

**IN THE MATTER OF THE THOMAS R. BRAIDWOOD, Q.C.,
COMMISSIONS OF INQUIRY UNDER THE *PUBLIC INQUIRY ACT*,
S.B.C. 2007, c. 9**

Room 801
Federal Courthouse
701 West Georgia Street
Vancouver, B.C.

April 2, 2009

PROCEEDINGS AT
HEARING (DAY 34)

COPY

McEachern & Associates
2390 Kensington Avenue
Burnaby, B.C. V5B 4E2
Phone: (604) 299-3595; Fax: (604) 299-3545
Toll-free: 1-866-366-2202

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Commissioner:	T.R. Braidwood, Q.C.
Commission Counsel:	A. Vertlieb, Q.C.
Associate Commission Counsel:	P. McGowan
Counsel for Zofia Cisowski:	W. Kosteckyj, S. Whiteley, S. Parhar

(ii)

Counsel for Government of Canada:	H. Roberts, J. Brongers
Counsel for Vancouver Airport Authority:	D. Stewart, C. Friesen
Counsel for B.C. Civil Liberties Association:	G. Pastine, S. Dubinsky
Counsel for Government of Poland:	D. Rosenbloom
Counsel for Corporal Benjamin Robinson:	R. Harris
Counsel for Constable Gerry Rundel:	T. Beaubier
Counsel for Constable Bill Bentley:	D. Butcher
Counsel for Constable Kwesi Millington:	R. Hira, Q.C.
Counsel for Public Service Alliance of Canada:	C. Buchanan, B. Matthews
Counsel for City of Richmond:	J. Goulden, M. Kleisinger, G. Trotter
Counsel for TASER International, Inc.	D. Neave, J. Spencer
Interpreter:	Kris Barski
Registrar:	L.N. Giles
Court Recorder:	P. Kealy, C.V.R., C.M.
Transcriber:	P. Kealy

1
Robert Dylski
In chief by Mr. Vertlieb

Vancouver, B.C.
April 2, 2009

1
2
3
4 THE REGISTRAR: Order. The hearing is now resumed.
5 THE COMMISSIONER: Yes. Good morning, all.
6 THE REGISTRAR: I understand there will be just a brief
7 pause.
8 MR. BRONGERS: Mr. Commissioner, while we're waiting
9 for the witness, I'm just wondering, since today
10 there is no video camera link, would it make more
11 sense for counsel to ask their questions from
12 counsel tables as opposed to coming up?
13 THE COMMISSIONER: Yes, it would. There's no video
14 link at all, to anyone.
15 THE REGISTRAR: The witness can see you. We can't see
16 him.
17 THE COMMISSIONER: Oh, all right.
18 THE REGISTRAR: So it would be preferable that you come
19 here because he can see you.
20 Witness, are you there?
21 A Yes.

22
23 (VIA VIDEOCONFERENCE)

24
25 ROBERT DYLSKI, a witness,
26 affirmed.
27

28 THE REGISTRAR: Would you state your full name, please.
29 A Robert Dylski.
30 THE REGISTRAR: Thank you. I will now turn you over to
31 the Commissioner, followed by Mr. Vertlieb.
32 THE COMMISSIONER: Sir, I'm the Commissioner. And I
33 thank you very much for your cooperation in this
34 matter. I know you are doing this on a voluntary
35 basis.
36 A I would like to thank you as well from myself and
37 on behalf of Mr. Dziekanski, and I would like to
38 welcome everybody as well.
39 MR. VERTLIEB: Thank you very much, Mr. Dylski. Let me
40 just ask you a few questions on behalf of the
41 Commission.
42

43 EXAMINATION IN CHIEF BY MR. VERTLIEB:

44
45 Q Sir, your date of birth is March 21 of 1965?
46 A [Interpreter addresses witness] Yes.
47 Q How long did you know Mr. Dziekanski?

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1 THE INTERPRETER: [Addresses the witness]
2 THE WITNESS: [Addresses the interpreter]
3 A 21st of March.
4 Q Yes, thank you. How long did you know Mr.
5 Dziekanski?
6 A About eight years.
7 Q How did you meet him?
8 A I cannot remember exactly how we met.
9 Q Did he become your neighbour?
10 A Yeah. I think I became his neighbour because he
11 lived longer in that neighbourhood that I moved
12 into.
13 Q As a neighbour, just describe him.
14 A Can you ask a concrete question?
15 Q As a neighbour was he helpful to you if you needed
16 help?
17 A No, I cannot recall me asking him for help. Yeah,
18 you know, I tried to do everything by myself. I'm
19 not really asking for help.
20 Q Let's talk about the drive to the airport. You
21 drove Mr. Dziekanski to the airport when he was
22 coming to Canada?
23 A Yes.
24 Q Who made the arrangement with you to drive Mr.
25 Dziekanski?
26 A Yeah, it was Robert who arranged several months
27 prior to his departure. He asked me whether, if
28 he is granted a visa, will I drive him to the
29 airport.
30 Q Did you see Mr. Dziekanski in the day or two
31 before he left for Canada?
32 A Probably.
33 Q Did you speak to him about how he was feeling
34 about the trip in terms of sleeping or his health?
35 A Of course we were talking about it. I cannot
36 recall exactly whether it was a day before his
37 departure or a couple of days before.
38 Q Did you talk --
39 A I contacted him for sure on the day of the
40 departure, like several hours before the
41 departure, and then later on and then just before
42 the departure.
43 Q And you drove him to the airport?
44 A Yes.
45 Q And how long was that drive? How long did it
46 take?
47 A Right now it takes a little bit less than when we

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In chief by Mr. Vertlieb

Cross-exam by Mr. Brongers (for Government of Canada)

1 drove because they finished the work on the
2 bridge.

3 THE INTERPRETER: [Addresses the witness]

4 A Yeah, it took about two hours because we lost our
5 way. I didn't know that the bridge was under
6 repairs.

7 MR. VERTLIEB:

8 Q And just describe the trip with Mr. Dziekanski.
9 How was he with you?

10 A So in the car he was calm and quiet.

11 THE INTERPRETER: [Addresses the witness]

12 A But several hours before we started the trip to
13 the airport, even like several minutes before we
14 started the trip, he was nervous and he was
15 panicky.

16 MR. VERTLIEB: Thank you very much.

17 MR. HIRA: Mr. Commissioner, I trust my friend,
18 Commission counsel, is not going to lead evidence
19 regarding the last answer given by the witness
20 that he was panicking just before the start of the
21 trip.

22 THE COMMISSIONER: That was led. He just led it.

23 MR. HIRA: I'm sorry, but the details of that, I trust
24 my friend is going to choose not to lead.

25 THE COMMISSIONER: Well, it'll be up to you people, I
26 guess.

27 MR. BRONGERS: Good evening, Mr. Dylski.

28 A Welcome.

29 MR. BRONGERS: My name is Jan Brongers. I'm a lawyer
30 for the Government of Canada.

31 A I understand.

32 MR. BRONGERS: Thank you for assisting the Commission
33 today. I just have a few questions about Mr.
34 Dziekanski.

35 A You are welcome.

36

37 CROSS-EXAMINATION BY MR. BRONGERS ON BEHALF OF THE
38 GOVERNMENT OF CANADA:

39

40 Q To your knowledge, before this trip to Canada had
41 Mr. Dziekanski ever travelled outside of Poland?

42 A I don't know anything about it.

43 Q So you're not aware of any other trips other than
44 this one?

45 A So personally I've never heard about Mr.
46 Dziekanski being abroad other than the trip to
47 Canada.

Robert Dylski

Cross-exam by Mr. Brongers (for Government of Canada)

