

INQUIRY INTO THE INVESTIGATION AND
PROSECUTION OF DEREK HARVEY-ZENK

The Honourable Roger Salhany, Q.C., Commissioner

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Transcript of Proceedings
before the Commission sitting at
the Winnipeg Convention Centre
Winnipeg, Manitoba

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Tuesday, August 5, 2008

Volume 25

INQUIRY PROCEEDINGS

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1 TUESDAY, AUGUST 5, 2008

2 UPON COMMENCING AT 9:00 A.M.

3 THE CLERK: All rise. This Commission
4 of Inquiry is now open.

5 THE COMMISSIONER: Mr. Paciocco, while
6 you're getting your material together, I wanted
7 just to ask Mr. Kaplan two questions. The first
8 is, section 722 of the code provides that a victim
9 impact statement must be in accordance with the
10 provincial laws or regulations. I can't remember,
11 I haven't read it in some time. Is there a
12 provincial law or regulation that sets out the
13 contents that should be in a victim impact
14 statement?

15 THE WITNESS: If I'm remembering
16 correctly, it should be in the Victims' Bill of
17 Rights area, but I'm not quite sure.

18 THE COMMISSIONER: The other thing I
19 wanted to know about, before we get into it, is
20 that the Victims' Bill of Rights talks about the
21 director of prosecutions. Who is the director?

22 THE WITNESS: On that note I can
23 answer, because the Victims' Bill of Rights was
24 passed some time ago as far as years. And at that
25 time, before we changed around, and when I say we,

1 I mean the Department of Justice, Criminal
2 Prosecutions, the director would have been
3 Mr. Slough, who is now the ADAG or Assistant
4 Deputy Attorney General. That's who it refers to.
5 And it's one thing that I did check before I came
6 back here. That's who it would have been.

7 THE COMMISSIONER: Who is it now?

8 THE WITNESS: It would be the
9 Assistant Deputy Attorney General.

10 THE COMMISSIONER: I see, okay. And
11 he does that in addition to his other duties?

12 THE WITNESS: We all do things in
13 addition to our regular duties, as best we can.

14 THE COMMISSIONER: Thank you.

15 MR. PACIOCCO: Thank you,
16 Mr. Commissioner. Good morning, Mr. Kaplan.

17 THE WITNESS: Good morning,
18 Mr. Paciocco.

19 MR. PACIOCCO: I apologize for the
20 need for a little interlude here to take care of
21 customary business on the first of sittings in
22 each week by announcing the witnesses that we're
23 going to be calling. This, the eighth week of the
24 hearing, we intend of course to complete the
25 evidence of Mr. Kaplan this morning. He will be

1 followed by Mr. Brian Gover, who is an expert
2 witness who will be dealing with the standards and
3 ethics of prosecution, and relate them to
4 hypotheticals that hopefully match the evidence
5 before you, Mr. Commissioner.

6 We will also be hearing from Mr. Don
7 Slough. We may be able to get his evidence
8 commenced today, although we are certainly
9 prepared, if need be, to start that task tomorrow.

10 And finally, the last witness
11 scheduled to testify at this Commission of Inquiry
12 is Mr. Derek Harvey-Zenk. He is scheduled to
13 attend, in response to the subpoena that was
14 issued to him, tomorrow.

15 After the evidence of Mr. Harvey-Zenk
16 is completed, next week will be the week for
17 submissions. We will have to finalize the
18 proposal that I put before you, Mr. Commissioner,
19 of commencing on the Tuesday so that everyone has
20 one additional day to assist them in their
21 preparation.

22 BY MR. PACIOCCO:

23 Q Thank you for your indulgence,
24 Mr. Kaplan.

25 Sir, we were going through the

1 retainer of Mr. Minuk and some of the background
2 information. On March 1st, 2005, you received an
3 executive summary from the East St. Paul Police
4 relating to this prosecution. Do you recall
5 receiving that document, sir?

6 A Yes.

7 MR. PACIOCCO: And for the sake of
8 completeness, I'm going to put the cover sheet
9 into evidence as an exhibit. It's found at G-40
10 of the book that has been prepared for these
11 proceedings.

12 THE CLERK: Exhibit 238.

13 (EXHIBIT 238: G.40, Fax charge sheet
14 to Brian Kaplan for East St. Paul
15 Police - Mar. 1, 2005)

16 BY MR. PACIOCCO:

17 Q Sir, what you're going to receive is
18 only the cover sheet of the document that was
19 faxed to your attention on the 1st of March from
20 the East St. Paul Police relating to the accused,
21 Harveymordenzenk, Derek, indicating the charges,
22 and indicating that attached the Crown package has
23 been prepared, including the court brief and
24 incident reports as well as relevant notices.

25 Sir, I take it when you received that,

1 that you familiarized yourself to some degree with
2 that material?

3 A I would have familiarized myself,
4 certainly with the court brief, which is a brief
5 summary as far as what the police had put together
6 as far as the file.

7 Q And sir, without suggesting that you
8 intimately familiarized yourself with every piece
9 of information relating to this prosecution, over
10 the course of the following months you became
11 generally familiar with the kind of evidence
12 available to Mr. Minuk in this prosecution, sir?

13 A It would have been available through
14 obviously discussions with outside counsel,
15 Mr. Minuk.

16 Q And you learned at some juncture that
17 the Professional Standards Unit investigation had
18 not produced police officers, even though many,
19 many witnesses had been interviewed, who could
20 give any type of precise evidence or even general
21 approximations of the amount of alcohol that
22 Mr. Derek Harvey Zenk had consumed?

23 A In a general way, yes.

24 Q Sir, you would agree with me, I take
25 it, that this case really epitomizes the

1 importance of independence in the prosecutor, sir?

2 A Well, that's why we went to outside
3 counsel based on our policy, yes.

4 Q Your policy is to do that in any case
5 where a justice official becomes the subject of a
6 prosecution, such as a police officer?

7 A Basically, yes.

8 Q And as this case developed, I would
9 suggest to you that it became even more apparent
10 that independence was crucial, given that more
11 than 20 police officers from the Winnipeg Police
12 Service who had been in the general or specific
13 company of Mr. Harvey-Zenk were providing evidence
14 that was either incomplete, relative to what
15 Sergeant Carter had identified during his
16 investigation of Mr. Harvey-Zenk, or inconsistent
17 with it, which is to say individuals not making
18 observations about the consumption of alcohol,
19 either not making observations about
20 Mr. Harvey-Zenk's state of impairment or attesting
21 to his sobriety, sir?

22 A I think to answer your question,
23 Mr. Paciocco, I was very happy this was a matter
24 to go to outside counsel, yes.

25 Q And sir, if counsel was to choose to

1 prosecute this case on all of the charges, the
2 spectre was raised of potentially not calling
3 those Winnipeg Police Officers who gave evidence
4 inconsistent with the prosecutorial theory of
5 impairment laid out in the charges, and
6 potentially cross-examining them and potentially
7 challenging their credibility as defence
8 witnesses. Do you agree that that was necessary
9 if this case was going to be prosecuted, sir?

10 A Again, Mr. Paciocco, not having read
11 every single page, when I was prosecuting many
12 years ago, as I recall, I would have liked to have
13 known everything to do with the file. And
14 therefore, to answer your question, I'm not sure I
15 can.

16 Q Well, sir, I'm suggesting to you that
17 these witnesses were either going to provide
18 evidence favourable to the defence or evidence
19 that was not going to advance the prosecution, and
20 that if they were going to be testifying, they
21 would have to be testifying as defence evidence.
22 They are not witnesses that the Crown would call.
23 Which raises the spectre of the Crown prosecutor
24 in this case potentially having to cross-examine
25 and challenge the credibility of several, if not

1 more, police officers from the Winnipeg Police
2 Service?

3 A Well, again, sir, not having read the
4 actual statements of any of the particular
5 witnesses that you are talking about, again, I'm
6 not sure. It seems to me I would have liked the
7 opportunity, in preparation, to read those
8 statements and then to determine, do I take them
9 at face value, what is their worth, to formulate
10 the strategy as far as prosecuting the case.

11 Q Okay. I'll put it to you this way,
12 sir.

13 A Okay.

14 Q If it became necessary, in the
15 interest of prosecuting the charge that was laid,
16 to cross-examine and challenge the credibility of
17 a large number of Winnipeg Police Service
18 Officers, who the Crown Attorneys often call as
19 witnesses in other cases and who they must present
20 as credible witnesses, it would be extremely
21 awkward, would you not agree with me, for a line
22 prosecutor to have to discredit the very officers
23 who she or he may need to call in some future case
24 as witnesses for the prosecution?

25 A Well, again, not having read the

1 statements in detail and not having knowledge as
2 far as the officers, anything but face value as
3 far as their statements, again, I'm not sure I can
4 answer that without a feel for the case in
5 general.

6 Q Okay, sir, I won't force you into
7 answering hypotheticals. I think we would agree
8 that this is a case where independence is an
9 important consideration?

10 A That I agree.

11 Q Thank you, sir. You, of course,
12 ultimately assisted in securing the services of
13 Mr. Minuk as the independent prosecutor in this
14 case?

15 A I would have been involved with the
16 engaging of outside counsel, as I normally am,
17 except in this particular case, for some unknown
18 reason that I think I said last time we were here,
19 it was Mr. Ridd, the duty counsel, who was in
20 charge of, at that point, at least engaging
21 outside counsel here, to get him on board for the
22 case as soon as possible.

23 Q And sir, on the 3rd of March you
24 formalize that by providing him with a written
25 retainer connected to his task in this case, sir?

1 A My support person would have issued
2 something and seen to it that he received the file
3 shortly thereafter.

4 Q That would have been under your
5 authority, sir?

6 A Definitely.

7 Q You had a close working relationship
8 with Mr. Minuk?

9 A I'd say yes.

10 Q And he had indicated that he had
11 regular, if not daily or second daily contact with
12 you in connection with all of his files when he
13 took on files for the Ministry, sir?

14 A I'd have to agree with him on that.
15 There were calls, e-mails and running into each
16 other occasionally because of the cases that he
17 had on the go.

18 Q Sir, why go to a private prosecutor
19 within Manitoba, given the various degrees of
20 separation that are possible under the independent
21 Crown policy? You can, for example, go to a
22 prosecutor from another jurisdiction, or even an
23 independent lawyer from another jurisdiction.
24 Could you explain to the Commissioner why, in this
25 case, it was considered appropriate to go to a

1 local practitioner such as Mr. Minuk?

2 A For a number of years, that's what we
3 had been doing, as far as I can recall, with
4 respect to our outside counsel, and I think I told
5 you at our interview, and it usually worked, in
6 fact, it always worked.

7 Q Was there any thought given to perhaps
8 trying to remove this case one step or two steps
9 further from having a local lawyer prosecuting it,
10 sir?

11 A Again, in this particular case,
12 because of what we had done in the past, this was
13 just assign outside counsel from our group.

14 Q Now, sir, Mr. Minuk has been the
15 subject of some criticism relating to the
16 allegations of conflict of interest. And I can
17 indicate to you that two experts who have
18 furnished reports to this Commission are of the
19 view that there was no conflict of interest in the
20 formal sense, and I can indicate to you that the
21 Manitoba Law Society concluded that there was no
22 conflict. In each of those cases of complaint,
23 they related in the first instance to the
24 suggestion that Mr. Minuk had acted for police
25 officers in the past. The second complaint was

1 that he had acted as counsel for a co-accused in
2 the same case as Mr. Wolson, who of course was
3 defending Mr. Harvey-Zenk.

4 Sir, I'm not going to ask you to
5 comment on whether or not that was a formal
6 conflict of interest, or whether you agree or
7 disagree with the experts, however, I do want to
8 ask you this, sir. Given those circumstances, did
9 you feel that selecting Mr. Minuk was problematic
10 in this case?

11 A I didn't feel that it was problematic
12 because, bottom line, if I can use that term, was
13 in my dealings with our outside counsel over the
14 last many years, they are all professionals and I
15 have always found they are able to deal with their
16 matters in a professional manner throughout. So,
17 again, I would say to you, I didn't feel that
18 there was any major conflict.

19 Q So your evidence would be that even
20 though you had discretion as to who to select, and
21 even though the general sentiment is there was no
22 formal conflict, you didn't feel that the concerns
23 that gave rise to some apprehension ultimately on
24 the part of some people made it an ill-advised
25 choice, because you had confidence in Mr. Minuk?

1 A Exactly.

2 Q Sir, you appreciated, I think, given
3 your experience from very early on that this was a
4 highly sensitive case in the political sense, sir?

5 A I'm not sure how to answer that. I
6 knew from the get-go one thing, that it was a
7 concern as far as this particular case and the
8 circumstances surrounding it.

9 Q You were ultimately made aware that
10 the family, in particular, the parents of Crystal
11 Taman, were extremely exercised and upset over
12 what they perceived to be failings in the criminal
13 justice system and had become quite involved in
14 trying to move both politicians and prosecutors in
15 this matter?

16 A That I understood.

17 Q On September 21st, 2005, a letter was
18 sent to the then Minister of Justice that I
19 understand came into your possession, sir?

20 A It somehow got routed down to me, yes,
21 from Mr. Mackintosh's office.

22 Q I'm going to ask that you be furnished
23 with Exhibit 219. It is found in book R-1.91.4,
24 book R-1.91.4. The page reference is 3115, page
25 3115.

1 Sir, what you should have in front of
2 you is a fax transmission sheet to Mr. Marty Minuk
3 dated the 21st of September, 2005, from yourself,
4 sir?

5 A Correct, yeah.

6 Q And the remarks indicate:

7 "Ms. Victoria Sveinson - regarding
8 death of daughter Crystal Taman
9 (Harveymordenzenk) Ministerial
10 correspondence follows for this
11 matter. Could you please draft a
12 response for Brian's signature on the
13 justice issues and forward to me for
14 Brian's review. Thanks Marty,
15 Colleen."

16 Sir, we have learned in these proceedings that
17 Colleen Ireton was your assistant?

18 A And still is.

19 Q I take it, sir, that this fax
20 transmission was sent under your authority to
21 Mr. Minuk?

22 A That's correct.

23 Q Why did you ask Mr. Minuk, who had
24 been appointed an independent prosecutor in this
25 case, to draft a response for your signature to

1 the letter of complaint that you will find
2 attached to that fax document, sir?

3 A Well, number one, whenever we engage
4 outside counsel, it's always been important, in my
5 view, that everything that comes in, whether it's
6 about witnesses or whether it's about victims,
7 should all be there for outside counsel, just by
8 way of information.

9 Number 2, I can say this, in looking
10 at the notes under remarks, that I would have
11 asked then Mr. Minuk to take a look at this and
12 also to hopefully prepare something, as I think
13 it's indicated here, for my review as far as a
14 potential reply to, in this case, Mrs. Sveinson.

15 Q Okay, sir. The first point you
16 mentioned is simply an informational one, and you
17 would agree with me you could have accomplished
18 that by simply forwarding a copy of the letter to
19 him so he has a heads up to potential challenges
20 he may have in dealing with the victims, that it
21 wouldn't have been necessary to ask him to draft
22 anything? You could have just sent him a copy of
23 the letter, sir?

