4 present in accordance with their training.

5 The principal charge against the CBSA
6 officers is that they are guilty of human
7 indifference in the manner in which they dealt
8 with Mr. Dziekanski. This is a serious allegation
9 not supported by the facts or circumstances of
10 that evening.

11 We provide a complete account in our written
12 argument. But in summary, what happened is Mr.
13 Dziekanski presented himself in Secondary Customs.
14 He was then investigated by Officer Bharya, who
15 quite quickly determined that there was no Customs
16 issue, and in the rest of his dealings with Mr.
17 Dziekanski was to assist Mr. Dziekanski in the
18 second phase of his travels to Canada, and that's
19 the Immigration. And he went out of his way to
20 try to find the Immigration documents that Mr.
21 Dziekanski would need when he attended Secondary
22 Customs. Mr. Bharya then personally escorted Mr.
23 Dziekanski from Secondary Customs to Secondary
24 Immigration and retrieved his baggage. And you
25 heard from him how infrequently that occurs.

26 You then have Officer Van Agteren taking the
27 lead in processing Mr. Dziekanski and his
28 Immigration claim. And you heard from her the
29 steps she took to assist, initially paging for
30 Ms. Cisowski into the meet-and-greet area, calling
31 Ms. Cisowski in Kamloops. And when none of those
32 were successful, she personally went through the
33 airport trying to find Ms. Cisowski and Mr.
34 Dziekanski's family.

35 And you heard from her how she attended the
36 Customs public desk and asked the officers whether
37 they had seen somebody who was looking for a
38 Polish immigrant. And you heard from her how she
39 made sure that Customs officers understood that if
40 somebody was to attend looking for a Polish
41 immigrant, to contact her.

42 Then you heard Mr. Chapin's coming -- his
43 assistance by providing the Polish that he knew.
44 And we do not say he was fluent in Polish, nor
45 does he have the limited Polish suggested by Mr.
46 Kosteckyj in his written submissions. And you
47 heard from him how at around two o'clock that

1 morning, he received a call from Ms. Cisowski
2 looking for her son. And you heard from him how
3 he physically searched the airport, including
4 going out onto the road to see whether or not Mr.
5 Dziekanski was out having a smoke or whether he
6 was trying to catch a cab. And you heard how,
7 tragically, he was with the RCMP still looking for
8 Mr. Dziekanski when he was pronounced dead.

9 Then you have Ms. Zadavec, who dealt with
10 Mr. Hutchinson, and we detail that interaction in
11 our written submissions extensively. What she did
12 was try to assist as best she could Mr.
13 Hutchinson's attempt to determine whether Mr.
14 Dziekanski had arrived or not into Canada. If she
15 was indifferent to the circumstances, she could
16 have simply not made any comment, not made any
17 search of the Immigration, and simply chumped him
18 off. But she didn't.

19 So far from demonstrating human indifference
20 to Mr. Dziekanski and his family, we say the
21 officers went beyond what was expected and tried
22 as much as they could to assist. And we commend
23 to you the words of Ms. Zadavec, and you'll
24 recall that I asked her whether she had an
25 opportunity to reflect upon her discussion with
26 Mr. Hutchinson and the events of that night. And
27 she said:

28
29 I think about it a lot. But I can't -- I
30 wouldn't do anything differently. If I knew
31 he was going to die, I would do everything
32 differently. But in doing my job -- I did my
33 job.
34

35 I think there's a great risk in looking at
36 the prism of the events of the 13th and the 14th
37 with the full knowledge that we have today of what
38 happened. We say if there's any criticism to be
39 levelled, it has to be against the CBSA and not
40 the individual officers who were simply doing what
41 they could given the circumstances. If there were
42 failings that evening, it was a result of systemic
43 problems not caused by misconduct or improper
44 conduct by the CBSA.

45 I wish to turn to the three general charges
46 by Mr. Kosteckyj generally about the officers.
47 The first is that the Customs officials sent Mr.

1 Dziekanski out of the Customs Hall knowing that
2 Ms. Cisowski had already left the airport. Our
3 principal response to that is that's a
4 fundamentally unfair proposition since it was not
5 put to the witnesses. But secondly, the
6 preponderance of the evidence clearly demonstrates
7 that none of the officers knew that Ms. Cisowski
8 had already left the airport. And we refer to
9 what Ms. Van Agteren had done. If she'd just been
10 told that the family had just left the airport,
11 why would she page? Why would she call Kamloops?
12 Why would she go into the meet-and-greet area in
13 an extensive search? Why would she ask the public
14 Customs desk to keep an eye for somebody who might
15 be looking for a Polish immigrant? And why at the
16 end of the evening would she and Ms. Purewal, as
17 they were leaving for the evening, on their way
18 out at around 1:00 a.m., look to the meet-and-
19 greet and, not seeing Mr. Dziekanski present,
20 believed he had met up with his family? Those
21 actions aren't consistent with people who believed
22 that the family had already left.

23 We say that the evidence of Ms. Churchill-
24 Browne doesn't make any sense, that she must have
25 misunderstood a conversation that occurred by Tina
26 Zadavec and Officer Van Agteren in which Ms.
27 Zadavec had indicated that the family might have
28 left for Kamloops.

29 Just for a moment, what Churchill-Browne
30 testified was words to the effect of, "What? Is
31 this man still here? His family have been waiting
32 for him all day and they've just left for
33 Kamloops." We say it makes no sense for Ms.
34 Zadavec to have said that. First of all, she
35 didn't know that Mr. Dziekanski had been in the
36 Secondary Immigration. She would not have said,
37 "Is this man still here?" And of course, as you
38 heard from her, she had made numerous suggestions
39 to Mr. Hutchinson about what the family may wish
40 to do: to call Poland to see if he had caught the
41 plane; call home to see if a message had been left
42 by him. And she certainly would not have said,
43 "The family have just left for Kamloops" when her
44 conversation with Mr. Hutchinson had occurred some
45 two to three hours before this event.

46 The second principal charge is that the CBSA
47 employees are seeking to hide behind the privacy

1 legislation to explain their actions. To this
2 charge we say that the employees are compelled to
3 act in accordance with the privacy legislation and
4 their training, and they acted consistent with
5 that, with the sole exception of the one Customs
6 officer who dealt with Ms. Widiner, the Lufthansa
7 employee. It was that employee, unfortunately,
8 who, what we say, took improper steps of divulging
9 personal information about Mr. Dziekanski to
10 somebody not authorized. And you simply cannot
11 bootstrap improper conduct of one officer to
12 suggest other officers ought to have breached
13 their privacy rights.

14 We'll ask you to look at her evidence at
15 January 21st on page 9. We say that it's clear
16 from how she testified, saying that it was unusual
17 to get that information, hoping that the officers
18 "would work with me," that she understood that
19 this wasn't something that would ordinarily be
20 available to her and that she had no right to
21 have.

22 But there is an important part of her
23 testimony that hasn't gotten great attention.
24 This is Ms. Widiner. Prior to going to the CBSA
25 Customs, she actually went to Secondary
26 Immigration looking for Mr. Dziekanski. She
27 attended with a piece of paper with his name. She
28 went to the Secondary Immigration looking for Mr.
29 Dziekanski. She was assisted by an officer of
30 either Asian or Japanese descent. What that
31 officer did wasn't to access the ICES database to
32 see whether or not Mr. Dziekanski had landed.
33 What that officer did was do a physical inspection
34 of the Immigration area and report back to Ms.
35 Widiner that he wasn't there.

36 When you examine the conduct of Ms. Zadavec,
37 we ask you to consider the actions of the
38 Immigration officer dealing with Ms. Widiner.
39 That is what the officers were taught to do in
40 Immigration, do a physical inspection, report
41 back. It did not occur apparently to that officer
42 nor to Ms. Zadavec that she could access the
43 Customs database through the supervisor.

44 The third charge by Mr. Kosteckyj is that
45 there were no efforts made to find a translator
46 and that the CBSA had a positive duty to find a
47 translator. As to the first part of the charge,

1 it is factually incorrect. Steps were taken to
2 find a translator, but due to the limited
3 resources available to the employees, they did not
4 have access to a Polish translator. Instead, the
5 CBSA utilized an officer with some knowledge of
6 Polish and that was the best that they could do
7 given the resources.

8 As to the second part, we say that there is
9 no obligation on CBSA members to ensure that
10 individuals connect with their reception or to
11 inform travellers that the reception may have
12 left. And we set out in our written argument
13 about the various reasons why officers in the
14 discharge of their duties will inadvertently or
15 intentionally lead to a failure for a traveller to
16 meet up with the reception.

17 I turn now to the specific allegations
18 against the four officers Mr. Kosteckyj makes in
19 his written submissions, and they are Ms. Kullar,
20 Ms. Van Agteren, Ms. Zadavec and Mr. Chapin.

21 One officer singled out for criticism is Ms.
22 Kullar, who worked at the Primary Identification
23 Line. We say that this is the most unfounded
24 criticism and demonstrates the risk of viewing the
25 events not through the eyes of the participants at
26 the time but rather with the clarity of the all-
27 knowing perspective of hindsight. The charge by
28 Mr. Kosteckyj against Ms. Kullar is she didn't get
29 a translator, she didn't personally escort Mr.
30 Dziekanski through the airport, and finally, at
31 the end of the evening she did not get involved
32 with the interaction with Mr. Dziekanski and the
33 officers in Secondary Customs. And you'll recall
34 last week that you clarified whether Mr. Kosteckyj
35 was seeking a finding of misconduct on that latter
36 charge, and he indicated he was.

37 As to the first element, the evidence
38 discloses there were no translation services
39 available at the PIL other than the select
40 contractors who perform translation services, and
41 none of them spoke Polish. We note that Mr.
42 Kosteckyj suggested in questioning that
43 translation services were available though the
44 Polish Embassy and Consulate. From my review,
45 there's no evidence of that, and of course no
46 method at the PIL to use such translation services
47 even if those services were available.

1 Recall again, Mr. Commissioner, that Mr.
2 Dziekanski approached the booth with a mostly
3 correctly filled out form. She was able to
4 quickly correct and add the necessary information.
5 She indicated there was nothing unusual in how the
6 form was filled out and that he was no different
7 than the thousands upon thousands of travellers
8 arriving each week with little or no English. The
9 only thing unique about him was the manner in
10 which he was sweating, not even the fact that he
11 was sweating.

12 And as you heard, the duties of the PIL
13 officer is primary investigation. She was simply
14 to make a quick determination as to whether there
15 needed to be secondary investigation, nothing
16 more. There was no reason to get a translator,
17 and of course she could not.

18 As to personally escorting Mr. Dziekanski,
19 there was no reason to do so given he didn't
20 present himself as unusual. And you heard from
21 her how when travellers are confused about where
22 they are to go, they come back to the PIL and talk
23 to the officers there and get better or different
24 instructions. Apparently Mr. Dziekanski, for
25 whatever reason, did not return to the PIL to get
26 further or better directions. And you heard from
27 her how she was not permitted to leave the PIL.

28 Now, the third charge against Ms. Kullar --
29 and it's found at page 7 of Mr. Kostecky's
30 submission, which I'll read to you:

31
32 It is of special note that when Ms. Kullar
33 saw Mr. Dziekanski in the Customs area at
34 around 12:50 a.m., she made no mention of the
35 fact to any of her co-workers that she had
36 previously dealt with him and that she
37 realized that he had been in the secure area
38 of the airport for nearly 7 hours. Once
39 again, indifference was the order of the day.
40 The one observation that Ms. Kullar did make
41 when she was going home at 1:00 was that Mr.
42 Dziekanski seemed calm and she did not
43 observe him to be perspiring.

44
45 Now, the first problem, we say, with that
46 allegation is it wasn't put to her in her
47 testimony. She is now denied the opportunity and

1 in fact her right to natural justice, to defend
2 herself against this accusation. My review of her
3 testimony is she was never asked why she did not
4 convey the information to co-workers at the time.
5 It was incumbent upon a party, such as Mr.
6 Kosteckyj, to put that to her and give her an
7 opportunity to explain herself and not simply to
8 make that allegation in closing.

9 Notwithstanding that we say you ought not to
10 consider that allegation, we say the charge is
11 baseless. It's easy to forget the testimony since
12 it occurred almost nine months ago. But what
13 happened with Ms. Kullar is as follows. She
14 processed Mr. Dziekanski at approximately 4:09.
15 She had not more than a 30-second interchange with
16 him. Many hours later, around 10:30 or so, Mr.
17 Bharya was dealing with Mr. Dziekanski in
18 Secondary Customs. At that time Mr. Bharya
19 contacted Ms. Kullar when she was working the
20 extension. You'll recall that's the glassed-in,
21 short, squat area in the PIL. Mr. Bharya called
22 to find out what time Mr. Dziekanski's plane had
23 landed. She told him what that time was. She
24 further talked to him about Mr. Dziekanski
25 sweating, including asking Mr. Bharya whether Mr.
26 Dziekanski was still sweating, to which she was
27 informed no. And you'll see that found in the
28 January 20th transcript at pages 28, 29, 39 and
29 40.

30 She had no other information to provide the
31 officers. She also knew that he had stopped
32 sweating hours ago when she saw him at 12:50. She
33 did not believe there to be a medical issue at the
34 time she processed him at 4:09 and she did not
35 believe there to be a medical issue at 12:50. So
36 she sees a calm individual being attended to by
37 two CBSA officers who she understood to be
38 investigating Mr. Dziekanski's entry into Canada.

39 Now, she testified she was curious. Now,
40 there's lots of reasons why Mr. Dziekanski could
41 have not been processed at 12:50. He may have had
42 difficulties with his Immigration documents or
43 information. There may have been an investigation
44 about whether or not the information allowed him
45 to attend Canada.

46 THE COMMISSIONER: Well, your submission is there was
47 no evidence upon which one can infer that she had

1 or the amount of time that he was in the
2 system to any supervisor?

3 A No.

4
5 Now, you'll see, Mr. Commissioner, from lines 37
6 to the bottom of the page, she's asked whether or
7 not she reported it to a supervisor and she
8 indicated that there was no obligation to report
9 what she had seen to a supervisor.

10 But if you go to page 41, line 36 -- this is
11 still Mr. Hira:

12
13 Q Now, you didn't ask Mr. Bharya or the
14 people that you saw him dealing with at
15 five to 1:00 as to why he was still
16 there, correct?

17 A I did not interrupt their examination,
18 no.

19 Q Were they examining him at five to 1:00?

20 A They were still interacting with the
21 passenger.

22 Q When you say interacting, what do you
23 mean by that?

24 A Well, the passenger was still there.
25 They were still trying to get him out,
26 therefore I wasn't about to interrupt
27 just to find out what was going on.
28 There was enough officers taking care of
29 the matter.

30
31 So in short, Mr. Commissioner, with respect to
32 this charge, she had relayed the information that
33 Mr. Kosteckyj says ought to have been relayed to
34 Mr. Bharya. She had done that at 10:30, two hours
35 earlier. The declaration card that Mr. Bharya and
36 Mr. Chapin had had her stamp on it. If they had
37 thought that they needed more information from Ms.
38 Kullar, they could have simply talked to her.

39 Now, the one bit of information she didn't
40 convey to Mr. Bharya was that Mr. Dziekanski had a
41 language issue. His card already had that
42 declared, and of course all people dealing with
43 Mr. Dziekanski quickly came to that conclusion.
44 There would be no reason a junior officer would
45 interrupt the investigation occurring at 12:50 to
46 pass on information that they already have. There
47 was no misconduct for what she did. We ask that

1 Mr. Kosteckyj, who is undoubtedly a reasonable
2 man, reconsider this public request of finding
3 misconduct on Ms. Kullar's part since it was based
4 upon inaccurate assumptions as to the facts.

5 Now, with respect to the charges against Ms.
6 Zadavec --

7 THE COMMISSIONER: You have a spelling for that, do
8 you?

9 MR. BUCHANAN: Zadavec. I have it as Z-a-d-r-a-v-i-c,
10 but I could be corrected on that.

11 We deal in a full manner with the defence of
12 the charge against Ms. Zadavec, but I wish to
13 point out a number of factual inaccuracies, we
14 say, in his submission. First, in his written
15 submission he claims that Mr. Hutchinson told Ms.
16 Zadavec that there was a mix-up in where Mr.
17 Dziekanski was to meet his family. I gather the
18 assertion is that Mr. Dziekanski had been told by
19 his mother to wait at the baggage carousel. When
20 you review the testimony, you'll find as follows.
21 First, Mr. Hutchinson did not testify that he told
22 Ms. Zadavec about the mix-up. Second, Ms.
23 Zadavec testified, and she did not testify that
24 she was told about the supposed mix-up. And so
25 there's no evidence before you upon which you
26 could base a finding that Mr. Hutchinson told her
27 about the mix-up in the meeting location.

28 No one asked Mr. Hutchinson why he didn't
29 disclose this crucial piece of information to her.
30 We do not know whether that would have made a
31 difference, but it may have. It may have given
32 her pause to think, why, Mr. Dziekanski could
33 still be in the Customs Hall after such a lengthy
34 period of time. She may have considered going to
35 the baggage carousel to see if he was still there.
36 We simply do not know what might have been if Mr.
37 Hutchinson had passed that information on to her.

38 But he's not to blame. Again, this is
39 looking back in hindsight. There's hundreds of
40 ways that could have stopped the tragedy on the
41 morning of the 14th, but simply acting a different
42 way doesn't make your steps unreasonable.

43 Second, Mr. Kosteckyj submits that Mr.
44 Hutchinson believed he had been chumped off by Ms.
45 Zadavec. Those were his words about the dealings
46 that Mr. Hutchinson had with the airport, and by
47 his words I mean Mr. Kosteckyj's words. When you

1 review the evidence of Mr. Hutchinson, it's clear
2 he felt in his dealings with Ms. Zadavec that she
3 was being helpful and cooperative. There's no
4 evidence that he felt chumped off by his dealings
5 with the CBSA.

6 Undoubtedly in the conversation between Mr.
7 Hutchinson and Ms. Zadavec, she said words to the
8 effect, "I can tell you without breaching
9 confidence that there's nobody matching his
10 description here." Now, you have our explanation
11 in writing about why that statement was reasonable
12 for her to say in the circumstances. I wish to
13 address a different point, and that's the use of
14 the extent of "here." We gather Mr. Kosteckyj
15 suggests that Mr. Hutchinson had a confusion about
16 the extent of what "here" meant, that it means
17 something beyond the Secondary Immigration and
18 instead meant the entire Customs Hall. If that
19 was a confusion, it was unintentional and was a
20 confusion shared by both parties. Ms. Zadavec
21 testified that she was speaking only about the
22 Immigration area.

23 And under Mr. Hutchinson's version of events,
24 it's simply not reasonable that he could have
25 assumed that she was speaking of the entirety of
26 the Customs Hall. Because remember, under his
27 version - and this isn't in doubt, this part - she
28 didn't have his name so she couldn't have checked
29 any databases, and under his version - and this is
30 disputed - there was no interruption in the phone
31 call for the physical inspection of the area. So
32 where is the reasonable basis for Mr. Hutchinson
33 to conclude that she could tell with certainty
34 that Mr. Dziekanski was not in the Customs Hall
35 when she didn't have his name to check the
36 databases and she clearly didn't physically check
37 the area?

38 Another assertion by Mr. Kosteckyj arises
39 from Ms. Churchill-Browne's testimony. He says in
40 his oral submissions that it was Ms. Zadavec who
41 made the statement about -- words to the effect of
42 Mr. Kosteckyj being a big boy. There is no
43 evidence that the person who made the comment
44 about the family leaving for Kamloops was the same
45 person who testified as to the big boy comment.
46 If Mr. Kosteckyj wishes that connection to be
47 made, he had to get that in evidence from the

1 witness. Viewing her evidence, we say it's clear
2 that she was talking about different officers
3 making different statements.

