



Commission for Public
Complaints Against the
Royal Canadian Mounted Police

Commission des plaintes
du public contre la
Gendarmerie royale du Canada

**Report Following a Public Interest Investigation into a
Chair-Initiated Complaint Respecting the Death in RCMP
Custody of Mr. Robert Dziekanski**

December 8, 2009

Canada 

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CHAIR'S REPORT ON A PUBLIC INTEREST INVESTIGATION

Introduction¹

Mr. Robert Dziekanski died while in the custody of members of the Royal Canadian Mounted Police (RCMP) in the early morning hours of October 14, 2007, in the international arrivals area of the Vancouver International Airport (YVR). The circumstances leading to the death of Mr. Dziekanski have resulted in great pain and sorrow for his family and in great public interest and concern.

Public comment and discussion focused on the nature of the interaction between Mr. Dziekanski and the RCMP members, including whether the RCMP members adhered to policy and whether that policy was reasonable. The nature of the CEW as a weapon, training provided to RCMP members in its use, and the specific use of the CEW by the responding RCMP members during the YVR incident played a prominent role in the ensuing review by the Commission for Public Complaints Against the RCMP (CPC or Commission).²

I was, and am, of the view that this incident required examination by the Commission, a neutral and dispassionate third party, to address not only the conduct of the RCMP members involved, but also the issues of adherence to and adequacy of existing RCMP policy and training. As Chair of the Commission, therefore, on November 8, 2007, I initiated a complaint to delve into the two aspects of the incident which are within the jurisdiction of the Commission, those being the appropriateness of the response by the RCMP to the complaints concerning Mr. Dziekanski's behaviour at YVR, and the police investigation of the death of Mr. Dziekanski.³

An issue inextricably linked to the incident is the use of a conducted energy weapon (CEW), also known as a TASER®, by an RCMP member during the arrest of Mr. Dziekanski. The CEW is a prohibited firearm pursuant to the regulations under the *Criminal Code* of Canada.⁴ Debate pertaining to the overall appropriateness of the use of CEWs by police had been ongoing for some time prior to the YVR incident (and has been previously commented on by the Commission as indicated below), but this particular use of a CEW focused

¹ This report has been prepared in reliance on the RCMP's assurance that all relevant documentation has been disclosed to the Commission.

² For a discussion of the ongoing concern with respect to the use of CEWs, please see the report *RCMP Use of the Conducted Energy Weapon*, available at www.cpc-cpp.gc.ca/prr/inv/cew-ai/cew_fin_rp-eng.aspx.

³ See **Appendix A** for a copy of the Chair-initiated complaint.

⁴ S.2 & Schedule 1, Regulations Prescribing Certain Firearms and other Weapons, Components and Parts of Weapons, Accessories, Cartridge Magazines, Ammunition and Projectiles as Prohibited or Restricted, SOR/98-462.

considerable attention and scrutiny on appropriate CEW usage and the nature of the CEW as a weapon.

Separately, on November 20, 2007, the Minister of Public Safety, the Honourable Stockwell Day, requested that the Commission ... *review the RCMP's protocols on the use of CEWs and their implementation, including compliance with such protocols and provide an interim report by December 12, 2007.*

Background

The following sets out an overview of the events leading to the death of Mr. Dziekanski and provides a factual backdrop to the incident.

The issues surrounding the incident itself as well as a discussion and analysis of relevant policies, training and other conduct and related issues will be discussed in depth in the body of this report. Additionally, further detail may be found in the appendices attached to this report. While most observers are by now familiar with the incident, a brief summary bears repeating for the purposes of this report.

Mr. Robert Dziekanski, then a 40-year-old Polish immigrant intending to join his mother, Ms. Helena Zofia Cisowski, in Canada died early in the morning of October 14, 2007 at YVR while in the custody of members of the RCMP.

Mr. Dziekanski departed from Katowice, Poland on Saturday, October 13, 2007 at 6:20 a.m. (Central European Time) on Lufthansa Airlines flight 3297. He arrived at 7:55 a.m., approximately one hour and thirty five minutes later, in Frankfurt, Germany (Central European Time).

Mr. Dziekanski departed Frankfurt, Germany on Saturday, October 13, 2007 at 12:15 p.m. (Central European Time) on Condor Air flight 6070. Condor Air flight 6070 arrived in Vancouver at 3:12 p.m. on Saturday, October 13, 2007. This equates to 00:12 a.m. Central European Time on Sunday, October 14, 2007.

By the time he arrived in Vancouver, Mr. Dziekanski had been travelling for a total of almost 18 hours, not including the time since he awoke and travelled to the airport in Katowice, Poland.

Persons coming into Canada pass through a two-stage process when clearing Canada Customs and Immigration requirements. The first is a Primary Inspection Line (PIL), at which the person seeking to enter Canada is asked preliminary questions by an officer of the Canada Border Services Agency (CBSA). If the CBSA officer determines that the traveller requires further review, either from the perspective of Customs or Immigration requirements, that officer will refer the traveller for a secondary inspection. Mr. Dziekanski was referred to the secondary area.

Overall security of the airport is the responsibility of the Vancouver Airport Authority, which employs private security personnel to patrol the airport grounds. Pursuant to agreements involving the Province of British Columbia, the City of Richmond and the Greater Vancouver Airport Authority, the policing of the airport and surrounding City of Richmond is the responsibility of the RCMP pursuant to the terms and conditions of the Municipal Policing Supplemental Agreement for British Columbia – Vancouver International Airport.⁵

Both CBSA and YVR employee witnesses indicated to RCMP investigators that Mr. Dziekanski was perspiring heavily when he appeared at the PIL. No CBSA official nor any YVR employee in the area appears to have taken any action to either assist Mr. Dziekanski or attempt to determine the cause of his physical state at that time. It should be noted that the CBSA has conducted its own investigation with respect to the conduct of its officers. These issues are also within the purview of the Braidwood Commission (explained below).⁶

For reasons unknown, Mr. Dziekanski opted to remain in the secure area of YVR international arrivals for almost six and a half hours. He did not seek assistance from, and he was apparently not noticed by CBSA officers or YVR staff during the intervening time.

At approximately 10:30 p.m. on Saturday, October 13, 2007, Mr. Dziekanski approached the Canada Customs Secondary Inspection point, at which time he received assistance from CBSA officials to locate his baggage in the unclaimed luggage area of the secure facility, cleared Customs and was directed to the Canada Immigration office. He was processed as an immigrant and admitted to Canada at approximately 00:45 a.m. on Sunday, October 14, 2007. At that point he was free to leave the airport and enter Canada. While being processed at the CBSA secondary examination, however, Mr. Dziekanski was provided with several glasses of water by CBSA officials.

Because video surveillance footage, as it existed at that time, did not capture much of this area, for the most part, Mr. Dziekanski's movements cannot be tracked during that six-and-a-half-hour period. The secure area in which Mr. Dziekanski remained for the duration of this time contains luggage carousels, baggage counters and seating areas, as well as the secondary examination areas for Canada Customs and Immigration.

Mr. Dziekanski was noted on YVR video surveillance cameras to have exited the secure area of the international arrivals area, waited for a short time in the public waiting area, then gained re-entry to the secure side of the international arrivals area.

⁵ Clause 2.1 of the Richmond Municipal Police Unit Agreement Supplemental – Vancouver International Airport, dated April 1, 1997.

⁶ See also **Appendices B** and **E** for further details on the Braidwood Commission.

Attached to this report as **Appendix G** is a chart, posted in December 2007 on the website of the Vancouver Airport Authority,⁷ which illustrates the area involved and provides an overview of some of the changes made by the airport in the wake of the death of Mr. Dziekanski. The incident involving Mr. Dziekanski took place at the point leading from the international arrivals passenger service area to the public greeting area.

Other Interests

I note at the outset and recognize that interests and entities in addition to the Commission have an ongoing interest in these issues and events. The Government of British Columbia has created what has commonly been referred to as the Braidwood Inquiry to examine the death of Mr. Dziekanski and its effects.

In addition, the British Columbia Civil Liberties Association (BCCLA) has lodged two complaints with the Commission.⁸

Finally, I will make reference in this report to the Independent Observer Program. This is an initiative arranged between this Commission and the Commanding Officer of RCMP "E" Division (British Columbia), whereby Commission staff are assigned to observe and assess the impartiality (not the adequacy) of RCMP investigations which examined the conduct of RCMP members who are involved in high-profile and serious incidents, such as in-custody deaths.⁹

Summary of Findings and Recommendations

My findings and recommendations, with a commensurate explanation for each, are set out in the body of this report. A summary is located at **Appendix Y**.

⁷ http://www.yvr.ca/authority/newsreleases/news_details.asp?id=528

⁸ See **Appendix B** and **Appendix C** for further details.

⁹ Further detail on the mandate of the Independent Observer during the YVR investigation may be found at **Appendix B**. Further information on the Independent Observer Program and the role and findings of the Independent Observer in this matter may be found at **Appendix F** of this report.

Allegation 1 – RCMP Conduct and the Death of Mr. Dziekanski

Part A

This part of the report will address what I consider to be the primary aspects of the interaction between the responding RCMP members and Mr. Dziekanski. For a more complete discussion of the issues, please see the appendices as referenced in the report.

Chair-Initiated Complaint

As Chair of the Commission, I am authorized pursuant to subsection 45.37(1) of the *Royal Canadian Mounted Police Act* to initiate a complaint for investigation.

The findings and recommendations made by the Commission are not criminal in nature, nor are they intended to convey any aspect of criminal culpability. Although some terms used in this report may concurrently be used in the criminal context, such language is not intended to include any of the requirements of the criminal law with respect to guilt, innocence or the standard of proof.

With respect to the first part of my complaint, the interaction between the RCMP members and Mr. Dziekanski, it is crucial to bear in mind that the Commission focused on the key question of what the responding members knew at the time they attended the scene of the complaint of a man acting erratically. What the members attending actually knew, or should have surmised, is crucial in determining whether they acted appropriately in the circumstances and whether they complied with the law and applicable RCMP policies. Further, attributing knowledge to them that they did not have or could not reasonably have had at the time of the incident is not helpful in assessing the evidence or arriving at reasonable conclusions, findings and recommendations.

RCMP Involvement and Timing of the Response

Four RCMP members were on duty at YVR during the evening of Saturday, October 13, and early hours of Sunday, October 14, 2007. Presumably because the shift had been quiet and no calls for assistance had been received by these members, all four were present at the RCMP sub-office at YVR at the time complaints were received concerning a male acting erratically in the international arrivals area, which was less than two minutes away by car. The complaint was received from RCMP dispatch by Constable Kwesi Millington, one of the four members on duty. As will be discussed below, I have a number of issues with the version of events as presented by the responding members.

The members on duty that evening were:

Corporal Benjamin Robinson – Corporal Robinson was the most senior member present and was also the shift supervisor. At the time of the incident, Corporal Robinson had approximately 11 years of police service and had been posted in several detachments in British Columbia.

Constable Kwesi Millington – Constable Millington had just under two and a half years service, and was the only one of the four who was equipped with a CEW that evening (Model X26E).

Constable Gerry Rundel – Constable Rundel had approximately two years of service and had been posted to the Richmond Detachment since October 2005 and at YVR since approximately October 2006.

Constable Bill Bentley – Constable Bentley had approximately one and a half years of service. He began working at YVR in September 2007.

The three constables had served entirely at the Richmond Detachment.

All four members had received basic training at the RCMP Academy in Regina, Saskatchewan and been posted to “E” Division (British Columbia). This report will delve further into their training and certifications as they become relevant to the analysis.

According to these same members in their testimony before the Braidwood Inquiry, the RCMP sub-detachment at YVR does not have a specific policy with respect to storage, assignment and carrying of a CEW. Evidence indicated that two CEWs were available at YVR to be carried by RCMP members on an “as available” basis, and that although not specifically articulated, it was practice that more senior members signed out and carried the CEWs.

A number of persons were present in the public greeting area of YVR outside the international arrivals exit area. One of those present, Mr. Paul Pritchard, noticed Mr. Dziekanski, who at that time was back on the secure side of the point of egress from International Arrivals.

Following a heated verbal exchange between Mr. Lorne Meltzer (a limousine driver who had come to YVR to pick up a client from an international flight) and Mr. Dziekanski, Mr. Pritchard captured the actions of Mr. Dziekanski in a series of digital video recordings. Mr. Pritchard’s videos provide a more accurate record of the actions of Mr. Dziekanski in the seconds prior to the arrival of the RCMP and the interaction between Mr. Dziekanski and the RCMP, than does the YVR video. Accordingly, Mr. Pritchard’s video has been the primary means of mapping the chronology of the interaction between Mr. Dziekanski and the four RCMP members who attended.

Interaction Between RCMP Members and Mr. Dziekanski

As a result of a series of 911 calls, the four RCMP members on duty at YVR responded to complaints of a man (now known to be Mr. Dziekanski) acting erratically in the international arrivals area. The four travelled via separate vehicles, but all arrived at approximately the same time. In addition to the initial dispatch, the members received updating information en route via police radio.

The radio traffic between the YVR members and RCMP dispatch confirms that at the time of attending the exit from the international arrivals secure doors, the four RCMP members had been advised that a male of approximately 50 years of age (Mr. Dziekanski was later found to be 40 years of age), who was thought to be intoxicated (later found not to be true), was acting erratically, throwing luggage around and throwing chairs through windows (later found not to be true). The male was further described as having dark hair and was wearing a white jacket.

As the four members arrived, it was pointed out to them by YVR security that Mr. Dziekanski was the person involved in the erratic behaviour and that he did not speak English. As the members entered the secure area, they would have been able to view the broken computer on the floor as well as a small table broken against the glass (no glass was actually broken).

The RCMP members had no way of knowing that Mr. Dziekanski had been travelling for many hours, that he apparently had consumed no food and had very little fluids to drink, nor could they be expected to gauge the level of Mr. Dziekanski's state of mind or his possible frustration at not meeting his mother as he had no doubt anticipated would happen when he arrived in Canada.

The Pritchard video and witness statements confirm that upon arrival, the RCMP members received basic information from YVR Security and other witnesses as they continued to walk toward Mr. Dziekanski and hopped over a small retaining barrier. The members went directly to Mr. Dziekanski who was standing just inside the doors (on the secure side) of the International Arrivals exit area.

All four members approached Mr. Dziekanski. None stopped to meaningfully obtain details or confirm from witnesses present the information received via police radio with respect to the nature of Mr. Dziekanski's actions (such as the allegation that Mr. Dziekanski had thrown furniture through a window—which was later found not to be true—or the degree of violence involved). One might speculate that had one or two members taken the time to do so while the remaining members approached Mr. Dziekanski to monitor for further outbursts, it is possible that the dynamic of the interaction and final outcome would have been entirely different.

Within twenty-five seconds after the interaction began, a decision was made by Constable Kwesi Millington to deploy the conducted energy weapon (CEW) carried by him during that shift. Corporal Robinson appeared to have come to a similar determination at the same time as Constable Millington, in that Corporal Robinson indicated that he instructed Constable Millington to deploy the CEW simultaneously with Constable Millington deploying it on his own. Following the deployment and multiple cycling of the CEW on Mr. Dziekanski and a scuffle involving all four RCMP members, Mr. Dziekanski was subdued and handcuffed. He died shortly thereafter while under the control of the RCMP members.

Further information may be found as follows:

- Chronology of Events – **Appendix H**
- Actions of Mr. Dziekanski – **Appendix I**
- Pritchard Videos – **Appendix J**

RCMP Members' Response to YVR Complaints

Comments with respect to the response by the RCMP members are predicated on policy in effect at the time of the YVR incident.¹⁰ In addition, the *Criminal Code* of Canada authorizes a police officer who is acting in the administration or enforcement of the law to use as much force as is necessary for that purpose.

As noted above, the members were responding to a series of complaints of a man acting erratically. Although they had no direct confirmation, they were advised by RCMP dispatch that there could be alcohol or drugs involved.¹¹ As a result, it was incumbent on the members to consider all relevant use of force options available to them, including the use of no physical force at all.

The members were in RCMP uniform and all carried their issued items of kit, including OC spray, an ASP (collapsible) baton,¹² handcuffs and a sidearm. The CEW is not an issue item of kit, but is signed out by a member at the beginning of, or during, his or her shift. Constable Millington was the only member who carried a CEW at that time.

¹⁰ The authority for police to use force flows from section 25 of the *Criminal Code* of Canada, which authorizes a police officer who is acting in the administration or enforcement of the law to use as much force as is necessary for that purpose. That authority is circumscribed by section 26, which stipulates that the person who exercises such force is criminally responsible for any excess force used according to the nature and quality of the act that constitutes the excess. Section 27 provides that a person is justified in using as much force as is reasonably necessary to prevent the commission of an offence for which a person may be arrested without warrant, or that would be likely to cause immediate and serious injury to the person or property of anyone, or to prevent the commission of such an offence.

¹¹ See Chronology of Events.

¹² All references in this report to the baton are to the ASP baton.

Since the complaint had been taken by Constable Millington, he may have believed that he was responsible for the file. From a response management point of view, however, Corporal Robinson was the senior member present, had the most experience and he, therefore, had overall responsibility with respect to the RCMP response.

Notwithstanding Constable Millington's testimony during the Braidwood Inquiry that he believed he was in charge of the incident, none of the RCMP members appears to have been in charge and taken control to coordinate the actions of the other responding members.¹³ As shift supervisor, and given the relative levels of policing experience, this duty should have fallen to Corporal Robinson.

As the RCMP members approached the scene, Constable Bentley was heard to ask Constable Millington whether he had a CEW with him. Constable Millington responded in the affirmative.

Although combative behaviour and corresponding use of force options were contemplated by the responding members, I am not aware of any evidence to suggest that the actual use of the CEW was considered prior to arrival by the members. Furthermore, no operational or situational planning appears to have taken place prior to or during the incident.

Suggestions have been offered that Superintendent Wayne Rideout, then the Officer in Charge of the Integrated Homicide Investigation Team (IHIT), knew of conversations among the responding members to imply that the responding members had formulated a plan to deploy the CEW prior to arriving and interacting with Mr. Dziekanski. These suggestions gained further momentum following the disclosure of an e-mail written by Chief Superintendent Richard Bent, then RCMP Deputy Criminal Operations Officer in British Columbia, in which he stated that he had spoken with "Wayne" (Superintendent Rideout) and that Superintendent Rideout had stated that the responding members had formulated such a plan. The Commission has interviewed Superintendent Rideout, who categorically denied having such knowledge or passing such information on to Chief Superintendent Bent.

The Pritchard video of the event indicates that the members initially attempted to placate Mr. Dziekanski and that for a few seconds he stood with his hands at his sides looking at the members. He motioned to his luggage, but was directed toward the counter area a few metres away by Corporal Robinson. At that point, Mr. Dziekanski put his arms in the air and moved to the counter area.¹⁴

¹³ In evidence before the Braidwood Inquiry, both Constables Rundel and Bentley stated that they saw their roles as support to Constable Millington as the lead investigator. Constable Bentley stated that Corporal Robinson was present as their supervisor.

¹⁴ Constable Millington said in his evidence during the Braidwood Inquiry that he was not aware that Corporal Robinson had directed Mr. Dziekanski toward the counter area.

The members then took up positions around Mr. Dziekanski in an arc of approximately 180 degrees (known as tactical positioning) intended, according to Corporal Robinson's statement, to preclude Mr. Dziekanski from moving to another area of the airport. Although not articulated, presumably the purpose of the tactical positioning was to ensure that Mr. Dziekanski could only focus on engaging one member at a time if he chose to resort to violence and to provide a protective distance (known as a reactionary gap)¹⁵ to allow the members to react in the event that Mr. Dziekanski did attack them.

At approximately the same time, the members displayed differing responses to the same threat cues purportedly displayed by Mr. Dziekanski. As discussed, Corporal Robinson indicated in his statement, and confirmed during testimony at the Braidwood Inquiry, that he was about to order Constable Millington to deploy the CEW as Constable Millington deployed it. Corporal Robinson unholstered his ASP baton, but did not extend it. Constable Bentley unholstered his ASP baton and did extend it. Constable Rundel took no overt defensive action. Constable Rundel did not indicate that he was aware that the CEW was about to be deployed, but he did state that through his training he anticipated the use of the CEW. These differing reactions confirm to me that Corporal Robinson ought to have taken control to ensure a coordinated approach to Mr. Dziekanski.

Within approximately four seconds of the members positioning themselves, Constable Millington deployed the CEW. Medical evidence noted only one mark on Mr. Dziekanski's body consistent with being struck by a CEW probe. The second probe struck the lower part of Mr. Dziekanski's shirt. The probe likely made intermittent contact with Mr. Dziekanski when his shirt moved,¹⁶ resulting in his being subjected to an intermittent electrical current. Constable Millington noted that the CEW emitted an intermittent "clacking" sound. According to RCMP CEW training, this sound indicates that the circuit is not complete and that contact is not being made. Corporal Robinson said that he told Constable Millington to *hit him again* (i.e. cycle the CEW again) because the CEW was *having no effect*.

RCMP Operational policy in effect at the time required that, when possible, members are to give the warning *Police, stop or you will be hit with 50,000 volts of electricity!*¹⁷ This warning, or challenge as it is called in RCMP policy, was not given by Constable Millington. He was not asked by the IHIT investigators about the failure to warn when he gave his statements post-event. However, in his CEW Usage Report (Form 3996), Constable Millington indicated that the warning was not given. The reason cited was:

¹⁵ See definition found in **Appendix O**.

¹⁶ The Pritchard video indicates that Mr. Dziekanski's shirt was not tucked into his trousers, but was hanging loosely.

¹⁷ OM 17.2.2.1.

Member told male to stop moving and put hands on desk nearby. The male did not understand English so verbal communication was difficult.

During his testimony at the Braidwood Inquiry, Constable Millington stated that he felt he did not have time to issue the challenge to Mr. Dziekanski before he deployed the CEW.

Having viewed the video of the event, I see no reason why the warning could not have been given. The members had surrounded Mr. Dziekanski by that time and although one senses from the video that steps to address the situation were about to be taken imminently, Constable Millington had time to issue the challenge prior to discharging the CEW.

As noted, prior to the discharge of the CEW, time was also available for the members to confirm events with witnesses, consider tactical repositioning or to attempt other means of de-escalating the situation, such as continuing to use hand gestures and presenting a non-threatening demeanour to Mr. Dziekanski. Unfortunately, the CEW was discharged before any meaningful de-escalation was attempted.

In the final analysis no one will ever know whether it would ultimately have been necessary to physically subdue Mr. Dziekanski had other methods failed. The point, however, is that no other methods of de-escalation were attempted to defuse or resolve the situation with less risk of injury to all involved.

I accept that Corporal Robinson did not initially instruct Constable Millington to deploy the CEW and that Constable Millington did so on his own initiative. The question remaining is whether the deployment of the CEW was reasonable in the circumstances.

The members had been advised as they entered the area that Mr. Dziekanski did not speak English. It would be reasonable to assume that Mr. Dziekanski did not understand them, but given that he was about to be struck by the CEW, Constable Millington should have issued the challenge in any event. No doubt situations have occurred in which an individual feigns an inability to speak a language in order to obtain an advantage. Issuing the challenge would have ensured that Mr. Dziekanski, if he actually did understand English, was aware of what was about to happen. The tone of voice and body posture would also have alerted Mr. Dziekanski to the fact that escalation of force by the police was imminent.

The Commission has asked the RCMP to provide information on the training received by its members in dealing with persons who cannot understand or meaningfully communicate with RCMP members. I am advised that no such training is provided.

Further, issuing the warning would have alerted the other responding members that the CEW was about to be deployed. A warning of this nature, when tactically feasible, is supported by the "E" Division Use of Force Coordinator, Corporal Gregg Gillis. As noted, at least one of the members indicated that he did not know the CEW was about to be deployed until he heard it discharge. A warning in this circumstance would, therefore, have served two purposes:

1. It would have alerted the other members to ensure that no one moved in to engage Mr. Dziekanski just as Constable Millington fired the CEW, thereby possibly obscuring the target or being struck by the probes themselves. Shouting "TASER! TASER!" prior to discharging the weapon is recommended as a tactical consideration in the TASER International training course, and
2. It would have drawn Mr. Dziekanski's attention to the fact that a weapon was pointed at him and would have confirmed to Constable Millington and the others present that Mr. Dziekanski was aware of the presence of a weapon (whether or not he appreciated it was a CEW). From my viewing of the Pritchard video, I do not believe that Mr. Dziekanski actually looked at Constable Millington before the CEW was deployed. The understanding that a weapon was pointed at him may have caused the situation to de-escalate, thereby avoiding the necessity of deployment. Conversely, had the CEW been ultimately necessary, at a minimum other means of resolution would have been attempted.

Another related aspect of the deployment of the CEW with which I have concern is the fact that the members did not speak with each other during the incident. Constable Bentley stated that he was unaware of the CEW until Constable Millington discharged it. At no time did Constable Millington indicate to the other members present that he was unholstering the weapon or that he actually intended to deploy it. As I have indicated above with respect to the failure to warn the other members present, nothing prevented Constable Millington from unholstering the weapon and advising the other members that he had done so, then while covering Mr. Dziekanski with the CEW, either obtaining their input as to how best to handle the situation (given his limited operational experience), or advising the others of his intention to deploy the CEW.

Various operational rationales have been advanced as to why Constable Millington could not take additional time to assess the situation. These include the facts that Mr. Dziekanski had in his hand a weapon (an open stapler) and that the target Mr. Dziekanski presented to Constable Millington might be lost if Mr. Dziekanski lunged at one of the responding members. I find it difficult to accept these as being realistic in the circumstances.

I appreciate that the events as they unfolded in real time were stressful for all involved and I do not expect police officers to engage in communal decisions

when the window to do so is very short and the circumstances dictate an immediate response. That said, Mr. Dziekanski was fully surrounded in a confined space. Had Constable Millington taken even a few more seconds to take stock of the available options, the dynamic may have changed and resulted in a much different outcome.

Finding

The RCMP members involved in the arrest of Mr. Dziekanski were in the lawful execution of their respective duties and were acting under appropriate legal authority.

Finding

In light of the information possessed by the RCMP members responding, the decision to approach Mr. Dziekanski to deal with the complaints was not unreasonable. At any point a member of the travelling public or an employee at YVR could have happened upon Mr. Dziekanski. As evidenced by the multiple calls to 911, it was incumbent upon the RCMP members to ensure a safe environment for the public and employees using the airport facility and to halt the disturbance being caused by Mr. Dziekanski.

Finding

To ensure a coordinated approach to Mr. Dziekanski, Corporal Robinson should have taken control and directed the other responding members to ensure that each was aware of the intended response and to ensure that each communicated with the others as the events unfolded.

Finding

Prior to deploying the CEW, Constable Millington should have issued the required warning/challenge to Mr. Dziekanski as required by RCMP policy, notwithstanding the fact that Mr. Dziekanski appeared not to understand the English language.

Finding

Because no significant attempts were made by the RCMP members present to communicate with Mr. Dziekanski, to obtain clarification of information pertaining to Mr. Dziekanski's situation or to communicate among themselves, deployment of the CEW by Constable Millington was premature and was not appropriate in the circumstances.

Recommendation

The RCMP should consider designing and implementing training for its members in techniques to communicate with persons who cannot verbally communicate with them.

Discharge and Cycling of the CEW

Corporal Robinson¹⁸ and Constable Millington appear to have been of the same mind with respect to the use of the CEW in these circumstances. During the Braidwood Inquiry, Constable Millington indicated that even though Corporal Robinson directed him to cycle the CEW subsequent to the initial deployment, the decision to cycle it again was his.

The video of the incident demonstrates that upon being struck by the probes, Mr. Dziekanski turned and stepped to his right. An open stapler can be seen in his right hand as he raised his arms. The members present characterized his actions as attempting to “fight through” the electrical current. They said they had seen others attempting to fight off the CEW during CEW training sessions. As the first cycle of the CEW ended, Mr. Dziekanski fell to the floor, obviously writhing in pain.

Following the death of Mr. Dziekanski, data from the CEW was downloaded.¹⁹ The download report noted the following CEW activations:

1. i. 2007-10-13 19:55:33 – one-second [spark test²⁰];
- ii. 2007-10-14 01:23:49 – six-second activation;
- iii. 2007-10-14 01:23:55 – five-second activation;
- iv. 2007-10-14 01:24:12 – five-second activation;
- v. 2007-10-14 01:24:25 – nine-second activation; and
- vi. 2007-10-14 01:24:32 – six-second activation.

The time indicated in the download report indicates the end of a firing cycle, not the beginning.

According to the report, the total cycle time with respect to Mr. Dziekanski was 31 seconds, but the amount of time the current actually made contact with Mr. Dziekanski could not be established. Although the cycle may be interrupted by the operator, the TASER[®] X26E is programmed such that the CEW produces current for five seconds after it is discharged. At that point the current stops flowing, unless the trigger is pulled by the operator. I note that information

¹⁸ Corporal Robinson’s CEW certification had expired at the time of the incident and he was slated to be re-certified in late 2007.

¹⁹ Post-incident the data contained in the Model X26E Taser[®] used by Constable Millington was downloaded by Constable Craig Baltzer of the Delta Police Department, Delta, British Columbia. On October 24, 2007, at the time of the download, Constable Baltzer was a 21-year member of the Delta Police Department and had been a Certified Firearms Trainer for the Department since 1993, full time since 2001. In that time Constable Baltzer had also been certified as a Provincial Use of Force Instructor and had been certified by TASER International as a Master Taser[®] Instructor and Taser[®] Armorer.

²⁰ OM 17.7.7.2.2.2 indicates that *[a] spark test is the only approved and reliable method to assess the state of the NiMH batteries and the functionality of the CEW.*

adduced during the Braidwood Inquiry indicated that at 10 milliseconds into the next second, the CEW rounds up to the nearest second. Constable Craig Baltzer, the Delta Police member who performed the download of the CEW involved in the Dziekanski incident was not aware of the rounding characteristics of TASER[®] products.

With respect to multiple cycles of the CEW, the Incident Management/Intervention Model (IM/IM)²¹ cautions against injury to the subject. This is supported by the RCMP Operational Manual, which also cautions that the subject may be injured by multiple cycles of the CEW.

The Pritchard video, when mapped against the CEW download report shows that Mr. Dziekanski had fallen to the floor and was writhing in pain at the termination of the first five-second CEW deployment. This begs the question of why additional CEW cycles were necessary. RCMP policy stipulates that control of a subject should be taken at the earliest opportunity after CEW deployment in probe mode.²²

Following the first CEW discharge, the members can be seen standing around Mr. Dziekanski. After a one-second pause, the CEW is cycled a second time for five seconds. It is not until the termination of the second deployment that Corporal Robinson can be seen as the first member to move in to subdue Mr. Dziekanski. At this point, Mr. Dziekanski had been subjected to a total of approximately 10 seconds of intense pain with no attempt made by police to restrain him.

After the second deployment, the responding RCMP members began to struggle with Mr. Dziekanski. Instead of waiting until he observed the members attempting to subdue Mr. Dziekanski to determine whether a third deployment was necessary, Constable Millington, after a two-second delay, again deployed the CEW for a five-second cycle. This, as I view the Pritchard video, appears to be in response to Corporal Robinson's direction to *Hit him again*.

On completion of the third deployment in probe mode, Constable Millington removed the cartridge from the CEW and, four seconds later, deployed the CEW in push stun mode against Mr. Dziekanski's back for nine seconds. As noted previously, according to the RCMP Operational Manual as it existed at the time of the incident, in push stun mode the CEW is a pain compliance device.²³

After a one-second delay, Constable Millington again deployed the CEW against Mr. Dziekanski in push stun mode for a further six seconds.

²¹ Described further below and at **Appendix U**.

²² OM 17.7.3.1.4.

²³ OM 17.7.3.2.3.

I note that in his testimony during the Braidwood Inquiry, Constable Millington indicated that although the trigger of the CEW may have been pulled, contact was not made with Mr. Dziekanski for the duration of the 31 seconds of cycling.

In terms of the number of deployments/cycling of the CEW (as noted above, five in total), and in light of the above-mentioned danger to the subject from multiple deployments as identified in the RCMP policy,²⁴ once he decided to deploy the CEW it was incumbent on Constable Millington to deploy the weapon the least number of times necessary to control Mr. Dziekanski. Mr. Dziekanski was on the floor writhing in pain at the end of the first deployment, yet Constable Millington opted to cycle the CEW a second time before any attempt was made to control Mr. Dziekanski or to wait until his reaction to the first deployment was observed. Had Mr. Dziekanski been subdued and arrested after the first deployment, further deployments would obviously have been unnecessary.

As Constable Millington did not conduct an adequate assessment of the first deployment, contrary to the CAPRA model,²⁵ whether further cycling was actually necessary cannot be known.

The deployment and further cycling of the CEW, particularly those in push stun mode, were up to nine seconds in length. This, in my view, was an inappropriate use of the CEW. Of a total of 49 seconds from the time Constable Millington first deployed the CEW, it was activated for 31 seconds. Although Constable Millington has indicated that he heard an intermittent clacking sound in probe mode (indicating that contact was not being made with Mr. Dziekanski for part of that time), no significant effort was made to determine the effect the CEW was having on Mr. Dziekanski.²⁶ This is true both with respect to his physical well-being and whether he was prepared to stop struggling and allow himself to be arrested. The use of the CEW in those circumstances, therefore, became inappropriate.

In testimony during the Braidwood Inquiry, Corporal Gillis (an RCMP use of force expert) testified that the neuromuscular stimulus inflicted by the use of the CEW in either probe or push stun mode against Mr. Dziekanski would not have caused

²⁴ OM 17.7.3.1.3.

²⁵ The model used by the RCMP to train its members in the analysis of risk during police response situations. CAPRA is an acronym standing for the stages included in this problem-solving model: Client/Acquiring and Analysing Information/Partnerships/Response/Assessment and Continuous Improvement. The CAPRA model requires members to consider all relevant situational factors when determining what actions to take including whether to use force and, if so, the necessary amount of force to use under the circumstances. Situational factors are as varied as the incidents to which they apply and may include the number of subjects being dealt with, their size and demeanour, whether they are armed, the number of members, the lighting, environmental conditions, etc. The CAPRA model is explained further at **Appendix O – Use of Force Report**.

²⁶ The autopsy of Mr. Dziekanski noted one mark on his chest consistent with a CEW probe. The other probe was found lodged in Mr. Dziekanski's shirt, which could account for the intermittent contact as the shirt moved closer to or further from his body.

him to pull his arms into his chest and lock them to avoid being handcuffed because the current from the CEW removes the ability of the individual to *work all the various motor and ligament functions* required to carry out such a motion. Despite these assertions, in my view, whether Mr. Dziekanski appeared to struggle because his muscular contractions made it impossible for him to allow his arms to be pulled back or because he did not wish to allow it cannot be known.

I note that after the final cycle of the CEW, the struggle continued for approximately one more minute before Mr. Dziekanski was finally handcuffed. Constable Millington has not explained why he terminated the CEW cycling when he did and why he did not find it necessary to continue to deploy the CEW against Mr. Dziekanski during the balance of the struggle.

Obviously, Mr. Dziekanski is unable to inform us as to whether he continued to struggle to avoid being handcuffed, or in desperation to be able to breathe.

Finding

Constable Millington cycled the CEW multiple times against Mr. Dziekanski when those subsequent cycles were not known by him to be necessary for the control of Mr. Dziekanski.

Finding

The multiple cycles of the CEW against Mr. Dziekanski when no significant effort was made to determine the effect of the CEW on Mr. Dziekanski was an inappropriate use of the CEW.

Provision of First Aid

Statements indicate that until the time shortly before the Richmond Fire Rescue Department and BC Ambulance personnel arrived, Mr. Dziekanski was breathing and had a pulse. In his statement to IHIT, Constable Millington stated that Mr. Dziekanski *was put into handcuffs and members waited for EHS members to arrive to examine the male.*

Video of the event indicates that Corporal Robinson did stay with Mr. Dziekanski and, along with Mr. Trevor Enchelmaier (a supervisor for Securigard, a private security firm at YVR), monitored Mr. Dziekanski who, by both of their accounts, was breathing and had a pulse. In such a case, and given that no other wounds required immediate first aid, the appropriate course would have been to monitor Mr. Dziekanski for breathing and heart rate.²⁷

²⁷The City of Richmond, BC Web page on medical emergencies recommends performing CPR only if the victim is unconscious, is not breathing and has no signs of circulation. See <http://www.richmond.ca/safety/firerescue/medical.htm>.

Constable Bentley can be seen in the Pritchard post-incident video, but provided no first aid to Mr. Dziekanski. The other two constables present did not monitor Mr. Dziekanski. Constable Rundel was dispatched by Corporal Robinson to obtain a set of “hobbles”²⁸ from the police car in the event that Mr. Dziekanski regained consciousness and became violent again. Constable Millington can be seen to roll up the electrical wires from the CEW on the Pritchard post-incident video.

Mr. Enchelmaier took Mr. Dziekanski’s carotid pulse at least three times prior to the arrival of Richmond Fire Department and BC Ambulance paramedic personnel; he said the pulse became progressively weaker. According to Mr. Enchelmaier’s statement, the reason he did so was because none of the RCMP members opted to take off their gloves to check Mr. Dziekanski’s pulse. Mr. Enchelmaier also said that he spent time ensuring that his staff were performing their roles effectively; therefore, he may have missed or does not recall Corporal Robinson’s actions. Corporal Robinson testified during the Braidwood Inquiry that he did take his glove off to check Mr. Dziekanski’s pulse. The Pritchard video shows Corporal Robinson taking his glove off and a motion that is consistent with him taking a pulse.

The fact that Corporal Robinson took off his glove and checked the pulse does not constitute the provision of adequate care to Mr. Dziekanski. Had Corporal Robinson taken the pulse himself on a regular basis he would have recognized that Mr. Dziekanski’s pulse and breathing were becoming weaker and less regular and this information would have been relayed to the Richmond Fire and BC Ambulance personnel by police radio prior to their arrival.

Corporal Robinson also testified that he was not aware of medical equipment, such as a defibrillator, being available at YVR. When asked if he had requested emergency medical personnel available at YVR, his evidence was that the role of the police is to request medical assistance when it is required, but not to request it from a specific location.

Notwithstanding the fact that Mr. Enchelmaier opted to assist, it was the RCMP members on scene who had primary responsibility for Mr Dziekanski’s welfare until that responsibility was ceded to the fire and ambulance personnel who attended.²⁹ Members of the RCMP had arrested and placed Mr. Dziekanski in handcuffs and, given the duty of care owed to persons in custody, it was their responsibility to physically monitor and see to the welfare of Mr. Dziekanski. It should have been RCMP members, therefore, who actually monitored Mr. Dziekanski pending the arrival of qualified medical personnel.

²⁸ Hobbles are a means of tethering the feet and hands of subjects who are extremely violent.

²⁹ BC Ambulance personnel testified at the Braidwood Inquiry that medical responsibility for a patient is transferred from the police to fire and/or ambulance personnel who attend. Testimony of Mike Egli, March 26, 2009, p. 84.

According to their statements and testimony during the Braidwood Inquiry, none of the responding RCMP members indicated that they had asked Mr. Enchelmaier about his first aid qualifications at the time of his intervention. I have no reason to believe that Mr. Enchelmaier's first aid qualifications were previously known to the RCMP members. The RCMP members, therefore, had no way of knowing whether Mr. Enchelmaier was qualified in first aid or whether his involvement would exacerbate an already serious situation.

Mr. Enchelmaier was certified in first aid and stated that Mr. Dziekanski was breathing and (initially) had a strong pulse. According to Corporal Robinson, Mr. Enchelmaier indicated that Mr. Dziekanski was still breathing shortly before the arrival of the emergency medical personnel. Mr. Enchelmaier confirmed making that statement and indicated to an IHIT investigator that when the Richmond Fire personnel arrived and he turned Mr. Dziekanski over to them, Mr. Dziekanski was breathing and had a pulse, albeit the pulse rate was slower than it had been previously.

Testimony from Richmond Fire personnel during the Braidwood Inquiry was critical of the level of first aid provided by the police. BC Ambulance personnel, who arrived within minutes of Richmond Fire personnel, were critical of the failure of Richmond Fire personnel to provide Mr. Dziekanski with appropriate first aid, including the failure to administer oxygen to him. A Richmond firefighter at the scene testified that BC Ambulance personnel arrived just as the initial assessment of Mr. Dziekanski was being completed.

Finding

Corporal Robinson did not adequately monitor Mr. Dziekanski's breathing and heart rate.

Finding

Because Corporal Robinson did not know the qualifications of Mr. Enchelmaier, he should not have allowed him to provide first aid or actively monitor Mr. Dziekanski's condition. That task should have been performed by the RCMP members themselves. Corporal Robinson, therefore, failed to provide adequate medical care to Mr. Dziekanski.

Recommendation

RCMP detachment familiarization procedures should include a detailed review of available medical facilities and equipment.

Removal of Handcuffs

The initial call from the involved police officers for medical support was for a routine response (Code 1), but it was quickly upgraded to Code 3 (emergency response) when Mr. Dziekanski became unconscious. According to witness statements and the statements of the responding members, prior to the arrival of

fire and ambulance personnel, Mr. Dziekanski was turning blue. That Mr. Dziekanski was in distress should have been increasingly obvious to the attending members.

Richmond Fire personnel indicated that they requested several times that the handcuffs be removed, as did BC Ambulance personnel upon their arrival. The reason cited by RCMP members for not removing the handcuffs was a concern for the safety of those present in the event Mr. Dziekanski was being deceptive or regained consciousness and became combative. I am aware of no evidence to support the suspicion that Mr. Dziekanski was feigning or being deceptive. On the contrary, evidence indicates that Mr. Dziekanski was seen to be turning blue as the arrest was being completed. Corporal Robinson who, in his statement to IHIT investigators said that he noticed Mr. Dziekanski's ear turning blue *during the struggle* recanted during his Braidwood Inquiry testimony and said that he noticed the ear after Mr. Dziekanski was handcuffed. Constable Rundel did not recall the colour change while Constables Bentley and Millington also swore that the colour change to blue occurred after Mr. Dziekanski was handcuffed.

Had the responding RCMP members truly believed that Mr. Dziekanski was being deceptive or just temporarily unconscious and that he would revive and again become combative, as opposed to having a real concern for the safety of Mr. Dziekanski after his arrest, there would have been no need to upgrade the ambulance response call to Code 3.³⁰

To argue that for safety reasons handcuffs should not have been removed at that point is indefensible. Corporal Robinson indicated in his statement to IHIT that Mr. Dziekanski began to turn blue during the struggle as he was being arrested; therefore, the members should have had a heightened awareness of the possibility that Mr. Dziekanski may have been experiencing actual distress as opposed to being deceptive. In addition, at that point there were four RCMP members, as well as several Richmond firefighters and YVR security personnel present. Had Mr. Dziekanski recovered and become violent, more than ample personnel were present to deal with the situation.

I temper that remark with an understanding that the subject members had just been involved in a hard struggle to control Mr. Dziekanski. In the heat of the moment, it may be understandable why the members would have subjective concerns with respect to the removal of handcuffs. During the intervening few minutes and the arrival of the fire and ambulance personnel, the members should have recognized that any risk posed by Mr. Dziekanski had been mitigated by his physical exhaustion and clearly waning state of consciousness.

Further, I am aware of the testimony of BC Ambulance personnel during the Braidwood Inquiry to the effect that the conduct of the police in this incident was

³⁰ "Code 3" is a term generally meaning for emergency personnel to respond at once with lights and siren.

typical of what they would have expected, and that the fact that Mr. Dziekanski continued to be handcuffed did not preclude the provision of medical aid to him, although such medical assistance would have been facilitated by the removal of the handcuffs.

Finding

The handcuffs should have been removed from Mr. Dziekanski when the members recognized that he was unconscious and in distress and no immediate threat to the members was perceived. At a minimum, they should have been removed immediately upon the initial request of medical personnel.

Assessment of Members' Conduct and Credibility

The IM/IM stipulates that risk assessment is a continuous activity throughout any incident:

Since situations evolve, you should be continually assessing risk. The behaviours you are responding to and situational circumstances may change. The reasonableness of the option selected, therefore, may change at any point in the intervention.

As noted in the discussion on the CAPRA model, the first stage of risk assessment identified in the IM/IM is Information Gathering. Information from complainants had been gathered and passed to the responding members via police radio. Some of that information was passed to RCMP dispatch via YVR operations personnel who themselves were passing second-hand information to RCMP dispatch. The responding RCMP members should have known that the information as passed to them may or may not have been correct and required verification/assessment once they arrived at the scene. This is especially true given that four members attended. This provided sufficient numbers to control the scene, obtain the necessary information from bystanders and observe Mr. Dziekanski.

Mr. Dziekanski was contained in the secure area of the airport. The responding members knew he had been at that location for some time and he gave no cue that he was about to evade the police or run. As they approached, Mr. Dziekanski shouted *Police!* several times in Polish, and stood his ground. I see no reason why the members could not have taken steps to observe Mr. Dziekanski and contain him, and taken some time to obtain some background information from the nearby witnesses.

I note that at least one YVR security employee, in uniform, had been present for a number of minutes prior to the arrival of the RCMP, but Mr. Dziekanski made no move to attack him, evade him or to move to another location away from him. I do not believe that the mere presence of the RCMP members would have

exacerbated the situation and required them to take immediate action to approach and arrest Mr. Dziekanski.

In an RCMP training video, the protocol for dealing with persons who are displaying erratic behaviour is demonstrated. The video refers to excited delirium (a term now expunged from the RCMP lexicon); however, the concepts are equally applicable to any situation in which an individual is demonstrating severely agitated behaviour. In the training video, RCMP members are seen responding to a situation in which an individual is clearly disturbed. One member takes control and directs the other two responding members as to how they will approach the subject and how they will effect the arrest (in this video example of scene management and interaction with the subject, the CEW is deployed). Also included in the video are emergency medical personnel.

I recognize that human responses may not always align exactly with policy, especially when those responses come about in the heat of an incident and reactive decisions are made intuitively without time to fully reflect on potential outcomes. It is for this reason that the training component is crucial to the outcome of an incident. If police officers are not trained to react in a manner that will bring about the most successful and least injurious outcome, the decisions taken in response to demonstrated behaviour will not be in keeping with the principles³¹ of the IM/IM and community expectations of the police.

Much of the discussion concerning this incident includes the response of the members to the complaint of a male acting erratically near the exit doors from the international arrivals area. With respect to the use of the CEW, however, the fact is that it was Constable Millington who opted to draw the weapon and discharge it at Mr. Dziekanski.

The statements of the members indicate varying degrees of awareness of Constable Millington's use of the CEW. Corporal Robinson indicated in his statement that he knew Constable Millington had drawn the CEW and that Constable Bentley had expanded his baton. Corporal Robinson said that he directed Constable Millington to deploy the CEW at almost the same time as it was discharged. Constable Millington had no recollection of being directed to discharge the weapon.

As the shift supervisor and senior member in charge at the scene, the fact that Corporal Robinson was aware that Constable Millington had drawn the CEW from its holster and did not direct Constable Millington to re-holster the CEW, indicates that Corporal Robinson was likely of the view that the use of the CEW was a viable option and within the principles and parameters of the IM/IM. Similarly, the fact that Constable Millington drew the weapon implies that he, too, considered the CEW to be a viable option and in keeping with his training.

³¹ A listing of these principles is found in RCMP policy.

Corporal Robinson stated that he had been involved in approximately 12 incidents (operational and in training) during which he had witnessed a person receive an electric shock from a CEW. He said that in none of those incidents was anyone injured.

As can be observed in the table found at **Appendix P**, the conduct of the members generally aligns with policy; however, it does so only if several assumptions are made. For example, one must assume that the responding members actually gave thought individually or collectively to how they would approach the interaction with Mr. Dziekanski as opposed to simply reacting to the situation as it unfolded. The statements of the members do canvass other possible use of force options, but none of the members stated that they coordinated their thoughts as they approached the YVR terminal.