24 A Well, again, he had the most knowledge
25 and understanding as far as the file per se? Even

1 though I know, having received one of your
2 questions at the interview and thought about it
3 again and again, that you make a valid point as
4 far as the issues raised mostly in the letter that
5 was passed along by Mrs. Sveinson as far as
6 justice matters, if you will. And I probably can
7 agree with you.

8 Q Okay. Just so that it is clear for
9 everyone here and for the Commissioner, the
10 question I put to you was in response to your
11 evidence where you indicated that he was the
12 prosecutor and would have more information about
13 the case. And I had observed that this letter in
14 fact wasn't about the case per se, it was about
15 general justice issues and the state of the law.
16 And I take it from your response that you are now
17 agreeing with me that the letter was indeed about
18 broader justice issues, and that it perhaps didn't
19 require any inside information from the prosecutor
20 in order to be able to respond?

21 A Upon reflection, I will agree with
22 you.

23 Q Thank you, sir. And I also wanted to
24 simply follow up on an answer you gave a moment
25 ago. You indicated that you had asked in this

1 remarks column for Mr. Minuk to provide a response
2 for your review. You'd agree with me that what it
3 says here is that he is being asked to draft a
4 response for your signature, sir?

5 A Correct. And it goes on to say on
6 justice issues and forward to me for review, yes.

7 Q All right, sir. And you, I take it
8 the intent here was to have him draft a letter,
9 and if you were satisfied with it, you would sign
10 it and send it off?

11 A That probably would have been the end
12 result, in my view, had I received it.

13 Q And I'm just going to ask you this,
14 sir. Given the importance of maintaining
15 independence on the part of your prosecutors, do
16 you really, with the benefit of hindsight,
17 consider that it was appropriate to ask that
18 prosecutor to serve, in effect, as administrator
19 in drafting a response for your signature, sir?
20 Do you not agree that that creates a close
21 connection between you with Manitoba Justice and
22 this individual who is supposed to be maintaining
23 an independent posture?

24 A I'm not sure that I can agree with you
25 on that. Again, I would just say anything coming

1 into our office, I would feel more comfortable
2 making sure that outside counsel knew all about
3 these things. As far as the drafting, I've
4 already indicated to you, upon reflection.

5 Q And sir, you did, and in fairness to
6 you, certainly, you made that observation. But
7 was that observation based on your re-examination
8 of the letter and seeing that it only dealt with
9 general justice issues, or is that based on a
10 sense that perhaps when you appoint an independent
11 prosecutor, it's better not to have that
12 prosecutor preparing documents that are ultimately
13 going to come from the very office he's supposed
14 to be independent from?

15 A Well, again, I would still want to
16 know that my outside counsel knew all that was
17 incoming, especially from victims and/or
18 witnesses. So I would still continue. Whether I
19 would have prepared something myself, upon
20 reflection, I could have.

21 Q Yes. And you won't get any debate, I
22 suspect, about whether you should keep him
23 advised. The issue has to do with the drafting of
24 the letter, sir.

25 Sir, you get him at one point to

1 contact the MPI so that he might be in some
2 position to deal with the concerns about the
3 Manitoba Provincial Insurance. I can show you a
4 document, it's Exhibit 220 in these proceedings,
5 Exhibit 220. This is at R-1.91.5, page 3121, page
6 3121.

7 Starting over at page 3122, you'll see
8 an e-mail trail in which Mr. Minuk advises you
9 that he can reply to matters with respect to
10 prosecution, but not MPI.

11 As a result of that e-mail that was
12 sent to you on the 26th of September, you
13 ultimately respond to him indicating that, on the
14 27th of September, "assume you will contact them."
15 And then subsequently at 11:40 on that same date
16 up at the top, he indicates:

17 "I will. In that regard the October
18 deadline for response may need to be
19 extended. Is that possible?"

20 So you'd agree with me that you had suggested that
21 he follow up with MPI as a result of his
22 indication to you that he didn't feel equipped to
23 respond in that regard, sir?

24 A Yes.

25 Q And again, do you not feel that you're

1 kind of using an independent prosecutor as an
2 administrator to assist the Ministry in responding
3 to a letter that was addressed to the Ministry,
4 sir?

5 A At that time, I probably felt that
6 Mr. Minuk, based on his experience outside of the
7 criminal sphere, as far as criminal law, might be
8 able to get answers quicker.

9 Q All right, sir. I'm going to ask that
10 the clerk provide you with Exhibit 218 in these
11 proceedings, Exhibit 218.

12 What you have in your hand, sir, is a
13 document that we in the Commission have colour
14 coded to earmark all of the times when Mr. Minuk
15 has indicated in his statement of account or
16 invoice that he had contacted either yourself,
17 Ms. Ireton or Mr. Slough. And there are
18 approximately 40 such contacts indicated in blue
19 on the document, sir. I'll take you through some
20 of them.

21 A Can I just ask counsel, over what
22 period of time, without me going through all of
23 this right now?

24 Q Sir, it was over the entire period of
25 the file. Those are the contacts for which he

1 rendered accounts.

2 A So from February 25, '05?

3 Q It would have been from February 25th,
4 '05, until the completion of matters on the 30th
5 of November, '07.

6 A Okay.

7 Q And we'll look at the nature of the
8 communications and give you an opportunity to
9 respond to ones that strike --

10 If you take a look first, sir, on the
11 first page, you will see that on the 1st of March,
12 2005, Mr. Minuk received a telephone call from
13 Mr. Jim Poole. Mr. Jim Poole is with the
14 Professional Standards Unit of the Winnipeg Police
15 Service. And he telephones you and receives a
16 call back to you and mails to Mr. Poole. On the
17 2nd of March, there is mail to you updating you
18 and a call again from Mr. Poole, an e-mail to you
19 and from you.

20 Those communications, sir, had to do
21 with whether or not the Winnipeg Police Service
22 special prosecutions -- the Professional Standards
23 Unit rather, should become involved in the
24 investigation of the Winnipeg Police Officers who
25 had spent time with Mr. Derek Harvey-Zenk.

1 Do you recall having those discussions
2 with Mr. Minuk?

3 A My best recollection is, again, by way
4 of information and I'm just trying to piece
5 together best I can, would have been information
6 as far as I believe East St. Paul engaging
7 Professional Standards Unit to assist at that
8 point, I would think because of manpower, my small
9 understanding of East St. Paul and their setup.

10 Q Yes, sir. And I know you can't speak
11 for what Mr. Minuk was thinking, but why did you
12 engage in the exchange about the involvement of
13 the Professional Standards Unit in this file and
14 not simply leave that to your independent
15 prosecutor?

16 A Well, I don't think I truly engaged,
17 as I said at the outset, this was by way of simple
18 information. I recall to the effect that
19 Mr. Minuk would have said, East St. Paul or Carter
20 or what have you have engaged or were engaging
21 PSU, Professional Standards Unit, to assist.

22 Q All right, sir. On the 17th of March,
23 2005, Mr. Minuk receives a call from Katherine
24 Bueti from Mr. Wolson's office, and he calls you.
25 And there's further dealings later in the day

1 where there's another call to you and a call from
2 East St. Paul Police and a letter to Mr. Wolson.
3 That had to do with a request by Ms. Bueti for
4 disclosure from Mr. Minuk prior to Mr. Harvey-Zenk
5 going in and filling out a traffic accident
6 report. The upshot of it was that Mr. Minuk
7 notified Ms. Bueti that there would be no special
8 arrangements for early disclosure and that he
9 should get in and fill out the traffic accident
10 report, as he's required to. Do you recall that
11 incident, sir?

12 A I don't recall it clearly and, in
13 fact, I'm not really prepared to say that I have a
14 crystal clear recollection of that call.

15 Q Fair enough, sir. Do you think, and
16 this may degenerate into something of a
17 hypothetical question, given your lack of
18 recollection of this one incident, do you think
19 that this is something that Manitoba Justice
20 should be kept apprised of, the fact that a lawyer
21 is seeking early disclosure of information in
22 order to facilitate the fulfillment of a traffic
23 accident report obligation, sir? Is this the kind
24 of thing that you think Manitoba Justice should be
25 kept apprised of on an ongoing basis?

1 A Personally, no. But, again, I am not
2 one on a call from outside counsel to say don't
3 tell me this and don't tell me that. I think
4 you'll see, and I'm sure you have seen, that from
5 February '05 until October '07, that we're dealing
6 with about 32 months as far as calls or e-mails
7 from one of the outside counsel on this particular
8 matter, I'd certainly make myself available, give
9 outside counsel all the time they need just to
10 advise, if they wish, of things that are
11 transpiring.

12 Q All right, sir. We'll canvass the
13 appearances of regular contact later in more
14 detail. But I'm going to ask you at this point,
15 do you not think that it might not be a better
16 idea if counsel is contacting you on things you
17 don't need to know, to perhaps suggest that, given
18 the fact they are independent of you and they are
19 to conduct the case themselves, that perhaps it's
20 best that they only contact you on something of
21 importance, on a need to know basis for instance?

22 A I'm not going to be the one to tell
23 the outside counsel that I deal with, don't phone
24 me unless you think it's important, because what
25 they may think is important at any step of the

1 proceedings, I am prepared just to listen. And
2 also, as you know, based on my position, we have
3 to provide information when called upon by the
4 Minister's office, the Deputy Minister's office to
5 keep them informed. So anything being said, I
6 will certainly listen.

7 Q Are you able to indicate whether you
8 would have held views on either of these two
9 issues that we have just canvassed, just by way of
10 example, the involvement of the Professional
11 Standards Unit investigating Winnipeg Police
12 Officers on an East St. Paul investigation, and
13 whether early disclosure should be made to a
14 lawyer?

15 A I may hold views but, again, I don't
16 think that my particular views on certain
17 particular aspects really are that hopefully
18 germane to any major issue.

19 Q Do you share those views with
20 independent counsel when independent counsel is
21 advising you of this information and these
22 developments?

23 A I listen.

24 Q Do you share your views?

25 A Do I share all of the views?

1 Q Not all of the views but do you share
2 views on how you think these cases and these
3 situations should be handled?

4 A Well, certainly as a former trial
5 prosecutor, I may have differing views at
6 differing times, so I won't say that I don't have
7 differing views. And sometimes I would agree and
8 sometimes I wouldn't, but I keep things to myself,
9 because of outside counsel, and that's the reason
10 we go to independent counsel.

11 Q So your evidence, as I understand it,
12 is you wouldn't express agreement or disagreement
13 with the decisions that are being taken on matters
14 like that?

15 A Ultimate decision-making I think, as
16 Madam Justice Krindle said in her report, is up to
17 independent counsel.

18 Q Yes, sir, but I'm just asking you
19 again. Is it your evidence that you don't express
20 or share your views on matters such as those we
21 have just been canvassing with independent
22 counsel?

23 A I can only tell you, I don't share
24 certain views, but I also don't express them to
25 outside counsel.

1 Q And so is it safe to say you wouldn't
2 have shared any views you had on these issues with
3 Mr. Minuk?

4 A If we're talking about the three that
5 you have already mentioned, one dealing with
6 Ms. Bueti and the other two, probably not, as best
7 I can recall.

8 Q Okay, sir. On the 21st of April,
9 2006, Sergeant Carter has a meeting with Mr. Minuk
10 about the investigation in which serious problems
11 are disclosed. You can find it again in Exhibit
12 218. You can follow, you can go to October of
13 '06 -- excuse me, April of '06, looking at the
14 21st of April, sir, page 3401.35?

15 A Point 3?

16 Q 3405.35.

17 A Yes.

18 Q You do, I take it, have some recall of
19 controversies that were raised by Sergeant Carter
20 in a meeting with Mr. Minuk about the handling of
21 the file?

22 A I was made aware of that, yes.

23 Q You, I think, would have some recall
24 that included in the observations that Sergeant
25 Carter shared were allegations that Constable

1 Woychuk had in effect tailored his notes as a
2 result of suggestions made to him by former Chief
3 Bakema?

4 A I have a recall of that, yes.

5 Q And you, I take it, would also have a
6 recall of suggestions made by Sergeant Carter that
7 Constable Woychuk told him that former Chief
8 Bakema told Woychuk, when placing Mr. Harvey-Zenk
9 in the vehicle, that Mr. Harvey-Zenk was pissed?

10 A I know at some point I understood
11 that. I'm not sure if it was initially or after
12 reading the material.

13 Q And sir, the reason I'm putting that
14 to you is because on the 21st of April, 2006, that
15 was the disclosure that was initially made orally
16 to Mr. Minuk. And he indicates that he had a
17 teleconference with you and he has docketed it
18 together. He's clarified for us that the
19 teleconference was not with Carter in the office
20 and you on the other speaker phone or anything
21 like that, it was simply a phone call to you, sir.
22 But the first thing he did when he received that
23 information was contact you. And again, on the
24 27th of April, 2006, after receiving a written
25 report he had requested from Chief Carter, he

1 again contacts you as a result of the receipt of
2 the report.

3 Did you receive a copy of the report
4 yourself, sir?

5 A I definitely received a copy.

6 Q And sir, he sets up a meeting with you
7 that takes place on May 2nd, 2006. And he has
8 docketed the meeting as going for one hour, sir.

9 Do you recall that meeting that you
10 had with him to discuss the events that were
11 transpiring, sir?

12 A My recollection is that this was
13 brought to my attention orally or over the phone
14 by Mr. Minuk shortly after, and that's my
15 recollection, shortly after the meeting with
16 Carter that he had. Because I do recall that
17 Mr. Minuk was taken aback by some of the
18 information supplied by, at that time, Sergeant
19 Carter to him, and that would have taken some of
20 the phone calls that took place, just informing
21 me, this is what I have heard. And at one point,
22 I do have a recollection that Mr. Minuk said to
23 me, "I did what you would have advised me to do
24 probably. I said, "Can you put this in writing,
25 Sergeant?" That's what I recall as the thrust of

1 the conversations that we had.

2 And then in the conversation from the
3 27th, it would have been just to go over some of
4 the highlights, I can only imagine, based on the
5 letter from Carter.

6 Q Yes. Sir, then you do have that
7 meeting on the 2nd of May 2006 that lasts almost
8 an hour. What took place during that meeting,
9 sir?

10 A Again, I would have to say it had to
11 do with what should happen next as far as the
12 disclosure, if you will, by Sergeant Carter, and
13 the putting of everything that he recalled in
14 writing, that next best course might be as far as
15 potential investigation of East St. Paul.

16 Q All right. Things had already been
17 put in writing by this point, sir, because the
18 report had been furnished to him on the 26th of
19 April, and I'm talking about the 2nd of May 2006
20 meeting. Ultimately, sir, the RCMP was brought in
21 to assist in an investigation?

22 A That's correct.

23 Q And it was a Mr. Mike Horn, who I
24 understand was a former RCMP officer, who was
25 working with criminal justice, and you made the

1 connection with Mr. Horn to facilitate the
2 investigation?