- 1 Q Our understanding is that the only language
2 Mr. Dziekanski spoke was Polish. Do you know if
3 Mr. Dziekanski could speak any other languages?
4 A No, I don't know anything about it. As far as I
5 know, he only spoke Polish.
6 Q I understand that you had some conversations with
7 Mr. Dziekanski about his plans for coming to
8 Canada. Is that right?
9 A Yes, we talked about it.
10 Q Did Mr. Dziekanski explain to you what he planned
11 to do in Canada?
12 A Just a moment. I have to think about it. Yeah,
13 he was going to start a job that probably was
14 arranged by his mother. And he was going to live
15 with his mother.
16 Q And given that Mr. Dziekanski could not speak
17 English, did he explain to you how he planned to
18 cope with the language of Canada?
19 A From what I know, he had dictionaries with him,
20 and of course he was going to start a job in
21 Canada the very next day. So he would after a
22 certain period of time --
23 THE INTERPRETER: [Addresses the witness]
24 A I'm not quite sure, but from what I can recall he
25 was going to get some English courses.
26 Q Mr. Dylski, we've read the statement that you gave
27 to the Polish investigators last year. And we
28 understand that you were aware that Mr.
29 Dziekanski's mother had visited Poland a few
30 months before the trip to Canada. Is that right?
31 A Yes, of course. Yeah, I knew -- I've met her.
32 Q Did you discuss with Mr. Dziekanski's mother his
33 plans for his trip to Canada?
34 A Yeah, we were talking about for sure. But I
35 cannot remember details of our conversation.
36 Q I also understand that you were present in Mr.
37 Dziekanski's apartment the morning of the
38 departure, and you may have heard the conversation
39 between Mr. Dziekanski and his mother over the
40 telephone. Is that right?
41 A Yeah, I've heard portion of that conversation.
42 Q Could you explain what you recall of that
43 conversation, what they were discussing?
44 A Yeah. So when I came to Mr. Dziekanski's
45 apartment, I actually came to pick him up because
46 it was getting late.
47 THE INTERPRETER: Okay?

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Cross-exam by Mr. Brongers (for Government of Canada)

- 1 A Yeah, that's when the conversation took place and
2 it was on the speakerphone so I could hear what
3 Mrs. Cisowski was saying. So I was a witness to
4 his conversation where he was quite hesitant and
5 opposing his trip to Canada and his mom was trying
6 to convince him that he should come. Of course
7 everything was arranged for his arrival and the
8 plane tickets were already bought and paid for.
9 Yeah. So an apartment was waiting for him and
10 everything that's supposed to be ready for him.
- 11 THE INTERPRETER: Okay. [Addresses the witness]
- 12 A His future was laid out for him and everything was
13 ready, what they've discussed and what mom
14 arranged.
- 15 MR. BRONGERS:
- 16 Q Did you hear any -- sorry, please continue.
- 17 A So at this point he decided not to go, completely,
18 but we all tried to convince him to go.
- 19 Q And how was Mr. Dziekanski acting physically at
20 that time?
- 21 A Yeah, that was a very, very high panic that he was
22 in because he never flew a plane and he was afraid
23 of flying a plane. Yeah. And then everything he
24 was talking about was related to his fear of
25 flying.
- 26 Q And we understand that Mr. Dziekanski was shaking
27 and perhaps vomiting at that time?
- 28 A Yeah. He was shaking for sure and he was holding
29 onto a radiator -- heat radiator.
- 30 THE INTERPRETER: [Addresses the witness]
- 31 A And he was probably throwing up in my car. Yeah.
32 If he didn't vomit in my car, we had a little
33 bucket, but I cannot recall right now exactly what
34 happened. Now I cannot remember whether he was
35 vomiting at home or he was complaining about being
36 dizzy, and that's why we took the bucket with us.
- 37 MR. BRONGERS:
- 38 Q Now, Mr. Dylski, you explained that the trip of
39 Mr. Dziekanski had been planned. And I'm
40 wondering if you can explain what Mr. Dziekanski's
41 plan was for dealing with the airlines and the
42 flight when he cannot speak English.
- 43 A Yeah. We didn't talk about it because I don't
44 think that in the plane you have to know the
45 English. You just sit quietly.
- 46 Q And do you know if Mr. Dziekanski had a plan for
47 how to deal with the Canadian authorities when he

1 arrived in Vancouver, given that he cannot speak
2 English?

3 A We didn't talk about it because we didn't expect
4 any problems with Canadian authorities -- firstly.
5 And then secondly, there was no problem because we
6 were convinced that his mom is going to be at the
7 airport and she will help him because she speaks
8 English.

9 Q Did Mr. Dziekanski smoke?

10 A Yes, he did smoke earlier but probably he quit
11 smoking. He quit smoking a few days, maybe two
12 days before his departure to Canada.

13 Q And when Mr. Dziekanski was a smoker, do you know
14 how many cigarettes he would smoke a day?

15 A Yeah. I don't know exactly how many because we
16 never were together for the whole day. Yeah. So
17 I'm suspecting, because I smoke quite a bit, and
18 when I gave him a cigarette, he smoked with me.
19 So the same amount of cigarettes. Same number of
20 cigarettes.

21 Q Would you call him a heavy smoker or a light
22 smoker or a moderate smoker?

23 A So I'll try to describe it this way, that he
24 didn't have too much money so he would smoke when
25 he could afford it.

26 Q Did you know Mr. Dziekanski to drink alcohol?

27 A Yes, I do.

28 Q And can you explain to the best of your knowledge
29 how much he would drink on average?

30 A Yeah, it's really hard to describe, but what I can
31 tell you that there was in the eight-year period
32 that I knew him --

33 THE INTERPRETER: [Addresses the witness]

34 A -- that he drank four times alcohol because he
35 drank it with me. In Poland there is no tradition
36 that you walk with glass of whiskey in your hand
37 and drink. Yeah. So I cannot tell you how much
38 he drank a day, you know. Even not a day.

39 MR. BRONGERS:

40 Q Would you describe Mr. Dziekanski as a heavy
41 drinker or someone who drank a normal amount for
42 an average person?

43 A Well, I can confirm what I just said before, that
44 he drank four times within eight years because he
45 drank it with me.

46 Q And do you know if Mr. Dziekanski cancelled a trip
47 to Canada before he left with you in October of

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Cross-exam by Mr. Brongers (for Government of Canada)

Cross-exam by Mr. Butcher (for Cst. Bentley)

1 2007 for the airport?

2 A Yeah, I can recall hearing something but I'm not
3 hundred percent sure. Probably there was a
4 situation where he was going to go to Canada but
5 for whatever reasons that was postponed.

6 Q And you don't know those reasons?

7 A No, I cannot recall right now so I don't want to
8 mislead you.

9 MR. BRONGERS: Thank you so much for answering my
10 questions, Mr. Dylski.

11 A Thank you very much.

12 MR. BUTCHER: Mr. Dylski, my name is David Butcher.

13 I'm a lawyer for one of the police officers
14 involved in this case.

15 A Welcome.

16

17 CROSS-EXAMINATION BY MR. BUTCHER ON BEHALF OF CONSTABLE
18 BILL BENTLEY:

19

20 Q I understand that three people went in the car
21 from Gliwice to the airport; is that correct?

22 A Yes.

23 Q And they were yourself --

24 A [Not interpreted]

25 Q -- a young man called Wojciech Dibon, and excuse
26 my pronunciation, and your wife or girlfriend,
27 Aneta Czernel.

28 A No, it's not correct because there were more
29 people than three.

30 Q Because Mr. Dziekanski was in the car?

31 A That's correct.

32 Q Were there more than four?

33 A Just a moment. I have to think about it. Just a
34 moment. I'm thinking whether Elzbieta Dibon was
35 present as well or with us in the car. Yeah.
36 Because on two occasions I was driving the family
37 of Dziekanski to the airport.

38 Q What was the other occasion that you drove them to
39 the airport?

40 A Yeah. It was Zofia Cisowski that I would take to
41 the airport about four months before Mr.
42 Dziekanski's departure.

43 Q So today you can't remember whether Elzbieta Dibon
44 was in the car on the day that Mr. Dziekanski went
45 to the airport?