4 And as to the big boy comment, we ask you to
5 pay particular attention to what Ms. Churchill-
6 Browne actually testified to. She said words to
7 the effect - and I may have them slightly wrong -
8 "I hope that he stays at the airport until
9 daylight." She was not critical of the officers'
10 releasing Mr. Kosteckyj out of the secured
11 Customs. She didn't suggest in evidence that she
12 felt that it was unwise for him to leave the
13 secure Customs. She conveyed her view that he
14 should stay in the airport all night. And we know
15 that it's not unusual for people to have to stay
16 the night at the airport.

17 We say that there is no reason to criticize
18 Ms. Zadavec in your final report.

19 I'll just briefly deal with a few other
20 smaller matters. The first is with Ms. Van
21 Agteren. You have our statements about her trying
22 to find a translator. But we are concerned about
23 something that appears in the written submissions
24 of Mr. Kosteckyj, and that was the suggestion that
25 Ms. Van Agteren was more concerned about money
26 than Mr. Dziekanski. First, that was not put to
27 her.

28 THE COMMISSIONER: I'm sorry, I missed that. How do
29 you mean, concerned about money?

30 MR. BUCHANAN: When you review Mr. Kosteckyj's written
31 submissions, you'll see the suggestion that she
32 was more concerned about the government not having
33 to pay for two hours for the Polish translator
34 than calling the translator to assist her in her
35 processing of Mr. Dziekanski. It's a very serious
36 allegation and charge that was not put to her.

37 And we say it's absurd. It was of no
38 consequence to her whether or not the government
39 had to pay two hours. She clearly understood
40 there was no translator available, period. And
41 look at it from her perspective. It would have
42 been easier for her to call the translator than
43 take the steps she did for over an hour dealing
44 with Mr. Dziekanski. It makes no sense.

45 With respect to Mr. Chapin, you'll see in Mr.
46 Kosteckyj's written submission an attack on Mr.
47 Chapin's knowledge of Polish. Again, things like

1 "We don't even know whether he knows the Polish
2 word for 'drink'." Well again, that was not put
3 to Mr. Chapin. He testified to you he spoke those
4 words in Polish. You'll see in Mr. Kosteckyj's
5 written submissions that if Mr. Chapin had been
6 concerned about Mr. Dziekanski, he could have
7 turned him over to the RCMP, if he was concerned
8 about the level of intoxication. I think this
9 misses a critical point. The CBSA don't care
10 whether somebody attends in Canada intoxicated or
11 not. It's of no consequence. Mr. Chapin had no
12 concerns, assisted him as best he could. Mr.
13 Kosteckyj says that the evidence shows that Mr.
14 Dziekanski was reluctant to leave the secure
15 Customs area. We say that's not consistent with
16 the last interaction that they had, which again,
17 they said "thank you" and "have a good night" to
18 each other in Polish.

19 Turning to the issue of federal/provincial
20 jurisdiction, an issue we understand will be
21 argued later today, we simply adopt the
22 submissions of the Attorney General of B.C. We
23 say that since the CBSA officers were acting in
24 accordance with their expectations of duties and
25 training, there ought to be no personal criticism
26 and instead the inquiry ought to focus as far as
27 it can onto the institutional issues that occurred
28 that evening with respect to the CBSA.

29 The last point I will make, Mr. Commissioner
30 -- and this is when you are reviewing your
31 recommendations. I missed one that you may want
32 to consider. It was not canvassed very much in
33 evidence but we think it may still be important to
34 publicize a service that was available to Mr.
35 Dziekanski which he did not avail himself of, and
36 that's the meet and assist with the airlines. And
37 you heard from Ms. Widiner of Lufthansa the
38 process by which a traveller can self-identify as
39 somebody who needs special attention and special
40 assistance and that those people are then
41 transported by the airline to the CBSA and
42 assisted through the process with special
43 assistance. We don't know why Mr. Dziekanski or
44 Ms. Cisowski didn't avail themselves of this
45 process. Most likely, we say, it's because they
46 simply did not know about that. And your report
47 may wish to consider making sure that travellers

1 are more aware of that service which may have had
2 a difference in the outcome.

3 So barring any questions, Mr. Commissioner,
4 we simply say, upon your review of the evidence
5 and our written submissions, we would ask that you
6 find no cause for any criticism for the officers
7 and their actions that evening.

8 THE COMMISSIONER: All right. Thank you, Mr. Buchanan.

9 MR. NEAVE: Good morning, Mr. Commissioner. Before I
10 start, I just note the time. Would it be your
11 wish for me to commence and take the break in a
12 few minutes, or shall we take the break now?

13 THE COMMISSIONER: We usually do it at a quarter after
14 so we've got 25 minutes.

15 MR. NEAVE: Fine. Thank you, Mr. Commissioner. I have
16 the original of our written submissions with a
17 following page. There's a couple of typos with
18 respect to references that have been corrected and
19 they're on the loose sheet behind the submission.
20 And it would be of assistance, Mr. Registrar, if
21 you can put Exhibits 76 and 190 before Mr.
22 Commissioner. Those, Mr. Commissioner, are the
23 only documents that I intend to refer to barring
24 any questions that you may have of me.

25 The documents I'm referring to, for my
26 friends, are the final report of Dr. Lee and Dr.
27 Di Maio's e-mail of the 27th of May 2009.

28

29 SUBMISSIONS BY MR. NEAVE ON BEHALF OF TASER
30 INTERNATIONAL:

31

32 MR. NEAVE: Mr. Commissioner, I have endeavoured to
33 craft my oral submissions to follow in rough form
34 the written submissions. I don't intend to read
35 them and I don't intend, with few exceptions, to
36 touch down on them. Rather, my presentation will
37 endeavour to shorten those submissions and to be
38 more focused and more concise, given my
39 understanding of some of the comments that you
40 made to my colleagues last week.

41 Mr. Commissioner, Robert Dziekanski's death
42 at the Vancouver International Airport on the eve
43 of his immigration to Canada nearly two years ago
44 was tragic, and we echo the condolences that you,
45 Mr. Commissioner, and we and others extended to
46 the family at the commencement of these hearings
47 in January.

1 With respect to the evidence that's before
2 you, Dr. Lee issued his autopsy report in January
3 2008. That was more than a year before this
4 hearing commenced. It wasn't made public for,
5 reasons unknown to us, until the 19th of January,
6 when on behalf of TASER, it was read into the
7 record at this hearing.

8 You'll recall, and referring to Exhibit 76,
9 Mr. Commissioner, that Dr. Lee determined that
10 Mr. Dziekanski's principal cause of death was
11 sudden death during restraint, and a contributory
12 factor of chronic alcoholism.

13 In his evidence, he indicates and testified
14 that he died as a result of a cardiac arrhythmia
15 secondary to the effects of chronic alcohol abuse,
16 alcohol withdrawal and the stress from both the
17 emotional and physical aspects of that withdrawal,
18 the struggle with law enforcement personnel and
19 alcohol cardiomyopathy.

20 Mr. Commissioner, we say that the weight of
21 more than 65 days of evidence fully supports Dr.
22 Lee's conclusions.

23 THE COMMISSIONER: As I understand it, he did include
24 in the word "restraint" the impact of the shocks
25 from the Taser.

26 MR. NEAVE: Yes, I'll come to that, Mr. Commissioner.
27 Because he said something very important about
28 that. And I'll do that now. Because what he said
29 in cross-examination from Mr. Kosteckyj, and I'll
30 come back to this -- and it's at paragraph 128 of
31 the written submission.

32 Dr. Lee testified that sudden death during
33 restraint occurs where no Taser is deployed. And
34 he said this:

35
36 ...a number of deaths have occurred in
37 similar situations in which the Taser is not
38 involved. Therefore, in those situations,
39 the other forms of restraint clearly were
40 also significant. Because of that, it's very
41 difficult to say had he not been tasered
42 whether or not he would have lived or died.
43 It's quite possible that even if he had not
44 been tasered and they simply used other forms
45 of restraint, it's quite possible that he
46 still would have died. Because of that, it's
47 very difficult for me to say, with any degree

1 of certainty, that the Taser was the part
2 that pushed him over the edge and led to his
3 death.

4
5 And Mr. Commissioner, during the course of the
6 submissions I'll be taking you through other
7 aspects of the evidence which clearly indicates on
8 the record that there was no push over the edge.

9 And we say, Mr. Commissioner, that turning to
10 the medical evidence of the Taser deployments,
11 that the only rational finding that can be drawn
12 from the weight of the evidence that is properly
13 before you is that the Taser device did not cause
14 or contribute to Mr. Dziekanski's death. And to
15 find otherwise, we say, is to speculate. It would
16 require you to accept and give credence to the
17 junk science arising here at the Commission for
18 the very first time, junk science that has no
19 support in any published literature, peer-reviewed
20 or otherwise.

21 You have before you evidence in various forms
22 from Drs. Di Maio, Pollanen, Lee, Sloane, Lu,
23 Swerdlow, Ho, Panescu and Bozeman, experts whose
24 qualifications in sudden death research or medical
25 effects of the Taser device are world renowned and
26 whose research has contributed greatly to the
27 peer-reviewed research literature that's available
28 to this inquiry. The weight of that evidence, we
29 say, is that Mr. Dziekanski died suddenly during
30 restraint. It's a phenomenon that's been known to
31 the medical world for more than 150 years in all
32 forms of restraint, a phenomenon about which there
33 is a known constellation of symptoms, and many of
34 which were evidenced by Mr. Dziekanski prior to
35 his death.

36 All of the experts, we say, either agree or
37 concede that the mechanism of death in sudden
38 death cases is simply unknown.

39 You've heard that there are two prevailing
40 theories on why someone dies in an encounter with
41 police. The first is that it stems from a
42 metabolic disorder such that there's a change in
43 blood chemistry leading to a cardiac arrest. The
44 second is commonly called the fight-or-flight
45 symptom or system going into overdrive, causing
46 the same fatal effect.

47 The evidence before you that's fully

1 supported by the peer-reviewed scientific research
2 is that exposure to a Taser device on exhausted
3 individuals - and you'll recall Dr. Ho's paper in
4 particular - does not change the subject's
5 metabolic rates, respiration, stress hormones or
6 other blood serums, indeed, any of the
7 physiological indicators of either a fatal
8 metabolic disorder or a fatal fight-or-flight
9 condition.

10 The weight of the medical and scientific
11 evidence before you, we say, leads to the only
12 finding that the Taser does not have a negative
13 effect on the human heart. You have heard
14 evidence from Dr. Tseng, from Dr. Butt and Dr.
15 Chambers, and to a lesser extent from Dr. Kerr,
16 who simply speculate. They speculate with respect
17 to the medical effects of the Taser device. They
18 do so without any scientific or academic support
19 in the literature. And we say there are two
20 fundamental reasons why none of their theories can
21 be given any weight whatsoever.

22 The first is a matter of procedure based on
23 the principles of fundamental and natural justice.
24 As a result of the failure to put the speculative
25 theories - and by that I mean the extended
26 ventricular tachycardia theory, the alternating
27 pulse theory of Dr. Tseng, that are expressed by
28 both him, by Dr. Butt and Dr. Chambers, and, again
29 to a lesser extent, by Dr. Kerr - to each of the
30 experts who preceded them in order without any
31 cross-examination whatsoever on those issues, or
32 indeed evidence which impugns the evidence of
33 Di Maio, Pollanen, Sloane, Lu, Swerdlow, Ho,
34 Panescu and Bozeman, we say that on the
35 authorities of the Court of Appeal in this
36 province and in particular the **Medley** decision
37 that I referred you to when I made oral
38 submissions with respect to the admission of their
39 evidence, makes it unable to have any weight
40 placed on the opinions of Tseng, Butt, Chambers
41 and Kerr.

42 The second reason, Mr. Commissioner, is it is
43 clear on their cross-examination that the theories
44 with respect to ventricular tachycardia and the
45 alternating pulse theories are nothing more than
46 speculation. And we say that during the course of
47 Dr. Tseng's cross-examination and the cross-

1 examinations of Drs. Butt and Chambers, they
2 acknowledged the holes in their logic, they
3 acknowledged that there was no scientific support
4 in the literature for the theories that they
5 proposed, or that their theories were based on an
6 incomplete review of the peer-reviewed literature
7 that was before you, and importantly, lacked a
8 founding in any evidence that was before you. And
9 as a result -- and just for your *aide-mémoire*, Mr.
10 Commissioner, there's a detailed analysis of the
11 procedural issues and the findings of our court,
12 the decision of Justice Anderson in the **Medley**
13 decision from paragraphs 140 to 157 of our written
14 submissions, and we rely on those in their
15 entirety.

16 The overwhelming evidence of the civilian and
17 RCMP witnesses before you is that Mr. Dziekanski
18 was well on his way to an acute emotional and
19 physiological crisis before he encountered the
20 RCMP officers, and during my submissions we're
21 going to briefly take you to that evidence. We're
22 going to briefly review with you the expert
23 evidence in support of those propositions.

24 Clearly the temptation to lay blame in this
25 case is extreme. We hearken you back, Mr.
26 Commissioner, to something that Dr. Swerdlow said
27 at the first round of these hearings.

28 THE COMMISSIONER: Mr. Neave, I want this case to
29 depend on what I heard here.

30 MR. NEAVE: Thank you. Then I'll say this. The
31 simplest explanation in these cases is often the
32 best. It is not necessary or prudent to resort to
33 speculative or junk science to understand what
34 happened to Mr. Dziekanski. There is simply no
35 evidence to support a finding that the Taser
36 device caused or contributed to his death, and we
37 say that it is time that this uninformed
38 speculation about the role that the Taser device
39 may have had in this case be dispelled and the
40 attack on Taser's reputation end. We say that the
41 evidence before you puts to rest any assertion
42 that the Taser device caused or contributed to Mr.
43 Dziekanski's death.

44 In the next portion of my submissions, Mr.
45 Commissioner, I'm going to review some of the
46 evidence which we say is consistent with Dr. Lee's
47 findings.

Submissions by Mr. Neave (for TASER International)

1 THE COMMISSIONER: All right. We'll take a break now.

2 MR. NEAVE: Thank you.

3 THE REGISTRAR: The hearing will recess for ten
4 minutes.

5

6

(PROCEEDINGS ADJOURNED FOR MORNING RECESS)

7

(PROCEEDINGS RECONVENED)

8

9

THE REGISTRAR: Order. The hearing is now resumed.

10 MR. VERTLIEB: Mr. Commissioner, just before Mr. Neave
11 resumes, Mr. Pringle can't be here today and he's
12 asked Anna Konye of his firm to be here, and she's
13 here.

14 THE COMMISSIONER: Welcome.

15 MR. VERTLIEB: And as well, Mr. Craig Jones for the
16 Attorney General of B.C. is here and he has a
17 submission to make at the end.

18 THE COMMISSIONER: Yes. Thank you. Welcome.

19

20 SUBMISSIONS BY MR. NEAVE ON BEHALF OF TASER
21 INTERNATIONAL, continuing:

22

23 MR. NEAVE: Thank you, Mr. Commissioner. When I left
24 off, I indicated I would turn to the evidence that
25 we say is consistent with Dr. Lee's findings in
26 the post mortem report and in his evidence. And
27 I've taken you briefly to Exhibit 76. I do not
28 intend to return to that at the present time. And
29 I've read to you as well his evidence at paragraph
30 128 of the written submission with respect to what
31 he had to say about the inference that he could
32 properly draw as a medical practitioner from the
33 medical effects of the device.

34

35 The description of Mr. Dziekanski's cause of
36 death as being sudden death during restraint is
37 referred to, as you've heard, by different experts
38 in different specialties by different names. For
39 example, in-custody death syndrome, agitated
40 delirium, excited delirium, hyperarousal state,
41 adrenergic crisis, a metabolic derangement, or a
42 fight-or-flight overdrive.

42

43 We say that those are different descriptions
44 for what is essentially the same phenomenon. And
45 what is not in dispute, we say, with respect to
46 the evidence before you is that by whatever name,
47 it is clear that Mr. Dziekanski was in the throes
of this syndrome the night he died. The evidence

1 indicates that he suffered from a generalized
2 impairment of cognition and brain function,
3 disturbed thinking, perception and emotional tone.
4 He was defensively aggressive.

5 THE COMMISSIONER: Are you reading from something I
6 should be following?

7 MR. NEAVE: I'm reading from my notes, My Lord, with
8 respect to the oral submission.

9 What Dr. Lu said, the psychiatrist that was
10 before you, that we say has the most relevant and
11 extensive experience treating agitated or
12 delirious people, summarized Mr. Dziekanski's
13 condition in his report in this fashion:

14
15 Mr. Dziekanski demonstrated classic features
16 of delirium especially based on the Pritchard
17 video footage. He demonstrated psychomotor
18 agitation, disorganized behaviours. He
19 appeared both frightened and defensively
20 threatening. His aggressive behaviours did
21 not appear to aim at any individual in
22 particular or to achieve a specific purpose.
23 Mr. Dziekanski demonstrated a decreased
24 awareness of his surroundings. Mr.
25 Dziekanski's behaviours are not typical of
26 [an] individual in an unfamiliar environment
27 or [an] individual coping with language
28 barriers. [...] His actions were not
29 predictable. He appeared to have difficulty
30 organizing and coordinating his actions and
31 behaviours.

32
33 And then Dr. Lu went on to review the witness
34 statements that were provided to him, and he
35 opined that sleep deprivation, dehydration,
36 electrolyte balance and alcohol withdrawal were
37 all factors at play.

38 And with respect to Dr. Lu's evidence, we
39 join my friend Mr. Butcher in his submission that
40 Dr. Lu's evidence on Mr. Dziekanski's agitated
41 state ought to be preferred over that of Drs.
42 Janke and Webster.

43 The overwhelming weight of the evidence from
44 Mr. Dziekanski's friends in Poland, the Canadian
45 Border Services Agency personnel, the Airport
46 Authority, the contractors, the members of the
47 public and the RCMP officers that testified is

1 this. Mr. Dziekanski was an inexperienced and
2 reluctant traveller apprehensive about flying. He
3 was upset to the point of hysteria and vomiting at
4 the prospect of his trip. He had not slept in
5 several days. He had been drinking heavily. He
6 had quit smoking. And at the airport he displayed
7 bizarre behaviour. He was sweating and breathing
8 heavily. His movements were altered and in some
9 cases purposeless.

10 THE COMMISSIONER: Let me just interrupt you for a
11 moment. When you say there's evidence that he had
12 been drinking heavily, what do you refer to?

13 MR. NEAVE: The evidence of the Polish witnesses, Mr.
14 Commissioner, and I can take you to the specific
15 reference. It's at paragraph 9 of my written
16 submission, and 10. And the references are there,
17 cross-referenced to the witnesses and their places
18 in the evidence.

19 The evidence of Mr. Dziekanski's physical and
20 perceived emotional state changed dramatically as
21 more time passed while he was at the airport. His
22 behaviour was consistently considered to be highly
23 agitated and bizarre. And you heard from nine
24 civilian witnesses, and I'll name them for you for
25 your *aide-mémoire* - Dhari, Canzon, Hewer, Bosnjak,
26 Ashrafinina, Meltzer, Rudek, Arora and Sambrook -
27 with respect to that evidence. And the consistent
28 theme is they thought he was drunk or he was on
29 something. And indeed, the witnesses say these
30 things about their perception of Mr. Dziekanski on
31 that evening. For example:

- 32
- 33 - agitated;
 - 34 - having a very strange, almost wild look of
 - 35 someone capable of violence;
 - 36 - not normal -- there was something
 - 37 different about Mr. Dziekanski's manner
 - 38 and appearance, the evidence is;
 - 39 - he's out of control, giving the RCMP no
 - 40 choice but to intervene;
 - 41 - freaking out;
 - 42 - very upset;
 - 43 - distraught;
 - 44 - pacing;
 - 45 - panicked; and
 - 46 - manic.
- 47

1 And my friend Mr. Kosteckyj quite properly
2 concedes in his written submissions at page 21
3 that Mr. Dziekanski was both enraged and very
4 excited that night. That's a proper
5 characterization of his appearance on that
6 evening. And indeed, what that did, what that
7 appearance did, on the evidence before you, is it
8 prompts multiple calls from both the public and
9 others to 911. There are four requests from the
10 public for airport security to attend, and there
11 are eight calls from people within the airport to
12 911 that night in such close proximity to the
13 E-Comm resources that they were overloaded and
14 placed on hold.