As noted elsewhere in this report, Superintendent Rideout, then OIC of the IHIT unit, was interviewed by the Commission. During that interview he categorically denied that IHIT had any information pertaining to the allegation fuelled by an e-mail written on November 5, 2007 by RCMP Chief Superintendent Richard Bent, (then) Assistant Criminal Operations Officer (Contract) for British Columbia to the Criminal Operations Officer, Assistant Commissioner Al Macintyre, in which Chief Superintendent Bent stated that he had spoken with Superintendent Rideout and IHIT was aware of conversation among the responding members concerning the intent to deploy the CEW upon arrival.

During the interaction with Mr. Dziekanski, Constable Bentley extended his baton. Corporal Robinson withdrew his baton from its holster but did not extend it. He said that he was considering using it, but did not intervene or countermand him when Constable Millington withdrew the CEW from its holster. Constable Rundel took no overt defensive action. None of the members believed OC spray to be a viable option in the circumstances.

As I have noted in this report, real time incidents unfold very quickly and I do not expect responding members to take a collaborative approach to an incident that demands unilateral action. In this incident, however, it was open to one member to take control; that did not happen. Taking control is a duty that should have fallen to Corporal Robinson as shift supervisor and the senior member at the scene.

The constables all had between one and a half and just over two years service and were at that time posted at YVR (where one would anticipate that the number of calls requiring the members to deal with violent persons would be lower than for an average General Duty member posted, for example, in the City of Richmond). As a result of their junior service, mentoring and training was particularly important if they were to respond adequately to calls where violence may ensue.

I have raised these general concerns (in other contexts) with the RCMP previously.³²

Finding

The failure of Corporal Robinson to take control of the scene, communicate with and direct the more junior and inexperienced members negatively manifested itself throughout the interaction with Mr. Dziekanski.

The members who responded to the complaints involving Mr. Dziekanski have provided their version of the events of that evening in a number of fora. They have provided their handwritten notes of the events, they provided verbal statements to IHIT investigators, Constable Millington completed a Form 3996 (CEW Usage Report)³³ and each has given evidence before the Braidwood Inquiry.

Given that Constable Millington had completed his RCMP approved CEW training in July 2007, only three months prior to the YVR incident, it is foreseeable that Constable Millington's training would have been relatively fresh in his mind. He testified that his CEW training taught him that the CEW has been extensively studied as a non-lethal weapon and that the effect of a CEW is much less onerous than a heart pacemaker or defibrillator. He was also taught that the CEW in animal testing showed insignificant effects on heart rhythm and blood pressure. The result of such training might well have been that Constable Millington was more inclined to deploy the CEW because of the position of the RCMP that the CEW is an effective, relatively safe and less harmful means to achieve an end.

During Braidwood Inquiry testimony in particular, the members relied on the fact that they responded as they had been trained. Undeniably, training does inform the response demonstrated by the members. Implied in this rationale is that the members take the position that "I was only following instructions." That argument cannot stand. Training provides the basis for the response, but the members responding are required to apply reason and discretion to the application of the training response. Interestingly, the Instructor Notes in the CEW training manual stipulate that the CEW is *not a substitute for common sense and good judgement*.

When tracked against the Pritchard video, the recollections of the members fall short of a credible statement of the events as they actually unfolded. For example, each of the four members indicated that they felt threatened and spoke of the combative stance of Mr. Dziekanski. Each recounted that Mr. Dziekanski became aggressive and moved toward the RCMP members. No combative

³² RCMP Use of the Conducted Energy Weapon (CEW) Final Report, June 12, 2008, p. 7.

³³ In his evidence during the Braidwood Inquiry, Constable Millington indicated that he completed Form 3996 on October 18 or 19, 2007 and not prior to the completion of his shift on October 14, 2007, the night of the incident, as required by RCMP policy.

stance or movement toward the members, aggressive or otherwise, by Mr. Dziekanski can be detected in the video.

The statements provided by the members are sparse in terms of detail of the events and the thought processes of the members as events unfolded. In response to numerous questions from IHIT investigators, the members stated that they could not recall various aspects of the YVR incident. I have reviewed their evidence during the Braidwood Inquiry and I do not find that this evidence has mitigated or rehabilitated their initial statements.

I have concerns with the fact that the members met together at the YVR sub-detachment office following the incident prior to being interviewed by IHIT investigators. I am concerned that they also met as a group and that Constable Millington met privately with Corporal (now Staff Sergeant) Mike Ingles, the Staff Relations Representative (SRR), prior to IHIT involvement. I note that the SRR has indicated that his rationale for meeting with the involved members prior to IHIT investigators was his concern for their emotional well-being. The SRR has indicated that he did not discuss any details of the incident with the involved members on the night of the incident or at subsequent meetings he had with them.

As I have discussed in the section of this report titled Members' Notes, I have concerns with the quality and extent of notes maintained by the involved members. Similarly, I have concerns with the quality of the notes made by the SRR. The SRR's notes with respect to the morning of the incident (October 14, 2007) and his meeting with the four involved members consist of one page and one line on a second page in a small police notebook. The SRR kept no notes at all of his subsequent meetings with the involved members.

The SRR chose to quote verbatim the words of Corporal Brassington of IHIT when he asked the involved members for their statements, but he neglected to write down any of the advice he provided to the four members at the YVR sub-detachment office pertaining to their duty to give an accounting of their actions or a formal statement to IHIT investigators.

Investigative basics are that witnesses should be separated immediately to remove the potential opportunity for them to tailor their evidence or to concoct a version of events. Meetings such as the meeting with Corporal Ingles concern me because of the potential for inappropriate influence or involvement in an investigation. This aspect is discussed further in the section (below) titled Statements from RCMP Members.

The result of the foregoing is that because of the lack of detail in recounting the events coupled with their meeting together and with the SRR, the credibility of the members and the degree of reliance that I am able to attach to their versions of the events is considerably diminished.

I note that in the evidence given by each of the members during the Braidwood Inquiry, each has stipulated that aspects of their accounts of the events surrounding the death of Mr. Dziekanski were incorrect. To be clear, I am aware of no evidence to confirm that any aspect of the members' accounts of the events was concocted, that the members colluded in their accounts or that they were being intentionally deceptive.

Finding

I do not accept as accurate any of the versions of events as presented by the involved members because I find considerable and significant discrepancies in the detail and accuracy of the recollections of the members when compared against otherwise uncontroverted video evidence. In their statements, the members indicated in responses to numerous questions that they could not recall the detail of the events as they unfolded. The fact that the members met together and with the SRR prior to providing statements causes me to question further their versions of events.

Finding

The conduct of the responding members fell short of that expected of members of the RCMP by the Canadian public and by RCMP policies. The members demonstrated no meaningful attempt to de-escalate the situation, nor did they approach the situation with a measured, coordinated and appropriate response.

Finding

The members failed to adequately comply with their training in CAPRA and IM/IM to assess the behaviour of Mr. Dziekanski, and therefore the risk posed by him. As a result, the level of intervention went beyond what was necessary and acceptable, contrary to the RCMP's IM/IM and CAPRA model.

Finding

Because the RCMP positions the CEW as an intermediate weapon and trains its members that it is appropriate to use the CEW in response to low levels of threat because it is a relatively less harmful means of controlling a subject, the responding members did not fully appreciate the nature of the CEW as a weapon and it was resorted to too early.

Part B

This part of the report will address what I consider to be the secondary aspects of the interaction between the responding RCMP members and Mr. Dziekanski. For a more complete discussion of the issues, please see the appendices as referenced in the report.

It is incumbent on civilian police oversight agencies to ensure that investigative scrutiny is provided in an even-handed and objective manner. To that end, I have carefully reviewed the conduct of the RCMP members who responded to the complaint involving Mr. Dziekanski at YVR. In addition, I have carefully reviewed the Vancouver IHIT investigation of the death of Mr. Dziekanski to assess the issues relevant to my complaint.

The RCMP members of the Integrated Homicide Investigation Team (IHIT) involved in the investigation of the death of Mr. Dziekanski had the benefit of time and the ability to systematically conduct their investigation. The first responders, the four RCMP members who attended the scene, did not have the luxury of taking a protracted amount of time to verify facts or assumptions.

The public expects that both first responders and subsequent investigators will receive sufficient training and instruction to ensure that they are aware of and comply with applicable legislation and policies. The public also expects the guiding documentation and policy to be reasonable.

Nature of the CEW

The CEW is a prohibited firearm.³⁴ The Commission has been steadfast in its position that when used appropriately, the CEW can be an effective tool for the RCMP. The Commission has also maintained that the CEW causes intense pain, it may exacerbate underlying medical conditions and it has been used in situations where it is not justifiable nor in accordance with RCMP policy (known as “usage creep”).

Conversely, claims have been made from various quarters that the CEW is a viable alternative to lethal force, that its use results in a lowered risk of injury to the responding police officers and to the subject of the CEW and that it is, in effect, a much more humane way of effecting control over an individual who is resistant to arrest or control.

Juxtaposed against these claims is the reality that because the CEW can also be considered a pain compliance tool, the *Canadian Charter of Rights and Freedoms* (the Charter) may become operative because of the nature and

³⁴ The CEW has been classified as a prohibited firearm since 1998. See http://www.cfc-cafc.gc.ca/factsheets/r&p_e.asp and <http://laws.justice.gc.ca/en/ShowFullDoc/cr/SOR-98-462//en>.

manner of deployment of the CEW in some circumstances. The courts have held that use of the CEW in cruel and unusual circumstances offended various sections of the Charter and amounted to an abuse of process, resulting in stays of the criminal proceedings against the accused.³⁵

The CEW may be deployed in two modes—probe and push stun. Probe mode refers to the discharge of the weapon by firing a cartridge containing probes which lodge in the subject's body and are connected to the CEW by means of electrical wires. Push stun mode refers to the electrodes of the CEW being placed directly against the subject.³⁶

Overarching all of the foregoing is the question of whether police officers appreciate the nature and quality of the pain being dispensed. As discussed in this report, an issue the members appear not to have contemplated is whether the application of a pain compliance technique was justified in this situation. Notwithstanding the fact that the CEW is a prohibited firearm, the IM/IM as it existed at the time of the death of Mr. Dziekanski categorized the CEW as an intermediate level use of force option in the same genre as OC spray.³⁷

The Course Training Standard (CTS) for the RCMP CEW course allows for voluntary exposure of candidates to a CEW discharge, but the allowable time limit is two seconds, although some members have undergone the full five-second cycle. The discharge of a CEW is a full five seconds upon initial discharge; however, it can be disrupted by the user.

As discussed in this report at **Appendix K**, the output of some TASER[®] devices was questioned in a study commissioned by the Canadian Broadcasting Corporation (CBC) and published on December 2, 2008.³⁸ In addition, the Government of British Columbia has conducted testing on a number of its Taser Model M26 CEWs and found that:

³⁵ Reviewing the Police Use of Tasers: Recent Developments Include Application of the Abuse of Process Doctrine 57C.R. (6th) 263. (Ass't Professor David McAlister). See also *R. v. Walcott*, 57 C.R. (6th) 223.

³⁶ OM 17.7.2 – as issued 09-01-27.

³⁷ The recent changes to the IM/IM graphical model have led to modifications in the categorization of weaponry used by the RCMP. In the past, a distinction was made between impact weapons (e.g. batons and impact rounds) and intermediate weapons (e.g. CEWs and pepper spray). In a prior report on CEW use (*RCMP Use of the Conducted Energy Weapon, Interim Report*, <http://www.cpc-cpp.gc.ca/af-fr/pdf/InterimTaserReport.pdf>, at p. 34), the Commission recommended altering the CEW's placement on the IM/IM graphical model by elevating it to the level of impact weapons, the use of which was clearly identified as being appropriate when a subject's behaviour demonstrated higher levels of risk (e.g. when the subject was combative and not merely resistant). Now, both of these classes of weapons appear under the same heading in the graphical model and the distinctions in use are not readily apparent. However, it should be noted that members continue to be trained that appropriate use of the various weapons differs depending on the circumstances facing the member. Additionally, RCMP policy has been modified to stress that the use of the CEW is restricted to those instances when the subjects pose a threat to the safety of the public, the member or themselves.

³⁸ CBC Testing of CEWs – <http://www.cbc.ca/news/pdf/taser-analysis-v1.5.pdf>.

... 80% of the devices failed to operate within the manufacturers specifications. The results also showed that 90% of these units produced less electrical output than would be expected, potentially presenting both public and officer safety risks.³⁹

As a result, the RCMP on June 1, 2009 withdrew approximately 1,600 M26 CEWs from service nationally pending testing and/or replacement of some units with the newer Model X26. The RCMP has also conducted independent and random testing of some of its CEWs, as have some provinces.

TASER International training documentation notes that no deaths have been attributed to the TASER[®] but suggests that in any situation in which a person is displaying signs including bizarre or violent behaviour, breathing irregularities or loss of consciousness, medical assistance should be sought immediately.⁴⁰ This suggestion is further supported by three TASER International training bulletins issued in 2005, 2006 and 2007.

Policy has consistently recognized the need to assess other means of intervening to calm or subdue a suspect, and has required from the outset (absent an operational situation which would preclude such a step) that members identify themselves as peace officers and issue a warning prior to deploying the CEW.⁴¹

The RCMP CTS for the CEW User Course⁴² was created in July 2001 and amended in May 2002 and October 12, 2005. The RCMP CEW course is 16 hours in length. The CTS indicates that this amount of time allows instructors to teach the necessary material and provides time for practice and scenario-based training.

The RCMP appears to accept the proposition that the CEW is a less harmful and reliable means of controlling individuals who fall within the parameters of acceptable CEW usage. In support of this position, the RCMP often relies on studies funded by TASER International which support this proposition. The Commission has noted various issues with TASER International-funded methodological research, specifically but not limited to, that the manufacturer appears to make unsubstantiated claims that are difficult to independently verify, their use of small control groups of healthy volunteers which does not reflect operational realities, and a general lack of wholly independent research.

³⁹ See RCMP website <http://www.rcmp-grc.gc.ca/news-nouvelles/2009/20090601-m26-eng.htm>.

⁴⁰ TASER International Instructor's Training Course, p. 128 (on CD).

⁴¹ OM III.2.I.5.b.1, Revision 2861, 2002-06-19.

⁴² See **Appendix K** and **Appendix L** for further information concerning the CEW and RCMP CEW Training.

Overarching the foregoing is the issue of quality control. From the time of the initial roll-out of CEWs in 2001, RCMP policy,⁴³ until it was removed in the August 8, 2007 Operational Manual (the version in effect at the time of the death of Mr. Dziekanski) required that:

The Senior Armourer will be responsible for:

- 1. maintaining a current record of all the CEWs acquired by the RCMP;*
- 2. maintaining a quality assurance program for the testing and evaluation of the CEWs and munitions; and*
- 3. replacing malfunctioning CEWs.*

Notwithstanding the fact that the requirement to implement a quality control process was removed from policy, the Commission specifically asked the RCMP to identify the process through which it maintains quality control over its CEWs.

The RCMP responded that essentially, the only ongoing quality control process with respect to CEWs is that they are examined when first received by the RCMP Armourer in Regina, Saskatchewan, prior to distribution across the country. The examination does not assess the adequacy or consistency of the voltage delivered, but considers questions such as whether the unit is registered with a correct serial number, the battery pack fits properly, the internal clock is set to Greenwich Mean Time and the sights are aligned. A spark test is performed, but this is done by hand to visually ensure that a spark is present between the electrodes. No assessment of the actual voltage delivered by the unit takes place.

The response does not indicate that CEWs are periodically or routinely returned to the Armourer for voltage testing; therefore, my assumption is that they are not. Policy at the time of the YVR incident required that the CEW be returned to the Armourer if it is found to have malfunctioned or failed in operational usage, or if a download of data is required as part of an investigation.⁴⁴

Although CEWs have currently been subjected to independent testing as part of an ongoing internal RCMP audit (see **Appendix L**, titled CEW Training), I find the RCMP process to be an inadequate level of quality control. I would expect an adequate level of quality control to include an assessment of the ability of the weapon to function within standard parameters when it is first received. I would also expect that CEWs would be subject to regular technical testing to ensure their continued reliability.

Recommendation

The RCMP should review the CEW quality assessment program as currently in effect and consider whether it should be enhanced to ensure

⁴³ OM III.2.1.5 and OM 17.7.6.5.9 (2005-06-01).

⁴⁴ OM 17.7.7.5 (2007-08-08).

that a high degree of confidence may be placed in the performance of in-service CEWs.

Evolution of RCMP CEW Policy⁴⁵

The CEW was first approved for RCMP use in 2001. Policy governing the use of the CEW was implemented by the RCMP and that policy has received a number of amendments over time.⁴⁶ In the most recent revision, issued by the RCMP on January 27, 2009, policy was amended to recognize the high risk of death to acutely agitated or delirious persons⁴⁷ and to clarify that RCMP members are expected to proactively request medical assistance if the CEW is deployed on such persons.⁴⁸ Further, the RCMP Commissioner has determined that the CEW is only to be used *where it is necessary to do so in circumstances of threats to officer or public safety*.⁴⁹

Until the current iteration of the RCMP CEW policy, the concept of *excited delirium* was included in CEW policy. RCMP Commissioner Elliott indicated on January 6, 2009 during a radio interview that he has asked for the term excited delirium to be removed from RCMP policy. The rationale was that RCMP members should not be expected to make what amounts to medical diagnoses when responding to a situation and determining the appropriate use of force option required. As noted, the term has now been expunged from the revised RCMP Operational Manual issued in January 2009⁵⁰ and replaced with a reference to *agitated or delirious persons*, which is intended to more broadly capture a large group of persons displaying behaviour posing a risk to themselves, the police or others.

Medical Treatment Post CEW

Medical treatment for anyone who has been the subject of the deployment of a CEW has been contemplated pursuant to RCMP CEW policy since the inception of the weapon. Such treatment is at the discretion of the member(s) involved and is not mandatory.⁵¹ The initial supposition appeared to be that the subject will be lucid and ambulatory subsequent to CEW usage in that the policy requires the RCMP member to transport the subject to a medical facility, whenever possible, for examination and to record any injuries or other observable medical or physical afflictions caused by the CEW.⁵² The policy in place at the time of the

⁴⁵ A more detailed discussion of the evolution of RCMP CEW policy may be found at

Appendix K.

⁴⁶ The evolution of RCMP CEW policy is discussed in more detail at **Appendix K.**

⁴⁷ OM 17.7.3.1.4 – Revised 09-01-27.

⁴⁸ OM 17.7.3.1.4 – Revised 09-01-27.

⁴⁹ Commissioner's remarks to SECU – <http://www.rcmp-grc.gc.ca/news-nouvelles/speeches-stat-discours-decl/2009-02-12-commiss-secu-eng.htm>.

⁵⁰ OM 17.7 – Revised 09-01-27.

⁵¹ OM 17.7.5 – Revised 09-01-27.

⁵² OM III.2.I.5.c, Revision 2822, 2001-12-20.

YVR incident recognized the severity of the potential state of agitation of the subject prior to deployment and the need to provide medical care, particularly in those circumstances; current policy requires intervention of professional medical personnel when warranted.⁵³

Medical caveats such as this do not serve to underscore in the minds of RCMP members that the CEW inflicts great pain on the recipient and that it is a potentially lethal weapon. In my view, if public confidence in the ability of the RCMP to use the CEW appropriately is to be maintained, the RCMP must demonstrate that its members use the CEW judiciously and with discretion. The weapon must not be used precipitously. To achieve this goal, I believe that the RCMP must amend its training regimen to underscore the dangers inherent in the use of the CEW by members.

As I stated before the Braidwood Commission:

If the state or its representatives want to introduce a device for use against a member of the public, it bears the onus of ascertaining what level of risk to the public flows from the use of the device. If there's any ambiguity and uncertainty, that doubt should be resolved in favour of the citizen.

At the time of the YVR incident (October 2007), the CEW was classified by the RCMP as an intermediate device. RCMP policy at that time was that weapons in this category could be used against subjects who exhibited resistant behaviour or more threatening behaviour, such as being combative.

When members are faced with situations posing the risk of death or grievous bodily harm, they are trained that the CEW is only appropriate if another member can provide *lethal over-watch*. This means that at least one other member should have a gun ready to shoot in case the CEW misfires or is ineffective and the threat is not neutralized.

In the YVR incident, three other RCMP members were present and were armed with their service pistols. The issue of lethal over-watch was not canvassed in statements taken from the responding RCMP members during the IHIT investigation, as it was not relevant to the circumstances.

Autopsies conducted on persons who have died proximate to CEW usage and scientific studies have not identified a causal link between the CEW and death. I am of the view that although there exists a paucity of scientific evidence pointing to the CEW being the cause of death or a prime contributing factor thereto, from a public policy perspective we must be circumspect. The RCMP has accepted in policy that the CEW may pose a risk to seriously agitated persons; therefore, the assumption should be that the CEW may cause harm as opposed to the view

⁵³ OM 17.7.3.4.1.5, 2007-08-08.

commonly held among police that the CEW is a less harmful and acceptable means of effecting an arrest.

I am not suggesting that the CEW should not be used. I am suggesting, however, that it only be used in circumstances in which such use is justifiable and necessary. The assumption should be that the CEW poses inherent risk and unless and until it can be demonstrated clearly that it does not, the bias should go to less usage, rather than more.

Appropriate Use of the CEW

Crucial to the analysis of the appropriate use of the CEW is an awareness and understanding that the CEW delivers intense pain to the recipient of the deployment whether the CEW is used in probe or push stun mode. Because of the nature of the weapon, therefore, its use must be justifiable, judicious and proportional to the circumstances.

I have made my position on this issue known for quite some time. In my December 2007⁵⁴ interim report on RCMP use of the CEW, I stated:

The tragic occurrences associated with CEW use in the past few months have raised the level of public concern regarding the weapon. The RCMP relies upon studies that speak to the relative safety of CEWs as a less lethal technology. However, many of these same studies note the lack of research in relation to "at risk groups." It is imperative that research be continued to establish the safety levels for "at risk groups" and to determine whether, by virtue of the very symptomology exhibited by these groups (i.e. drug use or psychiatric disorders), they may be exposed to a disproportionate number of police interventions where CEW use may be deemed appropriate.

Further, an appreciation of the level of pain associated with the CEW is crucial to ensure not only the appropriate use of the weapon but also the avoidance of what the Commission has dubbed "usage creep," i.e. the trend toward using the CEW in circumstances for which its use was not authorized by RCMP policy. As I also noted in my December 2007⁵⁵ report on the use of the CEW:

The current approach by the RCMP clearly illustrates a shift in permissible usage from the original intent in 2001, which was more restrictive in that the weapon was to be used to subdue individual suspects who resisted arrest, were combative or who were suicidal. The Commission refers to this expanded and less restrictive use as "usage creep." This has resulted in deployment of the weapon outside stated objectives as illustrated by

⁵⁴ CPC Report titled *RCMP Use of the Conducted Energy Weapon*, Interim Report, December 11, 2007. See http://www.cpc-cpp.gc.ca/prr/inv/cew-ai/cew_ai_int_rp-eng.aspx.

⁵⁵ CPC Report titled *RCMP Use of the Conducted Energy Weapon*, Interim Report, December 11, 2007. See http://www.cpc-cpp.gc.ca/prr/inv/cew-ai/cew_ai_int_rp-eng.aspx.

cases that have been reviewed by the Commission over the past six years where the individuals have exhibited behaviours that were clearly non-combative or where there was no active resistance.

TASER International states that the CEW in probe mode does not rely on pain to achieve compliance. The documentation with respect to the effects of CEW usage conveys that the pain component of the CEW is more benign than it really is. Virtually every person who has been the subject of a CEW deployment, whether voluntary or involuntary, refers to the experience as being extremely painful (as noted below). RCMP training pertaining to the CEW deals with the pain inflicted by the weapon in a relatively narrow and perfunctory manner.

As I noted in my June 2008 final report on the use of CEWs by the RCMP:⁵⁶

When used in probe mode, it is rare that more than one (1) cartridge is fired and 66 percent of the time the weapon is cycled only once. Conversely, push stun is the mode more apt to be used multiple times. When push stun mode alone is used, it is used two or more times on 40 percent of occasions. This is significant and confirms a concern raised repeatedly by the Commission that push stun mode is the most susceptible usage subject to usage creep.

This is true in the case of Mr. Dziekanski also. The CEW was used in probe mode more than the norm. In addition, I find that the manner in which it was used in push stun mode was inappropriate. This type of inappropriate usage was identified in my earlier reports on the CEW.

In its training sessions for police “train the trainer” personnel,⁵⁷ TASER International teaches that the concept behind the CEW in probe mode is that it incapacitates the central nervous system to achieve its goal of incapacitating the subject. The training indicates that the CEW does *not rely on pain to achieve compliance. It overwhelms the central nervous system and achieves incapacitation.*

The IM/IM describes intermediate devices as including OC spray and the CEW.⁵⁸ Training provided not only to RCMP members, but to CEW users in general, reinforces the notion that the CEW is a safe and effective means of controlling a person.⁵⁹ The question of relative safety to the recipient is not as clear, nor is it

⁵⁶ *RCMP Use of the Conducted Energy Weapon (CEW)*, June 12, 2008. See http://www.cpc-cpp.gc.ca/prr/inv/cew-ai/cew_fin_rp-eng.aspx.

⁵⁷ Personnel who are to return to their various police agencies to certify other police personnel locally.

⁵⁸ See Appendix U for a listing of intermediate devices.

⁵⁹ In evidence before the Braidwood Inquiry, for example, Constable Rundel stated that he was trained that the CEW causes less harm to an individual than does OC spray or the baton. See Braidwood Inquiry, Rundel evidence, Feb 24, 2009, pp. 42, 80 and Feb 25, 2009, pp. 17, 50.

clear that police are cognizant of the fact that the CEW is, first and foremost, a means of achieving compliance by debilitating the recipient through neurological muscle control and pain in probe mode and solely through the means of a powerful localized pain stimulant when deployed in push stun mode.

The exercise of appropriate discretion is crucial in the decision to use the CEW. Some police officers do not appear to adequately comprehend the nature of the CEW as a weapon, i.e. the extreme level of pain associated with the use of the CEW or the risk to the health of the subject because the training provided to them does not require them to take such analyses into account at the time of deploying the CEW.

In light of the foregoing, my view with respect to the pain inflicted by the CEW, as expressed in my December 11, 2007 Interim Report on the *RCMP Use of the Conducted Energy Weapon*,⁶⁰ has not changed:

Of note, regardless of the mode, the subjects will experience pain. However, little attention appears to have been paid to the level of pain induced by CEW application. The use of CEWs was reviewed in R. v. Hannibal, 2003 BCPC 0504. In that case, in which an RCMP member was charged with assault for an incident in August 2001, Judge Challenger commented, "No studies have been done with respect to the subjective experience of being tasered in comparison to conventional empty hand control (soft) techniques." However, an Amnesty International report contained the following anecdotal references:

According to [TASER International] they are one of the few non-lethal weapons effective in causing incapacitation without physiological injury. They have pointed out that any pain involved is transient, with no after-effects. However, officers subjected to even a fraction of the normal taser discharge during training have reported feeling acute pain:

"Bjornstad, who was jolted for 1.5 seconds as part of his training, said all of his muscles contracted and the shock was like a finger in a light socket many times over. 'who [sic] has experienced it will remember it forever...You don't want to do this. It's very uncomfortable...and that's an understatement.'" (The Olympian, 14 October 2002)

"It's like getting punched 100 times in a row, but once it's off, you are back to normal again." (The Olympian 2 March 2002)

"It felt terrible." "It hurts. I'm going to think twice before I use this on anyone." (two officers quoted in the Mobile Register 8 April 2002)

⁶⁰ http://www.cpc-cpp.gc.ca/prr/inv/cew-ai/cew_ai_int_rp-eng.aspx#_Toc189029657.

*"It is the most profound pain that I have ever felt. You get total compliance because they don't want that pain again." (firearms consultant, quoted in **The Associated Press** 12 August 2003)*

*"They call it the longest five seconds of their life...it's extreme pain, there's no question about it. No one would want to get hit by it a second time." (County Sheriff, quoted in **The Kalazazoo [sic] Gazette**, Michigan, 7 March 2004):*

*In assessing the negative aspects of CEW deployment Judge Challenger wrote: "The RCMP and other forces should consider the taser's potential for superficial burning and tissue damage which can create scabbing and scarring. The taser creates extreme pain and can create instant, complete incapacitation. **Conventional pain compliance techniques can be carefully controlled by the officer administering them. The amount of pain inflicted by the taser cannot be adjusted** [emphasis added]."*

The pain component of CEW use remains a subject largely left to anecdotal commentary and not sufficiently explored to assist in determining the appropriateness of its use in law enforcement interventions.

Statistically, CEW usage results in relatively few serious injuries or deaths when compared to the number of deployments. What statistics do not take into account, however, is the nature of the CEW as a weapon and whether the use of the CEW was appropriate in the circumstances. I believe that the equally pertinent study, therefore, should not be to examine how many people have been seriously injured or have died during or subsequent to CEW deployment, but whether the use of the CEW was appropriate in the circumstances of the deployment.

Given the injuries that have occurred subsequent to deployments of the CEW, the onus of demonstrating that the CEW is a viable response in the particular circumstances of its use must rest with the police. Pointing to statistics to show that in most deployments no serious or lasting injury is sustained by the recipient is not sufficient. Justification of its use must include an appreciation of the nature of the CEW, i.e. that the level of pain inflicted and the potential for serious bodily harm or death to the recipient was appropriate and necessary within the confines of a specific set of circumstances.

As noted above, on January 27, 2009, the RCMP amended its policy stipulating that the CEW may only be used in circumstances in which the RCMP member, after considering the totality of the circumstances, perceives a threat to his or her safety or the safety of a member of the public.⁶¹ However, it is not clear how members will interpret the reference to "threats". This change, which results in

⁶¹ OM 17.7.1.4 – Revised 09-01-27.

less clarity in delineating the appropriate use of police weapons, leaves the Commission unable to determine whether this amendment will raise the bar to the level contemplated in the Commission's recommendation made in its earlier reports to the RCMP. Rather, it relies too heavily on a member's subjective appreciation of events without laying the objective policy-based foundation for which to assess the conduct. The Commission's concern with this is that the lack of clear guidelines may well continue to contribute to "usage creep" institutionally and to the individual cases of inappropriate CEW use that have been reviewed and commented upon by the Commission, including this incident.

Compounding this issue are the recent pronouncements by the Provinces of British Columbia and Alberta regarding their respective positions on the threat threshold to be adhered to by police officers that must be present before a CEW can be deployed. Particularly, it is unclear whether the RCMP's new policy on this threshold can, or will be reconciled with these provincial standards. Additionally, Commissioner Braidwood was unequivocal by stating that a *clear and imminent threat of bodily harm* must be present before a CEW is deployed. This appears to be a significantly higher threshold than the RCMP's current policy contemplates. It is unclear what amendments to the applicable RCMP policy will be required in order to adhere to these provincial policies while at the same time maintaining a national standard consistent for all members across the RCMP.

While I am in agreement with the RCMP's approach of providing more stringent controls on the use of the CEW, I am not convinced that its new threshold meets that test. Further, the necessary articulability with respect to the use of this weapon must include both objective and subjective elements. The member must lawfully be in the place where the CEW is deployed, he or she must have a subjective belief that the potential harm caused by the CEW is reasonable in the circumstances, and the conduct of the member must be reasonable in the eyes of an independent and objective person presented with the same set of circumstances.

RCMP members must be trained that they should be more circumspect in resorting to the CEW. While RCMP training does include a voluntary exposure to the CEW, such exposure is conducted, obviously, in controlled circumstances to ensure the safety of the member being exposed to the voltage, and in a non-confrontational situation. Clearly, field circumstances cannot be easily replicated.

Recommendation

The RCMP should continue to be involved in and stay abreast of current independent research on the use and effects of the CEW.

Recommendation

Notwithstanding the fact that the RCMP has (as of January 2009) amended its policy such that the use of the CEW is to be used in response

to a threat to officer or public safety as determined by a member's assessment of the totality of the circumstances being encountered, the RCMP should clarify for its members and the public what the appropriate circumstances for using the CEW are and what threat threshold will be utilized to assess the appropriateness of such use.

Recommendation

The RCMP should consider a review of its training to ensure that its members are well versed in the potentially dangerous nature of the weapon and to ensure that training provided to members assists them in appropriately assessing the circumstances in which deployment of the CEW is justified, bearing in mind the degree of pain inflicted on the subject during the CEW deployment and the potential outcome of such deployment.

Appropriateness of the RCMP Response

To reiterate, the Chair-initiated complaint as it relates to the interaction between the RCMP members and Mr. Dziekanski concerned compliance by the responding RCMP members with policies, procedures, guidelines and statutory requirements pertaining to the interaction with Mr. Dziekanski. Further detail and analysis of those policies and requirements are set out below.

As previously noted, the decision as to whether or not criminal charges were warranted in these circumstances has been addressed by the British Columbia Criminal Justice Branch and consequently is not the subject of this report.

Applicable RCMP Policy

Incident Management/Intervention Model

The RCMP utilizes the IM/IM to train and guide members in the use of force,⁶² promote risk assessment and depict various levels of resistance, behaviours and reasonable intervention options.⁶³ At the time of Mr. Dziekanski's death, the IM/IM was predicated on the following seven principles:

- 1. The primary objective of any intervention is public safety.*
- 2. Police officer safety is essential to public safety.*
- 3. The intervention model must always be applied in the context of a careful assessment of risk.*
- 4. Risk assessment must take into account: the likelihood and extent of life loss, injury and damage to property.*
- 5. Risk assessment is a continuous process and risk management must evolve as situations change.*

⁶² A more thorough discussion of the use of force options may be found at **Appendix L**.

⁶³ See the IM/IM schematic at **Appendix U**.

6. *The best strategy is to utilize the least amount of intervention to manage the risk.*
7. *The best intervention causes the least amount of harm or damage.*

I believe that these final two principles are crucial to policing as provided by the RCMP, but in order for RCMP members to intervene appropriately, they must be trained in and cognizant of the nature of the various means of intervention available to them. As I have indicated in this report and in other reports I have issued, with respect to CEW deployment I do not believe that RCMP training teaches a realistic awareness of the nature of the CEW as a weapon. Accordingly, RCMP members do not have an appropriate awareness of the potential for harm and therefore the overall nature of the intervention they may undertake.

The IM/IM was amended by the RCMP in May 2009. The seven principles have been altered to six, as follows:⁶⁴

1. *The primary duty of a peace officer is to preserve and protect life.*
2. *The primary objective of any intervention is public safety.*
3. *Peace officer safety is essential to public safety.*
4. *The IM/IM is consistent with federal statute law and common law authorities and in no way replaces or augments the law.*
5. *The intervention model must always be applied in the context of a careful assessment of risk, taking into account the likelihood and extent of life loss, injury, and damage to property as a result of the intervention.*
6. *Risk assessment is a continuous process and risk management must evolve as situations change.*

I note that the final two principles enumerated in the IM/IM as it existed at the time of the death of Mr. Dziekanski have been excised from the current IM/IM. Although one might argue that the previous principles are subsumed in the current IM/IM, I am of the view that the principles as previously set out clearly capture the need to intervene to the lowest possible extent that will enable RCMP members to carry out their duties safely (taking into account the need to ensure the safety of both the police and the public) and effectively.

Further, I am of the view that despite the fact that using the least amount of force necessary is articulated in RCMP training, it should be emphasized that the primary goal should be de-escalation.

I believe that the principles espoused by Sir Robert Peel in 1829 are still relevant today. During my presentation to the Braidwood Commission I articulated four

⁶⁴ See www.rcmp-grc.gc.ca/ccaps-spcca/cew-ai/imim-miqi-eng.htm.

pillars upon which I believe public confidence in the police are founded. I stated:⁶⁵

Policing in Canada is built upon the guiding principles of Sir Robert Peel. In particular, four principles strike me as paramount, and are as important today as they were to Peel in 1829.

First is the fact that the police can only perform their duties if they have the public's approval of their actions. Second is the reality that the police are the public, and the public are the police. This principle means that the police are acting as our agents in carrying out a general social obligation to preserve the peace.

Third, the police must use physical force only to the extent that is necessary to preserve public order. Finally, the police rely on the willingness of public cooperation to undertake their duties.

RCMP Training

Use of force experts, who teach police officers the concepts involved in determining risk and the appropriate level of response, have provided comment with respect to the use of force against Mr. Dziekanski.⁶⁶ My difficulty with these comments is that I see a circular logic at work. Sergeant Brad Fawcett of the Vancouver City Police, and Corporal Gregg Gillis of the RCMP are the use of force experts who commented with approbation on the appropriateness of the force used by the responding members. These are the same persons who regularly lecture and train the police. From an objective point of view, therefore, a potential bias for the use of force training as provided to police is inherent and must be recognized. As a result, in the present case I have concerns that Sergeant Fawcett and Corporal Gillis gave input with respect to the appropriateness of the force used by the responding members.

If RCMP training is such that the CEW use is deemed appropriate when faced with the lowest level of risk presented by the subject's behaviour, it will accordingly be resorted to sooner and more often by RCMP members.⁶⁷ That is, police officers may tend to resort to the CEW earlier in the mistaken belief that it is an appropriate response.

If a police officer acts as he or she has been trained, the actions of that officer may subsequently be justified by the trainer according to that training model. If the training model is in error, however, justification does not serve to make the

⁶⁵ Presentation to the Braidwood Inquiry, June 25, 2008. See Commission website <http://www.cpc-cpp.gc.ca/nrm/spe/2008/20080625C-eng.aspx>.

⁶⁶ Referred to here are Vancouver Police Sergeant Fawcett and RCMP Corporal Gillis.

⁶⁷ The RCMP characterizes its use of force options in terms of the IM/IM, which conceptualizes the escalation/de-escalation of force during an interaction. Please see **Appendix U**, which sets out the types of devices considered as intermediate.

officer response correct. In the matter under discussion, I do not believe that sufficient empirical data are available to accept the position of the RCMP that the CEW should be emphasized as a less harmful weapon.

The fact that a trainer or use of force expert says that a member acted according to policy does not make the actions of the member correct if the weapon is in reality more dangerous than training portrays it to be and, therefore, the training policy itself is flawed.

Through the IM/IM (as it then read) RCMP members are trained that they should use the least amount of force necessary to achieve the goals of policing, ensure public safety and minimize the risk and damage. Consequently, the RCMP members were required to assess Mr. Dziekanski's behaviour and the attendant level of danger/risk he posed to himself, to the RCMP members and to the public at large, and take the appropriate steps to assess the situation correctly to manage the arrest and take Mr. Dziekanski into custody by employing the minimum amount of force required.

In their training curriculum at the RCMP Training Academy (Depot Division, Regina), cadets are taught the gradations of officer intervention within the IM/IM framework, beginning with officer presence and verbal intervention, as well as CAPRA-based skills in problem solving. These aspects of training are focused on developing the necessary verbal skills which police officers rely on when confronting potentially volatile situations. In addition, cadets receive training on negotiation and mediation skills and at the mid-point of their Depot training they begin to make use of these skills in role play scenario-based interactions with actors posing as members of the public.

The goal is to teach RCMP officers to respond appropriately and to be able to recognize the need for and use of appropriate tools to de-escalate a situation before it spirals out of control.

Although cadets receive such training, I am not aware of ongoing in-service training for RCMP members to retain awareness of and continued proficiency in such de-escalation techniques.

Use of Force Report

On March 3, 2008, a Use of Force Report was provided to IHIT investigators by Sergeant Brad Fawcett, a member of the Vancouver Police Department.⁶⁸

The involvement of Sergeant Fawcett came about due to a November 23, 2007 letter from Superintendent Wayne Rideout, Officer in Charge of IHIT, to Chief Constable Jim Chiu, Chief of the Vancouver Police Department.

⁶⁸ For a more thorough assessment of Sergeant Fawcett's Use of Force Report, please see **Appendix O**.

Superintendent Rideout requested Sergeant Fawcett's services to provide an *expert opinion on the use of force used by the four involved members*. The letter requesting Sergeant Fawcett's assistance did not specify the scope of review to be undertaken by Sergeant Fawcett, nor did it stipulate whether Sergeant Fawcett was to gauge the actions of the four RCMP members against RCMP policy.

For a number of reasons set out in **Appendix O**, I found Sergeant Fawcett's report not to be particularly informative and therefore I have not relied on it.

Finding

Although IHIT did engage the services of a use of force expert, that expert was not provided with adequate direction in terms of the questions to be considered, the scope of his work or the terms of reference he was to consider.

Spark Test

A secondary issue with respect to the use of the CEW concerns the need to perform a spark test when the weapon is signed out for use and the documentation of such a test post-incident. RCMP members are required to complete a CEW Usage Report (Form 3996) after an incident involving the CEW. Constable Millington did file such a report; however, the format of the report (Form 3996) does not require a member to indicate whether the CEW was spark tested prior to deployment. RCMP Operational policy states that a *spark test is the only approved and reliable method to assess the state of the NiMH batteries and the functionality of the CEW*.⁶⁹ According to the CEW download report, Constable Millington did perform such a spark test when he signed out the weapon.

TASER International, the manufacturer, has indicated that a "spark test" is the sole means in the field to ensure that the CEW is operating properly. A spark test should be conducted each time a CEW is signed out.

The RCMP is currently pilot testing a form known as the Subject Behaviour/Officer Response (SB/OR) to capture data pertaining to any use of force by an RCMP member, including the threatened use, un-holstering or deployment of the CEW. I understand that the SB/OR will come into full use in 2010 and that the CEW Usage Report (Form 3996) currently in use will then be dispensed with.

As noted above, CEW practice at YVR was that the weapon is signed out by the member. The Commission asked for a copy of the control log sheet on which Constable Millington would have signed out the CEW used by him on

⁶⁹ OM 17.7.7.2.2.2 as issued 09-01-27.

October 13/14, 2007. The RCMP advised that the control log sheet was never seized as evidence during the IHIT investigation, nor has it surfaced since. The RCMP believes that the sheet has likely been destroyed as part of its document management processes.

Recommendation

The RCMP should:

1. Amend its Conducted Energy Weapon (CEW) Usage Reporting Form (Form 3996), to require that information concerning a spark test be captured as part of the CEW usage reporting process (or include such requirement in the forthcoming Subject Behaviour/Officer Response data base); and
2. Edit its Operational policy to emphasize the importance of the spark test and clearly indicate that the spark test is mandatory to confirm proper functioning of the CEW.

Code of Conduct – Internal Investigation

Stemming, but separate from, the IHIT investigation into the death of Mr. Dziekanski, it was open to the RCMP to initiate an internal investigation into the actions of both the responding members and the media relations officers in order to ascertain whether disciplinary action was warranted. No such investigations were launched.

The authority to initiate such an investigation is pursuant to section 40, found in Part IV of the *RCMP Act*.⁷⁰

The relevant section of Part IV of the *RCMP Act* reads as follows:

40. (1) Where it appears to an officer or to a member in command of a detachment that a member under the command of the officer or member has contravened the Code of Conduct, the officer or member shall make or cause to be made such investigation as the officer or member considers necessary to enable the officer or member to determine whether that member has contravened or is contravening the Code of Conduct.

Because YVR is located within the bounds of the RCMP Richmond Detachment, it was within the authority of the Officer in Charge of the Richmond Detachment to order a Code of Conduct investigation. Subsequent to the conclusion of such an investigation, the decision then rests with the appropriate officer,⁷¹ typically the Commanding Officer of the RCMP division in which the impugned member is

⁷⁰ *Royal Canadian Mounted Police Act*, R.S., c. R-9, section 1, Chapter R10.

⁷¹ Defined at section 2(1) of the *RCMP Act*.

...serving, to decide whether or not formal, informal⁷² or no disciplinary action is warranted.⁷³

The Code of Conduct of the RCMP is found at sections 38 to 58.7 of the *RCMP Regulations, 1988*.⁷⁴ For the purposes of this discussion, however, the obviously relevant portions of those Regulations which could have been considered by the OIC of the Richmond Detachment are:

39. (1) *A member shall not engage in any disgraceful or disorderly act or conduct that could bring discredit on the Force.*

(2) *Without restricting the generality of the foregoing, an act or a conduct of a member is a disgraceful act or conduct where the act or conduct*

(a) is prejudicial to the impartial performance of the member's duties; or

(b) results in a finding that the member is guilty of an indictable offence or an offence punishable on summary conviction under an Act of Parliament or of the legislature of a province (SOR/94-219, s. 15).

45. *A member shall not knowingly or wilfully make a false, misleading or inaccurate statement or report to any member who is superior in rank or who has authority over that member pertaining to*

(a) the performance of that member's duties;

(b) any investigation;

(c) any conduct concerning that member, or any other member;

(d) the operation of the Force; or

(e) the administration of the Force. (SOR/94-219, s. 18.)

Clearly, section 39(1) above could be relevant if the conduct of the responding member(s) was considered to have brought disgrace or discredit on the Force. In light of the discrepancies between the versions of events reported by the responding members and the Pritchard video, the OIC could have considered whether the responding members knowingly or wilfully made false, misleading or inaccurate statements to investigators, contrary to section 45. The same rationale could be applied to the motivation for some of the comments made by Sergeant Lemaitre, the initial media relations officer (MRO).

The Commission has not been provided with information from the RCMP pertaining to whether such an investigation was considered in the wake of the death of Mr. Dziekanski.

Notwithstanding any recommendation I might make at this point with respect to a review of the decision not to conduct such an investigation, the outcome is moot

⁷² Defined at section 41 of the *RCMP Act*.

⁷³ *RCMP Act*, section 43(1).

⁷⁴ Royal Canadian Mounted Police Regulations, 1988. SOR 88-361.

in that section 43(8) of the *RCMP Act* stipulates that no formal disciplinary hearing into an allegation that a member has contravened the Code of Conduct may be initiated more than one year from the time the contravention and the identity of that member become known to the Commanding Officer of the region in which the impugned member is serving. The identities of the responding members and fact of the death of Mr. Dziekanski were known to the OIC of the Richmond Detachment and to the Commanding Officer from October 14, 2007.

Recommendation

The RCMP should review its processes and criteria with respect to the initiation of an internal investigation into the conduct of its members to ensure consistency of application across the country.

Member Certifications

Each of the responding RCMP members had been certified in the use of the CEW. Constable Millington, who actually carried and deployed the CEW during the incident, was certified in July 2007. Corporal Robinson, the shift supervisor, had been qualified but his CEW certification expired in April 2006. Both Constables Rundel and Bentley held valid certificates in the use of the CEW.

At the time of the incident, RCMP policy required that members be re-certified in the use of the CEW every three years. That policy has now been altered, and members must now re-certify annually in the use of the CEW.⁷⁵

Notwithstanding Corporal Robinson's assertion during his testimony before the Braidwood Inquiry that his first aid certificate had lapsed in 2002, information provided by the RCMP indicates that each of the responding members held a valid certificate in first aid. For a full discussion of the certifications held by the responding members, please see **Appendix M**.

⁷⁵ OM 17.7.1.4 – Revised 09-01-27.

Allegation 2 – Investigation of Mr. Dziekanski’s Death

Part A

This part of the report will address what I consider to be the primary aspects involving the investigation by IHIT of the death of Mr. Dziekanski. For a more complete discussion of the issues, please see the appendices as referenced in the report.

IHIT Investigation

According to its website, IHIT is:

responsible for investigating homicides, police involved shootings and in-custody deaths that occurred [sic] within the Lower Mainland areas policed by the RCMP, Abbotsford, New Westminster and Port Moody police departments.⁷⁶

Although the IHIT teams are considered integrated, i.e. investigators from each of the four police agencies mentioned above participate in IHIT investigations, the team investigating the death of Mr. Dziekanski consisted only of RCMP members.

Criminal Investigation or Coroner’s Responsibility

Central to the IHIT investigation is a consideration of primary responsibility to conduct such an investigation. The IHIT investigators took initial responsibility for the investigation upon their arrival and began to process the scene, take statements and collect evidence. The Officer in Charge of IHIT, Superintendent Rideout, said during a December 2008 media briefing that initially the IHIT team was conducting a sudden death investigation on behalf of the Coroner’s Office, under the authority of the BC *Coroner’s Act* (presumably because IHIT was of the view that no criminal offence had been committed). During the Braidwood Inquiry, however, he said that:

... our first thought process was advancing this case as it unfolded to a Crown counsel and perhaps a criminal court. So we, as – as when we were tasked with this investigation, IHIT’s responsibility was to conduct an independent investigation of ... the death of Robert Dziekanski at YVR.