46 A Yeah. So you have my -- when I gave my evidence
47 to police in Poland, you've got complete record

- 1 and you will see the details what I said at that
2 time.
- 3 Q Okay. Do you have a copy of the statement that
4 you provided to the police?
- 5 A No, I don't. I don't even know whether I got a
6 copy from the police.
- 7 Q When you gave that statement to the Polish police,
8 were you doing your best to be accurate and
9 truthful about the events involving Mr.
10 Dziekanski?
- 11 MR. KOSTECKYJ: Before the witness answers, my
12 understanding is the statement was given to the
13 RCMP, not to the Polish police. So I think that
14 that's not quite accurate.
- 15 MR. BUTCHER: Maybe Ms. Roberts has the answer, but my
16 understanding is that -- I'll let Ms. Roberts
17 answer the question.
- 18 THE INTERPRETER: [Addresses the witness]
19 THE WITNESS: [Addresses the interpreter]
- 20 MS. ROBERTS: My understanding is that the questions
21 were asked by the Polish prosecutors at the
22 request of the IHIT investigators.
- 23 THE COMMISSIONER: Thank you.
- 24 MR. BUTCHER:
- 25 Q And I believe that with -- can you tell us who was
26 present when you were interviewed?
- 27 A Yes, I do remember.
- 28 Q Can you tell us who was there?
- 29 A Prosecutor. So there was a Polish prosecutor,
30 interpreter, and three people from Canada.
- 31 Q Did you understand that they were members of what
32 we call the RCMP or Royal Canadian Mounted Police?
- 33 A No, I didn't.
- 34 Q But the questions themselves were asked by the
35 Polish prosecutor?
- 36 A Yeah. The questions were asked by the prosecutor,
37 and from time to time somebody from the Canadian
38 delegation asked questions as well.
- 39 Q I want to go back to a couple of months earlier in
40 the year 2007, before the day of the trip to the
41 airport, and then come back to the day --
42 A [Not interpreted]
- 43 Q And I understand that you had known for some time
44 that Mr. Dziekanski was planning to immigrate to
45 Canada.
- 46 A I myself tried to convince him to go to Canada as
47 soon as I learned that his mom is in Canada.

- 1 Q Why was that?
- 2 A Yeah. Well, I was thinking that he would have a
3 better future in Canada. It's a richer country.
- 4 Q He told you that he was afraid to change his
5 surroundings and concerned about having to move to
6 a different culture, didn't he?
- 7 A Yes, he mentioned this. Yeah. But I was trying
8 to convince him. Maybe I didn't take all the
9 traits of his character under consideration by
10 doing that. Yeah. I was under impression that a
11 40-year-old man wouldn't have any problems in
12 adopting to a new country.
- 13 Q Were you aware that he was initially scheduled to
14 travel to Canada sometime before he actually made
15 the trip?
- 16 A Yeah. We just talked about it, that the first
17 trip was postponed.
- 18 Q And do you know why that was?
- 19 A Yeah. I just said a moment ago that I don't
20 remember or I didn't know why.
- 21 Q Now, how much did you see of Mr. Dziekanski in the
22 day or two before he left?
- 23 A How often and how long? The day before his
24 departure, I saw him about three times. So in the
25 afternoon, in the evening, and at the moment when
26 I'm supposed to take him and drive him to the
27 airport.
- 28 Q Dealing with the first two of those occasions
29 first, how was he when you saw him in the
30 afternoon and the evening?
- 31 A Yeah. I just -- like I mentioned a few moments
32 ago, the closer we got to the departure, the more
33 nervous he was getting, and upset.
- 34 Q And I'm going to see if you know this. But I
35 understand that he gave your wife or girlfriend
36 his ticket and some money and a passport because
37 he was concerned that Elzbieta Dibon might take
38 those items away from him.
- 39 A I don't know why he did it, what was the
40 motivation. Yeah. But even his luggage was at
41 our place for about a day or two before the
42 departure. Okay. So his passport and his plane
43 tickets and all the other stuff was in a yellow
44 envelope, everything that he brought from Krakow.
45 But I don't recall the reasons for doing so.
- 46 Q But he did bring those things over to your house a
47 day or two before the trip?

- 1 A Yeah. Yes, but I cannot recall whether it was a
2 day or two days before the departure.
- 3 Q Now I'm going to turn to the morning that you took
4 him to the airport. You got to his house at about
5 four o'clock in the morning?
- 6 A Yeah, it was -- yeah, it was between 3:00 and
7 4:00, close to four o'clock in the morning.
- 8 Q And when you got there, he had decided that he
9 wasn't going to go to Canada?
- 10 A Yes.
- 11 Q And this is what you told the Polish prosecutor
12 about what you saw when you went to his house.
13 I'm going to read to you just a little bit:
14
15 But he was not convinced by this, he was
16 grasping the radiator tightly and we weren't
17 able to make him let go, it was a kind of
18 hysterical reaction. I don't know, it's
19 almost as if he felt as though something
20 wasn't right.
21
- 22 Is that an accurate statement about what you saw
23 and what was happening?
- 24 A Yeah. It's a fact that he was grasping, you can
25 call, onto Polish land.
- 26 MR. BUTCHER: I'm sorry?
- 27 THE INTERPRETER: Polish land. It's an expression.
- 28 A And as far as I can tell, it was a panic attack
29 because he was afraid of flying.
- 30 MR. BUTCHER:
- 31 Q And do you agree that you thought that he was
32 hysterical?
- 33 A Yeah. It's hard for me to distinguish between
34 panic or fear. I'm not an expert so my opinion
35 doesn't matter.
- 36 Q Will you agree -- I'm going to get the interpreter
37 to read what I just read to you in Polish and see
38 if you will agree that this is what you told the
39 prosecutor.
- 40 THE INTERPRETER: [Reads]
- 41 MR. BUTCHER:
- 42 Q Do you agree that that's what you told the
43 prosecutor?
- 44 A Yeah. If it's in the documents, then yes,
45 probably I did.
- 46 Q And you were trying your best to be accurate and
47 honest?

11
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Cross-exam by Mr. Butcher (for Cst. Bentley)

1 A [Interpreter addresses witness] Yes, that's --
2 since it's in the documents, that's what I said.
3 Q Just so it's clear, this interview took place on
4 the 15th of April 2008?
5 A It's hard to say. I don't remember what I did on
6 the 15th of April in 2008.
7 Q Just to finish this off, I'm going to ask the
8 Polish interpreter here to translate the Polish
9 paragraph that I asked him to read.
10 THE INTERPRETER: Do you want me to read it again?
11 MR. BUTCHER: Yes, in English, please.
12 THE INTERPRETER: Oh, in English. Okay.

13
14 But he was not convinced by this, he was
15 grasping the radiator tightly and we weren't
16 able to make him let go, it was a kind of
17 hysterical reaction. I don't know, it's
18 almost as if he felt as though something
19 wasn't right.
20

21 MR. BUTCHER: Now, I just want to make sure that you
22 agree that that is the correct translation of the
23 Polish.

24 THE INTERPRETER: Yes, it is.

25 MR. BUTCHER:

26 Q And I understand that this incident involving Mr.
27 Dziekanski holding onto the radiator tightly
28 lasted for about 20 minutes.

29 A It's hard to say how it long lasted. If I knew
30 that's going to be important in the future, I
31 would pay attention to it.

