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April 20, 2010

VIA EMAIL

PRIVILEGED & CONFIDENTIAL

Superintendent W.S. (Wade) Blizard
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C/Supt. C.J. Callens

APR 29 2010

Deputy Criminal Operations
Officer (Contract) "E" Division

HA to file

Dear Sir:

Re: Thomas R. Braidwood, Q.C. Hearing and Study Commission (the "Inquiry")

On February 17, 2010, you requested our opinion concerning several questions. In general terms, the questions concern the testimony given by four members of the Royal Canadian Mounted Police (the "RCMP") – Constable Bill Bentley ("Cst. Bentley"), Constable Kwesi Millington ("Cst. Millington"), Corporal Monty Robinson ("Cpl. Robinson") and Constable Gerry Rundel ("Cst. Rundel") (collectively, the "Officers") – at the Inquiry in February and March 2009. The Inquiry was constituted pursuant to the *Public Inquiry Act*, S.B.C. 2007, c. 9 (the "*Public Inquiry Act*") to inquire into and report on the death of Robert Dziekanski at Vancouver International Airport ("YVR") on October 14, 2007.

Your specific questions were set out in a letter from Chief Superintendent C.J. Callens dated February 15, 2010 and can be summarized as follows:

- (a) Does the testimony of the Officers at the Inquiry constitute perjury under s. 131(1) of the *Criminal Code*, R.S.C. 1985, c. C-46 (the "*Criminal Code*")?
- (b) Does the testimony of the Officers at the Inquiry violate ss. 39(1) or 47 of the *Royal Canadian Mounted Police Regulations, 1988*, S.O.R./88-361 (the "*Code of Conduct*")?

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Vancouver, Calgary, Toronto, Ottawa, Montréal, Québec and London, England

Sgt. Chris BRIDGE
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- (c) If the answer to question (b) is "yes", would s. 13(3) of the *Public Inquiry Act* preclude disciplinary proceedings under the *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. R-10 (the "*RCMP Act*") relating to breaches of the *Code of Conduct*?

We answered question (c) by letter dated February 23, 2010. That letter also addresses the limitation period under the *RCMP Act* for the commencement of any disciplinary proceedings against the Officers by reason of their testimony at the Inquiry.

I. Conclusion

Based on our review of the materials with which you have provided us, the testimony of the Officers at the Inquiry does not likely amount to perjury under s. 131(1) of the *Criminal Code*. Nor does it violate the *Code of Conduct*. While there is some discord between the Officers' testimony, their notes, their statements to investigators, the testimony of eyewitnesses and other evidence, we believe it is far from clear that this discord reflects any intention on the part of the Officers to mislead the Inquiry, or recklessness in that regard. It more likely reflects:

- (a) the frailties of human memory, considering particularly the extremely short timeline for the events at YVR about which the Officers testified;
- (b) the fact that the Officers' initial recollections of the events at YVR was flawed, owing to the intense circumstances in which they made their observations and the impact of Mr. Dziekanski's death on the Officers and/or to efforts by the Officers to maximize their justification for the use of force vis-à-vis Mr. Dziekanski; and
- (c) the Officers' use, in accordance with their training, of specialized terms (e.g., "combative") in their testimony without adequate explanation as to the meaning of those terms.

II. Relevant statutory provisions

A. *Criminal Code* s. 131

131. (1) Subject to subsection (3), every one commits perjury who, with intent to mislead, makes before a person who is authorized by law to permit it to be made before him a false statement under oath or solemn affirmation, by affidavit, solemn declaration or deposition or orally, knowing that the statement is false.

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(2) Subsection (1) applies, whether or not a statement referred to in that subsection is made in a judicial proceeding.

B. Code of Conduct ss. 39 and 47

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.

...

47. A member shall not knowingly neglect or give insufficient attention to any duty the member is required to perform.

III. Background facts

The following facts are drawn from testimony at the Inquiry and documents issued in connection with the Inquiry, and appear to be uncontroversial in that context.

A. Mr. Dziekanski and his arrival at YVR

Mr. Dziekanski was born on April 15, 1967. He was 40 years of age at the time of his death on October 14, 2009. He spoke Polish and some Russian, but no English. An autopsy disclosed that Mr. Dziekanski's condition was consistent with chronic alcoholism.