Superintendent Rideout also explained at the Braidwood Inquiry that as at the end of October 2007 he felt there were insufficient grounds to conclude that any of the RCMP officers involved had committed a criminal offence in relation to the death of Mr. Dziekanski. In mid-November 2007, he wrote to the B.C. Coroner’s Service to indicate that a criminal investigation into the death of Mr. Dziekanski

⁷⁶ See <http://bc.rcmp.ca/ViewPage.action?siteNodId=131&languageId=1&contentId=3794>.

was underway by IHIT and that the results of the investigation would be submitted to Crown counsel for a decision as to criminal charges.

RCMP news releases in the days following the death of Mr. Dziekanski indicated that the investigation was criminal in nature and being conducted under the aegis of IHIT.⁷⁷ On November 17, 2007 Deputy Commissioner Gary D. Bass, Commanding Officer of the RCMP's "E" Division (British Columbia) mentioned in a press release the ongoing IHIT investigation.⁷⁸

The IHIT never publicly relinquished jurisdiction to investigate the matter as a criminal investigation, and ultimately submitted a Report to Crown Counsel pertaining to the investigation. The submission of the Report to Crown Counsel allowed the British Columbia Criminal Justice Branch (BC Justice) to consider whether criminal charges against any of the responding members were appropriate. No charges were approved.⁷⁹

I am concerned that the nature of the investigation was not apparent to the investigators, i.e. whether they were conducting a criminal investigation or an investigation under the BC *Coroner's Act*. For example, investigators appear to have been of two minds with respect to the seizure of evidence. Exhibit reports were completed with respect to physical evidence (such as the CEW, probes and wires) at the scene which was directly related to the death of Mr. Dziekanski. Other evidence, such as the Pritchard video, was not seized but was "borrowed". Had the investigation been treated as a criminal investigation from the outset, however, IHIT investigators likely would not have been so ambiguous in their approach.

I note that early in 2009 the RCMP "E" Division began to consider a draft Memorandum of Understanding with the BC Coroner's Office and other police agencies in the province with respect to the provision of operational assistance under their respective mandates. If signed, this document will represent a significant step forward in achieving a coordinated approach to such investigations.

Recommendation

I reiterate my recommendation from my report on the Police Investigating Police (August 2009) that all RCMP member investigations involving death, serious injury or sexual assault should be referred to an external

⁷⁷ See <http://www.bc.rcmp.ca/ViewPage.action?contentId=929&q=dziekanski&siteNodeId=38&languageId=1>.

⁷⁸ See <http://www.bc.rcmp.ca/ViewPage.action?contentId=1390&q=dziekanski&siteNodeId=38&languageId=1>.

⁷⁹ Please see the section of this report discussing the role of BC Justice.

police force or provincial criminal investigation body for investigation. There should be no RCMP involvement in the investigation. If, however, the RCMP continues to investigate such matters, then I recommend that the RCMP implement clear policy directives that all investigations in which death or serious bodily injury are involved and which involve RCMP members investigating other police officers will be considered criminal in nature until demonstrated not to be.

Issues Involving the IHIT Investigation

I have concerns with respect to certain aspects of the investigative approach taken by IHIT and with information released to the public through the media.

Presence of Corporal Robinson at the Richmond Detachment Briefing

On October 14, 2007 an IHIT briefing was held at the Richmond Detachment. Present were the IHIT investigative team and media relations officers (MRO). At some point during the briefing, Corporal Robinson, one of the involved members, was present and related to the IHIT members his perception of events. As is noted in more detail below at **Appendix S** (Media Releases), it is possible that to some extent the information provided to the media by the MRO in the early days of the investigation was coloured by Corporal Robinson's input.

Staff Sergeant (then Sergeant) Attew, the IHIT team commander at that time, stated that he was not aware that Corporal Robinson was one of the four involved members or he would not have allowed Corporal Robinson to attend. Superintendent Rideout, who was not present at the briefing, has indicated that he would not have allowed Corporal Robinson to attend because of the obvious potential to taint the objectivity of the investigation. The Richmond Detachment MRO, Corporal N. Basra, was not present at the IHIT briefing, but stated that she would not have allowed an involved member to attend because of the possibility of inadvertently adopting a position advanced by that involved member which could then make its way to the media by mistake.

The responsibility to ensure that the integrity of the investigation was maintained fell to the senior IHIT member at the briefing. As team commander at the time, that was Staff Sergeant Attew.

Overarching the decision to allow Corporal Robinson to attend the IHIT briefing is the apparent lack of certainty on the part of IHIT investigators in the early stages of the investigation with respect to the nature of the investigation. When interviewed by the Commission, Superintendent Rideout took the position that the IHIT investigators had no evidence of a criminal offence having occurred, and therefore the incident was not initially treated as a criminal investigation. It is possible that information provided to the media could have been predicated on the same assumption, resulting in a more relaxed attitude by the MRO.

Finding

Corporal Robinson, as an involved member, should not have been permitted to attend the IHIT briefing held at the Richmond Detachment on October 14, 2007. Sergeant Attew failed to ensure that only appropriate RCMP members were present during the briefing.

Pritchard Video

The video taken by Mr. Pritchard at YVR of the incident involving Mr. Dziekanski was purportedly “borrowed” from him by Constable Patrick Mulhall, an IHIT investigator, on the night of the incident (October 14, 2007).⁸⁰ According to documents filed by Mr. Pritchard during his attempts to recover the video,⁸¹ he was told by Constable Mulhall that the video was to be copied by the RCMP and that it would be returned to him within 48 hours. Constable Mulhall subsequently contacted Mr. Pritchard and informed him that the time of return could be one and a half to over two years (approximately) because it would be used at a Coroner’s Inquiry. This information is confirmed in a note to file by Constable Mulhall. In the same note, Constable Mulhall indicated that the video was not returned because Superintendent Rideout, the Officer in Charge of IHIT, had decided that it should be retained pending completion of the investigation by IHIT. It was confirmed that Superintendent Rideout had made the decision to retain the Pritchard video on October 22, 2007 and that by October 19, 2007, most (not all) of the witnesses had been interviewed.

During his interview with the Commission, Superintendent Rideout stated that he believed that the video could have been seized, and not “borrowed”, pursuant to provisions of the *Criminal Code* or the *BC Coroner’s Act*. He was not able to offer an opinion as to why these provisions were not exercised.

Mr. Pritchard initiated legal proceedings to recover his video, which ultimately was returned to him prior to litigation taking place.

Given that the video was not initially seized from Mr. Pritchard but was obtained with his consent and acquiescence, the RCMP had no authority to retain the video when Mr. Pritchard asked for its return. If the video was considered to be seized, this fact should have been clearly communicated to Mr. Pritchard. Either way, it was unclear to Mr. Pritchard what the status of his property was.

I have reviewed the Vancouver Police Department policy⁸² on obtaining video relevant to an investigation. I commend that organization for putting in place

⁸⁰ Mr. Pritchard was initially interviewed by Constable Rundel on October 14, 2007 shortly after the incident. The interview was terminated early by Corporal Johal of the Richmond Detachment, according to Rundel testimony during the Braidwood Inquiry (February 23, 2009, p. 80).

⁸¹ Statement of Claim dated October 25, 2007.

⁸² See <http://vancouver.ca/police/media/2009/RefresherBulletin.pdf>.

what I consider to be clear and practical policy on the issue. The RCMP may wish to consider this as a model for similar policy.

Recommendation

Given the proliferation of recording devices, it is anticipated that incidents in which RCMP members will seek to obtain private video or audio recordings will potentially occur more frequently in the future. Whether the police seize a video or audio recording of an event or obtain it on consent from a member of the public, the police must know and advise the public of the authority under which the video or audio recording is obtained. I recommend that the RCMP provide clarification for members with respect to obtaining video or audio recordings of an event.

Media Releases

The RCMP has been criticized with respect to certain statements made by its members in the media following the death of Mr. Dziekanski.⁸³ On November 13, 2007 the British Columbia Civil Liberties Association (BCCLA) made a complaint⁸⁴ to this Commission, pursuant to Part VII of the *RCMP Act*. The complaint contained a number of allegations with respect to some of the RCMP media statements made in the days following the death of Mr. Dziekanski and with respect to the possession of the Pritchard video by the RCMP. The BCCLA complaint also alleged that the RCMP provided a subjective version to the public of the events which led to Mr. Dziekanski's death.

As per process under the *RCMP Act*, the complaint was referred to the RCMP for investigation. In a report dated December 23, 2008 and signed by Chief Superintendent Rob Morrison, Officer in Charge of Operations Strategy Branch, "E" Division, Vancouver, provided to the BCCLA, Chief Superintendent Morrison stated that the RCMP investigation found no basis in any of the allegations made by the BCCLA. He went on to say that Sergeant Lemaitre (the RCMP media relations officer) was provided operational guidance by him (Chief Superintendent Morrison) with respect to keeping notes.

The BCCLA subsequently requested that I conduct a review of the adequacy of the RCMP public complaint investigation. Since that review is inextricably linked to this investigation, I have provided my review of the RCMP Part VII investigation in this report. The review can be located at **Appendix C** to this report.

During a press conference on December 12, 2008,⁸⁵ Superintendent Rideout advised that he recognized that some information as provided to the public in the

⁸³ The issue of media releases is discussed in more detail at **Appendix S**.

⁸⁴ See **Appendix C**.

⁸⁵ See

www.bc.rcmp.ca/ViewPage.action?contentId=7425&q=dziekanski&siteNodeId=38&languageId=1.

early stages of the investigation was incorrect and inconsistent with information obtained through the investigation. He then went on to say that although the RCMP knew of the errors, they were not corrected because of the ongoing investigation and because of other factors, such as awaiting the decision by BC Justice as to whether criminal charges would be brought against the RCMP members involved.

In evidence provided to the Braidwood Inquiry on May 6, 2009, Superintendent Rideout stated further that the release of certain information pertaining to particular aspects of the investigation was, in his view, overly specific and a potential threat to the integrity of the investigation of the death of Mr. Dziekanski. As a result he replaced Sergeant Lemaitre, the media relations officer who had been the RCMP media lead, with Corporal Carr, a media relations officer attached to IHIT. Superintendent Rideout stated that although he was aware of the inaccuracies, he did not correct the public record because of what he perceived as the potential impact on the fairness of any subsequent proceeding, such as a criminal trial (in the event charges were warranted), before a coroner's inquest or before a commission of inquiry such as the Braidwood Commission.

Arguably, correcting relatively straightforward inaccuracies such as the number of members present or the number of times the CEW was cycled would not have compromised the position of the RCMP vis-à-vis any criminal investigation of the events. It is incumbent on the RCMP to take all reasonable steps to confirm information prior to it being provided to the public and to correct inaccuracies when they are found, unless an overriding rationale exists as to why that information should not be made public. Failing to do so perpetuates concerns that the police are not conducting a transparent and impartial investigation into its members.

At the same news conference, Superintendent Rideout was asked whether the officers involved intended to deploy the CEW on Mr. Dziekanski whether or not he had picked up a weapon (the stapler). Superintendent Rideout responded that the IHIT investigation canvassed all aspects of the event, and concluded that the responding RCMP members deployed the CEW because of the perception that Mr. Dziekanski's behaviour was *extraordinary and combative*.⁸⁶

In that same exchange during the December 12, 2008 news conference, Superintendent Rideout also said:

While enroute to responding to the incident, the officers received update information about the situation through the radio. They were advised on the nature of the complaint that they were responding to. By policy, their duty necessitated them to take Mr. Dziekanski's [sic] into custody. They would be making assessment as to how they would do that while they

⁸⁶ See

www.bc.rcmp.ca/ViewPage.action?contentId=7425&q=dziekanski&siteNodeId=38&languageId=1.

were enroute, based on all available information to them. We know that occurred.

This statement begs the question as to whether IHIT had any knowledge of the responding members having discussed the use of the CEW prior to their arrival at YVR, or had colluded or concocted a story to the contrary. This was put directly to Superintendent Rideout during his interview with the Commission. Superintendent Rideout categorically denied that IHIT had or has any such knowledge.

This question was also posed to the RCMP by the Commission. The RCMP has advised me that it has examined the files and audio recordings related to this issue and cannot locate any indication that IHIT had any such knowledge.

The primary questions to be asked with respect to media releases are whether, over time, the media releases provided by the RCMP were fair and objective or whether they were to any degree self-serving and defensive of RCMP members and their conduct. Although I cannot state categorically that media releases were provided to protect or enhance the image of the RCMP, I have concerns that some of the information provided to the media did just that. This issue is discussed in more detail in **Appendix S** (Media Releases) to this report.

The issue of the impression left by RCMP media releases was also discussed in my *Final Report on Chair-Initiated Complaint into the Shooting Death of Ian Bush – November 28, 2007*.⁸⁷ In that decision, I recommended that *[t]he RCMP develop a media and communications strategy specifically for police-involved shooting investigations that recognizes the need for regular, meaningful and timely updates to the media and to the public. In addition, the media and communications strategy should include a publicly available general investigative outline of the steps to be taken and the anticipated timeline for each step.*

Finding

The RCMP should have released certain information to the media which would have served to clarify information pertaining to the death of Mr. Dziekanski and correct erroneous information previously provided without compromising the IHIT investigation.

Recommendation

I reiterate my recommendation in the Ian Bush decision that *[t]he RCMP develop a media and communications strategy specifically for police-involved shooting investigations that recognizes the need for regular, meaningful and timely updates to the media and to the public. In addition, the media and communications strategy should include a publicly available general investigative outline of the steps to be taken and the*

⁸⁷ See my Final Report in the Bush matter (November 28, 2007 File No.: PC-2006-1532, at p. 64.

anticipated timeline for each step. I also expand my recommendation to cover all in-custody death investigations.

Cause of Death

A determination with respect to the cause of Mr. Dziekanski's death is outside the scope of this report; however, some information regarding the medical assessment is provided below.

An autopsy was performed by Dr. Charles Lee on Mr. Dziekanski on October 16, 2007. Dr. Lee stated in his autopsy report that the cause of death cannot be conclusively determined and that a pre-existing heart condition of Mr. Dziekanski combined with signs of chronic alcoholism and being pinned in the prone position as he was being subdued, may have led to a fatal arrhythmia.⁸⁸ Dr. Lee indicated as well that although Mr. Dziekanski was agitated, he likely did not suffer of delirium. The autopsy of Mr. Dziekanski found no trace of alcohol or drugs in Mr. Dziekanski's body. Dr. Lee ruled that the death of Mr. Dziekanski was best characterized as sudden death following restraint.

Subsequent to Dr. Lee's autopsy, Dr. Michael Pollanen, the Chief Forensic Pathologist for Ontario, was asked by IHIT investigators to review the autopsy findings of Dr. Lee and provide a second opinion on the findings. After reviewing the autopsy report and supporting medical documentation and evidence collected by Dr. Lee, as well as viewing video and photos, Dr. Pollanen concluded that:

- 1. Robert Dziekanski did not die of the effects of a physical injury, the toxic effects of a drug, or an acutely fatal natural disease or condition. There are at least four variables that could be co-factors in death: an agitated state, restraint in the prone-position, the effects of a taser discharge and chronic alcoholism.*
- 2. Robert Dziekanski did not die of a taser-induced cardiac arrhythmia.*
- 3. There is competing scientific evidence on the putative adverse non-cardiac effects of a taser discharge in animals and man. If Robert Dziekanski's death was caused, in part, by the adverse effects of an agitated state, then we need to keep an open mind about the putative role that the taser discharge may have played in indirectly contributing to death, since Mr. Dziekanski appears more (dis)stressed and agitated after the deployment of the taser.*

For additional information concerning the medical assessments, please see **Appendix T**.

⁸⁸ Arrhythmia is an abnormal heartbeat. See <http://www.heartandstroke.com/site/c.iKIQLcMWJtE/b.3484057/k.22A1/Arrhythmia.html>.

Positional Asphyxia

Reference was made by Dr. Lee and by Dr. Pollanen to Mr. Dziekanski being placed in a prone position while being restrained and the possibility that this position, coupled with a state of high agitation, can lead to death.

I note from my review of the video of the arrest of Mr. Dziekanski, that Corporal Robinson is seen to be apparently placing weight on Mr. Dziekanski's upper body for approximately 40 seconds during the struggle, while Mr. Dziekanski was in the prone position. This is corroborated by Corporal Robinson's statement to IHIT investigators and statements of other responding RCMP members during the incident. I note that during his evidence before the Braidwood Inquiry, Corporal Robinson denied having placed an inordinate amount of his weight on Mr. Dziekanski's neck area.

While not conclusive or determinative of the cause of death, and based on the comments of the pathologists in this case, it is my belief that positional asphyxia may occur independent of other contributing factors such as delirium. As noted above, Dr. Lee indicated that he did not believe that Mr. Dziekanski suffered from delirium.

Whether Mr. Dziekanski would have survived had the struggle with the RCMP members been shorter, or had he been moved to a full recovery position immediately after his arrest, or had the handcuffs been removed sooner, cannot be known.

A 2005 decision of the British Columbia Police Complaint Commissioner⁸⁹ dealt with positional asphyxia causing death. In that decision, the Commissioner also discussed positional asphyxia vis-à-vis excited delirium and other causes of irrational behaviour. He recommended that police should receive regular and updated training on these issues and commented on issues related to officer and public safety, and the need to quickly obtain medical assistance when necessary to protect the person displaying such behaviour.

Recommendation

The RCMP should immediately conduct a review of its policies and training regimen to ensure that members are adequately trained with respect to recognizing the risks inherent in, and signs of, positional asphyxia and in taking steps to mitigate those risks.

Travel to Poland

Criticism has been levelled at the RCMP investigation by some because of travel to Poland by IHIT investigators,⁹⁰ citing such travel as an attempt to discredit Mr. Dziekanski and having no link to investigative necessity. During a news

⁸⁹ [Reasons for Decision re: Benny Matson](#), March 22, 2005.

⁹⁰ Further information on this issue may be viewed at **Appendix R** to this report.

conference in December 2008, Superintendent Rideout provided an explanation for the travel to Poland.

His position was that such travel was necessary to seek background and potential evidence which was available in Poland. Further, Superintendent Rideout has indicated that such additional information had been requested by the medical experts who attempted to determine the cause or causes of Mr. Dziekanski's death. I note that a number of the expert reports prepared subsequent to the *post mortem* examination of Mr. Dziekanski indicated that background information pertaining to Mr. Dziekanski may assist in determining the cause of death.

Those medical experts, however, were focused on the cause of death, and not the nature or the manner of death. In my view, therefore, the travel goes to the nature of the investigation being conducted. If the IHIT team was conducting a *Coroner's Act* investigation, i.e. to determine the cause of death, the travel may have been deemed necessary, but I would expect that acquiescence from the Coroner's Service would have been sought prior to embarking. If the investigation was criminal in nature, an awareness of the events leading up to the death may assist in determining culpability but, again, I would have expected a clearer rationale for the travel.

The travel of IHIT investigators to Poland was not carried out pursuant to the *Mutual Legal Assistance in Criminal Matters Act* (commonly known as an MLAT request), but was arranged on an *ad hoc* basis as between IHIT and Polish authorities. Canada and Poland have had a bilateral assistance agreement in place since 1997.⁹¹

During his interview with the Commission, Superintendent Rideout stated that he participated in the travel to Poland because he wanted to uncover any available information to explain why Mr. Dziekanski acted as he did at YVR. He said that the Coroner appeared not to be interested in Mr. Dziekanski's behaviours prior to his death, but he (Superintendent Rideout) felt that physical and mental health issues as they related to Mr. Dziekanski were relevant. Superintendent Rideout pointed out that he did not accede to the travel because of the profile of the investigation. He said the trip was not intended to discredit Mr. Dziekanski and that he would have conducted such a background investigation for any in-custody death file.

The reasons for undertaking such travel could include furthering a criminal investigation, providing assistance to the Coroner's Service or in support of a civil matter. The RCMP has not been clear in any official release as to the nature of the travel or its goals and objectives, thereby contributing to the perception of partiality.

⁹¹ 1997 Canada Gazette Part I, p. 2060 (Vol. 131, No. 29). See http://www.oas.org/JURIDICO/mla/en/can/en_can-mla-gen-liste.html.

Part B

This part of the report is intended to address what I consider to be the secondary aspects of the IHIT investigation of the death of Mr. Dziekanski. For a more complete discussion of the issues, please see the appendices as referenced in the report.

Statements from RCMP Members

As part of their duties, police officers are required to document their involvement in events which occur as a result of their employment and to provide that documentation to their employer. Such documentation must also be disclosed by operation of law to defence counsel or as directed by the courts with respect to judicial processes. Further, in order for a police officer to bring him or herself within the confines of protection offered by section 25 and other relevant sections of the *Criminal Code*, he or she must provide sufficient information to demonstrate that at the relevant time he or she was a peace officer engaged in the lawful execution of his or her duty and using only as much force as was necessary for that purpose.⁹²

As I noted in my report on the death of Ian Bush:⁹³

As a general rule, persons in Canada are under no legal obligation to provide a statement to the police. The police may request that a person provide a statement to them during an investigation but, absent some statutory or common law duty to comply, they have no means to enforce the request. If the police have reasonable grounds to arrest a person and keep them in custody, the police may attempt to interrogate the person in circumstances where the person's liberty has been taken away from them, but there is still no requirement that the person cooperate with the police.

RCMP members are required to provide an "accounting" of their activities when directed to do so. This is termed a "duty to account" statement. The authority to compel RCMP members to provide a duty to account statement is derived from the fact that RCMP members are required to obey a lawful order from another RCMP member who is superior in rank or who has authority over the member. There is no similar requirement for ordinary citizens in the ordinary course of police investigations.

Given the mandatory nature of duty to account statements, they are likely not voluntary and not admissible in criminal proceedings. It is clear that the duty to account is primarily viewed as an administrative process. For example, it may be used for the purpose of code of conduct proceedings. Although the duty to account is not specifically considered part of the

⁹² *Criminal Code*, section 25 (R.S., 1985, c. C-46).

⁹³ Commission File No.: PC-2006-1532, November 27, 2007.

criminal investigation process, this type of statement can provide general information from which to commence a criminal investigation.

One statement taken from one of the responding members was considered by IHIT investigators to be a duty to account statement. This was a statement taken by Corporal D. Brassington from Constable Millington at the YVR RCMP sub-detachment office in the hours following the incident. According to the summary contained in the Report to Crown Counsel, when Corporal Brassington arrived all of the responding members (Corporal Robinson and Constables Millington, Rundel and Bentley) were together in the sub-office, along with Staff Relations Representative (SRR)⁹⁴ Corporal Ingles. Corporal Ingles indicated to Corporal Brassington that he had spoken with Constable Millington.

According to information before the Commission, many RCMP members are of the view that there exists an unwritten rule that members will provide what amounts to a duty to account statement following an incident. Such statements are at times taken following a meeting between the SRR and the member involved.

The requirements of the duty to account statement must be clear to all RCMP members. Although some divisional guidelines do contemplate the duty to account,⁹⁵ that is not currently the case within the RCMP nationally.

The role of the SRR is not to provide legal advice. Since SRRs do not provide legal counsel for RCMP members, conversations between the involved member and the SRR are not privileged in the legal sense, although within the RCMP they are considered confidential.

Absent explanations, the issue here is the perception such a meeting conveys. Why did the SRR meet with all of the members involved? Did the SRR and Constable Millington meet alone? For how long? What was discussed? What was the resulting input or influence, if any, of the SRR's involvement? Who called the SRR and why?

In terms of the meeting between Constable Millington and Corporal Ingles, I have no knowledge of the content of the conversation, other than Constable Millington's comment in his statement that Corporal Ingles told him that he had the option to *sleep on it and not give a statement right away* to ensure that he (Constable Millington) recalled all of the details.

Corporal Ingles has commented on the meeting.⁹⁶ It appears to me from the comments of Corporal Ingles that, in his view, the role of the SRR is to filter information as between the involved member and the investigators. With respect

⁹⁴ The RCMP is not unionized. SRRs carry out a function akin to a union representative.

⁹⁵ See **Appendix Q** – Involvement of Staff Relations Representative.

⁹⁶ Ibid.

to the role of and interaction between an SRR and an involved member, I see this as a practice fraught with potential pitfalls. The investigators, particularly in the early stages of an investigation, require facts which are not adulterated or influenced. The investigator is at liberty to conduct the interview of the involved member without the SRR potentially having first discussed the facts of the situation with the member. SRR attendance and discussion with the member(s) involved prior to the member being asked to provide a statement with respect to serious incidents could result in filtered information being provided to the investigator. The further danger is the potential for the appearance of interference, or at worst actual interference, with an ongoing investigation.

In light of my recommendation (see page 47) that investigations of police officers involved in incidents of death or serious bodily harm be treated as criminal investigations until they are demonstrated to be otherwise, the role of the SRR should be clarified.

Notwithstanding the potential that the involved member's statement may be influenced, I am concerned that prior to taking a statement from the involved member, the investigator could be influenced by information or a version of events provided by the SRR. To paraphrase an old maxim, an impartial investigation must not only be done, it must be seen to be done. This is particularly true when the police are investigating the police.

In addition to concerns with the presence of the SRR prior to any interview being conducted or statement taken from police witnesses by the investigators, I have concerns with the fact that apparently all of the involved members were together at the sub-detachment at YVR following the death of Mr. Dziekanski to meet with the SRR. Basic investigative practice is for witnesses to be separated to avoid any opportunity for complicity or the appearance of such.

The issue of the duty to account statement has arisen previously and I have recommended the need to address the propriety of the involvement of the SRR. In my decision in the Ian Bush matter,⁹⁷ my recommendation and the response of November 2, 2007 from the Commissioner of the RCMP were as follows:

Recommendation

The RCMP develop a policy that dictates the requirement, timeliness and use of the duty to account that members are obliged to provide.

Commissioner Elliott responded:

I support this recommendation and will ask the Director, Community, Contract and Aboriginal Policing Services, to ensure that this is done in a timely manner.

⁹⁷ Commission File No.: PC-2006-1532, November 27, 2007.

To date, it has not been confirmed with the Commission that this recommendation has been implemented.

Finding

The responding RCMP members meeting alone at the YVR sub-detachment office following the death of Mr. Dziekanski was inappropriate.

Finding

An SRR should not have been permitted to meet alone with Constable Millington prior to the IHIT investigator.

Recommendation

If the protocol of SRR attendance is to continue, the RCMP should formalize the role of the SRR to provide clear policy and guidance to ensure that the SRR knows the bounds of his or her involvement and the required protocols with respect to such attendance, and that in all such cases the SSR not meet alone with a subject member in advance of being interviewed by an investigator.

Recommendation

I reiterate my recommendation in the Ian Bush decision (November 2007) that *[t]he RCMP develop a policy that dictates the requirement, timeliness and use of the duty to account that members are obliged to provide.*

IHIT Approach to Questioning Members

It is apparent to me that the IHIT investigators did not approach the interviews of the involved members or the civilians with a coordinated set of issues to be covered to ensure that the same areas were canvassed with each person. This is not to suggest that the IHIT investigators should have conducted each interview from the same set of questions, but coordination of the nature of questions to be asked of each witness would have been helpful. The resulting statements do not represent what would be considered a coordinated approach.

When IHIT was asked whether this postulation was correct, IHIT responded that:

The IHIT members who conducted statements had full, unfettered access to the entire investigational file. To varying degrees the members resourced information such as the daily log, statement transcripts, video footage, audio recordings and other material that was collected through the course of the investigation.

Verbiage such as “to varying degrees” conveys the image that investigators did not approach the interview process in a coordinated manner and each approached the conduct of interviews as he or she saw fit. My concern,

therefore, is that investigators may have worked in isolation of the details obtained by others and that the coordination of information may have caused necessary questions to go unasked. For example, in their statements to IHIT the responding RCMP members were never pressed about the degree of communication among members during the Dziekanski incident, nor were they pressed about the nature of the decision to deploy the CEW, the speed with which it was deployed or other means available to de-escalate or resolve the situation.

Although the RCMP subscribes to major case management practices, a reasonable amount of time is necessary to organize and put in place the tools necessary to manage the file. During the interviews conducted immediately after the incident, I understand that IHIT investigators would be attempting to obtain all of the information available without conducting significant analysis. In the days following the incident, however, investigators would have been able to conduct a cursory analysis at a minimum, to be able to determine what areas required sharper focus and the level of depth of information required.

Recommendation

The RCMP should review its operational policies and procedures to ensure that, particularly in serious cases in which members investigate the actions of other members, processes are available to enable investigator awareness of the nature and depth of detail required during interviews.

Police Caution

The responding RCMP members from whom statements were taken by IHIT investigators did not receive a police caution pursuant to the *Canadian Charter of Rights and Freedoms* at the time their statements were taken because investigators felt there was no evidence that a criminal offence had been committed. At the time the statements were taken, IHIT investigators knew that Constable Millington had discharged the CEW, they knew that there had been an altercation involving the members and Mr. Dziekanski and they knew that Mr. Dziekanski was deceased. They did not, however, have evidence that any of the responding members had committed a criminal offence.

According to the RCMP Learning Module on Witness Statements, the threshold for taking a cautioned statement is a (reasonable) suspicion that a criminal offence may have been committed.⁹⁸ IHIT investigators did not have such a belief when they took the statements from the responding members. Investigators indicated in the IHIT Report to Crown Counsel that they were prepared to stop any given interview and issue the necessary caution had any evidence of a criminal offence come to light.

⁹⁸ See <http://www.rcmp-learning.org/iim/ecdi1010.htm#step3>.

The Report to Crown Counsel as compiled by the IHIT investigation stated:

Investigators made a conscious decision to take un- warned statement [sic] versus warned statements. Based upon the totality of the evidence available to investigators at the time, no evidence existed indicating criminal behaviour on the part of the officers. Investigators were prepared to stop interviews and warn the officers at any time should their information suggest criminal code breaches.

With respect to the first statements taken by IHIT investigators from the responding members shortly after the death of Mr. Dziekanski, I do not disagree with the decision to take non-cautioned witness statements.

Beginning at 7:23 a.m. on October 14, 2007, an IHIT briefing took place at the Richmond Detachment and by that time, a number of IHIT investigators had viewed the Pritchard video. After viewing the Pritchard video and realizing that the statements of the responding members did not align with the video evidence, it would have been prudent for IHIT investigators to have asked themselves whether the video presented a reasonable suspicion that a criminal offence had taken place before taking subsequent statements from the responding members.⁹⁹ This would have caused them to reconsider and document whether to take cautioned statements from the responding members and whether or not to show the Pritchard video to the involved members prior to taking further statements.

Evidence during the Braidwood Inquiry supports the assumption that Superintendent Rideout, the Officer in Charge of IHIT, did consider this action and decided against it. In an e-mail dated November 5, 2007 from Superintendent Rideout to his superior, Chief Superintendent Dale McGowan, Superintendent Rideout stated:

... we will not be releasing the video to the involved member. We feel it would be inappropriate in an impartial investigation.

Superintendent Rideout explained in his Braidwood Inquiry testimony that although he wrote *member*, he actually meant that the video would not be released to the four responding members.

The video, vis-à-vis the involved members, appears not to have been considered by IHIT investigators in the context of an investigative tool. In his evidence during the Braidwood Inquiry, Superintendent Rideout indicated that he had considered the effect on the involved members of the video being publicly

⁹⁹ Sergeant Pierre Lemaitre, RCMP "E" Division Media Liaison, said in evidence at the Braidwood Inquiry that he saw the Pritchard video on the morning of October 14, 2007. Sergeant Lemaitre (and other witnesses) said that IHIT investigators also viewed the video.

released, but he did not comment on the reason for not reviewing the video with the involved members. He said:

... the thinking was that the release of that video and their viewing of it would be traumatic for them, ... and there was some concern should that be released, my position was that was not the role of the IHIT investigation and that we should not participate in that.

Superintendent Rideout reiterated those comments during his interview by the Commission when he was asked why the Pritchard video was not put to the responding members to allow them to comment on the differences between their versions of events and the scenes depicted in the video. Notably, during his testimony at the Braidwood Inquiry on September 22, 2009, Superintendent Rideout was asked about an e-mail which on October 23, 2007 he sent to Inspector Bill Fordy (a member of IHIT) in which he referred to the fact that the Regional Coroner had *concerns regarding discrepancies between the members statemnets [sic] and the seized video at YVR*. In that same e-mail Superintendent Rideout says, *Perhaps you could review the statements. We will likely have to re-interview members to address his questions*. Superintendent Rideout testified during the Braidwood Inquiry that he intended this message as a “head’s up” or a notification to Inspector Fordy. Despite this comment, these discrepancies were not addressed with the members involved in this incident. I am left to surmise, therefore, that the use of the video as an investigative tool was not considered by IHIT.

Finding

If for no other reason than to be fair to the responding members and give them an opportunity to address the significant and readily apparent discrepancies between their versions of events and the video, it would have been appropriate to provide the responding members with an opportunity to view the Pritchard video prior to taking further statements from them.

Notes of Responding Members

I have reviewed the notes taken by each of the responding members with respect to the interaction with and death of Mr. Dziekanski. The quality, completeness and content of these notes is well below the standard expected of police officers. Three of the four responding members deal with the entire incident in approximately four pages of their relatively small (pocket sized) police notebooks. The fourth member recorded the entire incident in approximately two pages. Each of these records also includes the names and contact information of potential witnesses, meaning that the substantive description with respect to the interaction with Mr. Dziekanski is even more truncated than the number of pages indicated.

The result is that detail with respect to the observations of the members, their perceptions of the scene and Mr. Dziekanski's actions as well as their own responses and the rationale for those actions is sparse. At best, the notes provide a very high level overview of the incident. I note that during his testimony in the Braidwood Inquiry, Staff Sergeant Douglas Wright¹⁰⁰ indicated that he urged Corporal Benjamin Robinson to take "excellent notes" about the incident, but that ultimately those notes were not to his standard. Notably, Staff Sergeant Wright acknowledged that it is often the case that due to the fact that a member's notes may be subject to "examination and/or production and/or a search warrant to address what it is that he did at the time," a member will put "very, very short, cryptic notes" and that the documentation on the file itself would be where additional information would be held.

RCMP policy advises members that:

2. General

2. 1. The member's notebook is a fundamental investigative tool. It is essential that notebooks be properly compiled, complete and accurate in order to support investigations, corroborate evidence and increase the credibility of a member's testimony in court. Properly recorded entries (notes) may also prove to be invaluable in substantiating information years after an investigation.

*2. 2. You may use notebook entries to refresh your memory for court if the notes were made at or near the time of the occurrence.*¹⁰¹

Some or all of the responding members may take the view that because they were going to be asked to provide verbal statements concerning the YVR incident, the need for detailed written notes was lessened. I do not accept this position. No matter the occurrence, RCMP members are aware that they will be required to document the matter with internal written reports. The requirement to document police actions does not replace or diminish the need to document the matter in their own notebooks. As noted elsewhere in this report in the section titled *Statements from RCMP Members*, in order for a member to invoke the protections of section 25 and other relevant sections of the *Criminal Code*, he or she must provide sufficient information to demonstrate that at the relevant time

¹⁰⁰ In October of 2007, Staff Sergeant Wright was the Staff Sergeant in charge of the Vancouver International Airport sub-detachment of the Richmond RCMP.

¹⁰¹ See RCMP Policy at **Appendix V**.

he or she was a peace officer engaged in the lawful execution of his or her duty and using only as much force as was necessary for that purpose.¹⁰²

The issue of sub-standard note taking has arisen in previous Commission decisions.¹⁰³ To date, the Commission has seen no discernable improvement in note taking.

To be clear, I make a distinction between note taking in the field and the completion of the various reporting forms to be completed by RCMP members (such as Occurrence Reports, Continuation Reports, CEW Usage Report or the Subject Behaviour/Officer Response Report [which will apparently be implemented in 2010]). Although RCMP policy requires in some circumstances that computer-based reporting be completed prior to the end of shift, absent adequate field note taking, the reliability of the data used for inclusion in the mandatory reporting documents must be considered suspect. Furthermore, the Commission has reviewed many cases in which the electronic reporting forms are not completed in a timely manner. In such cases, absent comprehensive, contemporaneous notes, the reliability of the written record will be seriously diminished.

I see as problematic the potential that in some cases members opt to rely on memory to provide reporting, as opposed to ensuring that appropriate and comprehensive field notes are taken in the first instance.

Finding

The responding members did not keep adequate notes of the incident involving Mr. Dziekanski.

Recommendation

In light of the continuing nature of this issue, the RCMP should take steps to ensure that members are aware of the importance of note taking, and that supervisors should be encouraged to regularly review the notes taken by their subordinates to ensure the quality of such documentation.

Critical Incident Stress Debriefing

In addition to the meeting with the SRR, a critical incident stress debriefing took place on October 27, 2007. Present were the four members as well as others trained in helping people deal with the aftermath of a traumatic event. Other than Constable Bentley, who gave his final statement on November 22, 2007, the other members had all provided statements prior to this debriefing taking place. I have reviewed Constable Bentley's post debriefing statement and note that it does not differ in substance from the accounts provided by the other members, nor does it differ from his own previous statements.

¹⁰² *Criminal Code*, section 25 (R.S., 1985, c. C-46).

¹⁰³ As examples, see Kingclear, CPC File PC-5710-200401, October 10, 2007 (<http://www.cpc-cpp.gc.ca/prr/inv/Kingsclear/rep-rap/rep-rap-eng.aspx>) and Lasser, CPC File PC-2008-1192, March 29, 2009 (<http://www.cpc-cpp.gc.ca/prr/rep/rev/chair-pre/Frank-finR-09-eng.aspx>).

I understand the need to provide such debriefing sessions to assist those involved in dealing with traumatic events. As such, for the health and well-being of those involved these sessions are necessary, provided they do not in any way interfere with the need to segregate evidence or contribute to the tainting of future evidence.

Independent Observer Comments

As noted in the section of this report discussing the Independent Observer Program, the Independent Observer found that no IHIT investigators had any association with any of the responding members.

He noted that the girlfriend of an IHIT investigator was acquainted with the girlfriend of Constable Millington. As a result, the IHIT team commander unilaterally assigned the investigator to the role of file coordinator, with the result that the investigator did not participate in conducting the investigation itself. This action was taken with no prompting from the Independent Observer.

Further, the Independent Observer reported that the IHIT team commander was accredited (in Major Case Management) and that each of the investigators was assigned full-time to the IHIT team, meaning that each worked solely on the investigation of homicide cases. The IHIT members, therefore, are highly trained and possess the skill sets necessary to conduct serious investigations.

The incident involving Mr. Dziekanski occurred at approximately 1:30 a.m. on Sunday, October 14, 2007. IHIT was advised of the death of Mr. Dziekanski at 2:28 a.m. and arrived at YVR to begin the investigation at 3:45 a.m.

The Independent Observer noted no signs of bias or partiality on the part of the IHIT investigators. On October 29, 2007, the Independent Observer received a CD containing witness statements taken to that date. Upon review of those statements, he noted no concerns with respect to impartiality or the asking of leading questions.

Having had the opportunity to review the IHIT investigation file, I agree with the assessment of the Independent Observer. I also note the following:

1. IHIT responded with an appropriate number of members to conduct the investigation;
2. RCMP Forensic Identification Technicians were called to the scene after the death of Mr. Dziekanski. These technicians processed the scene for evidence and chronicled the incident appropriately with photographs;

3. IHIT investigators began to take statements from the responding members and some of the civilians very shortly after arriving at the incident.

I have no evidence to suggest that IHIT investigators were less than professional. No evidence suggests that the responding RCMP members involved in the incident were treated inappropriately.

Major Case Certification

When investigating incidents are deemed to be serious in nature, such as homicides, most Canadian police agencies subscribe to a series of investigative protocols and processes known as Major Case Management.

At the time of the investigation of the death of Mr. Dziekanski, Superintendent Wayne Rideout, a member of the RCMP and the OIC of IHIT, was certified as a Team Commander in Major Case Management. Staff Sergeant David Attew, the initial commander of the IHIT team conducting the investigation was also Major Case certified. According to Superintendent Rideout, a number of the IHIT investigators on the team had taken the Major Case Investigators Course, while others, although experienced investigators, were newer on the IHIT team. In total, nine IHIT members were present at the YVR scene.

I note that Superintendent Rideout, although he was the OIC of IHIT and therefore had overall responsibility for the IHIT investigation teams, was not the original commander of the IHIT team assigned to investigate Mr. Dziekanski's death. Approximately one month into the investigation, however, he assumed those duties, presumably because of the public interest generated into the death.

OPP Review

On November 19, 2007 Chief Superintendent Richard Bent, Deputy Criminal Operations Officer of RCMP "E" Division requested that the Ontario Provincial Police (OPP) conduct a file review of the IHIT investigation. Specifically, Chief Superintendent Bent requested that the OPP examine the IHIT investigation to ensure that it was thorough, professional and unbiased. The OPP review found that overall the IHIT investigation was conducted in an impartial and unbiased manner and that the management of the investigation was conducted according to established standards. I have not relied on the OPP report in my investigation.

Finding

No bias or partiality toward the involved RCMP members was present in the IHIT investigation of the death of Mr. Dziekanski.

Comment on Body-Worn Video Devices (Head Cams)

Finally, I wish to address an issue, the importance of which is exemplified by the varying witness accounts of this incident. Undoubtedly, public interest in the events leading up to Mr. Dziekanski's death was increased because of the video footage showing the events unfold in real time. The proliferation of digital technology will afford members of the public an ever-increasing ability to capture all manner of events as they unfold. In my review I have relied heavily upon the images recorded by Mr. Pritchard, as the best evidence of the critical period of time, to assess both the interaction between the police and Mr. Dziekanski as well as the accuracy of the recollections of the various witnesses who later provided their accounts of the incident.

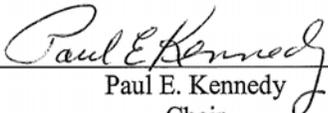
Policing agencies throughout the world are experimenting with video technology to assist them in their policing activities. In July and August of this year the Victoria Police Department conducted a pilot project using body-worn video devices (head cams) to record police interactions with the public. Anecdotal accounts of this project speak to its success. In the United Kingdom a trial project using these devices was commenced in 2006. The number of agencies in the United Kingdom integrating this technology continues to grow.

In the circumstances of this case, there would have been a clear benefit to video footage capturing the events from the members' perspectives. Although the Commission had the benefit of a non-police generated video, there is no doubt that a system that would allow all "to see and hear the event unfold through the eyes and ears of the officer at the scene,"¹⁰⁴ would be the best of all possible options. In addition to providing the best evidence, from an examination of early United Kingdom experiences, it may have a crime reduction effect, improve arrest and conviction rates, reduce overall police workload and be a useful tool to provide members with feedback as to their interaction with the public thereby improving the civility of the police.

While these benefits must be balanced against privacy rights, costs and increased infrastructure demands, I believe that the time has arrived to give these devices additional consideration within the Canadian policing context.

Having considered the complaint, I hereby submit my Public Interest Investigation Report in accordance with subsection 45.43(3) of the *RCMP Act*.

15 OCT 2009


Paul E. Kennedy
Chair

¹⁰⁴ *Guidance for the Police Use of Body-Worn Video Devices*, Home Office (Police and Crime Standards Directorate), July 2007, at p. 5.

Appendix A – Chair-Initiated Complaint

On November 8, 2007, as Chair of the Commission for Complaints Against the RCMP, I initiated a complaint pursuant to subsection 47.35(1) of the *RCMP Act* to assess:¹⁰⁵

1. Whether the RCMP officers involved in the events of October 14, 2007, from the moment of initial contact until Mr. Robert Dziekanski's subsequent death, complied with all appropriate policies, procedures, guidelines and statutory requirements for the arrest and treatment of persons taken into custody, including any RCMP directives or guidance related to the handling of persons who cannot communicate in either of Canada's official languages, and whether such policies, procedures and guidelines are adequate.

2. Whether the RCMP officers involved in the criminal investigation of the RCMP members involved in the events of October 14, 2007 complied with the RCMP policies, procedures, guidelines and statutory requirements for the conduct of such an investigation and whether such policies, procedures and guidelines are adequate and, further, whether such investigation was carried out in an adequate and timely fashion.

On February 9, 2009 I also initiated a public interest investigation into the Dziekanski matter pursuant to subsection 45.43(1) of the *RCMP Act*.

¹⁰⁵ CPC website <http://www.cpc-cpp.gc.ca/prr/rep/rev/chair-pre/cic-robertD-07-eng.aspx>

Appendix B – Background Information

The Commission for Public Complaints Against the RCMP is an agency of the federal government and is distinct and independent from the RCMP. When investigating any complaint filed with it, and notwithstanding the fact that the complaint in this matter was initiated by me as the Chair, the Commission is not an advocate for the complainant, the RCMP or its members. As Chair, my role is to reach conclusions after an objective examination of the evidence available. When appropriate, I make findings and/or recommendations as to steps the RCMP may take to improve or correct conduct by RCMP members.

It must be further emphasized that the Commission's mandate does not extend to making findings of criminal or civil liability, but rather is founded in assessing the appropriateness of the conduct of the RCMP members as well as that of the RCMP itself and the procedures in place at the time. Pursuant to the *RCMP Act*, my recommendations are not binding on the RCMP.

The complaint I filed involves an examination of the conduct of the responding RCMP members, but it also involves an examination of the investigation conducted by the RCMP of the death of Mr. Dziekanski. Increasingly in our society, criticism is levelled against the optics of investigations of police conducted by police. Among my tasks as Chair is to ensure that investigations in which RCMP members investigate other RCMP members are conducted with impartiality and that the investigations are thorough.

On December 11, 2007 the Commission released an interim report listing ten recommendations associated to three broad areas of conclusion (indicated below), and in June 2008 the Commission released a final report, entitled *RCMP Use of the Conducted Energy Weapon*, concerning the use of CEWs by members of the RCMP.

The three broad areas of conclusion noted in the June 2008 report were that the RCMP should:

- 1) *Coordinate and strengthen its efforts related to data collection and analysis of CEW use;*
- 2) *Empirically justify policy shifts with respect to CEW use, especially when that shift loosens the restrictions of deployment; and*
- 3) *Clarify to its members and to the public when it is permissible to deploy the weapon.*

In a letter to me as Chair of the Commission, dated November 29, 2007, RCMP Commissioner William J.S. Elliott indicated that the RCMP had taken additional steps to study the RCMP's use of the CEW, including:

1. Conducting a preliminary review of the RCMP's national policies and protocols as well as supplementary policy guidelines for RCMP detachments having airports within their jurisdiction, and taking steps to amend those policies to "reflect the requirement to have appropriate medical assistance on hand, whenever possible, when responding to reports of violent individuals and there is a heightened potential for the deployment of a conducted energy weapon."
2. Appointing a senior RCMP Officer to review RCMP policy and training with respect to CEWs.

On January 27, 2009 the RCMP issued an amended Operational Manual policy on the use of CEWs. The key points noted in the amended policy are that:

- 1) The RCMP now recognizes that a risk of death is associated with the deployment of the CEW;
- 2) The CEW may now be used only in circumstances in which the RCMP member, after considering the totality of the circumstances, perceives a threat to his or her safety or the safety of a member of the public;
- 3) RCMP members must now be re-certified annually in the use of the CEW;¹⁰⁶ and
- 4) The term *excited delirium* was removed from all RCMP policy and was replaced with the phrase *agitated or delirious persons*.

In addition, subsequent to the death of Mr. Dziekanski the RCMP opted to:

1. Restrict the use of the weapons to situations involving threats to officer or public safety;
2. Test a sample of CEWs to ensure adequate operation (following a Canadian Broadcast Corporation report calling into question the reliability of the output of some CEWs). On June 1, 2009, the RCMP removed from service approximately 1,600 Model M26 CEWs (the older model used by the RCMP) following testing by the Government of British Columbia which indicated that ...*80% of the devices failed to operate within the manufacturers specifications. The results also showed that 90% of these units produced less electrical output than would be expected, potentially presenting both public and officer safety risks.*¹⁰⁷ The RCMP will test these units and replace defective CEWs with the newer Model X26;
3. Enhance use of force reporting mechanisms; and
4. Conduct ongoing analysis of reporting on CEW usage.¹⁰⁸

¹⁰⁶ OM 17.7.1.4 - Revised 09-01-27.