3 A Correct. Because I believe, as I told
4 you during the interview, Mr. Horn was the
5 Assistant Deputy Minister of Justice, and I was
6 fully aware that he had connections with police
7 contracts throughout the province. And I thought
8 I'd like to see this get to an outside agency to
9 investigate as soon as possible. So I made the
10 call to Mr. Horn and gave him a brief background
11 by way of what he could expect. And then I
12 believe the letter was sent on to him.

13 Q Can we take it that it was your
14 decision to involve the RCMP and to conduct an
15 investigation into potential obstruction of
16 justice by former Chief Bakema?

17 A I'd have to say yes, as far as getting
18 the matter on to Mr. Horn and asking him to
19 perhaps get in touch with another police agency.

20 Q And sir, there was another issue that
21 Mr. Minuk shared with us that arose out of this.
22 And it had to do with the need to disclose this at
23 some point to Mr. Wolson. Did you discuss
24 strategies surrounding the disclosure of this
25 information to Mr. Wolson?

1 A I'm sure it had to have taken place
2 during some of the discussions with Mr. Minuk.
3 But in the end result, this would have been up to
4 Mr. Minuk to decide when and how to make
5 appropriate disclosure because this case was still
6 going to be obviously investigated.

7 Q And is it fair to say, sir, you may
8 have had suggestions or observations about how
9 best to handle that situation?

10 A Again, I'm not sure, trying to look
11 back at that time, that I would have made
12 suggestions. I know I would have listened as far
13 as what Mr. Minuk would have had to say as far as
14 disclosure.

15 Q You're not ruling out that you may
16 have made suggestions to him about how he might
17 want to handle that, sir?

18 A I'm not prepared at this stage to rule
19 anything out.

20 MR. PACIOCCO: Okay. Sir, I'm not
21 going to belabour the RCMP point with you, but
22 there's one issue I do want to touch on. It's
23 relating to a document found at R-1.91.27.
24 R-1.91.27.

25 THE CLERK: Exhibit 239.

1 (EXHIBIT 239: R-1.91.27, Letter from
2 Darrell Madill to Mike Horn dated May
3 23, 2006)

4 BY MR. PACIOCCO:

5 Q Now this is a letter that is sent
6 to --

7 A Mr. Horn.

8 Q -- Mr. Horn from Mr. Madill, the
9 Assistant Commissioner and Commanding Officer of D
10 Division of the RCMP.

11 A Yes.

12 Q It is cc'd to both Mr. Minuk and to
13 yourself. And it records that Assistant
14 Commissioner Robinson met with Mr. Minuk on
15 Monday, May 15th, 2006, to discuss concerns
16 identified in the letter of May 5th, 2006 that is
17 referenced in here. It indicates that an
18 investigational team was created following the
19 meeting, and about four or five lines in, it says:

20 "The team will focus its
21 investigations on the actions of Harry
22 Bakema and other members of the East
23 St. Paul Police Service who were
24 involved in the motor vehicle fatality
25 investigation. Once the team has

1 completed its work, a full report will
2 be forwarded to Mr. Minuk through
3 Mr. Kaplan's office."

4 Now, sir, I brought this letter to
5 your attention because, if Mr. Minuk was going to
6 prosecute this case, former Chief Bakema would
7 have to be a witness called by the prosecution.
8 And this letter evidences an investigation being
9 conducted of potential obstruct justice charges
10 against Mr. Bakema, who of course would be a
11 witness for Mr. Minuk.

12 Do you agree with me, sir, that
13 Mr. Minuk should have had, or should have had no
14 involvement in connection with the investigation
15 of Chief Bakema, given that Chief Bakema could
16 ultimately be a witness that he was going to call?

17 A Well, I agree with you that he, that
18 is Mr. Minuk, should have no involvement with the
19 investigation.

20 Q All right, sir. The last line of this
21 paragraph that I read to you records the position
22 of Mr. Madill at least, that the full report is
23 going to be forwarded to Mr. Minuk through your
24 office. Are you able to comment on that line,
25 sir, and the suggestion that the report goes to

1 Mr. Minuk?

2 A Well, again, I'm not going to look
3 into the mind of Madill, but I would think that
4 they would want some place, if you will, that the
5 report has to be sent to. And they would know, as
6 they know in the past with their officers being
7 charged, where to send the material, definitely to
8 our office, that's number one. The inclusion of
9 the word "forwarded" to Mr. Minuk, I'm sort of not
10 prepared to say that's what was going to happen.

11 Q Did you respond at all to that, I
12 guess, alert that this officer may have felt that
13 the report was for Mr. Minuk?

14 A I didn't, no.

15 Q Did you note it at the time? Did it
16 strike you as a strange expectation on the part of
17 the officer, sir?

18 A It really didn't strike me at that
19 point in finally seeing this document.

20 Q All right, sir. We're not focusing on
21 the RCMP investigation so I'm not going to spend
22 any more time on that. I want to deal with the
23 adjournment. While this investigation is under
24 way, there are certain file management decisions
25 that have to be made. I understand that a meeting

1 took place on May 12, 2006, involving yourself,
2 Mr. Minuk, and Greg Lawlor, who I understand was
3 general counsel to the Province of Manitoba?

4 A He was one of our general counsel,
5 yes.

6 Q Could you indicate to the Commissioner
7 what that meeting was about and how it came about,
8 sir?

9 A This meeting, to the best of my
10 recollection, was arranged by me at the request or
11 questioning by Mr. Minuk, as far as an issue that
12 he had, in my view, asking for some assistance.
13 The assistance was in perhaps framing the request
14 for an adjournment based on the investigation by
15 RCMP dealing with the East St. Paul Police and
16 then Chief Bakema. I felt at that time that
17 because, really the pressures that Mr. Minuk was
18 under based on the media coverage dealing with
19 this particular case, asking for assistance, we
20 would try, or I would try at least to see if we
21 could provide some assistance in the framing of
22 the request to Mr. Wolson for the adjournment, in
23 this particular case.

24 Having said that, I thought perhaps
25 bringing in an objective as possible individual

1 from our office, with a great deal of experience,
2 not per se experience in, I had one case on the go
3 and another case coming this way that is being
4 investigated, but just general experience, three
5 heads perhaps better than one, and asking
6 Mr. Lawlor to take part in the discussion as to
7 best way to frame it. I think I can also go
8 further, if I may --

9 Q Yes?

10 A -- and say, on reflection, there's no
11 question in my mind that if I said to Mr. Minuk,
12 look, you have 25 years experience, you can do
13 this yourself, it was just in the circumstances of
14 this particular case, with the kind of obvious
15 publicity the case was receiving almost on a daily
16 basis, that I thought if we could assist, we
17 would. And after the discussion with Mr. Lawlor,
18 I believe he came up with a sentence or a wording
19 or two that might assist Mr. Minuk.

20 Q Sir, you very efficiently covered
21 about a page and a half of my questioning with
22 your response, and I'm not going to put all these
23 documents into evidence because they have already
24 been exhibited. But the essence of this was that
25 Mr. Lawlor ends up drafting the contents of a

1 letter that Mr. Minuk ultimately adopts and signs,
2 indicating to Mr. Wolson that he requires an
3 adjournment, and Mr. Lawlor assisted in actually
4 providing the wording.

5 Do I take it from your response, sir,
6 that Mr. Minuk had 25 years of experience and
7 certainly would have been able to respond and make
8 appropriate requests for an adjournment from a
9 co-counsel?

10 A I think, sir, without question, I
11 would say that, but...

12 Q Yes, go ahead with the "but," sir, I
13 don't want to stop you.

14 A But, again, under the particular
15 circumstances of this case, I just felt if there
16 was assistance by having one of our general
17 counsel with me to give a suggestive wording, that
18 that would be fine.

19 Q And so effectively, sir, you have the
20 participation of Manitoba Justice through the
21 embodiment of your high office, along with a
22 Manitoba government lawyer assisting an
23 independent counsel in making a step in connection
24 with the case. Would that be a fair way to put
25 what happened, sir?

1 A I'd like to put it even more simply
2 than that by just saying, the assist with respect
3 to this particular case, three heads better than
4 one, just by way of a suggestion.

5 Q Okay. Sir, you have a conditional
6 sentence policy within your Ministry?

7 A Yes, we do, sir.

8 Q And I note, and I'll take you to it
9 shortly, but I note that it provides for the
10 conduct of a case conference in the situation
11 where a prosecutor is considering recommending or
12 participating in a conditional sentence where
13 there's been a death or serious bodily injury as a
14 result of a criminal act?

15 A Yes.

16 Q Sir, what is a case conference?

17 A A case conference is available to the
18 line Crown Attorneys, where they have a matter of
19 obviously import that they'd like to discuss, and
20 usually it falls within the realm of murder,
21 manslaughter, these type of cases primarily, to
22 meet with, to request to meet for a case
23 conference with that particular Crown, and
24 hopefully with a bit of background, with that
25 Crown, supervising senior Crown, and together

1 with, on average, two directors from our office,
2 set up the meeting and to discuss and receive the
3 benefit of experience and input as far as
4 decision-making.

5 Q Now, sir, I understand there are four
6 directors in the office?

7 A Correct.

8 Q And you yourself are one and, of
9 course, there are three other highly placed
10 individuals, and you would draw on at least two of
11 those individuals in an ideal case conference
12 setting?

13 A Unless, Mr. Paciocco, the case happens
14 outside the City of Winnipeg, and then I am the
15 director that has to sit on almost all of these
16 regional matters, if you will.

17 Q And sir, would it be fair to say that
18 at these case conferences, the group of very
19 senior Crown prosecutors who have assembled can
20 give the go-ahead or approval for the
21 recommendation that is being made by the
22 prosecutor who has assembled the case conference,
23 or caused it to be assembled?

24 A There can be discussions, there can be
25 views expressed, there can be suggestions made.

1 In the end result, I'd have to agree with you that
2 based on the fact that usually there are two
3 directors, that would be the biggest help as far
4 as concluding the matter.

5 Q And in effect, sir, the Crown needs to
6 get the approval of that case conference in order
7 to go ahead with a conditional sentence
8 recommendation?

9 A Based on policy, yes.

10 Q Now, clearly, sir, the case conference
11 that you have described is not intended to apply
12 to independent prosecutors such as Mr. Minuk?

13 A No.

14 Q Do you have anything set up that might
15 be similar to a case conference where independent
16 prosecutors are either required or advised to
17 attend and present their proposals?

18 A No, we don't. Because in the end
19 result, the difference between a line Crown and
20 outside counsel, outside counsel will make the
21 final decision, whereas our line Crowns will rely
22 on further input and two directors to assist and
23 help with the decision. We wouldn't go to outside
24 counsel, you know, if we were deciding what should
25 be done.

1 Q Sir, when we last spoke, and it was
2 only the two of us and a court reporter, you
3 talked about not having case conferences per se,
4 but having what you referred to as informational
5 sessions with independent prosecutors, sir. Do
6 you recall that exchange?

7 A I do have recollection of that, yes.

8 Q Are you able to educate the
9 Commissioner about what your reference to
10 informational sessions was meant to communicate at
11 that time, sir, and whether it still reflects your
12 evidence?

13 A It would still reflect my evidence in
14 the sense of, outside counsel have the
15 opportunity, certainly, not that I am the
16 all-knowing and omniscient to say anything to our
17 outside counsel other than to engage them, but to
18 bring matters to at least my attention and
19 indicate what they're thinking of doing sometimes,
20 what their positions will be, again, not to
21 interfere certainly with outside counsel, but just
22 by way of information to know what's going on.
23 Because as I said, I think at the outset at least
24 this morning, myself and certainly the Assistant
25 Deputy Attorney General have to be in a position

1 to supply information to, whether the Deputy
2 Minister, or as a result of that to the Minister
3 of Justice. So it is important that we know
4 information. It doesn't have the same feeling as
5 a case conference, certainly with outside counsel.

6 Q In what sense?

7 A In the sense of providing direction,
8 if you will. Again, I guess you have to be at a
9 case conference to really understand, and my best
10 to explain it, but a position is presented,
11 whether let's say on murder, manslaughter, or to
12 reduce murder to manslaughter. Here are the
13 facts, here are the background. You have a
14 supervising senior Crown, and you have two
15 directors saying, well, what about this and what
16 about that, and don't you think this would help?
17 And final decision will hopefully be made with a
18 conglomeration of what is discussed at the case
19 conference, with the assist of the directors and
20 the supervising senior Crown.

21 Q Are you suggesting, sir, that during
22 the informational sessions with independent
23 prosecutors, there is no what about this and what
24 about that conversations that take place?

25 A Oh, there might be just by way of

1 questions saying, well, what about that, what
2 about this, just to receive information. But, no,
3 for want of a better term, no direction, you
4 should do this or you should do that, that doesn't
5 take place with our independent counsel.

6 Q Would there be recommendations to them
7 in terms of how you think they should proceed,
8 sir, on any of the issues that are raised?

9 A I don't believe we do that. That's
10 the reason to go to outside counsel. Again, their
11 decision. We have gone to them. We are really
12 bound by what they are doing, what they suggest.

13 Q Sir, you did indicate in the interview
14 that there could come a point where you would
15 claim the right to interfere in the decisions that
16 are being proposed to you?

17 A I believe if memory serves, and
18 sometimes it doesn't for me, but I would have
19 indicated that certainly it's possible at some
20 point, if there was something so egregious said or
21 suggested by outside counsel, I would have to take
22 it certainly up with the ADAG and advise there's a
23 problem. Now, that's never happened in my number
24 of years dealing with outside counsel. But based
25 on your question, as I recall at the time, that

1 would have been my answer, just to stop if, for
2 example, somebody is suggesting something that we
3 could never live with.

4 Q Okay.

5 A It would have to be something very
6 egregious.

7 Q Would it be fair to say that there is
8 a very restrained veto power in operation during
9 these informational sessions on the part of
10 yourself, representing the Manitoba Justice?

11 A I think that that's got to be fair to
12 say, sure.

13 Q Sir, on July 13th, there is an e-mail
14 from yourself to Mr. Slough, which has been made
15 Exhibit 48 in these proceedings. That will be
16 furnished to you. It is found in book R-4. R-4,
17 unfortunately, is a book without tabs, so I'll
18 have to take you to the very complex pagination.
19 Page 3401, 3401.22, 3401.22.

20 Sir, you have in front of you, I hope,
21 a memorandum from yourself to Mr. Don Slough dated
22 July 13th, 2007?

23 A Correct.

24 Q And it records that you received a
25 call from Marty, who we all understand to be

1 Mr. Minuk, on Thursday evening, July 12th at home.
2 The matter was set for Preliminary Inquiry on
3 July 16th and Richard Wolson QC is counsel. Marty
4 informed you that he was touching base to indicate
5 that he believed Zenk was prepared to plead guilty
6 to drive dangerous causing death for an agreed
7 upon joint recommendation for a conditional
8 sentence.

9 Do you recall that phone call from
10 Mr. Minuk?

11 A Number one, I recall the memorandum.
12 And number two, I do recall the phone call coming
13 in the evening at home from Mr. Minuk.