15 I'm not going to go into it in detail, but
16 you have extensive evidence from the RCMP officers
17 about their perception of Mr. Dziekanski's
18 physical and emotional state that evening.

19 What all this does, Mr. Commissioner, is
20 provides you with an overview of what's happening
21 from a physiological sense with Mr. Dziekanski.

22 There is clear evidence before you, and you
23 will recall that during my examinations of various
24 witnesses I put to them a list of factors that
25 were frequent in these sudden death cases. And
26 they are these:

- 27
28 - The subject is generally male;
29 - Aged between 20 and 50 years of age;
30 - The cases often involve restraint of an
31 agitated individual, a person who is
32 sweating profusely, a person who's pacing,
33 seemingly meaningless;
34 - There's barricading behaviour;
35 - Superhuman strength is a common indicia.

36
37 And as you pointed out, Mr. Commissioner, in
38 response to one of my friends' submissions, that
39 symptom or constellation of symptoms arises with
40 or without alcohol or drug intoxication.

41 There are no known anatomical or
42 toxicological causes. And generally, or
43 frequently, the first rhythm that is detected is
44 asystole. And when you look at the evidence
45 that's before you, there are constant or
46 consistent themes with that, all of which goes to
47 support Dr. Lee's post mortem examination.

1 Increased body temperature and sweating. You've
2 got evidence before you from a number of
3 individuals, not only with respect to that being
4 an indicia of a heightened physiological and
5 emotional response associated with sudden death.
6 But the factual evidence before you that Mr.
7 Dziekanski was abnormally sweating, using words
8 like "sweating profusely," "perspiration running
9 all over his face," "mopping his brow with a
10 handkerchief," "very sweaty," "very pale,"
11 "uncomfortable," is the evidence.

12 And indeed the Canadian Border Services
13 officer Kullar describes it in this fashion:
14

15 He literally had sweat dripping off of his
16 chin, like rolling down and dripping off of
17 his chin...
18

19 The advanced life support paramedic Randell
20 describes Mr. Dziekanski as being "moderately
21 diaphoretic" upon his attendance, again a state of
22 excessive sweating associated with an underlying
23 medical condition.

24 Those observations lend support for the
25 medical opinion that Mr. Dziekanski was in a
26 hyperaroused, likely delirious state.

27 There are other indicia. Dr. Lu identifies
28 psychomotor dysfunction as being consistent with
29 delirium. And there is evidence before you with
30 respect to that very issue. As an example,
31 Officer Chapin testified that Mr. Dziekanski had:
32

33 slurred speech, some stumbling, ... unsteady
34 walking [...] He was steadying himself with
35 the - his baggage cart as he walked over from
36 Immigration to Customs.
37

38 Securiguard Rudek testified that when Mr.
39 Dziekanski:
40

41 ...was throwing the stuff around he, uh, he
42 was almost falling over as he was, as he was
43 doing this. He wasn't, he wasn't able to do
44 it steadily, he was, he was almost tripping
45 over himself...
46

47 was that witness's evidence.

1 Ms. Ashrafinia, a civilian witness, testifies
2 that Mr. Dziekanski was:

3
4 walking abnormally, like slow, tired, like
5 drunk. I have no idea what was the reason.
6

7 her evidence was.

8 And airport security guard Arora has evidence
9 with respect to Mr. Dziekanski stumbling while
10 raising the wooden stool above his head, again
11 consistent with this feature of psychomotor
12 dysfunction.

13 And the experts support those findings. Dr.
14 Lu, as I've indicated, testifies that in his view
15 Mr. Dziekanski exhibited the psychomotor agitation
16 which is typical of delirium. And Dr. Pollanen,
17 who you'll recall is the chief forensic
18 pathologist for Ontario, agreed. He wrote this:
19

20 There can be no doubt that Robert Dziekanski
21 was markedly agitated and, therefore, could
22 qualify for the diagnosis of excited
23 delirium.
24

25 Now, with respect to the variance that you've
26 heard with Mr. Dziekanski's appearance that night,
27 Dr. Lu provides a valid and proper analysis, and
28 it is this, that delirium fluctuates over time.
29 He noted that it worsens with the daytime/daylight
30 cycle and is something that's lost with air
31 travel. And this may indeed explain how some
32 individuals who encountered Mr. Dziekanski early
33 did not notice anything wrong while others
34 observed signs of autonomic and cognitive
35 disturbances. It's consistent with that evidence.

36 The question is, then, why did Mr. Dziekanski
37 experience this state, this heightened state
38 associated with sudden death? And the experts,
39 Mr. Commissioner, provide you with an explanation.
40 Dr. Lee concludes that chronic alcohol abuse is a
41 factor. And there is ample evidence before you
42 with respect to that: the fatty liver finding.
43 And certainly there's a controversy with respect
44 to the cardiomyopathy. But Dr. Lee's evidence on
45 that point, and the doctor who actually conducted
46 the autopsy, made that finding.

47 There's the evidence of the changes to the

1 cerebellum. There's the evidence of the fatty
2 liver on autopsy which, going back to your point
3 on your question to me about recent consumption of
4 alcohol, is an issue that the experts confirm. A
5 fatty liver on autopsy can confirm that Mr.
6 Dziekanski had consumed alcohol recently.

7 So again, going back to the question of why,
8 the experts provide you with a further basis upon
9 which you can consider, and that is the alcohol
10 withdrawal issue. And that, you will see, Mr.
11 Commissioner, in Dr. Di Maio's opinion. He opines
12 that the likely role of alcohol withdrawal and
13 chronic alcohol abuse, and provides you with a
14 list of symptoms of alcohol withdrawal which are
15 known to precipitate electrolyte imbalance and
16 over-activity of the autonomic nervous system, all
17 of which can cause arrhythmia, all of which can
18 cause sudden death. Indeed, when you analyze Dr.
19 Di Maio's list of the various factors that are in
20 his report, Mr. Dziekanski exhibits four symptoms
21 of alcohol withdrawal: autonomic hyperactivity;
22 sweating; psychomotor agitation, that is,
23 unintentional and purposeless movements including
24 pacing and throwing articles about; anxiety; and
25 insomnia.

26 And the timing, Mr. Commissioner, is
27 important with respect to this issue, because you
28 will recall from the medical evidence that there
29 is no indication from the toxicologist that there
30 is any alcohol or was any alcohol in Mr.
31 Dziekanski's system at the time of the autopsy.

32 And Dr. Di Maio sets out in his report how
33 the symptoms of alcohol withdrawal generally
34 commence four to twelve hours after the person
35 ceases to drink and usually peak on the second
36 day. This, we say, is consistent with Mr.
37 Dziekanski's travel and with the negative toxicity
38 analysis on autopsy.

39 Indeed, Dr. Di Maio goes on to attribute Mr.
40 Dziekanski's death to a cardiac arrhythmia
41 secondary to the effects of chronic alcohol abuse.

42 Dr. Butt characterizes Dr. - and you'll
43 recall that Dr. Butt was in his report critical of
44 various findings of other experts, none of whom
45 had those theories put to them - characterized
46 Dr. Di Maio's opinion on the pathophysiology of
47 the alcoholic cardiomyopathy related to chronic

1 alcohol abuse to be both important and
2 significant, in his words.

3 And there is other evidence before you with
4 respect to this. Dr. Christian Sloane, who
5 provided an expert report but who was not called,
6 for reasons which we don't know, characterized Mr.
7 Dziekanski as suffering from a state of agitated
8 delirium consistent with some degree of alcohol
9 withdrawal.

10 And on this issue Dr. Butt deferred to the
11 opinion of a psychiatrist or addiction specialist
12 on this issue. That's, for example, someone with
13 Dr. Lu's qualifications. And neither Dr. Tseng
14 nor Dr. Chambers weighed in on the issue. They
15 said nothing about this.

16 We say that the overwhelming weight of the
17 evidence is that Mr. Dziekanski was in a state of
18 agitated delirium prior to the arrival of the RCMP
19 officers. This is a syndrome known to be
20 associated with sudden death. That the
21 physiological cause for the delirium in Mr.
22 Dziekanski's case is primarily associated with
23 alcohol withdrawal, and that's consistent with all
24 of the experts. And Dr. Lu goes on to add that
25 Mr. Dziekanski's case may be multifactoral, and he
26 lists additional features:

- 27
28 - sleep deprivation;
29 - nicotine withdrawal -- and there's
30 evidence that Mr. Dziekanski had recently
31 stopped smoking;
32 - disrupted sleep/wake cycles; anxiety over
33 international travel, and I've taken you
34 to some of the evidence with respect to
35 that issue;
36 - the lengthy time Mr. Dziekanski remained
37 in the Customs Hall;
38 - and the severe language barrier
39

40 as other reasons that Mr. Dziekanski was in the
41 state that he was the night he died.

42 And unless you have questions of me, Mr.
43 Commissioner, with respect to that point, I'm
44 going to move on to the Taser exposure issues.

45 My comments with respect to the Taser
46 deployment are going to be brief. I'm not going
47 to comment upon the use of force question.

1 The evidence before you is that the Taser
2 devices both operated within specifications.
3 There is no issue on that point at all. There is
4 no evidence that the Taser did not work properly
5 or it failed. And indeed, what the evidence is is
6 that the Taser in probe mode did not always result
7 in a closed circuit when it was deployed, and that
8 evidence, Mr. Commissioner, is clear from the
9 clacking issue that you're abundantly familiar
10 with and I'm not going to take you through that.

11 What is clear, we say, is that on the
12 physical and testamentary evidence that's before
13 you, Mr. Dziekanski received the Taser discharge
14 only intermittently. In probe mode and in push
15 stun mode, those deployments were not over the
16 cardiac axis, and there is no evidence before you
17 that suggests that they were.

18 THE COMMISSIONER: I think there's some evidence that
19 one of the probes was perhaps, but not both. As
20 you put it, not across --

21 MR. NEAVE: Exactly.

22 THE COMMISSIONER: -- the heart.

23 MR. NEAVE: Not across the heart.

24 THE COMMISSIONER: Just one.

25 MR. NEAVE: Right. And the evidence of that, and the
26 only evidence on that point, is Dr. Tseng's
27 speculation that the probe or that the mark that
28 was centre line below the sternum, was a Taser
29 probe. Dr. Lee in his autopsy report makes that
30 suggestion as well.

31 The evidence of the other witnesses who did
32 the calculation, presuming that the other probe
33 where located in the shirt was the second probe,
34 and assuming for a moment that the probe that
35 we're talking about in centre mass was the first,
36 is that you've got a spread of something between
37 12 and 15 inches over the abdomen. But the second
38 probe, if it is in the shirt, left -- there's no
39 indication from Dr. Lee's autopsy report that that
40 second probe impacted on the skin in any way - it
41 certainly wasn't located affixed to the skin - and
42 indeed appeared to -- and I think the only
43 conclusion that can be properly drawn, is it
44 appeared to float with the shirt. And that
45 explains, when you look at Dr. Panescu's evidence
46 and the evidence of the use of force experts, why
47 it was an intermittent charge because the shirt is

1 floating in and out. And as you're aware, it's
2 only when the second -- presuming you have contact
3 with the first probe, it's only when the second
4 probe is within two inches of the mass do you get
5 electrical discharge. And that explains quite
6 nicely what was going on in this case if the probe
7 is actually in the shirt. And that's the only
8 evidence that we have about where that second
9 probe is. But certainly that line is not cardiac
10 axis.

11 And importantly, the other probe
12 deployments -- the push stuns, I believe the
13 evidence is they were to the back shoulder area.
14 You've heard evidence that in that mode, the Taser
15 device is pain compliance only, and Dr. Panescu's
16 evidence is that in that mode there is no
17 electrical effect on the heart, firstly from its
18 position but secondly because of the nature of the
19 electrical field that's generated when it's in
20 that mode. And that's a localized, very small
21 effect which transitions from the two electrodes
22 over that -- I think it's about a 4-centimetre
23 distance, approximating.

24 If you accept that with respect to the probe
25 issue and the push stun issue, the only
26 deployments that we're speaking about which can
27 have a potential for cardiac effect are the ones
28 in probe mode, not the push stun mode. And the
29 result of that is that we're talking about
30 deployments one through three, and they terminate,
31 according to the clock, at 1:24:25 a.m. The
32 effect of that is important, and it's important in
33 this way. After the deployment in probe mode, Mr.
34 Dziekanski continues to struggle violently with
35 the RCMP officers for more than 90 seconds and he
36 is then under continued observation for the
37 ensuing seven to nine minutes, during which time,
38 the evidence is uncontested, he was breathing and
39 he had a pulse.

40 And we say in those circumstances, it's
41 simply not possible for the Taser deployment to
42 have any cardiac effect on Mr. Dziekanski because
43 he vigorously resisted the police officers'
44 attempts to place him in handcuffs long after the
45 probe modes were completed, and both civilian and
46 officer evidence with respect to the nature of the
47 struggle that ensued are very clear.

1 For example - and you need not rely on the
2 police officers' evidence for these points -
3 Marija Bosnjak testified that Mr. Dziekanski
4 continued fighting when he was on the ground and
5 he was still moving his hands after he was
6 handcuffed. Robert Ginter says this. The RCMP
7 attempts to hold Mr. Dziekanski down.
8

9 A ...The RCMP were attempting to hold him
10 down. They appeared to be pinning his
11 arms, I assumed to put handcuffs on but
12 I did not see the handcuffs. All four
13 members were actively engaged. They had
14 their hands full.
15

16 Mr. Dziekanski was very vocal and appeared to Mr.
17 Ginter to be the aggressor.

18 Mr. Enchelmaier testified that Mr. Dziekanski
19 was "kicking and thrashing around" - his words -
20 struggling with the RCMP to the point that Mr.
21 Enchelmaier intervened to hold his legs down.

22 You've heard from my friends with respect to
23 the RCMP's evidence with respect to their dealings
24 with Mr. Dziekanski. But it's clear, we say, he
25 exhibited superhuman strength. And again, another
26 indicia of the sudden death in restraint
27 phenomenon.

28 The handcuff evidence is important, we say,
29 and it's important in this sense, that on autopsy,
30 in the post mortem report, Dr. Lee determined that
31 Mr. Dziekanski had bruising and abrasions around
32 his wrist, and in his evidence he testified that
33 that bruising and those abrasions were consistent
34 with handcuffing. He further testified that the
35 bruising evidenced a significant degree of
36 resistance, and said this. Mr. Dziekanski:
37

38 was putting pressure against the -- the
39 handcuffs , consistent with continuing to
40 struggle after he was handcuffed.
41

42 And we say that piece of evidence is very
43 important because it rules out the effect that the
44 Taser had any cardiac impact on Mr. Dziekanski.

45 And there is no evidence before you from any
46 expert that suggests that there is a delayed
47 cardiac effect from a Taser device on a human in

1 circumstances like this. None.

2 With respect to the ongoing monitoring of Mr.
3 Dziekanski, you've heard from my friends Mr.
4 Butcher and Mr. Hira and others about how Corporal
5 Robinson and Mr. Enchelmaier testified that they
6 were monitoring Mr. Dziekanski for breathing and
7 pulse.

8 We say Mr. Enchelmaier's evidence is key
9 because what it does is provides you with the best
10 evidence possible of what was happening to Mr.
11 Dziekanski when he was on the ground. And there
12 is no issue with respect to Mr. Enchelmaier's
13 qualifications. He was certified in first aid and
14 CPR and first responder training from St. John
15 Ambulance. He worked as a former ambulance
16 attendant in Australia, a lifeguard in California,
17 and the medical experts, including Dr. Tseng and
18 Dr. Chambers, and indeed Dr. Swerdlow, opined that
19 he was qualified to assess pulse.

20 That evidence is clear. Mr. Enchelmaier
21 tested and monitored Mr. Dziekanski's pulse on
22 three occasions over the time that Mr. Dziekanski
23 was on the ground. And the evidence is clear that
24 the last such examination occurred approximately
25 two minutes before Richmond Fire arrived, and
26 we're looking at a timeframe in the seven to nine
27 minutes post-Taser deployment.

28 Importantly, Mr. Enchelmaier, as you'll
29 recall, does a carotid examination. On the first
30 occasion, it's his evidence that the pulse -- and
31 he describes it in this fashion:

32
33 A ...a very strong fast pulse on the neck.

34
35 A It was a very fast pulse, like somebody
36 had -- a pulse that you would expect in
37 somebody that had been running -- strong
38 and fast.

39
40 That evidence is uncontradicted. About two
41 minutes later, he performs the second check, and
42 in so doing says that he had recovered slightly in
43 terms of breathing. So we have breathing on the
44 second check. But he says this. Mr. Enchelmaier
45 testified that Mr. Dziekanski's pulse -- I'm
46 quoting:

47

1 A ...pulse wasn't as fast. It was more of
2 a person who'd been at rest, a slower
3 pulse. And again felt a good pulse in
4 his neck, in the carotid pulse, and
5 breathing was clear.
6

7 He testified that he could hear a breath -- and
8 I'm quoting:
9

10 A ... hear a breath, I hear him breathing.
11 Not a heavy breathing, as I mentioned
12 before with the -- same as the pulse, it
13 was a person breathing who was at rest,
14 would have been at rest.
15

16 Again, that evidence is uncontradicted.

17 The third check, again carotid and breathing,
18 occurs at approximately 1:40 a.m., as I've
19 mentioned, about two minutes before Richmond Fire
20 arrive. And Mr. Enchelmaier describes Mr.
21 Dziekanski's breathing in this fashion: breathing
22 and with a slow, clear pulse.
23

24 He was cross-examined and he was emphatic
25 that he'd checked Mr. Dziekanski's carotid pulse
26 on three times, perhaps more. He added that he
27 was able to assess how regular Mr. Dziekanski's
28 pulse was, and in Mr. Enchelmaier's evidence:
29

30 A It seemed regular to me. Nothing
31 unusual about it.
32

33 And for you, Mr. Commissioner, you need not
34 just rely on Mr. Enchelmaier with respect to what
35 he did, but that evidence is supported by others
36 who were observing him. For example, YVR
37 Operation Shift Manager Sambrook testifies that he
38 observed Mr. Enchelmaier checking Mr. Dziekanski's
39 condition, including breathing and pulse, more
40 than once.

41 Mr. Sambrook testified that before Richmond
42 Fire arrived, Mr. Enchelmaier said to him, or he
43 overheard Mr. Enchelmaier say, that Mr. Dziekanski
44 was breathing and has a pulse.

45 Mr. Ginter also had a contemporaneous
46 conversation with Mr. Enchelmaier on scene to the
47 effect that Mr. Dziekanski had a pulse and was
 breathing despite eventually having lost

1 consciousness.

2 And Horizon Air employee Kula testifies that
3 she "remember[s] someone came over and put their
4 hand on his neck as if to check for a pulse" about
5 a minute or minute and a half after Mr. Dziekanski
6 was in handcuffs. She also remembers an RCMP
7 officer checking Mr. Dziekanski's pulse points and
8 "one just kept by his side, checking his pulse,"
9 was her evidence.