Mr. Dziekanski arrived at YVR at approximately 3:20 p.m. Pacific Daylight Time ("PDT") on October 13, 2007. He had departed from Katowice, Poland at 6:20 a.m. Central European Time on October 13, 2007 (8:20 p.m. PDT on October 12, 2007), connecting in Frankfurt, Germany en route to YVR.

When Mr. Dziekanski arrived at YVR, he was greeted at the Primary Inspection Line (the "PIL") of the Canada Border Services Agency ("CBSA"), where he was referred to a Translation Guide to complete his Canada Customs form.

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After being processed by Monica Kullar, who was the CBSA officer posted at the PIL, Mr. Dziekanski was sent to Immigration Secondary to have his landing documents processed and to Customs Secondary.

Mr. Dziekanski did not collect his baggage from carousel 23, to which it had been routed. At 5:15 p.m., Lufthansa employee Julene Widiner removed the baggage and placed it at the Lufthansa counter.

At 10:33 p.m. -- more than seven hours after his initial arrival -- Mr. Dziekanski approached CBSA officer Kal Bharya. Officer Bharya and another CBSA officer escorted Mr. Dziekanski to Customs Secondary at 10:51 p.m., where Mr. Dziekanski's Confirmation of Permanent Residence was processed. Mr. Dziekanski left Customs Secondary at 12:40 a.m. on October 14, 2007.

After leaving Customs Secondary, Mr. Dziekanski entered the International Reception Lounge (the "IRL") at approximately 12:45 a.m. and then entered the public-side meet and greet area at approximately 12:55 a.m. Several minutes later, Mr. Dziekanski attempted to regain entry to the IRL and began to hit the door. At approximately 1:13 a.m., Lorne Meltzer, a limousine driver, opened the IRL door and Mr. Dziekanski re-entered the IRL.

B. Arrival of the Officers at YVR

On October 14, 2007, Cpl. Robinson was the duty supervisor for the RCMP's YVR detachment. He received a radio broadcast at approximately 1:26 a.m. informing him that there was an intoxicated male throwing luggage at YVR. Cpl. Robinson along with the other Officers reported to the scene. While driving to YVR, they received a radio update indicating that the intoxicated male was now breaking glass.

The Officers arrived at YVR at approximately 1:27 a.m. on October 14, 2007. Cst. Bentley, Cpl. Robinson and Cst. Rundel entered the public area of YVR together, while Cst. Millington entered immediately behind them. They approached Mr. Dziekanski in the IRL and interacted with him for approximately 25 seconds before Cst. Millington deployed a Taser weapon five times.

Mr. Dziekanski fell unconscious. Cst. Bentley radioed for an Emergency Health Services ("EHS") ambulance to provide medical support. At approximately 1:40 a.m., firefighters from Richmond Fire-Rescue arrived. EHS Basic Life Support paramedics arrived shortly thereafter. EHS Advanced Life Support paramedics then arrived. Mr. Dziekanski was officially pronounced dead at approximately 2:10 a.m. on October 14, 2007.

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C. The Inquiry

In February 2008, the government of British Columbia announced that a public inquiry would be called concerning the death of Mr. Dziekanski at YVR. Thomas Braidwood, Q.C. (the "Commissioner") was appointed as the sole commissioner of the Inquiry. The Inquiry's formal mandate was:

- (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; and
- (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.

D. Notices of Misconduct

Paragraph 21(1)(d) of the *Public Inquiry Act* authorizes the Commissioner to make a finding of misconduct against a person, if he considers that doing so is necessary in order to effectively and efficiently fulfill his duties. On April 30, 2009, the Commissioner issued documents entitled Notice of Misconduct to each of the Officers, by which documents the Commissioner indicated that he might make such findings.

Each of the Officers applied to the Commissioner to quash his respective Notice of Misconduct. When those applications were dismissed by the Commissioner on June 9, 2009, each of the Officers commenced a proceeding in the Supreme Court of British Columbia under the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, seeking to quash his Notice of Misconduct. Those proceedings were dismissed on June 15, 2009 by Mr. Justice Silverman: *Rundel v. British Columbia – Braidwood Commission*, 2009 BCSC 814. On December 29, 2009, the Court of Appeal for British Columbia dismissed appeals from Mr. Justice Silverman's decision: *Bentley v. Braidwood*, 2009 BCCA 604.