32 Q I'm going to read to you a bit of the statement
33 now. And it appears that the statement began with
34 a question in English. The investigator asked in
35 English:
36

37 When the witness was with Robert at his
38 apartment and he said that Robert did not
39 want to go and he held on to the radiator,
40 how long did that take, how long was he
41 upset? What was the length of time?
42

43 And then the translator translated it as follows,
44 and you gave this answer.

45 A [Not interpreted]

46 MR. BUTCHER: Can you tell us what the answer was by
47 Mr. Dylski in the transcript?

1 THE INTERPRETER: It said: "Yes, I think it's about 20
2 minutes."
3 MR. BUTCHER:
4 Q Now, Mr. Dylski, I've just read to you part of the
5 transcript and it's from our page 1225. Having
6 heard that, does that refresh your memory about
7 how long it was that this incident went on?
8 A Yeah. Well, it didn't refresh my memory, but if I
9 said that it lasted 20 minutes, and because it was
10 only a few months from the inquiry --
11 Q You'd accept that the comment you made in this
12 statement was accurate and true?
13 A Yeah. I stand behind my -- whatever I said in the
14 interview with the prosecutor, and if there is any
15 discrepancy between what I said before and what
16 I'm saying today, please take the document as
17 true, as correct.
18 Q Now, whilst this incident was going on, Mr.
19 Dziekanski's mother was on the telephone and on
20 the speakerphone?
21 A Yes.
22 Q And she and you and the other people present were
23 doing what you could to try to persuade him to
24 agree to leave the apartment and agree to come to
25 Canada?
26 A Yeah. I'm sure that I was trying to convince him.
27 His mom was trying to convince him. Aneta tried
28 to convince him. But I'm not sure what was the
29 reaction of Mrs. Dibon and her son.
30 Q You were concerned that if it went on much longer,
31 he would miss the plane?
32 A Yes.
33 Q However, once he was in the car travelling to the
34 airport, he was calm?
35 A Yeah, he was -- he was very calm and he didn't
36 talk at all in the car. And he was very calm at
37 the airport as well. He went to the bathroom and
38 he had a soft drink.
39 Q One of the things -- just going back to the
40 conversation with the mother, one of the things
41 that the mother was telling him was that it would
42 be very expensive if not impossible to change the
43 plane ticket again?
44 A Yeah. There was such conversation because the
45 tickets couldn't be rebooked and we couldn't
46 return them. But I'm not sure whether it really
47 was impossible to return them or it was just a

- 1 ploy to convince him to come to Canada.
- 2 Q I'm going to suggest, and see if this refreshes
3 your memory, that he vomited twice in the
4 apartment -- once in a living room and once in a
5 bathroom -- and then once again in the car. Do
6 you remember that?
- 7 A [Interpreter addresses witness] He didn't vomit
8 in my apartment because it wasn't in my apartment.
9 It was in his apartment.
- 10 Q No, I -- sorry. The question wasn't clear. Do
11 you remember him vomiting twice in his apartment?
- 12 A I cannot recall right now. It's hard to say. But
13 if I testified in the prosecutor's office, then
14 it's true.
- 15 Q How long is the drive to the airport? Or more
16 correctly, I suppose, how long was the drive to
17 the airport that day?
- 18 A I'm suspecting that at least an hour and a half.
19 That's what I can recall today.
- 20 Q Now, I understand that although you knew Mr.
21 Dziekanski for eight years, you didn't know him
22 particularly well.
- 23 A That's correct.
- 24 Q And you told the prosecutor that you'd only been
25 to his house about five times in those eight years
26 and that he'd been to your residence a few more
27 times in that time. Is that correct?
- 28 A That's correct.
- 29 Q But you did drink alcohol with him a few times,
30 and when you were drinking with him, it was vodka
31 that you were drinking?
- 32 A That's correct.
- 33 Q Had you ever seen him acting in the way that he
34 was acting in the apartment at four o'clock in the
35 morning on October the 13th, 2007, on any other
36 occasion?
- 37 A I never saw him in this state, this condition,
38 before.
- 39 Q How was it that he stopped hanging onto the
40 radiator? What happened? Did somebody pull him
41 off or did somebody persuade him to let go?
- 42 A It's hard to say, but personally I stopped trying
43 to convince him and pull him off the radiator.
44 Like I just left him alone.
- 45 Q How did he get --
- 46 A Yeah. But I'm not sure whether he helped himself
47 or somebody helped him, but at some point he just

Robert Dylski

Cross-exam by Mr. Butcher (for Cst. Bentley)

Cross-exam by Mr. Hira (for Cst. Millington)

1 stood up and left.

2 Yeah. I would like to add something to the
3 question where you were asking about him throwing
4 up. He didn't vomit in the car because I don't
5 recall emptying the bucket, and I wouldn't carry
6 it back to my home.

7 Q Do you remember the --

8 A He didn't vomit in the car.

9 Q Do you remember, though, taking a bucket in the
10 car because he had vomited earlier?

11 A Yeah. I cannot remember why, what's the reason.
12 I cannot remember. I cannot remember whether he
13 was already vomiting before or if he was
14 complaining that he feels sick and he might vomit
15 in the car.

16 MR. BUTCHER: Thank you. Those are my questions, Mr.
17 Dylski. Thank you very much for your help.

18 A Thank you very much.

19 MR. HIRA: Good evening, Mr. Dylski. My name is Ravi
20 Hira. I represent one of the police officers.

21 A Good evening.

22 MR. HIRA: We're all grateful that you have come
23 forward and made the time for us. Thank you.

24 A No problem.

25 MR. HIRA: I have a few questions arising from the
26 statement that you gave to the Polish prosecutor
27 and the three officials from Canada.

28 A You're welcome.

29

30 CROSS-EXAMINATION BY MR. HIRA ON BEHALF OF CONSTABLE
31 KWESI MILLINGTON:

32

33 Q Thank you. The first question I have relates to
34 your observations of Mr. Dziekanski in the
35 afternoon and the evening before you picked him up
36 in the morning to take him to the airport. I
37 understand from looking at the statement that you
38 gave to the Polish prosecutor that as far as you
39 knew, Mr. Dziekanski couldn't sleep and couldn't
40 eat just before the trip to the airport.

41 A That's correct. It's not only the day before he
42 left for Canada, but from what Mr. Dziekanski told
43 me, he didn't sleep the night before. So the
44 night when we left for the airport was his second
45 sleepless night, and he didn't have appetite so he
46 didn't eat.

47 Q Thank you. The second question that I have

1 relating to your statement is a comment that you
2 made to the prosecutor about drinking on one
3 occasion with Mr. Dziekanski. You were asked by
4 the prosecutor about what did he like to drink.
5 And your answer was:
6

7 I don't know how much he drank because, as I
8 had mentioned earlier, our visits were rather
9 short. When we drank alcohol together we
10 probably drank a great deal likely because I
11 can consume substantial amounts.
12

13 Did you give that answer and is it an accurate
14 answer?

15 A Yes. And even if I didn't say that, that's the
16 truth.

17 Q Thank you. The last question that I have arising
18 from your statement relates to the video taken at
19 the Vancouver International Airport. Sir, you had
20 an opportunity to watch the video prior to giving
21 the statement that you gave to the Polish
22 prosecutor; is that correct?

23 A It's hard to say.

24 Q Did you see the video prior to giving the
25 statement to the Polish prosecutors in April 2008?

26 A The first time I -- I saw the video on TVN, a
27 Polish station, and you would have to check the
28 dates when they ran that video was the dates when
29 I gave my testimony to figure out which one was
30 first.

31 Q All right.

32 A If during my testimony at prosecutor's office I'm
33 relating to the video, it means that I saw it
34 before the testimony in Poland.

35 Q I'm going to ask you some questions from the
36 statement that you gave to the Polish prosecutor.

37 MR. HIRA: And for the assistance of other counsel and
38 Mr. Commissioner, I'm at page 1227. I appreciate,
39 Mr. Commissioner, you don't likely have this
40 statement in front of you, but that's more for the
41 record.

42 Q You were asked by one of the Canadians in English,
43 and it was translated into Polish:

44
45 Has the witness seen the video from the
46 airport?
47

Robert Dylski

Cross-exam by Mr. Hira (for Cst. Millington)

Cross-exam by Mr. Stewart (for Vancouver Airport)

1 And your response was, "Yes."

2 A Then I probably saw it.

3 Q Thank you. And you recall in the video seeing Mr.
4 Dziekanski smash a computer or throw it to the
5 ground, did you not?

6 A Yeah. I don't know whether it was computer or
7 anything else, but there was something on the desk
8 that he destroyed.

9 Q Thank you. You also saw him holding up a chair or
10 a small table?

11 A Well, it looked like a chair and he was fighting
12 with the door or dealing with the door.

13 Q Yes? Did you see him throw a small table against
14 the glass window, breaking the small table or the
15 small chair?

16 A Yeah. I cannot recall exactly what he did, but I
17 remember that he was pushing the chair against the
18 sliding door.

19 Q Fair enough. Have you seen such behaviour from
20 Mr. Dziekanski as you saw in the video in any of
21 your other meetings or dealings with him?