¹⁰⁷ RCMP website – <http://www.rcmp-grc.gc.ca/news-nouvelles/2009/20090601-m26-eng.htm>.

¹⁰⁸ BC – YVR News Conference Statements – A/Commissioner A. MacIntyre, 2008-12-12. See also Commissioner's statement before Standing Committee on Public Safety and National

Other Interests

BCCLA Complaint

The British Columbia Civil Liberties Association (BCCLA) filed a complaint with the Commission on November 13, 2007¹⁰⁹ concerning what it perceived as misrepresentations made by RCMP media relations representatives and the failure of the RCMP to return video recordings taken by Mr. Pritchard in a timely manner.¹¹⁰

The complaint was investigated by the RCMP, which concluded in a final report dated December 23, 2008 that none of the allegations advanced by the BCCLA could be supported. One RCMP media relations officer did, however, receive operational guidance as a result of his failure to keep adequate notes.

On March 19, 2009, the BCCLA wrote to me to register its discontent with the response received from the RCMP following the RCMP's investigation of the BCCLA complaint relating to media relations. The BCCLA requested that its complaint be reviewed by the Commission. The relevant documents are located at **Appendix C** and **Appendix D**, respectively.

Details provided by the RCMP to the media concerning events surrounding the death of Mr. Dziekanski are inextricably linked to the BCCLA request for a Commission review of its complaint. Accordingly, my review of the BCCLA complaint pertaining to media relations is set out in detail below in the section of this report titled **Appendix S – Media Releases**.

Thomas R. Braidwood, Q.C., Hearing and Study Commission

The Province of British Columbia has initiated a Commission of Inquiry having two phases, each headed by Commissioner Thomas R. Braidwood, Q.C., and known as the Braidwood Commission (more formally, the Thomas R. Braidwood, Q.C., Hearing and Study Commission). The first phase was empowered to examine the appropriateness of the use of CEWs in the Province of British Columbia and to report on and make recommendations with respect to training in the use of the weapons. The first phase of the Braidwood Commission was not intended to have direct applicability to the RCMP.

The second phase, which began to hear witnesses on January 19, 2009, was empowered to examine the events and circumstances of the death of Mr. Dziekanski at YVR and to issue a report.

Security – Feb 12, 2009 – <http://www.rcmp-grc.gc.ca/news-nouvelles/speeches-discours/2009-02-12-commissecu-eng.htm>.

¹⁰⁹ This complaint is to be distinguished from the BCCLA complaint lodged on October 24, 2007 against the members who sought to detain Mr. Dziekanski at YVR.

¹¹⁰ BCCLA letter of complaint dated November 13, 2007.

The full terms of reference of the Commissions are found at **Appendix E** to this report.

BC Criminal Justice Branch

In addition, following the IHIT investigation and the submission of a Report to Crown Counsel, the actions of the responding RCMP members were examined by the British Columbia Criminal Justice Branch (BC Justice) with a view to determining whether criminal charges were warranted. According to the statement issued by BC Justice, the charges contemplated were:

1. Assault;
2. Assault with a Weapon; and
3. Manslaughter.

BC Justice was of the view that the actions of the responding RCMP members contributed to the death of Mr. Dziekanski. *Criminal Code* authorities¹¹¹ which permit a peace officer to use reasonable force in the proper execution of his or her duties, were then analyzed in conjunction with decided cases which stipulate that a peace officer is not expected to measure the use of force with exactitude, particularly in circumstances which may result in serious injury to police officers or members of the public.

Based on the evidence available to BC Justice at that time, no criminal charges were approved against any of the responding RCMP members. The decision of BC Justice was that:¹¹²

There is a substantial body of independent evidence which supports that the Officers in question were lawfully engaged in their duties when they encountered Mr. Dziekanski, and the force they used to subdue and restrain him was reasonable and necessary in all the circumstances.

In light of this independent evidence, there is not a substantial likelihood of conviction in this case for any of the offences considered, in fact, the available evidence falls markedly short of this standard.

Accordingly, the Criminal Justice Branch will not be approving any charges in relation to this very tragic event.

¹¹¹ Sections 25 and 26 of the *Criminal Code*.

¹¹² See **Appendix W** – BC Justice Statement, or <http://www.theglobeandmail.com/v5/content/pdf/CRIMINALJUSTICEBRANCHCLEARSTATEMENT.pdf>.

The mandate of the Commission for Public Complaints Against the RCMP does not extend to a review of the decision by BC Justice (at **Appendix T**). The BC Justice release concerning the decision stated that the examination of the legal issues involved was carried out in a neutral and unbiased manner and according to objective standards.

Independent Observer Pilot Project

In March 2007 a project known as the Independent Observer Pilot Project was undertaken between the Commission and the RCMP in British Columbia ("E" Division, as it is known in the RCMP). The Program was formalized as the *Independent Observer Program* in September 2008.

Through the Program, Commission staff are assigned to observe and assess the impartiality (not the adequacy) of RCMP investigations which examined the conduct of RCMP members who are involved in high-profile and serious incidents, such as in-custody deaths. The project is operated in conjunction with the RCMP's Office of Investigative Standards and Practices (OISP) in British Columbia. The intent of the project is to address the public's concerns with respect to the level of objectivity and impartiality of RCMP investigations involving the conduct of RCMP members.

On October 15, 2007, the day following the death of Mr. Dziekanski at YVR, the Commission was notified by the RCMP that the incident had occurred. The Commission assigned an Independent Observer to meet with Integrated Homicide Investigation Team (IHIT) investigators and observe the investigative process to assess its impartiality. Specifically, the Independent Observer was assigned to:

- Make an initial assessment as to the impartiality of the RCMP IHIT assigned to investigate this incident.
- Monitor progress so as to ensure that any future issues as they relate to the impartiality of the investigation are identified and addressed.

The Independent Observer completed an assessment as to the impartiality of the IHIT investigative team and identified no issues with respect to the impartiality of the investigation.

A complete description of the Independent Observer Program may be found at **Appendix F**.

Appendix C – BCCLA Complaint re Media Issues

The following are the texts of the BCCLA letter of complaint, dated November 13, 2007 pertaining to media issues, as well as the BCCLA letter dated March 19, 2009 requesting that I review the RCMP investigation of the initial media related complaint.

PROTECTED

COMPLAINT

File No. PC-2007-2344

SUBJECT: Mr. Jason Gratl
British Columbia Civil Liberties Association
Suite 550, 1188 West Georgia Street
Vancouver BC V6E 4A2
Telephone No: (604) 687-2919

On November 13, 2007, the Commission received the attached complaint from Mr. Gratl concerning the conduct of Sergeant Pierre Lemaitre of the Richmond, British Columbia RCMP Detachment and Corporal Dale Carr of the Integrated Homicide Investigation Team. Mr. Gratl writes:

“Dear Mr. Kennedy,

Re: Complaint against the RCMP over public statements and actions in the investigation of the in-custody death of Robert Dziekanski

I am writing on behalf of the BC Civil Liberties Association (BCCLA) to initiate a complaint under the Royal Canadian Mounted Police Act against the relevant member(s) of the Richmond RCMP detachment and Integrated Homicide Investigation Team that made public statements regarding the in-custody death of Robert Dziekanski and the seizure of Paul Pritchard’s video recording of Mr. Dziekanski’s death. Mr. Pritchard loaned his recording to the RCMP with a promise it would be returned within 48 hours, but later had to launch a civil suit against the RCMP to retrieve his property.

Please note that this complaint is distinct from our prior complaint dated October 24, 2007 against the RCMP member who sought to detain Mr. Dziekanski.

Mr. Dziekanski died October 14, 2007 shortly after receiving two taser pulses from an RCMP officer at the Vancouver International Airport. Shortly after the incident, Sgt. Pierre Lemaitre publicly stated that the officers present at the incident attempted to calm Mr. Dziekanski down verbally and with hand gestures. It was stated that Mr. Dziekanski ignored the officers, prompting them to use the taser. Information gleaned from eyewitness accounts contradicts this official position.

Walter Kosteckyj, counsel for Mr. Dziekanski’s mother Sofia Cisowski, has stated that he has viewed video of the incident and 24 seconds elapsed between officers arriving on the scene and the use of the taser. Mr. Dziekanski was isolated and reportedly presented no danger to the

public or responding officers. In an international airport, it is commonplace for people to have limited understanding of English and it was obvious that Mr. Dziekanski spoke a language other than English and was not understanding the officers. Any statement that the officers made an honest attempt at establishing communications constitutes misrepresentation given the circumstances.

Paul Pritchard, who witnessed and recorded the incident, has publicly stated that he heard an RCMP officer ask for and receive permission to use a taser before the officers confronted Mr. Dziekanski. Any statement that explicitly or implicitly leads the public to believe that the taser was used as a last resort contradicts the statement of Mr. Pritchard. Mr. Pritchard's statement is supported by the rapid deployment of the taser. There appears to be no evidence that supports the position that the taser was used as a last resort. Evidence that is publicly available in fact contradicts this representation. The evidence publicly available indicates that the officers in question did not pursue less intrusive methods, and any statement made otherwise constitutes misrepresentation given the circumstances.

I am also concerned about statements that misled the public as to Mr. Dziekanski's character. Sgt. Lemaitre repeatedly made statements implying if not alleging that Mr. Dziekanski was under the influence of alcohol or drugs or had a medical condition that caused his death. Examples of such statements are as follows:

"The man was sweating profusely and violent which could indicate either drug use or a medical condition." ("RCMP methods under scrutiny after airport Taser death." CanWestNews Service, National Post, 15 October 2007)

[On the RCMP interest in obtaining toxicology results] "There was obviously something very different that was going on inside him." ("Mother questions Taser death." Chantal Eustace, Vancouver Sun, 18 October 2007)

Sgt. Lemaitre also publicly questioned whether Mr. Dziekanski's identification was genuine. ("Witness says she tried to calm victim." Ian Bailey, Globe & Mail, 16 October 2007, S1)

Sgt. Lemaitre spoke without specific evidence to support his position. Mr. Dziekanski's autopsy and toxicology results refute Sgt. Lemaitre's position. While drugs, alcohol or a medical condition are possible contributors to Taser deaths, Sgt. Lemaitre appeared not to be explaining this possibility, but instead framed it as near certainty without alternative explanations. For example, Mr. Dziekanski's physical exertion was the obvious cause of profuse sweating, not drug use. Sgt. Lemaitre's assertion of something being "obviously" wrong was incorrect and inappropriate. Sgt. Lemaitre appears to have misled the public while casting aspersion on the character of Mr. Dziekanski. Either the intent or effect of the characterizations of the events and of Mr. Dziekanski appear designed to provide a favourable account of the RCMP's role in this death. This is inappropriate especially given the fact that the RCMP members are under investigation and the RCMP has a lead role in undertaking that investigation.

With respect to the video, an unnamed officer spoke with Paul Pritchard and obtained his recording of the incident under the promise it would be returned immediately. The officer quickly informed Mr. Pritchard that the available equipment would not allow a copy to be made, and an agreement was reached to return the recording within 48 hours. Once in possession of the recording, the RCMP first informed Mr. Pritchard that previous agreements would have to be retracted and the recording would not be returned until a coroner's inquest concluded, some 1.5 to 2.5 years in the future.

According to public statements by Cpl. Dale Carr of the Integrated Homicide Investigation Team, the video had to be withheld because it would contaminate witnesses' memories. Yet, by the time these statements were made, the RCMP had already established and publicized their version of the story in great detail. If there were witnesses that had not been interviewed, contamination had already occurred. If the release of the video was inappropriate because of fear of contamination, the previous release of information by the RCMP should be equally viewed as contamination by the RCMP.

Cpl. Carr also publicly attacked Mr. Pritchard's desire to release the video on the grounds that it would upset Mr. Dziekanski's mother, Zofia Cisowski ("Police say they will return Taser video soon." Johnathan Fowlie and Chantal Eustace, Vancouver Sun, 2 November 2007, A1). This unfounded statement appears to be made for the purpose of discrediting Mr. Pritchard's intentions, as the public statement by Ms. Cisowski and her lawyer, Walter Kosteckyj, seem only to support the publication of the video.

As of the date of this complaint, the video has been returned to Mr. Pritchard clearly repudiating the RCMP's original justification for withholding the video.

Thus, without legal right, the RCMP effectively seized this video recording and suppressed it in a manner that was, either in intent or effect, to advantage the RCMP's reputation.

In sum, the BCCLA is concerned that the relevant RCMP member(s) misrepresented themselves to the public on various occasions and that they failed to return the video to Mr. Pritchard in a timely manner without grounds for doing so.

Given the serious nature of our complaints, and to maintain and enhance the public's confidence in the RCMP, we request that your office rather than the RCMP conduct this investigation.

I look forward to your response."

This complaint was received by Lorraine Blommaert, Team Lead for the Commission for Public Complaints Against the RCMP. The information contained in this complaint was provided to and received by the Commission pursuant to paragraph 45.35(1)(a) of the *RCMP Act*. This complaint is forwarded to the RCMP as the notification required to be given to the Commissioner pursuant to subsection 45.35(3) of the Act.

Attachment: 4 pages

bc civil liberties association

Colombie-Britannique



November 13, 2007

Paul Kennedy, Chair
Commission for Public Complaints Against RCMP
PO Box 3423, Station 'D'
Ottawa, Ontario
K1P6L4

Fax: 613 952 8045

Dear Mr. Kennedy,

Re: Complaint against the RCMP over public statements and actions in the investigation of the in-custody death of Robert Dziekanski

I am writing on behalf of the BC Civil Liberties Association (BCCLA) to initiate a complaint under the *Royal Canadian Mounted Police Act* against the relevant member(s) of the Richmond RCMP detachment and Integrated Homicide Investigation Team that made public statements regarding the in-custody death of Robert Dziekanski and the seizure of Paul Pritchard's video recording of Mr. Dziekanski's death. Mr. Pritchard loaned his recording to the RCMP with a promise it would be returned within 48 hours, but later had to launch a civil suit against the RCMP to retrieve his property.

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"He may have ingested drugs, or may have a medical condition." ("Airport death raises questions." Jonathan Woodward, Vancouver Sun, 15 October 2007)

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instead framed it as near certainty without alternative explanations. For example, Mr. Dziekanski's physical exertion was the obvious cause of profuse sweating, not drug use. Sgt. Lemaitre's assertion of something being "obviously" wrong was incorrect and inappropriate. Sgt. Lemaitre appears to have misled the public while casting aspersion on the character of Mr. Dziekanski. Either the intent or effect of the characterizations of the events and of Mr. Dziekanski appear designed to provide a favourable account of the RCMP's role in this death. This is inappropriate especially given the fact that the RCMP members are under investigation and the RCMP has a lead role in undertaking that investigation.

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Given the serious nature of our complaints, and to maintain and enhance the public's confidence in the RCMP, we request that your office rather than the RCMP conduct this investigation.

I look forward to your response.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'J. Gratl', written in a cursive style.

Jason Gratl,
President

bc civil liberties association

Association des libertés de la Colombie-Britannique



March 19, 2009

Paul Kennedy, Chair
Commission for Public Complaints Against RCMP
PO Box 3423, Station 'D'
Ottawa, Ontario
K1P6L4

Dear Mr. Kennedy,

Re: Request for review of complaint PC-2007-2344 (2007-30019) regarding public statements and actions by the RCMP in the investigation of the in-custody death of Robert Dziekanski

I am writing on behalf of the BC Civil Liberties Association (BCCLA) to request a review of our complaint PC-2007-2344. This complaint alleges that public statements and actions by the RCMP during the investigation of the in-custody death of Robert Dziekanski violate RCMP policy and amount to professional misconduct.

This complaint was made only a few weeks after Mr. Dziekanski died in police custody. The BCCLA attempted to provide several examples of misrepresentation for the investigator and cited our sources. The assigned investigator requested that the BCCLA provide copies of the articles. The BCCLA denied this request for several reasons.

First, the BCCLA monitors only a limited number of media sources due to our limited capacity as a small, non-profit organization. The BCCLA explicitly noted that the articles we cited were examples, and we believe that a thorough and adequate investigation ought to examine other news sources and relevant RCMP internal records such as press releases and interview tapes in order to effectively investigate our complaint.

Second, the investigator was made aware that the cited articles were available in the public domain. The Vancouver Sun and the National Post allow unrestricted public access to news articles for quite some time. The Globe and Mail restricts access after an article has been posted for seven days, but provides articles for a small fee thereafter. The public library may also have the news articles archived. The BCCLA submits that all articles cited were readily available to the investigator, and in point of fact, are still available.

APR 27 09 8:37

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“RCMP methods under scrutiny after airport Taser death.” CanWest News Service, National Post, 15 October 2007.

Available at:

<http://www.nationalpost.com/news/story.html?id=4378a9fa-2b33-426b-974b-d2ee563e1b17>

“Airport death raises questions.” Jonathan Woodward, Vancouver Sun, 15 October 2007.

Available at: <http://www2.canada.com/vancouvernews/news/story.html?id=78aadf6b-9d89-433d-afd6-edd53f1a4e6e&k=20860>

“Mother questions Taser death.” Chantal Eustace, Vancouver Sun, 18 October 2007.

Available at:

<http://www.dose.ca/news/story.html?id=e7a4e879-1f07-492e-9cdf-7cb9ed79c935>

“Witness says she tried to calm victim.” Ian Bailey, Globe & Mail, 16 October 2007, S1.

Available for a small fee at:

http://www.theglobeandmail.com/servlet/Page/document/v5/content/subscribe?user_URL=http://www.theglobeandmail.com%2Fservlet%2Fstory%2FLAC.20071016.BCTASER16%2FTPStory%2FNational&ord=52241606&brand=theglobeandmail&force_login=true

“Police say they will return Taser video soon.” Jonathan Fowlie and Chantal Eustace, Vancouver Sun, 2 November 2007, A1.

Available at:

<http://www2.canada.com/vancouvernews/news/story.html?id=f8f83d21-8883-45b7-81c0-b8e0b766507d&k=82963>

Third, the BCCLA submitted a complaint with clear citations and it is not the responsibility of the BCCLA to undertake investigative duties after filing a complaint. The RCMP has legal duties to a complainant outlined by the RCMP Act, and the clearly cited news articles can be obtained without impact on the limited resources of the BCCLA. The RCMP is obligated to obtain evidence in order to conduct a thorough and adequate investigation and the BCCLA made every effort to facilitate that process. Quite simply, the request was deemed inappropriate.

Furthermore, the investigator states that he was unable to acquire news articles because media outlets referred him to “their legal department and did not cooperate by providing the requested information”. The report does not state which media organizations did not cooperate, what noncooperation entailed, and the reasons for not cooperating. As well, the report does not address whether the investigator made any attempts to address this lack of cooperation in order to pursue the RCMP’s legal obligations to investigate the BCCLA’s complaint appropriately.

Unless the RCMP can provide evidence that they were legitimately refused access to relevant news articles they could otherwise not obtain through other sources, including the internet or library archives, the BCCLA contends that the RCMP has not fulfilled its statutory obligations.

The BCCLA submits that the investigation is inadequate and asks that the complaint be reviewed by the Commission for Public Complaints against the RCMP and investigated further by the RCMP. Due to the gross inadequacy of the RCMP investigation, the BCCLA requests that the Commission monitor future investigation of this complaint in order to ensure the RCMP fulfils its statutory obligations to the BCCLA.

In order to facilitate reinvestigation of the BCCLA's complaint, the BCCLA's allegations and the conclusions of the report are examined in detail below. Please note that the allegations below have been numbered according to the original complaint and that that numbering does not match the investigation report. This was done because the report does not capture all of the allegations made in the original complaint.

Allegation 1

"...24 seconds elapsed between officers arriving on the scene and the use of the taser. Mr. Dziekanski was isolated and reportedly presented no danger to the public or responding officers. In an international airport, it is commonplace for people to have limited understanding of English and it was obvious that Mr. Dziekanski spoke a language other than English and was not understanding the officers. Any statement that the officers made an honest attempt at establishing communications constitutes misrepresentation given the circumstances."

Allegation 2

"Paul Pritchard, who witnessed and recorded the incident, has publicly stated that he heard an RCMP officer ask for and receive permission to use a taser before the officers confronted Mr. Dziekanski. Any statement that explicitly or implicitly leads the public to believe that the taser was used as a last resort contradicts the statement of Mr. Pritchard. Mr. Pritchard's statement is supported by the rapid deployment of the taser. There is no evidence that supports the position that the taser was used as a last resort. The officers did not honestly pursue less intrusive methods, and any statement made otherwise constitutes misrepresentation given the circumstances."

Allegations 1 and 2 seem to have been conflated in the investigation report into a single allegation "that Sergeant Lemaitre stated the attending police officers attempted to calm Dziekanski and as a last resort, used the taser."

Although the articles that supported the BCCLA's allegations were not examined, Tom Forster did report on a CBC interview of which the BCCLA was not aware that resulted in the following statement:

"Sergeant Lemaitre in an interview with the CBC on October 16, 2007 defended the actions of the members by telling the reporter how various use of force options were not

ideal during the altercation with Dziekanski. At this point in time, no opinion from a use of force expert had been received by IHIT indicating whether the use of the CEW or the use of force generally was appropriate or not. Such a report was not requested by IHIT until early November 2007.”

The BCCLA made its complaint due to concerns that the investigation of Mr. Dziekanski’s in-custody death was biased, and that the primary concerns of the RCMP were the defence of its members and its public image. Canadians expect the RCMP to investigate crimes in a manner that ensures no Canadian is above the law. Nevertheless, Sergeant Lemaitre, a spokesman for the RCMP, defended the actions of officers who were the subjects of an open criminal investigation. Furthermore, Sergeant Lemaitre defended the officers’ deadly use of force even though an internal review as to the appropriateness of the degree of force used had not been completed. Despite the investigator’s conclusion that the allegations are not supported, it is difficult to see how Sergeant Lemaitre’s actions do not indicate professional misconduct and biased reporting of the RCMP’s investigation of this in-custody death.

Given the information supplied in the investigation report, that Sergeant Lemaitre actively defended the actions of officers involved in an in-custody death without reference to an internal investigation, *any* assertion by Sergeant Lemaitre that the attending members used an appropriate degree of force appears inappropriate, unfounded, and biased.

Allegation 3

“Sgt. Lemaitre repeatedly made statements implying if not alleging that Mr. Dziekanski was under the influence of alcohol or drugs or had a medical condition that caused his death.”

Allegation 4

“Sgt. Lemaitre also publicly questioned whether Mr. Dziekanski’s identification was genuine.”

Allegation 3 was expanded into two allegations in the investigation report that addressed the three examples the BCCLA provided in order to support its allegations, “that Sergeant Lemaitre may have been under the influence of alcohol, drugs, or had a medical condition that caused his death,” and “that Sergeant Lemaitre stated that Dziekanski was sweating profusely and was violent which could indicate either drug use or a medical condition and that there was obviously something very different going on inside him.”

Allegation 4 was not investigated.

Allegations 3 and 4 are based on the appropriateness of certain statements Sergeant Lemaitre made to the media. The BCCLA cited articles that contained unfounded assertions that appeared only to serve as a character attack on Mr. Dziekanski. Unless the RCMP claims that Sergeant Lemaitre was misquoted, it is difficult to see how the investigation report can claim that the statements were not made.

Although the articles that supported the BCCLA's allegations were not examined, Tom Forster notes the following:

"The Pritchard video confirms that Dziekanski was sweating profusely. While it could indicate drug use, or a medical condition or that something was going on inside him, or something else altogether, at the time the comment was said, the autopsy report had not confirmed, eliminated or otherwise provided information about the cause of Dziekanski's sweating or his overall behaviour. As well, the toxicology report had not yet been received and therefore, these comments could amount to speculation which would be contrary to RCMP policy."

Sergeant Lemaitre is clearly speculating in some of his statements, such as when giving weight to a toxicology report not yet received or when questioning the authenticity of identification without cause. Allegations 3 and 4 need to be investigated further, as the report ignores the supporting evidence supplied by the BCCLA and ignores an allegation in its entirety.

The investigation report clearly focuses on the fact that Sergeant Lemaitre did not have investigational details to support his statements. In Allegations 1 and 2, the BCCLA contends that Sergeant Lemaitre made statements in defence of the members involved and the public image of the RCMP. In Allegations 3 and 4, Sergeant Lemaitre makes statements that consistently create suspicion about Mr. Dziekanski. Defending those that are the subject of an active homicide investigation and casting suspicion on the role of the victim is extremely inappropriate. The BCCLA alleges that Sergeant Lemaitre was not only involved in speculation, but that that speculation served a purpose: to shift blame from the involved officers and the RCMP to Mr. Dziekanski. It is difficult to posit any other reasonable explanation for Sergeant Lemaitre's conduct. It is noteworthy that Sergeant Lemaitre releases many details of the investigation that could contaminate the investigation by altering the accounts of witnesses.

Allegation 5

"An unnamed officer spoke with Paul Pritchard and obtained his recording of the incident under the promise it would be returned immediately. The officer quickly informed Mr. Pritchard that the available equipment would not allow a copy to be made, and an agreement was reached to return the recording within 48 hours. Once in possession of the recording, the RCMP informed Mr. Pritchard that previous agreements would have to be retracted and the recording would not be returned until a coroner's inquest concluded, some 1.5 to 2.5 years in the future.

Without legal right, the RCMP seized this video recording and suppressed it."

Allegation 5 was not investigated but a statement was made that there was no suppression.

The BCCLA submitted in our original complaint that the RCMP had no right to seize Paul Pritchard's property, and that they actively tried to suppress the video by claiming it would not be released until after a coroner's inquest. The investigation report makes a passing reference to

this allegation by noting “there is no evidence that there was any attempt to suppress the video as it was presented to the BC Coroner immediately and in fact was viewed by Mrs. Cisowski’s lawyer [Walter Kosteckyj] shortly thereafter.” The BCCLA does not question whether the BC Coroner’s Office had the videotape in question and is aware that Mr. Kosteckyj viewed the tape, but the tape was not returned to Mr. Pritchard until after he launched a lawsuit. The BCCLA alleges that the RCMP did not have the legal authority to maintain possession of the tape and that telling Mr. Pritchard he would not have his property returned to him until after a coroner’s inquest amounts to suppression.

While the report does not investigate the allegation it concludes that there is no evidence of suppression. Paul Pritchard’s statement, as reported by the Vancouver Sun and other media outlets, contradict this:

“Pritchard said he gave the videos to police right after the incident on the understanding they would be returned within 48 hours. He said police have held onto the videos ever since, telling him he may not see the footage again for up to 2 1/2 years.”¹

The Canadian Press reported that Mr. Pritchard launched his law suit precisely because he was told the video might be withheld for years.

“[Pritchard] turned over the video to police investigators on a promise it would be returned within 48 hours but went public with a lawsuit after being told RCMP might keep it for years.”²

Documentation of Mr. Pritchard’s lawsuit was not examined as part of this complaint, and Paul Pritchard was not contacted as a witness. There appears to be no basis to claim that “there is no evidence that there was any attempt to suppress the video”. The BCCLA contends that there is evidence of attempted suppression and that evidence has not been examined.

Allegation 6

“According to Cpl. Dale Carr of the Integrated Homicide Investigation Team, the video had to be withheld because it would contaminate witnesses’ memories. By this time the RCMP had already established and publicised their version of the story in great detail. If there were witnesses that had not been interviewed, contamination had already occurred. If the release of the video was inappropriate because of fear of contamination, the

¹ “Police say they will return Taser video soon.” Jonathan Fowle and Chantal Eustace, Vancouver Sun, 2 November 2007, A1. <http://www2.canada.com/vancouvernews/news/story.html?id=f8f83d21-8883-45b7-81c0-b8e0b766507d&k=82963>

² “‘Blood-curdling scream’ heard on airport death video.” The Canadian Press, CTV.ca, 13 November 2007. http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20071113/airport_taser_071113?s_name=&no_ads=

previous release of information by the RCMP should be equally viewed as contamination by your office.”

Allegation 6 is examined as an allegation “that Corporal Carr stated the Pritchard video recording was being withheld from the public to prevent witness account contamination but that the RCMP was continuing to publicly espouse subjective information about the incident thereby contaminating potential witness accounts to the detriment of Dziekanski and to the benefit of the RCMP.”

The report concludes that Corporal Carr did not release information about the investigation after being assigned to the case. The statements made by Sergeant Lemaitre were not considered. Sergeant Lemaitre, as outlined above, clearly speculated about Mr. Dziekanski’s mental state, his mental health, drug use, and the authenticity of Mr. Dziekanski’s identification. Sergeant Lemaitre also made several statements as to the appropriateness of the involved officers’ conduct. These are clearly details of the investigation that could impact the integrity and content of witnesses’ statements. The investigation report implicitly supports a claim that Sergeant Lemaitre released details of the investigation by noting that Sergeant Lemaitre’s statements “were contrasted against details depicted in the video”. The original complaint made by the BCCLA does not limit its allegation to Corporal Carr, and the statements of Sergeant Lemaitre were not addressed in the investigation report.

That Corporal Carr or other RCMP members did not release details of the investigation after October 16th has not been established. At no time does the report state that RCMP media releases and press conferences were examined; instead, the investigator claims to have examined that which was in the public domain. The BCCLA believes it is appropriate to examine all RCMP press releases and all tapes held by the RCMP of its own interviews. If the RCMP is to make the claim that it does not retain records of its own press releases or record (or keep recordings of) their own press conferences, the BCCLA also believes that some of this information can be obtained from media outlets.

Allegation 7

“Cpl. Carr publicly attacked Mr. Pritchard's desire to release the video on the grounds that it would upset Mr. Dziekanski's mother, Zofia Cisowski.” This unfounded statement appears to be made for the purpose of discrediting Mr. Pritchard's intentions, as the public statements of Ms. Cisowski and her lawyer, Walter Kosteckyj, seem only to support the publication of the video.”

Allegation 7 was not investigated on the excuse that there was no video of Corporal Carr’s statements. The BCCLA cited its source in making the allegation.³

³ “Police say they will return Taser video soon.” Jonathan Fowlie and Chantal Eustace, Vancouver Sun, 2 November 2007, A1. <http://www2.canada.com/vancouversun/news/story.html?id=f8f83d21-8883-45b7-81c0-b8e0b766507d&k=82963>

The report concludes that Corporal Carr spoke as a parent and projected that no parent would want to see video of their child's death. This is not supported by Corporal Carr's statements to the media. To be clear, the cited article states the following:

"Carr said he expects Pritchard will release the video to the media as soon as he is able. He added, however, that doing so is likely to upset Dziekanski's mother, Zofia Cisowski. 'She is beside herself. This has been extremely traumatic for her and this is what, are we 10 or 15 days later? And it's going to be dredged up again,' he said. 'Probably, I can pretty much imagine the clips that are going to be shown if it's given, and I think it's terrible,' he added.

...

Pritchard added he is determined to let the public see the video so the full story can get out, but he said he would speak with Cisowski before making any final decisions. 'I will first talk to Mr. Dziekanski's family and their lawyer to make sure it is okay and then just get it out to the media,' he said. 'I want the public to see this.'"⁴

Corporal Carr clearly states that the release of the video will further traumatize Ms. Cisowski's. Corporal Carr cannot speak for Ms. Cisowski and clearly Mr. Pritchard intended to confer with Ms. Cisowski before he released the tape to the public. The BCCLA contends that it is inappropriate of Corporal Carr, acting as a representative of the RCMP, to state any opinion or judgement on the broadcasting of this video. Corporal Carr's statement serves no purpose other than to shed negative light on the video's release. Corporal Carr did not express any sympathy based on his status as a parent, as claimed in the investigation report.

As the BCCLA's complaint was made shortly after the in-custody death of Robert Dziekanski, certain details of the incident had not come to light. It is now clear from the Braidwood Inquiry that the taser was discharged five times. The RCMP initially reported that Mr. Dziekanski was tasered twice and expressly denied claims that Mr. Dziekanski was tasered four or five times.⁵ Furthermore, it is now clear from the Braidwood Inquiry that four RCMP officers attended the scene. The RCMP initially reported that three officers attended.⁶ The BCCLA believes that it is

⁴ "Police say they will return Taser video soon." Jonathan Fowlie and Chantal Eustace, Vancouver Sun, 2 November 2007, A1. <http://www2.canada.com/vancouvernews/news/story.html?id=f8f83d21-8883-45b7-81c0-b8e0b766507d&k=82963>

⁵ "Tasered man an immigrant with family in Interior", Kelly Sinoski, Vancouver Sun, 17 October 2007 <http://www2.canada.com/vancouvernews/news/westcoastnews/story.html?id=f25214b1-5a95-482a-8f40-2fa30c5aada6&k=926>

"Witness says she tried to calm victim", Ian Bailey, The Globe and Mail, 16 October 2007 http://www.theglobeandmail.com/servlet/Page/document/v5/content/subscribe?user_URL=http://www.theglobeandmail.com%2Fservlet%2Fstory%2FLAC.20071016.BCTASER16%2FTPStory%2F%3Fquery%3DWitness%2Bsaw%2Bfive%2Bofficers%252C%2Bheard%2Bfour%2Bpulses&ord=63631766&brand=theglobeandmail&force_login=true

⁶ "Tasered man an immigrant with family in Interior", Kelly Sinoski, Vancouver Sun, 17 October 2007 <http://www2.canada.com/vancouvernews/news/westcoastnews/story.html?id=f25214b1-5a95-482a-8f40-2fa30c5aada6&k=926>

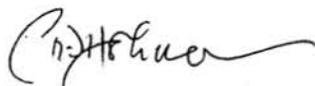
"Witness says she tried to calm victim", Ian Bailey, The Globe and Mail, 16 October 2007

not unreasonable for these instances of apparent misrepresentation also be examined when this complaint is reviewed.

The BCCLA requests that its complaint be reviewed by the Commission. Assuming the Commission accepts our request for review, given the serious charges we bring to your attention, the inadequacy of the ensuing investigation, and to maintain and enhance the public's confidence in the RCMP, we request that your office monitor the reinvestigation of this complaint to ensure that a thorough and unbiased investigation takes place.

I look forward to your response.

Yours sincerely,



Rob Holmes,
President

http://www.theglobeandmail.com/servlet/Page/document/v5/content/subscribe?user_URL=http://www.theglobeandmail.com%2Fservlet%2Fstory%2FLAC.20071016.BCTASER16%2FTPStory%2F%3Fquery%3DWitness%2Bsaw%2Bfive%2Bofficers%252C%2Bheard%2Bfour%2Bpulses&ord=63631766&brand=theglobeandmail&force_login=true

“Man dies after Taser shock by police at Vancouver airport”, CBC News, 14 October 2007

<http://www.cbc.ca/canada/british-columbia/story/2007/10/14/bc-taser.html?ref=rss>

“Man dies at YVR after being Tasered”, Lora Grindlay, Vancouver Sun, 14 October 2007

<http://www2.canada.com/theprovince/news/story.html?id=4b9cbac7-36af-4527-8411-0299e4763807>

Appendix D – RCMP Response to BCCLA Complaint re Media Issues

Attached below is the letter (the RCMP's Final Report) sent by Chief Superintendent Rob Morrison to the BCCLA with respect to the RCMP investigation of the BCCLA complaint pertaining to media issues.



Royal Canadian
Mounted Police

Gendarmerie royale
du Canada

Classification désignation document

"E" Division
Operations Strategy Branch

Your File - Votre référence

PC-2007-2344

Our File - Notre référence

2007-30019

Mr. Jason Gratl
c/o BC Civil Liberties Association
Suite #550 - 1188 West Georgia Street
Vancouver, BC
V6E 4A2

Date

December 23 2008

Dear Mr. Gratl:

This letter is in reference to the public complaint you lodged with the Commission for Public Complaints against the RCMP (CPC) on November 13, 2007.

A thorough investigation has been conducted and I am now in a position to address your concerns.

Background Information:

On October 14, 2007, Richmond Detachment members were called to Vancouver International Airport following a report of a disturbance in the International Arrivals secure area. Initially, airport security officers attended but were unable to communicate with a 40 year old agitated male who apparently could not respond to English language. This male was sweating profusely and was acting out by shouting. He picked up a small folding table and threw it against a glass wall and then attempted to throw a computer that was still tethered to a counter. As a result, airport security contacted the RCMP. RCMP officers arrived on scene and within a short time, a member activated a Conducted Energy Weapon (CEW). The male, later identified as Robert Dziekanski, fell to the floor and was restrained with the use of handcuffs.

The male fell unconscious and subsequently died at the scene. The Integrated Homicide Investigation Team (IHIT) and BC Coroner's service were called to the scene to investigate. Initial Media briefings were conducted by Sergeant Lemaitre and Corporal Carr.

An unrelated traveler by the name of Paul Pritchard, used his own digital camera to record continuous footage of the encounter between Mr. Dziekanski and airport security, as well as the arrival and interactions of RCMP officers.

Summary of Complaint:

You allege that there are several misleading statements and misrepresentations made by RCMP media relations officers (MRO's) during the first few days following the police custody death of Robert Dziekanski on October 14, 2007. You also allege that the RCMP had no legal right to seize the video recording from Pritchard and suppress it in a manner that was, either in intent or effect, to advantage the RCMP's reputation or project a more favorable account of the RCMP's role during

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RCMP GRC 2823 (2002-11) WPT

the encounter with Dziekanski.

You quoted newspaper articles when outlining your allegations; specifically:

1. That Sergeant Lemaitre stated the attending police officers attempted to calm Dziekanski and as a last resort, used the taser.
2. That Sergeant Lemaitre stated Dziekanski may have been under the influence of alcohol, drugs or had a medical condition that caused his death.
3. That Sergeant Lemaitre stated that Dziekanski was sweating profusely and was violent which could indicate either drug use or a medical condition and that there was obviously something very different going on inside of him.
4. That Corporal Carr stated the Pritchard video recording was being withheld from the public to prevent witness account contamination but that the RCMP was continuing to publicly espouse subjective information about the incident thereby contaminating potential witness accounts to the detriment of Dziekanski and to the benefit of the RCMP.
5. That Corporal Carr stated the Pritchard video recording was being withheld from the public to prevent upsetting Mrs. Cisowski (the decedent's mother), even though she and her lawyer wanted it released.
6. That Corporal Carr publicly attacked Paul Pritchard's motive for release of the video.

There have been numerous public complaints lodged relating to this incident, specifically there has been a public complaint lodged relating to the seizure and retention of the video recording taken by Mr. Paul Pritchard. Section 45.36 of the RCMP Act allows for the disposition of complaints should other avenues of investigation be continuing, in this case a Criminal Investigation into the Police Custody Death of Mr. Dziekanski. As such any allegations relating to the seizure and retention of the video recording taken by Mr. Paul Pritchard will be addressed in relation to the MRO's conduct only.

Staff Sergeant Tom Forster was assigned to the investigation of your public complaint.

Findings of Investigation:

In December 2007, the RCMP investigator, Staff Sergeant Forster met with you to determine whether there was any specific evidence to support your allegations and to complete the public complaint form. You did not provide Staff Sergeant Forster with any further documentation or evidence. You did cite newspaper articles and advised that much of the information was held in the public domain. In the course of this interview it was also discussed that you had a reasonable expectation that during the course of this public complaint investigation, if other non-specified inaccuracies surfaced regarding the release of information to the media by the RCMP in relation to Mr. Dziekanski (decedent), that those issues should be investigated.

Staff Sergeant Forster reviewed information found in the public domain and attempted to obtain information from sources that you cited in your public complaint. The media sources cited in your public complaint referred Staff Sergeant Forster to their legal department and did not cooperate by providing the requested information. As a result, Staff Sergeant Forster relied on media

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interviews as located in the public domain, as a result the examination of video footage of news segments could only be placed in context if either the preamble and/or postscript was included in the clipping. Interviews were also conducted with members related to the concerns of this public complaint, including the subject members.

Allegation #1: That Sergeant Lemaitre stated the attending police officers attempted to calm Dziekanski and as a last resort, used the taser.

As noted in the Pritchard video, the CEW was utilized approximately 25 seconds after members arrived at the scene. Sergeant Lemaitre in an interview with the CBC on October 16, 2007 defended the actions of the members by telling the reporter how various use of force options were not ideal during the altercation with Dziekanski. At this point in time, no opinion from a use of force expert had been received by IHIT indicating whether the use of the CEW or the use of force generally was appropriate or not. Such a report was not requested by IHIT until early November 2007.

There are several media video clips in the public domain which show Sergeant Lemaitre reporting that members tried to calm Dziekanski down, all to no avail and that a CEW was deployed. Members of the RCMP are familiar with use of force options included in the Incident Management Intervention Model and when interviewed about his comments to the CBC, Sergeant Lemaitre stated he barely recalled doing that interview. He believed his motivation for explaining the various options was to try to help a lay person understand what process the members would have been going through before the CEW was employed. Sergeant Lemaitre when interviewed advised that he was not misrepresenting information.

As such, the allegation that Sergeant Lemaitre misrepresented this information is not supported.

Allegation #2 That Sergeant Lemaitre stated Dziekanski may have been under the influence of alcohol, drugs or had a medical condition that caused his death.

No video recording shows that Sergeant Lemaitre asserted this information as fact. Sergeant Lemaitre when interviewed on this stated that he would have said that IHIT were investigating to see if alcohol, drugs or a medical condition existed which is that the investigation would try to determine. Further, in reviewing the IHIT file, it was noted that several eyewitnesses who were interviewed at the airport provided statements to police where they believed alcohol was involved as DZIEKANSKI was acting erratically like a person might under the influence of alcohol or a drug.

This allegation is not supported by any evidence uncovered in this investigation.

Allegation #3: That Sergeant Lemaitre stated that Dziekanski was sweating profusely and was violent which could indicate either drug use or a medical condition and that there was obviously something very different going on inside him.

The Pritchard video confirms that Dziekanski was sweating profusely. While it could indicate drug use, or a medical condition or that something was going on inside him, or something else altogether, at the time this comment was said, the autopsy report had not confirmed, eliminated or otherwise provided information about the cause of Dziekanski's sweating or his overall behavior. As well, the toxicology report had not yet been received and therefore, these comments could amount to speculation which would be contrary to RCMP policy.

There is no video of this particular comment and the newspaper sources cited by the BCCLA did not cooperate. There is no direct evidence relating to this allegation and your office was unable to provide any further information. As such, this allegation is not supported.

Allegation #4: That Corporal Carr stated the Pritchard video recording was being withheld from the public to prevent witness account contamination but that the RCMP was continuing to publicly espouse subjective information about the incident thereby contaminating potential witness accounts to the detriment of Dziekanski and to the benefit of the RCMP.

The Pritchard video is very graphic and an excellent piece of evidence in factually depicting what happened. As is prudent in any investigation, capturing what an independent witness observed before being able to be influenced by talking with other witnesses or seeing material that could influence their recollection is crucial. Corporal Carr's comments were authorized by Superintendent Rideout, an experienced homicide investigator and a police subject matter expert in investigating deaths. Withholding the video from the public and from potential witnesses until statements were obtained is a tried and true process. Once all witnesses were interviewed, the Pritchard video was released. There is no evidence that there was any attempt to suppress the video as it was presented to the BC Coroner immediately and in fact was viewed by Mrs. Cisowski's lawyer shortly thereafter.

Once Corporal Carr was assigned to be the spokesperson for the Dziekanski investigation on October 16, 2007, there were no further releases made about details from any witnesses or involved members. However, media outlets were continuing to run footage from Sergeant Lemaitre's early interview releases in anticipation of the public release of the Pritchard video on November 14, 2007. At the time, the early release by Sergeant Lemaitre were contrasted against details depicted in the video.

I cannot support this allegation as it is not supported by any evidence uncovered in this investigation.

Allegation #5: That Corporal Carr stated the Pritchard video recording was being withheld from the public to prevent upsetting Mr. Cisowski (the decedent's mother), even though she and her lawyer wanted it released.

When Corporal Carr was interviewed he stated that while he did not speak to Mrs. Cisowski, he as a parent, projected how any parent would feel about seeing a video where their child dies, nobody would want to see such a thing and especially not on national television. As mentioned earlier, the Pritchard video was withheld for sound investigational reasons. Of note, the day before the Pritchard video was released, Pritchard himself (in an interview with CTV and Global TV) forewarned the public of the graphic nature of the depictions that he didn't think Mrs. Cisowski would want to see the video.

This allegation is not supported by any evidence uncovered in this investigation or provided to the RCMP investigator.

Allegation #6: That Corporal Carr publicly attacked Paul Pritchard's motive for release of the video.

The investigator could not locate any video that contained comments which could amount to an attack upon the character of Mr. Pritchard. You could not provide evidence of this allegation when interviewed by the investigator and the newspaper sources cited in your complaint did not cooperate in this investigation.

This investigation is not supported by any evidence uncovered in this investigation.

* Of note is that this investigation recognized that Sergeant Lemaitre did not maintain notes as expected of all RCMP members. I have personally provided Sergeant Lemaitre with operational guidance regarding both the RCMP's expectation and my own, of the importance of keeping adequate notes when involved in any file.

Conclusion:

Media Relations Officers find themselves in demanding situations when responding to incidents of a sensitive nature involving a death in custody. Attempting to release information as expeditious as the public and media desires, puts police investigations at risk. Historically, the RCMP have released little information prior to the conclusion of the investigation. Striking this balance of how much information to release can be difficult. Too much or too little may be misconstrued or put the ability to bring the investigation to a conclusion into jeopardy.

Please be advised that, pursuant to Section 45.4 of the RCMP Act, I am notifying you that the investigation into your complaint has now been concluded. If you are not satisfied with the manner in which your complaint has been addressed by the RCMP, you may request a review by the Commission for Public Complaints Against the RCMP by corresponding with them at the following address:

Commission for Public Complaints Against the RCMP
Canada Post: Bag Service 1722
Ottawa, ON
K1P 0B3
Tel: 1-800-267-6637
Fax: 1-613-952-8045

Yours truly,



Rob Morrison, Chief Superintendent
Officer in Charge
Operations Strategy Branch
"E" Division

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cc: Commission for Public Complaints Against the RCMP, File PC-2007-2344

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Appendix E – Braidwood Commissions – Terms of Reference

The Province of British Columbia has initiated two Commissions of Inquiry, each headed by Commissioner Thomas R. Braidwood, Q.C., and known as the Thomas R. Braidwood, Q.C., Hearing and Study Commission, the mandate of each is as follows:¹¹³

4(1) The terms of reference of the inquiries to be conducted by the study commission ... are as follows:

- a) to review current rules, policies and procedures applicable to constables, sheriffs and authorized persons ... in respect of their use of conducted energy weapons and their training and re-training in that use;*
- b) to review research, studies, reports and evaluations respecting the safety and effectiveness of conducted energy weapons when used in policing and law enforcement in British Columbia and in other jurisdictions;*
- c) to make recommendations respecting
 - i. the appropriate use of conducted energy weapons by constables, sheriffs and authorized persons ... in the performance of their duties and the exercise of their powers, and*
 - ii. the appropriate training or re-training of those constables, sheriffs and authorized persons in that use of conducted energy weapons;**
- d) to submit a report to the Attorney General on or before June 30, 2008 (Amended by OIC 882 to June 30, 2009).*

(2) The terms of reference of the inquiries to be conducted by the hearing and study commission ... are as follows:

- a) to conduct hearings, in or near the City of Vancouver, into the circumstances of and relating to Mr. Dziekanski's death;*
- b) to make a complete report of the events and circumstances of and relating to Mr. Dziekanski's death, not limited to the actual cause of death;*
- c) to make recommendations the commissioner considers necessary and appropriate;*

¹¹³ Section 4, Braidwood Inquiry Terms of Reference, at http://www.braidwoodinquiry.ca/terms_of_reference.php.

d) to submit a report to the Attorney General on or before a date to be determined by the Attorney General in consultation with the Commissioner.

The second Braidwood Commission, sitting in Vancouver, B.C., began to hear witnesses on January 19, 2009.