14 Q Are you able to indicate how long that
15 conversation may have lasted and what was
16 discussed?

17 A I don't believe the conversation
18 lasted very long. I am only saying that based on
19 memory that some people are morning people, some
20 people are evening people. I'm a morning person,
21 and for the last 30 odd years I come to the office
22 at about 7:00 a.m. That means that I usually go
23 to bed fairly early. Mr. Minuk's call was
24 sometime during the evening, and I'm just
25 guessing, maybe 8:00 or 9:00 o'clock. And I think

1 that's one of the reasons that in my memorandum to
2 Mr. Slough dated July 13, I would have indicated
3 that I told Mr. Minuk, whatever he told me at that
4 time, and this is the basics of what he told me, I
5 just wanted to sleep on it. And in the early
6 morning hours, because I know Mr. Minuk is an
7 early morning person, that I'd like to rehear more
8 of the information in case I wanted to ask a
9 question or two, just to understand what he was
10 basing everything on.

11 Q So your evening conversation was a
12 short one?

13 A I don't believe it was very long.
14 That's my best recollection.

15 Q That will be a relief to Mr. Minuk
16 because apparently he forgot to bill you for it.
17 It doesn't show up in his dockets.

18 A The government is very happy then.

19 Q Sir, you indicate that you wanted to
20 sleep on it. What exactly were you sleeping on,
21 sir?

22 A I'm not going to say a bed,
23 Mr. Paciocco, but my simple view is I wanted to
24 hear it in the brightness of the morning, to
25 understand exactly what he was saying, especially

1 this case that has gone along for quite some time
2 and this offer of the plea, I just wanted to know
3 all about it.

4 Q All right, sir. Would it be a fair or
5 unfair statement for me to make that you were
6 having some input into whether this was a deal
7 that he should take?

8 A I think it's unfair. It wasn't input
9 from me into the deal that he started to inform me
10 of, it was wanting to know by information all the
11 essence of this particular matter.

12 Q Sir, would you not agree with me that
13 just to get information simply involves a
14 communication that can be one way, and that you
15 don't usually need to sleep on information. The
16 expression "sleep on" certainly connotes that you
17 were giving some consideration to the proposal?

18 A Well, that may be to you, with all due
19 deference. To me it means I just want to hear it
20 in the light of the morning when I am thinking
21 perhaps better to understand what it was.

22 Q There are other indications in your
23 letter that connote, and I'm going to ask for your
24 evidence on this, but connote consideration on
25 your part and recommendation on the part of

1 Mr. Minuk suggesting that perhaps he was bouncing
2 this off you for some degree of approval. And I'm
3 going to point those out to you and ask you for
4 your comment.

5 Getting back to the "sleep on"
6 passage.

7 "I said initially I wanted to sleep on
8 it and arrange to meet him early
9 Friday morning so he could provide all
10 the background and his opinion."

11 So to me at least reading that, sir, and you are
12 the author and I do want you to clarify if I'm
13 misunderstanding this, but to suggest that you
14 were receiving someone's opinion is different from
15 simply having someone describe for you what they
16 intend to do, sir. This is a decision that's in
17 the works and it is being bounced off you. Is
18 that an unfair way for me to characterize or
19 understand that line in your letter, sir?

20 A I think "opinion" to me would be
21 basically what he thought of the offer. And the
22 conclusion as far as sentences he described, I
23 wanted to hear from him, again, based on that
24 Madam Justice Krindle's report that said end
25 result is up to outside counsel, but for my own

1 edification, I wanted to hear what else he had to
2 say about it.

3 Q All right, sir. And he is expressing
4 to you his view that it should be accepted,
5 according to your note here. Again, it connotes
6 the suggestion that he is seeking to persuade,
7 that he is seeking to gain your approval, that
8 he's seeking to bring you on side. Is that again
9 a misunderstanding or a mischaracterization of
10 what you were intending to communicate there, sir?

11 A I really don't think it was, in my
12 view, to bring me on side. But, again, I go back
13 to information that I wanted to hear.

14 Q All right, sir. The next paragraph:
15 "The Friday meeting allowed a better
16 understanding of outside counsel's
17 position and his recommendation that
18 the offer should be accepted."

19 Why would you use the word
20 "recommendation" if this was simply information
21 that was being provided to you, rather than his
22 decision to accept the offer? Why would you talk
23 about it as a recommendation, sir?

24 A Again, going through each and every
25 word, recommendation at the point in time of me

1 writing the memorandum, this would have been the
2 word I wanted to use there instead of, his final
3 decision is.

4 Q But do you not agree with me that a
5 recommendation is something that is being offered
6 to another for their opinion or approval?

7 A I'm not sure that I agree with that
8 totally. I know what I meant to say in this, and
9 perhaps I may have used the wrong word. But
10 again, in the end result, it would be a
11 recommendation by outside counsel, call it
12 opinion, recommendation, final word, whatever.

13 Q Sir, if it's just informational for
14 you, isn't it action, the outside counsel's
15 decision, the outside counsel's choice that he has
16 made as opposed to a recommendation to the people
17 who are effectively bringing him on and assigning
18 the case to him?

19 A Perhaps, upon reflection I could have
20 used the word "decision," may be more
21 understanding.

22 Q And there's more, sir?

23 A Yes.

24 Q "I advised him I wanted to run the
25 background by a couple of senior

1 Crowns for their opinion."

2 Correct, sir?

3 A Correct.

4 Q Why would you be getting the opinion
5 of senior Crowns if all this was, was information
6 about what Mr. Minuk intended to do?

7 A Well, this was a matter, as I have
8 said before, that had a great deal of publicity.
9 This was a matter that had been in the works, if
10 you will, from the get-go in February '05. I just
11 felt, again, with the three heads being better
12 than one, just to discuss what was being
13 recommended or decided, that for my edification,
14 this was proper and that I could advise, whether
15 the ADAG, or the Deputy Minister, or even the
16 Minister, that this was what was going to be
17 taking place. And therefore, it's somewhat easy,
18 based on my position, to acquire those couple of
19 heads of people with some seniority just to say,
20 here is what we have, what do you think? I guess
21 just to verify in my own mind that this was the
22 final decision that was going to be made by
23 outside counsel, that everything was fine.

24 Q And sir, why would you need the
25 opinions of other Crowns to tell you what the

1 final decision of outside counsel was going to be?

2 A It's not the final decision of outside
3 counsel.

4 Q It's how you framed it, sir, and I
5 just wanted some clarification?

6 A It was just to run it by two of my
7 senior colleagues.

8 Q And I take it the position was, if
9 this was considered to be unacceptable by your two
10 senior colleagues and yourself, you would have
11 gone back to Mr. Minuk and told him that?

12 A That I can't answer for you, I'm not
13 sure.

14 Q Sir, there would have been no utility
15 in getting the opinions of others and sleeping on
16 it yourself if you weren't going to share your
17 concerns with Mr. Minuk. Do you not agree with
18 that, sir?

19 A I agree with that. And whether this
20 would have been in the realm of egregious, as I
21 said before, as far as any interference, that I'm
22 not sure hypothetically what would have happened
23 down the road. I just wanted to make perfectly
24 sure, even in my own mind, that this was the
25 proper route.

1 Q So you were effectively canvassing, in
2 your own mind and with your colleagues, whether
3 this was one of those cases whether you would
4 interfere with the decision that Mr. Minuk was
5 going to make? Was this one of those egregious
6 cases?

7 A Well, in my view, this wasn't one of
8 those egregious cases. In my view, based on the
9 information that I received, with pretty much the
10 knowledge that my colleagues had, that my thinking
11 was probably correct that Mr. Minuk's decision was
12 correct.

13 Q You were turning your mind to whether
14 this was one of those cases where you might
15 interfere with the decision of Mr. Minuk. That's
16 why you were considering it, sleeping on it, and
17 getting the opinions of others; is that not fair?

18 A I'm not sure that it's fair, as far as
19 sense of interfering. It was just in my own mind
20 to make sure that everything was on track
21 properly.

22 Q And just not to belabour the point,
23 but if it had not been on track, you would have
24 done something about it?

25 A If I felt that it was, as I said

1 before, egregious, could we have interfered? We
2 may have. Do we regularly interfere? Never.

3 THE COMMISSIONER: Excuse me, how
4 would you, if you came to the conclusion that it
5 was not on track, how would you deal with the
6 independent Crown? What would you say to him?
7 You're fired, or don't do it?

8 THE WITNESS: If I felt that it was so
9 egregious and not of the realm of normality and
10 the circumstance of the case, I would have, as I
11 indicated to Mr. Paciocco during the interview,
12 figured out some way to interfere, or at least to
13 get it to my Assistant Deputy Attorney General,
14 and then probably for discussion. Because then,
15 based on our policy, perhaps even the Deputy
16 Minister or Minister might wish to interfere.

17 THE COMMISSIONER: Okay.

18 BY MR. PACIOCCO:

19 Q All right, sir. And you indicate in
20 your memo that you did meet with Zane Tessler and
21 John Peden, who I understand are very experienced
22 Crown prosecutors?

23 A One is a supervising senior Crown and
24 the other is a senior Crown. Mr. Tessler has
25 background as defence counsel for at least 10 or

1 11 years, and then the rest with our department.

2 Q And it indicates in your memo that all
3 of you agreed that this is the best that one could
4 hope for in the particular circumstances of the
5 case?

6 A Correct.

7 Q And I take it you communicated that to
8 Mr. Minuk?

9 A I don't know if I communicated that
10 particular aspect to Mr. Minuk.

11 Q What did you tell him?

12 A At which time?

13 Q When you had a conversation with him,
14 after you had a conversation with Mr. Tessler and
15 Peden?

16 A I don't know if I told Mr. Minuk
17 anything about that conversation. That
18 conversation was basically for my own edification
19 and to make sure everything was fine.

20 Q What did you tell him about your own
21 views, sir?

22 A What did I tell Mr. Minuk?

23 Q Yes, sir, about your own sense of his
24 proposal, or his intent, or his recommendation, or
25 whatever word you want to use, what did you tell

1 him about your own views?

2 A I'm trying to think back to any one of
3 the conversations that I may have had with
4 Mr. Minuk.

5 Q I know you had a conversation with him
6 after you spoke to Mr. Tessler and Mr. Peden,
7 unless I'm misreading your memo, because it goes
8 on and indicates that Marty was advised to deal
9 with the husband of the deceased and explaining
10 all of the circumstances at his arranged meeting
11 Friday morning?

12 A Yes.

13 Q And I'm thinking of that conversation,
14 sir. You, I take it, can't recall what it was you
15 said to him?

16 A Dealing with Mr. Tessler and --

17 Q No, not necessarily dealing with
18 Mr. Tessler and Mr. Peden, but your views on the
19 proposed plea bargain or joint position
20 arrangement that he had communicated to you, sir?
21 Did you tell him, I think this is the best you can
22 do, or did you tell him, I don't have a problem
23 with this, Marty?

24 A I'm trying to remember back as far as
25 what I may have said to him, if anything, other

1 than what you've just described based on my
2 memorandum to the Assistant Deputy. And again,
3 I'm not sure if I said anything in particular to
4 him about that. Again, this was his decision and
5 he was going to go ahead with it.

6 Q All right, sir. You had also
7 indicated in that same paragraph that Marty has
8 also informed the parents of the deceased. Do you
9 know where you got that information from, sir?

10 A That had to have been from Mr. Minuk.
11 I knew during the period of time starting in
12 February '05, from that time until towards the end
13 of the sentencing, that he would have had dealings
14 with certainly Mr. Taman and some of the family
15 and the parents.

16 Q The reason I put it to you is because
17 Mr. Minuk had not met with the Sveinsons for
18 approximately one year prior to this memo. And
19 Mr. Minuk indicated that, to the best of his
20 recollection, he wouldn't have said this to you.
21 And I'm wondering whether this reflects something
22 you believe he told you or --

23 A What I do recall, Mr. Paciocco, was at
24 some point, and I may not be able to zero in to
25 exactly the time period during this 32 months, but

1 I recall Mr. Minuk saying to me, and it may have
2 been earlier than the one-year period you are
3 referring to, that not only did he speak to or
4 have a meeting arranged with the registered
5 victims, but also he took it upon himself to
6 either speak to or meet with -- and I'm not clear
7 on that -- with the parents, who were not the
8 registered victims because he felt that was what
9 he should do. And I wouldn't have stopped him
10 doing that.

11 Q Certainly, and that's evidence we have
12 heard, sir. But this specifically talks about
13 Marty having informed the parents of the deceased.
14 In context, and correct me again if I'm wrong, I
15 read that as Marty having informed them about the
16 way this case is going to be resolved, through a
17 conditional sentence and a plea to the dangerous
18 driving?

19 A That I'm not sure I can answer for
20 you.

21 Q Okay. You do refer to a meeting
22 that's upcoming.

23 "Marty has also informed the parents
24 of the deceased, who I understand do
25 not see eye to eye with their

1 son-in-law..."

2 And above that, you indicate that:

3 "Marty was advised to deal with the
4 husband of the deceased in explaining
5 all the circumstances at his arranged
6 meeting Friday morning."

7 Correct, sir?

8 A That's what it says, yes.

9 Q Shortly after that meeting, sir, if
10 you look back at the docket, Exhibit 218, you will
11 see that he contacted you. Do you recall any
12 discussion about how that meeting with the family
13 went, sir?

14 A I'm not positive, because there were I
15 think more than one meeting, if I recall
16 correctly.

17 Q And you were kept up-to-date on each
18 of them, sir. You don't recall what was said on
19 this occasion, sir?

20 A I don't have a vivid recollection of
21 this one.

22 Q All right, sir. I'm going to take you
23 to the conditional sentencing policy at this
24 point. It's in volume G-45. It's been made
25 Exhibit 217 in these proceedings, G-45, Exhibit

1 217.

2 A Yes.

3 Q Sir, this conditional sentence policy
4 found at page 1385 of volume G was adopted in
5 April of 2005, prior to the sentencing
6 arrangements that had been communicated to you by
7 Mr. Minuk?

8 A Correct.

9 Q And sir, it indicates that Crown
10 Attorneys are instructed that generally a
11 conditional sentence should not be recommended in
12 cases involving death or serious bodily harm. And
13 that appears twice on the first page of the
14 policy, sir, both as a policy statement and as the
15 first principle there.

16 A Correct.

17 Q Would it be fair to say that the tenor
18 of this policy is to discourage the use of
19 conditional sentencing, save in exceptional
20 circumstances where death or serious bodily injury
21 has resulted from a crime, sir?

22 A I think that was pretty fair, yeah.

23 Q All right, sir. The exceptional
24 circumstances that are provided for over on page
25 1386, there are bullets, you'll notice, just above

1 the -- right after the first complete text
2 paragraph, and the first have really nothing to do
3 with this case. The next has to do with the views
4 of the victim.

5 How, sir, based on your understanding
6 of this policy, do the views of the victim factor
7 into the decision on whether a conditional
8 sentence should be recommended?