22 A No, I never -- I never saw him like that. I was
23 never a witness to behaviour like this.

24 Q Thank you. Now, one more matter. Do you recall
25 any occasion when the police attended at his
26 apartment?

27 A I was never a witness of police visits at Mr.
28 Dziekanski's apartment.

29 MR. HIRA: Those are my questions. Thank you very much
30 for your assistance.

31 A Thank you very much.

32 MR. STEWART: Mr. Dylski, my name is Dwight Stewart
33 and I'm the lawyer for the Vancouver International
34 Airport.

35 A Good morning.

36 MR. STEWART: Thank you, sir. I have a few brief
37 questions.

38

39 CROSS-EXAMINATION BY MR. STEWART ON BEHALF OF VANCOUVER
40 AIRPORT AUTHORITY:

41

42 Q The first is this. Ms. Czernel has described Mr.
43 Dziekanski having a cell phone in his possession
44 to take with him on his travels. Do you recall
45 that also?

46 A He did have a cell phone on him but I cannot
47 recall whether he had that cell phone on him or it

- 1 was in one of his bags.
- 2 Q Yes. In fact, I think Ms. Czernel recalls either
3 doing it herself or assisting Mr. Dziekanski in
4 putting the cell phone in his bags.
- 5 A I'm not sure. I cannot confirm.
- 6 Q With respect to the cell phone, though, did you
7 have any discussions with Mr. Dziekanski or did
8 you hear him have discussions with Ms. Czernel
9 about any plan to call you to let you know that
10 he'd arrived safely in Frankfurt?
- 11 A Not Frankfurt. Yeah. I cannot recall a
12 conversation that he would call us from Frankfurt,
13 but -- but he was going to call us after arrival
14 in Vancouver when he safely made it to his house.
15 Yeah. He was going to phone us after, you know,
16 coming down and settling, after one or two days
17 after arrival.
- 18 Q I take it, then, sir, that you didn't hear back
19 from Mr. Dziekanski when he was just as far as
20 Frankfurt?
- 21 A No. The last time we saw him and talked to him
22 was at the airport in Pyrzowice.
- 23 Q Earlier, sir, you made mention of Mr. Dziekanski
24 having a dictionary. Am I correct that that was a
25 Polish-English dictionary?
- 26 A Yes.
- 27 Q In the days before Mr. Dziekanski left, were you
28 ever with him when Mr. Dziekanski might have been
29 practising with the dictionary?
- 30 A No, I -- no, I wasn't a witness to him practising
31 the dictionary.
- 32 Q We have been informed that for a period of
33 approximately one week, Mr. Dziekanski went to see
34 if he wanted to live in Germany. Do you know
35 anything about that, sir?
- 36 A It's the first time I hear about it.
- 37 Q As I understand it, on the morning that you gave
38 Mr. Dziekanski the ride to the airport, you were
39 first called by Ms. Cisowski at your apartment.
40 Do you recall --
- 41 A No, I cannot recall.
- 42 Q Can you tell me, sir, how long does it take to
43 drive from your apartment to Mr. Dziekanski's
44 apartment?
- 45 THE WITNESS: [Addresses the interpreter]
46 THE INTERPRETER: [Addresses the witness]
47 A One and a half seconds.

Robert Dylski

Cross-exam by Mr. Stewart (for Vancouver Airport)

Cross-exam by Mr. Hira (for Cst. Millington)

1 MR. STEWART:

2 Q Sir, after you'd taken Mr. Dziekanski to the
3 airport, to your recollection, did you or Ms.
4 Czernel have any telephone conversation with Ms.
5 Cisowski to confirm for her that indeed her son
6 had made it safely to the airport?

7 A I cannot recall.

8 Q Do you know whether there was any -- later in the
9 day, was there a call from Ms. Cisowski back to
10 you or Ms. Czernel asking about Robert?

11 A I cannot recall as of today, but if it was in my
12 testimony to the prosecutor, that's the truth.

13 Q I don't think I did see that in your statement,
14 sir. It was truly just my asking the question.

15 A As of today, I cannot recall. But from what I can
16 recall, we didn't make any contact with Mrs.
17 Cisowski or Mrs. Dibon. Because we were waiting
18 for Robert's phone call just as he promised.

19 MR. STEWART: Thank you, sir. I'm sorry to have had
20 to ask you questions about what must have been a
21 sad day.

22 A No problem. Thank you very much.

23 MR. HIRA: Mr. Commissioner, I wonder if I might have
24 leave to ask one question -- that is a series of
25 questions and --

26 THE COMMISSIONER: Yes, go --

27 MR. HIRA: -- answers arising from my last question to
28 the witness.

29 THE COMMISSIONER: Yes, go ahead.

30 MR. HIRA: Thank you, Mr. Commissioner.

31

32 CROSS-EXAMINATION BY MR. HIRA ON BEHALF OF CONSTABLE
33 KWESI MILLINGTON, continuing:

34

35 Q Mr. Dylski, it's Ravi Hira once again and I wish
36 to draw to your attention a couple of questions
37 and answers from your statement to the Polish
38 prosecutor.

39 A You're welcome.

40 Q You were asked by the prosecutor:

41

42 Are you aware of any incidents in which there
43 was police involvement, did the police ever
44 visit his home?

45

46 MR. KOSTECKYJ: With respect --

47 THE COMMISSIONER: No, I'm not going to allow that.

Robert Dylski

Cross-exam by Mr. Hira (for Cst. Millington)

1 MR. HIRA: Thank you.

2 A [Not interpreted]

3 MR. HIRA: I would like to put on the record the
4 question and answer after the witness has finished
5 so that the record is clear in terms of the
6 anticipated answer.

7 THE COMMISSIONER: All right, go ahead. Do it now.

8 MR. HIRA: Thank you. The questions that I was
9 proposing to ask were:

10

11 Are you aware of any incidents in which there
12 was police involvement? Did the police ever
13 visit his home?

14

15 He answered:

16

17 I had heard about some police visits but I'm
18 not aware of the reasons behind these visits.

19

20 He was asked again:

21

22 I had heard about the police visiting
23 Robert's home but I do not know...

24

25 And he answered:

26

27 The reasons behind the visit...

28

29 That's what I wish to put to him and ask him
30 whether it was accurate.

31 THE COMMISSIONER: I can't possibly see any relevance
32 to the lack of information, let alone the fact the
33 police arrived.

34 MR. HIRA: Fair enough.

35 THE COMMISSIONER: I confirm what I wrote in my ruling.
36 Anybody else?

37

38 Sir, I'm most obliged to you for your
39 cooperation. Thank you so much. We'll sign off
40 now.

40

41 (WITNESS EXCUSED)

42

43 MR. VERTLIEB: Mr. Commissioner, just to clarify
44 something Ms. Roberts said, from the RCMP file
45 that was produced, there's a comment about this
46 subject. If I may just read it to you just to
47 clarify:

1 On April 15, 2008 at 0924 hours Robert Dylski
2 was interviewed... The interview
3 was...recorded. [He] was asked a list of
4 prepared questions and was asked to clarify
5 when necessary. The questions were asked in
6 Polish via the Prosecutor and were translated
7 to investigators via [someone named]
8 Granicki. Superintendent Rideout --
9

10 Now, that would be RCMP.

11
12 -- asked for clarification where required.
13 Corporal Teboul and Constable Hodge were also
14 present during the interview. Constable
15 Hodge prepared the monitor notes during the
16 interview.
17

18 Dylski provided an identification card to
19 Luba --
20

21 And I don't know who Luba is.

22
23 -- at the beginning of the interview. Luba
24 informed Dylski that the interview was
25 related to the investigation into death of
26 Robert Dziekanski. He was also advised that
27 on the request of Canada he was being
28 interviewed and that the interview was being
29 recorded. He was instructed that he must
30 tell the truth and that if found to be lying
31 he would be subject to penalty.
32

33 And then a reading of the statements themselves,
34 you'll see where it would appear that someone
35 other than Luba would become involved. So I just
36 wanted to put that on the record for
37 clarification.