Appendix F – Independent Observer Program

The CPC Independent Observer Program assesses the impartiality but not the adequacy of RCMP investigations in these cases using the following criteria:¹¹⁴

1. **Line Management:** Assess whether there are any actual or perceived conflicts of interests in terms of the members of the investigative team and those who are the subject of the investigations. Determine the appropriateness of the management structure and reporting relationships.
2. **Appropriate Level of Response:** Assess whether the RCMP investigative team response to the incident is appropriate and proportionate to the gravity of the incident. Has the RCMP assigned the appropriately qualified investigators to the investigative team? Are the team leader(s) and the lead investigator(s) Major Case Management accredited?
3. **Timeliness of the Response:** Assess whether members of the RCMP investigative team responded in a timely fashion to the incident.
4. **Conduct:** Assess whether the conduct of members of the RCMP investigative team is consistent with section 37 of the *RCMP Act*.

The Independent Observer completed an assessment as to the impartiality of the IHIT investigative team and identified no issues with respect to the impartiality of the IHIT investigation. More specifically, with respect to the criteria enumerated above, his observations were:

1. Line Management

The Observer found that no IHIT investigators had any association with any of the responding members. He noted that the girlfriend of an IHIT investigator was acquainted with the girlfriend of Constable Millington. As a result, the team commander unilaterally assigned the IHIT investigator to the role of file coordinator, with the result that the investigator did not participate in conducting the investigation itself. This action was taken with no prompting from the Independent Observer.

¹¹⁴ All information in this section is located on the CPC website: www.cpc.cpp.gc.ca.

2. Appropriate Level of Response

The investigation team commander was accredited (in Major Case Management). Each of the investigators was assigned full time to the IHIT team, meaning that each worked solely on the investigation of homicides.

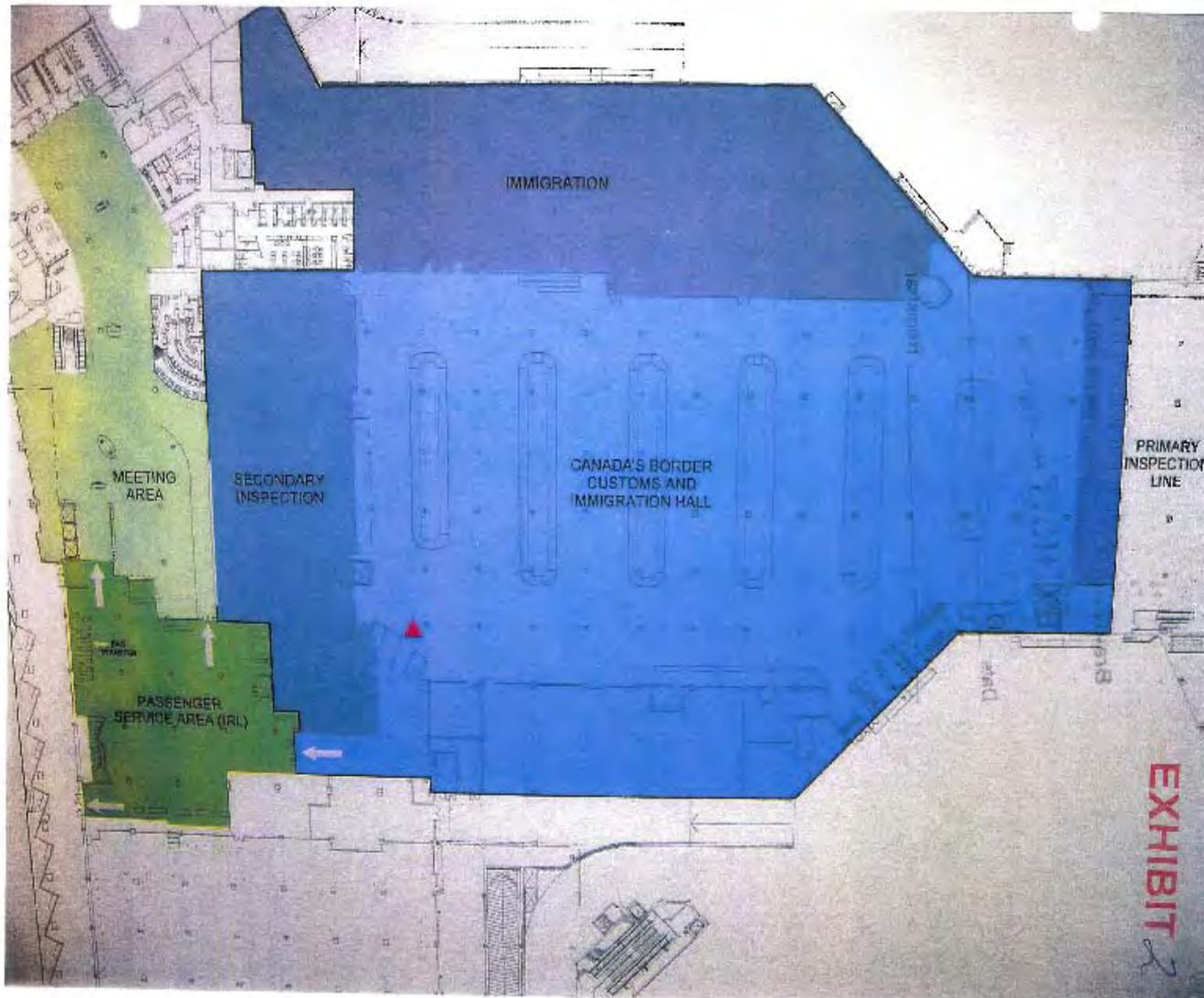
3. Timeliness of Response

The incident occurred at approximately 1:30 a.m. on Sunday, October 14, 2007. IHIT was advised of the death of Mr. Dziekanski at 2:28 a.m. and arrived at YVR to begin the investigation at 3:45 a.m.

4. Conduct

The Independent Observer noted no obvious signs of bias or partiality on the part of the IHIT investigators. On October 29, 2007, the Independent Observer received a CD containing witness statements taken to that date. In his update of November 1, 2007, the Independent Observer noted no concerns with respect to impartiality or leading the witnesses. As part of my Chair-initiated complaint, I have identified issues with respect to the conduct of the IHIT investigation (which arose subsequent to the update), which are discussed in the body of this report and related appendices.

The chart below is Exhibit 2 filed during the Braidwood Inquiry.



Appendix H – Chronology of Events

3:12 p.m. Saturday, October 13, 2007 – Mr. Dziekanski arrived at YVR via Condor Air flight 6070. He passed through the CBSA Primary Inspection Line and remained in the secure area of the international arrivals area.

10:30 p.m. October 13, 2007 – Mr. Dziekanski approached the CBSA Secondary Inspection point and was processed by both Customs and Immigration.

12:45 a.m. Sunday, October 14, 2007 – Mr. Dziekanski completed CBSA processing and was free to enter Canada.

1:24 a.m. October 14, 2007 – The first of a series of 911 calls was received by RCMP Richmond Detachment operators indicating that a man (known later to be Mr. Dziekanski), who was reported as likely intoxicated (later found not to be true), was acting erratically, breaking windows and furniture (later found not to be true) and was obstructing the exit from the secure international arrivals area to the public greeting area.

RCMP members who are dispatched do not receive calls from, nor do they speak directly with, persons calling 911. The information is taken by operators and relayed to the member(s) assigned. Because of the nature of radio transmissions, all other members using the same radio frequency, in this case all members assigned to the Richmond Detachment, are able to hear all dispatched transmissions.

The Report to Crown Counsel compiled by IHIT investigators indicates that the time presented on the RCMP dispatch time logs is out of sync with actual time by approximately one minute and 30 seconds. No specific reason for this delay is known, nor are IHIT investigators aware whether this situation has been rectified.

In addition, the internal clock as indicated in the CEW download report does not synch with the timelines. The CEW download indicates that the cycling of the weapon occurred between 01:23:43 and 01:24:32.¹¹⁵

01:24:46 – The first 911 call from the YVR Operations Centre was received by RCMP operators. The call lasted approximately one minute and 32 seconds. The caller from YVR indicated that an unknown female had just called her to state that a male in his 50s was presently located in the international arrivals reception lobby, and stated that the male was throwing suitcases and chairs. The caller informed the YVR Operations Centre that the male appeared

¹¹⁵ This is a common problem with the CEWs used by the RCMP which has been noted in other cases reviewed by the Commission and has resulted in an inability to thoroughly review some matters because of the unreliability of the evidence.

intoxicated, that he had dark hair and was wearing a white coat. The caller was concerned that someone would be hurt.

At approximately 1:26 a.m., in an exchange lasting approximately 27 seconds, the dispatcher requested via the Richmond Detachment radio dispatch channel that a YVR member attend. Constable Millington replied and indicated that he would take the call. The dispatcher informed him that information was limited, and stated that a non-white male of approximately 50 years was throwing luggage around the international arrivals area. The male had dark hair and was wearing a white coat. An Occurrence Event, a written synopsis of the radio call, was transmitted to E – 23 (Constable Millington) by the dispatcher at 1:27 a.m.

1:28 a.m. – The second 911 call from YVR Operations was received by an RCMP operator. The caller indicated that the male was now throwing chairs through the glass windows.

01:28:40 – The dispatcher contacted Constable Millington again, advised that the male was now throwing chairs through the glass at the location and asked if Constable Millington had any other members attending with him. Constable Millington advised that other members were with him.

01:30:52 – The RCMP dispatcher recognized that the microphone of one of the members attending the complaint of the erratic male at YVR was keyed open, i.e. the radio unit used by that member was broadcasting, and at 01:31:13 went on-air to ask about the status of D – 21, Constable Rundel, whom she knew was working in Zone 1 (YVR) of the Richmond Detachment.

01:31:14 – BC Ambulance Service received a call from YVR Operations. The call was logged as a non-alert overdose and was assigned a routine priority for response.

01:31:38 – E – 23 (Constable Millington) advised dispatch that one male was in custody, that all four YVR members had attended the scene. He confirmed that D – 21 (Constable Rundel) was with him.

01:32:13 – BC Ambulance dispatched unit 51A to respond to the call received at 01:31:14.

01:32:25 – E – 24 (Constable Bentley) requested by police radio that Emergency Health Services (EHS) (also referred to as BC Ambulance Service) be dispatched. Constable Bentley requested that EHS use a routine priority for the call. This means that EHS should attend, but there was no urgency to the need for medical personnel.

01:32:49 – Dispatch received a radio call from an unknown member at the scene who requested that the BC Ambulance Service response be upgraded to Code 3 (most urgent). The member said that the male was unconscious but breathing.

01:32:50 – BC Ambulance received an updating call informing that police were on scene, that the patient had a decreased level of consciousness and requesting that the call be upgraded to Code 3.

01:33:00 – The RCMP dispatcher advised BC Ambulance Service that the call should be upgraded to Code 3. BC Ambulance Service dispatch asked if this was the “intoxicated guy” and the RCMP dispatcher confirmed it. She also indicated to BC Ambulance Service that RCMP members were with the male, and that it was safe for EHS personnel to attend.

01:33:16 – E – 23 (Constable Millington) was advised by dispatch that EHS was en route Code 3.

01:33:39 – BC Ambulance received a call to indicate that the patient was now unconscious.

01:33:57 – Another RCMP dispatcher also called EHS to upgrade the response to Code 3.

01:34:00 – The Richmond Fire Department was contacted by RCMP dispatch and asked to attend YVR. A Captain and three firefighters were assigned.

01:34:09 – Unit 51A, the BC Ambulance unit which had initially been assigned, was cancelled by BC Ambulance dispatch because it was too far removed from YVR for the Code 3 call. At that time, the call was assigned to Unit 69A2 (crew members Egli and Maciak).

01:35:06 – BC Ambulance also dispatched unit 69A1 (crew members Randell and Van Houten) for the Code 3 call to YVR.

01:40:00 – Richmond Fire Department personnel arrived at YVR.

01:42:02 – E – 24 (Constable Bentley) requested the file number for the incident from dispatch.

01:46:57 – BC Ambulance Unit 69A2 arrived on scene.

01:47:17 – BC Ambulance Unit 69A1 arrived on scene.

Appendix I – Actions of Mr. Dziekanski

The location at YVR where the incident took place is the point of egress from the secure international arrivals area to the public meeting area. Video coverage of the area is not all encompassing, but three YVR video cameras did record relevant details. Specifically, these cameras were numbered 24401, 22233, and 22244. I have reviewed the relevant video from these cameras.

Camera 24401 points down and covers the main area of international arrivals. At various times while he remained in the secure area of the international arrivals area, Mr. Dziekanski can be seen. Camera 22233 points from the public area of the airport and covers the doors exiting to the exterior of the airport. Two of the RCMP members who attended the complaint regarding Mr. Dziekanski entered the building through these doors. Camera 22244 points inside the airport toward the exit doors from the secure area of international arrivals to the public waiting area. This camera captures images including Mr. Dziekanski blocking the exit doors, his interaction with the limousine driver, Mr. Meltzer (see below), and the arrival of the police.

In addition, video footage was taken by a civilian witness, Mr. Paul Pritchard. Mr. Pritchard's video footage, which will be discussed in more detail below, is the footage of the incident that has been widely reported in the media.

The only YVR camera which captured any details of significance to the investigation is camera 22244. This camera looks east into the public waiting/greeting area near the international arrivals exit door.

As per the date and time stamp on the YVR video footage, on October 14, 2007 at approximately 24:53:32, Mr. Dziekanski, pushing a luggage cart with two suitcases and one smaller bag, exited the secure area and entered the public waiting/greeting area. He walked a short distance and sat in a chair in the public waiting area.

At approximately 24:57:39, he stood and pushed the luggage cart back toward the doors to the secure international arrivals area. Because of the distance from the camera and blockage from fixed objects in the frame of the picture, determining Mr. Dziekanski's exact movements during this time is not possible. The doors between the secure and public areas open automatically for persons exiting the secure area, but cannot be opened from the public side without a pass card. Only authorized persons hold such cards; these include YVR and RCMP personnel as well as accredited persons, such as certain limousine drivers who have received clearance. Mr. Dziekanski began to bang on the doors as though he wanted someone to open them to allow him back into the secure area of the airport.

Witness accounts indicate that Mr. Dziekanski was throwing his luggage and attempted to regain entry to the secure side of the glass doors. During that time, Mr. Lorne Meltzer, a limousine driver who was at the airport to pick up passengers from another international flight, arrived and used his pass card to open the doors. Mr. Meltzer said in his statement that he told Mr. Dziekanski he would have to leave because another flight was due to arrive shortly.

Mr. Dziekanski, who did not speak any English and was visibly upset and shouting at no one in particular prior to the encounter with Mr. Meltzer, became even more agitated and the two began shouting at one another, although apparently neither could understand the other. At this point, the doors were open, and Mr. Dziekanski took a chair from the secure area and placed it between the doors to keep them from closing. He and Mr. Meltzer continued the verbal sparring, with Mr. Meltzer shouting that Mr. Dziekanski would have to move because he was blocking the exit doors. Mr. Dziekanski became more upset and more agitated.

One witness indicated that Mr. Dziekanski was sweating profusely at this time and stated that she perceived either an odour of alcohol or body odour emanating from Mr. Dziekanski. The witness stated that Mr. Dziekanski seemed lost. She said that she attempted to communicate with him in several different languages, none of which was Polish.

YVR surveillance camera 22244 which, as noted, was trained on the waiting area and includes the International Arrivals exit doors, shows that at approximately 01:25:45 on October 14, 2007, airport security entered the public area and observed Mr. Dziekanski's actions. Airport security personnel did not appear to interact with Mr. Dziekanski other than to observe him. Camera 22244 is located some distance from the site of the events. Although movement is visible, the grainy nature of the video coupled with the distance and objects blocking the view render the video inappropriate to determine the exact events which transpired.

Appendix J – Pritchard Videos

Video 1 – Prior to RCMP Involvement

Mr. Pritchard's video camera records that at 01:17:52 on October 14, 2007 (according to Mr. Pritchard's video time indicator), he saved the first video of Mr. Dziekanski. This video was taken prior to the arrival of the RCMP, but after the interchange between Mr. Dziekanski and Mr. Meltzer.

At various points in the Pritchard video, Mr. Dziekanski can be heard to make statements in Polish. The words spoken by Mr. Dziekanski were translated on October 18, 2007 by Constable Wicik, an RCMP member fluent in the Polish language.

For the purposes of the Braidwood Inquiry, however, Commission counsel had the audio portion of the Pritchard video enhanced and the Polish words spoken by Mr. Dziekanski translated by a professional translator. The translation was entered as evidence on February 2, 2009 at the Braidwood Inquiry by Mr. A. Kris Barski. Because Mr. Barski is a professional translator, his evidence was given under oath and he had the benefit of enhanced audio, I prefer the translation by Mr. Barski over that of Constable Wicik, and it is Mr. Barski's translation to which I will refer. In addition, Mr. Barski's translation was conducted in conjunction with another Polish translator, Ms. Malgorzata Jaszczewska.

Time referenced in this appendix refers to running time of the Pritchard videos, and not time of day.

As the video opens, Mr. Dziekanski can be seen standing a short distance inside the secure area of international arrivals, a short distance from the exit doors. As indicated previously, these doors are activated by motion sensors inside the secure area which cause the double glass doors to swing out so that as persons walk to exit, the doors automatically swing open. As also noted, an electronic pass card is necessary to open the doors from the public waiting area side.

A clear, glass wall separates the secure and public areas. Leading into the public area from the doors is a waist high barrier consisting of a wooden railing with a glass partition to the floor. The barrier provides a pathway for persons exiting the secure arrivals area.

Just inside the doors to the secure area, a counter can be seen stretching to the right of the doors. A sign above the counter indicates it is the "Airport Greeting Centre". On the counter sits a computer and other items, presumably the property of YVR. No YVR or CBSA employees are seen at the counter.

The video shows two green, swivel chairs blocking the point where the doors into the secure area would normally close. The chairs are seen to act as physical barriers to closing the doors, causing the doors to attempt to close, and then immediately open again because of the blockage. Mr. Dziekanski can be seen placing a small wooden table on the floor next to the chairs, presumably to further block them from closing.

Mr. Dziekanski then walks to the counter, picks up a clipboard in his right hand and walks back to the doors. He appears to be quite upset and agitated. The clipboard can be seen shaking as he holds it. He can be heard on the video to be saying some words (translated below) and can be seen and heard to be breathing heavily. He appears to also be perspiring heavily.

- At the 00:30 mark, Mr. Dziekanski says: *Rozpiardole to biuro*. This was translated as: *I will trash this office*.
- At the 00:40 mark, Mr. Dziekanski is heard to say: *Spierdalajcie*. Mr. Barski translated this as *Fuck off*.
- At the 00:57 mark of Mr. Pritchard's first video, Mr. Dziekanski can be seen to pick up the small wooden table and hold it in front of himself as if to fend off someone or something.
- At the 01:11 mark of the video Mr. Dziekanski, still holding the table in front of him, steps into the public area and speaks, apparently to the people assembled in the public waiting area. Conversation can be heard between a male and female in the public area speculating as to the language spoken by Mr. Dziekanski. They assume it to be possibly Russian and the male can be heard to say that a Russian interpreter is needed.
- Also at the 01:11 mark of the video, Mr. Dziekanski says: *Rozpiardole szyby. Rozpiardole tutaj szyby. Zobaczysz*. This was translated as *I will smash the glass, and I will smash the glass here. And you will see*.
- At the 01:34 mark, Mr. Dziekanski says: *Co powiedziałaś? Ty mnie nie pozwolisz* which means *What did you say? You will not let me?*
- At the 01:39 mark, Mr. Dziekanski says: *Ty mnie nie pozwolisz?*, which means *You will not let me?*
- At the 01:43 mark, Mr. Dziekanski says: *Kurwa go mać. Oskarżę Ciebie i wszystkich*, which is translated as *For fuck's sake. I will sue you and everybody else*.

- At 01:56 of the video, Mr. Dziekanski says: *Dobra, dobra. [Nie do odszyfrowania] jesteśmy w innym kraju [Nie do odszyfrowania].* This was translated as *Fine, fine [Indecipherable] we are in a different country so [Indecipherable].*
- At the 02:08 mark, a woman, later identified as Ms. Sima Ashrafinia, enters the frame and, from the waiting area of the exit barrier, speaks to and attempts to calm Mr. Dziekanski. Mr. Dziekanski speaks to her, and at the 02:34 mark he moves back inside the secure area and holds the table higher, as if in a defensive posture.
- Between the 02:13 and 02:16 marks, Mr. Dziekanski says: *Rozpiardolę całą szafkę. Rozpiardolę całą 36 szafkę. [Nie do odszyfrowania] kłopotu.* Which means: *I will smash the entire desk. I will smash the entire desk. [Indecipherable] trouble.*
- At 02:22, Mr. Dziekanski says: *Dajcie mnie święty spokój. Odejdźcie mówię.* This was translated as *Leave me alone everybody. Go away I said.*
- At 02:32 of the video, Mr. Dziekanski says: *Kurwa mać.”* This was translated as *For fuck’s sake.*

The video ends at the 02:56 mark.

Video 2 – Deployment of CEW

At the beginning of the second video, Mr. Dziekanski can be seen through the glass wall standing on the secure side of the international arrivals area near the computer sitting on the counter. Ms. Ashrafinia is also in frame, still attempting to calm Mr. Dziekanski. Mr. Dziekanski’s luggage can be seen stacked on the floor at the end of the counter closest to the exit doors.

Mr. Barski was also asked to listen to the enhanced audio from this video and attempt to translate the words spoken by Mr. Dziekanski.

- At the 00:06 mark of the video, Mr. Dziekanski was heard to say: *Jak długo już mam czekać.* This means *How long do I still have to wait?* Mr. Barski stated that Mr. Dziekanski also said: *Co mnie nie puścicie? Nie dacie mnie stąd wyjść?* This was translated as *So you will not let me go? You will not let me out of here?*

- At the 01:06 mark of the video, Mr. Dziekanski is seen throwing the computer from the counter onto the floor. A male voice is heard to say *Oh, right in front of the cops, too.*
- At the 01:17 mark, Mr. Dziekanski then picks up the small wooden table and throws it against the glass wall, breaking the table.
- At the 01:25 mark, Mr. Dziekanski picks up the computer from the floor. A different male voice is heard to say: *Sir, sir. Put it down... Please put it down.* A reflected image in the glass of the wall shows this instruction to be from a YVR security guard (dressed in a reflective yellow jacket and later identified as Lance Rudek), who can also be seen to motion with his hands that Mr. Dziekanski should put the computer down. Mr. Dziekanski complies.
- At the 01:59 mark, a female can be heard to say: *He's so scared. Just leave him.*
- At the 02:02 mark, Mr. Dziekanski moves one of the two green swivel chairs from blocking the doors and takes it back to the counter area.
- At the 02:10 mark, a male voice says: *Why are the police not here? We called Security and we called the police.*
- At the 02:56 mark, Mr. Dziekanski approaches the exit doors (still in the secure area) causing them to open. He moves the remaining green swivel chair to his right (toward the wall) and out of the way of the doors.
- At the 03:00 mark, the camera swings almost 180 degrees from Mr. Dziekanski to the uniformed RCMP members arriving. Mr. Dziekanski can be heard to yell *Policja!* (the Polish word for police) twice.
- At the 03:04 mark, an unidentified male (later identified as Constable Bentley) is heard to say *Got your Taser?* A response of "Yup" is heard. Constable Millington later confirmed that the response came from him. Constable Millington was the only responding RCMP member equipped with a CEW that night.

As the camera pans back to Mr. Dziekanski, a brief exchange between an unidentified male and the arriving members (who continue to move toward Mr. Dziekanski) can be heard. A member says: "Where is he?" The unidentified male (later learned to be Mr. Meltzer, the limo driver) replies: "He's right inside there. He speaks Russian."

Constables Millington and Bentley were the first two to hop over the barrier wall leading to the doors to the secure area at approximately the 03:23 mark. As the

members enter the secure area, a voice can be heard to say: *How are you, Sir?*, then: *How's it going, bud?*

In evidence during the Braidwood Inquiry, Constable Bentley stated that he spoke these words. Constable Rundel closely followed the first two members, but at the time Constable Bentley's comments were made he had not yet completed crossing the barrier.

At this point, the members were just inside the doors. Mr. Dziekanski was approximately one to one and a half metres inside the secure area facing the members. He appears to be speaking to the members (in Polish) and gestures with his arms. Mr. Dziekanski's comments are inaudible because of the glass wall blocking his voice and because of ambient sound in the public waiting area.

Corporal Robinson can be seen to remain on the waiting area side of the barrier for several more seconds. At the 03:31 mark, he also crosses the barrier and enters the secure area.

At that point the camera begins to swing as Mr. Pritchard moves to another vantage point, causing an obstructed view of the RCMP members interacting with Mr. Dziekanski inside the secure area. Compounding the obstruction is the reflection of lights in the glass wall.

- At the 03:37 mark, the members can be seen talking with Mr. Dziekanski who is approximately two metres inside the secure area, near his luggage. Mr. Dziekanski's arms are at his sides and his stance does not appear combative.
- At the 03:41 mark, Mr. Dziekanski throws his arms in the air and steps away from the members, toward the counter. The members follow, and use hand gestures to indicate to Mr. Dziekanski where they would like him to stand. At this point, Mr. Dziekanski is standing in front of the counter with his back to the glass wall and to the camera. The view of him and the members facing him is obstructed by the counter, which is approximately just above waist height. The members fan out in a semi-circle in front of him. The video indicates that the members were giving direction to Mr. Dziekanski and that Mr. Dziekanski was speaking to the members. His attention appears to be directed primarily to Corporal Robinson. None of the members spoke Polish and Mr. Dziekanski spoke no English.
- At the 03:43 mark, Mr. Barski testified that Mr. Dziekanski stated: *Odczep się. Odczep się. Co wy zdurnieliście? [Nie do rozszyfrowania]*. Mr. Barski translated this as *Leave me alone. Leave me alone! Did you become stupid?* Mr. Barski testified this could also mean *Are you out of your mind? Why?*

Mr. Barski was not positive about the last word uttered by Mr. Dziekanski, but believes it was stated.

- At the 03:45 mark, Mr. Dziekanski appears to pick something up from the counter (later determined to be a stapler) and at the 03:46 mark, Constable Bentley can be seen to take a step back from Mr. Dziekanski. Simultaneously, the other members appear to take note of something Mr. Dziekanski is holding. Corporal Robinson can be seen to withdraw his ASP baton from his holster, but not deploy it. By the 03:48 mark, the other members have taken up positions as indicated below around Mr. Dziekanski, and are approximately two metres away from him. Mr. Dziekanski can be heard speaking loudly to the members.

The video shows Constable Millington (who was the only member equipped with a CEW that night) in the nine o'clock position to the far left of Mr. Dziekanski. Next, in the 11 o'clock position, was Corporal Robinson. To Mr. Dziekanski's one o'clock position was Constable Rundel. Constable Bentley was to Mr. Dziekanski's three o'clock position.

At that point, Mr. Dziekanski is standing facing the members. His hands cannot be seen. In their statements, members indicated that Mr. Dziekanski grabbed a stapler from the counter and that they believed he was going to use it as a weapon.

- At the 03:49 mark, 26 seconds after the members make first contact with Mr. Dziekanski, the conducted energy weapon (CEW) can be heard to discharge. Constable Millington is out of frame at this time, but at the 03:51 mark he can be seen coming into frame, holding the CEW. In his statement to IHIT, Corporal Robinson said that he gave an instruction to Constable Millington to deploy the CEW simultaneous with Constable Millington deploying it on his own.

In evidence during the Braidwood Inquiry, Constable Millington said that he did not hear Corporal Robinson issue the instruction for the initial deployment. He said that he (Constable Millington) then cycled the CEW for the second time of his own volition and that he cycled the CEW for the third time on Corporal Robinson's instructions (when he heard Corporal Robinson say: *Hit him again*). Notwithstanding the instruction from Corporal Robinson, Constable Millington accepted that the decision to cycle the weapon was his.

Corporal Robinson testified before the Braidwood Inquiry that he verbally instructed Constable Millington to deploy the CEW initially and that the deployment of the weapon by Constable Millington was almost simultaneous with his instruction.

- At the 03:51 mark, Corporal Robinson can be seen to re-holster his still unextended ASP baton.
- Mr. Dziekanski reacts to the deployment of the CEW immediately. His arms flail up in the air and at the 03:52 mark, an object (later identified as an open stapler) can be seen in Mr. Dziekanski's right hand. Mr. Dziekanski then stumbles several steps to his right and at the 03:55 mark he falls to the floor past the end of the counter. Mr. Dziekanski can be seen through the glass wall writhing on the floor and screaming.
- At the 04:04 mark, Corporal Robinson moves in and begins to subdue Mr. Dziekanski. He is joined at 04:06 by Constable Rundel. At the 04:10 mark, Constable Bentley and Constable Millington join in. Constable Millington still has the CEW in his right hand, and his assistance is to hold Mr. Dziekanski's feet with his free (left) hand. Mr. Dziekanski continues to writhe throughout the attempts to subdue him.¹¹⁶
- At the 04:12 mark, Constable Millington stands and directs his attention to the CEW, which he holds facing Mr. Dziekanski. At 04:12/04:13 someone, likely Corporal Robinson, is heard to shout "*Hit him again. Hit him again.*"
- At the 04:13/04:14 mark, someone (likely Constable Millington) is heard to say *Got 'im. Got 'im.*
- At the 04:19 mark, a YVR security guard begins to block the frame and he is joined at the 04:20 mark by another man. The two fully obscure the view. It is clear, however, that the RCMP members were attempting to restrain Mr. Dziekanski and that Mr. Dziekanski continued to struggle. According to witness statements and statements from the involved RCMP members, Mr. Dziekanski received no blows from fists, feet or batons. Neither the baton nor oleoresin capsicum (OC) spray (also known as pepper spray) was used by the members to subdue Mr. Dziekanski. The rationale behind the force used by the RCMP members against Mr. Dziekanski and its appropriateness is discussed in **Appendix O** of this report.

¹¹⁶ As noted, the CEW download report indicated that the weapon was cycled five times during this period (three times in probe mode and two times in push stun mode). Contact with Mr. Dziekanski was clearly made in push stun mode, but because one probe lodged in Mr. Dziekanski's shirt and given Constable Millington and other members' statements that the CEW made a "clacking" sound in probe mode (indicating that probes were not completing the circuit and current was not flowing), it is impossible to know whether Mr. Dziekanski was subjected to electrical current throughout the cycling of the CEW.

Constable Millington indicated in his statement that the contact of the CEW probes with Mr. Dziekanski was intermittent, and as a result, he could at times hear a clacking sound, indicating that electrical current was not flowing into Mr. Dziekanski as the CEW was cycled. Clearly, Mr. Dziekanski had some exposure to the electrical current as demonstrated by his reaction to the deployment of the CEW.

- At approximately the 04:23 mark, Constable Millington is seen to move around Mr. Dziekanski and insert himself with the other members close to Mr. Dziekanski. Constable Millington indicated in his statement that he administered the CEW in push stun mode to Mr. Dziekanski twice during this period. Push stun mode means that the electrodes of the CEW were held to Mr. Dziekanski's body.
- At the 04:32 mark, Corporal Robinson can be seen kneeling¹¹⁷ on Mr. Dziekanski's upper body. At this same time, a male voice (presumably a YVR employee) can be heard in the public waiting area saying: *Greg, Cathay is coming through with 300 plus. What do you want to do?* Presumably this is a reference to a Cathay Pacific flight from which passengers were due to exit via these doors shortly. No evidence has been located to indicate that the RCMP members were aware of any such flight, or that the presence of these Cathay Pacific passengers affected how they dealt with Mr. Dziekanski.
- By approximately the 04:55 mark, Mr. Dziekanski's struggles lessen considerably and his moans sound as though he is becoming exhausted. At this point, Constable Bentley is seen straddling and sitting on Mr. Dziekanski's thighs, Constable Rundel is near his waist attempting to handcuff Mr. Dziekanski. Corporal Robinson is hidden behind onlookers, but is believed to be near Mr. Dziekanski's head and shoulder area, controlling his upper body movements.
- At the 05:01 mark, onlookers clear and Corporal Robinson can be seen kneeling on Mr. Dziekanski's upper back/shoulder area. Mr. Dziekanski is lying on his stomach during the struggle.
- At the 05:05 mark, Constable Bentley gets up from Mr. Dziekanski's thighs and walks around to Mr. Dziekanski's head. At 05:10, he picks up his baton which he had deployed during the interaction with Mr. Dziekanski. The baton was not used during the altercation; Constable Bentley had dropped it to the floor while assisting in subduing Mr. Dziekanski.

¹¹⁷ In his testimony before the Braidwood Inquiry, Corporal Robinson denied putting excessive pressure on Mr. Dziekanski's upper back and neck. Braidwood transcript, March 23, 2009, p. 86, March 24, pp. 53–55, March 25, pp. 63, 65–68.

- At the 05:17 mark, Mr. Dziekanski continues to struggle. Corporal Robinson appears to have placed a considerable amount of his weight on Mr. Dziekanski's upper body.¹¹⁸ By the 05:19 mark, it appears that Corporal Robinson's right shin and ankle are pressing down on the back of Mr. Dziekanski's neck. He remains in this position until the 05:46 mark of the video.
- At 05:31, Constable Bentley begins to collapse his baton. Corporal Robinson and Constable Rundel remain by Mr. Dziekanski, whose movement has by this time virtually stopped.
- By the 05:53 mark, the members appear to be looking at one another and exchanging words. No one appears to check Mr. Dziekanski or take any specific actions to administer first aid.

The video ends at the 05:56 mark.

Video 3 – Post-Incident

A third video was shot by Mr. Pritchard. The date stamp on the video camera indicates that it was saved at 01:31:06 on October 14, 2007.

As the video begins, Corporal Robinson and Constable Bentley can be seen kneeling beside Mr. Dziekanski, who does not move. At various points, Corporal Robinson leans over Mr. Dziekanski, as if to check for breathing. Constable Millington is rolling up electrical wires, presumably from the CEW probes. Constable Rundel is not seen in this video.

At the 00:43 mark, a male wearing a suit comes into frame and kneels to check Mr. Dziekanski's carotid pulse. The male was later determined to be Mr. Trevor Enchelmaier, YVR Aviation Security Supervisor with the private firm Securigard.

At 00:53, Mr. Dziekanski can be seen to remain handcuffed, although he appears to be unconscious. Other than monitoring Mr. Dziekanski, no identifiable first aid appears to be rendered by the RCMP members in attendance. Corporal Robinson is seen to lean over close to Mr. Dziekanski a number of times prior to the arrival of emergency medical personnel.

Subsequent to his arrest, Mr. Dziekanski appears to be lying in a prone position, but rolled somewhat onto his right side. Each of the RCMP members was wearing gloves. Corporal Robinson can be observed to remove his gloves on at least one occasion, apparently to check Mr. Dziekanski's vital signs.

¹¹⁸ As discussed in this report, in evidence during the Braidwood Inquiry, Corporal Robinson denied having placed an inordinate amount of weight on Mr. Dziekanski's neck area.

The video ends at the 01:07 mark.

Appendix K – The Nature of the CEW and the Evolution of CEW Policy

The CEW was first approved for RCMP use in 2001. It is a prohibited firearm pursuant to the *Criminal Code*¹¹⁹ as indicated in the RCMP Operational Manual,¹²⁰ which advises members of that fact. A report completed for the RCMP by an external consultant has identified an issue with respect to the designation of the weapon as approved for use by the RCMP, in that the regulatory amendments necessary to possess the weapons have not been enacted. It is to be borne in mind that notwithstanding the RCMP Operational Manual categorization of the CEW as an *intervention option to control individuals and avert injury to members and the public*,¹²¹ and the IM/IM categorization of the CEW as an intermediate device, the CEW is, as noted, a prohibited firearm and must be treated as such.

The CEW may be deployed in two modes; probe mode and push stun mode. In probe mode, the function of the CEW is to incapacitate the neuromuscular system of the recipient of the discharge. Compliance may be achieved in a clinical sense by incapacitating muscle groups but the reality, although collateral to the means of incapacitation, is the infliction of severe pain on the recipient.

In push stun mode, i.e. with the electrodes of the CEW being placed directly against the subject, the RCMP Operational policy in force at the time of the YVR incident stipulated that in this mode, the CEW is primarily a pain compliance device. This stipulation has been removed from the most recent iteration of CEW policy.¹²² I noted in my March 2009 report that statistics now indicate a reduction of approximately 30% in CEW usage in push stun mode.¹²³

Following the RCMP providing the Commission with data concerning CEW deployments during the period October 1, 2007 to December 31, 2007, I expressed my concern to RCMP Commissioner Elliott with respect to the characterization of injuries sustained by recipients of CEW deployments. Specifically, I expressed concern that characterization of injuries ranging from “no injury” to “death proximal to CEW usage” do not appropriately capture the degree of harm the CEW is capable of causing. In the category “no injury”, the RCMP includes *the immediate effect of CEW usage (slight burns/probe marks)*. By repeatedly categorizing minor primary injuries as “no injury” the RCMP is, in

¹¹⁹ See http://www.cfc-cafc.gc.ca/factsheets/r&p_e.asp.

¹²⁰ OM 17.7.7.1.1. (2007-08-08).

¹²¹ OM 17.7.1.1 – Revised 09-01-27.

¹²² OM 17.7 as issued on 09-01-27.

¹²³ RCMP Use of the Conducted Energy Weapon (CEW), March 31, 2009. See <http://www.cpc-cpp.gc.ca/prrr/rep/sir/cew-ai-09-eng.aspx>.

effect, minimizing the consequences of the CEW and potentially desensitizing RCMP members and the public to the effects of the CEW.

It is of interest to note that in a news interview, Mr. Ujjal Dosanjh, Attorney General of British Columbia at the time when CEWs were first introduced into the province by the RCMP in 2001, indicated that he was advised that the CEW was intended to be used only in situations in which it could be used as an alternative to lethal force.¹²⁴

The concept of less lethal force was reviewed by the RCMP in a 2000 position paper, and a CEW Evaluation Project was conducted by the RCMP. It was recommended that:¹²⁵

1. The M26 Advanced TASER[®] be adopted as a less lethal response option by the RCMP.
2. Those operational units which already have the M26 Advanced TASER[®] and trained operators be authorized to continue operational deployment until such time as a final decision has been made.
3. A three-year plan be adopted to assure a timely “roll out” of this less lethal technology to front lines of service delivery.
4. An individual be identified and tasked with the responsibility of implementing this process.

The CEW was marketed as a viable less lethal force option. In a 2007 internal report,¹²⁶ the RCMP expanded on the criteria for assessing less lethal devices, as outlined in the 1998 report titled *Less Lethal Force Technology*. These criteria were:

1. *temporary effect;*
2. *minimal medical implications;*
3. *high probability of instantaneous control;*
4. *effective on the highly motivated;*
5. *observable effects;*
6. *ideally only affect the intended.*

As noted previously, the CEWs used by the RCMP are manufactured by TASER International. In its training sessions,¹²⁷ TASER International teaches that the CEW in probe mode incapacitates the central nervous system which in turn incapacitates muscle groups to achieve its goal of incapacitating the subject.

¹²⁴ Toronto Star, January 30, 2009.

¹²⁵ <http://www.rcmp-grc.gc.ca/ccaps-spcca/cew-ai/cew-ai-eds-sda-report-rapport-eng.htm>

¹²⁶ RCMP report titled *Report on Conducted Energy Weapons and Excited Delirium Syndrome*. Issued November 20, 2007

¹²⁷ Training sessions for police personnel who are to return to their various police agencies to certify other police personnel locally

The manufacturer indicates that the CEW in probe mode does *not rely on pain to achieve compliance. It overwhelms the central nervous system and achieves incapacitation.*

TASER International training indicates that although voltage is high (50,000 volts) the amperage of the unit is lower than that of a heart defibrillator and is therefore safe. TASER International also indicates that officer safety is a prime factor in deploying the CEW and cites various examples of jurisdictions where injuries to officers declined significantly after the CEW was implemented.

In order to assess the actions of the RCMP members involved, it is instructive to canvass the evolution of CEW policy within the RCMP. The following is a non-exhaustive listing of policy amendments as they relate to the CEW; included are those amendments I believe are relevant to the discussion at hand. Other amendments, such as the type of approved holster, have not been highlighted here.

Initially, policy on the CEW was part of RCMP Operational Manual Chapter III.2 (Arrest); however, in 2005 the CEW policy was moved to Chapter 17.7, which became a separate chapter dealing with the CEW.

2001

In 2001, RCMP policy¹²⁸ with respect to the CEW was that the CEW was viewed as:

... a less lethal means for controlling suspects and averting injury to members, suspects and the public.

Members were required to record details of CEW usage in their police notebooks, and were required to report usage to their supervisors, but were not required to record or report CEW usage further.¹²⁹ The Senior Armourer was responsible to maintain a Quality Assurance program for the testing and evaluation of CEWs.¹³⁰

¹²⁸ OM III.2.1.5.a.1, Revision 2821, 2001-12-20.

¹²⁹ OM III.2.1.5.d.1, Revision 2821, 2001-12-20.

¹³⁰ OM III.2.1.5.e.4, Revision 2821, 2001-12-20.

2002

A number of policy revisions were issued in 2002. The first stipulated the types of batteries authorized to be used in the CEW.¹³¹ An amendment issued in May 2002 clarified that the CEW was not to be used for crowd dispersal.¹³² An amendment issued in June 2002 required members to also complete and submit a reporting form to Headquarters, Ottawa each time a CEW was used on a suspect.¹³³

A September 2002 amendment indicated *inter alia* that:¹³⁴

- a. Members must qualify annually to operate the CEW; and
- b. The CEW may only be used to subdue individual suspects who resist arrest, are combative or suicidal.

Finally, an amendment issued in October altered the location of reporting CEW usage form to Headquarters, Ottawa.¹³⁵ The requirement for annual CEW recertification was subsequently changed to three years, but annual recertification has now been reinstated—please see below.

2004

One amendment was issued in 2004 which effectively rewrote policy on the CEW and significantly enhanced the content of the Operational Manual with respect to the CEW. Highlights are provided here:

- a. Only the Taser[®] M26, described as *an intervention device to control individuals and avert injury to members and the public*, is approved for RCMP use;
 - a. Use of the term “less lethal” was removed from the description of the CEW as was the term “suspects”. Suspects was replaced by the term “individuals”;¹³⁶
- b. Members were required to re-qualify for CEW use every three years (instead of annually as required in September 2002),¹³⁷
- c. Definitions of *Stun Mode*, *Probe Mode*, *Use of the CEW*, and *Operational Cartridge* were added;¹³⁸
- d. Use of the CEW must be in accordance with the principles of the IM/IM;¹³⁹

¹³¹ OM III.2.1.5.e.4, Revision 2829, 2002-03-14.

¹³² OM III.2.1.5.a.4, Revision 2837, 2002-05-15.

¹³³ OM III.2.1.5.d.3, Revision 2861, 2002-06-19.

¹³⁴ OM III.2.1.5.a.3–4, Revision 2876, 2002-09-25.

¹³⁵ OM III.2.1.5.d.3, Revision 2894, 2002-10-30.

¹³⁶ OM III.2.1.5.a.1, 2004-06-23.

¹³⁷ OM III.2.1.5.a, Revision 2861, 2002-06-19.

¹³⁸ OM III.2.1.5.b.1–4, 2004-06-23.

¹³⁹ OM III.2.1.5.c.1, 2004-06-23.

- e. The requirements for medical intervention post-CEW became more stringent;¹⁴⁰
- f. Reporting requirements were altered such that reporting to Headquarters (including whether the CEW was used in *stun* or *probe* mode) was required only when:
 - a. Medical issues were involved,
 - b. A civil claim was anticipated,
 - c. Drug or alcohol abuse is anticipated or “difficulties” encountered (difficulties were not defined),
 - d. Circumstances were such that the event should be reported,¹⁴¹
- g. The unit commander became responsible to ensure that all members under his or her command were aware of the policy directive concerning the CEW.¹⁴²

2005

In June 2005 the RCMP Operational policy on the CEW moved from Operational Manual III.2 (Arrest) to Chapter 17.7 (Conducted Energy Weapon).

Added to the definition of *Use of CEW* were the words:

*... when the presence of the CEW assists in taking control of a situation whether the CEW Challenge is given or not.*¹⁴³

The requirement issued in the June 23, 2004 amendment that the Headquarters reporting form was required only in certain circumstances was repealed and replaced with a requirement that a report was to be provided within 15 days to Headquarters every time the CEW was used.¹⁴⁴

An amendment in September 2005 (preceded by an operational bulletin issued in July 2005) recognized for the first time the potential for danger to the subject if the CEW is cycled multiple times or for periods exceeding 15–20 seconds.¹⁴⁵ The caveat with respect to the danger of multiple cycling has been retained in policy since that time. This point was confirmed by comments of Commissioner Elliott before the Standing Committee on Public Safety and National Security on February 12, 2009.

This amendment included a requirement for a battery cool-down period of ten minutes if the CEW was cycled more than ten times consecutively.¹⁴⁶

¹⁴⁰ OM III.2.1.5.d.1, 2004-06-23.

¹⁴¹ OM III.2.1.5.e.1–4, 2004-06-23.

¹⁴² OM III.2.1.5.f.5, 2004-06-23.

¹⁴³ OM 17.7.2.3.1, 2005-06-01.

¹⁴⁴ OM 17.7.5, 2005-06-01.

¹⁴⁵ OM 17.7.3.3, 2005-09-08.

¹⁴⁶ OM 17.7.6.3, 2005-06-01. See also Bulletin OM-445, 2003-10-09.

Bulletin OM-465 (Operational Manual), issued in July 2005, referred to a report issued by the Victoria (BC) Police Service and indicated that continuous cycling of the CEW for more than 15–20 seconds *may increase the risk to the subject and should be avoided where practical*.¹⁴⁷ This caveat was included in subsequent versions of CEW policy.¹⁴⁸

In August 2005, a technical report on CEWs (or Conducted Energy Devices – CEDs as they are also known) was issued by the Canadian Police Research Centre (CPRC), in Ottawa, Ontario. The CPRC report indicated that the work was conducted in close collaboration with a Victoria (BC) Police Service study.

The CPRC’s review of CEWs focused on three areas: the medical safety of CEWs, the policy considerations for police CEW operations and the analysis of the medical condition known as excited delirium. As noted, the term “excited delirium” has now been expunged from RCMP policy.

The RCMP no longer uses CPRC to conduct assessments of CEWs. As of November 2008, MPB Technologies Inc. became the approved testing facility for RCMP CEWs.¹⁴⁹ Accordingly, I have not relied at all on any CPRC documentation in my investigation.

An amendment issued in September 2005 altered the wording of the policy on considering other possible intervention options by adding the words *to control a subject*.¹⁵⁰

2007

The CEW policy in effect at the time of the death of Mr. Dziekanski (October 2007) was issued in August 2007. This policy required members to *take control of the subject as soon as possible during a CEW probe-mode deployment*.¹⁵¹ The version added the concept of *excited delirium*¹⁵² (which was removed from RCMP documentation as of January 2009) and informed members that:

*If you suspect that an individual is experiencing an excited delirium medical emergency, when possible create a response strategy before deploying the CEW and include Emergency Medical Services (EMS) attendance in your strategy.*¹⁵³

¹⁴⁷ OM 17.7.3.3, 2005-10-19. See also Bulletin OM-465, 2005-07-12.

¹⁴⁸ OM 17.7 – Revised 09-01-27.

¹⁴⁹ RCMP CEW Testing Protocol – February 2009.

¹⁵⁰ OM 17.7.3.2.1, 2005-09-08.

¹⁵¹ OM 17.7.3.1.4, 2007-08-08.

¹⁵² OM 17.7.3.2. Defined at 17.7.2.7, 2007-08-08.

¹⁵³ OM 17.7.3.2.4, 2007-08-08.