10 So there's abundant evidence before you with
11 respect to what Mr. Enchelmaier says he did and
12 what others observed he actually did.

13 And then, Mr. Commissioner, there's the
14 evidence of the B.C. Ambulance Service who
15 requested an update on Mr. Dziekanski's condition,
16 and that's at 1:31 a.m. in the morning. And in
17 response, Ms. Hanson confirmed with Mr. Ginter,
18 who was on scene, that Mr. Dziekanski was
19 conscious and breathing at that point.

20 Now, the attack on Mr. Enchelmaier comes from
21 Dr. Tseng. What he says is Mr. Enchelmaier may
22 have confused his own pulse with that of Mr.
23 Dziekanski. Like other aspects of Dr. Tseng's
24 evidence, that's entirely speculative and is not
25 supported by any scientific literature on that
26 topic with respect to trained first responders,
27 and indeed, any. He didn't advance any support
28 for that in the literature. And indeed, Mr.
29 Enchelmaier's evidence is that he knew he was
30 aware that he should use two fingers and not his
31 thumb, and when he checked the pulse, that's what
32 he did.

33 The last common feature with respect to Mr.
34 Dziekanski is the rhythm that he presented on the
35 first occasion. It was asystole. There is no
36 evidence at all in this case that there was
37 ventricular fibrillation, ventricular tachycardia.
38 None. He presents asystole when he's first hooked
39 up to the Richmond Fire -- they get a no shock
40 advisory. That's what that means. And then when
41 he's hooked up to the more sophisticated LifePak a
42 couple of minutes later, they get a printout he's
43 asystole. That again is a common feature of these
44 cases.

45 Mr. Commissioner, I'm now going to move on to
46 the various theories that have been advanced with
47 respect to causation in this case.

1 As I've indicated, Dr. Lee determined after
2 physical, microscopic and toxicological studies
3 that the principal cause of death was sudden death
4 during restraint with chronic alcoholism listed as
5 a contributory factor. Now, despite that, or
6 notwithstanding that finding, we've now heard from
7 15 medical or scientific experts in seven fields
8 with respect to causal or contributory factors
9 leading to death. And those include the
10 following. Dr. Lee, who I've mentioned.
11 Dr. Di Maio, who I've mentioned. He provided you
12 with a written -- well, there was a written report
13 of Dr. Di Maio obtained by IHIT. That has been
14 filed as an exhibit. Dr. Di Maio was not called
15 personally. He was available. Dr. Pollanen,
16 written submissions. And Dr. Butt was called in
17 response, we say, to those reports. We had three
18 cardiac electrophysiologists: Dr. Swerdlow, Dr.
19 Tseng and Dr. Kerr. We had emergency medicine
20 specialists with knowledge of conducted energy
21 device exposures. Dr. Ho testified before you.
22 Dr. Sloane, again by way of written submission
23 with the IHIT opinion. Dr. Bozeman, again written
24 submissions to you. You heard from a biomedical
25 engineer. Dr. Panescu testified before you. Two
26 psychiatrists: Dr. Lu, who I've mentioned; Dr.
27 Janke. Two physiologists: Dr. Noone and Dr.
28 Webster. And an epidemiologist, Dr. Chambers.

29 Those are the experts that you heard. And
30 suspicion that the Taser device caused or
31 contributed to Mr. Dziekanski's death has been a
32 constant theme, we say, throughout that evidence.

33 The easiest misconception with respect to
34 that evidence to dispel is the question of whether
35 there was ventricular fibrillation. And on that
36 point you've heard from Drs. Swerdlow, Panescu and
37 Ho, and the written reports of Drs. Di Maio and
38 Pollanen, all of whom directly exclude a Taser-
39 induced cardiac arrest as a possibility. And Dr.
40 Ho explained it in this fashion:

41
42 A ...most people sort of lock onto the
43 perception that the Taser, if it's going
44 to kill you, is capable of
45 electrocution. And by applying
46 electricity to somebody, you are able to
47 electrocute them. Now, it's well

1 supported in medicine that if you apply
2 electricity to somebody and you
3 electrocute them, you basically stop
4 them immediately. It's not a (*sic*) I
5 apply electricity to you and you
6 continue to live for several minutes
7 afterwards, or continue to have a viable
8 heartbeat for several minutes
9 afterwards.

10
11 That's Dr. Ho's evidence.

12 Dr. Di Maio is equally clear. He says this.
13 And stepping back for a moment, Dr. Di Maio is one
14 of the pre-eminent forensic pathologists in North
15 America. You heard that from Dr. Lee. He wrote
16 and writes the pathology bible, the yellow book,
17 it's called. He says this:

18
19 There is no evidence that the use of the
20 Taser caused the death.

21
22 He goes on to explain it in this way, and I'm
23 quoting from his report:

24
25 The only way a TASER could theoretically
26 cause death directly would be by producing a
27 fatal cardiac arrhythmia, i.e. by
28 electrocution, and then only when employed as
29 an Electro-Muscular Disruption (EMD) device
30 [e.g. in probe mode].

31
32 And that goes back to my point that I was making
33 before, Mr. Commissioner.

34
35 The arrhythmia produced would have to be
36 ventricular fibrillation, the arrhythmia
37 produced by electrocution.

38
39 And Dr. Di Maio excludes this as a possibility in
40 Mr. Dziekanski's case by saying this:

41
42 Following the last use of the Taser in the
43 Electro-Muscular Disruption (EMD) mode, Mr.
44 Dziekanski continued to struggle, was drive-
45 stunned at least once, handcuffed and even
46 then continued to struggle.

1 Now, with respect to that position, that it
2 can't be ventricular fibrillation, Dr. Butt
3 agrees, Dr. Ho agrees. And the experts before you
4 were unanimously, we say, of the view that Mr.
5 Dziekanski could not have died in ventricular
6 fibrillation because he would have collapsed
7 immediately after the Taser exposure and been
8 unable to struggle or vocalize for the ensuing six
9 to nine minutes.

10 And Dr. Swerdlow says this:

11
12 After the first 10 or 15 seconds, patients
13 with ventricular fibrillation are unconscious
14 and in cardiac arrest. They're unable to make
15 any voluntary or purposeful movement
16

17 Dr. Lee agrees, and he says that an external
18 electrical charge would have an immediate, not
19 delayed, impact on the human heart. And in Dr.
20 Lee's opinion, any direct effect of the Taser
21 device would not be consistent with Mr. Dziekanski
22 having an apparent pulse and respiration several
23 minutes after being restrained. And you will
24 recall Dr. Panescu, Pollanen, and indeed Dr. Kerr,
25 when I cross-examined him and he was in Boston,
26 agreed with that proposition.

27 With respect to Dr. Kerr, when he was finally
28 provided with the evidence from Mr. Enchelmaier,
29 agreed that if that was correct, that during that
30 period Mr. Dziekanski could not have been in VF or
31 in ventricular tachycardia.

32 Dr. Pollanen in his report says this, and I'm
33 quoting:

34
35 The video evidence clearly excluded a direct
36 Taser-related acute arrhythmic death. The
37 main evidence for this conclusion is that
38 Robert Dziekanski is seen to be alive, after
39 successful deployment of the Taser. Thus, I
40 am satisfied that the "temporal dissociation"
41 is sufficient evidence to exclude a direct
42 role of the Taser discharge in causing death
43 in this case.
44

45 That's from Dr. Pollanen.

46 Dr. Chambers, on the other hand, testified
47 that the temporal sequence of the Taser deployment

1 and Mr. Dziekanski's sudden death suggests a
2 possible causal relationship. That is nothing
3 more than speculation. It's inconsistent with the
4 evidence before you and it's inconsistent and not
5 supported by any medical human research. And he
6 didn't point to any, and can't.

7 And indeed, in his evidence and in his
8 opinion, Dr. Chambers cites the Ross text, you
9 will recall. And we took him to the Ross text,
10 and in particular to Dr. Laposata's chapter in
11 that text. And she says this:

12
13 When an in-custody restraint death occurs,
14 there is a close physical and temporal
15 association between the restraint process and
16 the death that follows. Because of this, it
17 is tempting to attribute the cause of death
18 to the restraint procedure itself. However,
19 this is an error of logic: the fallacy of
20 *post hoc ergo propter hoc*, which is Latin for
21 "after this therefore because of this." This
22 error in logic may mislead death
23 investigators into building a case centered
24 on the deadly effects of police restraint
25 procedures and prevent consideration of other
26 mechanisms and causes of death that occur
27 contemporaneous with restraint.

28
29 And Dr. Chambers in his cross-examination finally
30 conceded that the mere fact that there is a
31 temporal relationship is an insufficient basis
32 upon which to find causation alone.

33 Now, Mr. Commissioner, I am about to move to
34 cardiac capture, and I note the time. I won't
35 finish that section before the break.

36 THE COMMISSIONER: All right. We'll take a break,
37 then. Are you able to give any estimation as to
38 how long you might be?

39 MR. NEAVE: I think I will be around an hour.

40 THE COMMISSIONER: All right. Thank you.

41 MR. HIRA: Mr. Commissioner, I've now had an
42 opportunity to read the 12 pages dated October
43 12th, 2009, and the six pages dated September 30,
44 2009, and I've asked Commission counsel to let me
45 know as to which aspects of these 18 pages he will
46 be relying on or are relevant in order that I may
47 give you my position.

Submissions by Mr. Neave (for TASER International)

1 THE COMMISSIONER: Well, those counsel are not going to
2 argue before me, but we'll see what they say.
3 We'll leave this, then, till after the break.

4 MR. HIRA: Thank you.

5 THE REGISTRAR: The hearing is adjourned until 1:30.

6

7 (PROCEEDINGS ADJOURNED FOR NOON RECESS)

8 (PROCEEDINGS RECONVENED)

9

10 THE REGISTRAR: Order. The hearing is resumed.

11

12 SUBMISSIONS BY MR. NEAVE ON BEHALF OF TASER
13 INTERNATIONAL, continuing:

14

15 MR. NEAVE: Thank you, Mr. Commissioner. This morning
16 you asked a question about alcohol consumption.
17 My colleagues have given me another reference in
18 addition to the material I gave to you. Exhibit
19 120, and it's IHIT pages 1121 and 1122.

20

And just as I was finishing up, Mr.

21

Commissioner, I had made reference to the Ross
22 text to which Dr. Chambers referred in his report.
23 It is our position that not only does Dr.
24 Laposata's chapter not agree with Dr. Chambers'
25 position; the text doesn't, in its entirety.

26

Now, moving to the cardiac capture issue, Mr.

27

Commissioner, that's another theory that's been
28 advanced as a possibility in this case. And
29 that's without merit as well, and I'll go through
30 that for you.

31

You'll recall from the evidence that the only
32 reference in the literature to cardiac capture in
33 a human is a case involving a pacemaker, and that
34 case has been critiqued on the basis that it's
35 unknown whether the current was transmitted by the
36 wire or not.

37

As Dr. Lee testified, the electrical current
38 from a Taser has to reach the heart in order to
39 have the potential to cause the heart to have an
40 abnormal rhythm or an abnormal contraction, to be
41 captured, in essence.

42

And what you have before you is the evidence
43 of Dr. Panescu. All of that evidence is
44 unchallenged. And Dr. Panescu's evidence stands
45 for the proposition that the safety margin is 758
46 times greater than that for the ventricular
47 fibrillation threshold in humans and it's 36 times

1 greater than the threshold for cardiac capture.

2 There is no evidence before you upon which
3 you can find that the Taser device paced or
4 captured Mr. Dziekanski's heart. The only rhythm
5 that you have evidence of is asystole. There is
6 no evidence that the device triggered a fatal
7 arrhythmia.

8 Those theories - the theory that in this case
9 that actually occurred - are not supportable, and
10 they're contained in the evidence of Dr. Tseng,
11 Chambers, and to a lesser extent with Dr. Kerr.
12 Dealing with Dr. Kerr first, you'll recall, as I
13 mentioned earlier that in his cross-examination he
14 agreed that if Mr. Enchelmaier's evidence was
15 correct, and there's nothing to suggest that it
16 isn't, you could not have had VF or VT. You
17 couldn't have had, in other words, cardiac
18 capture.

19 Dr. Tseng and Dr. Chambers advance a theory,
20 entirely speculative, and one upon which they do
21 not cite any scientific or medical literature
22 other than the pacemaker study, and I know you're
23 familiar with that.

24 And on the pacing and the ventricular
25 tachycardia theory - that's the one that Dr. Tseng
26 advances - in his cross-examination, when the
27 authorities upon which that thesis is founded and
28 which he cross-references in his report, are put
29 to him, it's clear they don't stand for the very
30 proposition that he advances. Dr. Tseng goes on
31 to say that Dr. Ho's research includes examples of
32 Taser-induced tachycardia, and in that regard he's
33 either mistaken or he's misleading this
34 Commission.

35 As Dr. Ho testified, certain of his research
36 subjects exhibited sinus tachycardia. That's a
37 normal but faster heart rate before being tasered,
38 not ventricular tachycardia as a result of the
39 application of the Taser device.

40 And Dr. Tseng, when I pressed him on his
41 cross-examination, testified that he was unaware
42 of any paper that suggests an external electrical
43 source can cause ventricular tachycardia let alone
44 the sustained ventricular tachycardia for any
45 period approaching seven to nine minutes. And he
46 admitted in his cross-examination that there is no
47 evidence that Mr. Dziekanski was ever in

1 ventricular tachycardia. And it has to be
2 remembered what we're talking about. We're
3 talking about a sustained ventricular tachycardia,
4 according to Dr. Tseng, lasting multiples of
5 minutes, up to seven. And the literature that he
6 cited with respect to the ventricular tachycardia
7 point and the sustained tachycardia point
8 indicates that in that study it self-corrected in
9 less than 17 seconds.

10 And you will see -- and I refer you to Dr.
11 Swerdlow's follow-up report of the 26th of May
12 2009 - it is tendered - and in there he has
13 reviewed the literature and finds that with
14 respect to humans, there is no reported case of
15 ventricular tachycardia being associated with the
16 Taser device. What he does in a supplemental
17 report that follows, which is Exhibit 186, is talk
18 about an animal study involving a pig. But he's
19 clear that that study does not affect his opinion
20 in Exhibit 185.

21 Simply there is no basis for the Tseng
22 theory. None.

23 And indeed, Dr. Ho in his evidence reviewed
24 with you his human research in his lab and said
25 that he has been unable to reproduce ventricular
26 tachycardia in humans despite a 15-second long
27 continuous Taser exposure on physically exhausted
28 subjects. He describes Dr. Tseng's theory as
29 "grasping at straws" in his evidence.

30 And Dr. Butt in his evidence testified that
31 there is no support in the medical literature for
32 the concept of delayed ventricular fibrillation
33 from an electrical source.

34 And I've reviewed already with you Dr. Kerr's
35 evidence in his cross-examination with respect to
36 both of those points when the Enchelmaier evidence
37 is finally put to him.

38 Now, Dr. Di Maio, in Exhibit 190, Mr.
39 Commissioner, which I hope you have -- it's the
40 very brief thoughts that Dr. Di Maio forwarded to
41 the Commission on the 27th of May 2009. And
42 you'll recall how this occurred, Mr. Commissioner.
43 Di Maio wasn't called. He wasn't cross-examined
44 with respect to the novel Tseng theory and the
45 novel Chambers theory, and the experts who had
46 preceded had been invited by the Commission to
47 respond in writing. And we say, firstly on that

1 issue from a procedural standpoint that that's
2 inadequate on the authorities. And I've referred
3 you to those authorities already. But on the
4 substantive point, you will see in Exhibit 190
5 Dr. Di Maio reviews both Dr. Kerr's position and
6 Dr. Tseng's position, and at point 2 on the second
7 page simply says this with respect to Dr. Tseng:

8
9 He [Dr. Tseng] states that the Taser caused
10 ventricular tachycardia that evolved into
11 ventricular fibrillation as a fact. What is
12 the evidence?

13
14 Dr. Di Maio says. And he's right. There isn't
15 any.

16 He says the same thing at point 3 with
17 respect to Dr. Kerr's position. What is the
18 evidence? There is none.

19 And on the procedural point, the reference,
20 Mr. Commissioner, is in the **Canadian Natural**
21 **Resources** case, and that's summarized in
22 paragraphs 148, 149 and 152 of my written
23 submission. It's not an answer to cure the
24 mischief caused by the failure to call and cross-
25 examine these experts on fundamental issues by
26 inviting them to respond in this fashion.

27 And at page 6 of Exhibit 185 - that's Dr.
28 Swerdlow's follow-up of the 26th of May 2009 -
29 Dr. Swerdlow provides a detailed analysis under
30 the heading, "Mr. Dziekanski would be the first
31 person who collapsed more than a minute after CEW
32 discharge to have ventricular tachycardia as the
33 initial rhythm." The first one. And as Dr.
34 Swerdlow says in that report:

35
36 The medical community simply does not have an
37 explanation for these sudden deaths.

38
39 And then goes on to say this:

40
41 Our lack of understanding of the mechanisms
42 responsible for asystolic cardiac arrests
43 does not negate their occurrence. All
44 evidence in Mr. Dziekanski's case points to
45 an asystolic cardiac arrest.

46
47 That would be one, Mr. Commissioner, without VT or

1 VF. The heart just goes asystole. And then he
2 says:

3
4 No evidence points to undetected ventricular
5 tachycardia or ventricular fibrillation.
6

7 There is simply no literature that supports Dr.
8 Tseng's theory.

9 Likewise, there is no support for Dr. Tseng
10 and Dr. Kerr, who picks up these points from Dr.
11 Tseng, that there was a Taser-induced ventricular
12 tachycardia which then converted into ventricular
13 fibrillation. There's no evidence to support that
14 proposition at all, not only in the facts that are
15 before you but in the medical literature. There
16 is no support for that.

17 And in order for you to accept such a
18 proposition, you would have to find that Mr.
19 Dziekanski had two unverifiable abnormal heart
20 rhythms that occurred in sequence and that went
21 asystole.

22 And I take you again back to Dr. Di Maio's
23 evidence or statement in 190: What is the
24 evidence? There is none, I say.

25 The next theory that Dr. Tseng raised was
26 this pulseless alternans theory, which he says is
27 a form of ventricular tachycardia where only every
28 other electrical heartbeat results in blood flow.
29 In cross-examination Dr. Tseng conceded that there
30 was no evidence to support the theory and that
31 he's not aware of any support for that theory in
32 the scientific literature.

33 And indeed, Dr. Tseng concedes he simply
34 cannot determine the mechanism of death. And I'm
35 going to take you to that. It's at paragraph 183
36 of my written submission, Mr. Commissioner. He
37 was asked these questions and gave these answers,
38 at paragraph 183:
39

40 Q You would agree with me, Doctor, that
41 there is nothing in the peer-reviewed
42 and published human research that has
43 established the mechanism of fatal
44 collapse with sudden death cases where
45 a Taser was also deployed?

46 A Where the Taser was...?

47 Q Also deployed.

1 A I'm not aware of any, no.

2 Q That remains an unanswered question,
3 would that be fair?

4 A Yes.

5 Q The mechanism of death is unknown; is
6 that correct?

7 A Yes.

8 Q And without the mechanism of death being
9 known, would you agree with me that it
10 is only speculation to give an opinion
11 on what caused or contributed to death
12 in a Taser-related case?

13 A Yes.

14

15 I continue at paragraph 184, Mr. Commissioner.
16 Dr. Tseng's speculations as to what caused or
17 contributed to Mr. Dziekanski's death do not meet
18 the rigours required for this Commission to accept
19 his expert opinion. His theories lack any
20 evidentiary foundation, as Dr. Di Maio notes, and
21 they are unsupported in the literature. And the
22 reference is to the well known case of **Mohan** that
23 you're familiar with.