38 THE COMMISSIONER: All right. Thank you.

39 MR. VERTLIEB: Now, we have that motion of Mr. Hira's.
40 I'm going to suggest that we deal with it if we can
41 this afternoon. Any time after two o'clock would
42 work for our schedule. We have some things we
43 need to do now until at least two o'clock.

44 THE COMMISSIONER: Well, I'm going to suggest 2:30.

45 Does that sound convenient?

46 MR. VERTLIEB: That's fine for us. Thank you.

47 MR. BUTCHER: Mr. Commissioner, we had understood that

1 there was going to be a second witness from Poland
2 called today. I learnt that this witness was not
3 going to be called as I finished my cross-
4 examination of this last witness. I have to
5 express my disappointment that I'm learning about
6 the Commission's decisions to not call witnesses
7 as the decision is announced rather than in
8 advance. And I'm going to propose that we arrange
9 for some read-ins of that witness's evidence just
10 as we have arranged for read-ins from the
11 statement of Mr. Dibon.

12 THE COMMISSIONER: Well, you'll have to discuss that
13 with counsel.

14 THE REGISTRAR: Mr. Commissioner, maybe I can clarify
15 that. We learned that just before we started from
16 the previous witness.

17 THE COMMISSIONER: Yes, there was a problem with the
18 witness. I mean, these things are not done on a
19 cavalier basis.

20 MR. VERTLIEB: Just for the benefit of the rest of the
21 participants, Mr. Giles told us this morning as we
22 were about to start that apparently the witness's
23 father had had some medical seizure. What's the
24 story, Mr. Giles? You've heard the -- what
25 happened? Please tell us.

26 THE REGISTRAR: I was advised through Mr. Barski that
27 the witness advised that the woman would not be
28 appearing as her mother -- her father had had a
29 stroke and that she had to attend to him. So that
30 was just before we started and I did not get the
31 opportunity to advise everybody.

32 THE COMMISSIONER: So there we have the reason.
33 There's always a reason behind these things. It's
34 not a cavalier procedure.

35 Now, before we adjourn, one more thing. In
36 that we're going to adjourn for a little over a
37 week now, and in that perhaps some counsel may
38 wish to formulate over that period of time some
39 type of submissions or argument at the end, I'll
40 just say that what is going through my mind at the
41 moment is to invite written submission and to
42 allow a very brief period of time for various
43 counsel to address their written submission. And
44 although I haven't settled on that type of time, I
45 was thinking that in that there are certainly
46 differences between, no doubt, the points of view
47 of the counsel for each of the RCMP policemen, yet

1 there is a tremendous overlap. And that being so,
2 perhaps a half an hour each would be convenient,
3 being a total of two hours. Maybe an hour for
4 Mr. Kosteckyj and an hour perhaps for the --
5 because the medical evidence will be in by then --
6 for the lawyer for TASER, and maybe a half an hour
7 for everybody else. But I'm certainly open to
8 suggestions on that.

9 Okay. We're going to adjourn now to Tuesday,
10 a week Tuesday, at ten o'clock.

11 MR. VERTLIEB: Mr. Commissioner, did you want to come
12 back this afternoon at 2:30 to deal with Mr.
13 Hira's motion?

14 THE COMMISSIONER: Yes. I'm sorry, I forgot. Yes.
15 2:30, then, for the argument. Thank you.

16 THE REGISTRAR: The hearing is now adjourned until
17 2:30.

18

19 (PROCEEDINGS ADJOURNED FOR NOON RECESS)

20 (PROCEEDINGS RECONVENED)

21

22 THE REGISTRAR: The hearing is now resumed.

23 THE COMMISSIONER: Yes, Mr. Hira.

24 MR. HIRA: Thank you, Mr. Commissioner.

25 You should have the affidavit, which I will
26 be referring to, and you mentioned that you had
27 the *Scopelliti* case.

28 THE COMMISSIONER: I do.

29 MR. HIRA: If you don't, I have many copies.

30 THE COMMISSIONER: I do.

31 MR. HIRA: Not all for you, though.

32 THE COMMISSIONER: One's enough.

33 MR. HIRA: And if any of my friends want copies, they
34 are available.

35 Mr. Commissioner, I don't bring this
36 application lightly. I am aware of your rulings
37 but I am duty bound to bring it, and I will.

38 In my submission, this application should
39 have been brought by Commission counsel. This is
40 not an application to blame the victim, rather an
41 application to seek relevant evidence.

42 The purpose of this inquiry includes to
43 provide Mr. Dziekanski's family and the public
44 with a complete record of the circumstances of and
45 relating to Mr. Dziekanski's death. The records
46 being sought are, in my submission, relevant, as
47 one, they may explain his behaviour at the

1 airport, and second, Commission counsel has put
2 Mr. Dziekanski's character in issue through the
3 witnesses this week.

4 Let me just go through briefly the history of
5 the application. The records have been sought
6 from Poland since the beginning of this phase of
7 the inquiry without any meaningful response. We
8 wrote to Commission counsel on March 9 seeking the
9 records. We again wrote to Commission counsel on
10 March 17 and received no response from any party.
11 Thus the application was filed on March the 27th.
12 And I emphasize we've had no response, no
13 position.

14 The materials in the application, that is the
15 affidavit materials -- and I'm referring to the
16 article which spans pages 13 to 15, and the report
17 of Dr. Di Maio, in particular page 17, item 15,
18 and the conclusion, the last paragraph at page
19 24 -- disclose the following.

20 One -- and I'm looking at page 14 in the
21 article -- that --

22 THE COMMISSIONER: Just a minute now. You're looking
23 at what?

24 MR. HIRA: Page 14 of the affidavit, which is the
25 article.

26 THE COMMISSIONER: This is an article -- oh, in the
27 newspaper.

28 MR. HIRA: That is correct, November 14, 2007.

29 THE COMMISSIONER: Yes.

30 MR. HIRA: And I'm looking at page 14, Mr.
31 Commissioner.

32 THE COMMISSIONER: Yes.

33 MR. HIRA: At the fourth paragraph. They disclose that
34 he had a "troubled past," that he'd served a five-
35 year sentence for robbery, which of course is
36 theft with violence.

37 THE COMMISSIONER: Well, under our law it is.

38 MR. HIRA: All I can go with is what information I
39 have. If it is different under Polish law,
40 counsel for Poland can advise.

41 Next --

42 THE COMMISSIONER: Excuse me a minute. You're on page
43 14 and I'm there. But what was the line you were
44 looking at?

45 MR. HIRA: If you read the whole fourth paragraph, the
46 reporter notes that Dziekanski had --

47 THE COMMISSIONER: I've got it.

1 MR. HIRA: And if you proceed down three more
2 paragraphs, he's described as "far from being an
3 angel he made a lot of wrong decisions in his
4 life."

5 The report of Dr. Di Maio, which starts at
6 page 16 and is dated September 16, 2008, and was
7 part of the IHIT materials, notes at page 17 in
8 the items that he relied upon, item 15, a
9 translation of an article from the *Polish Times*
10 stating that the deceased had a thick police file
11 with a record of few thefts and one act of
12 violence while under the influence of alcohol.

13 That article I have been unable to find in
14 the materials.

15 The doctor discloses at page 20 or writes at
16 page 20 in the paragraph starting in the middle in
17 regard to the autopsy findings, going through that
18 paragraph, he says, I believe in the fourth
19 sentence:

20
21 Thus the autopsy findings in the heart, liver
22 and brain are what one would expect in a
23 chronic abuser of alcohol.

24
25 He then goes on in some detail over the next pages
26 dealing with those findings, and concludes at page
27 24, Mr. Commissioner:

28
29 In summary, it is my opinion that death was
30 due to a cardiac arrhythmia secondary to the
31 effects of chronic alcohol abuse; alcohol
32 withdrawal; stress from both the emotional
33 and physical results of the withdrawal; the
34 struggle with law enforcement personnel, and
35 alcohol cardiomyopathy.

36
37 And deals with the mechanism that may have
38 precipitated death in the next sentence.