Excited delirium was explained as a medical emergency which may be brought on by stimulant use, psychiatric illness or a combination of both.¹⁵⁴ It then went on to list symptoms or behaviour typical of excited delirium, which in my view could also include behaviour demonstrated by a person in a state of high agitation. These included:¹⁵⁵

- a. Removal of clothing,
- b. Bizarre and violent behaviour,
- c. Running in heavy street traffic,
- d. Hyperactivity,
- e. Aggression,
- f. Smashing objects, particularly windows and glass,
- g. Non-responsive to police presence or verbal intervention,
- h. Extreme paranoia,
- i. Incoherent shouting,
- j. Flight behaviour,
- k. Lid lift (eyes open so wide the whites are completely visible),
- l. Impervious to pain,
- m. Ability to resist numerous police officers over an extended period,
- n. Overheating, or
- o. Profuse sweating or no sweating at all.

The policy advises members that a person experiencing a state of excited delirium requires medical treatment following restraint, and suggests that use of the CEW in probe mode may be the most effective response to establish control.¹⁵⁶ The policy also indicated that with respect to excited delirium:

- a. Enough members should be on hand for quick and effective control of the individual to minimize the incidence of physical confrontation,
- b. One member should be on the CEW,
- c. Effectively control the arms and legs during CEW deployment cycles,
- d. Apply approved restraints,
- e. Remove the subject from the prone position as soon as it may safely be accomplished after control is established,
- f. In the event the subject suddenly becomes quiet and stops resisting, summon EMS and prepare to administer CPR, and
- g. Subjects experiencing excited delirium should be transported to Health Services by EMS when possible.¹⁵⁷

I have chosen to equate this state with that of a person who is highly agitated because I believe that the same criteria and response should be provided no matter the underlying cause of the behaviour.

¹⁵⁴ OM 17.7.2.7.1, 2007-08-08.

¹⁵⁵ OM 17.7.2.7.1 to 16, 2007-08-08.

¹⁵⁶ OM 17.7.3.2.3, 2007-08-08.

¹⁵⁷ OM 17.7.3.2.4.1.2 to 8, 2007-08-08.

The policy confirmed that a member certified in first aid may remove the probes from an individual after deployment of the CEW.¹⁵⁸

The requirement to report is modified in that the reporting form must be completed before the end of a shift every time the CEW is used¹⁵⁹ (this includes withdrawing the unit from its holster as a means to gain control, not necessarily deploying it).¹⁶⁰

2009

The current CEW policy as captured by the RCMP Operational Manual was amended in January 2009.¹⁶¹ The policy now requires that RCMP members qualified on the CEW must re-certify annually (which, as noted above, was the policy in 2002). Previous policy (2004 to 2009) required a three-year recertification.

The policy as amended takes into consideration the risks inherent in using the CEW and stresses that deploying the CEW is only an option *in response to a threat to officer or public safety as determined by the Member's assessment of the totality of the circumstances being encountered*.¹⁶² The Manual goes on to note that the member's response must be reasonable and the force used must be necessary in the circumstances.

The policy restraints under which use of the CEW was authorized were relaxed over time. Initially, the CEW was to be used to subdue suspects *who resist arrest, are combative or suicidal*.¹⁶³

Wording varied slightly, but from 2001 until 2007, RCMP policy stipulated that before resorting to the CEW, members were to *consider other possible intervention options to control a subject*.¹⁶⁴ The version of the RCMP's CEW policy issued in August 2007¹⁶⁵ (the version in effect at the time of the Dziekanski incident) removed that requirement.

In past reviews, I have expressed concern about the positioning of the CEW within the IM/IM. Most recently, in my report to the Minister of Public Safety, I called for a restriction on the use of the CEW to respond to subject behaviour that is characterized at the combative stage or higher. The Commission has

¹⁵⁸ OM 17.7.5.3, 2007-08-08.

¹⁵⁹ OM 17.7.6.1.3, 2007-08-08.

¹⁶⁰ OM 17.7.2.4, 2007-08-08.

¹⁶¹ OM 17.7.

¹⁶² OM 17.7.3.1 – Revised 09-01-27.

¹⁶³ OM III.2.1.5.a.3 – 2001-12-20.

¹⁶⁴ For example, see OM 17.7.3.2.1 – 2005-09-08.

¹⁶⁵ OM 17.7 – 2007-08-08.

undertaken a broader review of the adequacy of RCMP CEW policies in the form of a public interest investigation into in-custody deaths proximal to CEW use.¹⁶⁶

As noted above, in January 2009 the RCMP amended its policy stipulating that the CEW may only be used in circumstances in which the RCMP member, after considering the totality of the circumstances, perceives a threat to his or her safety or the safety of a member of the public. However, it is not clear how members will interpret the reference to “threats”. This change, which results in less clarity in delineating the appropriate use of police weapons, leaves the Commission unable to determine whether this amendment will raise the bar to the level contemplated in the Commission’s recommendation made in its earlier reports to the RCMP. Rather, it relies too heavily on a member’s subjective appreciation of events without laying the objective policy-based foundation for which to assess the conduct. The Commission’s concern with this is that the lack of clear guidelines may well continue to contribute to “usage creep” institutionally and to the individual cases of inappropriate CEW use that have been reviewed and commented upon by the Commission, including this incident.

Compounding this issue is the recent pronouncements by the Provinces of British Columbia and Alberta regarding their respective positions on the threat threshold to be adhered to by police officers that must be present before a CEW can be deployed. Particularly, it is unclear whether the RCMP’s new policy on this threshold can, or will be reconciled with these provincial standards. Additionally, Commissioner Braidwood was unequivocal by stating that *a clear and imminent threat of bodily harm* must be present before a CEW is deployed. This appears to be a significantly higher threshold than the RCMP’s current policy contemplates. It is unclear what amendments to the applicable RCMP policy will be required in order to adhere to these provincial policies while at the same time maintaining a national standard consistent for all members across the RCMP.

General CEW Policy

The content of the police warning to be issued prior to the deployment of the CEW has been changed over the intervening time. Initially, the warning to be delivered was:

*Stand still or you will be hit with 50,000 volts of electricity!*¹⁶⁷

The warning was altered in the 2004 amendment to:

*Stop or you will be hit with 50,000 volts of electricity!*¹⁶⁸

¹⁶⁶ The investigation is associated with a related Chair-initiated complaint into the conduct of RCMP members present at, or engaged in, incidents where individuals in RCMP custody died following the use of a conducted energy weapon (CEW), which incidents have taken place anywhere in Canada between January 1, 2001 and January 1, 2009 (PC-2009-0055).

¹⁶⁷ OM III.2.1.5.b.3, Revision 2822, 2001-12-20.

¹⁶⁸ OM III.2.1.5.c.2.3, 2004-06-23.

Subsequent to the incident involving Mr. Dziekanski, the RCMP issued Bulletin OM-478 on January 7, 2008. The Bulletin stipulates that members may use the CEW, whether in probe or push-stun mode, *on persons who are displaying Active Resistant Behaviour and higher categories of behaviour.*¹⁶⁹ The Bulletin differentiates between active resistant behaviour and passive resistant behaviour. Active resistant behaviour includes behaviour during which a person *is physically resisting* attempts at control by the police officer. Passive resistant behaviour is behaviour in which a person resists control through *passive physical actions or verbal refusal in response to lawful commands.*

The Bulletin created two subdivisions in the IM/IM category of Resistant Behaviour. Prior to the issuance of Bulletin OM-478, the behavioural category was indicated solely as *Resistant*, and was defined as:

The person demonstrates resistance to control by the police officer through behaviours such as pulling away, pushing away or running away. This can include a situation where a police officer activates a police vehicle's emergency equipment and the suspect fails to stop and attempts to evade apprehension by driving evasively.

Prior to Bulletin OM-478, the IM/IM did not recognize passive resistance as a separate level of resistance for which the use of the CEW was deemed not to be warranted.

The RCMP Operational Manual was amended on January 27, 2009¹⁷⁰ to reflect changes to CEW policy.

On November 20, 2008, the RCMP engaged MPB Technologies Inc. to begin testing of a selection of its CEWs, particularly those manufactured prior to 2006. From across Canada, 30 CEWs were selected and tested using the 2005 TASER International protocol. Following consultation with both TASER International and the CPRC the protocol was amended to obtain a more accurate result. Test results have not yet been received.

At the time, the RCMP was aware that a study¹⁷¹ commissioned by the Canadian Broadcasting Corporation (CBC) was to be released. That study found variances in the voltage outputs of a number of CEWs tested.

¹⁶⁹ Bulletin OM-478, 1.1.

¹⁷⁰ OM 17.7 Revised 09-01-27.

¹⁷¹ Analysis of the Quality and Safety of the Taser X26 devices tested for Radio-Canada/Canadian Broadcasting Corporation by National Technical Systems, Test Report, at <http://www.cbc.ca/news/pdf/taser-analysis-v1.5.pdf>. See also news item: RCMP to test some Tasers after CBC investigation – <http://www.cbc.ca/canada/story/2008/12/09/rcmp-tasers.html?ref=rss>.

On June 1, 2009, the RCMP removed from service approximately 1,600 Model M26 CEWs (the older model used by the RCMP) following testing by the Government of British Columbia which indicated that ... *80% of the devices failed to operate within the manufacturers [sic] specifications. The results also showed that 90% of these units produced less electrical output than would be expected, potentially presenting both public and officer safety risks.*¹⁷² The RCMP will test these units and replace defective CEWs with the newer Model X26.

RCMP Comments on CEW Training

On May 6, 2009 Inspector Troy Lightfoot, the Officer in Charge of Use of Force and Operations Programs appeared before the Braidwood Inquiry. He indicated in his evidence that reporting requirements with respect to the CEW have been altered by the RCMP subsequent to October 2007, and stated that current policy requires that CEW usage reports be reviewed at a divisional and national level to assess whether such usage was within the scope of policy. Added to policy is the category of “acutely agitated or delirious persons” as being at higher risk of harm if exposed to a CEW deployment.

Inspector Lightfoot confirmed that CEW recertification is required annually (as noted above) and stated that ensuring continued CEW certification is a responsibility of each division. He stipulated that the RCMP has not imposed any requirement that members complete a minimum number of years of service prior to becoming CEW certified.

Inspector Lightfoot also discussed amendments to the IM/IM which were approved in May 2008. He said that the IM/IM no longer includes a category of weapons known as “Impact Weapons”, and said that the language associated with some subject behaviours has been changed. By way of example, he indicated that:

- Non-cooperative is now called passive resistant behaviour.
- Resistant behaviour is now called active resistant behaviour.
- Combative behaviour is now called assaultive behaviour.
- Death or grievous bodily harm is now called grievous bodily harm or death.

He said that, in addition, a ring has been added to the IM/IM. The intent of this ring is to represent a filter between behaviour and potential intervention responses. The term *communication* has replaced the former *verbal intervention*.

¹⁷² RCMP website – <http://www.rcmp-grc.gc.ca/news-nouvelles/2009/20090601-m26-eng.htm>.

Inspector Lightfoot indicated that amendments to RCMP policy subsequent to the death of Mr. Dziekanski stipulate that the CEW may only be deployed in circumstances involving a risk to officer or public safety.

I note that the language used in the amended RCMP policy does not line up with the categories of behaviour currently described in the IM/IM. It is not known how the members will be expected to reconcile the two.

Appendix L – CEW Training

De-escalation Techniques

Prior to discussing CEW training, it is informative to briefly canvass RCMP training with respect to the de-escalation of situations in order to avoid the use of force altogether. At various levels of training at Depot Division, cadets are taught the gradations of the officer interventions as found in the IM/IM, beginning with officer presence and communication, as well as CAPRA-based skills in problem solving. These aspects of training are focussed on developing the necessary verbal skills which police officers rely on when confronting potentially volatile situations. In addition, cadets receive training on negotiation and mediation skills and at the mid-point of their Depot training they begin to make use of these skills in role play scenario-based interactions with actors posing as members of the public.

Cadets are assessed on their ability to apply the appropriate level of response/force in these scenario situations as gauged against the IM/IM. The overall goal of the RCMP in providing such training is to ensure that members respond appropriately to the varied situations they will encounter in the field as police officers.

Although cadets receive such training, I am not aware of ongoing in-service training for RCMP members to reinforce the training received at Depot with respect to de-escalation tactics.

CEW Training

The Course Training Standard (CTS) for the CEW User Course was created in July 2001 and amended in May 2002 and September 2005. The RCMP CEW User Course is 16 hours in length. The CTS indicates that this amount of time allows instructors to teach the necessary material and provides time for practice and scenario based training.

The CTS stipulates that to successfully complete the course, each candidate must pass a written examination and achieve a score of 80%. In addition, each candidate must participate in role play exercises to demonstrate understanding of the weapon. According to the CTS:

Candidates will be given a skill display test and use role playing to ensure they can properly utilise the CEW in an effective and proficient manner. Candidates will be required to demonstrate proper use of the CEW and to explain and provide legal articulation of their actions to the instructor.

Upon completion of the course, each candidate is evaluated by the instructor and is rated either Competent or Unacceptable in each component of the course. A rating of Unacceptable in any course component means that the candidate does not receive credit for the course and is therefore not certified to operate the CEW.

Notwithstanding the requirement to be rated either Competent or Unacceptable, the CTS provides instructors with other assessment categories. In addition to the two noted above (Competent or Unacceptable), instructors may also rate candidates as Needs Improvement or, in the event a skill was not tested during a session, that aspect may be marked as Not Applicable.

The purpose of the CEW course at the time of the YVR incident was set out as:

This course is designed to provide the learner with the techniques, abilities, and knowledge to safely carry and use Conducted Energy Weapons (CEW). Successful candidates will be able to:

- *State the philosophy of Less Lethal Interventions;*
- *Describe where the Conducted Energy Weapon fits into the Incident Management / Intervention Model, in both probe and “Push Stun” deployment;*
- *State RCMP Policy as it relates to the CEW;*
- *State the design characteristics of the Conducted Energy Weapon;*
- *State the relevant technical data for the Air Cartridge and the Conducted Energy Weapon;*
- *Identify and name the parts of the Conducted Energy Weapon;*
- *Describe the function of the CEW in the “Push Stun” Mode and the “Probe” Mode;*
- *Describe the target areas on the body, for “Probe” deployment and state the considerations in determining the point of aim;*
- *Explain the effectiveness of the CEW as it relates to “Probe” spread;*
- *Describe the different injuries that can result from the Conducted Energy Weapon and state the physiological and psychological effects of the use of the Conducted Energy Weapon, in both “Probe” mode and “Push Stun” mode;*
- *Perform the function check for the Conducted Energy Weapon;*
- *Describe and demonstrate the loading procedure for the Conducted Energy Weapon;*
- *Explain proper drawing and holstering from a CEW Holster;*
- *Describe and demonstrate how to aim the Conducted Energy Weapon, with or without the use of the laser sight;*
- *Describe and demonstrate the failure drills; incorporating transitions from the failed CEW deployment to other mandated levels of intervention;*

- *Explain approved battery loading and battery recharging considerations;*
- *Explain the medical care requirements of post CEW deployment, in both the “Probe” mode and “Push Stun” mode;*
- *Explain and demonstrate the operational considerations for “Probe” deployment;*
- *Explain and demonstrate the operational considerations for “Push Stun” deployment;*
- *Understand the CEW reporting procedures;*
- *Describe and demonstrate how to clean and maintain the Conducted Energy Weapon;*
- *Demonstrate and explain the proper technique to use when removing probes from a client;*
- *Identify the groups at risk in experiencing excited delirium;*
- *Identify the typical development of a person experiencing excited delirium; and*
- *Have a [sic] understanding of the physiology associated to excited delirium.¹⁷³*

The RCMP CEW course is divided into 14 modules as follows:

1. Introduction, Course Orientation
 - Opening address
 - Mutual introductions
 - Course outcomes and purpose (i.e. job relevancy)
 - Syllabus
 - Course materials
 - Assessment procedures and purpose
 - General administration
 - Accommodation and meals
 - Transportation
 - Department
 - Expenses (i.e. financial coding)
 - Any other matter of concern to the efficient operation of the course
2. Technology Overview
 - Technology
 - Central nervous system
 - Sensory nervous system
 - Motor nervous system
 - Stun to NMD
3. Electrical – CEW (TASER®) Characteristics
 - Technical data

¹⁷³ As noted elsewhere in this report, the RCMP has now expunged the term “excited delirium” from its policy.

- Arcing
- Wet environment

- 4. Medical
 - Safe technology
 - Physical effects
 - Physical injuries
 - Common and possible side effects

- 5. RCMP Policies And Protocol
 - Definitions
 - Deployment
 - Certification
 - Medical treatment
 - Reporting procedures

- 6. Why CEW?
 - Lower lethality force
 - Modes of deployment
 - Principles of the IMIM

- 7. Voluntary Exposure
 - Rational
 - Safety and guidelines
 - Voluntary exposure report

- 8. CEW (TASER® X/M26)
 - Nomenclature
 - Weapon safety
 - Cartridge safety
 - Nomenclature and trigger operation
 - Holsters

- 9. Batteries And Air Cartridges
 - Battery removal/insertion
 - Power indicator
 - Battery testing guidelines
 - Air cartridges types and characteristics
 - Propulsion system
 - Probes, wires and AFID tags
 - Maintenance and storage

- 10. Practical Application
 - Loading, unloading, re-loading and aiming
 - Preparation for duty
 - Firing sequence and verbal commands

- Operational deployment
- Failure drill
- Tactical consideration
- Effects on animals

11. Field Application

- First responder response option
- Drug users
- Preventing suicides
- Emotionally disturbed persons
- Independent conclusions
- In-custody deaths

12. Scenario Based Training

- Objectives
- Officer safety
- Safety rules
- Safety equipment
- Scenario training rules
- Practical scenario based training

13. Excited Delirium

- Typical development
- Physiology
- What officers need to know
- What we don't know
- Case study

14. Dataport Download

- Downloading data
- Download maintenance

15. Course Final Verbal Critiques

- An open discussion with candidates
- Constructive feedback from candidates
- The review of each topic with the purpose of seeking ideas to improve the design, content and delivery of the course
- The review of the content, value and delivery of each scenario
- A discussion on the learning environment and accommodation
- A discussion on the instructors and observers
- A discussion on the course coordinator
- Suggestions from candidates regarding additional content required and redundant content in the current course.

Training of RCMP members and indeed, training of other police forces in Canada is dependent upon the research conducted by various organizations and

agencies. Various studies¹⁷⁴ cited in this report inform police officers that the CEW is a viable alternative to lethal force, that it poses a low risk of danger to the responding police officers and to the subject of the CEW and that it is, in effect, a much more humane way of effecting control over an individual who is resistant to arrest or control.

In its report, the Canadian Police Research Centre (CPRC) indicated that various injuries have been observed in police personnel undergoing such voluntary exposure. The Phoenix (Arizona) Police Department reportedly has banned voluntary exposure because of the concern for injuries to police personnel. The report noted that injuries have also been caused to police personnel when training in more traditional arrest and control techniques such as joint control and hand to hand measures.

The CPRC concedes that use of the CEW, initially introduced as an alternative to lethal force, has evolved to the point where it is viewed as being appropriate for use in situations in which what had until May 2008 been known in the RCMP IM/IM lexicon as intermediate weapons (see references to testimony from Inspector Lightfoot, above) may be used.

The concept of Intermediate Weapons was developed in the United States in the 1980s, according to a document entitled *Report on Conducted Energy Weapons and Excited Delirium Syndrome* issued in November 2007 by the RCMP.¹⁷⁵

¹⁷⁴ Canadian Police Research Centre study and the study conducted by the Victoria Police Service (referenced in the CPRC study).

¹⁷⁵ <http://www.rcmp-grc.gc.ca/ccaps-spcca/cew-ai/cew-ai-eds-sda-report-rapport-eng.htm>

Appendix M – Member Certifications

With respect to CEW and first aid training and certification, the responding members were qualified as follows:

Corporal Robinson – **CEW**¹⁷⁶ – Taser® Operator’s Course on April 23, 2003 (Instructor – Constable B. Cassell [since retired])
Expiry – April 23, 2006

First Aid – First Aid recertification – January 14, 2005
Expiry – January 14, 2008

Constable Millington – **CEW** – Conducted Energy Weapon User’s Course completed July 12–13, 2007 (Instructors – Corporal G. Gillis and Constable Dhillon)
Expiry – July 13, 2010

First Aid – Basic First Aid completed – June 4, 2007
Expiry – June 8, 2010

Constable Rundel – **CEW** – Conducted Energy Weapon User’s Course completed July 21–22, 2007 (Instructors – Corporal Sandry and Constable Tarasoff. Course Coordinator – Corporal Gillis¹⁷⁷)
Expiry – July 22, 2010

First Aid – Basic First Aid completed – December 12, 2004
Expiry – December 12, 2007

Constable Bentley – **CEW** – Conducted Energy Weapon User’s Course completed July 21–22, 2007 (Instructors – Corporal Sandry and Constable Tarasoff. Course coordinator – Corporal Gillis)
Expiry – July 22, 2010

First Aid – Basic First Aid completed – November 29, 2005
Expiry – November 29, 2008

¹⁷⁶ Corporal Robinson’s CEW certification was out of date on October 14, 2007 at the time of the YVR incident. It is noted that he did not carry or use the CEW during the incident.

¹⁷⁷ Constable Rundel indicated in his statement that Corporal Gillis was his instructor.

Appendix N – RCMP Use of Force Options

The RCMP members were required to assess Mr. Dziekanski's behaviour and the attendant level of danger/risk he posed to himself, to the RCMP members and to the public at large, and take steps to manage the risk. To carry out this task, the RCMP members had a number of options available to them pursuant to the IM/IM. These included:

1. Tactical Repositioning

Tactical repositioning refers to a situation in which police refrain from confronting the suspect pending a greater tactical advantage. The IM/IM model provides that tactical repositioning may be used at any point in a situation:

- If doing so reduces the likelihood and extent of harm to the public;
- If fear of death or grievous bodily harm is identified, providing it does not expose others to injury or deadly force;
- If seeking assistance will help to ensure public and police safety;
- If buying time and gaining distance will help to ensure public and police safety; and
- If the member has ensured that the scene has been contained and there is little or no potential for harm.

During the Dziekanski incident, the members had the option of not confronting Mr. Dziekanski until they had all the relevant facts at their disposal. They could, for example, have canvassed the witnesses and YVR security present to determine the level of threat posed by Mr. Dziekanski. Mr. Dziekanski had already demonstrated erratic behaviour as well as a propensity for violence and he had damaged property. The members were unable to communicate with him. Instead of confirming the level of threat posed, the members made a decision to confront Mr. Dziekanski.

This is not to suggest that police officers should ignore an unfolding situation which requires immediate intervention. As I have noted, I do not believe that was the case in this situation and it was therefore open to the responding members not to take immediate action.

Constable Bentley stated that in his mind, Mr. Dziekanski changed from cooperative to combative behaviour when he grabbed the stapler. Although the members involved may have considered the demeanour of Mr. Dziekanski to be combative, they had the option of tactical repositioning to contain Mr. Dziekanski and maintain control, while observing his actions and attempting to find a less violent means of resolving the situation. That option was not exercised.

2. Officer Presence

The members attended the scene of the complaints. Initially, Mr. Dziekanski appeared to calm down, but within seconds, he put his hands in the air and walked away from the police officers with the members behind him directing him to the counter area. In the Pritchard video, Mr. Dziekanski can be seen looking at his luggage, while Corporal Robinson can be seen directing Mr. Dziekanski to the counter area, which is the direction taken by Mr. Dziekanski. While open to interpretation, the gesture by Mr. Dziekanski of putting his hands in the air and moving to the location as directed by Corporal Robinson may be an act of compliance, and not hostility.

Because the situation was immediately escalated, it cannot be known whether continued officer presence would have had the desired effect and defused the situation.

3. Verbal Intervention

Neither the RCMP members nor Mr. Dziekanski could verbally understand the needs of the other. Absent a Polish interpreter, and absent a significant effort to make contact through gestures and demeanour, the disconnection was bound to continue.

As the interaction progressed, the members did use hand gestures and directed Mr. Dziekanski to an area near the counter in the exit area. Mr. Dziekanski appears to have picked up an item (seen in the video to be an open stapler) perceived by the RCMP members to be a potential weapon.

Although the brief verbal interventions by the members were not having the desired effect, it is unfortunate that more time was not spent by the members to use gestures and sign language to calm Mr. Dziekanski and prevent the continuation of the offence. Certainly, the police needed to take control of the scene and ensure that Mr. Dziekanski was not able to effect further damage to property or to any person present. Further efforts to calm Mr. Dziekanski may or may not have had the desired effect. However, the fact that they were not attempted contributed to the escalation of the interaction.

4. Empty Hand Control

The next level of intervention according to the IM/IM is the use of empty hand control. This includes “soft” empty hand control processes such as joint locks (for example, applying leverage to the suspect’s arm or leg joint(s) to create immobility), pain compliance, creating imbalance in the suspect and handcuffing the suspect.

This was an option that could have been used by the members without resorting to any higher level of force. There were, after all, four RCMP members who

could potentially have wrestled Mr. Dziekanski to the ground and handcuffed him. The problem with such empty hand control (soft) is that to wrestle a person of Mr. Dziekanski's size (Mr. Dziekanski was approximately 177 cm tall [5' 11"] and weighed 86 kg [190 lbs]) and subdue and handcuff him, the risk is much greater that either Mr. Dziekanski or one of the RCMP members would have been injured. This risk was not specifically articulated by the members in their statements.

A second level of empty hand control, known as "hard" hand control process, was also open to the members. Hard empty hand control processes include punches, kicks and carotid holds. None of these were used against Mr. Dziekanski. In their statements, none of the members discussed in any detail the use or lack of use of empty hand control processes. In his statement, Constable Rundel indicated that he considered the use of "hand to hand" combat but did not feel that it was warranted.

Principles 1 and 2 (tactical repositioning and officer presence), respectively, of the IM/IM (above) are to ensure public safety and officer safety when determining the appropriate level of force to be applied during the intervention.

Because the CEW was deployed so quickly after the interaction between the RCMP members and Mr. Dziekanski, it is impossible to say whether empty hand control would have been effective, or whether Mr. Dziekanski would have calmed to the point that officer presence would have de-escalated the intervention. In light of the One Plus One Theory,¹⁷⁸ however, the members were trained not to match Mr. Dziekanski's level of resistance, but to use one level higher.

5. Intermediate Devices

The IM/IM in place at the time of the death of Mr. Dziekanski describes the range of intermediate devices to include OC (oleoresin capsicum) spray, CEW and others.

OC spray was considered by the members. Both Corporal Robinson and Constable Rundel said that they considered OC spray but believed that because of the combative behaviour being exhibited by Mr. Dziekanski and the likelihood of contamination of the members and the public, the CEW was the best means to control Mr. Dziekanski. As discussed, none of the members discussed with or

¹⁷⁸ RCMP members are trained to utilize one level of intervention higher than the demonstrated resistance level of the person with whom they are interacting (known as the 1 + 1 policy). While adhering to the principle of proportionate and reasonable use, the IM/IM authorizes graduated levels of intervention in a circular fashion where any level of intervention is available, depending on the level of risk posed by the person that is being dealt with. The concentric and overlapping circles present on the IM/IM signifies that there may be more than one option available to members and that the fluid network of the circles requires continual assessment and reassessment of risk.

commented to the others as the incident unfolded, what option would be appropriate in the circumstances.

The Pritchard video,¹⁷⁹ and Constable Bentley's statement, indicate that Constable Bentley had deployed his collapsible baton. Constable Bentley also said that he formed the opinion that it was possible that Mr. Dziekanski wanted to fight because of the broken debris (computer and chair) on the floor. Constable Bentley stated that he opened his baton when Mr. Dziekanski grabbed the stapler. He stated as well that his thought pattern was to consider the use of force model to apply the least amount of force that would accomplish the task (of taking Mr. Dziekanski into custody). Constable Bentley indicated that he did not know Constable Millington was going to deploy the CEW until it was discharged.

Training provided not only to RCMP members, but to CEW users in general, reinforces the notion that the CEW is a safe and effective means of controlling a person. Statistical analyses indicate that the CEW appears to be effective in achieving this goal. The question of relative safety to the recipient is not as clear, nor is it clear that police are cognizant of the fact that the CEW is, first and foremost, a means of achieving compliance by debilitating the recipient through the means of a powerful pain stimulant.

The exercise of appropriate discretion is crucial in the decision to use the CEW. Police officers do not appear to comprehend the nature of the CEW as a weapon, i.e. the level of pain inflicted or the possibility that the CEW may cause the death of the recipient of the charge, because the training provided to them does not require them to take such analyses into account at the time of deploying the CEW.

It has been demonstrated that use of a CEW as opposed to a member's sidearm, has saved lives. The training necessary for police officers must address the need to apply judicious discretion in the decision to deploy the CEW.

6. Lethal Force

The IM/IM stipulates that lethal force, intentionally inflicting force which the actor knows creates a substantial risk of causing death or serious bodily harm,¹⁸⁰ may only be authorized where there is a threat of death or grievous bodily harm to the RCMP member or a member of the public. No such threat existed in this situation. I accept that the responding members did not anticipate or foresee the death of Mr. Dziekanski.

¹⁷⁹ Post-incident. Constable Bentley is seen on the Pritchard video collapsing his baton.

¹⁸⁰ Black's Law Dictionary – Definition of *deadly force*.

Appendix O – Use of Force Report

As noted in the body of this report, I have not relied on the Use of Force Report prepared by Sergeant Brad Fawcett in my investigation. My comments and analysis of the Use of Force Report set out the reasons for non-reliance.

On March 3, 2008, a Use of Force Report was provided to IHIT investigators by Sergeant Fawcett, a member of the Vancouver Police Department. Sergeant Fawcett indicated in the document that he was providing an opinion at the request of IHIT, but did not indicate the question on which he was asked to opine.

The involvement of Sergeant Fawcett came about due to a November 23, 2007 letter from Superintendent Wayne Rideout, Officer in Charge of IHIT, to Chief Constable Jim Chiu, Chief of the Vancouver Police Department, requesting Sergeant Fawcett's services to provide an *expert opinion on the use of force used by the four involved members*. The letter requesting Sergeant Fawcett's assistance did not specify whether Sergeant Fawcett was to gauge the actions of the four RCMP members against RCMP policy, nor did it specify for Sergeant Fawcett the scope of his review.

Sergeant Fawcett stipulated in his report that he is qualified in assessing the adequacy and appropriateness of the force used by police and that he provides:

... expert opinions in the areas of Use of Force, Police Training and Training Standards, Non-Firearms Prohibited Weapons, Street Weapons, and Weapons Concealed by Design.

As will be discussed in more detail below, Sergeant Fawcett made certain assumptions which I did not find to be in evidence. For example, he attributed characteristics such as anger to Mr. Dziekanski, when Mr. Dziekanski's state of mind cannot be known. More importantly, Sergeant Fawcett assessed the actions of the responding RCMP members not by the training received by RCMP members pursuant to the IM/IM, but by what he perceived to be standard police training pursuant to the National Use of Force Framework (NUFF), and by threat cues he assumed or believed to have been perceived by the responding members. Although he may be correct in his assumptions concerning training, no mapping of RCMP training to the NUFF was provided as a concordance to enable the reader to accurately assess the response of the responding members based on the IM/IM. This is a fatal methodological flaw.

In his report, Sergeant Fawcett canvassed the witness statements of persons who observed the actions of Mr. Dziekanski and the interaction with the RCMP members, as well as the statements of the RCMP members, and reviewed video associated with the incident. Sergeant Fawcett then conducted an analysis of

the events using the facts as known juxtaposed against the National Use of Force Framework,¹⁸¹ a document akin to the IM/IM. The NUFF is a document which, at the time of the YVR incident, was not used in RCMP training.

Following the scenario of the incident as visible in the Pritchard video, Sergeant Fawcett noted that the RCMP members, upon initially confronting Mr. Dziekanski, used the force response options of officer presence (four uniformed officers) and communication (informal greeting). He went on to say that the members did not take an aggressive stance and attempted to use hand signals with Mr. Dziekanski as a means of communicating with him and attempting to calm him.

Sergeant Fawcett pointed out that after Mr. Dziekanski put his arms in the air and walked away from them, the RCMP members fanned out around Mr. Dziekanski and maintained what is known as a reactionary gap. He stated that police across North America are trained to make use of such a space and defined the reactionary gap and its rationale as:

... the distance outside the longest technique of the subject, generally four to six feet for an apparently unarmed subject. A reactionary gap is used to provide officers with sufficient time to analyze, evaluate, plan, and initiate a physical response to threat stimulus. The time required is typically ¾ of a second. The reactionary gap concept takes into account the fact that subjects have the benefit of first act and the officers will also be responding to a threat stimulus that happened in the immediate past. It is hoped that maintaining a reactionary gap will provide officers with sufficient time to respond effectively to a spontaneous assault.

Fanning out around Mr. Dziekanski was, in Sergeant Fawcett's opinion, a reasonable approach and one that was tactically called for to avoid a situation in which the suspect could attack all of the police officers at one time.

Sergeant Fawcett stated that police training is to contain the problem in order to mitigate *opportunities for the suspect to flee police and resume (the) behaviour elsewhere*. He indicated that it also reduces the possibility of other persons unwittingly placing themselves in jeopardy by entering into an uncontrolled area.

Sergeant Fawcett pointed out that the intervention took place in an airport terminal and that it was reasonable for the RCMP members to anticipate that other travellers leaving the international arrivals area could enter into the situation at any time.

¹⁸¹ According to a May 2009 article appearing in Police Chief Magazine (see http://policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=1397&issue_id=102004), the National Use of Force Framework began development in 1999 by police use of force trainers from across Canada and the United States to provide consistent and mandated use of force standards.

At the time Mr. Dziekanski picked up the stapler, the members can be seen on the Pritchard video to appear more concerned and Constable Bentley can be seen to take a step back. In Sergeant Fawcett's opinion, by acquiring the stapler for the purpose of using it as a weapon, Mr. Dziekanski elevated the level of demonstrated behaviour to assaultive. The National Use of Force Framework states that assaultive behaviour occurs when a person:

... attempts to apply, or applies force to any person; attempts or threatens by an act or gesture, to apply force to another person, if he/she has, or causes that other person to believe upon reasonable grounds that he/she has, present ability to effect his/her purpose. Examples include kicking and punching, but also include aggressive body language that signals the intent to assault.

The RCMP trains its members using the Incident Management/Intervention Model (IM/IM). The IM/IM does not recognize a resistance level known as assaultive behaviour, but like the NUFF, the IM/IM does recognize increasing levels of resistance (from cooperative to non-cooperative to resistant to combative to persons who show the potential to cause grievous bodily harm or death).

The lack of mapping between the NUFF, used by Sergeant Fawcett, and the IM/IM, is problematic. Sergeant Fawcett's report did not correlate one use of force measurement to the other; therefore, it cannot be stated with certainty how a term such as "assaultive behaviour" equates to the term "combative behaviour" as used in RCMP training.

The relevant IM/IM resistance levels in terms of the indications provided by the Pritchard video as well as the members' statements and those of other witnesses appear to be resistant leading to combative resistance. The resistant level is defined by the IM/IM as:

The person demonstrates resistance to control by the police officer through behaviours such as pulling away, pushing away or running away. This can include a situation where a police officer activates a police vehicle's emergency equipment and the suspect fails to stop and attempts to evade apprehension by driving evasively.

Combative, which is how the RCMP members who attended described Mr. Dziekanski, is defined in the IM/IM as:

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

However it is characterized, the rationale for the increased level of aggression is that by potentially using the stapler as a weapon of opportunity, Mr. Dziekanski increased the level of harm that he was capable of producing. Sergeant Fawcett stated:

A stapler held in a fist maintains the integrity of the fist upon impact, adds weight to a punch, and provides a variety of impact surfaces (a subject can strike with a “loaded fist” or with the top or bottom of the stapler. ... The behaviour demonstrated by the deceased is classified as Assaultive. ... He had the apparent means, ability, intent, and opportunity to assault the officers or anyone else who entered into the immediate area.

Sergeant Fawcett does not explain how an open stapler equates to a “loaded fist.” To the uninitiated, an open stapler (as visible in the Pritchard video, half of the stapler unit was moving freely outside of Mr. Dziekanski’s fist), used as a means to buttress a punch, would appear to result in potential injury to the hand of the person holding the stapler if it folded on itself.

Sergeant Fawcett stated that the reactionary gap should be increased when a subject is armed or demonstrates what he described as “pre-assault cues.” These include the following gestures and actions:

- *Clenching fists;*
- *“Thousand yard” stare;*
- *Balling of the masseter muscle (jaw clenching);*
- *Bladed stance relative to the officers;*
- *Adjusting their positions relative to the officers;*
- *Target glancing;*
- *Verbal threats; and*
- *Depersonalizing officers or others.*

Sergeant Fawcett provided the above as examples of such pre-assault cues and stated that police officers are instructed to recognize pre-assault cues in order to defend themselves and/or others from assault they believe to be imminent.

The IM/IM used by the RCMP does not refer to “pre-assault cues.” Rather, RCMP training teaches members to analyze “threat cues” through their interaction with an individual. In this regard, the IM/IM states:

Throughout the management of an incident, a police officer should be alert to threat cues such as body tension, tone of voice, body position and facial expression to ready them to use an appropriate response option. These threat cues may indicate the potential for a suspect to display more or less resistant behaviours described under “categories of resistance” that would justify the use of different “response options” ...

Overarching the IM/IM, RCMP members are trained using the CAPRA problem-solving model. CAPRA is an acronym standing for the processes included in the RCMP problem-solving model: Client/Acquiring and Analysing Information/Partnerships/Response/Assessment and Continuous Improvement. Fundamental to the RCMP CAPRA model are the concepts of finding alternative and preventing crime. Practitioners of CAPRA are encouraged to prevent:¹⁸²

... the problem from occurring or from escalating by addressing contributing factors to the broad problem rather than specific incidents or manifestations of the issue.

The impact of the CAPRA model on the IM/IM and use of force options was not discussed by Sergeant Fawcett in his report.

Although Sergeant Fawcett's Use of Force Report does not address the issues from the point of view of RCMP training standards, there may be overlap in the concepts involved. Corporal Gregg Gillis, an RCMP use of force expert, responded as follows to questions from an external agency pertaining to situational factors:

Question 1:

... "situational factors" (within the meaning of the IMIM & Part 17.7^[183] of the RCMP Operational Manual) include environmental conditions, number of subjects, perceived subjects' abilities, knowledge of subject, time & distance and potential attack signs...

Corporal Gillis confirmed that this is correct from an RCMP perspective.

This position was reiterated in his evidence before the Braidwood Inquiry, when Corporal Gillis said:

... each and every case has to be looked at on its own situational factors, the behaviours of the persons, the perceptions of the officers, and tactical considerations.

Question 2:

Does the term "situational factors" also include subject behaviours/categories of resistance such as combative behaviour or are subject behaviours/categories of resistance regarded as a different category of factors? ...

¹⁸² See: <http://www.rcmp-grc.gc.ca/ccaps-spcca/capra-eng.htm>.

¹⁸³ OM 17.7 is the chapter which deals with the CEW.

Corporal Gillis responded:

The behavior of the person or persons an officer is interacting with are [sic] a different category and not included in the Situational Factors¹⁸⁴ portion of the IMIM. The behavior of the person, or persons, is [sic] significant factor. The officer's perceptions of that behavior are critical in the risk assessment and related response as such it is a separate category or section of the IMIM and distinct from the "Situational Factors" area.

Corporal Gillis also stated that, in general, response options are aligned to the behaviour being exhibited to the police officer.

In his evidence before the Braidwood Inquiry, Corporal Gillis confirmed that the NUFF and the IM/IM are similar in nature, and provided an overview to the Commissioner of the two.

On July 29, 2009, Deputy Commissioner H.D.M. Madill, responsible for Contract and Aboriginal Policing provided me with a letter in which he provided an update on the status of the 22 recommendations arising from the interim and final reports (issued in December 2007 and June 2008, respectively) of the Commission pertaining to the RCMP's Use of the CEW. With respect to the alignment of the IM/IM and the NUFF, Deputy Commissioner. Madill stated:

On May 29, 2008 the RCMP approved a new Incident Management Intervention Model (IMIM) to align with the existing Canadian Association of Chiefs of Police (CACP) National Use of Force Framework (NUFF). The alignment of the IMIM and the NUFF will ensure commonality of language and terminology between the RCMP and other Canadian law enforcement agencies. The term "impact weapon" is no longer included in the new IMIM.

I was not provided with an RCMP analysis of the process of aligning the IM/IM and the NUFF to be able to comment with any insight on the rationale for the alignment, the process of carrying out the alignment or a means of gauging the appropriateness of the alignment, and more importantly, its outcome.

Use of Force Report and Deployment of the CEW

Within four seconds of Mr. Dziekanski picking up the stapler, Constable Millington discharged the CEW in probe mode. The video does not

¹⁸⁴ It should be noted that situational factors are included in CAPRA, the risk assessment/problem-solving process taught to RCMP members. Situational factors are also considered when assessing the appropriateness of the use of the CEW and will be discussed further in that context.

indicate at what point Constable Millington withdrew the CEW from its holster (because he is out of frame), but it does not appear to be in his hand when Constable Millington was last in frame. It is therefore reasonable to conclude that Constable Millington drew the weapon at the time Mr. Dziekanski picked up the stapler and Constable Millington became concerned that Mr. Dziekanski could use the stapler as a weapon.

Assuming that the time required to draw and point the CEW is approximately two seconds, any assessment carried out by Constable Millington that the stapler in the hands of Mr. Dziekanski constituted a weapon took place in less than the remaining two seconds. Police officers are required to make very quick decisions, often under very trying circumstances. Had Mr. Dziekanski held a more robust weapon, such as a letter opener, a piece of pipe or a chair, for example, the quickness of the decision to deploy the CEW would perhaps have been more articulable and understandable.

Sergeant Fawcett categorized the CEW as an intermediate weapon, in the same category as OC spray and other such weapons. This categorization of the CEW and OC spray is supported by the IM/IM. The police baton, at that time, was considered an impact weapon pursuant to the IM/IM.¹⁸⁵

As the members entered the scene, and as pointed out by Sergeant Fawcett, at least two of them contemplated the use of the CEW. This is supported by the fact that as they entered the YVR terminal, Constable Bentley asked Constable Millington (the only member in possession of a CEW that night) whether he had the CEW with him. Constable Millington replied in the affirmative.

Sergeant Fawcett believed that consideration of the CEW as an option was reasonable because of the information the RCMP members had received via radio prior to arriving at the scene as well as their observations upon arrival. It will be recalled that the members responding believed that the male could be intoxicated and that he had already demonstrated violent behaviour. It will be recalled as well that Superintendent Rideout indicated to the Commission that IHIT had no knowledge of the responding members' predetermining that the CEW would be deployed against Mr. Dziekanski.

I agree that consideration of the CEW was reasonable. Deployment of the weapon as it actually occurred, however, was not.

Sergeant Fawcett stated that OC spray:

... has been shown to have a significant failure rate when used on subjects intoxicated by drugs and/or alcohol, subjects who are mentally ill,

¹⁸⁵ In May 2008 the RCMP approved amendments to the IM/IM which removed the category of Impact Weapons.

and/or subjects that are goal oriented. Officers had been informed that the deceased appeared to be intoxicated and the officers, based on their observations and information provided to them by police dispatch and witnesses could suspect that he might be suffering from a mental illness.

These statements, written by Sergeant Fawcett in his report dated March 8, 2008, are entirely speculative. Because he referred in the report to injuries received by Mr. Dziekanski which were noted during the autopsy, I assume that Sergeant Fawcett had read the autopsy report prepared by Dr. Lee. Sergeant Fawcett would therefore have known that the autopsy report of Dr. Lee, received by the BC Ministry of the Solicitor General on January 29, 2008, indicated that no drugs or alcohol were found in Mr. Dziekanski's body (although the responding RCMP members would not have know this at the time of the incident).

Further, although the responding members had been informed by radio dispatch that Mr. Dziekanski appeared to be intoxicated, none of the members indicated in their statements that they suspected from their observations at the scene that Mr. Dziekanski was intoxicated or suspected that he suffered from a mental illness. They did note the destruction of property (computer and chair) at the scene.

Sergeant Fawcett postulated that the members responding:

... also have to consider the tactical environment in which the incident was occurring. The use of oleoresin capsicum spray would result in significant contamination in a closed environment. Anyone coming into the area could be impacted.

Some of the responding members did express a concern that OC spray would contaminate the area.

Sergeant Fawcett considered the possibility of the use of the police baton during the incident. His opinion was that using the baton would have required the members to close the reactionary gap between them and Mr. Dziekanski, thereby placing them at greater risk of injury from the weapon of opportunity (the stapler) possessed by Mr. Dziekanski. Further, closing the reactionary gap would have compromised the ability of Constable Millington (the only member equipped with a CEW) to acquire Mr. Dziekanski as a target because the other members would be in the field of view.

Sergeant Fawcett was of the view that the use of the baton was not appropriate because baton blows to Mr. Dziekanski would have caused significant bruising and potentially more serious injuries.

In his Use of Force Report, Sergeant Fawcett considered the possible option of the four members physically controlling Mr. Dziekanski without the aid of any tactical weapons. He formed the opinion that:

Engaging the subject in a physical struggle would have been contrary to training with regards to the One-Plus-Theory The officers could reasonably expect that anyone involved in a physical struggle (themselves, the deceased, or bystanders) may suffer an injury. A concern for the officers when considering the use of Physical Control as a force response option is the fact that they would likely be precluding Constable MILLINGTON from using his conducted energy device should their efforts at establishing physical control fail. The use of physical control tactics is strongly influenced by officer characteristics such as confidence in his or her abilities, previous successes or failures, his or her perception of the subject's ability to resist, and many other variables. Subject characteristics and environmental considerations may also influence an individual officer's decision to preclude the use [of] Physical Control in a given situation. Attempting physical control, while not prohibited, would be contrary to the One-Plus-one Theory.

In my opinion, the decisions taken by the responding members, particularly Constable Millington, were based on more than what Sergeant Fawcett considered to be their *perceptions* as they responded to Mr. Dziekanski. The training received by these members, coupled with what Sergeant Fawcett described as their *past experience with similar situations* (to the best of my knowledge, none of the responding members had encountered a situation such as the one involving Mr. Dziekanski previously), *and the knowledge that several people were witnessing their actions* likely created a mindset within which the members responded to the situation which presented itself that night.

Sergeant Fawcett discussed various use of force options available to the RCMP members who responded. He stated that:

RCMP Officers have been instructed in the area of Force Options Theory contained within the Incident Management and Intervention Model (IMIM) and the One Plus One Theory. Force Options Theory advocates that officers are not required to incrementally escalate through all categories of force options before they determine the appropriate use of force response. There are many circumstances, such as the incident in question, where it is reasonable and appropriate to escalate from Officer Presence to Intermediate Weapons without attempting Physical Control. The decision to escalate their force response option should be based upon preclusion: lower force options would be inappropriate and/or ineffective. The officers involved in the incident had attempted the force response options of Officer Presence and Communications, both of which failed to gain the deceased's voluntary compliance. High-level officer presence (multiple

uniformed officers) and Communications had failed to gain the deceased's voluntary compliance.

The One-Plus-One Theory advocates that police officers [sic] respond to subject behaviours with a force response option one "level" greater than that demonstrated by the subject(s). Additionally, should an officer discover one weapon on a subject they are to assume there is a second one they have not yet discovered. In the incident in question the officers were responding to a subject armed with a weapon, albeit one limited to close quarters tactics. The officers responded with a CED, which allowed them to remain outside the effective range of the subject. Doing so was consistent with the One-Plus-One Theory.

Sergeant Fawcett concluded that:

The actions of the officers in this incident represent a reasonable escalation and de-escalation of force based upon the actions of the subject.

From my review of the available video, I noted no de-escalation of force by the responding members. Sergeant Fawcett cited his reasoning as follows:

The officers precluded lower force options, specifically high level Officer Presence in conjunction with Communications, by virtue of the fact that they had been attempted and failed. Once Officer Presence and Tactical Communications fail officers must necessarily escalate to the application of physical force. The officers used an Intermediate Weapon, specifically a conducted energy weapon, in conjunction with Physical Control to gain control of DZIEKANSKI. The officers' actions were consistent with their Common Law duties, various Criminal Code (Canada) provisions and RCMP policy and training.