9 A I would think based on the Victims'
10 Bill of Rights, my understanding is certainly the
11 view of the victim is to be taken into
12 consideration by the Crown who has conduct of the
13 matter. In the end result, however, it will be up
14 to the Crown as far as final decision.

15 Q Given that this is a specific
16 exception to the general discouragement of
17 conditional sentences, where the views of the
18 victim are listed, would it be fair to say that in
19 a case where the victim is amenable to a
20 conditional sentence, that might liberate the
21 Crown somewhat from the usual policy discouraging
22 conditional sentences?

23 A Certainly, it would be another factor
24 that the Crown might wish to place before the
25 court.

1 Q And the views of the victim, if they
2 are opposed to a conditional sentence, would of
3 course be a factor that the prosecutor should
4 consider in deciding whether to give effect to a
5 conditional sentence recommendation?

6 A It will be something, as I said, that
7 the Crown handling the matter and having conduct
8 of matter will I'm sure take into account.

9 Q The next one, sir, dealing with the
10 exigencies of the case:

11 "The exigencies of the case, i.e.
12 difficulties with proof, may permit a
13 Crown Attorney to recommend a
14 conditional sentence in order to
15 obtain a conviction even though a
16 conditional sentence would not
17 normally be appropriate. This is a
18 difficult judgment call and a case
19 conference will be of assistance in
20 determining whether this course is
21 justified."

22 Sir, did you consider the contact by Mr. Minuk to
23 yourself to be something in the form of an
24 informal case conference to determine whether a
25 conditional sentence really was in keeping with

1 this policy?

2 A It will be part of the information and
3 possibly discussions that would have taken place
4 during, as you say, the 40 odd conversations just
5 over the phone with Mr. Minuk. But I would think
6 that the primary focus on this particular matter
7 was the last bullet that indicates that, where
8 there is case law to the effect that a conditional
9 sentence would be appropriate in the circumstance
10 of the particular case, would have been the
11 section which Mr. Minuk was aware of and probably
12 would have followed in this case.

13 Q All right, sir. So did your
14 discussions with Mr. Minuk progress to the point
15 where there was an indication that he felt he
16 could prove dangerous driving and it really wasn't
17 a case where you had to have a conditional
18 sentence trade-off in order to get a conviction of
19 dangerous driving, instead it was a fit sentence,
20 given this case?

21 A I think with everything at least that
22 I was informed of and understood as far as this
23 case, whether it was the investigation by East St.
24 Paul and anything to do with that investigation,
25 and what the provable facts were in the case, let

1 alone I couldn't judge credibility of any of the
2 witnesses that were with this case, that that
3 would have been a consideration of, look, there is
4 a drive dangerous cause death, I think we can
5 prove that. Whether it's 60 per cent or 90 per
6 cent or 30 per cent, that was there. And to go
7 along with that, you have to also judge what would
8 be an appropriate sentence in the circumstances
9 if, in fact, that was offered.

10 Now, I really have no information from
11 Mr. Minuk as far as his dealings with Mr. Wolson.
12 I think everybody here knows Mr. Wolson is a very
13 competent counsel, and here was the offer,
14 together with the suggestion of conditional
15 sentence based on case law. And that could have
16 been the subject of some of the information that I
17 would have received from Mr. Minuk, in and around
18 this time, as far as the case law that he was
19 thinking about.

20 Q Okay, sir. We'll look at the
21 characterization of that conversation shortly.
22 But just before I leave the conditional sentence
23 policy --

24 A Yes.

25 Q -- this last bullet, what it says is:

1 "The Crown Attorney is not required to
2 argue that a conditional sentence is
3 inappropriate in the face of clear
4 authority to the contrary."

5 Do you agree with me that it doesn't say that a
6 Crown Attorney is permitted to recommend a
7 conditional sentence where it is not contrary to
8 authority?

9 A You're going to have to repeat that
10 question, if you would?

11 Q I'm asking you if there is a
12 distinction between saying to your Crowns, look,
13 if there's clear authority that says a conditional
14 sentence is okay, you don't have to stand up and
15 say that it's inappropriate on the one hand; as
16 opposed to, if there's authority that says a
17 conditional sentence is okay, then you are
18 liberated from this policy and you can go ahead
19 and engage in a joint recommendation for a
20 conditional sentence? What is your sense of what
21 this bullet is communicating?

22 A It would seem to me that if this, in
23 fact, were a case conference and my Crown came
24 with a supervising Crown and one of my directors
25 and said, look, here is the position as far as the

1 offence or offences. Here are the precedents,
2 whether over the past five or 10 years, whether
3 just from Manitoba or all through the country,
4 that says this is an appropriate disposition based
5 on the law as we understand it. Then I think we
6 would probably go along and say, you are
7 convinced, we're convinced, go ahead.

8 Q Okay. So your understanding of this
9 bullet would effectively be that if the
10 conditional sentence is consistent with sentencing
11 authorities, your prosecutors are liberated from a
12 policy saying that they should generally not
13 recommend conditional sentences?

14 A Yes.

15 Q Sir, you continue, through the good
16 offices of Ms. Ireton, to try and stay in touch
17 with what's happening. There's an e-mail and I
18 won't take anybody to it, but it's 7:12 in the
19 morning. I know you are all morning people, but
20 on July 16th at 7:12 in the morning, there's an
21 e-mail to Mr. Minuk asking, what is happening?
22 And he responds in an e-mail that has now been
23 made Exhibit 227 in these proceedings. And I
24 would ask that you be furnished with that.
25 Exhibit 227 is found in book R-2.91.49.

1 Sir, if you take a look at page 3236
2 of that document. Probably be the second page of
3 the document that you have.

4 A Yes.

5 Q You will find an update from Mr. Minuk
6 at 10:12 p.m. on the 15th of July, 2007. And in
7 it, Mr. Minuk sets out the thinking that lead to
8 the position that he has proposed and intends to
9 take in court. This ultimately becomes the text
10 of a CIA, a Controversial Issues Alert that is
11 issued through your office, sir?

12 A To the deputy's office, yes.

13 Q Yes. Did you have any role in the
14 preparation of that document, the CIA?

15 A The CIA? The only role I would have
16 taken would be to advise, but I believe Mr. Minuk
17 knows about that, to get his CIA to the assistant,
18 to the Assistant Deputy Attorney General's office.
19 And she sees to it that it is put in proper form
20 to go across the street to the Deputy's office.

21 Q Sir, did you consider the proposal
22 that had been put forward to you by Mr. Minuk
23 during your conversation on the 13th or 12th of
24 July to be a plea bargain?

25 A I would say that my understanding,

1 where you had senior counsel knowing their cases
2 and knowing their facts and getting together and
3 concluding with the offer, and as well with a
4 recommendation for sentence, that in my view, that
5 would be my understanding, a plea bargain.

6 Q All right, sir. That's basically what
7 you said during your discussion with me that we
8 had earlier that became a transcript for these
9 proceedings. And I suggested to you at the time
10 that there is a distinction between two counsel,
11 whether senior or otherwise, each agreeing that
12 the proper outcome of a case is a plea to one
13 charge and a conditional sentence on the one hand,
14 and on the other hand the parties trading
15 something by way of a quid pro quo in order to
16 accomplish some type of joint compromise. And I
17 suggested to you that in Manitoba, only the latter
18 is a plea bargain and the former is a joint
19 position. Do you have any comment on that
20 distinction, sir?

21 A Well, I understand where you are
22 coming from and going, because I also thought
23 about that question after your interview with me.

24 Q Okay.

25 A And I thought to myself, well, it's

1 very nice that I said I believe it was --

2 Q It's a distinction without a
3 difference.

4 A That's exactly what I said, I was just
5 trying to come up with those words. And then I
6 thought to myself, with all due respect, certainly
7 to the Court of Appeal of our Province, that
8 perhaps the distinction without a difference is
9 something I perhaps shouldn't have said,
10 especially with Madam Justice Steel being the
11 majority on the case in question that you were
12 asking about. I can understand where she was
13 coming from, and I have the most possible
14 admiration for Madam Justice Steel. But I still
15 feel that in the circumstances of this particular
16 case, that there was an agreement between very
17 senior counsel, with a recommendation as far as
18 plea, as far as sentence, that still to me was a
19 plea bargain that I would have hoped the court
20 would have taken into serious consideration.

21 THE COMMISSIONER: Excuse me. You see
22 no distinction between a plea bargain and a joint
23 submission?

24 THE WITNESS: That's what I said
25 during the interview, although I can understand

1 that there is a difference, moving it up perhaps
2 one level.

3 THE COMMISSIONER: I'm not asking you
4 to argue with the Court of Appeal.

5 THE WITNESS: No, no.

6 THE COMMISSIONER: I'm just simply
7 saying, the Court of Appeal has made a distinction
8 between the two, whether you agree with it or not.
9 But you see that there is a distinction?

10 THE WITNESS: Yes, Your Honour.

11 THE COMMISSIONER: Thank you very
12 much.

13 BY MR. PACIOCCO:

14 Q And sir, given the distinction, where
15 did you situate this arrangement between
16 Mr. Wolson and Mr. Minuk, according to your
17 understanding through your conversations with
18 Mr. Minuk?

19 A Where did I situate it?

20 Q Yes, on what we have had described in
21 your Court of Appeal authority as a spectrum or
22 range of types of joint positions, coming from a
23 simple, hey, Eureka, we agree to let's trade
24 horses to get this done, plea bargain?

25 A I would have concluded that it was a

1 plea bargain.

2 Q So what in your understanding did
3 Mr. Minuk trade in order to accomplish the outcome
4 that he secured?

5 A I believe, based on the case law, he
6 would have agreed to the joint recommendation as
7 far as conditional sentence for the offer of that
8 plea by Mr. Wolson's client to the offence of
9 drive dangerous cause death.

10 Q All right, sir. I'm going to take you
11 to the last paragraph on page 3236 of the document
12 that Mr. Minuk sent to you, and get your views on
13 what this paragraph meant to you at the time and
14 what it means to you now. In his explanation, he
15 says:

16 "The main issue will become sentencing
17 because the prevailing authorities on
18 the facts admissible support a
19 conditional sentence. I am of the
20 opinion that it is the appropriate
21 sentence in this case."

22 Sir, do you not get the sense there
23 that if it is the appropriate sentence in the
24 case, in Mr. Minuk's opinion, that he's not really
25 trading anything in order to arrive at the

1 position that goes to the court, that this is a
2 case where he simply happens to agree with
3 Mr. Wolson that this is a conditional sentence
4 case?

5 A Well, I think he agrees with
6 Mr. Wolson. He also agrees with the precedent
7 that it falls within the realm of conditional
8 sentence.

9 Q And that was your understanding from
10 your conversation with him?

11 A I would say yes.

12 Q Okay, sir. The August 22nd hearing
13 comes up and I think you do recall, having had
14 your memory refreshed through the earlier
15 interview we had, that there were two hearings,
16 and the specific dates were August 22nd and
17 September 12th. August 22nd was the expected
18 sentencing submissions that would ultimately
19 produce a decision by the judge. Mr. Minuk
20 advised us that he sent his August 22nd
21 submissions to you and to Mr. Slough. Do you
22 recall that happening, sir?

23 A I believe so, yes.

24 Q Is this something that independent
25 prosecutors normally do, provide you with written

1 text of the submissions that they are going to
2 make in court before those submissions are made,
3 sir?

4 A I'd have to say not normally, no.

5 Q When you received that, what was your
6 sense, sir? What was your reaction to getting a
7 text from a prosecutor that basically set out,
8 almost word for word, what was ultimately read
9 into the record?

10 A I thought he was passing it along to
11 me just to take a look at if I wished, whether it
12 was, in my view, verbatim of what he was going to
13 give by way of a submission, or whether it was, as
14 counsel normally do, write out a few things and
15 then can be termed to be perhaps an outline of
16 what they are going to say in court, I wasn't
17 quite sure and I didn't check with him about that.

18 Q The document that he did send to you
19 looked very much like a complete text. It had
20 adjectives and everything else in there. It
21 wasn't just bullet points, sir. But with respect
22 to that document, what did you understand he was
23 sending it to you for, sir?

24 A Just to take a look at, if I wished.

25 Q To what end?

1 A That I think you're going to have to
2 ask Mr. Minuk, or if you haven't already, that
3 would be the person. I think again, Mr. Paciocco,
4 going back to the particular time, going back to
5 what I perceived to be a lot of pressure on
6 outside counsel in this particular case, I think
7 he was just giving it to us to say, this is what I
8 think I'm saying, this is what I'm going to be
9 saying, to even, to make him feel a little bit
10 better.

11 Q And sir, you would expect that given
12 your circumstances, given the pressures he was
13 under and the difficulties he was under, by
14 providing that to you, he was effectively trying
15 to get your take on whether it was appropriate,
16 well done, whether it required modifications,
17 whether the positions he was taking were
18 compelling or appropriate? Would you not have
19 accepted the document in that spirit, given that
20 you had concern for the political environment he
21 was operating in?

22 A This still would have been his
23 position to put forth, whether it was exactly word
24 for word of what he was going to do, or whether it
25 was an outline of what he wanted to say basically

1 to the court, his decision.

2 Q You read it, sir?

3 A I briefly read it, I believe, yes.

4 Q And if you had problems with it, you
5 would have contacted him and said, you know,
6 Marty, I don't think that this is the way you
7 should put this, or maybe you want to say this as
8 well, or here's an argument you can put in there.
9 Would you not have done that, sir?

10 A I wouldn't have, no. Again, I always,
11 always keep just that one caveat. Had something
12 come out at me from that of an egregious nature,
13 and I hate to keep using that term, but that's the
14 only way I might have said anything.

15 Q Now, sir, we did ask Mr. Minuk about
16 this, and I'm going to put this to you for your
17 reaction. This passage was also read to Mr. Minuk
18 during his testimony. And it comes from his
19 transcript at page 89, and beginning at line 9,
20 relating to this. He says:

21 "My recollection, sir, is that I would
22 have prepared a written submission.
23 That written submission would have
24 been forwarded over to Mr. Kaplan and
25 Mr. Slough. They would have had the

1 opportunity to read it, and once
2 having read it, then receive what I
3 would consider to be to some extent an
4 approval. I would have gone forward
5 with it and I would have made any
6 amendments or any changes that they
7 would have asked or suggested that I
8 make.

9 Q So your submission would have been
10 vetted by --

11 A I don't know, I guess that's the
12 word, vetted, but I gave them to them
13 in advance.

14 Q Mr. Kaplan and/or Mr. Slough?

15 A Yes."

16 So his position is that he's giving it to you,
17 that he's taking your review of it as approval,
18 and that he would have made any changes that you
19 would have recommended or suggested. How do you
20 react to that, sir?

21 A I'm not sure how I can react to that.
22 That was what he thought and that's what he's
23 testified to.

24 Q And sir, did you do anything or say
25 anything to give him to understand that's what was

1 happening with those submissions?

2 A I think simply by silence, that would
3 have been all that we could have provided to him,
4 unless the caveat came to be. But we didn't say
5 anything or -- at least, I can only speak for
6 myself.

