

The Wrong Way of Worldmaking: One Lawyer's Opinion About The Dziekanski Inquiry

"A possible world is given by the descriptive conditions we associate with it"ⁱ. But as Nelson Goodman queries: "In just what sense are there many worlds? What distinguishes genuine from spurious worlds? What are world's made of? How are they made? ... And how is worldmaking related to knowing?"ⁱⁱ. From reading excerpts of Constable Kwesi Millington's testimony in the Dziekanski inquiry, it seems that his world is more spurious than genuine; and that his evidence, along with that of his fellow Mounties, belongs in fiction 101, not in a place where truth, or at the very least, "truthlikeness" is expected.

Philosopher Karl Popper coined the term "truthlikeness" to express the idea that one theory of the world may have better correspondence with reality -- or be closer to the truth -- than another theory. Where a "true" proposition is something that is "in fact" the case; a "truthlikeness" proposition is something close to being the case, but not necessarily true. In Kwesi Millington's world, Robert Dziekanski "...had a stapler open" and was in a "combative stance"ⁱⁱⁱ. Mapped onto the backdrop of disturbing video of an incident where Mr. Dziekanski was tasered numerous times during an incident involving the Royal Canadian Mounted Police, there is one apparent truth -- "truthlikeness" for Millington (and his fellow police officers) was nothing short of a blatant and intentional lie.

There are many disturbing aspects to Mr. Dziekanski's case. That he died while being tasered and manhandled by members of Canada's police force is certainly troubling. Much has been made about the safety, viability and effectiveness of tasers as non-lethal weapons. Concerns have been expressed regarding the handling of a non-English speaking visitor and some have even questioned airport policy with respect to handling persons such as Mr. Dziekanski. Indeed, one is left to wonder why an interpreter was not made available at some point during his 10 hour ordeal. Had somebody bothered to make efforts to facilitate communication in Polish, they would have understood Mr. Dziekanski to be asking rational questions, such as "how long do I have to wait?"^{iv}. In this writer's view, however, as interesting and important as all of these issues are, the primary concern is the fact that members of Canada's police force fabricated reports to justify the use of the taser in the circumstances. The bottom line is, fabrication of evidence by anybody, but in particular law enforcement officials, is a breach of a most sacred trust, and as such, simply cannot be tolerated!

In the Dziekanski inquiry, the fabrication was not limited exclusively to the report of Constable Millington, but extended to all of the officer's involved in the melee. As Ian Mulgrew of the Vancouver Sun reported: "Millington [was] the third of ...four RCMP officers who confronted Dziekanski to testify and each ... recited a near identical story using similar language ... shown to be misleading on the same key points"^v. When pressed in cross-examination about a lack of corroboration between his notes and the

video, Constable Millington consistently testified: "I was wrong about that"^{vi}. A rather convenient response which begs the question: but for the video, would we have ever known about the events leading up to Mr. Dziekanski's death? Would Mr. Dziekanski's memory have been forever tarnished by misleading details reported by police? Perhaps even more troubling, if Constable Millington and his fellow officers were prepared to mislead in this case, how many other cases have they been responsible for creating misleading reports or supplying misleading evidence? How many people have been convicted on the basis of their testimony? How many judge's gave their evidence the benefit of being supplied on the basis of notes or reports made contemporaneously at the time of the investigation? How many other police officers have fabricated similarly? "The immediate, obvious damage is in the questions now sure to be raised about the credibility of other Mounties who present statements of facts within our justice system"^{vii}. In the immortal words of Friedrich Nietzsche, "... what questions has this will to truth not laid before us! What strange, wicked, questionable questions!"^{viii}.

Our criminal justice system has mechanisms to ferret-out the deceiver, but they are far from perfect. Full, fair and frank disclosure of material information allows Prosecutors to make critical evaluations about the case, including the all important decision as to whether to prosecute at all. And when a decision is made to prosecute, cross-examination with the benefit of full disclosure is a powerful tool for exposing frailties in the evidence. But even when conducted with preparation and skill, effective cross-examination can still fail to create reasonable doubt in the mind of a trial judge. Of course, findings of fact are ultimately made by trial judges -- who are themselves human beings, susceptible to human frailty and coloured by individual experience. The deception meter varies from judge to judge. An acquittal before one judge is a conviction before another. Reasonable doubt in one case, is proof beyond a reasonable doubt in another. Suffice it to say, though inconsistency is a reality of our criminal justice system, the more honest the evidence, the more likely fidelity to the truth.

The criminal justice system places a great deal of trust in its law enforcement officials. As Judge Bagnall stated in *R. v. Langlois*, [2004] B.C.J. 1372 (B.C.P.C.) a police "...officer holds the trust of his community every time he goes to work"^{ix}. This trust relationship is more than merely a tenuous bond between society and police, but is the cornerstone of any civilization purporting to function on the basis of civil liberty and the rule of law. When law enforcement officials actively disseminate misleading information or falsify police reports, they not only jeopardize the rights of the people they are empowered to protect, but endanger the innocent and tarnish the sanctity of our system of justice.