Sergeant Fawcett did not provide a temporal discussion with respect to the failure of officer presence and communications. He did not suggest how much time is enough time to have attempted a particular tactic in order for officers to determine whether it is successful, nor is there a discussion of what elements constitute failure or how failure is measured.

Sergeant Fawcett stated:

The reasonableness of a particular use of force must be judged from the perspective of a reasonable peace officer on the scene, rather than with 20/20 vision of hindsight. The calculus of reasonableness must embody allowance for the fact that peace officers are often forced to make split second judgements in circumstances that are tense, uncertain, and rapidly evolving. These circumstances inflict neurological and physiological

responses of fight, flight, posture, and submit on the officer, and may influence the determination of the level of force considered necessary by the peace officer in a particular situation. The courts have said that the peace officer cannot be expected to measure the force used with exactitude (R. v. Bottrell: 60 C.C.C (2d) 211).

DZIEKANSKI'S intentions when angrily damaging property and grabbing the stapler may have been for innocent purposes however the officers involved had no way of knowing this. There has been an extraordinary media outcry regarding the reasonableness of the use of force decisions made by the officers involved in the incident. It should be noted, however, that media and/or public perception of the incident do not determine the reasonableness of the officers' use of force.

Various media have asserted that DZIEKANSKI needed "help". It must be realized that no other assistance, medical or otherwise, could be provided until control had been established. The many callers to 9-1-1 and airport security called for the police, not Emergency Health Services.

It is responsible to point out that, while the author and reader have had the opportunity to view the videos provided numerous times, in slow motion, and stop action – the officers involved in the incident did not. Their decisions were based upon their perceptions, which evolved from the dispatched information, witnesses statements made to them upon arrival, and their own observations. Their perceptions are influenced by their training, past experience with similar situations, and the knowledge that several people were witnessing their actions.

In my opinion, the decisions taken by the responding members, particularly Constable Millington, were based on more than *perceptions*. The training received by these members, coupled with what Sergeant Fawcett described as their *past experience with similar situations, and the knowledge that several people were witnessing their actions* actually created a mindset within which the members responded to the situation which presented itself that night. RCMP CEW training teaches that the CEW is a *less lethal intervention* to control suspects. The implication, therefore, is that RCMP members are trained to view the CEW as a more humane manner of carrying out an arrest in order to mitigate and minimize potential injuries to the police, to the suspect and to bystanders.

Given that Constable Millington had completed his CEW training in July 2007, only three months prior to the YVR incident, it is foreseeable that Constable Millington's training would have been relatively fresh in his mind and he might well have been more inclined to deploy the CEW.

Sergeant Fawcett cited the 1999 decision of the Honourable Madam Justice Southin of the British Columbia Court of Appeal:¹⁸⁶

What a judge must not do in a case such as this is take into account in determining the issue of “reasonable grounds” what the person injured was in fact intending to do, nor the actual consequences of the force used, no matter how tragic.

Sergeant Fawcett’s analysis, cited above, considered various use of force options and discussed the possibility that RCMP members, civilians or the suspect could be injured in the event that a confrontation took place which involved hand to hand physical force. Although he did consider options ranging from officer presence to use of the baton, his analysis did not take into consideration soft and hard empty hand control techniques as taught to RCMP members as part of the use of force process. Prior to the deployment of the CEW, no soft or hard empty hand control techniques were used in the arrest of Mr. Dziekanski.

The distinction is important in that these options, particularly soft empty hand control techniques, include joint locks. Sergeant Fawcett did briefly discuss the use of superior strength by police officers in effecting an arrest (which he called physical control) and which allows for the use of joint locks. He did not, however, discuss the relative merits of such procedures versus use of the CEW.

In using techniques such as joint locks, the individual officer is able to apply the requisite amount of force to achieve the goal of compliance. The CEW does not allow for such variation in force; when the CEW is deployed, the full voltage is applied to the recipient and the officer deploying the CEW is not able to vary the current to achieve the desired outcome. This issue was not canvassed by Sergeant Fawcett’s report.

Consideration of the entire range of use of force options available was a reasonable and necessary step not only for Constable Millington, but for all of the responding members in determining how best to deal with Mr. Dziekanski. Use of the CEW is but one aspect of the range of options. Given the apparent level of threat posed by Mr. Dziekanski as captured on the Pritchard video, resorting to and deploying the CEW in such a short time span is problematic.

I have concerns with respect to the analysis conducted by Sergeant Fawcett because his analysis does not bring the use of force as trained by the RCMP into primary focus. Rather, he uses the National Use of Force Framework as his policy guide. While this document may be relevant for many police forces across

¹⁸⁶ *Berntt v. Vancouver*: BCCA 1999 345. See also <http://canlii.org/eliisa/highlight.do?language=en&searchTitle=Search+all+CanLII+Databases&path=/en/bc/bcsc/doc/2001/2001bcsc1754/2001bcsc1754.html>. See also the December 14, 2001 decision of the BCSC in this matter which also cites the above quote of Southin JA - (2001), 209 D.L.R. (4th) 494.

Canada, it is not the training standard of the RCMP. Further, he does not directly tie his analysis into specific aspects of even the NUFF.

Although the principles are similar, and although I have no reason to doubt that Sergeant Fawcett's intention was to identify best practices, it is unfortunate that Sergeant Fawcett did not analyze the appropriateness of the RCMP response in light of the training provided to RCMP members.

Discussion in Sergeant Fawcett's report surrounding issues such as the appropriateness of the One Plus One Theory, and the reasonableness of the RCMP members' beliefs concerning the response to Mr. Dziekanski, especially in light of the inability of the RCMP members to recall in their statements the events as depicted in the Pritchard video, would have been helpful.

Further, I take issue with Sergeant Fawcett ascribing a state of mind to Mr. Dziekanski, which may give the appearance that Sergeant Fawcett exhibited bias in his assessment of the situation. For example, Sergeant Fawcett refers to Mr. Dziekanski "angrily" damaging property. Language such as this can only be supposition on Sergeant Fawcett's part; he cannot know what Mr. Dziekanski's state of mind was at the time.

Sergeant Fawcett also addressed media reports that Mr. Dziekanski needed help and pointed out that 911 callers asked for the police and not Emergency Health Services. Sergeant Fawcett was asked to provide his assessment of the reasonableness of the force used by responding RCMP members, not to address extraneous issues. By providing such unsolicited comments, Sergeant Fawcett called into question his objectivity.

I note that Corporal Gregg Gillis, an RCMP member recognized as a use of force expert, is of the view that Sergeant Fawcett's report is not inconsistent with RCMP training. Semantics and descriptors may differ, but Corporal Gillis' view is that the overarching principles enumerated by Sergeant Fawcett are sound. While not in any way undermining Corporal Gillis' reputation, I note as well that it was Corporal Gillis who trained Constable Millington in the use of the CEW. The coordinator for the CEW user courses taken by Constables Bentley and Rundel was also Corporal Gillis. Constable Rundel indicated in his statement that his CEW instructor was Corporal Gillis. As such, any opinion provided by Corporal Gillis would, at the very least, create the perception of bias.

Appendix P – Conduct of RCMP Members in Light of CEW Policy

The following table illustrates the conduct of the responding members as it aligns with policy in existence at that time (October 2007):

Conduct	Policy
Constable Millington conducted “spark test” at the beginning of his shift.	OM 17.7.2.2.2 did not specifically require a spark test; however, it did indicate that the sole means of ensuring the operability of the CEW is the use of a spark test. CEW download report indicated that a spark test was conducted.
Constable Millington used Taser® Model X26E.	Taser® Models M26 (model 4400) and X26E are approved – OM 17.7.1.1.
Constable Millington was qualified to use CEW.	Certification required by OM 17.7.1.3.
Four members responded to complaint of erratic behaviour from male.	Consistent with 17.7.3.2.4.1.2.
Failure of members at the scene to gather information and adequately assess risk.	Not consistent with CAPRA model.
Constable Millington “used” CEW.	Use meets definition as per 17.7.2.4.
Only Constable Millington used CEW.	Consistent with 17.7.3.2.4.1.3.
Constable Rundel considered excited delirium as possible aggravating factor re Mr. Dziekanski. Others may have considered it, but did not mention it in their statements.	Excited delirium defined at OM 17.7.2.7. See 17.7.3.2 re issues involving ED.
CEW warning not given.	Not consistent with OM 17.7.3.1.2.

Constable Millington deployed CEW against Mr. Dziekanski. Millington says Dziekanski was <i>sweaty/clammy...</i> , <i>paranoid...</i> , <i>under the influence of something</i> , but doesn't use words "excited delirium". Statements of responding members indicate they considered other use of force options.	Millington's statement is consistent with IM/IM examples of excited delirium. See OM 17.7.2.7.1.
Constable Millington first used CEW in probe mode before using it in push stun mode.	Consistent with 17.7.3.2.3.
CEW was used for multiple cycles.	Not consistent with 17.7.3.1.3 – Multiple deployment or continuous cycling of the CEW may be hazardous to a subject. CEW should not be cycled repeatedly unless situational factors dictate otherwise.
Members did not attempt to take control of Mr. Dziekanski during the first deployment of the CEW in probe mode.	Not consistent with 17.7.3.1.4 – Unless situational factors dictate otherwise, make every effort to take control of the subject as soon as possible during a CEW probe mode deployment.
EHS was not present at time members responded. Members did not anticipate a need for medical intervention.	Consistent with 17.7.3.2.4.
EHS was called within seconds of Mr. Dziekanski becoming unconscious.	Consistent with 17.7.3.2.4.1.7.
EHS requested Code 3 when Mr. Dziekanski went unconscious and was seen to be turning blue.	Consistent with 17.7.3.2.4.1.7.
Members controlled Mr. Dziekanski's arms and legs during CEW deployment/struggle to subdue.	Consistent with 17.7.3.2.4.1.4.
Mr. Dziekanski was moved from the prone to semi-recovery position after control was established, although he remained handcuffed.	Partially consistent with 17.7.3.2.4.1.6.

Although EHS was called, members did not adequately monitor Mr. Dziekanski's vital signs or recognize the level of distress he was suffering. Handcuffs remained in place.	Not consistent with 17.7.5.2.
Failure to adequately document the incident in notes.	Not consistent with OM 25.2.2.1.
Constable Millington filed a Conducted Energy Weapon Usage Report (Form 3996) upon completion of his shift the night of the incident.	Filing of the document is consistent with 17.7.6.1.3. The content of Form 3996 is significantly misaligned with the video evidence.
Data was downloaded from the CEW after the YVR incident.	Contemplated at OM 17.7.2.8.

Appearances are that prescriptive policy was generally complied with. Those areas in which compliance was not noted deal primarily with aspects of the application of policy involving judgement. In addition, the members appear not to possess an understanding and appreciation for the nature of the CEW as a weapon.

CEW Usage Report – Constable Millington

Constable Millington did file a CEW Usage Report (as noted in the table above) as required by RCMP policy. The report (Form 3996) contained a number of omissions and errors, which are a cause of concern. Specifically, they are as follows:

1. The ostensible reason Constable Millington and the others felt threatened by Mr. Dziekanski was that he had picked up a stapler which they were concerned he would use as a weapon. Constable Millington's CEW Usage Report, however, does not mention the fact that Mr. Dziekanski possessed a weapon. The box labelled *Weapons Carried or Immediately Accessible by Subject* was left blank. The stapler is mentioned in the Incident Summary box, however.
2. Although the model of the CEW used by Constable Millington is indicated (Taser® X26), the serial number of the weapon is not indicated. The serial number was captured elsewhere, such as in the investigation exhibit report; however, the failure of Constable Millington to include the serial number is significant in that absent the serial number, it is not possible to identify the

particular weapon used in order to ensure that the correct unit was tested with respect to its operating properties and parameters of the electrical current produced by it.

3. The narrative provided by Constable Millington does not align with the Pritchard video coverage of the incident. In his report, Constable Millington indicated that:

When members got closer to the male, he stepped back and away. The male then deliberately knocked items off of a desk nearby and grabbed an office stapler. The male swung the stapler wildly with his arm at the members. Cst. MILLINGTON unholstered the CEW and pointed it at the male subject. The male was not apprehensive upon seeing the CEW. The male raised the stapler in one hand and raised the other fist. The male then aggressively moved towards members on scene. Cst. MILLINGTON recognized the male's behaviour had escalated from resistant to combative, and deployed the CEW. The CEW was cycled once for the full 5 seconds, which stopped the male from moving, but he continued to walk towards members with his arms raised once the cycle was completed. Cst. MILLINGTON cycled the CEW a second time, after which members were able to wrestle the male to the floor. The male was still struggling at this time and Cst. MILLINGTON cycled the CEW again. However, the CEW electrical impulse was audible, which meant that at least one of the probes were [sic] not attached. Cst. MILLINGTON took the cartridge off of the CEW and used the push stun mode on the male's rear deltoid (upper back) area. At this point, members were able to control the male and get him into handcuffs.

The Pritchard video does support Constable Millington's contention that Mr. Dziekanski stepped back and away from the members shortly after they arrived. It does not, however, support Constable Millington's justification for unholstering the CEW when he stated that Mr. Dziekanski *swung the stapler wildly with his arm at the members*, that Mr. Dziekanski *raised the stapler in one hand and raised the other fist*, or that Mr. Dziekanski *then aggressively moved towards members on scene*. The video clearly demonstrated that at the time Constable Millington discharged the CEW, Mr. Dziekanski was standing at the counter with his arms by his sides.

Given that the stapler is clearly visible in his right hand after he was struck by the CEW probes, it is likely that Mr. Dziekanski did pick up the stapler as he approached the counter. However, since his hands were not visible in the video it is not possible to know at what point exactly when.

4. Constable Millington indicated in his Form 3996 that:

Cst. MILLINGTON unholstered the CEW and pointed it at the male subject. The male was not apprehensive upon seeing the CEW.

The Pritchard video suggests that after the responding members fanned out around Mr. Dziekanski (during which time Constable Millington appears to have unholstered the CEW) and prior to the discharge of the CEW, Mr. Dziekanski glanced at Constable Millington (to the far left of Mr. Dziekanski) for at most a second, just as the CEW was fired. In my view, Mr. Dziekanski did not have time to register apprehension or any other emotion prior to the deployment of the CEW.

I do not accept any of the versions of events as presented by the involved members because I note so many discrepancies in the detail and accuracy of the recollections of the members when tracked against video evidence.

All of the foregoing was canvassed and confirmed by evidence given by the responding members during the Braidwood hearings.

Appendix Q – Involvement of Staff Relations Representative

As noted in the body of the report, prior to the commencement of interviews with the involved RCMP members by IHIT investigators, the members met with Staff Sergeant (then Corporal) Mike Ingles, the Staff Relations Representative (SRR) collectively and at least Constable Millington met with him individually.

The issue is not the fact of the meeting, but the perception it conveys. Did the SRR and the member meet alone? For how long? What was discussed? What was the resulting input or influence, if any, of the SRR's involvement? Who called the SRR and why?

The Commission subsequently posed questions to Staff Sergeant Ingles with respect to both the meeting and the nature of the duty to account statements taken from the members. In his response Staff Sergeant Ingles stated that no formalized duty to account requirement exists. Staff Sergeant Ingles stated that:

Specifically there is an “unwritten” acknowledgment that our members should not be withholding any information that would either a) compromise any investigation, or b) place any member of the public or another member in danger. Unless a member has knowingly committed an offence they will almost always want to provide their version of what occurred. When and how that should happen is another, more complex, matter.

He went on to state that:

A member does have a [sic] “Rights” as outlined in the “YOUR RIGHTS AND OBLIGATIONS – A Guide for Members of the RCMP” document that can be found on the SRR website. As even the investigators are often at odds on what a member is “required” to provide our role is to gain a rudimentary understanding of what has occurred and explain to the members what is likely to occur, what their options are, and how they can assist the investigation while ensuring they are not placing themselves in legal peril.

In the case of YVR ... I will note that even the understanding of the investigator(s) of our role and position is unclear. ... Essentially we are free from the constraints of the investigator role, focused on ensuring that the mental and physical health of the member are being addressed, and based on our frequent involvement in such situations being able to provide guidance to a member who in most cases, specifically an in custody death, has not been involved in a similar situation previously. We also understand that there are certain things that an investigator needs to know to allow the investigation to proceed. ... the involved member likely has

not experienced this before and to have the guidance of someone who is neither their supervisor nor the investigator is often helpful.

I suppose considering there is no policy that requires a member to provide a statement there is no need to have a policy that directs when the member can consult an SRR. The [sic] are free to contact and consult us on any matter related to their welfare and employment.

I note that RCMP "E" Division guidelines (which are not national in scope) do contemplate the duty to account. The RCMP "E" Division Internal Investigations Guidelines state:

All members are accountable to the RCMP for their actions during the course of their duties. Included in this accountability is an obligation to provide relevant information when requested.

This duty to account should not be confused with providing a voluntary statement to an investigator. The duty to account could simply encompass the completion of standard paperwork such as form 1624 or answering basic questions pertaining to an incident that could be expected from any supervisor or fellow member in other investigations. The request for a voluntary statement made to a member subject of a Part IV investigation should be separate and distinct from an investigator's request for information to satisfy the duty to account or the RCMP's "right to know". The voluntary statement may encompass more detailed questioning by the investigator pertaining to the alleged incident.

The role of the SRR is not to provide legal advice. Since SRRs do not provide legal counsel for members, conversations between the involved member and the SRR are not therefore privileged in the legal sense, although they are confidential.

According to Staff Sergeant Ingles (the SRR), after being called by the Richmond Detachment SRR sub-representative, he arrived at YVR at approximately 3:45 a.m. on October 14, 2007. He spoke with the four involved members and at one point spoke alone for approximately two minutes with Constable Millington to determine the latter's emotional state (he was aware it was Constable Millington who had deployed the CEW). The SRR stated that he did not discuss any details of the incident with the involved members (neither on the night of the incident nor at subsequent meetings with the involved members) and that he was with them at the YVR sub-office until the arrival of Corporal Brassington of IHIT.

Staff Sergeant Ingles wrote that:

We did not have discussions relating to details of the incident. I advised all four members that I didn't want or need to get into any details of the investigation, and that they should not discuss details of what had occurred during the incident with each other until after they had given statements.

He went on to state that he:

... advised the four members of the differences between a "statement" and accounting for their actions in the first instance, often referred to as a "duty to account". I advised them that they were not required to provide statements right now (meaning that morning), simply providing a short outline of their involvement as they would in any file is sufficient at this point. I explained that this was an extremely stressful time for everyone involved and that their recollections would likely be more clear once they had gotten one or more sleep cycles. I was advised by them all, but do not specifically recall the words or gestures in reply from any particular one of them, that the facts were the facts and they didn't have any problem providing a statement to the investigators.

Staff Sergeant Ingles wrote that at approximately 4:40 a.m. Corporal Brassington stated to the four involved members:

You need to do a duty to account. If you are willing to give a statement, I'll take that as well. You guys aren't a suspect or anything like that.

Staff Sergeant Ingles wrote that he:

... commented to the 4 members that I didn't think a statement at that time, following a long shift and a traumatic incident, was a good idea, however they could make their own decisions on if and when they would provide a statement.

I have no knowledge of the content of the conversation between Constable Millington and Staff Sergeant Ingles, other than Staff Sergeant Ingles' comments and Constable Millington's comment in his statement that Staff Sergeant Ingles told him that he had the option to *sleep on it and not give a statement right away* to ensure that he (Constable Millington) recalled all of the details.

I have received a copy of the notes kept by Staff Sergeant Ingles with respect to the morning of the incident (October 14, 2007) and his meeting with the four involved members at the YVR RCMP sub-detachment office. His notes of that meeting consist of one page and one line on a second page in a small police

notebook. He has indicated that he kept no notes of subsequent meetings with the four involved members. As I have indicated in the part of this report addressing what I perceive to be an ongoing lack of quality in police note keeping, I find these notes to be inadequate to properly capture the content of the discussion between Staff Sergeant Ingles and the responding members.

In a response to questions posed by the Commission with respect to the involvement of Staff Sergeant Ingles and the duty to account statement, Staff Sergeant Ingles cited the following RCMP regulations pertaining to the Staff Relations Representative Program as his authority for attending:

***RCMP Regulations
Division Staff Relations Representative Program***

96. (1) The Force shall have a Division Staff Relations Representative Program to provide for representation of the interests of all members with respect to staff relations matters.

(2) The Division Staff Relations Representative Program shall be carried out by the division staff relations representatives of the members of the divisions and zones who elect them.

In support of his attendance, Staff Sergeant Ingles also cited the SRR Constitution which he said *gives us direction on duties*. He quoted from Article 13 of the SRR Constitution (emphasis added by Staff Sergeant Ingles):

ARTICLE 13 – DUTIES OF STAFF RELATIONS REPRESENTATIVES

A. The duties of the SRRs are as follows:

(i) Providing information, guidance and support to RCMP members, and in particular:

(a) Providing RCMP members with information on developments nationally, Regionally and in the Division, including but not limited to national policies, SRR Caucus positions, decisions and local developments;

(b) Reporting information of RCMP-wide interest for broader dissemination through the Program Director;

c) Providing advice, guidance and active support to members on the human resources implications and applications of legislation, policies and procedures as they affect them;

(d) Establishing and maintaining processes and mechanisms for effective two-way communication with members and Divisional management for the effective resolution of issues and disputes; and

(e) Arranging or engaging in facilitation and mediation to resolve issues and disputes between members and management.

(ii) Participating in divisional meetings where discussions will directly affect the terms and conditions of employment of members;

(iii) Representing members' interests and ensure their participation in the overall management of the RCMP, including but not limited to the following:

(a) Participating in studies, task forces and committees established by the RCMP where they impact or may potentially impact members, at the national, Regional, Divisional, and other levels;

(b) Participating as a member in one or more of the National Committees; RCMP Staff Relations Representative Program Constitution (2007-10-04 Final)

I Consulting with members and/or their representatives on issues affecting or potentially affecting them that are the subject of discussion in National Committees, at SRR Caucus and Regional Caucus or as part of studies or reviews; and

(d) Subject to RCMP Policy and guidelines established by the SRR Caucus, represent members' interests with the media and with external stakeholders;

(iv) Supporting the overall effectiveness of the SRR Program, including but not limited to the following:

(a) Supporting the involvement of the Sub-representatives of his/her division, zone or area designated directorate to have the training, information and support they need to be effective;

(b) Participating in meetings of the SRR Caucus unless excused by NE or prevented by any sanction imposed under the SRR Constitution;

I If unable to attend any meeting of the SRR Caucus, appointing a replacement Sub-Representative to attend; and

(d) Supporting, advancing and carrying out all official policies, goals and objectives of the SRR Program.

It appears to me from the response of Staff Sergeant Ingles that, in his view, the role of the SRR is to filter information as between the involved member and the investigators. I see this as a dangerous and potentially precarious situation. The investigators, particularly in the early stages of an investigation, require facts which are not adulterated or influenced. The investigator should be able to conduct the interview of the involved member without the presence of the SRR.

My concern is that prior to the commencement of taking a statement from the involved member, the investigator could be influenced by information or a version of events provided by the SRR. To paraphrase an old maxim, an impartial investigation must not only be done, it must be seen to be done. This is particularly true when the police are investigating the police.

The protocol of members meeting with an SRR has been noted in previous¹⁸⁷ matters which have been investigated by the Commission. Although such meetings may have legitimacy, the optics are such that members could be coached by the SRR on what to say or how to react during their subsequent statement(s). I stress that I have no evidentiary basis to impute inappropriate motives or conduct to the SRR in this instance.

I recommended in a previous decision¹⁸⁸ that the RCMP should consider implementing policy with respect to the issue of the duty to account statement. Such policy would provide clarity for RCMP members as well as the public in terms of the nature of such a statement, when it is required, what information is required and the use to which it may be put.

¹⁸⁷ *Final Report on Chair-Initiated Complaint into the Shooting Death of Ian Bush – November 28, 2007*, which may be viewed at <http://www.cpc-cpp.gc.ca/prr/rep/rev/chair-pre/lanBush-fin-rpt-eng.aspx>.

¹⁸⁸ *Ibid.*

Appendix R – Travel to Poland

This issue of the necessity for travel to Poland by investigators was addressed by Superintendent Wayne Rideout, the Officer in Charge of IHIT at a news conference on December 17, 2008.¹⁸⁹ Superintendent Rideout stated:

The reason our investigators traveled to Poland was to obtain witness statements that would be used in any court proceedings, inquests or inquiries in Canada, and to determine Mr. Dziekanski's activities, health and state of mind in the days leading up to his departure for Canada. The team discovered a number of factors, which they passed on to the medical experts to help them render an opinion in relation to cause of death.

....

The trip took place from April 14 to 17, 2008. The investigators were able to observe interviews conducted by the Polish authorities, based on questions that our investigators provided in advance and supplemented by follow up questions through an interpreter. The entire process took place in accordance with Polish law and with the cooperation of Polish prosecutors. A Polish prosecutor oversaw the interviews and heard the evidence, given under oath.

When the investigators returned to Canada, the statements they had obtained were translated and provided to medical experts and to the Provincial Crown as supplementary information to the initial report to Provincial Crown Counsel. Experts used this information in conjunction with all other information to provide their opinions with respect to Mr. Dziekanski's death.

¹⁸⁹ See

<http://www.bc.rcmp.ca/ViewPage.action?contentId=7425&q=dziekanski&siteNodeId=38&languageId=1>.

Appendix S – Media Releases

The issue of misstatements and/or the provision of misinformation to the media, and ultimately to the public, by the RCMP have become issues with respect to the investigation into the death of Mr. Dziekanski. As part of my investigation in this matter I identified these issues as being worthy of comment.

On November 13, 2007¹⁹⁰ the British Columbia Civil Liberties Association (BCCLA) initiated a public complaint pursuant to Part VII of the *RCMP Act*, pertaining to the lack of accuracy of information provided to the media and the failure of the RCMP to return the video taken by Mr. Pritchard in a timely manner. These actions were characterized by the BCCLA as violations of RCMP policy and professional misconduct on the part of the involved RCMP members.

The complaint was investigated by the RCMP as per Part VII of the *RCMP Act*; however, the BCCLA was not satisfied with the RCMP investigation into its complaint (as per the RCMP letter of disposition to the BCCLA dated December 23, 2008). In a letter I received from the BCCLA dated March 19, 2009, subsequent to my decision to comment in this report on issues involving RCMP media releases, the Commission was requested to review the RCMP investigation into the BCCLA complaint pertaining to RCMP media releases (pursuant to Part VII of the *RCMP Act*). I will accede to that request.

Because the BCCLA request for review is inextricably linked to the overall investigation into the death of Mr. Dziekanski, it is my intention to deal with the review in the context of this report. The correspondence from the BCCLA as well as the RCMP letter of disposition are appended to this report at **Appendix C** and **Appendix D**, respectively.

As noted, the November 13, 2007 complaint by the BCCLA contained a number of issues which may be categorized into several broad areas:

1. The failure to return the Pritchard video in a timely manner
2. Content and accuracy of RCMP media releases
3. The investigation into the BCCLA complaint

The allegation concerning the failure of the RCMP to return the Pritchard video has been addressed elsewhere in this report (see Section titled Pritchard Video). Issues pertaining to RCMP media releases and the nature of the RCMP investigation into the BCCLA complaint are addressed below.

¹⁹⁰ The BCCLA initiated a separate complaint with the Commission on October 24, 2007 concerning the conduct of the four RCMP members who were directly involved at the time of Mr. Dziekanski's arrest and subsequent death.

Allegations of inaccuracies in RCMP media releases in the early stages of the investigation into the death of Mr. Dziekanski may be characterized into three principle areas. First are the allegations of factual errors provided by the RCMP media relations officer (MRO), who, in the early days of the investigation was Sergeant Pierre Lemaitre, "E" Division Strategic Communications (Sergeant Lemaitre was replaced as MRO by Corporal Dale Carr, the MRO for IHIT). Second are the allegations of gratuitous comments and apparent hypothesizing engaged in by Sergeant Lemaitre. Third is the failure to correct known factual errors in information provided by the MROs.

The BCCLA complaint identified a number of facts in various media news articles in which the MRO was quoted and which were subsequently shown to be false. The BCCLA complaint indicated that during media interviews Sergeant Lemaitre stated that:

- *The attending RCMP members attempted to calm Mr. Dziekanski and used the CEW as a last resort;*
- *Mr. Dziekanski may have been under the influence of alcohol, drugs or had a medical condition that caused his death;*
- *Mr. Dziekanski was sweating profusely and was violent which could indicate either drug use or a medical condition and that there was obviously something very different going on inside of him.*

Further, the BCCLA complaint stated that when Corporal Carr assumed the responsibility as MRO with respect to the death of Mr. Dziekanski, Corporal Carr:

- *Stated that the Pritchard video was being withheld from the public to prevent witnesses account contamination but that the RCMP was continuing to publicly espouse subjective information about the incident thereby contaminating potential witness accounts to the detriment of Dziekanski and to the benefit of the RCMP;*
- *Stated that the Pritchard video recording was being withheld from the public to prevent upsetting Mrs. Cisowski (the decedent's mother), even though she and her lawyer wanted it released;*
- *Attacked Paul Pritchard's motive for release of the video.*

Although the above are the examples cited in the BCCLA complaint, other misstatements have also been identified and my comments will include them.

The release of information by the RCMP to the media is governed by RCMP policy,¹⁹¹ which includes the requirement to ensure that information released to the media:

- Does not result in injury, injustice or embarrassment to the victims or the accused;

¹⁹¹ OM.27.2.2.

- Does not result in publicity that could affect the course of a trial;
- Does not contravene the provisions of the *RCMP Act*, *Privacy Act*, *Access to Information Act*, the *Canadian Charter of Rights and Freedoms* or the *Canadian Human Rights Act*.

Pursuant to that same policy, RCMP members when speaking with the media are advised not to speculate or offer a personal opinion. They should report only the facts.

Further, RCMP policy is that members are not to release information that would compromise an investigation or individual rights.¹⁹² All information released to the media must present the views of the RCMP and any of its partner stakeholders.¹⁹³ I presume this final caveat to be interpreted by the RCMP such that the views of the RCMP and its partner stakeholders, when viewed in the context of the overall RCMP media policy, are that RCMP MROs are expected to provide a factual and non-biased version of events to the media.

According to an internal RCMP report titled *A Review of Communications Surrounding the 2007 YVR Incident* prepared in May 2008, during the month following the death of Mr. Dziekanski, over 1,000 e-mails were exchanged within the RCMP with respect to the creation of the media strategy to address that incident.¹⁹⁴ The review examined the RCMP's media response to the incident and made recommendations with respect to the process of incident management from a media relations perspective.

Included in the report is a discussion on the effect of apologizing, both from the point of view of the perceived assignment/assuming of blame by the person or agency apologizing, and from a more pragmatic and realistic point of view that an apology statistically lowers legal costs and increases public support.

Overall, the report recognizes organizational and systemic deficiencies in the handling of media issues relating to the death of Mr. Dziekanski and suggests steps to be taken to address and correct them.

Factual Errors by the MRO

At approximately 7:23 a.m. on October 14, 2007, just hours after the death of Mr. Dziekanski, a briefing was held at the Richmond RCMP Detachment at which IHIT investigators attended along with Sergeant Lemaitre and Corporal Carr. Sergeant Lemaitre was with the RCMP "E" Division Strategic Communications, while Corporal Carr was the MRO for IHIT.

Evidence presented during the Braidwood Inquiry has demonstrated that during the briefing, the Pritchard video was viewed by those in attendance and in

¹⁹² OM 27.1.1.2

¹⁹³ OM 27.3.3.1.

¹⁹⁴ See Vancouver Sun article on the same topic, June 20, 2009.

addition, Corporal Robinson, one of the RCMP members involved in the interaction with Mr. Dziekanski, also attended to provide investigators with his version of the incident (see the section in the body of the report titled *The IHIT Investigation*, sub-section titled *Presence of Corporal Robinson at Richmond Detachment Briefing*). Both Sergeant Lemaitre and Corporal Carr said in evidence before the Braidwood Commission that they viewed the video briefly. Sergeant Lemaitre said that he paid little attention to Corporal Robinson's version of events and said that he was able to tune it out of his mind.

During media interviews in the days immediately following the death of Mr. Dziekanski, Sergeant Lemaitre made a number of statements of fact and provided speculation to the media as to the state of mind of Mr. Dziekanski. He was also critical of the recollection of Ms. Sima Ashrafinia, one of the witnesses to the incident. At various points during those interviews Sergeant Lemaitre used the term "going on the record," apparently to impress upon the media the veracity of the information he was conveying.

Sergeant Lemaitre was the RCMP's MRO with respect to the Ian Bush matter and as such he was criticized for providing too little information to the media in that situation. In his statement to the RCMP Part VII complaint investigator, Sergeant Lemaitre said that he felt pressure because of the criticism from the Ian Bush matter to release more information than he had done in that case.

In the early part of the investigation the team commander, Staff Sergeant (then Sergeant) David Attew, discussed with Sergeant Lemaitre the information to be released to the media. Staff Sergeant Attew later said that he was surprised when he learned of the information Sergeant Lemaitre had released to the media because it was not what had been agreed between them. Staff Sergeant Attew was concerned that the "spin" being placed by Sergeant Lemaitre would be seen as self-serving to the RCMP, appeared to be defensive in tone and contained inaccuracies. This concern came to be shared by Superintendent Rideout, who opted to remove Sergeant Lemaitre and replace him as MRO with Corporal Carr.

Clearly, it was recognized early by IHIT investigators that some of the information imparted by Sergeant Lemaitre was incorrect and/or speculative. As will be discussed below, no steps were taken by IHIT to correct these inaccuracies. Although not exhaustive, this included statements by Sergeant Lemaitre that:

- The CEW had been cycled twice. Sergeant Lemaitre indicated that the source of his information in this regard was IHIT¹⁹⁵ and stated: *We know for a fact that there were two pulses.*¹⁹⁶ (This was later confirmed by Constable Baltzer's download report to be five cycles);
- Three RCMP members attended the incident involving Mr. Dziekanski (the actual number was four). At the time of making this statement,

¹⁹⁵ CBC video, October 16, 2007 at the 03:12 mark.

¹⁹⁶ CBC video, October 16, 2007 at the 03:30 mark.

- Sergeant Lemaitre was responding to a question concerning a discrepancy between the number of members reported by a witness (five) and the number actually attending. Sergeant Lemaitre went on to speculate that two YVR security employees dressed in uniforms and bright yellow jackets could have been misinterpreted for RCMP members. Those two plus the three members who he said did attend would account for the five reported by the witness;
- No YVR video of the incident existed. Sergeant Lemaitre stated: *I can tell you that there was no video camera in that area at the airport.*¹⁹⁷ The tape then stops. It is not known, therefore, whether Sergeant Lemaitre qualified this statement any further. The statement was in response to a media question as to whether there existed video coverage of the international arrivals area at YVR (Sergeant Lemaitre had viewed the Pritchard video when he made this statement). In fact, YVR video of the area did exist. Unfortunately, the quality of the video and the distance of the camera from the events rendered it virtually useless;
 - Mr. Dziekanski may have had drugs or alcohol in his system (later shown to be false); and
 - Mr. Dziekanski received a second “pulse” from the CEW and there was *absolutely no change in disposition. Still erratic, violent.*¹⁹⁸ He said that after the three members physically controlled Mr. Dziekanski on the ground, they placed handcuffs on him to stop Mr. Dziekanski from punching and fighting. Mr. Dziekanski slipped into unconsciousness and one member continued to monitor his pulse and vital signs up to the time that EMS took over.

In his statement to Staff Sergeant Forster, Sergeant Lemaitre said that he did attend the Richmond Detachment briefing on the morning of October 14, 2007 and viewed the Pritchard video one time. He recalled the IHIT members present discussing the file and what each witness had said, but said that he shut it out of his mind because he did not need to know that information.

When asked about the statement that there was no video in the area of the incident, Sergeant Lemaitre implied that Corporal Carr told him not to mention the Pritchard video and said that he was responding to a question about the availability of YVR surveillance video. He knew the Pritchard video was a key piece of evidence, and he did not believe that it was up to him to divulge its existence, absent clear direction from IHIT that he could talk about it.

Sergeant Lemaitre stated during his Part VII interview by Staff Sergeant Forster that he said that there were two cycles of the CEW because that was what he had heard at the Richmond Detachment briefing on the morning of October 14, 2007. The same rationale was provided as the reason he indicated that three RCMP members had responded to the incident involving Mr. Dziekanski.

¹⁹⁷ CBC video, October 16, 2007 at the 07:42 mark.

¹⁹⁸ CBC video, October 16, 2007 at the 06:28 mark.

He recalled explaining the IM/IM during a media interview, but believed he was simply providing background and context, as opposed to justifying the actions of the involved RCMP members. With respect to the comments that Mr. Dziekanski may have consumed alcohol or drugs, Sergeant Lemaitre stated that he was simply providing comments based on his experience as a police officer. In his evidence before the Braidwood Inquiry, Sergeant Lemaitre stated that he was clear in the interview that he was speculating and said that he added during the interview that *[i]t would be up to a coroner and the toxicology report to give us those answers.*

Sergeant Lemaitre did indicate in a French language interview conducted on November 14, 2007 that some of the information he had provided in the hours after the death of Mr. Dziekanski had been incorrect. He did not go into specifics, but indicated that he had been misinformed. The media reported that Sergeant Lemaitre would not make the same statement in English. No such corrections were made by him or any other MRO or IHIT representative in the English media. Sergeant Lemaitre's position was that he made the clarifications he did in the French interview because he was responding to a question from the media. He stated that he did not have the authority to clarify any information for the English media.

Sergeant Lemaitre stated that he challenged Ms. Ashrafinia's version of events in the media interview because, based on the information he had been provided, he believed that she was incorrect. In his statement he recognized that by making such comments he could be perceived as being less than impartial. He stated that he was never notified by Corporal Carr or anyone else at IHIT that there were problems with his media releases, nor was he ever told why he was taken off the file.

Failure to Correct Known Errors

As indicated, factual errors in information provided to the media were known to IHIT investigators shortly after the investigation began. Staff Sergeant (then Sergeant) Attew became aware of discrepancies and errors in the media information released by Sergeant Lemaitre. He was concerned not only because of the errors, but because Sergeant Lemaitre had released information which had not been agreed to by IHIT and because the tone of Sergeant Lemaitre's media releases were defensive with respect to the actions of the RCMP members involved. He believed that Sergeant Lemaitre should have provided factual information only (as per policy) because the matter was still under investigation and no definitive findings had yet been made. He said that he spoke with Corporal Carr, the IHIT MRO, and asked him to follow up with Sergeant Lemaitre informally. Corporal Carr said he never did follow up with Sergeant Lemaitre. No rationale was provided, other than Corporal Carr saying that he did not want to second-guess Sergeant Lemaitre.

The matter was not pursued through the chain of command. As noted, Superintendent Rideout became aware of the issues, and opted to remove Sergeant Lemaitre as MRO and replace him with Corporal Carr.

The decision not to correct known deficiencies was made by Superintendent Rideout as Officer in Charge of IHIT. He believed that attempting to correct errors and misstatements would cause more problems than it would cure because the police would be placed in the position of having to provide updates and explanations, thereby placing the integrity of the investigation in jeopardy and running the risk of having the issues tried in the media. Superintendent Rideout therefore determined that it would be better to say nothing.

During a press conference on December 12, 2008,¹⁹⁹ Superintendent Rideout stated:

We recognize that some of the information provided today is inconsistent with what was said by the RCMP at the onset of the investigation.

In the early days following the incident, an RCMP spokesperson stated that the conducted energy weapon was deployed twice. It is now clear that there were three cycles in probe mode and two in push stun mode.

The RCMP spokesman conveyed the information he had been provided from one of the officers present at the airport. That officer did not himself deploy the conducted energy weapon.

The reason the RCMP could not publicly correct the information when it was determined that a mis-statement had been made, is that, by that time a criminal investigation had been undertaken. Prior to the conclusion of the investigation, the provision of a report to Provincial Crown Counsel and a determination of whether criminal charges would be laid, it would not have been appropriate to disclose publicly the evidence that had been gathered.

The IHIT investigation into the incident at Vancouver International Airport has been concluded. Throughout the process, we have adhered to the policies and principles that apply to all major investigations, and believe our conclusions are fact-based and reasonable.

¹⁹⁹ See

<http://www.bc.rcmp.ca/ViewPage.action?contentId=7425&q=dziekanski&siteNodeId=38&languageId=1>.

I am of the opinion that correcting relatively straightforward inaccuracies such as the number of members present or the number of times the CEW was cycled would not have compromised the position of the RCMP vis-à-vis any criminal investigation of the events. It is incumbent on the RCMP to take all reasonable steps to confirm information prior to it being provided to the public and to correct inaccuracies when they are found unless an overriding rationale exists as to why that information should not be made public.

At the same news conference on December 12, 2008, Superintendent Rideout was asked the following question and he responded (question is in bold and the response in regular italic type):

It looked like that the officers backed up because they knew they were going to deploy the Taser[®] and not because of the stapler. What did the IHIT investigation reveal?

Supt. Wayne Rideout: The IHIT investigation looked at the entire incident in context with every other component in this investigation, Mr. Dziekanski's behaviour in the hours and minutes before the officers encountered him. The entire video showed that Mr. Dziekanski was disoriented, confused and appeared to be somewhat incoherent. While enroute to responding to the incident, the officers received update information about the situation through the radio. They were advised on the nature of the complaint that they were responding to. By policy, their duty necessitated them to take Mr. Dziekanski's (sic) into custody. They would be making assessment as to how they would do that while they were enroute, based on all available information to them. We know that occurred.

The officers were making observations based on what they saw. It is extremely important that we recognized what they saw, what facial expressions and body movements led them to believe. The act of throwing up the hands can be interpreted as one of non-compliant and a resisting or combative posture. When that is followed by picking up a stapler and turning into the direction of the officers, we recognized that this behaviour was seen as extraordinary and combative. We interpreted that's why the actions were followed as they did.

Superintendent Rideout was asked by the Commission to explain his comment above that *[w]e know that occurred*. He indicated that his reference was to the knowledge that the responding members had received information over the police radio as they were en route to the scene. Superintendent Rideout was unequivocal that IHIT had no knowledge or awareness that the responding members had discussed or considered the use of the CEW against Mr. Dziekanski prior to their arrival at the exit doors from the international arrivals level of YVR.

The primary questions to be asked are whether, over time, the media releases provided by the RCMP were fair and objective and whether or not the public was provided with appropriate and sufficient information. There is a need to protect the evidence gathered from public dissemination and to ensure that one witness is not tainted or tempted to tailor evidence based on the evidence of another.

In a press release issued on November 30, 2007, Corporal Carr, who had assumed the MRO role from Sergeant Lemaitre, stated:²⁰⁰

The investigative team would like to address an issue surrounding the perception that police did not administer first aid to Mr. Dziekanski after administering the Conducted Energy Weapon.

Although the investigation is not complete at this time, investigators can say, based on current information, the following:

Immediately after the CEW was deployed on Mr. Dziekanski, officers arrested him and placed him in handcuffs.

Investigators have learned that Mr. Dziekanski was monitored by both the police at the scene and YVR security, breathing and pulse were present. During what would be a regular on-going assessment of Mr. Dziekanski's state, officer's [sic] noticed that he had become unconscious. Emergency medical personnel were called to attend. The officers and the YVR Security member continued monitoring Mr. Dziekanski and continued to identify that breathing and a pulse was present. This monitoring continued with the same findings throughout the time that it took emergency medical personnel to arrive at the scene.

Investigators have learned that upon the arrival of Richmond Fire Department a request was made to have the handcuffs removed from Mr. Dziekanski, officers did not remove the handcuffs at this time as they had a safety concern. It is the role of police to render a situation safe in order that emergency medical personnel can effectively perform their duties. Upon the arrival of BC Ambulance service a short time later, BCAS personnel requested the handcuffs be removed, it was at that time the officers assessed and removed the handcuffs.

It is important to understand investigators have learned that based on the continuous monitoring of Mr. Dziekanski it was the opinion of officers and the YVR security member at the incident that Mr. Dziekanski was

²⁰⁰ See

<http://www.bc.rcmp.ca/ViewPage.action?contentId=1602&q=dziekanski&siteNodeId=38&languageId=1>.

breathing and had a pulse, however he was unconscious the entire period while awaiting for emergency medical personnel to attend.

It is important to understand that the care and monitoring of Mr. Dziekanski will form part of our investigation and submissions will be going forward in our reports for Coroner's Inquest, Commission for Public Complaints investigation, Public Inquiry, RCMP Internal Investigation, OPP file review.

The press release appears to be factually correct. In my view, however, it leaves an impression which is not supported by the video taken by Mr. Pritchard. Firstly, the release mentioned that Mr. Dziekanski was handcuffed and that RCMP members were reluctant to remove the handcuffs because of safety concerns, presumably because Mr. Dziekanski would regain consciousness and continue to struggle. This issue has been discussed in the section of the report concerning first aid administered to Mr. Dziekanski, at page 17.

The issue of the impression left by RCMP media releases was also discussed in my *Final Report on Chair-Initiated Complaint into the Shooting Death of Ian Bush – November 28, 2007*.²⁰¹ In that decision, I recommended that *[t]he RCMP develop a media and communications strategy specifically for police-involved shooting investigations that recognizes the need for regular, meaningful and timely updates to the media and to the public. In addition, the media and communications strategy should include a publicly available general investigative outline of the steps to be taken and the anticipated timeline for each step.*

Clearly, errors were made in releasing incorrect information to the media and those errors should have been corrected. Although the evidence does not allow me to state that the errors were intentional or were intended to demean Mr. Dziekanski, I am concerned that in an effort to put a positive face on the actions of the involved RCMP members, Sergeant Lemaitre and, to a lesser degree Corporal Carr, engaged in speculation and supposition which went well beyond the scope of applicable RCMP policy and potentially misled the public.

As Superintendent Rideout pointed out in his interview with the Commission, his concern was that the integrity of the investigation be safeguarded and that information not be disseminated which could potentially cause witnesses to tailor their evidence. To carry out that goal, his view was that errors should not be corrected because to do so would have required IHIT investigators to release information considered sensitive to the investigation, which could have compromised the integrity of the investigation. He chose not to correct the errors to avoid having to provide the correct information and to avoid what he anticipated would be numerous questions from the media which he believed would also have negatively affected the integrity of the investigation.

²⁰¹ See my Final Report on the Ian Bush death (November 28, 2007 File No.: PC-2006-1532, at p. 64 (www.cpc-cpp.gc.ca)).

He now holds the view that he could have indicated to the public that errors were made in information provided to the media by the RCMP, but he was not prepared to address or correct them at that time.

RCMP Investigation of the BCCLA Public Complaint

The standard of investigation by the RCMP of a public complaint lodged under Part VII of the *RCMP Act* is addressed in section 8 of the Commissioner's Standing Order (Public Complaints):

8. A member responsible for conducting the investigation of a complaint shall

(a) conduct the investigation in an objective and neutral manner consistent with recognized investigative procedures; and

(b) impartially and diligently gather evidence with a view to bringing the investigation to a conclusion.

On December 12, 2007 Staff Sergeant T.K. Forster was assigned to conduct the investigation of the BCCLA public complaint pursuant to Part VII of the *RCMP Act*. The crux of the BCCLA complaint required him to review, analyze and attempt to determine the veracity of the impugned MRO comments pertaining to the death of Mr. Dziekanski. Although a number of examples of MRO media statements were cited, the BCCLA complaint was somewhat open-ended in that the complaint alleged that *...relevant RCMP member(s) misrepresented themselves to the public on various occasions²⁰²....* The position of the BCCLA appears to be that the RCMP should have conducted an investigation into all statements made by MROs relating to the death of Mr. Dziekanski and investigated each.

Staff Sergeant Forster attempted to obtain video from media sources; however, apparently the media were not inclined to share video with the police absent judicial compulsion. Since an investigation pursuant to Part VII of the *RCMP Act* is not criminal in nature, no authority exists to obtain a search warrant or production order under the auspices of the *Criminal Code*, or to compel the production of potential evidence through other means.

In addition, Staff Sergeant Forster met with the BCCLA in an attempt to obtain any additional information or material which may have assisted him in his task.²⁰³ The BCCLA provided a number of citations, but took the position that the material in question was in the public domain and declined to provide additional

²⁰² Letter of complaint from BCCLA to Commission, dated November 13, 2007, p.3.