39 The evidence that you have heard and seen
40 includes on video strange if not bizarre behaviour
41 in Pritchard videos one and two at the Vancouver
42 International Airport, reports from civilians that
43 they were alarmed or scared by the behaviour, and
44 they took the time to report the behaviour to
45 airport security or operations. You visually can
46 see that he creates a barricade at the entrance to
47 the IRL. He smashes a computer, smashes furniture

1 against the wall. Prior to doing so, the chair or
2 table that was smashed against the glass wall is
3 held in an apparently threatening manner towards
4 one of the witnesses.

5 And in Exhibit 33, the Polish translation of
6 the video provided by Mr. Barski, he states -- his
7 opening comments are, he threatens to trash the
8 office, and later on to smash the entire desk.
9 And I'm referring to the first Pritchard video,
10 Mr. Commissioner.

11 THE COMMISSIONER: I recall.

12 MR. HIRA: Upon recognizing the police -- and there's
13 no doubt he recognizes them because he calls
14 out -- he deliberately grabs a stapler and assumes
15 a combative stance. He fights through the
16 handcuffing process. In my submission, this
17 behaviour is unorthodox, if not bizarre.

18 Against this behaviour, Commission counsel,
19 counsel for Ms. Cisowski, and counsel for Poland
20 have deliberately engaged in attack on the
21 credibility of the RCMP members, who have
22 responded saying they viewed his actions as
23 resisting and combative and they described what
24 they saw on the other side of the video while they
25 faced him.

26 It is submitted that the records -- and we
27 don't know what they are, but we're led to believe
28 they are those records from the materials that I
29 showed you in the affidavit -- the records may
30 provide an explanation for the behaviour and
31 smashing the computer and the chair, threatening
32 civilians, his failure to cooperate with the
33 police and instead grabbing a stapler, and may
34 buttress the credibility of the RCMP officers
35 regarding their evidence that he was agitated,
36 resistant and combative. A history of this type
37 of activity may be consistent or would be
38 consistent with his behaviour at the airport and
39 with the police.

40 Now, the authority that I rely upon I have
41 provided in my motion materials. I will refer
42 you --

43 THE COMMISSIONER: Yes, I've read it through carefully.

44 MR. HIRA: Very well. May I just refer you to --

45 THE COMMISSIONER: Yes, indeed.

46 MR. HIRA: -- applicable paragraphs? In my submission,
47 it stands for the proposition that records such as

1 this are clearly relevant in a case where it is
2 alleged that the victim acted aggressively and the
3 actions of those dealing with his aggression were
4 to overcome the aggressive behaviour regardless of
5 whether or not the history of this behaviour is
6 known to the persons attempting to counter the
7 aggressive behaviour.

8 I rely on paragraphs 2 and 3, that set up the
9 propositions. They're on page 1. You can read
10 faster than I can speak so I will just make
11 reference in most cases and elaborate in a couple
12 of cases with respect to the paragraphs. I also
13 rely on paragraphs 23 and 24.

14 With reference to the type of evidence that
15 was sought to be adduced in that case, it fell
16 into three types of categories. One, at paragraph
17 25, was an actual conviction involving aggressive
18 behaviour, and you can see that in the last
19 sentence in paragraph 25.

20 Paragraph 26. There was a stay of
21 proceedings -- and you can see that in the last
22 sentence in paragraph 26 -- so there was no
23 conviction.

24 And in paragraph 27, this was a case where no
25 charges were laid and no police complaint was
26 made, but it was still admissible as aggressive
27 behaviour by the victim.

28 I also rely upon paragraphs 29 and 30. And
29 at paragraph 31, citing Dean Wigmore, Mr. Justice
30 Martin said:

31
32 When the issue of self-defense is made in a
33 trial for homicide, and thus a controversy
34 arises whether the deceased was the
35 aggressor, one's persuasion will be more or
36 less affected by the character of the
37 deceased; it may throw much light on the
38 probabilities of the deceased's action.
39

40 He goes on at the next page just before paragraph
41 32, the quote:

42
43 In the present use, this additional element
44 of communication --

45
46 That is knowledge of the deceased's prior
47 aggressive tendencies.

1 about relevance, what can be done is that the
2 records can be produced and vetted by the
3 Commission counsel or yourself before they're
4 released to any party.

5 Those are my submissions. I said I'd take 20
6 minutes. Apparently I was three minutes longer.
7 Subject to any questions.

8 THE COMMISSIONER: No. Thank you, Mr. Hira. You were
9 very complete.

10 MR. BUTCHER: Perhaps if I can just make a couple of
11 points in support of Mr. Hira's application.

12 THE COMMISSIONER: Yes, indeed.

13 MR. BUTCHER: I join him and adopt everything he has
14 said. Firstly, I want to take you back to a point
15 earlier where a question was raised, and I forget
16 who raised it, about whether or not the criminal
17 or discipline history of the police officers
18 should be disclosed. It may have been Mr.
19 Kosteckyj that made that application. And in
20 discussions with counsel, it was conceded that if
21 there were any founded, relevant, similar
22 convictions or findings, they should be disclosed,
23 because they were relevant to the assessment of
24 the facts. I take the same position with respect
25 to the similar records of Mr. Dziekanski.

26 I want to as well perhaps just follow up on
27 something that Mr. Hira said at the end. There is
28 obviously a difference between disclosure and
29 admissibility. I take the position that counsel
30 are entitled to disclosure from the government
31 participants of all of the relevant non-privileged
32 information in their possession or control. But
33 the delivery of the material by a government
34 participant doesn't make the material that's
35 delivered relevant or admissible. And if Mr.
36 Kosteckyj is correct and the only record is 23
37 years old and relates to something that happened
38 when Mr. Dziekanski was a juvenile, then it may
39 well not be relevant but it would still, I would
40 say, be disclosable to us. That's all I have to
41 add.

42 THE COMMISSIONER: Gentlemen, I do not need to hear
43 other counsel. Since receiving this application,
44 I have given this matter very anxious and careful
45 consideration. And in my view, the matter is
46 exceptionally clear. It is put forward to me that
47 this evidence may be relevant with reference to

1 explaining certain matters at the airport. And I
2 absolutely agree and find that that is one of the
3 ratios in the *Scopelliti* case, that if there is
4 independent third-party evidence that tends to
5 show past aggressive behaviour, that past
6 aggressive behaviour may be relevant to prove a
7 fact in issue. Here that fact in issue is whether
8 or not Mr. Dziekanski was aggressive towards the
9 police at various times during the episodes that
10 we saw disclosed.

11 However, the case is also clear that there
12 must be a factual and logical connection between
13 that third-party evidence that is about to be
14 tendered and the circumstances here. And indeed,
15 in the case itself, in reviewing carefully the
16 pieces of evidence that were thought to be
17 admissible, those pieces of evidence were closely
18 associated, and indeed, the violence that was
19 depicted in the episodes in that case were
20 somewhat clear and so were held to be relevant in
21 that case.

22 However, here I am of the opinion that
23 despite what is said in the newspaper and despite
24 what the learned doctor relied upon, that evidence
25 is far too remote to form a connection in any
26 logical way in order to prove the facts in issue
27 that I've identified and counsel has carefully
28 identified.

29 To be a little more complete, in the case
30 itself, *Scopelliti*, found in [1981] O.J. No. 3157
31 in the Court of Appeal of Ontario, paragraphs 2
32 and 3, as pointed out by counsel, identify the
33 issue. In paragraph 3, and I'm paraphrasing:

34
35 This appeal raises among other questions the
36 important question as to the admissibility of
37 prior acts of violence by the deceased, not
38 known to the accused, towards other persons,
39 where the defence advanced by the accused is
40 self-defence.

41
42 Now, here we're not actually talking about self-
43 defence, but nonetheless I think the parallel is
44 apt and the parallel is clear.