7 Q On August 28th, 2007, after the
8 submissions were furnished, Ms. Colleen Ireton
9 wrote to Mr. Minuk about articles appearing in the
10 paper relating to victim impact statements and
11 asking for a response. Do you recall that, sir?

12 A Do I recall the e-mail?

13 Q Or do you recall the incident that
14 lead to an e-mail?

15 A It probably was something from the
16 papers.

17 Q And are you able to indicate to the
18 court why Ms. Ireton, your assistant would be
19 writing to Mr. Minuk about newspaper accounts of
20 the case?

21 A Possibly because from -- either the
22 deputy's office, there was some inquiry as far as
23 a response.

24 Q Okay. So are we to understand that
25 the deputy's office may be concerned about the

1 impact that that publicity could have on the way
2 in which this case was handled through one of the
3 prosecutors that Manitoba Justice went out and
4 retained, and that this was simply a way to ensure
5 that everybody was informed about what had taken
6 place?

7 A Having been with government for more
8 than half my life, I can only say that this was a
9 request for some information to explain what
10 perhaps was noted or read as far as the media.
11 That's my best answer on that.

12 Q Okay. So, effectively, it's
13 information. You're going to your independent
14 prosecutor saying, we need to know what's gone on
15 so that we can respond and we can be ready for
16 anything that comes up in the press. Is that
17 fair?

18 A That's basically the understanding.

19 MR. PACIOCCO: Okay, sir. The
20 sentencing submissions take place on
21 September 12th. I'm going to ask that you be
22 provided with document found at book R-2.91.65,
23 R-2.91.65. This may have been made an exhibit,
24 Madam clerk, I'm not certain.

25 THE CLERK: Exhibit 240.

1 MR. PACIOCCO: Exhibit 240.

2 (EXHIBIT 240: R-2.91.65, Hard copy of
3 email from Martin Minuk to Brian
4 Kaplan sent 9/09/07 10:11 p.m.
5 attaching draft submission)

6 BY MR. PACIOCCO:

7 Q This is an e-mail from Mr. Minuk to
8 yourself on September 9th saying, here is a draft
9 for you to look at, any comments or suggestions;
10 right?

11 A It appears to be, yes.

12 Q So you would have certainly understood
13 when you received these drafts of submissions,
14 that were in fact made on September 12th, that he
15 was looking for your comments or suggestions?

16 A That's what it seems to indicate, yes.

17 Q Did you read these, sir?

18 A I would have at least briefed through
19 what he sent to me.

20 Q And sir, having done that, what would
21 you have done?

22 A The only thing I would have done is, I
23 think I told you at the interview, is perhaps make
24 the odd spelling correction if I see it. And the
25 only reason I do that is because my wife is a

1 teacher for 33 years, and so I learn from that.

2 Q My wife is a teacher too, sir, and I
3 can't spell, but that's commendable.

4 A Oh, I can't spell either, but I try my
5 best.

6 Q Sir, with respect to comments or
7 suggestions, did you not make any comments or
8 suggestions to him about the submissions he was
9 going to make?

10 A I don't believe so, whatsoever.
11 Again, correction, maybe one or two, that's it.

12 Q All right. So you wouldn't share the
13 expression that was used by Mr. Minuk, that this
14 was effectively a vetting of his submissions by
15 you, sir?

16 A Again, I think we discussed before
17 what the term vetting means, whether it's
18 informational, or running something by, or what
19 have you. But I don't believe I gave any
20 suggestion other than what I've just told you.

21 Q All right. Sir, on September 12th,
22 when the hearing before Chief Judge Wyant was
23 occurring, Mr. Minuk has advised us that he spoke
24 to you and, according to his recollection,
25 Mr. Slough, during a break when he was asked by

1 the Chief Judge whether he was going to prove that
2 Mr. Harvey-Zenk had alcohol in his body. It was
3 already determined that he was not going to be
4 proving that Mr. Harvey-Zenk was impaired by
5 alcohol. The issue was the simpler one of whether
6 he had alcohol in his body.

7 Did you have a conversation with
8 Mr. Minuk during a recess in that court proceeding
9 on September 12th?

10 A I believe so, yes.

11 Q And where did that conversation take
12 place from your end? We know that he called you
13 on his cell phone. Where were you?

14 A As best I can recall, I may have been
15 in my office. I don't believe this was on a cell
16 phone from me, so that's my conclusion. I
17 probably was in my office at the time.

18 Q Are you able to indicate whether
19 Mr. Slough was present at the time that the call
20 came through?

21 A I know Mr. Slough was present for one
22 of the calls at least in that time period from
23 Mr. Minuk. And I'm not quite recollecting whether
24 he was there at this particular call.

25 Q Sir, if he would have been there, what

1 would the practice have been? Do you put somebody
2 on a speaker phone? Do you patch people through
3 so you can have a three-way conversation? I'm
4 just trying to understand Mr. Minuk's evidence and
5 his recollection that he spoke to the both of you.
6 Would it have been serially or at the same time?

7 A I don't think it would have been
8 serially. I think, if at all, it may have been a
9 call from Mr. Minuk and putting it on a speaker
10 phone with Mr. Slough.

11 Q What took place during that
12 conversation with Mr. Minuk?

13 A Again, my recollection is that it had
14 to do with what Chief Judge Wyant may have been
15 asking him, whether he wished to call evidence
16 after something said by Mr. Wolson. And my
17 recollection now, because it's one of the other
18 questions that I thought about after you had asked
19 it at the interview, my best recollection is
20 saying to Mr. Minuk, and I recall I believe I said
21 it to him, what do you think? And his response to
22 me was to the effect that I don't believe that we
23 should call any evidence. And the only thing I
24 can't tell you for certain, whether there was any
25 sort of agreement that he may have had with

1 Mr. Wolson. I'm not clear on that. But having
2 said that, my response then would have been -- and
3 I can't speak for Mr. Slough at this point, I'm
4 sure you'll ask him as well -- was that's fine. I
5 had nothing else to tell him.

6 Q Okay. That's fine by way of we're
7 okay with that, sir?

8 A I'm sorry?

9 Q That's fine by way of, we're okay with
10 that?

11 A That was his decision.

12 Q Okay. Sir. And you indicated that
13 you said, well, what do you think? Was that in
14 response to a request by Mr. Minuk for what you
15 think?

16 A I think that's probably how it came
17 about. Again, best recollection. So I think
18 you'd be correct in suggesting that.

19 Q Are you aware, sir, that on certain
20 authorities the absence of impairment, even in the
21 absence of impairment, the consumption of alcohol
22 is an aggravating sentencing factor?

23 A I believe certainly based on some of
24 the case law, it can be considered.

25 Q Did you take that into consideration

1 in your discussion with Mr. Minuk? Were you aware
2 of it at the time?

3 A I don't think the discussion was very
4 long at all.

5 Q Did you receive any information from
6 Mr. Minuk about what evidence he may have had
7 available to him to prove that there was alcohol
8 in the body of Mr. Harveymordenzenk?

9 A I think I had some form of
10 understanding from discussions with him, over the
11 period of time, what he may have had available to
12 him.

13 Q And were you aware that he had
14 evidence from two ambulance attendants or
15 paramedics that they smelled alcohol on
16 Mr. Harveymordenzenk's breath?

17 A I think I told you at the interview I
18 was aware of one for sure, by way of information.

19 Q Were you aware of the fact that
20 Constable Woychuk claimed to have smelled alcohol
21 on his breath en route?

22 A It's possible, yeah.

23 Q And that Sergeant Carter claimed to
24 have received a strong smell or odour of alcohol
25 when he first engaged with Mr. Harveymordenzenk

1 back at the police station?

2 A Again, I have a recall of that.

3 Q Did you offer any view as to whether
4 or not Mr. Minuk should try and prove the presence
5 of alcohol when you had your conversation with
6 him?

7 A No.

8 Q What was your own view as to whether
9 he should do so, sir?

10 A My own view?

11 Q Yes, sir?

12 A I'd have to say my own view, because
13 now upon reflection it seems to me that one of the
14 expert opinions that I was privileged to read,
15 that was supplied to me, came from Mr. Peck, was
16 probably a correct view, and would have been in my
17 view the correct view.

18 Q It would have been your view at the
19 time, sir?

20 A That at that point, it was pretty well
21 irrelevant because it couldn't tie up to anything
22 else by way of impairment.

23 MR. PACIOCCO: Mr. Commissioner, it's
24 10:47 and we have really pushed the limits of the
25 morning break. It's a good time.

1 THE COMMISSIONER: Yes, 15 minutes.

2 THE CLERK: All rise. This Commission
3 of inquiry will take the morning recess.

4 (Proceedings recessed at 10:47 a.m.
5 and reconvened at 11:03 a.m.)

6 THE CLERK: All rise. This Commission
7 of Inquiry is now reopened.

8 BY MR. PACIOCCO:

9 Q Mr. Kaplan, I have very few questions
10 left for you, sir. There are a number of briefing
11 notes and things of that nature that came about in
12 the aftermath of the September 12th hearing, in
13 which Mr. Minuk was providing information to your
14 office and to Mr. Slough, basically updating and
15 explaining the decisions that had been made, sir.
16 Are you familiar with those? We went through them
17 during the last interview, sir.

18 A I think so.

19 Q And I take it, sir, that that's
20 something that happens in the ordinary course,
21 when there are publicity issues that the Ministry
22 has to be concerned about relating to the way a
23 file was handled, that there would be briefing
24 information furnished to the Attorney General and
25 perhaps even to the Premier?

1 A Fair enough, yes.

2 Q So I'm not going to take you through
3 those documents, but our understanding, sir, is
4 that those documents would have been sought from
5 Mr. Minuk in order to educate everyone in the
6 Ministry all the way up, so that if there were
7 questions from the press or anything that had to
8 be dealt with, they would have the information
9 required?

10 A I think that's fair.

11 Q Sir, I'm going to take you to one more
12 document before we're done, and this one is found
13 in R-2.91.80, R-2.91.80.

14 THE CLERK: Exhibit 241.

15 MR. PACIOCCO: R-2.91.80 will be
16 Exhibit 241.

17 (EXHIBIT 241: R-2.91.80, Copy of
18 email from Martin Minuk to Brian
19 Kaplan sent 10/20/07 4:17 a.m.
20 attaching letter of Richard Wolson
21 dated October 19, 2007)

22 BY MR. PACIOCCO:

23 Q Sir, what you are about to receive
24 from book R-2 at page 3308 is an e-mail sent from
25 Martin Minuk to yourself, along with a letter that

1 had been received from Mr. Wolson by Mr. Minuk,
2 and that letter had to do with the court's
3 consideration of broadcasting the sentencing on
4 CJOB radio. The e-mail from Mr. Minuk reads as
5 follows:

6 "Are we chatting about this and
7 determining if prosecutions wants to
8 take a position on this, or just let
9 the accused deal with it alone."

10 Do you recall receiving that e-mail, sir?

11 A I do recall receiving the e-mail, yes.

12 Q And you'd agree with me that he's
13 essentially asking you for some direction as to
14 how to deal with this question?

15 A He's asking if prosecutions wishes to
16 take a position. And my recollection of this is
17 telling Mr. Minuk that prosecutions was not taking
18 a position.

19 Q Okay. Sir, I'm just going to ask you
20 a general wrap-up question here.

21 A Okay.

22 Q We have, and I know it was over the
23 course of two and a half years, we have 30
24 docketed contacts between Mr. Minuk and yourself,
25 another seven with Ms. Ireton, and nine or 10 with

1 Mr. Slough. You ask Mr. Minuk to draft a response
2 to the Sveinsons in connection with their letter
3 to the Minister. He approached you with respect
4 to the initial adjournment of the Preliminary
5 Inquiry and with respect to further investigation
6 arising out of the Carter disclosures. He was
7 advised on the strategy for getting the
8 adjournment, and even provided with wording for a
9 letter to Mr. Wolson. He approached you in
10 advance of the submissions on August 22nd with the
11 plea agreement that was being proposed and there
12 was some discussion about that, then forwarded to
13 you his submissions of August 22nd. He approached
14 you prior to September 12th with respect to the
15 submissions that he was going to be making on that
16 day. When he was called upon by the judge to make
17 a fundamental decision about whether he was going
18 to prove alcohol, he called you yet again. And he
19 approached you for a number of other more minor
20 things such as your media position.

21 Do you consider the contacts of that
22 frequency and that nature, relating to what are in
23 truth the crucial decisions that this prosecutor
24 made, to be such as to affect the appearance of
25 his independence, that he is coming to the very

1 body that feels it cannot handle this prosecution
2 because of the appearance that it might be too
3 close to police officers, and yet your independent
4 prosecutor is coming to you on a regular basis in
5 connection with very important and fundamental
6 decisions. Do you not consider that that's a
7 problem of appearances with respect to the
8 functioning of an independent prosecutor?

9 A In this particular case, Mr. Paciocco,
10 the contacts of approximately 30 or 40 times,
11 whether by e-mail or whether by phone, over a
12 period of 32 months, my view is, no, it doesn't
13 show any interference. The decision and the end
14 result was always outside counsel and that's why
15 we have the policy and that's why we go to outside
16 counsel.

17 Q Sir, even if you choose to count these
18 according to counts, times per month, do you not
19 agree with me that the contacts, many of them,
20 every major decision that was taken in this case
21 involved a contact between Mr. Minuk and you, from
22 whether to give earlier -- early disclosure to
23 counsel, to the involvement of the Professional
24 Standards Unit, to the plea bargain, to the
25 adjournment, to the submissions, to the decision

1 to prove alcohol, do you not take the view, sir,
2 that it compromises, at least the appearance of
3 independence to have that kind of contact taking
4 place during a case?

5 A If you're asking me my personal view,
6 Mr. Paciocco?

7 Q I am, sir.

8 A No, I don't feel that in any way that
9 compromised the situation.

10 MR. PACIOCCO: Those are the questions
11 that I have for you today, Mr. Kaplan. Thank you
12 very much for your testimony. I'm sure there will
13 be other counsel and perhaps the Commissioner that
14 will have further questions.

15 THE WITNESS: Thank you.

16 THE COMMISSIONER: Mr. Kaplan, I'm not
17 unmindful that you're on the horns of a dilemma.
18 It's a balancing act. You have to have an
19 independent counsel, you have to show that he's
20 independent of government. And at the same time,
21 your Minister wants to know what's going on, and
22 he wants to be assured that he's not placed in an
23 embarrassing situation.

24 Do you have any recommendations as to
25 how this can be accomplished, and avoid the kind

1 of situation that occurred in this case, or at
2 least the adverse publicity that was in this case?

3 THE WITNESS: Well, Mr. Commissioner,
4 there's nothing I can do as far as the media
5 approach to various matters. We're not involved
6 with them. But, again, in this particular case,
7 and I'm not going to sit here and make comment on
8 what the media does rightly or wrongly, but in
9 this particular case, it was felt, not just by me,
10 that there was an unfairness based on lack of
11 facts that the media were aware of, that they came
12 down in a very, what I thought to be an unfair
13 position for our outside counsel, which we
14 couldn't have helped as far as Mr. Minuk was
15 concerned, during what was happening during this
16 period of time. Other than to say, as I believe
17 Mr. Slough said at least on one occasion to the
18 media, look, we have full confidence in our
19 outside counsel and Mr. Minuk.