24 Dr. Tseng's speculative testimony is
25 unhelpful to this Commission. He is not an
26 expert; he is an advocate. And the clearest
27 example I can give to you of that, Mr.
28 Commissioner, is Dr. Tseng's evidence with respect
29 to how he first became involved with giving
30 opinions about the effect of the Taser device.
31 That was a phone call from a reporter when his
32 boss was away, and paraphrasing: He asked me if
33 the Taser could have an effect on the heart, and I
34 said, yeah. Having done no research at all. He
35 wears that statement and that sequence of events
36 as a badge of honour. But the badge reads
37 "Advocate," not "Expert."

38 I'm going to turn now briefly, Mr.
39 Commissioner, to the question of the contribution,
40 rather than cause, that it is alleged that the
41 device played in Mr. Dziekanski's death. The
42 weight of the expert opinions before you that are
43 based on peer-reviewed human research support the
44 proposition that the Taser device did not
45 contribute to death in this case. You heard from
46 Dr. Lee that:

47

1 A In cases like this, the mechanism of
2 death is almost certainly a biochemical
3 or physiological mechanism, most likely
4 a result of what's known as a
5 hyperadrenergic state.
6

7 Dr. Swerdlow testified that acute stress can
8 cause rapid heart rhythm disturbances where the
9 catecholamines and activation of the sympathetic
10 nervous system make the heart race. He says,
11 however, this:
12

13 A ...What's perplexing to most
14 investigators is how in the same
15 situation the heart could all of a
16 sudden just stop.
17

18 He poses that. And he says:
19

20 And yes, I do find that perplexing and I
21 don't think that's well understood,
22 either by me or by -- generally by our
23 field.
24

25 is what he said to you.
26

27 Dr. Di Maio in his written opinion said:
28

29 There is no evidence that use of a TASER
30 causes significant acidosis o [sic: or]
31 metabolic derangement. In fact the research
32 disproves this.
33

34 And you'll see that reference in Exhibit 190. And
35 that flows -- and the research that he may be
36 talking about is the research that was before you,
37 and that's the research of Dr. Ho, Dawes and
38 others. And that was very recent research of this
39 year in which the study concluded that the
40 deployment of the Taser device did not increase
41 the relative markers of stress in the body as
42 compared to various other restraint techniques,
43 including the Taser device. And it didn't add
44 another layer or increase those characteristics in
45 any way.

46 The authors in that paper concluded that the
47 Taser device does not activate the human stress

1 response more than any other forms of restraint
2 and, in fact, activated fewer stress markers than
3 did batons or immersions in cold water. That
4 evidence is uncontradicted before you except in
5 this way. It's contradicted by Dr. Chambers, but
6 it's contradicted in a manner that's just
7 dismissive in nature. It's not contradicted in a
8 manner which says no, there are other studies out
9 there that show different things. What he does is
10 he attacks the study. He attacks the study as
11 being underpowered, as using too few people, as
12 being written in a journal from Ireland. There's
13 simply no basis for that attack whatsoever.

14 And indeed, when pressed, he can't identify
15 any publication in which his theory of Taser
16 deployment and a fatal stress response is
17 substantiated. Just none.

18 And then you go back to what Dr. Lee said in
19 that passage I read from to you this morning: Mr.
20 Dziekanski could have very well died anyway.

21 Dr. Butt speculates that the increased
22 exertion and stress following the Taser deployment
23 could have contributed to Mr. Dziekanski's death.
24 No literature supports it. And that statement is
25 made after Dr. Butt finishes his report, forwards
26 it to the Commission counsel, and he goes on
27 holidays to Hawaii and then does an addendum.

28 Very curious circumstances, we say.

29 THE COMMISSIONER: I don't understand what's curious
30 about that. I'm not talking about the merits;
31 about, however, your comment.

32 MR. NEAVE: What I find curious is this, Mr.
33 Commissioner. An expert is retained to provide a
34 specific opinion on a specific question and
35 included in that opinion is the effect of the
36 Taser device. He finishes his report, he signs
37 the report, he sends the report in, and on the
38 fundamental question with respect to the role the
39 Taser could have, he says, contributed to Mr.
40 Dziekanski's death, he makes no comment until he's
41 reminded. I find that curious and, quite frankly,
42 irresponsible on his part. Particularly --
43 particularly where Dr. Butt concedes in cross-
44 examination at the very front end of his cross-
45 examination that the mechanism of death in a
46 Taser-related case is unknown. And there's some
47 "eureka" that occurs between that statement and

1 the final report that causes him to say there's a
2 contribution. Notwithstanding "I don't know what
3 the mechanism is." It's just totally inconsistent
4 and ought to be disregarded.

5 Dr. Tseng tries to support the same
6 proposition on the basis of the paper that he
7 co-authored with Byron Lee. You'll recall that's
8 the California study with respect to Taser
9 deployments. Except when you read the paper, it's
10 got nothing to do with Taser deployments. The
11 death cases they looked at may or may not have
12 been Tasered. They never looked at that. The
13 data that's available is limited in nature.
14 There's a number of major police forces from whom
15 they sought statistical information that didn't
16 respond. But more importantly, they don't link
17 the deaths to a Taser deployment.

18 The weight of the scientific knowledge simply
19 doesn't support those theses. As Dr. Di Maio and
20 Dr. Ho opine, current medical research
21 demonstrates that conducted energy weapon
22 deployment is not a stress of a magnitude that
23 separates it from any other form of subdual.

24 And then with respect to Dr. Chambers, he's
25 never given an opinion with respect to the safety
26 of an electrical device ever before, let alone the
27 Taser. And we say that he's simply not qualified
28 to proffer the kind of opinion that he advanced
29 before you and ought to be given no weight for
30 that reason and for the **Medley** line of
31 authorities.

32 Furthermore, Dr. Chambers was unable to cite
33 any literature which refuted the conclusions of
34 peer-reviewed papers on Taser devices by Dr.
35 Bozeman, Dr. Christine Hall, Dr. Ho, Dr. Dawes,
36 and others. He simply has nothing.

37 In our written submission, Mr. Commissioner,
38 we take you in detail through the peer-reviewed
39 literature. I'm not going to do that. Suffice it
40 to say there is no scientific evidence before this
41 Commission that indicates that the Taser device
42 was a contributing factor to Mr. Dziekanski's
43 death.

44 One consideration that is appropriate for you
45 to bear in mind, we say, when you're reviewing
46 these reports is the experts themselves.

47 Dr. Kerr properly conceded on cross-

1 examination that he was unaware of Trevor
2 Enchelmaier's evidence in monitoring Mr.
3 Dziekanski's pulse, and his opinion would have
4 been different.

5 Dr. Tseng I've reviewed with you. I'm not
6 going to say more.

7 In contrast to Dr. Tseng, Dr. Swerdlow has
8 done extensive work with respect to cardiac safety
9 of electrical devices. He's the lead author on
10 the only peer-reviewed study to consider heart
11 rhythms of people who died suddenly in Taser cases
12 where the deployment has been proximate.

13 Now, he told you, and indeed volunteered, as
14 did Dr. Ho and Dr. Panescu, that they provide
15 consulting services to TASER. And on that basis,
16 they were asked by Commission counsel, and did
17 provide a breakout of what they had each earned
18 from TASER. They are the only witnesses that I'm
19 aware of that are experts before you that were
20 asked to disclose their financial contribution
21 from any person. Why, I ask, were those three
22 selected and picked out? Those questions were not
23 asked of Dr. Tseng: How much money are you making
24 on this? Because quite frankly, as the courts in
25 this province have long since held, those kinds of
26 statements are insignificant because they would
27 place offside every expert in every substantial
28 piece of litigation in this province. It's just
29 simply not an issue. And it's a red herring for
30 you and ought to be disregarded.

31 I've addressed the Di Maio, Pollanen and
32 Sloane issue. Their reports were tendered for the
33 proof of their contents. They're tendered for
34 that purpose. It's not open for them to be
35 attacked in the manner that they were, and to do
36 so runs afoul if the **Medley** line of authorities in
37 the brief.

38 I apologize for not being here last week, but
39 I understand that Mr. Kosteckyj made some comments
40 about Dr. Panescu's expertise. His expertise is
41 set out in his opinion with respect to his
42 professional and academic background. The
43 evidence itself is unchallenged in this forum. He
44 holds, as his opinion says, more than 125 patents
45 with respect to cardiac and other medical devices.
46 He's eminently qualified to give you the kind of
47 evidence that he did.

1 With respect to Dr. Ho's studies and the
2 comments that Dr. Chambers and Tseng have made
3 with respect to the power issues, it's to be
4 remembered that some of Dr. Ho's work in the
5 earlier studies that he has done has been now
6 replicated by Drs. Chan, Vilke and Sloane. Those
7 papers are before you.

8 In conclusion, Mr. Commissioner, there are
9 thousands of cases each year where a Taser device
10 is safely deployed by law enforcement personnel on
11 individuals who are distraught, intoxicated or
12 unstable. The factual evidence in this case,
13 together with the current medical and scientific
14 research on sudden death during restraint,
15 excludes the Taser device as a cause or a
16 contributory to Mr. Dziekanski's death.

17 Sudden in-custody deaths of the sort that Dr.
18 Lee discussed in his report have been documented
19 for more than 150 years and have been associated
20 with pretty well every police restraint technique
21 or tool that has been used. The Taser device is
22 just the next one in this long line. As Dr. Butt
23 testified and as Dr. Tseng concedes, the mechanism
24 of the fatal collapse in sudden death cases during
25 restraint remains unknown. It remains unknown in
26 those cases and it remains unknown in Taser cases.

27 Drs. Swerdlow, Panescu, Ho, Di Maio, and
28 others confirm that there is nothing in the peer-
29 reviewed human research that has established the
30 mechanism of fatal collapse in sudden death cases.
31 And these cases, as you well know, often occur
32 without a Taser being deployed.

33 Without the mechanism of death being known,
34 we say it is simply speculative to conclude that
35 the Taser deployment caused or contributed to Mr.
36 Dziekanski's sudden death. And for these reasons,
37 we ask you to make these findings.

38 Mr. Dziekanski was in an acute emotional and
39 physiological crisis the night he died, which some
40 experts term delirium. The cause of Mr.
41 Dziekanski's delirious state is unknown but likely
42 related to chronic alcohol abuse and withdrawal.
43 There is a risk of sudden death associated with
44 these delirious states. The mechanism of sudden
45 death in these circumstances is unknown. There is
46 no evidence on the post mortem examination or the
47 expert opinions that can explain the mechanism of

1 Mr. Dziekanski's death.

2 On all of the available evidence, it would be
3 speculative and misleading to conclude that the
4 Taser deployment caused or contributed to Mr.
5 Dziekanski's death either directly or indirectly.
6 As I said at the opening, Mr. Commissioner, to
7 conclude otherwise is to speculate, and I have
8 provided you with two bases for doing so.

9 Those are my submissions, barring any
10 questions.

11 THE COMMISSIONER: All right. Thank you very much.

12 MR. GOULDEN: Mr. Commissioner, James Goulden for the
13 City of Richmond. I have filed, as you should
14 have, brief closing submissions on behalf of the
15 City of Richmond. My oral submissions will also
16 be brief. I do not intend to read or go through
17 our brief written submissions in any detail. I
18 only have a few additional oral submissions to
19 make on behalf of the City.

20

21 SUBMISSIONS BY MR. GOULDEN ON BEHALF OF THE CITY OF
22 RICHMOND:

23

24 MR. GOULDEN: As the tasering and subsequent death of
25 Mr. Dziekanski took place within the City of
26 Richmond and it was the City of Richmond's
27 Firefighters that were the first responders on the
28 scene for Mr. Dziekanski, our client, the City of
29 Richmond, felt it was appropriate that they
30 participate in this inquiry so that they could
31 assist the Commission in making the findings that
32 were necessary to make.

33 THE COMMISSIONER: I'm grateful for that. But offhand,
34 I can't remember any criticism of them.

35 MR. GOULDEN: Well, I hesitate to point out the
36 criticism, Mr. Commissioner.

37 THE COMMISSIONER: No, please do so.

38 MR. GOULDEN: But in light of the comments that you've
39 made, Mr. Commissioner, I will do what probably I
40 shouldn't do. The only criticism -- the two
41 criticisms I point out which I would touch upon,
42 Mr. Commissioner, would be, one, a number of
43 the -- and I was going to get to this in a moment.
44 But a number of the RCMP officers did comment on
45 Captain Graeme in particular, his recollection of
46 the evidence. And so it's appropriate to at least
47 respond in some sense to -- not to say defend, but

1 to at least respond to those comments on the
2 firefighters' evidence.

3 THE COMMISSIONER: Well, I'm alive to that part.

4 MR. GOULDEN: Pardon me?

5 THE COMMISSIONER: I'm alive to that.

6 MR. GOULDEN: That's point one. And point two, and
7 this one's a minor point but I will point it out
8 since you've asked, Mr. Commissioner. One of the
9 ambulance drivers did make a comment as to shortly
10 after arrival why more possibly hadn't been done
11 when the firefighters were on the scene. And as I
12 will point out briefly, the firefighters were on
13 the scene for such a short period, having gone
14 through their protocols, that when you really look
15 at what was done, they did everything they could
16 do. So I'm simply going to provide a few
17 submissions to make sure that there's no issue.
18 In light of your comments, I won't go into too
19 much detail, Mr. Commissioner. But those are the
20 two areas where there was at least some implied
21 potential criticism, although I don't say it goes
22 to a high level of comment.

23 I did want to on behalf of our client express
24 our appreciation for being allowed to participate
25 in this inquiry. We've been accorded courtesies
26 by your staff above and beyond our relatively
27 small involvement in this Commission, so I thank
28 you for that on behalf of the City of Richmond.
29 And we do, and our client, wish to say, being that
30 this took place within the City and it was our
31 firefighters first on the scene, to express our
32 condolences to Mr. Dziekanski and in particular to
33 his mother, Ms. Cisowski, for this tragedy, having
34 lost her son. So we did want to say that on
35 behalf of the City of Richmond.

36 I do want to point out, Mr. Commissioner,
37 that the City of Richmond did not participate in
38 this inquiry to point fingers or lay blame. We
39 didn't aggressively cross-examine any of the
40 witnesses aside from obviously the five or six
41 witnesses that were put forward on behalf of the
42 City of Richmond.

43 We simply participated to ensure, Mr.
44 Commissioner, that you have the evidence of the
45 City of Richmond and that it was fully and fairly
46 presented to the Commissioner. Whenever any of
47 the parties or your Commission counsel needed our

1 involvement, for example documents or witnesses,
2 we made sure to make sure that we're available,
3 even most recently with respect to some additional
4 documents. So that was one of the main reasons.
5 We wanted to ensure that you had everything before
6 you to make the findings that you are going to
7 make, Mr. Commissioner.

8 With respect to a couple of substantive
9 comments that I wish to make, Mr. Commissioner,
10 several counsel for individual RCMP officers,
11 including Mr. Hira, challenged Captain Graeme's
12 view of the scene, particularly the location of
13 the RCMP officers upon the three firefighters'
14 arrival. As you'll recall, Mr. Commissioner, the
15 three firefighters attended at the scene and then
16 the fourth one joined them later on when CPR was
17 being conducted.

18 I do not intend to engage in a detailed
19 debate at this time, and I will leave, of course,
20 the finding of facts to you, Mr. Commissioner.
21 But suffice it to say - and this is the main
22 comment I wish to make - Mr. Graeme and the rest
23 of the firefighters gave their evidence in an
24 honest and forthright manner. They clearly had no
25 axe to grind and no reason to alter or mislead any
26 of their evidence. The evidence they gave, be it
27 with respect to where they saw the RCMP officers
28 being away from the body when they arrived, be it
29 that Mr. Dziekanski was not in a recovery
30 position, be it the condition of Mr. Dziekanski's
31 skin being waxy and pale, all of their evidence
32 they gave in a straightforward manner. They stood
33 behind it on cross-examination. I submit it was
34 the best evidence they could give. They're
35 qualified. They're professionals that deal with
36 this all the time. And so I say generally
37 speaking, Mr. Commissioner, you should accept
38 their factual evidence as being truthful and being
39 accurate.

40 Simply put, Mr. Commissioner, the Richmond
41 Firefighters did everything they could to assist
42 Mr. Dziekanski at his time of need. There was no
43 time for the firefighters to engage in any other
44 lifesaving conduct prior to the arrival of the BLS
45 paramedics. There was reference - I believe it
46 was in at least Mr. Hira's submissions, amongst
47 others - made to the firefighters walking casually

1 to Mr. Dziekanski. I believe this was already
2 covered off in my re-examination. But I do wish
3 to point out with respect, as you've repeatedly
4 heard during this inquiry, Mr. Commissioner, the
5 firefighters are trained to walk into a scene in a
6 controlled manner. They do that to maintain
7 control, in order to ensure that everyone stays in
8 control, while at the same time they assess the
9 scene and, as Captain Graeme said, to make sure
10 it's safe and under control.

11 They had, as Mr. Commissioner will see in the
12 timing, less than 90 seconds with Mr. Dziekanski.
13 They undertook both a scene assessment and patient
14 assessment, briefly engaged with the RCMP officers
15 as to what was going on, requested the removal of
16 handcuffs, and were in the process of proceeding
17 with CPR and the AED protocols, and that was when,
18 as you heard, Mr. Commissioner, at the time that
19 Captain Graeme was taking out the patches for the
20 AED just as the ambulance people were arriving.

21 I know there were some questions last week
22 with respect to the training of the City of
23 Richmond Firefighters. I wanted to clarify a
24 couple of things. Now, although this wasn't
25 directly in the evidence of the firefighters, it
26 was touched upon in the evidence of Mr. Caldwell
27 and it's consistent with my understanding, which
28 is that the level of training is comparable
29 between the two groups, both the firefighters and
30 the ERS at the airport.

31 THE COMMISSIONER: Yes, I had that wrong.

32 MR. GOULDEN: And I also wanted to point out, and I'm
33 not sure if you're clear on this, Mr.
34 Commissioner, that the firefighters were in a
35 position and did have the equipment to engage the
36 automatic defibrillator, but they did not have
37 time. They were just bringing it out at the time
38 the ambulance took over. I do point out one of
39 the differences between their ability to use the
40 AED and the ambulance's ability to use the AED is
41 that the firefighters are not in a position -- if
42 they don't get the rhythms necessary to shock,
43 they're not in a position to override. The
44 ambulance, on the other hand, is in a position to
45 do those other things, that additional sort of use
46 of the AED. So that was the clarification that I
47 wish to make.

1 Once the paramedics came, as is the protocol,
2 they then become secondary. The firefighters
3 become secondary to the ambulance attendants and
4 they just simply do as they're instructed to do by
5 the ambulance attendants. They then, as is in the
6 evidence, assisted the paramedics for over 20
7 minutes, such as undertaking chest compressions
8 until directed to cease by B.C. Ambulance.

9 Now, in this case we have the good situation
10 that we have a number of professionals, including
11 Captain Graeme, who have attended on many scenes,
12 commenting at the time, doing everything they
13 could do. But also one thing that I wanted to
14 leave you with, Mr. Commissioner, is the last
15 comment was, from the evidence of Captain Graeme
16 in his testimony before this Commission, where he
17 said -- with the benefit of hindsight, Captain
18 Graeme, with his 20 plus years of experience,
19 remains satisfied, notwithstanding any alleged or
20 implied criticism - which we say is unfair and
21 unfounded on the evidence - Captain Graeme says
22 that he is satisfied that they acted appropriately
23 in all the circumstances. And I wish to just
24 quote one thing that he said during the hearing,
25 and this is contained as well in my written
26 submissions, Mr. Commissioner:

27
28 Q Is there anything else that your
29 firefighters and yourself could have
30 done from your arrival until the
31 ambulance arrival?
32

33 And his answer -- and I say it's consistent with
34 the evidence and consistent with the time they had
35 and their expertise:
36

37 A No, sir. We did our -- we did our best.
38

39 So once again, we thank you, Mr.
40 Commissioner, for undertaking this difficult but
41 important commission. Unless you have any
42 questions directed to the City of Richmond, those
43 are our submissions.