Inquiry head Thomas Braidwood heard testimony from all four officers involved in the tasing of Robert Dziekanski. Laughably, all four testified that they were "scared" and felt "threatened" by the 40 year old Polish-speaking man, whom they spent a grand total of 30 seconds with in the same room before shooting him with a pair of taser darts and

administering 50 000 volts. In the seconds prior to the first taser deployment, Dziekanski never meaningfully threatened the police as they cornered him *en masse* against a desk. Over the next 31 seconds Constable Millington shocked Mr. Dziekanski another three times, including a "push stun" while three police officers held him down. Millington testified that he administered the "second shock" because Dziekanski was still "moving and struggling" and the third because he was "still resisting". Dziekanski was "push stunned" because Millington thought his taser "wasn't working" properly. Perhaps what is more shocking than the 50 000 volts injected four times into Mr. Dziekanski is Millington's ridiculous rationalization for an obviously irrational act! Surely it does not defy logic that a human being would be moving and struggling, or perhaps "writhing", against pain inflicted by darts piercing the skin and 50 000 volts coursing through the body. In light of what was plainly visible to any seeing Cyclops was that Dziekanski dropped to the ground immediately after being tasered the first time. The taser was unquestionably working! Given Millington's training, which surely must have involved, at minimum a taser demonstration, Dziekanski's reaction was actually little different than the reaction of experienced police officers subjected to a taser shock as part of their officer schooling (with the exception of course that Dziekanski didn't have two fellow police officers gently helping him to the ground after he was jolted)^x.

Even if Millington and his fellow officers could justify the first taser shock, the second, third and fourth deployments were nothing short of torture.

The Oxford Dictionary defines "torture" as "the infliction of severe pain as punishment or means of coercion"^{xi}. Of course, Millington never testified that he used the weapon for kicks or that he deployed it without grounds (which would have been closer to the truth); instead, he rested his laurels on the oft cited and misused doctrine of officer safety. As stated by Calgary lawyer Gregory R. Dunn: "The doctrine of officer safety is the latest and most intrusive practical manifestation of our institutional zealous fixation on issues of safety and its sheer commonality of use has reached near leviathan proportions"^{xii}. Notwithstanding the exceedingly small number of officer injuries or deaths occurring in the line of duty, the doctrine is routinely cited and accepted without much adieu by courts across Canada. Constable Kwesi Millington essentially chanted the mantra "officer safety" at the inquiry as the basis for electrocuting Mr. Dziekanski. As he said, "[h]e had the stapler open, his other fist raised. He was in a combative stance as we call it and was approaching the officers, I believe, with the intent to attack, so I deployed the taser at that point"^{xiii}. In stark contradiction to Millington's testimony, the video showed Dziekanski surrounded by police, with his back to a desk and his arms somewhere at or below his midsection. Within 30 seconds of being in the same room and without a single identifiable act of aggression against any officer, Millington deployed the taser.

Constable Millington and his fellow officer are liars -- and let us not denigrate Robert Dziekanski's memory or the lessons that must be taken from this inquiry by characterizing their testimony or their conduct in creating misleading police reports in

any other way. Indeed, there may be a possible world where Mr. Dziekansky "approached" the officers in a "combative stance" with "raised fists" and armed with a stapler, but in this world, that didn't happen!

But for the video, there may have many possible worlds and Millington's ways of worldmaking may have been gospel -- but in the real world, captured on video, there is only one world -- and in that world, Mr. Dziekansky was a non-English speaking visitor who had effectively been detained for upwards of ten hours at the Vancouver Airport -- and when people entrusted to help him arrived (the police), he died. And to cover themselves, they lied. That is the tragic truth, or at the very least, the tragic "truthlikeness" of Robert Dziekanski's death.

So what lessons can be learned from this dreadful incident? What repercussions, if any, should befall those responsible?

Prior to the inquiry, the British Columbia Crown determined that no charges would be laid against Constable Millington and his colleagues. Presumably, the decision not to prosecute was premised upon a review of disclosure, including the misleading police reports; but now that disturbing flaws have been identified in these materials, one wonders whether this is still the right decision? If police can avoid meaningful responsibility by creating misleading reports, then what deters any law enforcement official from simply doctoring notes, tainting an investigation or disclosing nothing at all? Surely shifting the cost-benefit pendulum to favour the creative use of fiction as a means of avoiding meaningful accountability cannot be condoned? After all, a system of justice that does not seek justice against itself is no justice at all.

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ⁱ Kripke, Saul, Naming and Necessity, Harvard University Press, 1972: pg. 44.

ⁱⁱ Goodman, Nelson, Ways of Worldmaking, Hackett Publishing Company, 1978: pg. 1.

ⁱⁱⁱ Ian Bailey, The Globe And Mail, March 3rd, 2009, pg. A1. See also: <http://www.theglobeandmail.com/servlet/story/RTGAM.20090302.wtaserwitness0302/BNStory/National/home>

^{iv}<http://www.theprovince.com/Dziekanski+final+words+translated+from+Polish+inquiry/1245317/story.html>

^v<http://www.vancouver.sun.com/news/vancouver/Appalling+testimony+draws+guffaws+from+gallery/1347381/story.html>

^{vi} Gary Mason, Globe And Mail, Tuesday March 3rd, 2009, pg. A4. See also <http://www.theglobeandmail.com/servlet/story/RTGAM.20090302.wtaser-mason0303/BNStory/National>

^{vii} <http://thechronicleherald.ca/Columnists/1110582.html>

^{viii} Nietzsche, Friedrich, "Beyond Good and Evil", Basic Writings of Nietzsche, The Modern Library, New York, 1992: pg. 199.

^{ix} *R. v. Langlois*, para. 23.

^x see <http://www.youtube.com/watch?v=ACUjnJBHIZc> and <http://www.youtube.com/watch?v=F9Z7PfcjCm0&NR=1>

^{xi} The Oxford Paperback Dictionary, 4th Edition, 1994.

^{xii} Gregory R. Dunn, "Remembering Freedom – The Doctrine of Officer Safety", http://ccdlaforum.blogspot.com/2008_11_01_archive.html

^{xiii} Ian Bailey, The Globe And Mail, pg. A1.