IV. Materials considered

You provided us with an extensive body of materials to review and consider in preparing our opinion. Those materials included video recordings, transcripts of the testimony of the Officers and other witnesses and the Officers' submissions at the Inquiry. Also included were the Officers' notes of the incident at YVR and their statements to Integrated Homicide Investigation Team ("IHIT") investigators charged with investigating the incident. The key

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materials we reviewed and considered with respect to each of the Officers are particularized below.

In addition, we met with you and Sgt. Tim Ancil on March 31, 2010, concerning the RCMP Incident Management Intervention Model ("TMIM") and the training received by the Officers in that connection.

We also reviewed and considered Chief Superintendent Richard Bent's November 5, 2007 e-mail to Assistant Commissioner Al MacIntyre, and the testimony of Chief Superintendent Bent, Assistant Commissioner MacIntyre and Superintendent Wayne Rideout in that regard (although we eventually concluded that this evidence was equivocal and therefore unhelpful).

A. Cst. Bentley

We reviewed the following materials:

- (a) Notes of Cst. Bentley (October 13, 2007);
- (b) Statement of Cst. Bentley to Cpl. Teboul (October 14, 2007);
- (c) Statement of Cst. Bentley to Cpl. Brassington (October 19, 2007);
- (d) Statement of Cst. Bentley to Cpl. Teboul (November 22, 2007);
- (e) Transcript of Cst. Bentley's testimony at the Inquiry (February 25-26, 2009);
and
- (f) Submissions of Cst. Bentley at the Inquiry (September 29, 2009).

B. Cst. Millington

We reviewed the following materials:

- (a) Notes of Cst. Millington (October 13, 2007);
- (b) Statement of Cst. Millington to Cpl. Brassington (October 14, 2007);
- (c) Statement of Cst. Millington to Cpl. Brassington (October 15, 2007);
- (d) Statement of Cst. Millington to Cpl. Brassington (October 19, 2007);
- (e) Transcript of Cst. Millington's testimony at the Inquiry (March 2-4, 2009);
and
- (f) Submissions of Cst. Millington at the Inquiry (September 29, 2009).

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C. Cpl. Robinson

We reviewed the following materials:

- (a) Notes of Cpl. Robinson (undated);
- (b) Statement of Cpl. Robinson to Cpl. Teboul (October 14, 2007);
- (c) Statement of Cpl. Robinson to Cst. Mulhall (October 19, 2007);
- (d) Statement of Cpl. Robinson to S/Sgt. Forster, (March 13, 2008);
- (e) Transcript of Cpl. Robinson's testimony at the Inquiry (March 23-25, 2009);
and
- (f) Submissions of Cpl. Robinson at the Inquiry (September 29, 2009).

D. Cst. Rundel

We reviewed the following materials:

- (a) Notes of Cst. Rundel (October 14, 2007);
- (b) Statement of Cst. Rundel to Sgt. Attew (October 14, 2007);
- (c) Statement of Cst. Rundel to Cst. Mulhall (October 19, 2007);
- (d) Transcript of Cst. Rundel's testimony at the Inquiry (February 23-25, 2009);
and
- (e) Submissions of Cst. Rundel at the Inquiry (June 16, 2009).

V. Our analysis of the Officers' testimony

In several aspects, the testimony of the Officers at the Inquiry (as well as video recordings and the testimony of other witnesses at the Inquiry) is at odds with their prior notes and statements to IHIT investigators concerning the incident at YVR. Below, we outline the major areas of evidentiary discord, then discuss the significance of the discord relative to the questions you have put to us.

A. Major areas of evidentiary discord

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1. *Whether the Officers discussed deployment of the Taser before confronting Mr. Dziekanski*

When initially interviewed by IHIT, all of the Officers denied having discussed the use or possession of a Taser upon entering YVR. Two of the Officers, Cst. Bentley and Cst. Millington, later stated to IHIT and testified at the Inquiry that they remembered having discussed whether anyone had a Taser as they approached Mr. Dziekanski. The other two Officers, Cpl. Robinson and Cst. Rundel, continued to deny having overheard or participated in this discussion. Three civilian witnesses testified at the Inquiry that they overheard such a discussion, which suggests that the discussion occurred.