44 THE COMMISSIONER: No. Thank you very much. Now, I
45 think what we have left is the legal arguments.

46 Am I correct in that?

47 MR. TAYLOR: I would think so, Mr. Commissioner.

1 Mitchell Taylor for the Government of Canada.

2 Mr. Jones for the Government of British
3 Columbia has a constitutional point and we have a
4 response to it.

5 THE COMMISSIONER: Yes. All right. So we'll --

6 MR. TAYLOR: Now, Superintendent Rideout's lawyer, I'm
7 not sure if they're going to be presenting
8 something or not.

9 MR. KONYE: Anna Konye, sir, here for Mr. Pringle. I'm
10 not certain in terms of the timelines. I was
11 speaking to some of my friends over the noon
12 break. I also spoke to Mr. Pringle. There is a
13 possibility, depending on how long we're going to
14 be today, that he might be able to attend
15 tomorrow. Alternatively, perhaps if Mr. Pringle
16 would be able to make any reply in writing might
17 be the alternative if we're going to be finished
18 up today, sir.

19 THE COMMISSIONER: This is a reply you're speaking of?

20 MS. KONYE: Yes. A reply to my friend's argument for
21 the B.C. Government.

22 THE COMMISSIONER: Oh, I see. All right. Well, all
23 right. Seeing that's a question of law, yes, that
24 can happen. So we'll take a few minutes' break
25 now.

26 THE REGISTRAR: The hearing is adjourned for ten
27 minutes.

28

29 (PROCEEDINGS ADJOURNED FOR AFTERNOON RECESS)

30 (PROCEEDINGS RECONVENED)

31

32 THE REGISTRAR: Order. The hearing is resumed.

33 MR. VERTLIEB: I'm just wondering if my learned friends
34 have had a chance to consider their position on
35 this training bulletin that just came out.

36 MR. HIRA: Mr. Commissioner, I've now had a chance, as
37 I said, to read it. I note that it is being filed
38 after the evidence and after our submissions. I
39 have no other comments beyond that.

40 THE COMMISSIONER: Mr. Hira, that's not good enough.
41 I'm not going to let it in if anybody objects to
42 it.

43 MR. HIRA: That is my position. I'm doing nothing
44 other than that. If my friend is able to tell me
45 as to what is relevant in there, I might be a
46 little bit more substantive and I might be in a
47 position to consent to its admission. It's just

Submissions by Mr. Jones (for Attorney General of
British Columbia)

1 that I don't know, and you can tell from my
2 colouring, I don't know where this is going or how
3 it dovetails. So I'm seeking some guidance.

4 THE COMMISSIONER: All right. The document will not be
5 accepted.

6 MR. JONES: Mr. Commissioner, my name is Craig Jones.
7 I represent the Attorney General of British
8 Columbia. I'm going to be referring to my revised
9 written submissions and I've asked that they be
10 put on your desk. It's the clear Cirlex cover.
11 It says "Revised Submissions of the Attorney
12 General of British Columbia." Thank you, sir.
13 I've also submitted a book of authorities. In the
14 interests of time I don't intend to take you to
15 the authorities. Everything that I need to quote
16 is in the revised submissions that you have before
17 you. I might make reference to a document that
18 the Government of Canada delivered this morning,
19 which is "Submissions of the Government of Canada
20 in Response to the Constitutional Argument of
21 British Columbia." And again, in the interests of
22 time, I'm going to try to deal with everything all
23 at once rather than attempting any sort of reply.

24

25 SUBMISSIONS BY MR. JONES ON BEHALF OF THE ATTORNEY
26 GENERAL OF BRITISH COLUMBIA:

27

28 MR. JONES: We appear, as you know, sir, as a full
29 party to this proceeding under section 8 of the
30 **Constitutional Question Act**. The constitutional
31 issues at stake in this hearing are arising,
32 perhaps not entirely for the first time, before
33 you. But the time that they arose before was in
34 the context of notices of misconduct that were
35 delivered earlier this year to four police
36 officers on a confidential basis, and they were
37 challenged on constitutional grounds on a
38 confidential basis that eventually became the
39 subject of judicial review. My only point of that
40 is we did not have the opportunity when the
41 constitutional questions were first raised. We
42 weren't given notice under the **Constitutional**
43 **Question Act**, and so we could make no submissions
44 such as we are making now before you that first
45 time.

46

47

 For the purposes of notice, we're simply
accepting the written arguments of the parties as

1 sufficient notice under the *Constitutional*
2 *Question Act* and we're waiving the 14-day period.
3 I sent around and delivered written submissions
4 last Thursday, having found out about the
5 constitutional argument on Monday, and then
6 subsequent to that I was given a copy of the
7 submissions of Superintendent Rideout, who also
8 makes a constitutional argument, and one that is
9 considerably broader, if I might say so, than the
10 Government of Canada's.

11 And so the purpose of the revised submissions
12 before you is to actually deal with both the
13 Government of Canada's argument, as I understand
14 it, and the submissions of Superintendent Rideout
15 on the constitutional question.

16 So I'll begin at paragraph 2 of my written
17 submissions. Canada and Superintendent Rideout
18 invoke the doctrine of interjurisdictional
19 immunity for the proposition that there are some
20 areas into which the Commission cannot inquire, or
21 upon which it cannot comment.

22 And I go on to cite the passages from the
23 original argument, the written submissions of the
24 Government of Canada, and their constitutional
25 argument was confined at that time to three
26 paragraphs. And they said at paragraph 14:

27
28 [I]t is well established that a provincial
29 commission of inquiry cannot investigate core
30 subject matters that fall within federal
31 spheres of jurisdiction.
32

33 I just want to pause there for a moment. They say
34 "cannot investigate core subject matters that fall
35 within federal spheres of jurisdiction." As
36 you'll see, sir, we say that that's wrong. They
37 go on:
38

39 In particular, it is constitutionally
40 impermissible for a provincial commission of
41 inquiry to investigate --
42

43 I'll just underline that again.
44

45 -- the operations, policies or management
46 functions of a federal institution.
47

1 We say that's wrong. They then say:

2
3 ...Investigating either the CBSA or the
4 RCMP...would be beyond the constitutional
5 authority of British Columbia.
6

7 Again we say that's wrong.

8 And then later Canada says, paragraph 21:

9
10 It is also submitted that the Commission's
11 authority to make findings of misconduct
12 pursuant to s. 21 of the **Public Inquiry**
13 **Act** --
14

15 That of course is the provincial legislation from
16 which your mandate derives.
17

18 -- is subject to the same constitutional
19 limits described at paragraphs 14 and 15
20 above.
21

22 Consequently, the Inquiry should not make
23 institutional findings of misconduct against
24 the federal government or any of its
25 constituent entities, including the CBSA and
26 the RCMP.
27

28 So Canada's constitutional assertions are
29 made on either or both of two bases. First, the
30 Commission may not make findings against the RCMP
31 or CBSA as institutions, even if it could do so
32 with respect to individual members or employees.
33 And I take that now to be Canada's main thrust,
34 having read their submissions in reply. They're
35 drawing the distinction between findings with
36 respect to the institutions versus findings with
37 respect to individuals.

38 And second -- and this is the one that
39 Superintendent Rideout expands upon. Second,
40 Canada implies that the Commission may not make
41 findings regarding decisions, activities and
42 practices that might be characterized as
43 "operations, policies, or management" in nature.
44 In support of this proposition, Canada mainly
45 relies on the decisions of the Supreme Court of
46 Canada in the **Keable** case and **Alberta v. Putnam**.
47

1 And I should say --

2 THE COMMISSIONER: I was wondering when some of those
3 submissions were made as to the proper use of the
4 word "management functions." And there is the
5 devil in the details. What is a management
6 function? The way it was put, a management
7 function included the policy arrangements put
8 forward in order to govern the disclosure of
9 information to the public. And another view of
10 management functions may be a little broader than
11 that -- pardon me, a little narrower than that.

12 MR. JONES: Yes, sir. We're going to argue that on the
13 cases, and in particular on the most recent cases,
14 you can judge what falls within the essential core
15 of the management function, if you want to put it
16 that way, as to what is essential, that's vitally
17 essential to the particular federal quality of the
18 interest as opposed to the provincial into
19 policing in the province. And I'll expand on that
20 in my submissions.

21 Now, Canada in its submissions in
22 reply -- perhaps I can just take you to that very
23 quickly, sir. At page 2, there's a footnote
24 number 2 in which Canada says this -- and this is
25 just on the second point about what is management:

26
27 Canada acknowledges that there could
28 theoretically be a disagreement between it
29 and the AGBC over which specific actions by
30 individual public servants in a particular
31 case would constitute "administration and
32 management" of a federal institution.
33 However, Canada submits that none of the
34 actions that were in fact the subject of
35 evidence tendered before the Inquiry would
36 fall under this rubric. Since Canada is not
37 aware of any potential individual findings of
38 misconduct by the Inquiry that could be said
39 to relate to the administration and
40 management of either the CBSA or the RCMP,
41 this issue does not arise in this case.

42
43 So this is why I say that the thrust of Canada's
44 submissions, I think it's fair to say, is away
45 from the idea of management decisions being
46 immune, and the sole disagreement that we might
47 have is on this fine point of institutional

1 misconduct versus individual misconduct.

2 But having said that, Superintendent Rideout
3 does explicitly argue that the decisions he made
4 that are in question were management decisions
5 that are in the interjurisdictionally immune core
6 of the federal power.

7 So both of those questions are engaged,
8 although perhaps not both by my friends from
9 Canada.

10 I'm at paragraph 5 now, in which I just
11 reiterate that point. Superintendent Rideout says
12 that interjurisdictional immunity protects any
13 acts that he took in a management capacity from
14 inquiry, which includes "decisions that
15 Superintendent Rideout made with respect to what
16 information would be released to the media."
17 Because "his decisions in this regard would have
18 to be construed as administrative or management
19 decisions that significantly involve RCMP policy."
20 Superintendent Rideout also relies mainly on the
21 principles enunciated in **Keable** and **Putnam**.

22 The Attorney General of British Columbia
23 rejects both of these arguments and says that,
24 within or incidental to its mandate, this
25 Commission is unconstrained from making findings
26 or recommendations in these areas. The
27 Commission, we say, may, in short, follow the
28 facts presented no matter where they lead.

29 The crux of our argument is contained in
30 paragraph 7, and that is that the law of
31 interjurisdictional immunity has been
32 significantly changed. It has evolved radically
33 in the last few years. In particular, the case of
34 **Canadian Western Bank v. Alberta** and its sister
35 case, **British Columbia v. Lafarge Canada Ltd.** In
36 those cases, we say, the court sharply restricted
37 the application of interjurisdictional immunity
38 and held that it was contrary to the modern trend
39 in constitutional development which favours
40 harmony between provincial and federal regulation
41 over a "competing enclaves" approach. The
42 majority wrote - and this is from **Canadian Western**
43 **Bank** - that "the dominant tide of constitutional
44 interpretation does not favour interjurisdictional
45 immunity," and they proposed a tightly restricted
46 application of the doctrine.

47 The court wrote:

1 Although the doctrine of interjurisdictional
2 immunity has a proper part to play in
3 appropriate circumstances, we intend now to
4 make it clear that the Court does not favour
5 an intensive reliance on the doctrine, nor
6 should we accept the invitation of the
7 appellants to turn it into a doctrine of
8 first recourse in a division of powers
9 dispute.

10
11 And we say, after those decisions, those 2007
12 decisions of a -- well, they're unanimous
13 decisions of the court. There was a concurrence
14 in each by Justice Bastarache. After those
15 decisions, a single, two-stage test emerges.
16 Where the provincial activity is, in pith and
17 substance, within provincial legislative
18 authority, the federal activity over which
19 immunity is claimed must be shown to be within the
20 inviolable, essential core of the federal
21 interest. Then, it must be demonstrated, on the
22 facts of each particular case, that the province
23 is not only "affecting" the core federal activity,
24 but is actually "impairing it" -- in other words,
25 actual harm to the federal interest or activity
26 must be shown.

27 We say the onus on both of these points lies
28 with the party invoking the immunity, in this case
29 Canada and Superintendent Rideout.

30 The first part of our argument on these
31 points is that the Province has constitutional
32 authority over policing, and this is, I think, a
33 trite point and I don't think it's in issue. I'm
34 content to skip over this, except simply to
35 emphasize the passage from *O'Hara v. British*
36 *Columbia* that it's not just policing that is
37 within the core of provincial authority, if I can
38 put it that way, over the administration of
39 justice under section 92(14), but that it is
40 public confidence in the administration of justice
41 in the province that is also of provincial
42 concern. And that is the constitutional authority
43 that underlies this Commission: maintaining,
44 enhancing, preserving public confidence in the
45 administration of justice in the Province.

46 And we say that at least since *Keable*, it's
47 been accepted that a province may direct inquiries

1 into RCMP activities in the same way that they do
2 with respect to provincially constituted forces,
3 subject only to the application of the
4 interjurisdictional immunity doctrine.

5 Overleaf at our paragraph 13, we set out
6 Canada's constitutional authority over the RCMP.
7 And then we move on to discuss what we say is the
8 law as it was, the **Keable** and **Putnam** cases. And
9 I'm just going to describe those cases. I'm not
10 going to go in great detail through our argument
11 here.

12 But the **Keable** case, a notorious case, was
13 the public inquiry that occurred in Quebec in the
14 aftermath of allegations of RCMP dirty tricks in
15 the federal war against the FLQ, if I can put it
16 in those terms, and the ability of the provincial
17 government to order such an inquiry, to conduct
18 such an inquiry, was called into question. And in
19 fact, the majority, Pigeon for the majority, said
20 no, you can't do that, that that's subject to
21 interjurisdictional immunity and you can't look at
22 it.

23 And the distinction that we draw with respect
24 to the **Keable** case is that there is no question in
25 that case that the RCMP was acting as a federal
26 force, that this was a federally directed activity
27 of the police force that just happened to be going
28 on in Quebec. And in the concurring judgment of
29 Justice Estey, and we quote this at paragraph 16,
30 he notes that, and then down at the bottom in the
31 passage that we've underlined, he says:

32
33 There may be circumstances in those Provinces
34 which have contractual or other arrangements
35 with the federal government with reference to
36 the maintenance of police forces which will
37 call into question different principles, but
38 with which we are not here concerned.
39

40 So suggesting that if the police force is carrying
41 out its duties as a provincial police force, as is
42 the RCMP here, then different considerations may
43 come into play.

44 And so it was then left to the Supreme Court
45 of Canada in the subsequent decision of **Putnam** to
46 consider the RCMP as a provincial police force.
47 And **Putnam** concerned whether the provincial police

1 complaints procedure applied equally to the RCMP,
2 whether RCMP members could be called before a
3 hearing in the complaints process in the same way
4 that provincial police officers could. And the
5 court said no, that too was subject to
6 interjurisdictional immunity.

7 But the key thing about that decision, about
8 the **Putnam** decision, is that in that case the body
9 attacked was in fact purporting to be in a
10 position to mete out discipline against the RCMP,
11 against the officers involved. And so it's not
12 difficult to see, when we return later to the
13 question of what is management, that the inquiry
14 itself in that case was engaged in the management
15 of the RCMP officers. It was calling them
16 forward; it was investigating them with a view to
17 disciplining them. It was doing management. It
18 was not simply providing an advisory opinion to
19 the provincial government, findings of fact upon
20 which opinions would be issued.

21 So we say at our paragraph 19 that **Putnam**
22 really goes no further than to say that the
23 disciplinary investigation of RCMP officers in
24 their provincial role is a federal matter outside
25 provincial competence. The provincial government,
26 in other words, cannot by statute or executive
27 action engage in the management, organization or
28 discipline of the RCMP. But in the present case,
29 we say, Canada takes no exception, at least as I
30 understand it, to the Commission's role in
31 investigating the behaviour of its members, nor
32 even to the Commission making findings of
33 misconduct against them. The Attorney says that
34 this takes the present case outside **Putnam** and
35 also the decision of the Saskatchewan Court of
36 Queen's Bench in the **Milgaard** case, which is also
37 cited by Canada. If British Columbia is, through
38 this inquiry, competent to investigate the
39 behaviour of individual members - if doing so does
40 not offend **Putnam** - then it is competent to
41 investigate the institutional behaviour of the
42 RCMP, including questions of management and
43 direction that bear upon those actions.

44 And now we turn to what we say the law as it
45 is, and we say that the idea of
46 interjurisdictional immunity, the Supreme Court of
47 Canada's idea of it, has undergone a revolutionary

1 change in the last few years.

2 We write a paragraph 20 that in the 2007
3 decision of **Canadian Western Bank** and its
4 companion case of **Lafarge**, the Supreme Court
5 engaged in a broad re-thinking of the doctrine.
6 It found at paragraphs 35 to 47 that the approach
7 of identifying "enclaves" or "watertight
8 compartments" immune from intrusion must give way
9 to "co-operation among government actors to ensure
10 that federalism operates flexibly."

11 You may recall, sir, that there was a very
12 powerful, in my submission, dissent from **Putnam** by
13 Mr. Justice Dickson, as he then was, in which he
14 criticized this enclaves approach - and that was
15 the word he used - that was being taken by the
16 majority in that case, the idea that the RCMP
17 should live sort of in splendid isolation in some
18 kind of constitutional neverland, was rejected by
19 Justice Dickson in dissent. We say that his
20 dissent is much closer to the law as it now is
21 after **Canadian Western Bank** and **Lafarge**.

22 I just quote this paragraph at my paragraph
23 21 from **Lafarge** because Justice Bastarache, who
24 was concurring in that case as well as in **Canadian**
25 **Western Bank**, very nicely synthesizes the way that
26 the test for interjurisdictional immunity has
27 evolved. And he wrote at paragraph 97:

28
29 Until 1966, the test for federal immunity was
30 to determine whether the provincial law under
31 scrutiny would significantly "impair" or
32 "sterilize" the federally regulated activity.
33 This changed with the **Quebec Minimum Wage**
34 case, where the test adopted by the Supreme
35 Court of Canada was whether "a vital part of
36 the management and operation of the
37 undertaking" was "affect[ed]."

38
39 In 1988, [he writes], the Court reaffirmed
40 that test in **Bell Canada v. Quebec** with Beetz
41 J., for the Court, indicated that in order
42 for a federal undertaking to enjoy immunity
43 from the application of provincial laws, "it
44 is sufficient that the provincial statute
45 which purports to apply to the federal
46 undertaking affects a vital or essential part
47 of that undertaking, without necessarily

1 going as far as impairing or paralyzing it.
2

3 So "affects" and "not impairing" was the rule
4 between at least 1966 and 1988, which of course
5 was the period in which both **Keable** and **Putnam**
6 were decided. And it's not difficult to see that
7 you could argue that investigating, for instance,
8 the policies of the RCMP could be seen as
9 affecting the federal institution. And if indeed
10 that was the test in that period, one can see how
11 **Keable** came out the way it did. One can how
12 **Putnam** came out the way it did.