20 THE COMMISSIONER: What about an
21 independent body of senior counsel that
22 independent counsel can go to? And that then
23 removes the perception entirely, and may take the
24 heat off the Minister if the independent counsel
25 takes a position that is subject to criticism?

1 THE WITNESS: I would think that's a
2 possibility, certainly, but one also has to take
3 into account fiscal responsibility, and it's very
4 nice to say, well, why don't you send all these
5 matters out of province across Canada?

6 THE COMMISSIONER: I'm not talking
7 about out of province, I'm talking about within
8 this community, within Winnipeg, some senior
9 counsel who have been involved in criminal defence
10 and criminal prosecution, to whom someone like
11 Mr. Minuk could turn for advice and counsel. It
12 must be difficult for an independent prosecutor
13 who doesn't have the opportunity to have the kind
14 of conference that a line Crown has. He doesn't
15 have other counsel around him, other Crown he can
16 turn to and say, help, or what do you think? Do
17 you think that that kind of, maybe an independent
18 body set up by the Law Society or -- and I'm just
19 trying to think of some possibilities -- that he
20 could turn to that might, as I say, reduce any
21 feeling by the public that there is some
22 connection between the Ministry and independent
23 counsel?

24 THE WITNESS: I guess it would provide
25 another layer, if you will, of somebody to go to

1 who could be further, once removed from the
2 interactions on a daily basis. But also there is
3 some decisions that have to be made a little
4 quicker than getting to that body, I would imagine
5 having done this for many years, with outside
6 counsel. And I can also tell you, in my humble
7 view, that for the seven or eight or nine years
8 that I had been dealing with outside counsel, we
9 never really had this kind of issue ever come up
10 before. Whether it's through dealing with us in
11 the sense of, just to use Mr. Paciocco's term,
12 vetting matters or at least providing information
13 to us, this has never come up before.

14 THE COMMISSIONER: Well, the fact it
15 has never come up before doesn't mean it's not
16 going to come up again.

17 THE WITNESS: I understand.

18 THE COMMISSIONER: Okay.

19 MR. PACIOCCO: Nothing arising.

20 BY MR. ZAZELENCHUK:

21 Q Mr. Kaplan, I appreciate that while
22 your independent prosecutor is doing their job,
23 they are to remain independent, but does your
24 department have any kind of a post-closure audit
25 system in place for the prosecutors, the

1 independent prosecutors?

2 A Meaning, Mr. Zazelenchuk, exactly
3 what? I'm not sure.

4 Q Well, for example, when it's time for
5 an independent prosecutor to close a file because
6 it's over the appeal period has run, is there some
7 kind of a standard form report that's required
8 from him or her?

9 A Not required, Mr. Zazelenchuk, but I
10 think all of our outside counsel from -- since the
11 time I had been dealing with our outside
12 counsel -- have usually done a closing as far as
13 this has happened, that happened, this was
14 concluded, for our purposes.

15 Q And I appreciate that. But what I'm
16 getting at is, I don't do much insurance defence
17 work, but once many years ago I represented the
18 Law Society insurer in this province. And when
19 the case was finished, they gave me a standard
20 form to fill out that I was informed they
21 collected so that they could do ongoing
22 evaluations. And I was wondering if you have
23 anything like that?

24 A No, I can't say that we do. Because,
25 if anybody, I'm usually in touch with the counsel

1 throughout, even to conclusion matters by way of
2 sending of letters, and then I also sign off for
3 payment.

4 Q Fair enough. I'm curious about one
5 thing. It's Exhibit 48 and it's page 3401.22.
6 It's your memo to Mr. Slough dated July 13, 2007.

7 A The sleep on it memo?

8 Q Yes.

9 A Yes. Page again, Mr. Zazelenchuk?

10 Q 3401.22.

11 A Yes.

12 Q What I'm curious about is in that very
13 first paragraph, the second sentence, you say:

14 "You will recall all the issues
15 dealing with the investigation and the
16 evidentiary problems."

17 And then don't go on to list them even in point
18 form. Was there a reason for that? I mean, it
19 would seem to me that that's something very
20 important to the fact that either a joint
21 submission or a plea bargain is being entered
22 into, and that is some recitation of what exactly
23 the problems were?

24 A My recollection, not that I ever do
25 lengthy memorandums, that's just my style, but

1 that my Assistant Deputy Attorney General,
2 Mr. Slough, was informed at various times, as far
3 as some of these issues were concerned, just to
4 keep him apprised as matters were coming closer to
5 the hearing date.

6 Q Okay.

7 A And that probably was just orally or
8 passing in hall conversations, you know, how is
9 this case doing, or what have you. And I would
10 have apprised him of information that I would have
11 received from Mr. Minuk.

12 Q One last area, sir. You will recall
13 early on this morning, within the first 10
14 minutes, Mr. Paciocco was asking you questions
15 about the fact that you knew early on in this case
16 that this was going to be a case where the
17 prosecutor was potentially going to have to
18 cross-examine Winnipeg Police witnesses. Do you
19 recall that exchange with Mr. Paciocco earlier?

20 A I recall the exchange, yes.

21 Q And then you said something, and I
22 didn't quite catch what you said, but you were
23 referring to the statements that were gathered by
24 the Professional Standards Unit. You knew that
25 the Professional Standards Unit has interviewed

1 about 20 some odd police officers?

2 A I was made aware of that at some
3 point.

4 Q Yeah. And you were talking about what
5 you would have wanted if you were prosecuting this
6 case, and you said words to this effect, and tell
7 me if I'm wrong; I would have wanted to read the
8 statements, and then you set out some
9 alternatives, and either take them at face value
10 or not, or pursue them further. Do you recall
11 those comments?

12 A I believe so, yes.

13 Q Yeah. You were a very
14 well-experienced line prosecutor, you prosecuted
15 for some 25 years. Could you expand on that a
16 little bit further, please, sir, what you meant by
17 that comment?

18 A Well, I hate to start by saying "if I
19 were doing the prosecution," because that's not
20 going to be of much help to anybody here.
21 Everybody has their own style.

22 Q I appreciate that. But I'm more
23 interested in your experience, sir.

24 A Well, I would have, Mr. Zazelenchuk,
25 reviewed the whole of the case, plus all of the

1 statements to prepare myself. And what I would
2 see by way of the statements, I would have to make
3 some decision, certainly as we are getting closer
4 to Preliminary, and certainly to trial, what I had
5 there and when I wanted to deal with some of the
6 witnesses.

7 Q Sure. What if you found that those
8 statements were inadequate, on your review of
9 them?

10 A Inadequate in what sense?

11 Q You just thought they weren't done
12 well?

13 A By the maker of the statement or the
14 interviewer?

15 Q By the interviewer?

16 A Then I probably would have taken the
17 opportunity, as we progressed closer to hearing,
18 to perhaps chat with any of the officers.

19 Q What about the interviewer?

20 A I'm not sure I would have gone that
21 route at that stage.

22 Q What about early on, when you first
23 got them?

24 A Oh, I would have tried to get a handle
25 on the kind of case that I had to prosecute and to

1 review everything.

2 MR. ZAZELENCHUK: Okay. Thank you.

3 BY MR. McDONALD:

4 Q Mr. Kaplan, I have just a couple of
5 points I'd like to cover with you. Could I ask
6 Madam clerk to put before you Exhibit 233, which
7 is found in volume R-2, Mr. Commissioner, tab
8 91.72 --

9 A Thank you.

10 Q -- and 91.73. Do you have that
11 document, Mr. Kaplan?

12 A I have just received it, yes.

13 Q Thank you. Are you familiar with the
14 e-mail, sir? It's dated the 19th of September,
15 2007, and it's to Martin Minuk from Don Slough
16 with a copy to you?

17 A Having read it and noticed that I
18 received a copy back then, yes, I have a recall of
19 it.

20 Q You have a recall of receiving it back
21 about the time it was sent?

22 A I believe so.

23 Q And basically what, as I read the
24 document, Mr. Slough was asking Mr. Minuk to
25 address a few issues and provide him with some

1 responses to some specific questions. Is that
2 what you get from that?

3 A I believe you are correct.

4 Q And as I understand it, the document
5 at R-2.91.73 is Mr. Minuk's draft response to the
6 specific questions raised by Mr. Slough. Do you
7 see that?

8 A Where?

9 Q It's at page 3289 on the bottom
10 right-hand corner?

11 A Which exhibit would this be again,
12 sir?

13 Q I have it as Exhibit 233.

14 A I have 233, which I'm holding, that
15 says Exhibit 233, but I only have the one page as
16 far as the e-mail. Where should I be looking
17 next?

18 MR. PROBER: I think the exhibit is
19 142.

20 MR. McDONALD: 142, my apologies,
21 Mr. Commissioner, I don't have.

22 THE COMMISSIONER: Yes, it is, yes.

23 MR. McDONALD: Sorry, 142 is the final
24 version of the memo, not the draft. That's the
25 trouble.

1 I'm told the draft was also marked as
2 an exhibit, but it appears, and I apologize, I
3 have the wrong exhibit number. Mr. Paciocco is
4 looking. Hopefully he can --

5 MR. NOZICK: The draft is 142 and the
6 final copy was 143. The draft is 3289 and the
7 final copy 3296, I think.

8 MR. McDONALD: This is the final.
9 That's not the one. There is a draft which
10 appears. Oh, you have that now, sir?

11 THE WITNESS: No, I still have 142.
12 Is there another one?

13 BY MR. McDONALD:

14 Q Yeah, I'm looking at pages 3288 --

15 A 3288, I have that.

16 Q -- 3289, which is the draft memo
17 submitted by Mr. Minuk to you and to Don Slough?

18 A I have that.

19 Q All right. That's the document I'd
20 like you to have before you.

21 A Okay.

22 Q And it was attached, as I understand
23 it, or rather sent by Mr. Minuk as a draft
24 response to Mr. Slough's initial request. Do you
25 understand that?

1 A I understand now that you're asking
2 that and I believe that's correct.

3 Q All right. I'd like you to look at
4 the draft response, which is undated, whereas the
5 final one is dated September 20th?

6 A Okay.

7 Q And what, sir -- a copy was sent to
8 you, I take it?

9 A It indicates that in the e-mail, yes.

10 Q Yes. And did you receive it and
11 review it and get back to Mr. Minuk with any
12 comments or suggestions in respect to the draft?

13 A No, I didn't, because my understanding
14 of this particular response was that it was at the
15 request of the Assistant Deputy Attorney General,
16 Mr. Slough.

17 Q All right.

18 A And that probably, I believe, came
19 from a request from the Deputy Minister to
20 Mr. Slough.

21 Q All right. But I understand though,
22 sir, that you did become involved in some
23 discussions with Mr. Slough and with Mr. Minuk in
24 order to have the final response prepared. Is
25 that correct?

1 A I'm afraid -- if you could just make
2 it a little more specific?

3 Q Yeah. Let me see if I can help you.
4 If you look at the time docket, which are Exhibit
5 218, and go to September 20th, which is the date
6 of the final memo which you have before you,
7 Mr. Minuk records point -- three-tenths of an hour
8 being telephone calls from B. Kaplan to Don
9 Slough?

10 A The date again, sir?

11 Q September 20th, which is the date of
12 the final memo.

13 Now, I understood from Mr. Minuk's
14 evidence, and this will hopefully assist in
15 refreshing your memory, when he testified, he
16 testified that he did have a discussion with you
17 and with Mr. Slough concerning the final form of
18 the memorandum. Do you remember that? Does that
19 help you at all?

20 A I wish it did, but, no, it's not.

21 Q Let me just see if -- let me just see
22 if I can help you. Look at item 7 on the bottom
23 of page 1 of the draft memo, under the heading
24 "Summary of Scene Investigation of Zenk." Do you
25 see that?

1 A That would be page 3289?

2 Q 3289.

3 A Okay, yeah.

4 Q Item 7 reads, "At 8:21 Carter read the
5 blood demand." Do you see that?

6 A I see that.

7 Q All right. Go now to the final form
8 of that memo, which starts at page 3296, dated
9 September 20th, and you will notice that the
10 substance or the content of item 7 --

11 A Counsel, counsel, if I could just
12 interrupt, and I apologize --

13 Q Sorry?

14 A -- but I'm not sure where to find
15 3296.

16 Q Okay. Here it comes. My apologies.
17 I thought you had it.

18 THE COMMISSIONER: I think the
19 exhibits are a little, or at least the exhibit
20 list has a mistake in it.

21 MR. McDONALD: I've got to get it
22 straightened out, Mr. Commissioner.

23 THE COMMISSIONER: Yes, we will get it
24 straightened out.

25 MR. McDONALD: Yes, thank you.

1 THE COMMISSIONER: There's a
2 memorandum of draft, undated, and then there is a
3 memorandum which is the final one dated
4 September 20th, 2007. And the page number at the
5 bottom of the final one is 3296.

6 THE WITNESS: I have that now.

7 THE COMMISSIONER: And what he wants
8 you to look at is at number 7, and why it was
9 changed?

10 MR. McDONALD: Exactly,
11 Mr. Commissioner.

12 BY MR. McDONALD:

13 Q You'll note, Mr. Kaplan, my point is
14 that in the original draft, the only comment in
15 item 7 is "At 821 Carter read the blood demand"?

16 A Correct.

17 Q Then we have the conversation with
18 Mr. Minuk with you, I believe, and with
19 Mr. Slough, and then the final version comes out
20 with a significantly expanded number 7 which
21 reads:

22 "At 8:21 Carter read the blood demand,
23 which appears not to have been
24 required by reason of there being no
25 evidence to satisfy the section 254(3)

1 Criminal Code requirements that Zenk
2 was incapable of blowing or that it
3 was impracticable to take a breath
4 sample. This inappropriate demand was
5 not pursued by Carter who did 44
6 minutes later read the breath demand.
7 That fact clearly establishes that the
8 blood demand was inappropriate in the
9 circumstances."

10 Do you see that?

11 A I see that now.

12 Q And you see that the substance of the
13 final version is much more detailed than the
14 substance of the initial version at item 7?

15 A I agree.

16 Q What conversations can you recall with
17 Mr. Slough and/or with Mr. Minuk that lead to
18 Mr. Minuk amending paragraph 7, to expand it in
19 the form that it now exists?

20 A I really have no idea as far as
21 conversation certainly on any of the points.

22 Q You don't recollect, I take it?

23 A Not whatsoever.

24 Q Do you recall any discussions with
25 Mr. Minuk and/or Mr. Slough about the distinction

1 between a blood demand and a breath demand?

