



CRIMINAL JUSTICE BRANCH

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 laying on the floor physically shaking and becoming physically ill. Another friend also described him hanging onto 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 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 to 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 6 hours. This may account for the time period between 4:10 p.m. and 9:31 p.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 to the secured area. He managed to gain entry and placed his baggage and 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 5 civilians, 3 airline staff, and 2 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 01:25 a.m., four uniformed Richmond R.C.M.P. 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 2 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 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 Bentley, Rundel and 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. Millington deployed the taser 2 more times in the probe mode as the taser appeared to be malfunctioning. Millington determined that the taser was not functioning properly because of a "clacking" sound indicating 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 2 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 R.C.M.P. reviewed the police investigation file in this case. In his report the expert concluded the actions of the Officers appeared to be consistent with the Incident Management and Intervention Model used by the R.C.M.P., as they represented a reasonable escalation and de-escalation of force based upon the actions of the subject. This R.C.M.P. model defines the appropriate parameters of use of force by police. He also concluded that the actions of the Officers were consistent with R.C.M.P. 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.]