13 But we say at paragraph 22 that in **Canadian**
14 **Western Bank** and **Lafarge** the "affect" test was
15 explicitly abandoned in favour of the "impair"
16 test. The majority wrote:

17
18 Even in situations where the doctrine of
19 interjurisdictional immunity is properly
20 available, we must consider the level of the
21 intrusion on the "core" of the power of the
22 other level of government which would trigger
23 its application.
24

25 They then quote from Justice Beetz in the **Bell**
26 **Canada** case using the "affects" test. And then
27 they say at paragraph 49:

28
29 [...] In our opinion, it is not enough for
30 the provincial legislation simply to "affect"
31 that which makes a federal subject or object
32 of rights specifically of federal
33 jurisdiction. The difference between
34 "affects" and "impairs" is that the former
35 does not imply any adverse consequence
36 whereas the latter does. [...] It is when
37 the adverse impact of a law adopted by one
38 level of government increases in severity
39 from "affecting" to "impairing" (without
40 necessarily "sterilizing" or "paralyzing")
41 that the "core" competence of the other level
42 of government (or the vital or essential part
43 of an undertaking it duly constitutes) is
44 placed in jeopardy, and not before.
45

46 And not before.

47 So Their Lordships then turn to paragraph 51

1 to consider what are the "essential and vital
2 elements" of federal undertakings, and they
3 focused on those elements which are "absolutely
4 indispensable or necessary" to the operation of
5 the undertaking, and then they took some guidance
6 in that regard from the decided cases.

7 And interestingly, at paragraph 62, among a
8 long list of cases that -- well, maybe I should
9 back up. In **Canadian Western Bank**, the
10 respondents, who were arguing for
11 interjurisdictional immunity, said, look at all
12 these interjurisdictional immunity cases. You
13 cannot regulate banking in any way because of all
14 these cases. And the court divided them into
15 categories and dealt with them one by one, and one
16 of the categories the court identified was
17 management of federal institutions. And this led
18 to paragraph 62:

19
20 The cases relied upon by the appellants
21 dealing with the management of federal
22 undertakings --

23
24 I'm sorry, I said respondents earlier. I meant
25 appellants.

26
27 The cases relied upon...dealing with the
28 management of federal undertakings, including
29 the 1988 trilogy, belong in fact to a broader
30 line of cases dealing with federal
31 institutions, where management has been
32 considered an absolutely indispensable and
33 necessary element of federal jurisdiction.
34 These include the post office --

35
36 I'll skip the citations.

37
38 -- and the RCMP.

39
40 And the citations for the RCMP are, of course, **AG**
41 **Quebec v. AG Canada**, which is the **Keable** case to
42 which I've been referring, and **Attorney General of**
43 **Alberta v. Putnam**, holding inapplicable a
44 provincial police complaints procedure.

45 And then the court notes:

46
47 Yet RCMP officers are obliged to observe,

1 for example, provincial highway traffic laws.
2 Such laws do not affect the core of "what
3 they do and what they are" that is
4 specifically of federal interest.
5

6 If this inquiry does not affect the core of
7 what the RCMP does and what it is that is
8 specifically of federal interest, then this
9 inquiry is not approaching the threshold of the
10 interjurisdictional immunity doctrine.

11 Now, even if it were, even if some aspect of
12 the policies, directions, management of the RCMP
13 in this case could be said to be in the core,
14 that's still only half the test.

15 If Canada or Superintendent Rideout could
16 demonstrate that the activities over which they
17 are claiming immunity are "management," and part
18 of the "absolutely indispensable and necessary
19 element of federal jurisdiction," then they still
20 have to meet the second part of the test: does
21 the inquiry into and reporting upon these
22 activities "impair" - actually cause harm to - the
23 federal authority in question? Does the
24 Commission "affect the core of 'what they do and
25 what they are' that is specifically of federal
26 interest"? We say no. We say not even close.

27 At 26 we say the point worth emphasizing is
28 that the onus to establish these things through
29 evidence or argument lies upon the party invoking
30 interjurisdictional immunity, in this case Canada
31 and Superintendent Rideout. We say they haven't
32 done so.

33 At our paragraph 27, in the present case,
34 Canada has not suggested any way in which this
35 Commission's findings might affect, let alone
36 impair, any "essential or vital elements" of the
37 RCMP or CBSA, elements that are "absolutely
38 indispensable or necessary" to their operations,
39 and certainly not "absolutely indispensable or
40 necessary" to the federal interest. The federal
41 interest as opposed to the provincial. Nor, in
42 the Attorney's submission, could they do so. This
43 inquiry may end up commenting on the policies or
44 management of the RCMP, but it is certainly not
45 designing policies or engaging in the management
46 of the Force. Any effect on these activities, we
47 say, is purely incidental.

1 Now, Canada does advert, at paragraph 20 of
2 its submissions in response, perhaps I should say
3 in reply, that making:

4
5 a finding of misconduct against a federal
6 institution...would necessarily impair the
7 federal government's ability to administer
8 and manage that institution as a result of
9 the stigma that invariably would attach from
10 the provincial commission's finding.

11
12 They provide no evidence in support of such an
13 assertion, which, if applied in a principled way,
14 would restrict any provincial government actor
15 from commenting in the course of his duties on the
16 policies, administration or management of the
17 RCMP. Or perhaps, we say, Canada is arguing that
18 such comments only become unconstitutional if they
19 are too persuasive.

20 Indeed, we say, consistent with the
21 observations of Mr. Justice Pigeon in **Keable**,
22 quoted earlier, this inquiry might well as a
23 legitimate incidental effect reveal the
24 desirability of changes in the management and
25 operation of the RCMP or CBSA in the province.
26 This cannot be said to impair a vital or essential
27 or core federal interest. In fact, one would
28 think that the federal interest would be advanced
29 by advice regarding areas of possible improvement.

30 If it is possible for the federal and
31 provincial interests to operate side by side, they
32 must be permitted to do so. That's the new rule
33 of interjurisdictional immunity. That's the
34 lesson of **Canadian Western Bank**, of **Lafarge**, and
35 of the **Chatterjee** case, to which I'm going to
36 briefly turn.

37 In **Chatterjee** the question was whether the
38 Ontario **Civil Remedies Act**, which enables the
39 seizure by that Province of proceeds of unlawful
40 activity, was an invalid intrusion into federal
41 jurisdiction over criminal law. The Court found
42 the legislation to be constitutionally valid. And
43 in reaching that conclusion, Mr. Justice Binnie
44 observed as follows:

45
46 The argument that the CRA is *ultra vires* is
47 based in this case on an exaggerated view of

1 the immunity of federal jurisdiction in
2 relation to matters that may, in another
3 aspect, be the subject of provincial
4 legislation. Resort to a federalist concept
5 of proliferating jurisdictional enclaves (or
6 "interjurisdictional immunities") was
7 discouraged by this Court's decisions in
8 **Canadian Western Bank v. Alberta** and **Lafarge**.
9 As stated in **Canadian Western Bank**, "a court
10 should favour, where possible, the ordinary
11 operation of statutes enacted by both levels
12 of government."
13

14 The Court in **Chatterjee** reaffirmed the
15 doctrines of "double aspect" and incidental
16 effect. Justice Binnie said as follows:
17

18 The question, however, is at what point does
19 a provincial measure designed to "suppress"
20 crime become itself "criminal law." There
21 will often be a degree of overlap between
22 measures enacted pursuant to provincial power
23 (property and civil rights) and measures
24 taken pursuant to federal power (criminal law
25 and procedure). In such cases it is
26 necessary for the Court to identify the
27 "dominant feature" of an impugned measure.
28 If... the dominant feature...is property and
29 civil rights, it will not be invalidated
30 because of an "incidental" intrusion into the
31 field of criminal law.
32

33 We say the same can be said for a provincial
34 inquiry whose "dominant feature" is to maintain
35 public confidence in the administration of
36 justice. Such a body, operating under the
37 authority of provincial statute and its terms of
38 reference, may incidentally investigate and report
39 on the institutional behaviour of the RCMP or
40 CBSA, including questions of how management and
41 direction of the activities of the members
42 involved bore upon their actions.

43 I turn now to my conclusion beginning at page
44 15. We say, in sum, the recent decisions of the
45 Supreme Court of Canada in **Canadian Western Bank**
46 and **Chatterjee** stress that where, as here, there
47 is both a legitimate federal and provincial

1 interest in a matter, the federal and provincial
2 regulatory regimes must be made to work in harmony
3 if at all possible. In this case, there is no
4 inconsistency of purpose between a full inquiry by
5 the Commission and any federal jurisdiction or
6 law, and no evidence of impairment of federal
7 jurisdiction over federal entities respecting a
8 vital and essential part of their operations.

9 Perhaps I can digress for a moment and just
10 discuss the use my friends make of your previous
11 decisions on the constitutional question.

12 I've said earlier that these issues were
13 raised without notice to us. We weren't given the
14 opportunity to make this argument below. It did
15 go to judicial review, principally, I should say,
16 on the interjurisdictional question of whether
17 this inquiry was in fact entrenching on the
18 federal criminal law power, not on the
19 administration and management point. But on the
20 administration and management point - and I expect
21 my friends will raise this - we accept it for the
22 purposes of that argument, that your -- I think we
23 might have suggested that it was an unnecessarily
24 restrictive view of your own authority and your
25 own powers, was perfectly justifiable, and that
26 was of course what the court found.

27 But there are two concerns here. The first
28 concern is that you may be encouraged, certainly
29 by the argument of Superintendent Rideout, that
30 particular decisions that can simply be
31 characterized as somehow involving management or
32 policies or whatever else, are just off limits to
33 you, that you just can't look at that. You can't
34 investigate it. You can't report on it. That's
35 one concern, and that's the principal one that
36 I've been dealing with in my submissions.

37 But I suppose there is another concern, and
38 that is that - and this is reflected both in
39 Canada's and Superintendent Rideout's
40 submissions - that they would encourage you to
41 approach the question of your own authority and
42 the scope of this inquiry and the breadth of your
43 inquiry from a posture of unnecessary caution, an
44 unnecessary constitutional caution. And the
45 purpose of our submissions is to, to the extent
46 that we can, brush aside that concern from you, to
47 say that you can go where the facts in this case

1 lead you. You can make the findings of fact and
2 also the recommendations that are necessary for
3 you to fully, fully fulfil your mandate without
4 fear that you are overstepping any constitutional
5 bounds.

6 I return to my written argument at paragraph
7 34. The Attorney General submits that the inquiry
8 into the actions of the federal entities in
9 question related to Mr. Dziekanski's death has
10 nothing to do with their internal management or
11 operation as federal institutions. Nothing this
12 Commission is doing could be characterized as the
13 province engaging in the "discipline, organization
14 or management" of the RCMP or CBSA. **Keable** and
15 **Putnam**, even on their own terms, even if we were
16 back in 1981, don't apply. Conversely, the full
17 investigation and airing of these tragic events
18 does relate very directly to the public confidence
19 in the administration of justice in the province,
20 the core provincial concern. This goes equally to
21 decisions made by federal actors both prior to
22 and, we would say, following Mr. Dziekanski's
23 death, including the investigation of and
24 reporting the related facts to members of the
25 public. Even if the Commission's eventual report
26 "affects" the federal entities or the federal
27 government's interest, the Commission is
28 constitutionally unfettered provided it does not
29 "impair" them. Canada's argument, we say, must
30 fail.

31 And we close with a quote from the dissent,
32 again, of Justice Dickson in the **Putnam** case.
33 Remember he criticized the enclaves approach that
34 was taken by the majority in that case, and we say
35 that his decision foreshadowed, as dissents so
36 often do, the change in the law that occurred in
37 2007. Justice Dickson said this:

38
39 Public accountability is increasingly being
40 demanded of, and recognized by, those
41 institutions and corporations which affect in
42 a direct and important way, the daily lives
43 of our citizens. One sees this in respect of
44 government, large corporations, the
45 professions. No longer is it acceptable to
46 have vital matters affecting the public
47 decided behind closed doors. The dynamics of

Submissions by Mr. Jones (for Attorney General of
British Columbia)

Submissions by Mr. Taylor (for Government of Canada)

1 decision making and accountability have
2 changed. The result, of course, is to
3 engender confidence in the decision making
4 process and in the institutions whose
5 decisions are subject to scrutiny, in my view
6 the surest way of undermining public
7 confidence in the Force and in justice in
8 general would be to place the RCMP in a
9 cocoon, and exempt the actions of its members
10 from investigation by an independent
11 tribunal.
12

13 Subject to any questions, sir, those are my
14 submissions.

15 MR. TAYLOR: Mitchell Taylor for the Government of
16 Canada, Mr. Commissioner.

17 THE COMMISSIONER: Mr. Taylor, I've been listening
18 pretty hard most of the day. I think maybe five
19 minutes.

20 MR. TAYLOR: Certainly.
21

22 (PROCEEDINGS ADJOURNED)

23 (PROCEEDINGS RECONVENED)
24

25 MR. TAYLOR: Mitchell Taylor for the Government of
26 Canada, Mr. Commissioner. I have asked to place
27 before you, and I think you already had, our
28 supplemental submissions that were filed this
29 morning and a further decision, *MacKeigan*, that is
30 a 1989 decision of the Supreme Court of Canada,
31 which should be loose and before you as well. I
32 may not need to take you to it but you may want to
33 have with you the book of authorities that Canada
34 put in with our September 29th submissions. They
35 would be green, I believe. If they're not readily
36 available, that's fine.
37

38 SUBMISSIONS BY MR. TAYLOR ON BEHALF OF THE GOVERNMENT
39 OF CANADA:
40

41 MR. TAYLOR: I want to start by putting the present
42 issue and the constitutional point that's come
43 before you in some context, Mr. Commissioner. I
44 begin by noting that the Government of Canada
45 fully supports the work of this commission of
46 inquiry and, as you know, has participated fully
47 by providing witnesses, both CBSA witnesses and

1 RCMP witnesses.

2 THE COMMISSIONER: There's no question about that.

3 MR. TAYLOR: And there will be no question too that we
4 produced a lot of documents, more than many people
5 here want to see. And we have provided various
6 other assistance to the Commission counsel and
7 staff, we think.

8 And the Government of Canada has not in any
9 way resisted the exploration and the inquiry that
10 this commission of inquiry has undertaken as to
11 the on-the-ground activities, I'll call it, what
12 happened in the Customs Hall, what happened in the
13 IRL, what transpired with respect to the media
14 strategy and disclosure.

15 It is the case, Mr. Commissioner, that the
16 Government of Canada looks forward to your report
17 and the findings and recommendations that will be
18 therein, and fully expects that they will
19 contribute greatly to the public safety of all
20 Canadians and visitors and immigrants to Canada.
21 And those recommendations and the findings that
22 you make will be given every serious
23 consideration, Mr. Commissioner, by the Government
24 and its affected agencies.

25 In that regard, Mr. Jones, a couple of times
26 and then in closing, referred to the quote of
27 Justice Dickson, as he then was, later Chief
28 Justice, in *Putnam* where he spoke about the
29 importance of public scrutiny and not being in a
30 cocoon. Let me be clear that the Government of
31 Canada is not in any way suggesting that anyone,
32 least itself, or the RCMP or the CBSA, should be
33 in a cocoon, and in fact is open to and welcomes
34 public scrutiny, and numerous steps are taken and
35 are being taken in that regard.

36 The real question is, at what level of
37 government, that is, federal or provincial? The
38 quote that Mr. Jones refers to doesn't answer that
39 question. It says that openness is good, and we
40 fully agree. The question that comes before you
41 now is, what is the constitutional position of the
42 Government of Canada in regards to a provincial
43 commission of inquiry? Now, in this regard --

44 THE COMMISSIONER: I hesitate to interrupt you, but I'd
45 like to be rather specific. What is it exactly in
46 this particular instance, in this hearing, do you
47 suggest I shouldn't inquire into or make

1 recommendations about?

2 MR. TAYLOR: Thank you for that question, because
3 that's exactly where I was going. My read and
4 listening to the submission of Mr. Jones is that
5 he's at the 30,000 foot level. There are
6 principles of law put forward, but what does it
7 mean when you come down to the actual work of this
8 commission of inquiry? We have not seen in the
9 material and evidence that has preceded so far,
10 that there is anything wrong or any venturing into
11 a no-go area in terms of the inquiry that's been
12 conducted. And as I say, we have participated
13 fully with witnesses and so forth in that regard.
14 So we are not raising any complaint.

15 We're here today because, in our submissions
16 filed on the 29th of September, we put down and
17 laid out the point that as a matter of
18 constitutional law it is worth remembering and
19 giving adherence to the parameters that are
20 imposed on a provincial commission of inquiry, and
21 of course the same can be said of a federal
22 commission of inquiry vis-à-vis provincial
23 activities and management, but we're here before a
24 provincial inquiry. We put down that
25 constitutional point so that it is there before
26 you, and you, Mr. Commissioner, had already had to
27 deal with that in your June 9th ruling, and that
28 ruling was affirmed by the Supreme Court of
29 British Columbia by Justice Silverman on the 15th
30 of June.

31 So we put it out there, and then Mr. Jones
32 for the Attorney General of British Columbia has
33 come along and said that he takes issue with some
34 of the things that we are laying out. But he
35 doesn't actually refer, as I hear him, to
36 precisely what it is that he is saying we're
37 trying to prevent you doing. We're not trying to
38 prevent you doing anything in terms of an inquiry.
39 We are saying, Mr. Commissioner, and I think this
40 is what attracted Mr. Jones's attention in
41 particular insofar as the federal government is
42 concerned -- pausing here, I leave it to
43 Superintendent Rideout's counsel to speak to the
44 points raised against him, of course. But in
45 regard to Mr. Jones and the federal government, he
46 has taken up the point and has some concerns about
47 our submission that you ought not and cannot

1 constitutionally make findings of institutional
2 misconduct.

3 We are not saying that you have inquired into
4 anything that would be or could be constituted as
5 a no-go area within federal operation and
6 management. It is the law that that should not be
7 done, but we don't see that line has been crossed.
8 It almost follows, I suppose, that if you haven't
9 gone there, you wouldn't be making findings of
10 institutional misconduct because you haven't
11 inquired into the federal operation and
12 management.

13 But we have put out --

14 THE COMMISSIONER: So you're not suggesting that your
15 concept of management includes the role and
16 decisions of Superintendent Rideout concerning
17 what he allowed to be disclosed to the public?

18 MR. TAYLOR: Our position on that is that
19 Superintendent Rideout as the lead investigator
20 made decisions in that capacity and he made what I
21 will call operational decisions in the course of
22 that investigation, and more specifically as the
23 lead investigator - and he gave evidence on this,
24 of course - he had concerns about what media
25 information had been given out and he put a stop
26 to it, and he decided he wasn't going to put more
27 out.

28 But that's a lead investigator operational
29 sort of decision, and we don't take issue or
30 complain about that.

31 Now, with that, though, that is a decision
32 that was taken by Superintendent Rideout, and
33 Corporal Carr and Sergeant Lemaitre, for their
34 part, have given evidence about some of the
35 decisions and actions they took.

36 THE COMMISSIONER: Well, Mr. Taylor, I'm fully aware of
37 their defence. They say it's a matter of
38 appropriate discretion.

39 MR. TAYLOR: Yes. But in that specific subject area,
40 there's nothing there that would lead to a finding
41 of institutional misconduct to start with. But
42 should I be wrong on that and there be seen to be
43 something there - I can't see that there is - but
44 if somehow the institutional behaviour is engaged
45 as distinct from operational decision making, then
46 we say that as a matter of constitutional law,
47 there is not the capacity in a provincial

1 commissioner to make a finding of institutional
2 misconduct.

3 And in thinking about this, Mr. Commissioner
4 - and it's not a complete parallel by any means -
5 I offer this to you. And that is an analogy to
6 the policy and operational dichotomy decisions
7 that have come from the courts over the years with
8 the *Just* case and so forth. And you ask, what is
9 management or where is the line or how do you find
10 the divide between something that is management or
11 intrusion into management of a federal entity and
12 something that is not? Just as with the policy
13 and operational dichotomy cases, it may be helpful
14 to look at it this way. The higher up that
15 something is being done or decided or a policy
16 taken and the broader or bigger picture that it's
17 a policy or decision about, the more likely that
18 it would be, I submit, perceived as management or
19 administration of the force as distinct from
20 something that's not. And conversely, the lower
21 down and the more transactional an event we're
22 talking about or a decision or a policy or an
23 activity, then the less likely it's going to be a
24 management or operation or administration of the
25 force itself.