45 Then further along it identifies, as counsel
46 has pointed out, the evidence that was sought to
47 be admitted, and I won't go into that. And then

1 it quotes some law, and this is a decision of
2 Martin J.A., who of course has an exceptionally
3 high reputation in terms of his understanding of
4 criminal evidence and matters relating to that.
5 And in paragraph 30, he says in part:

6
7 Obviously, evidence of previous acts of
8 violence by the deceased, not known to the
9 accused, is not relevant to show the
10 reasonableness of the accused's apprehension
11 of an impending attack.
12

13 Now, here that would be the RCMP police.
14

15 However, there is impressive support for the
16 proposition that, where self-defence is
17 raised, evidence of the deceased's character
18 (i.e. disposition) for violence is admissible
19 to show the probability of the deceased
20 having been the aggressor and to support the
21 accused's evidence that he was attacked by
22 the deceased.
23

24 And of course that is apt before us here.

25 I won't go into the case in any further
26 detail than that.

27 Paragraph 46 reads in part:
28

29 I agree, of course, that evidence of previous
30 acts of violence by the deceased, not known
31 to the accused, must be confined to evidence
32 of previous acts of violence which may
33 legitimately and reasonably assist the jury
34 in arriving at a just verdict with respect to
35 the accused's claim of self-defence. To
36 exclude, however, evidence offered by the
37 accused which is relevant to prove his
38 innocence would not, in my view, be in the
39 interests of justice.
40

41 And in paragraph 47 there's an element of
42 discretion in balancing whether or not there is
43 a connection and a probative value between the
44 circumstances to be tendered and the facts in
45 issue.

46 I have that discretion to exercise and I must
47 exercise it judicially, and I exercise it on the

1 principle of remoteness and relevancy and whether
2 or not it would assist in adding evidence or
3 subtracting evidence to the events that occurred
4 between Mr. Dziekanski and the police at the time
5 in question.

6 Accordingly, then, as I mentioned earlier, I
7 am of the opinion that there is no such
8 connection.

9 Reference is also made to the fact that
10 counsel perhaps opened the door with reference to
11 the character of the accused. However, as we
12 know, one of the medical issues in this case
13 relates to circumstances surrounding the cause of
14 death, and unfortunately, later on in this case,
15 we'll no doubt have to probe whether or not there
16 was excited delirium, as some doctors have used
17 the term, whether or not questions of alcohol and
18 other difficulties that we've already heard about,
19 may impact upon the cause of death.

20 However, that to me is the use that I would
21 make of that evidence that we heard concerning
22 what has been characterized as Mr. Dziekanski's
23 character. And ultimately whether or not that is
24 of assistance, we have yet, of course, to
25 determine. And I am of the opinion that the door
26 has not been opened in order to show whether or
27 not there is evidence of his aggressive behaviour.

28 Now, I'm relating this to an event that took
29 place when he was the age of 17 and relating this
30 to some nebulous comments that have been pointed
31 out to me in the newspaper. I of course not for a
32 moment would shut down, based on these reasons
33 themselves, on evidence of alcohol or behaviour or
34 aggressive behaviour that one could connect to
35 these instances, like perhaps in the year or two
36 prior to it, based on very specific allegation of
37 facts.

38 Accordingly, that is my decision. And thank
39 you very much for your argument, gentlemen.

40 Now we're going to adjourn --

41 MR. BUTCHER: I wonder if I could just raise one more
42 matter. You made some comments there about the
43 cause of death, which is going to be one of our
44 next significant evidentiary inquiries.

45 THE COMMISSIONER: Yes, indeed.

46 MR. BUTCHER: I have served a motion seeking disclosure
47 of some more medical records from the Government

1 of Poland. Specifically, the translated medical
2 records and indeed the interview of the doctor who
3 treated Mr. Dziekanski, a Dr. Jablonska, disclosed
4 that in or about May or June of 2007, in other
5 words about four or five months before this event,
6 an ECG or ECGs were undertaken on Mr. Dziekanski,
7 and they showed that he had an abnormal heartbeat.
8 He was prescribed beta blockers because of an
9 accelerated heartbeat. As far as I can tell from
10 my review of the reports, that information was not
11 put before any of the doctors who've provided
12 expert assistance to date.

13 It is my lay view that those ECGs would be
14 very relevant documents in the assessment of the
15 cause of death, and so I have delivered today a
16 motion for production of those documents.

17 Now, the only party that can really have any
18 chance of accessing those documents is the
19 Government of Poland, as far as I can tell. Mr.
20 Rosenbloom has asked for some time to consult with
21 his client before responding to that. It would be
22 my submission that these records would clearly be
23 relevant to that cause of death inquiry or --
24 maybe I speak a little too hopefully -- clearly
25 have the potential to be relevant to that cause of
26 death inquiry.

27 And I'm going to ask, if I may, that that
28 application be set down on Tuesday when we return.

29 THE COMMISSIONER: I'm very much in counsel's hands
30 concerning this. Mr. Rosenbloom, is there any
31 comment you wish to make?

32 MR. ROSENBLOOM: I have no comment at this point in
33 time because I still have not seen your motion. I
34 gather you've provided it to somebody. I have not
35 received it, have I?

36 MR. BUTCHER: It was sent by e-mail this morning to you
37 and --

38 MR. ROSENBLOOM: At what time? I left at 7:15.

39 MR. BUTCHER: It was after that. And it's gone to
40 Commission counsel.

41 MR. ROSENBLOOM: I have not seen it --

42 MR. BUTCHER: I have a copy for my friend that I can
43 give him now.

44 MR. ROSENBLOOM: I want to cooperate with my learned
45 friend. Once I have seen the motion, I will
46 consult with the embassy in Ottawa and with the
47 foreign affairs ministry. I will communicate with

1 my learned friend. If I need more time than the
2 Tuesday on our return, I will speak to my learned
3 friend and we can deal with it. I appreciate that
4 it is time sensitive in the sense my friend would
5 like this information at the earliest occasion.
6 So I will work with my friend during the break,
7 and if there are problems, I will inform him what
8 those problems are and I'll report it to the
9 Commission when I return on Tuesday.

10 THE COMMISSIONER: Mr. Rosenbloom, thank you very much.
11 Have you anything to add, Mr. Vertlieb?

12 MR. VERTLIEB: Yes. The medical information that we
13 have, Mr. Commissioner, is provided by the RCMP
14 investigation and it's given to us by Ms. Roberts.
15 And we understand from Department of Justice
16 counsel that that's the complete medical file. We
17 were asked by Mr. Butcher -- I know he's asked us
18 about the file. We of course have no power to get
19 it. So if there's any other way that that could
20 be achieved, we're happy to entertain it. But
21 we're told that what has been provided is the
22 complete file.

23 Secondly, in terms of the return date, it
24 would not be Tuesday because we're not here next
25 week. Thirdly, Mr. Butcher and others should
26 know, though, that the doctor that he speaks of in
27 Poland wants assurances that we cannot give. Our
28 jurisdiction obviously is here in this province.
29 We can't meet some of the doctor's needs in terms
30 of protections from the Government of Poland and
31 other concerns she has in her home country. So
32 we're very limited in what we can do.

33 THE COMMISSIONER: Well, I think Mr. Rosenbloom is very
34 much aware of that.

35 MR. VERTLIEB: So I just wanted to mention that to you.

36 THE COMMISSIONER: Did you have something to say, Mr.
37 Brongers?

38 MR. BRONGERS: Thank you very much, Mr. Commissioner.
39 Just to ensure the accuracy of the record,
40 Commission counsel has indicated that the RCMP has
41 advised the Commission that they have the complete
42 medical record. My understanding is that the RCMP
43 was provided with some medical records. All of
44 those records that the RCMP has have been provided
45 to the Commission. But that's not the same as
46 saying that the RCMP has the entire medical record
47 that is within Poland. I just wanted to clarify

1 that for the record.

2 THE COMMISSIONER: Well, thank you very much, Mr.
3 Brongers. And it must be evident, too, that the
4 Government of Canada through its counsel has been
5 very cooperative towards our endeavours in this
6 matter. And also, Mr. Rosenbloom, thank you on
7 behalf of Poland.

8 All right, a week Tuesday at 10:00.

9 THE REGISTRAR: The hearing is now adjourned until
10 April 14th at 10:00 a.m.

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12 (PROCEEDINGS ADJOURNED TO APRIL 14, 2009, AT
13 10:00 A.M.)
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