2. *Whether Mr. Dziekanski raised a stapler high and swung it at the Officers before the Taser was deployed*

Based on the video recordings, Mr. Dziekanski was wielding a stapler at chest level when the Taser was deployed. The Officers have described this in different ways at different times.

In his notes, Cst. Bentley stated: "subject grabbed stapler and came at members screaming". In his statements to IHIT, Cst. Bentley maintained that Mr. Dziekanski had picked up and swung a stapler at the Officers. At the Inquiry, Cst. Bentley's testimony was to similar effect, although he downplayed the swinging on cross-examination.

In his notes, Cst. Millington stated that Mr. Dziekanski "motioned aggressively towards members" with the stapler. He stated to IHIT that Mr. Dziekanski had raised the stapler "high" and started advancing towards the Officers. In an incident report filed after Mr. Dziekanski's death, Cst. Millington stated that Mr. Dziekanski had swung the stapler "wildly" at the Officers. In his testimony at the Inquiry, Cst. Millington retracted this statement, and stated that he meant by "high" that Mr. Dziekanski had held the stapler above his waist.

Cpl. Robinson told IHIT that Mr. Dziekanski swung the stapler "up high" and tried to hit the Officers with it. At the Inquiry, Cpl. Robinson said that Mr. Dziekanski swung around quickly with something in his clenched fist. Cpl. Robinson determined that the thing in Mr. Dziekanski's fist was a stapler when his motions with his fist caused staples to fall. When referred to his IHIT statements, Cpl. Robinson testified that "up high" meant chest height and that he did not explain things well when he told IHIT that Mr. Dziekanski had tried to hit the Officers with the stapler.

For his part, Cst. Rundel told IHIT that Mr. Dziekanski picked up a stapler, put it above his head, motioned at the Officers and demonstrated combative behaviour. In his testimony at the Inquiry, Cst. Rundel stated that Mr. Dziekanski brought the stapler to his chest and put his left foot forward.

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3. *Whether Mr. Dziekanski fell to the ground after the first deployment of the Taser*

Before the Inquiry, each of the Officers claimed that Mr. Dziekanski had to be wrestled to the ground after the first deployment of the Taser. However, it is clear from the video recordings that Mr. Dziekanski fell to the ground after the first Taser deployment, and each of the Officers apart from Cst. Rundel conceded as much in testifying at the Inquiry.

In his notes, Cst. Bentley stated that Mr. Dziekanski appeared to be fighting through the Taser. When interviewed by IHIT, Cst. Bentley stated that Mr. Dziekanski had to be wrestled to the ground, although he noted that it did not require much force. At the Inquiry, Cst. Bentley testified that his statement to IHIT was inaccurate in that regard.

Similarly, Cst. Millington told IHIT that Mr. Dziekanski was wrestled to the ground, and stated in his incident report that Mr. Dziekanski continued to walk towards the Officers with his arms raised after the first deployment of the Taser. At the Inquiry, Cst. Millington testified that his statement about wrestling Mr. Dziekanski to the ground was a mistake.

Cpl. Robinson told IHIT that Mr. Dziekanski remained standing after the initial deployment of the Taser and had to be wrestled to the ground. At the Inquiry, Cpl. Robinson characterized that statement as "mistaken" and stated that he had "sort of blended the whole interaction" with Mr. Dziekanski.

Cst. Rundel told IHIT that the initial deployment of the Taser did not affect Mr. Dziekanski. At the Inquiry, Cst. Rundel maintained in his testimony that a second deployment of the Taser brought Mr. Dziekanski to the ground.

4. *How many times the Taser was deployed*

Cst. Millington deployed the Taser five times, and all of the Officers appeared to acknowledge as much at the Inquiry. However, there was general confusion in the Officers' notes and statements to IHIT regarding the number of times the Taser was deployed, and the Officers consistently expressed beliefs that the Taser had been deployed less than five times:

- (a) Cst. Bentley testified that he believed that the Taser was only deployed twice. He testified that he found out only by reading the Report to Crown Counsel that the Taser had been deployed five times.
- (b) Cst. Millington's notes state that the Taser was deployed three times. He testified at the Inquiry that he believed the Taser had been deployed four times.
- (c) In his initial statements to IHIT, Cpl. Robinson suggested that the Taser might only have been deployed once. At the Inquiry, Cpl. Robinson stated that he

gave Cst. Millington at least two, and possibly three, commands to deploy the Taser.