26 Now, because the Provincial Attorney has
27 raised an issue of constitutional law, we have
28 concluded that it needs to be responded to and
29 that is why we filed the supplementary material we
30 did. In our view, the Provincial Attorney is
31 seeking to push the boundaries of the
32 constitutional limitations on a provincial
33 commission of inquiry beyond what the law will
34 support. The Attorney General of B.C. says that
35 you, Mr. Commissioner, may follow the facts
36 presented no matter where they lead. And more
37 pointedly, he says that the Commissioner, you Mr.
38 Commissioner, have the constitutional authority to
39 direct an inquiry into the conduct of members - so
40 far so good - of the RCMP and of the institutions
41 themselves.

42 Now, we take some issue with that. We're not
43 suggesting that you have, but we take some issue
44 with the proposition.

45 And then the Provincial Attorney goes on to
46 say, if so doing is related to maintaining
47 confidence in the administration of justice in the

1 province. And he says that at page 6 of his
2 submissions.

3 Now, there's no doubt that the Province has
4 the jurisdiction over the administration of
5 justice and there's no doubt that it's important
6 to maintain public confidence, and the Government
7 of Canada, of course, fully supports that as
8 something for any province to do and fully
9 supports your work in that area. But contrary to
10 what the Provincial Attorney sets out at
11 paragraphs 4 and 34 of his submissions, it is, in
12 our submission, not a correct statement to suggest
13 that a provincial commission is unconstrained, to
14 use his word, from making findings against a
15 federal entity as institutions, or that the
16 Province is constitutionally unfettered, again to
17 use his word, in its ability to inquire into a
18 federal entity.

19 Mr. Commissioner, just on that, I agree with
20 Mr. Jones that "impair" is the test. "Affect" and
21 "impair" have bounced back and forth in the case
22 law over the years, but "impair" is the test. And
23 just on that point, I also note that -- I'm going
24 to come back to this. But Mr. Jones pointed out
25 that the Supreme Court of Canada moved from
26 "affect" to "impair" in the **Bell Canada** case in
27 1988 and that somehow renders **Keable** and **Putnam** no
28 longer good law. I don't think it does, and I'll
29 have some other points on that. But for the
30 moment, the **McKeigan** case, which I've passed up to
31 you, which is a decision of the Supreme Court of
32 Canada that comes out of the reference into the
33 wrongful conviction of Donald Marshall -- that's
34 1989, which is after **Bell**. And the court there
35 specifically refers to **Keable** with approval. But
36 "impair" we accept as the test but it doesn't take
37 away from the **Keable** line of reasoning.

38 Now, it is our submission, as I say, that the
39 Provincial Attorney's contention doesn't reflect
40 the constitutional limitations that are properly
41 in play. It is important and almost trite that
42 each of the provinces and the federal government
43 have to act within their sphere of constitutional
44 operation and authority, and it is also almost
45 trite that in a federal state, such as Canada,
46 there has to be a certain amount of give and take
47 and flexibility, and there will be overlap from

1 time to time.

2 The issue that has been presented before you,
3 that's put to you on this constitutional point,
4 appears to my mind to be something bigger than
5 what's going in this inquiry. It seems to be a
6 federal/provincial debate that is happening over
7 the course of a number of cases.

8 Be that as it may, the law, in our
9 submission, is clear and has long been so, and
10 **Putnam** and before it **Keable** are two leading cases
11 in that regard, and you are well familiar with
12 those, of course. **MacKeigan** essentially says the
13 same thing. And the reference, which I'll leave
14 with you, in **MacKeigan**, by the way, is page 43 in
15 Justice McLachlin, as she then was, now Chief
16 Justice's decision where she referred to **Keable**
17 and said with approval that the actual management
18 and operation of the federal activity or entity in
19 question to describe the constitutional limits on
20 a provincial commission or setting out areas that
21 it cannot venture into.

22 Just pausing there for the moment, Mr.
23 Commissioner, most of the cases seem to refer to
24 administration and management as the area of
25 constitutional impediment, but I do note that in
26 **MacKeigan** it says "management and operation." I
27 don't think that difference in wording matters
28 much for present purposes.

29 We have set out in our submissions just filed
30 at paragraphs 8 to 11 what we say is the
31 applicable law, and before that we set it out at
32 paragraphs 9 to 21 and 200 of the submissions that
33 were filed on September 29th.

34 **Keable** is well known to you. I'm not going
35 to go through it. **Putnam** is also well known to
36 you. I simply want to make one point about that
37 case. The Provincial Attorney says that **Putnam**
38 doesn't apply here because in that case, **Putnam**,
39 the provincial board was tasked with inquiring
40 into the management of a federal entity insofar as
41 it was vested with authority to discipline RCMP
42 members acting under provincial contract.

43 THE COMMISSIONER: Well, he said they were asked to
44 discipline them.

45 MR. TAYLOR: Or discipline, I'm sorry. Discipline,
46 yes. Thank you. And Mr. Jones said, well, **Putnam**
47 is different from what we have here and different

1 from a situation where a piece of advice or an
2 advisory opinion might be given on something to do
3 with a federal entity.

4 Now, again, we don't take issue with the
5 inquiry that's been conducted. It's perfectly
6 fine. But in terms of findings of institutional
7 misconduct, it's not correct, in my submission,
8 for, as I understand Mr. Jones, to suggest that
9 that's just an advisory comment or an advisory
10 opinion. A finding of institutional misconduct
11 would be just that, a finding. It may not have
12 sanctions as such but it is a finding and it does
13 intrude into the area of administration and
14 management of the federal entity if it were to be
15 made against the federal entity itself.

16 Now, Mr. Jones also said - and this is in
17 paragraph 19 and thereabouts of his argument -
18 that, as I read him anyhow, he is suggesting that
19 as Canada does not object to the constitutional
20 authority of the Commission to investigate a
21 member's actions or make individual findings of
22 misconduct, that also somehow takes this out of
23 the *Putnam* situation. We have not objected to
24 findings of institutional misconduct because we
25 believe that constitutionally that is something
26 that can be done here. There are others who are
27 participants before this Commission who have
28 another view, I realize, but that is not our view.

29 Sorry, if I said institutional, I meant
30 individual. You can make findings of individual
31 misconduct against federal employees or others
32 that are before you if the evidence so warrants
33 and if that in doing so would fulfil the mandate
34 that you have. But just because we have accepted
35 that there can be findings of individual
36 misconduct is not to say that that somehow means
37 that we have opened the door to findings of
38 institutional misconduct. The constitutional law
39 is the constitutional law, of course, and nothing
40 we do would change that. And if it's a no-go
41 area, then that's what should be given effect to.

42 Now, let me turn, if I may, to the *Canadian*
43 *Western Bank* and related cases, if I may. I did
44 not bring with me -- actually you do have a book
45 of authorities from Mr. Jones, I believe. I want
46 to take you to a couple of passages in the
47 *Canadian Western Bank* case which he relies upon.

1 I'm not sure which tab that would be in his book.

2 Mr. Jones put considerable weight on this
3 case and says, in short, that even if the
4 Government of Canada is correct that **Putnam** and
5 **Keable** mean that there should not be findings of
6 institutional misconduct made, that somehow the
7 **Canadian Western Bank** case changes all of that.
8 We say it does not. There is no doubt that the
9 **Canadian Western Bank** decision of the Supreme
10 Court of Canada rendered interjurisdictional
11 immunity to a point where it is going to apply
12 less often than more often. The Supreme Court of
13 Canada is preferring to see judges look at pith
14 and substance and paramountcy before getting to
15 interjurisdictional immunity as opposed to going
16 early on into interjurisdictional immunity.

17 However, with all of that,
18 interjurisdictional immunity continues and
19 survives, and the Supreme Court of Canada was
20 clear on that. As Mr. Jones pointed out, the
21 court goes through a -- it divides up
22 interjurisdictional immunity cases over the
23 decades into categories and has a number of them,
24 one of which is management of federal
25 institutions. And as Mr. Jones pointed out, at
26 paragraph 62 in the **Canadian Western Bank** case,
27 which is at page 52, in that rather long paragraph
28 of management of federal institution cases, the
29 court there pointed out -- well, I'll start at the
30 beginning:

31
32 The cases relied upon by the appellants
33 dealing with the management of federal
34 undertakings, including the 1988 trilogy,
35 belong in fact to a broader line of cases
36 dealing with federal institutions, where
37 management has been considered an absolutely
38 indispensable and necessary element of
39 federal jurisdiction. These include --
40

41 And then there's a list. Refers to the **Keable**
42 decision, circumscribing a provincial public
43 enquiry because "no provincial authority may
44 intrude into its management, and that's of course
45 at page 242 in **Keable**, and then refers to the 1981
46 decision in **Putnam**, holding inapplicable a
47 provincial police complaints procedure. It then

1 goes on to point out that RCMP members are
2 required to observe the general law, which of
3 course is true and fairly trite.

4 Now, a further passage in **Canadian Western**
5 **Bank** that's important, that I don't believe Mr.
6 Jones took you to, is at paragraph 77 in **Canadian**
7 **Western Bank**, which is at page 58. In that
8 paragraph, paragraph 77, this is where the court,
9 the majority, all of the justices except Justice
10 Bastarache, say that they think that it is not
11 always appropriate to begin by considering the
12 doctrine of interjurisdictional immunity, and they
13 prefer going to pith and substance and paramountcy
14 in a lot of cases before going to IJI. And then
15 they say this:

16
17 As we have already noted, interjurisdictional
18 immunity is of limited application and should
19 in general be reserved for situations already
20 covered by precedent.

21
22 The point being, Mr. Commissioner, that the court
23 in **Canadian Western Bank** specifically referred to
24 the **Keable** and **Putnam** line of cases and the
25 principle therein, and then moved on to say
26 precedent remains and stands. And notwithstanding
27 Mr. Jones's submissions, it is the case, in my
28 submission, that **Canadian Western Bank** has not
29 taken away from the force and the applicability of
30 **Putnam** and **Keable** before it.

31 I'm referring now to paragraph 25 and
32 thereabouts of the Provincial Attorney's
33 submissions. He takes some issue as to whether
34 the administration and management of the federal
35 entities is at the heart of any organization. We
36 say it is. We probably, as between the Provincial
37 Attorney and ourselves, are in agreement on a lot
38 of the principles and disagreeing perhaps as to
39 exactly what we're talking about.

40 But the administration and management of a
41 federal entity is at the heart of those entities.
42 It's at the heart of any organization and it goes
43 to the core and is the federal interest at stake.
44 And any provincial intrusion into that management
45 or administration would by definition impair the
46 federal entity because the administration and
47 management is something that is reserved

1 exclusively for the federal government. A federal
2 entity is answerable to the federal minister to
3 whom it reports, and the minister in turn to the
4 Prime Minister and the House of Commons, and
5 through that the people of Canada.

6 If you were to have a provincial commission
7 of inquiry or other provincial entity making
8 findings of institutional misconduct that go to
9 the management and administration of the entity,
10 it would strike at that core and be an untoward
11 and impermissible interference.

12 Now, further, Mr. Commissioner, and speaking
13 now to any finding of institutional or other
14 misconduct, what is that? The **Krever Inquiry**
15 decision has said that it is a finding or would be
16 a finding of bad management or improper or
17 unprofessional behaviour, and Mr. Butcher in his
18 submissions last week has references and some
19 submissions about that at paragraph 5 of his
20 submissions, but it comes from **Krever** at paragraph
21 40.

22 And if there were to be a finding of
23 institutional misconduct or, in other words, a
24 finding of bad management or improper or
25 unprofessional behaviour on the part of an
26 institution, it would mean that rather than being
27 accountable to the federal minister that I
28 referred to a few moments ago, a federal entity in
29 its management has somehow become or been made
30 accountable to a provincial emanation.

31 And we say that it would be unprincipled, Mr.
32 Commissioner, to conclude that a provincial
33 commissioner who is constitutionally prevented per
34 **Keable** et cetera from inquiring into the
35 administration and management of a federal entity,
36 that such provincial commissioner could
37 nonetheless engage in an evaluation of a federal
38 entity and make a finding of institutional
39 misconduct.

40 It could also have an untoward effect on
41 future commissions as well if the rules were
42 changed and findings of institutional misconduct
43 against federal entities were made by provincial
44 commissions, and vice versa, when you have
45 provincial entities appearing before federal
46 commissions.

47 I also leave with you, Mr. Commissioner, the

1 thought and submission that, as I've alluded to
2 before, I think there is an inadequate factual
3 record or evidentiary record that would allow you
4 to make any findings of institutional misconduct,
5 because you have - carefully, in our submission -
6 tailored this inquiry into areas that are properly
7 within the terms of your mandate and the
8 constitutional limitations, there hasn't been an
9 inquiry into the administration and management of
10 federal entities. And so you wouldn't have the
11 evidence that would allow you to make findings of
12 institutional misconduct. What you have is the
13 on-the-ground evidence of witnesses at the
14 airport, their supervisors, which includes, in the
15 case of the RCMP, Staff Sergeant Wright and
16 Superintendent Rideout as the lead investigator,
17 and you have the evidence of media officers.

18 You have the evidence of individual actions
19 taken by those people and you can make findings
20 and deal with those as you see fit at an
21 individual level. But you don't have the full
22 institutional picture.

23 Mr. Jones said that there isn't evidence of
24 impairment - and I just want to speak to that for
25 a moment - and because of that, there's no bar
26 against you making findings of institutional
27 misconduct. On that, it is my submission, if we
28 weren't clear before -- let me say that there is
29 no - sorry, my voice is disappearing - there is no
30 requirement for evidence. It necessarily follows
31 that if there is a finding of institutional
32 misconduct, it has impaired the administration and
33 management of the entity in question.

34 Also, contrary to what the Provincial
35 Attorney says, Mr. Commissioner, this is not a
36 situation where federal and provincial interests
37 can operate side by side. There is no room for
38 the provincial entities in the federal boardrooms.
39 Again, the administration and management is an
40 exclusively federal matter insofar as federal
41 entities are concerned.

42 Finally, before I come to a wrap-up
43 conclusion, not only is it beyond the jurisdiction
44 of a provincial inquiry to make findings of
45 institutional misconduct against a federal entity,
46 it is unnecessary for you to do so to fulfil your
47 mandate, in my submission. Again, Mr. Butcher has

1 this in his material filed last week. But
2 findings of misconduct should not be the principal
3 focus of an inquiry. They should only be made
4 where required to carry out the mandate. **Krever**
5 at paragraphs 52 and 53 says that. And here you
6 do not need to make findings of institutional
7 misconduct, in my submission, in order to fully
8 inquire into and make findings and recommendations
9 on the events and circumstances leading to and
10 surrounding Mr. Dziekanski's death.

11 So in conclusion, Mr. Commissioner - and you
12 may be wondering what do you make of all this,
13 what are you supposed to do with it - I don't
14 think it calls for a decision here and now today.

15 THE COMMISSIONER: I think your minister is safe.

16 MR. TAYLOR: Pardon me?

17 THE COMMISSIONER: I think your minister is safe.

18 MR. TAYLOR: Oh, good. Thank you. What we do suggest,
19 Mr. Commissioner, is that you should take all of
20 these submissions into account, as you will, in
21 your deliberations. And we submit that the
22 principles we advocate, which at bottom are the
23 **Keable** and **Putnam** propositions, are the ones that
24 govern. Nothing has changed and there should not
25 be, in this case, findings of institutional
26 misconduct for both constitutional reasons and
27 because there is no evidence that would give a
28 proper factual basis to that and there is no need
29 to do so to fulfil your mandate.

30 Again, I regret my voice. And thank you.

31 MR. JONES: I would just say, for 30 seconds, on the
32 point that my friend raised with respect to
33 paragraph 77 of the **Canadian Western Bank** decision
34 and the value of **Keable** and **Putnam** as precedents,
35 what the court is clearly referring to there is
36 that we would look to these precedents for areas
37 in which the interjurisdictional test might be
38 applied. But that doesn't change the fact that
39 the test itself to be applied in those
40 circumstances has changed. That would be all I'd
41 say in replay.

42 THE COMMISSIONER: Now, I think it is appropriate,
43 then, in writing for Mr. Pringle to make a reply
44 if he wishes. Is Friday soon enough, or shall I
45 make it Thursday?

46 MS. KONYE: Yes, sir. Friday would be fine.

47 THE COMMISSIONER: Friday, all right.

86
Closing Remarks

1 MS. KONYE: Would that be by 4:00 p.m., sir?

2 THE COMMISSIONER: All right.

3 MS. KONYE: Thank you.

4 THE COMMISSIONER: I don't quite see the need to
5 distribute that, but maybe you should in case
6 anybody gets excited.

7 MS. KONYE: Thank you, sir.

8 THE COMMISSIONER: All right, now. I think I promised
9 a reply. Has anybody anything else to say?

10 Well, then, I have some closing remarks. We
11 have now reached the conclusion of these
12 evidentiary hearings, and I'd like to make these
13 few remarks.

14 These hearings began on January the 19th.
15 Since then we have had 66 days of hearings, at
16 which 91 witnesses testified, either personally or
17 by way of teleconference. We have had [190]
18 exhibits, and the written transcripts of
19 witnesses' testimony total more than 5,500 pages.
20 We've had 30, at least, counsel.

21 This has been in every sense a team effort,
22 and I wish to express sincere thanks to Commission
23 counsel, Mr. Vertlieb, to associate Commission
24 counsel, Mr. McGowan, and to Dolores Holmes, as
25 well as to Ms. McKeachie and Mr. Lunn, who
26 supported them, for their efficient conduct of
27 these proceedings and for ensuring that all
28 relevant evidence was brought before the
29 Commission. Indeed, my many thanks extend to Mr.
30 Giles, our registrar, and Dr. Perra and Ms.
31 Stooshnov and the Commission staff who worked in
32 the background to provide administrative support.

33 I am equally grateful to counsel, who
34 represented the 15 individuals and organizations
35 who received participant status for these
36 proceedings. They have all come from busy law
37 practices, yet made generous accommodations to
38 their practices so that this Commission's work
39 could proceed as expeditiously as possible. All
40 counsel acted with professionalism, while at the
41 same time advocating on their clients' behalf,
42 indeed without compromise.

43 My mandate as Commissioner has three aspects:
44 to provide Mr. Dziekanski's family and the public
45 with a complete record of the circumstances of and
46 relating to his death; to make a complete report
47 of the events and circumstances of and relating to

1 Mr. Dziekanski's death, not limited to the actual
2 cause of death; and to make recommendations that I
3 consider necessary and appropriate.

4 When these proceedings began back in January,
5 I spoke directly to Mr. Dziekanski's mother
6 expressing my profound condolences for her loss.
7 I assured her that I and members of our Commission
8 team would make every effort to provide her with a
9 complete record of what happened that night at the
10 Vancouver International Airport in the hope that
11 it will assist her in dealing with enormous grief
12 and finding some closure and peace.

13 I am satisfied that these evidentiary
14 hearings have achieved that purpose. It now
15 becomes my responsibility to take what I have
16 heard, read and seen and prepare my report for the
17 Government.

18 Given the volume of material that must be
19 reviewed and the time required for production of
20 my report, it is my hope to deliver the report to
21 the Attorney General early in 2010.

22 Again, thank you all for your participation
23 and interest in these proceedings. These
24 proceedings are now concluded.

25 THE REGISTRAR: This hearing is now concluded.

26
27 (PROCEEDINGS CONCLUDED)
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