²⁰³ BCCLA letter dated March 19, 2009 to P. Kennedy.

information pertaining to MRO interviews. The BCCLA cited the fact that it is a small, non-profit organization which does not have the resources to fully monitor the media, and took the position that it is the responsibility of the police to seek out and obtain such data. As noted, the media also declined to assist in furthering Staff Sergeant Forster's efforts to obtain raw footage of MRO interviews.

Staff Sergeant Forster did contact the relevant media outlets; however, each either referred the matter to their counsel (who refused to comply) or refused outright to assist in the investigation.

I am satisfied that Staff Sergeant Forster made appropriate attempts to contact relevant media outlets and obtain data pertaining to the impugned MRO interviews, and that he was denied such access by each of those same outlets.

Ultimately, Staff Sergeant Forster was left to review video and media information recorded from public media broadcasts by the RCMP "E" Division media monitoring group. The unfortunate reality, therefore, is that Staff Sergeant Forster was only able to review that material which had been broadcast or printed by the media. He was not able to review the entirety of interviews taped by the media with RCMP MROs to determine whether the MROs had provided appropriate caveats and/or context or whether print media quotes were attributed accurately.

The relevant questions, however, are whether the investigation adequately addressed the BCCLA complaint and whether the conclusions drawn by Staff Sergeant Forster are accurate and supportable. The BCCLA raised the issue in its request for review that not all of its allegations were investigated. Specifically, the BCCLA in its March 19, 2009 letter to the Commission requesting a review of the RCMP Part VII investigation raised the fact that some allegations were conflated or ignored altogether. Whether or not the initial complaint of the BCCLA listed specific allegations (the BCCLA's initial letter of complaint of November 13, 2007 did not list specific allegations, but provided a narrative of issues), Staff Sergeant Forster was at liberty to investigate as he saw fit within the confines of the applicable standard of investigation.

None of the allegations brought forward by the BCCLA was found by the RCMP to be supportable. In some cases, this was because no bad faith or negative intent were noted on the part of the MRO involved, while in others a lack of cooperation from media outlets meant that there was insufficient evidence on which to base a finding. That said, and as I have noted, I do have concerns with the approach taken by the RCMP media relations members in light of the fact that the public received incorrect and/or incomplete information.

Having reviewed the RCMP Part VII investigation, I find no reason to question either the impartiality of the investigator or the conclusions he has drawn with

respect to the allegations. While some specific issues raised by the BCCLA may not have been canvassed to the satisfaction of the BCCLA, I am not of the view that the Part VII public complaint investigation conducted by Staff Sergeant Forster was below acceptable standards.

Appendix T – Medical Assessments

An autopsy was performed by Dr. Charles Lee on Mr. Dziekanski on October 16, 2007. Dr. Lee stated in his autopsy report that the cause of death cannot be conclusively determined and that a pre-existing heart condition of Mr. Dziekanski combined with chronic alcoholism and being pinned in the prone position as he was being subdued, may have led to a fatal arrhythmia.²⁰⁴ Dr. Lee indicated as well that although Mr. Dziekanski was agitated, he likely did not suffer from delirium. The autopsy of Mr. Dziekanski found no trace of alcohol or drugs in Mr. Dziekanski's body. Dr. Lee ruled that the death of Mr. Dziekanski was best characterized as sudden death following restraint.

Subsequent to Dr. Lee's autopsy, Dr. Michael Pollanen, the Chief Forensic Pathologist for Ontario, was asked by IHIT investigators to review the autopsy findings of Dr. Lee and provide a second opinion on the findings. After reviewing the autopsy report and supporting medical documentation and evidence collected by Dr. Lee, as well as viewing video and photos, Dr. Pollanen concluded that:

- 1. Robert Dziekanski did not die of the effects of a physical injury, the toxic effects of a drug, or an acutely fatal natural disease or condition. There are at least four variables that could be co-factors in death: an agitated state, restraint in the prone-position, the effects of a taser discharge and chronic alcoholism.*
- 2. Robert Dziekanski did not die of a taser-induced cardiac arrhythmia.*
- 3. There is competing scientific evidence on the putative adverse non-cardiac effects of a taser discharge in animals and man. If Robert Dziekanski's death was caused, in part, by the adverse effects of an agitated state, then we need to keep an open mind about the putative role that the taser discharge may have played in indirectly contributing to death, since Mr. Dziekanski appears more (dis)stressed and agitated after the deployment of the taser.*

²⁰⁴ Arrhythmia is an abnormal heartbeat. See <http://www.heartandstroke.com/site/c.iKlQLcMWJtE/b.3484057/k.22A1/Arrhythmia.htm>.

Dr. Pollanen encapsulated his conclusions as follows:

PUTATIVE CAUSAL FACTOR OR CO-FACTOR	SUPPORTIVE EVIDENCE	DETRACTING EVIDENCE
AGITATED STATE	<p>Video showing agitated and distressed state.</p> <p>There is an association between sudden death and an agitated state (mostly in full-blown “excited delirium”).</p>	<p>Unclear if the agitated state qualifies for full-blown “excited delirium”.</p> <p>No non-behavioural indicators of excited delirium (e.g. hyperthermia or rhabdomyolysis).</p>
RESTRAINT IN THE PRONE POSITION	<p>Video showing struggle and restraint in the face-down position.</p> <p>There is an association between sudden death and prone position restraint during excited delirium.</p>	<p>Short time interval of restraint mitigates against death from chest compression.</p>
TASER®	<p>The video evidence shows that the agitation was enhanced after taser discharge.</p>	<p>The video evidence excludes a fatal taser-induced arrhythmia.</p>

CHRONIC ALCOHOLISM	Fatty liver and lack of ethanol in blood. The latter may be related to alcohol withdrawal. Alcohol withdrawal may have contributed to the development of the agitated state.	No evidence of acetonemia. Beta-hydroxybutyrate level not measured. No vitreous electrolyte studies performed.
DILATED CARDIOMYOPATHY	Dr. Lee has found evidence for this condition	Not confirmed on this review.

In addition to the autopsy reports, IHIT investigators also sought an expert opinion from Dr. Christian M. Sloan of Del Mar, California with respect to the potential effects of alcohol withdrawal, on Mr. Dziekanski. Dr. Sloan is a practicing emergency physician, certified by the American Board of Emergency Physicians. He is employed as an academic attending and assistant clinical professor at the University of California at the San Diego Medical Center. Dr. Sloan indicated in his report that he has *taken care of numerous patients in various states related to alcohol, including alcohol intoxication, as well as the complete range of alcohol withdrawal; from mild tremors to fully developed major alcohol withdrawal as well as delirium tremens.*

I did not find Dr. Sloan’s opinion helpful in analyzing alcohol withdrawal as a contributing factor in Mr. Dziekanski’s death.

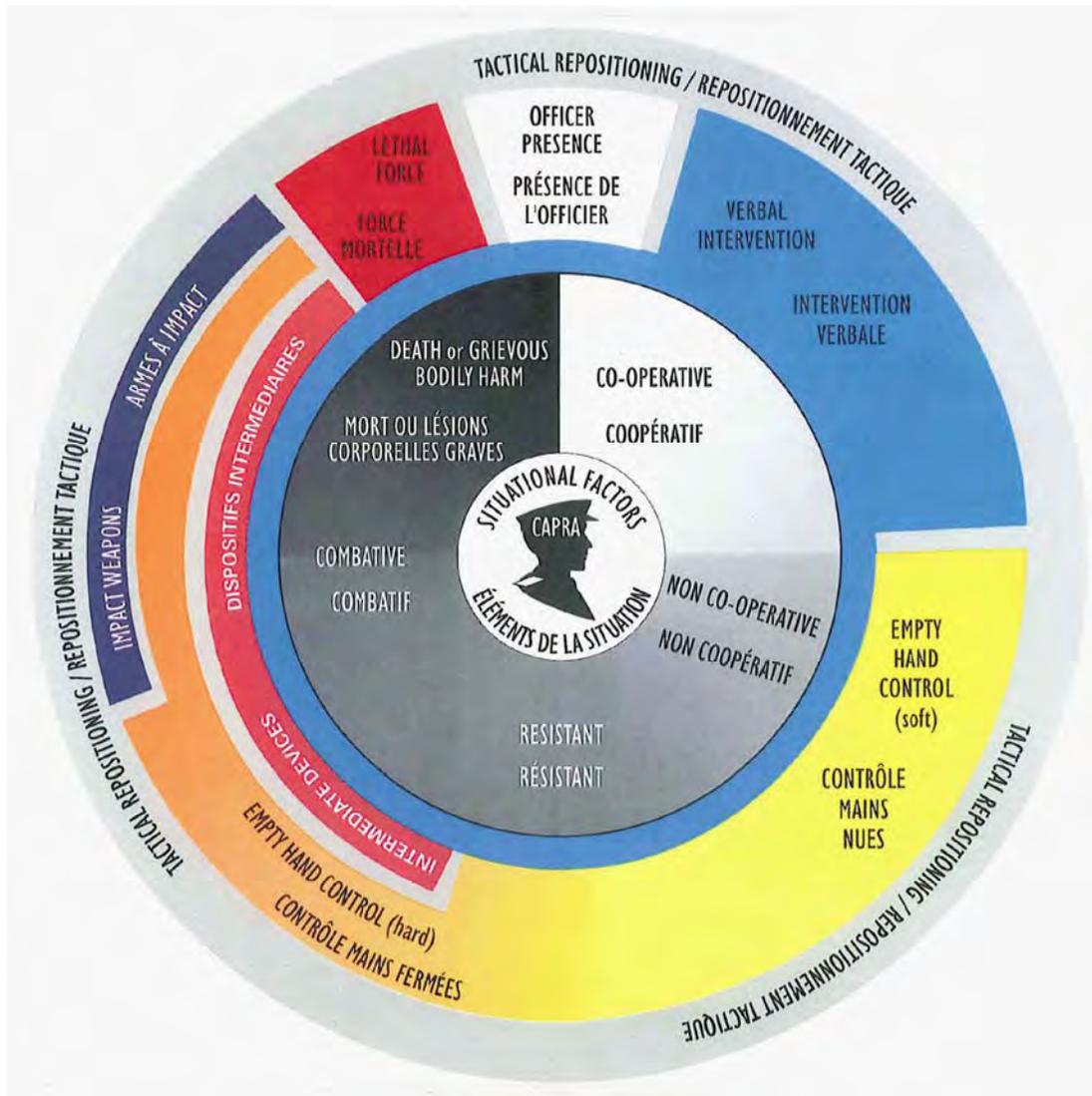
Dr. Sloan concluded:

From what I have available to me, in my opinion, Mr. Dziekanski’s condition on that evening could certainly be consistent with some degree of alcohol withdrawal. I believe that the time frames we are looking at would allow the development of alcohol withdrawal if he was habitually using in at least the week prior to his travel. By adding the condition of alcohol withdrawal to the milieu of agitated delirium that is witnessed on the video and described by those involved, or if it is solely due to alcohol withdrawal, is difficult to definitively determine, but placed him at risk for sudden death.

I note that found in Mr. Dziekanski's effects was an unopened 750-millilitre bottle of Vodka which Mr. Dziekanski could have opened and consumed at any point. He did not do so. As a result, I must question the assumption that alcohol withdrawal was an important contributing factor in Mr. Dziekanski's death.

Appendix U – IM/IM Diagram

The diagram below is the Incident Management/Intervention Model (IM/IM) used by the RCMP at the time of the YVR incident. It has since been amended (May 2008).



At the time of the YVR incident (October 14, 2007), the RCMP considered the following to be intermediate devices:

1. OC Spray (oleoresin capsicum)
2. CS gas
3. Conducted Energy Weapon (CEW)
4. Water Projection System

The only intermediate weapons carried by RCMP uniformed members on their duty belts are OC spray and the CEW. As discussed in the body of the report, the CEW is optional and may be carried only by qualified members.

At the time of the YVR incident, the RCMP considered impact weapons to include:

1. Extendable police baton (ASP)
2. Sock rounds

Because of the pain and risk of injury or death to the recipient, the Commission has consistently encouraged the RCMP to consider the CEW to be an impact weapon to underscore in the minds of members the importance of assessing the relevant considerations of its use prior to CEW deployment. Subsequent to the YVR incident the RCMP revisited the nature of intermediate and impact weapons and has since amended various aspects of the IM/IM and revised its listing of such weapons to identify only one category of weapon. The category of impact weapons has been removed as per amendments to the IM/IM in May 2008 and become part of the Intermediate Weapons category, now called *Less Lethal Weapons*. Less lethal weapons, defined as *those whose primary use is not intended to cause serious injury or death* consist of kinetic energy weapons, aerosols and conducted energy weapons.

As I have indicated in this report, I have assessed the YVR incident and activities related to it in light of policy as it existed at the time of Mr. Dziekanski's death. As I have noted, the IM/IM was subsequently amended.

The levels of intervention include officer presence, verbal intervention, soft and hard empty hand control, intermediate devices, impact weapons and finally, lethal force, which is only authorized where there is a threat of death or grievous bodily harm. At any given point, members are taught they may tactically reposition to de-escalate a situation or to better assess the risk.

As diagrammed, the IM/IM is not a linear structure such that one response necessarily leads to another. Rather, the IM/IM is intended to train RCMP members with respect to the need to constantly assess the risk and potential for harm and to respond at an appropriate level.

The IM/IM model assists RCMP members to categorize suspects into levels of anticipated levels of resistance based on threat cues such as *body tension, tone of voice, body position and facial expression to ready them to use an appropriate response option*. These threat cues may indicate the potential for a suspect to display more or less resistant behaviours.

The appropriate level of intervention must be determined by what the RCMP member knew, or should have known, as well as the information available to the member when he or she arrives on scene. RCMP members are trained that this assessment of risk is conducted using the CAPRA problem-solving model. CAPRA is an acronym standing for the stages included in this problem solving model: Client/Acquiring and Analysing Information/Partnerships/Response/Assessment and Continuous Improvement.²⁰⁵ These factors are the basis upon which a member will make the assessments called for in the IM/IM. Members are required to assess the risk posed by a subject, followed by a determination of the appropriate level of response, which may include the use of force. Fundamental to the RCMP CAPRA model are the concepts of finding alternative means to resolve an issue, and preventing crime. As practitioners of CAPRA, RCMP members are encouraged to prevent.²⁰⁶

... the problem from occurring or from escalating by addressing contributing factors to the broad problem rather than specific incidents or manifestations of the issue.

In formulating the course of action to be followed, the members must next consider the behaviour of the subject. The IM/IM lists subject behaviours as ranging from co-operative to non co-operative to resistant to combative to posing the threat of death or grievous bodily harm.

In general, once a member makes a determination as to the behaviour and risk posed by a subject, he or she must then choose an appropriate response. Early intervention options include officer presence, verbal intervention and physical control. As the threat increases, the member may turn to greater levels of physical force, intermediate weapons (such as OC spray²⁰⁷ or CEW), impact weapons²⁰⁸ (such as the baton) and finally the application of deadly force.

Verbal interventions and tactical repositioning occur regardless of the level of risk to assist the member in maintaining control of the situation, de-escalating any confrontation, and ensuring maximal safety for all concerned. This is consistent with the underlying principles of the IM/IM, which stress the safety of the public and the member and define the best strategy as the least amount of intervention

²⁰⁵ It will be noted in the above diagram that CAPRA is central to the IM/IM.

²⁰⁶ <http://www.rcmp-grc.gc.ca/ccaps-spcca/capra-eng.htm>

²⁰⁷ OC spray is commonly known as pepper spray.

²⁰⁸ As noted, the category of impact weapons was removed from the RCMP characterization of weaponry in May 2009.

to manage a risk. Accordingly, the best intervention causes the least amount of harm.

The version of CEW policy in effect at the time of the death of Mr. Dziekanski (October 2007) was issued in August, 2007. This policy required members to *take control of the subject as soon as possible during a CEW probe-mode deployment.*²⁰⁹ The version added the concept of *excited delirium*²¹⁰ (which was removed from RCMP documentation as of January 2009) and informed members that:

*If you suspect that an individual is experiencing an excited delirium medical emergency, when possible create a response strategy before deploying the CEW and include Emergency Medical Services (EMS) attendance in your strategy.*²¹¹

The RCMP members had a number of response options available to them according to the IM/IM. I have no evidence to suggest that any of these response options, except for the use of the CEW, were seriously considered. Briefly, these included:

1. Tactical Repositioning

Tactical repositioning allows police to remove themselves from confronting the suspect pending a greater tactical advantage or obtaining more complete information. As with verbal intervention (below), tactical repositioning is an ever-present and fluid response option. I note no evidence of the response option of tactical repositioning being utilized during the YVR incident.

2. Officer Presence

The very presence of a uniformed police officer can have the effect of de-escalating or escalating a given situation.

The RCMP members attended the scene of the complaints. Initially, Mr. Dziekanski appeared calm but within seconds, he put his hands in the air and walked away from the police officers. In the Pritchard video, Mr. Dziekanski can be seen looking at his luggage, while Corporal Robinson can be seen directing Mr. Dziekanski to the counter area, which is the direction taken by Mr. Dziekanski. While open to interpretation, the gesture by Mr. Dziekanski of putting his hands in the air and moving to the location as directed by Corporal Robinson may be an act of compliance, and not hostility.

The assumption by the responding members appears to have been that officer presence was not having an effect on Mr. Dziekanski because Mr. Dziekanski

²⁰⁹ OM 17.7.3.1.4, 2007-08-08.

²¹⁰ OM 17.7.3.2. Defined at 17.7.2.7, 2007-08-08.

²¹¹ OM 17.7.3.2.3, 2007-08-08.

walked away from them. Because the situation was immediately escalated it cannot be known whether, given additional time, officer presence would have had the desired effect and defused the situation.

3. Verbal Intervention

The RCMP members attempted to speak to Mr. Dziekanski, and he to them, but since neither spoke the language of the other communication was difficult. Absent a Polish interpreter neither could verbally understand the needs of the other. Given that Mr. Dziekanski shouted *Polizia!* Several times, it is apparent that he understood them to be police officers.

It is unfortunate that more time was not spent by the members to use gestures and sign language to convey to Mr. Dziekanski that he should remain calm and that they had the situation in hand. Certainly, the police needed to take control of the scene and ensure that Mr. Dziekanski was not able to effect further damage to property or to any person present.

Further efforts by the police to calm Mr. Dziekanski may or may not have had the desired effect, but the fact that they were not attempted helped ensure that the interaction would escalate.

4. Empty Hand Control

Empty hand controls include “soft” empty hand control processes such as joint locks (for example, applying leverage to the suspect’s arm or leg joint(s) to create immobility), pain compliance, creating imbalance in the suspect and handcuffing the suspect.

This was an option that could have been used by the members without resorting to any higher level of force. The problem with such empty hand control (soft) is that to wrestle a person of Mr. Dziekanski’s size (Mr. Dziekanski was approximately 177 cm tall [5’ 11”] and weighed 86 kg [190 lbs]) and subdue and handcuff him, the risk is much greater that either Mr. Dziekanski or one of the RCMP members would have been injured. This risk was not specifically articulated by the members in their statements.

A second level of empty hand control, known as “hard” hand control, was also open to the members. Hard empty hand control processes include punches, kicks and carotid holds. None of these were used against Mr. Dziekanski. In their statements, none of the members discussed in detail the use or lack of use of the empty hand control processes.

5. Intermediate Devices

The RCMP's IM/IM model continues to describe intermediate devices as including OC spray and the CEW. The model, as it existed at the time of the YVR incident, then moved upwards to impact weapons (such as the baton). For some time now, one of my primary concerns has been the positioning of the CEW on the IM/IM as a (lower range) intermediate device akin to OC spray, as opposed to situating it as an impact weapon (and therefore higher in the range of devices) and taking into account the potential for greater harm to be caused by the CEW. Characterizing the CEW as being higher on the scale of intermediate devices advises RCMP members that the CEW is considered to possess higher potential lethality as a weapon, and therefore is not to be resorted to absent clear justification for its use.

My reasoning for altering the position of the CEW is that police officers do not appear to adequately comprehend the nature of the CEW as a weapon, i.e. the extreme level of pain inflicted nor the possibility that the CEW may have a causal relationship in the death of the recipient of the charge, because the training provided to them does not require them to take such analyses into account at the time of deploying the CEW.

I note that during the YVR incident, Constable Millington resorted to the CEW (as noted, he was the only member carrying a CEW that evening). Simultaneously, both Corporal Robinson and Constable Bentley drew their ASP batons (Constable Bentley actually extended his baton). Constable Rundel, presented with the same scenario unfolding before him as the other responding members, opted not to resort to any weapon at that point.

It has been demonstrated that use of a CEW as opposed to a firearm, has saved lives. As I have previously stated, the CEW does have a place in the RCMP's arsenal of response options. The exercise of appropriate discretion is crucial in the decision to use the CEW; however, the key is that proper training is necessary to assist police officers in applying judicious discretion in the decision to deploy the CEW.

6. Lethal Force

The IM/IM stipulates that lethal or deadly force is to be used only in the presence of exigent circumstances where the intent of the member is to cause death in order to prevent death or grievous bodily harm to the member or a member of the public. No such threat existed in this situation. I accept that the responding members did not intend to cause the death of Mr. Dziekanski and that the RCMP does not identify the CEW as a use of force mechanism which may be used in a manner intending to cause death.

In the YVR incident, the members knew from the radio dispatch that a male of approximately 50 years of age was acting in a violent manner by throwing his luggage and throwing chairs through windows (later found not to be true). As the members arrived they were also told that the male did not speak English. They noted as they approached him that he appeared distraught and agitated.

The Commission recognizes that in any confrontation the dynamics of the situation can change very quickly and consequently the police must be prepared to take the actions they believe at that moment are appropriate. Depending on the urgency of the situation and the circumstances involved, the entire assessment, risk identification and characterization, and the decision as to which level of force best suits the situation can take place in the space of mere seconds.

Appendix V – Investigators’ Notebooks

RCMP policy speaks to the importance of investigators’ notebooks and the need to maintain them in a complete and timely manner:²¹²

2. General

2. 1. The member's notebook is a fundamental investigative tool. It is essential that notebooks be properly compiled, complete and accurate in order to support investigations, corroborate evidence and increase the credibility of a member's testimony in court. Properly recorded entries (notes) may also prove to be invaluable in substantiating information years after an investigation.

2. 2. You may use notebook entries to refresh your memory for court if the notes were made at or near the time of the occurrence.

2. 3. If you are performing operational duties, use and maintain an up-to-date notebook. Record the date for any operational assistance in your notebook.

2. 4. To reduce duplication in minor cases, notes may be made directly on the continuation report, form 1624.

3. Types of Entries

3. 1. Take notes as events occur or at the first available opportunity. If possible, make your entries in black or dark ink, neat, legible, concise, informative and well organized. While the specific contents of your notebook will depend on the type and complexity of the investigation, your notes should contain:

3. 1. 1. your observations and actions;

3. 1. 2. the collection, identification and handling of evidence;

3. 1. 3. the grounds to support detention, arrest or search;

²¹² OM 25.2.2.1.

3. 1. 4. *any cautions or warnings given to persons and details of the circumstances;*

3. 1. 5. *statements by suspects or witnesses, verbatim if possible;*

3. 1. 6. *the demeanor and emotional and physical state of persons, particularly when they make statements; and*

3. 1. 7. *personal information of any person involved in the investigation, excluding confidential sources.*

Appendix W – BC Justice Statement

Friday, December 12, 2008

CRIMINAL JUSTICE BRANCH CLEAR STATEMENT

Robert Dziekanski was a 40-year-old Polish man, who was the only child of Zophia Cisowski. Ms. Cisowski had immigrated to Canada from Poland in 1999 and settled in Kamloops. In 2007, arrangements were made for Mr. Dziekanski to immigrate to Canada and reside with his mother in Kamloops.

In the time preceding his departure, friends of Mr. Dziekanski confirmed that he was very apprehensive about leaving Poland to start a new life in Canada. He was also extremely anxious and fearful about the prospect of flying, as he had never been in an airplane before. An earlier flight had to be cancelled and rescheduled as a result of his fear of flying.

On the morning of his departure, October 13, 2007, Mr. Dziekanski was extremely anxious and afraid of the flight. He had not eaten or slept well in the days preceding his flight. When friends arrived at his home at approximately 3:00 a.m. to take him to the airport, he indicated that he was not going to fly. He spoke with his mother by telephone, using the speakerphone function, maintaining that he was not going to fly. He was described to be in a highly fearful and panicked state, bordering on hysterical. One friend described him sitting or lying on the floor physically shaking and becoming physically ill. Another friend also described him hanging on to a radiator on the verge of becoming hysterical. Mr. Dziekanski eventually calmed down approximately 20 minutes prior to his departure to the airport. All the witnesses were consistent in their description of Mr. Dziekanski's emotional state and the fact that he took a small container with him as he rode in the car to the airport, in case he became ill.

At the airport Mr. Dziekanski continually stated that he was afraid of flying; however, he boarded the airplane and departed for Frankfurt at 6:20 a.m. He arrived in Frankfurt at approximately 7:55 a.m. and departed once again at 12:15 p.m. on a flight to Vancouver (YVR). He arrived at YVR at what would have been 12:25 a.m. Polish time the following day, or 3:25 p.m. Vancouver time. His travel time to this point would have been approximately 21 hours. There was no information available to investigators regarding Mr. Dziekanski's emotional state during his flight to Vancouver from Frankfurt.

Video surveillance displayed Mr. Dziekanski passing through the primary checkpoint at 4:05 p.m. Vancouver time and into the baggage carousel area at 4:10 p.m. He had been instructed by his mother in their earlier conversation to wait for her at the baggage carousel; however, she was not aware that this area was not accessible to members of the public.

Mr. Dziekanski was observed by video surveillance briefly at 9:25 p.m. and 9:31 p.m.; it is not known what he did in the Canadian Border Services Agency (CBSA) area in the interim until he presented himself to the CBSA "Point" officer at 10:40 p.m. Mr. Dziekanski was directed to the secondary inspection area where he was processed by staff. Mr. Dziekanski did not speak or understand English, but they were able to ascertain through non-verbal communication that he had been sitting or sleeping on one of the chairs in the luggage carousel area for more than six hours. This may account for the time period between 4:10 p.m. and 9:31p.m. Staff located his luggage at one of the baggage counters and they were able to process his travel documents.

At 12:45 a.m. on October 14, 2007, CBSA Officers finished processing Mr. Dziekanski and escorted him to the hallway area which leads to the international arrivals area. He exited through the glass doors at 12:53 a.m. and sat down on the chairs on the public side. It would have been over 30 hours since he began his journey to Canada.

To this point, the investigation revealed that Mr. Dziekanski had personal contact with YVR Customer Service Representatives and CBSA Officials. They described him as pale, nervous, confused, frustrated and sweating profusely. One officer believed he was under the influence of alcohol.

Shortly after 1:00 a.m., Mr. Dziekanski began to display bizarre and threatening behaviour. Several civilians in the international arrivals area called 911 and also spoke with YVR security. Mr. Dziekanski was observed to bang on the glass doors in an attempt to re-enter the secured area. He managed to gain entry and placed his baggage and some airport furniture in the exit way keeping the doors open. He then began to throw items around including furniture, a computer, and a wooden chair against a window in an attempt to break it. At times he would calm down for a brief period and then become agitated once again. One civilian began video recording portions of the incident after Mr. Dziekanski had been posturing with furniture and he recorded several, but not all aspects of the incident. There were five civilians, three airline staff, and two YVR security staff in the area observing these events.

All the witnesses were consistent in describing Mr. Dziekanski's emotional state and actions prior to the arrival of police. They used terms such as aggressive, crazy, totally enraged, heightened state of pure panic, really upset to the point of

delusional, on drugs and intoxicated. He was observed to be sweating profusely throughout the incident.

At approximately 1:25 a.m., four uniformed Richmond RCMP members, Constable Millington, Constable Bentley, Constable Rundel and Corporal Robinson, responded to the call to the international arrivals area of YVR. They had been advised by dispatch that an intoxicated male was at the international arrivals area of YVR *throwing luggage around*. Approximately two minutes after the initial call they were further advised by dispatch that the same male was now throwing chairs through glass windows in the same area. When the officers arrived at the reception area witnesses advised them that Mr. Dziekanski was freaking out, drunk and did not speak English.

Constable Millington was asked by another officer if he had his taser. He responded yes. When Constable Millington entered the secured area his taser was still in its holster. This was corroborated by independent evidence.

At this juncture the evidence of independent civilian witnesses, police officers and digital video were materially consistent in relation to the events which followed.

The officers attempted to talk to Mr. Dziekanski and communicate with him with hand signals for several seconds. He momentarily calmed down and dropped his arms to his side.

He then became annoyed or frustrated, threw his arms up and moved off to the right. While doing so, he grabbed a stapler from a counter and held it out in his hand. On the video Constables Bentley and Rundel and Corporal Robinson suddenly and simultaneously moved backwards and away from Mr. Dziekanski when he grabbed the object from the counter. The video shows that he was holding a stapler in his right hand in the open position.

At this point, Mr. Dziekanski was 'tasered' in the probe mode by Constable Millington. Constable Millington deployed the taser two more times in probe mode, as the taser appeared to be malfunctioning. Constable Millington determined that the taser was not functioning properly because of a "clacking" sound indicating that the probes were not making proper contact, resulting in an incomplete electrical circuit. This is referred to as "non-dynamic hits or deployments."

One taser probe was later located in the lower portion of Mr. Dziekanski's shirt, which is indicative that only one of the two probes remained in contact with his body. At autopsy, an abrasion was located on Mr. Dziekanski's central chest area consistent with having been caused by a taser probe; a second electrode mark was not apparent, although other abrasions were present on

Mr. Dziekanski's chest and abdomen, one of which may have been an electrode mark.

After Mr. Dziekanski went to the ground he continued to struggle and resist despite the efforts of three officers to bring him under control and handcuff him. Constable Millington manoeuvred himself to the area around Mr. Dziekanski's shoulders and deployed the taser two more times in push stun mode, as Mr. Dziekanski continued to struggle and resist.

It took approximately 30 seconds after the last taser deployment to restrain and handcuff Mr. Dziekanski. The officers applied force to Mr. Dziekanski while he was on the ground in the prone position for at least 45 seconds. The force included Corporal Robinson pushing his knee/shin down in the shoulder/neck area of Mr. Dziekanski. Several independent witnesses commented in statements on how Mr. Dziekanski was able to resist and struggle with police while on the ground.

Once handcuffed behind his back, Mr. Dziekanski appeared to go limp and become unconscious. Mr. Dziekanski's pulse and breathing were periodically checked, and both were normal in the circumstances; however, upon the arrival of firefighters and paramedics, no pulse could be found. Shortly thereafter, Mr. Dziekanski went into cardiac arrest and died.

A use of force expert from a police department outside the RCMP reviewed the police investigation file in this case. In his report the expert concluded that the actions of the officers appeared to be consistent with the Incident Management/Intervention Model used by the RCMP, as they represented a reasonable escalation and de-escalation of force based upon the actions of the subject. This RCMP model defines the appropriate parameters of use of force by police. The expert also concluded that the actions of the officers were consistent with RCMP policy and training.

CAUSE OF DEATH

An autopsy was conducted on Mr. Dziekanski. The forensic pathologist observed the presence and signs of chronic alcohol abuse. However, toxicology tests showed that Mr. Dziekanski did not have any drugs or alcohol in his system at the time of his death. This raised the possibility that alcohol withdrawal may have played a role in his behaviour before and during his dealings with police.

The forensic pathologist concluded that Mr. Dziekanski's death was as a result of *Sudden Death Following Restraint*. He found no definite cause of death, which is typical of these types of incidents. Sudden death following restraint cases usually involve individuals who exhibit combative and bizarre behaviour. As a result, these cases often involve law enforcement personnel, but some cases include medical personnel and occasionally ordinary citizens. Sudden death following restraint has been associated with virtually all forms of physical

restraint, most instances of which did not involve the use of a taser. Before the taser was in use in Canada, sudden deaths following restraint were not uncommon.

In the pathologist's opinion, the use of the taser did not directly cause the cardiac arrest. Two other forensic pathologists concurred with that view. The combined opinions of three pathologists identified several factors which could have contributed to the cardiac arrest causing death; these include heart disease due to chronic alcohol abuse, an agitated state of delirium, the stress of the physical restraint worsened by the deployment of the taser, a decreased ability to breathe as a result of being restrained in the prone position for part of the struggle, and alcohol withdrawal.

Two medical experts in the area of addiction psychiatry and alcohol-related disease also reviewed this case. They identified a number of factors which could explain Mr. Dziekanski's bizarre and aggressive behaviour at YVR. Both experts concluded that Mr. Dziekanski was exhibiting behaviour consistent with the medical syndrome of delirium prior to death. The onset of the delirium could be explained by a number of factors including alcohol withdrawal, lack of sleep; dehydration, and a high degree of anxiety. These factors would have placed Mr. Dziekanski at increased risk for sudden death.

CHARGE ASSESSMENT POLICY

In conducting a charge assessment, Crown counsel must fairly, independently and objectively examine all the available evidence to determine:

1. First, whether there is a substantial likelihood of conviction; and, if so,
2. Whether a prosecution is required in the public interest.

A substantial likelihood of conviction exists where Crown counsel is satisfied there is a strong, solid case of substance to present to the Court. In determining whether this standard is met Crown counsel must determine:

1. What material evidence is likely to be admissible; and
2. The weight likely to be given to the admissible evidence; and the likelihood that viable, not speculative, defences will succeed.

APPLICATION OF THE LAW

The possible offences under the *Criminal Code* that were reviewed for the purposes of a charge assessment in this case were assault, assault with a weapon, and manslaughter.

Furthermore, the Branch is of the view that the available evidence would support the finding of both factual and legal causation at law. Simply stated, the officers' efforts to restrain and take physical control of Mr. Dziekanski were a contributing cause of his death. What remains is the consideration of the available

justifications or defences at law which may absolve the officers from criminal responsibility.

The most relevant sections of the *Criminal Code* relating to lawful justifications, or defences considered in this assessment were sections 25 and 26 of the Code, which permit a peace officer to use reasonable force in the proper execution of his or her duties. Secondary provisions that were considered were sections 34 and 37, which set out the defences of self-defence and using force to prevent an assault.

According to decided cases, a peace officer is not expected to measure the use of force with exactitude, particularly in circumstances which may result in serious injury to officers or members of the public.

DECISION

The charge assessment in this case was undertaken and reviewed by three levels of Executive Management within the Criminal Justice Branch. The reviews were unanimous in their conclusion.

There is a substantial body of independent evidence which supports that the officers in question were lawfully engaged in their duties when they encountered Mr. Dziekanski, and the force they used to subdue and restrain him was reasonable and necessary in all the circumstances.

In light of this independent evidence, there is not a substantial likelihood of conviction in this case for any of the offences considered; in fact, the available evidence falls markedly short of this standard.

Accordingly, the Criminal Justice Branch will not be approving any charges in relation to this very tragic event.

CRIMINAL CODE OF CANADA PROVISIONS PROTECTION OF PERSONS ACTING UNDER AUTHORITY

25. (1) Every one who is required or authorized by law to do anything in the administration or enforcement of the law

- (a) as a private person,
- (b) as a peace officer or public officer,
- (c) in aid of a peace officer or public officer, or
- (d) by virtue of his office,

is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.

(2) Where a person is required or authorized by law to execute a process or to carry out a sentence, that person or any person who assists him is, if that person acts in good faith, justified in executing the process or in carrying out the sentence notwithstanding that the process or sentence is defective or that it was issued or imposed without jurisdiction or in excess of jurisdiction.

(3) Subject to subsection (4), a person is not justified for the purposes of subsection (1) in using force that is intended or is likely to cause death or grievous bodily harm unless he believes on reasonable grounds that it is necessary for the purpose of preserving himself or any one under his protection from death or grievous bodily harm.

(4) A peace officer who is proceeding lawfully to arrest, with or without warrant, any person for an offence for which that person may be arrested without warrant, and every one lawfully assisting the peace officer, is justified, if the person to be arrested takes flight to avoid arrest, in using as much force as is necessary to prevent the escape by flight, unless the escape can be prevented by reasonable means in a less violent manner. [R.S., c.C-34, s.25.]

EXCESSIVE FORCE

26. Every one who is authorized by law to use force is criminally responsible for any excess thereof according to the nature and quality of the act that constitutes the excess. [R.S., c.C-34, s.26.]

Appendix X – Principles of Sir Robert Peel

The nine principles by Sir Robert Peel:

1. The basic mission for which the police exist is to prevent crime and disorder.
2. The ability of the police to perform their duties is dependent upon public approval of police actions.
3. Police must secure the willing co-operation of the public in voluntary observance of the law to be able to secure and maintain the respect of the public.
4. The degree of co-operation of the public that can be secured diminishes proportionately to the necessity of the use of physical force.
5. Police seek and preserve public favour not by catering to public opinion but by constantly demonstrating absolute impartial service to the law.
6. Police use physical force to the extent necessary to secure observance of the law or to restore order only when the exercise of persuasion, advice and warning is found to be insufficient.
7. Police, at all times, should maintain a relationship with the public that gives reality to the historic tradition that the police are the public and the public are the police; the police being only members of the public who are paid to give full-time attention to duties which are incumbent on every citizen in the interests of community welfare and existence.
8. Police should always direct their action strictly towards their functions and never appear to usurp the powers of the judiciary.
9. The test of police efficiency is the absence of crime and disorder, not the visible evidence of police action in dealing with it.

The nine principles by Sir Richard Mayne:

1. To prevent crime and disorder, as an alternative to their repression by military force and severity of legal punishment.
2. To recognize always that the power of the police to fulfill their functions and duties is dependent on public approval of their existence, actions and behaviour and on their ability to secure and maintain public respect.
3. To recognize always that to secure and maintain the respect and approval of the public means also the securing of the willing co-operation of the public in the task of securing observance of laws.
4. To recognize always that the extent to which the co-operation of the public can be secured diminishes proportionately the necessity of the use of physical force and compulsion for achieving police objectives.
5. To seek and preserve public favour, not by pandering to public opinion, but by constantly demonstrating absolutely impartial service to law, in complete independence of policy, and without regard to the justice or injustice of the substance of individual laws, by ready offering of individual service and friendship

to all members of the public without regard to their wealth or social standing, by ready exercise of courtesy and friendly good humour, and by ready offering of individual sacrifice in protecting and preserving life.

6. To use physical force only when the exercise of persuasion, advice and warning is found to be insufficient to obtain public co-operation to an extent necessary to secure observance of law or to restore order, and to use only the minimum degree of physical force which is necessary on any particular occasion for achieving a police objective.

7. To maintain at all times a relationship with the public that gives reality to the historic tradition that the police are the public and that the public are the police, the police being only members of the public who are paid to give full-time attention to duties which are incumbent on every citizen in the interests of community welfare and existence.

8. To recognize always the need for strict adherence to police-executive functions, and to refrain from even seeming to usurp the powers of the judiciary of avenging individuals or the State, and of authoritatively judging guilt and punishing the guilty.

9. To recognize always that the test of police efficiency is the absence of crime and disorder, and not the visible evidence of police action in dealing with them.

Appendix Y – Summary of Findings and Recommendations

Findings:

1. Finding

The RCMP members involved in the arrest of Mr. Dziekanski were in the lawful execution of their respective duties and were acting under appropriate legal authority.

2. Finding

In light of the information possessed by the RCMP members responding, the decision to approach Mr. Dziekanski to deal with the complaints was not unreasonable. At any point a member of the travelling public or an employee at YVR could have happened upon Mr. Dziekanski. As evidenced by the multiple calls to 911, it was incumbent upon the RCMP members to ensure a safe environment for the public and employees using the airport facility and to halt the disturbance being caused by Mr. Dziekanski.

3. Finding

To ensure a coordinated approach to Mr. Dziekanski, Corporal Robinson should have taken control and directed the other responding members to ensure that each was aware of the intended response and to ensure that each communicated with the others as the events unfolded.

4. Finding

Prior to deploying the CEW, Constable Millington should have issued the required warning/challenge to Mr. Dziekanski as required by RCMP policy, notwithstanding the fact that Mr. Dziekanski appeared not to understand the English language.

5. Finding

Because no significant attempts were made by the RCMP members present to communicate with Mr. Dziekanski, to obtain clarification of information pertaining to Mr. Dziekanski's situation, or to communicate among themselves, deployment of the CEW by Constable Millington was premature and was not appropriate in the circumstances.

6. Finding

Constable Millington cycled the CEW multiple times against Mr. Dziekanski when those subsequent cycles were not known by him to be necessary for the control of Mr. Dziekanski.

7. Finding

The multiple cycles of the CEW against Mr. Dziekanski when no significant effort was made to determine the effect of the CEW on Mr. Dziekanski was an inappropriate use of the CEW.

8. Finding

Corporal Robinson did not adequately monitor Mr. Dziekanski's breathing and heart rate.

9. Finding

Because Corporal Robinson did not know the qualifications of Mr. Enchelmaier, he should not have allowed him to provide first aid or actively monitor Mr. Dziekanski's condition. That task should have been performed by the RCMP members themselves. Corporal Robinson, therefore, failed to provide adequate medical care to Mr. Dziekanski.

10. Finding

The handcuffs should have been removed from Mr. Dziekanski when the members recognized that he was unconscious and in distress and no immediate threat to the members was perceived. At a minimum, they should have been removed immediately upon the initial request of medical personnel.

11. Finding

The failure of Corporal Robinson to take control of the scene, communicate with and direct the more junior and inexperienced members negatively manifested itself throughout the interaction with Mr. Dziekanski.

12. Finding

I do not accept as accurate any of the versions of events as presented by the involved members because I find considerable and significant discrepancies in the detail and accuracy of the recollections of the members when compared against the otherwise uncontroverted video evidence. In their statements, the members indicated in responses to numerous questions that they could not recall the detail of the events as they unfolded. The fact that the members met together and with the SRR prior to providing statements causes me to question further their versions of events.

13. Finding

The conduct of the responding members fell short of that expected of members of the RCMP by the Canadian public and by RCMP policies. The members demonstrated no meaningful attempt to de-escalate the situation, nor did they approach the situation with a measured, coordinated and appropriate response.

14. Finding

The members failed to adequately comply with their training in CAPRA and IM/IM to assess the behaviour of Mr. Dziekanski, and therefore the risk posed by him. As a result, the level of intervention went beyond what was necessary and acceptable, contrary to the RCMP's IM/IM and CAPRA model.

15. Finding

Because the RCMP positions the CEW as an intermediate weapon and trains its members that it is appropriate to use the CEW in response to low levels of threat because it is a relatively less harmful means of controlling a subject, the responding members did not fully appreciate the nature of the CEW as a weapon and it was resorted to too early.

16. Finding

Although IHIT did engage the services of a use of force expert, that expert was not provided with adequate direction in terms of the questions to be considered, the scope of his work or the terms of reference he was to consider.

17. Finding

Corporal Robinson, as an involved member, should not have been allowed to attend the IHIT briefing held at the Richmond Detachment on October 14, 2007. Sergeant Attew failed to ensure that only appropriate RCMP members were present during the briefing.

18. Finding

The responding RCMP members meeting alone at the YVR sub-detachment office following the death of Mr. Dziekanski was inappropriate.

19. Finding

An SRR should not have been permitted to meet alone with Constable Millington prior to the IHIT investigator.

20. Finding

If for no other reason than to be fair to the responding members and give them an opportunity to address the significant and readily apparent discrepancies between their versions of events and the video, it would have been appropriate to provide the responding members with an opportunity to view the Pritchard video prior to taking further statements from them.

21. Finding

The responding members did not keep adequate notes of the incident involving Mr. Dziekanski.

22. Finding

No bias or partiality toward the involved RCMP members was present in the IHIT investigation of the death of Mr. Dziekanski.

23. Finding

The RCMP should have released certain information to the media which would have served to clarify information pertaining to the death of Mr. Dziekanski and correct erroneous information previously provided without compromising the IHIT investigation.

Recommendations:**1. Recommendation**

The RCMP should review the CEW quality assessment program as currently in effect and consider whether it should be enhanced to ensure that a high degree of confidence may be placed in the performance of in-service CEWs.

2. Recommendation

The RCMP should continue to be involved in and stay abreast of current independent research on the use and effects of the CEW.

3. Recommendation

Notwithstanding the fact that the RCMP has (as of January 2009) amended its policy such that the use of the CEW is to be used in response to a threat to officer or public safety as determined by a member's assessment of the totality of the circumstances being encountered, the RCMP should clarify for its members and the public what the appropriate circumstances for using the CEW are and what threat threshold will be utilized to assess the appropriateness of such use.

4. Recommendation

The RCMP should consider a review of its training to ensure that its members are well versed in the potentially dangerous nature of the weapon and to ensure that training provided to members assists them in appropriately assessing the circumstances in which deployment of the CEW is justified, bearing in mind the degree of pain inflicted on the subject during the CEW deployment and the potential outcome of such deployment.

5. Recommendation

The RCMP should consider designing and implementing training for its members in techniques to communicate with persons who cannot meaningfully communicate with them.

6. Recommendation

The RCMP should:

1. Amend its Conducted Energy Weapon (CEW) Usage Reporting Form (Form 3996), to require that information concerning a spark test be captured as part of the CEW usage reporting process (or include such requirement in the forthcoming Subject Behaviour/Officer Response data base); and

2. Edit its Operational policy to emphasize the importance of the spark test and clearly indicate that the spark test is mandatory to confirm proper functioning of the CEW.

7. Recommendation

RCMP detachment familiarization procedures should include a detailed review of available medical facilities and equipment.

8. Recommendation

The RCMP should review its processes and criteria with respect to the initiation of an internal investigation into the conduct of its members to ensure consistency of application across the country.

9. Recommendation

I reiterate my recommendation from my report on the Police Investigating Police (August 2009) that all RCMP member investigations involving death, serious injury or sexual assault should be referred to an external police force or provincial criminal investigation body for investigation. There should be no RCMP involvement in the investigation. If, however, the RCMP continues to investigate such matters, then I recommend that the RCMP implement clear policy directives that all investigations in which death or serious bodily injury are involved and which involve RCMP members investigating other police officers will be considered criminal in nature until demonstrated not to be.

10. Recommendation

If the protocol of SRR attendance is to continue, the RCMP should formalize the role of the SRR to provide clear policy and guidance to ensure that the SRR knows the bounds of his or her involvement and the required protocols with respect to such attendance, and that in all such cases the SRR not meet alone with a subject member in advance of being interviewed by an investigator.

11. Recommendation

I reiterate my recommendation in the Ian Bush decision (November 2007) that:

The RCMP develop a policy that dictates the requirement, timeliness and use of the duty to account that members are obliged to provide.

12. Recommendation

The RCMP should review its operational policies and procedures to ensure that, particularly in serious cases in which members investigate the actions of other members, processes are available to enable investigator awareness of the nature and depth of detail required during interviews.

13. Recommendation

The RCMP should take steps to ensure that members are aware of the importance of note taking, and that supervisors should be encouraged to regularly review the notes taken by their subordinates to ensure the quality of such documentation.

14. Recommendation

Given the proliferation of recording devices, it is anticipated that incidents in which RCMP members will seek to obtain private video or audio recordings will potentially occur more frequently in the future. Whether the police seize a video or audio recording of an event or obtain it on consent from a member of the public, the police must know and advise the public of the authority under which the video or audio recording is obtained. I recommend that the RCMP provide clarification for members with respect to obtaining video or audio recordings of an event.

15. Recommendation

I reiterate my recommendation in the Ian Bush decision that *[t]he RCMP develop a media and communications strategy specifically for police-involved shooting investigations that recognizes the need for regular, meaningful and timely updates to the media and to the public. In addition, the media and communications strategy should include a publicly available general investigative outline of the steps to be taken and the anticipated timeline for each step.* I also expand my recommendation to cover all in-custody death investigations.

16. Recommendation

The RCMP should immediately conduct a review of its policies and training regimen to ensure that members are adequately trained with respect to recognizing the risks inherent in, and signs of, positional asphyxia and in taking steps to mitigate those risks.



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