- (d) Cst. Rundel told IHIT that the Taser was deployed two or three times. He testified at the Inquiry that he believed that the Taser had been deployed twice.

B. Significance of the Evidentiary Discord

The areas of evidentiary discord identified above are only significant for the purposes of our opinion if they suggest that the Officers' testimony at the Inquiry constitutes perjury or a violation of the Code of Conduct. Perjury requires proof that a person (1) made a false statement under oath; (2) knew the statement to be false; and (3) intended to mislead. For present purposes, we consider that a violation of the *Code of Conduct* would require the same, although recklessness might substitute for knowledge and intent in elements (2) and (3).

In our view, the areas of evidentiary discord identified above do not tend to reflect either perjury or a violation of the *Code of Conduct*, because it is far from clear that the discord stems from any intention or recklessness on the part of any of the Officers to mislead the Inquiry. We say this for three reasons.

First, the critical events at YVR about which the Officers testified at the Inquiry occurred in but a minute or two. While those events have been finely dissected and parsed with the aid of video recordings and many days of questioning by skilled examiners and cross-examiners, the reality is that they happened in extremely quick succession and in somewhat unexpected and probably stressful circumstances. Human memory is not perfect and errors in the Officers' recollection can and should be expected, particularly when that recollection is offered, as here, many months after the events in question and in relation to a brief and traumatic incident.

Second, and notwithstanding the frailties of memory, the Officers' testimony at the Inquiry was generally consistent with the video recordings and with the evidence of other witnesses. The major discord was between the Officers' testimony, on the one hand, and their notes and statements to IHIT, on the other. This tends to suggest that the quality of the Officers' initial recollections was negatively affected by the intense circumstances in which they made their observations and the impact of Mr. Dziekanski's death on the Officers and/or by efforts by the Officers to maximize their justification for the use of force vis-à-vis Mr. Dziekanski (*i.e.*, a lack of perfect candour during the investigation into Mr. Dziekanski's death).

Whatever the cause of the problems with the Officers' initial recollections, it had abated by the time of the Inquiry, perhaps owing to review of video recordings and eyewitness accounts and the requirement that the Officers testify under oath. While the possibility that the

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Officers were initially less than candid is troubling, it does not suggest they were untruthful in their testimony at the Inquiry or that they attempted to mislead the Inquiry. To the extent that the Officers sought to rationalize their earlier notes and statements while testifying at the Inquiry, we do not consider that this self-serving effort rises to the level of perjury or a violation of the *Code of Conduct*.

Third, the testimony given by the Officers, and their credibility at the Inquiry, appears unfortunately to have been tainted to some degree by their use of terminology provided to them in their training. The RCMP IMIM provides specialized definitions for terms (e.g., "combative") that are not known to members of the public, and are to some extent at odds with the terms' everyday meanings. In testifying at the Inquiry, the Officers often used these terms, seemingly in their specialized sense, without explaining the precise meaning of each term or even that the terms were being used as terms of art.

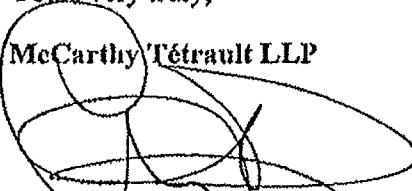
Most notably, the definition for the term "combative" provided in training is that "the person attempts or threatens to apply force to anyone, e.g. punching, kicking, clenching fists with intent to hurt or resist arrest or threats of assault" (emphasis added). In common parlance, however, the word implies that someone is fighting or attempting to fight. The Officers employed the term "combative" without explaining what the term meant to them and how it applied to Mr. Dziekanski's behaviour. This appears to have led to ambiguity and confusion at the Inquiry, and some general scepticism concerning the Officers' testimony.

We understand that RCMP training has been altered since the death of Mr. Dziekanski with the aim of improving officers' ability to describe an incident in terms comprehensible to lay people. While officers will still use IMIM terms, they have been trained to explain what those terms mean in plain language and to describe the specific observations that underlie the use of those compendious terms. This improved training may well help to avoid confusion and uncertainty when officers testify in the future.

Please contact us if you have further questions or require clarification of our views.

Yours very truly,

McCarthy Tétrault LLP



Leonard J. Doust, Q.C.*