2 A I am sure there could have been the
3 odd discussion. I have no recollection
4 specifically.

5 Q Was it your understanding of the facts
6 of this case, sir, at the time that you were
7 reviewing these documents with Mr. Minuk and
8 Mr. Slough, that what in fact had happened on the
9 day of the accident at the East St. Paul Police
10 Station was that Chief, then Sergeant, Carter made
11 an inappropriate blood demand. Was that your
12 understanding of the facts?

13 A At some point in time, counsel, I
14 would have been informed, had I not read it in any
15 of the material that I was given or informed of,
16 that then Sergeant Carter initially gave a blood
17 demand as opposed to a breath demand. I'm aware
18 of that.

19 Q So from a factual standpoint, when you
20 were addressing the issues in this case, one of
21 the factual issues that you proceeded on was that
22 Sergeant Carter made what all considered to be an
23 inappropriate demand for a blood sample. Is that
24 right?

25 A I believe he made a blood demand and

1 perhaps it should have been a breath demand.

2 Q All right. So you were never told, I
3 take it, that what now Chief Carter really did was
4 to make a breath demand but recorded it
5 erroneously as a blood demand? You were not aware
6 of that?

7 A I am not sure I am able to answer that
8 question.

9 Q Were you ever told that Sergeant
10 Carter's position was no, no, no, I never made a
11 blood demand of Mr. Zenk, I made the mistake in my
12 notes where I wrote blood demand, but I really
13 made a breath demand. You weren't aware of that?

14 A I don't have a recollection of that
15 particular change or opinion from Carter.

16 Q All right. So as far as you are
17 concerned, on September 20th, when Mr. Minuk was
18 talking to you and to Mr. Slough, the factual
19 component of the case included an inappropriate
20 blood demand by Sergeant Carter?

21 A I believe that it may have been
22 mentioned, yes. I understood that there was a
23 blood demand as opposed to a breath demand.

24 MR. McDONALD: Thank you, sir. That's
25 all I have, Mr. Commissioner. Thank you.

1 THE COMMISSIONER: Let's correct the
2 exhibit while we're at it.

3 MR. McDONALD: I'm not sure if I'm
4 capable of correcting it, but I have the final
5 version as 142. Now, I don't know if that's
6 right.

7 THE COMMISSIONER: Well, 142 says it
8 is R-2.91.73 and it is not. That is 91.72, it
9 should be 72 and not 73.

10 MR. McDONALD: I have Exhibit 233 as
11 being R-2.91.72, and the clerk is nodding on that
12 note. Now, as far as R-2.91.73, I'm not sure.

13 THE CLERK: 142.

14 MR. McDONALD: That's Exhibit 142.

15 THE COMMISSIONER: Well, 142 says hard
16 copy of e-mail from Don Slough to Martin Minuk.
17 Now, 73 is the draft copy the memorandum. It's
18 not an e-mail from Don Slough to Martin Minuk,
19 it's an e-mail from -- it's, in fact, the
20 memorandum.

21 MR. McDONALD: It's a memorandum from
22 Minuk to Slough/Kaplan.

23 THE COMMISSIONER: Well, I think the
24 problem is that the first page is an e-mail and
25 the memorandum follows.

1 MR. McDONALD: Yes.

2 THE COMMISSIONER: So maybe it can be
3 resolved by simply adding a draft memorandum in
4 reply.

5 MR. McDONALD: In the description of
6 the Exhibit, e-mail with draft memorandum from
7 Martin Minuk, undated, because we know it's the
8 undated one.

9 THE COMMISSIONER: Yes, all right.
10 We'll make that correction.

11 MR. McDONALD: Thank you very much.

12 MR. HOEPPNER: No questions of
13 Mr. Kaplan.

14 MR. WEINSTEIN: No questions.

15 MR. JACK: No questions.

16 MR. PROBER: No questions.

17 THE COMMISSIONER: Mr. Green,
18 Ms. Dixon, Mr. Green, any questions? It went very
19 quickly.

20 MR. GREEN: I'll be after my friend.

21 THE COMMISSIONER: Oh, you're after.
22 Is that all right with you?

23 MR. NOZICK: That's fine with me.

24 THE COMMISSIONER: Is the large number
25 of books brought up any indication to the amount

1 of cross-examination you're going to conduct?

2 MR. NOZICK: We're going to have to
3 ask Yogi Berra about that, Mr. Commissioner. I
4 hope not.

5 THE COMMISSIONER: All right.

6 BY MR. NOZICK:

7 Q The first point that Commission
8 Counsel raised was that he recorded something like
9 40 contacts between yourself and Mr. Minuk between
10 February 25th, and I think he said November 30th
11 of 2007. Do you recall him making that point?

12 A I believe so, yes.

13 Q Now, I'm not the best at arithmetic,
14 but I notice that there were seven calls after
15 September 12th, 2007, which was the final
16 sentencing date. Would you agree with me?

17 A Yes.

18 Q I don't want you to have to add it up.
19 The Commissioner, I'm sure, will do it at his
20 convenience.

21 So there were 33 calls between
22 February 25th, or 33 contacts between
23 February 25th and the final sentencing date. Is
24 that fair?

25 A Yeah.

1 Q Now, there were formal retainer
2 letters sent to Mr. Minuk, first of all, a general
3 retainer letter, and secondly, a specific retainer
4 letter. Is that fair?

5 A Correct.

6 Q And that would be Exhibits 54 and 55,
7 which are found at G-43. And both of those,
8 without reading the details, both of those letters
9 refer to the Department of Justice being the
10 client of Mr. Minuk; correct?

11 A Yes.

12 Q And that you are the contact person,
13 actually you're the client of Mr. Minuk, from a
14 solicitor/client point of view?

15 A Yes.

16 Q And both of those letters invite
17 Mr. Minuk to keep your office or yourself apprised
18 as to the status of the matters. Is that fair?

19 A Fair.

20 Q And that's also found in the
21 independent, the independent policy which I take
22 it is G-44, and that's exhibit number 215?

23 A Yes.

24 Q And that recognizes at page 1384 of
25 that exhibit that the independent counsel has full

1 access to all employees within the Department of
2 Justice --

3 A Correct.

4 Q -- including yourself. Now, my
5 understanding is that the policy itself was
6 subject to a review by Justice Krindle; is that
7 correct?

8 A Correct, yes.

9 Q And that was, Justice Krindle produced
10 a report that is found in volume N of the
11 disclosure, which I don't believe has been
12 tendered as an exhibit yet, Mr. Commissioner,
13 which I would ask be tendered as an exhibit. And
14 in her report, she actually includes a copy of the
15 original policy that we had been talking about.
16 Do you recall that?

17 A I recall.

18 THE CLERK: N-79 is Exhibit 242.

19 MR. NOZICK: Sorry, what number?

20 THE CLERK: N-79.

21 THE WITNESS: Thank you.

22 (EXHIBIT 242: N.79, Appointment of
23 Independent Counsel - Review (Ruth
24 Krindle, December 18, 2007)

25

1 BY MR. NOZICK:

2 Q Would you agree with me that she did a
3 fairly thorough review of the policies?

4 A I have known her for 33 odd years, and
5 she definitely is a thorough person with
6 everything.

7 Q I have known her for 40 years and
8 she's a former Crown Attorney; correct?

9 A You bet, yes.

10 Q Extensive experience in government and
11 Crown policy; correct?

12 A Exactly.

13 Q Well respected jurist of the, now
14 retired, but of the Manitoba Court of Queen's
15 Bench?

16 A I agree.

17 Q And I'm not going to take the
18 Commissioner through the whole report because
19 you'll have it as an exhibit.

20 THE COMMISSIONER: I assure you, I
21 will read it carefully. I've already read it once
22 and I will read it again.

23 BY MR. NOZICK:

24 Q All right. I'm just referring
25 particularly to pages 13 -- sorry, pages 12

1 through 15, and I'll just highlight a couple of
2 points that I think are relevant to this
3 discussion, Mr. Commissioner.

4 At page 13 in the first paragraph, in
5 the last sentence, she points out that:

6 "Consultation between the independent
7 prosecutors and departmental
8 prosecutors is to be encouraged
9 provided that the independent
10 decision-making role of the
11 independent prosecutor is always
12 recognized and respected."

13 Do you see that there, sir?

14 A I see it.

15 Q And I take it, you agree with that?

16 A I agree.

17 Q And I'm going to suggest to you that
18 nothing that you did, at least, was different from
19 the comments in that particular sentence; is that
20 fair?

21 A I believe that's correct, sir.

22 Q And she then says:

23 "Independent prosecutors, particularly
24 those from outside the jurisdiction,
25 may reasonably require the assistance

1 of departmental prosecutors to attend
2 to administrative or preliminary tasks
3 on their behalf."

4 Is that correct?

5 A Fair, yes.

6 Q And that's what happens in practice?

7 A That's what happens.

8 Q She then makes certain recommendations
9 as to, perhaps how to make the policy more
10 transparent, correct?

11 A Yes.

12 Q She also says at page 14, paragraph
13 five, or Roman numeral number five:

14 "I understand that independent
15 prosecutors meet periodically with the
16 Director of Regional Prosecutions and
17 Education..."

18 That would be yourself?

19 A Correct.

20 Q "...to brief the department on the
21 progress of referrals, principally to
22 assure the department that none of the
23 referrals are being neglected."

24 Correct?

25 A Yes.

1 Q "That type of administrative meeting
2 at the call of the department is
3 necessary and reasonable and in no way
4 diminishes the independence of the
5 prosecutor."

6 Correct?

7 A Correct.

8 Q And I take it you share that view?

9 A Definitely.

10 Q She then says:

11 "The policy should acknowledge the
12 fact of these meetings and state their
13 administrative purpose in order that
14 they are not misconstrued."

15 Do you see that?

16 A Yes.

17 Q And then she makes some conclusions
18 that are self-explanatory. But as a result of
19 this report, I understand that the Manitoba policy
20 was, in fact, amended or varied. Is that fair?

21 A That's correct.

22 Q And I'm referring the Commission to
23 volume Exhibit X-1.3, I believe, and that is
24 Exhibit 49.

25 THE COMMISSIONER: X-1.

1 MR. NOZICK: X-1.3 starts at page 95,
2 and I would refer the witness to page 99.

3 THE WITNESS: I don't have that,
4 Mr. Nozik.

5 THE CLERK: Exhibit 231.

6 MR. NOZICK: Exhibit 231. I think
7 some of these exhibits have been tendered twice.

8 THE WITNESS: Yes. Page?

9 MR. NOZICK: Page 95 of my copy at the
10 bottom. Do you have that there?

11 THE WITNESS: I'm looking.

12 THE COMMISSIONER: Is that February?

13 MR. NOZICK: February 2008.

14 THE COMMISSIONER: Yes. Policy
15 statement, thank you. Guideline number five.

16 THE WITNESS: I have it now.

17 BY MR. NOZICK:

18 Q So, the review of Judge Krindle was
19 held, I think in December, December 20th is when
20 she delivered her report, of 2007. And the
21 department acted, it looks like fairly quickly, in
22 revising the policy to conform with the
23 recommendations in February of 2008?

24 A That's correct.

25 Q And much of the policy is the same as

1 the old policy; correct?

2 A Correct.

3 Q But the major difference appears to be
4 at page 5 under the terms and conditions of the
5 appointment, paragraph D has been substantially
6 amended?

7 THE COMMISSIONER: Just let me get
8 there. Where is it?

9 MR. NOZICK: Page 99.

10 THE COMMISSIONER: I have it, but
11 what --

12 MR. NOZICK: Paragraph D.

13 THE COMMISSIONER: D, thank you.

14 BY MR. NOZICK:

15 Q Just to compare it very briefly with
16 the old policy, Exhibit 215, paragraph D basically
17 said that the independent counsel has full access
18 to all employees within, and all documents and
19 information held by the Department of Justice for
20 the Province of Manitoba. That sentence appears
21 in paragraph E of the new policy and then is
22 followed by examples of that. Do you see that in
23 the new policy? That's one of the changes?

24 A I see it.

25 Q All right. Then referring to the

1 major amendment in paragraph D, what it states is
2 it acknowledges that there will be an ongoing
3 relationship between the Department of Justice and
4 the independent prosecutor in post retainer
5 period.

6 "This relationship is reasonable,
7 necessary, and exists for
8 administrative, practical and
9 consultive purposes."

10 And I take it that is, in effect, what the
11 practical aspect of what was happening during,
12 under the old policy; is that fair?

13 A That's fair.

14 Q And basically just codifies what was
15 taking place in practice?

16 A I believe so, yes.

17 Q And then she says:

18 "It does not detract from the
19 independence of the prosecutor."

20 I'm assuming that you agree with that comment?

21 A Yes, I do.

22 Q And then she repeats the old policy
23 essentially:

24 "The independent counsel has full
25 access to all employees within the

1 Department of Justice.."

2 et cetera. And she says:

3 "This access might reasonably be
4 sought by the independent counsel in a
5 number of situations."

6 And she goes on to name a number of the
7 situations. Which I take it, again, is a
8 codification of the practical manner in which the
9 policy was being administered in the past?

10 A Correct, yes.

11 Q And what the old policy said,
12 referring again to Exhibit 215 in paragraph C, and
13 that's also incorporated in the new policy,
14 similarly under paragraph number C?

15 A Yes.

16 Q "The advice and directions in the
17 case are final and binding on the
18 Department of Justice for the Province
19 of Manitoba, subject only to receiving
20 direction from the Attorney General or
21 the Deputy Attorney General, which
22 direction if given will forthwith be
23 made public."

24 I take it that that exception is what you were
25 talking about when you said that you would look at

1 some of the decisions to see whether they are
2 outrageous. I think you used the term egregious?

3 A Egregious, yes.

4 Q I like outrageous, but it means the
5 same thing?

6 A To me, yeah, pretty much the same.

7 Q And basically that's the paragraph or
8 the policy that you felt is affected by that? In
9 other words, you have to know what the decisions
10 are in order to decide whether they are in
11 accordance with policy or whether they are totally
12 outrageous; correct?

13 A Correct.

14 Q And if they are in accordance with the
15 policy, the decision of the independent prosecutor
16 is final and binding on the department?

17 A Correct.

18 Q I'm going to suggest to you,
19 Mr. Kaplan, tell me if I'm wrong, but I'm going to
20 suggest to you that you at no time directed
21 Mr. Minuk to do anything in this particular case;
22 is that fair?

23 A I'd have to agree with you on that.

24 Q And it was your view that the decision
25 that he made with respect to accepting the plea of

1 guilty to the charge of dangerous driving causing
2 death, and to agree to a, call it a joint
3 recommendation for a conditional sentence, was
4 according to the policy of the Department of
5 Justice?

6 A I'd have to agree, based on the
7 circumstances of this particular case.

8 Q And based on your knowledge of the
9 facts that the decision that he made was a
10 reasonable decision with respect to that decision?

11 A I'd have to agree with that.

12 Q And I take it that the decision that
13 he made with respect to accepting the plea to that
14 particular charge and recommend a particular
15 sentence was in accordance to the law of Manitoba
16 as it was at that particular time?

17 A My understanding, that's correct.

18 Q And as I understand the policy with
19 respect to conditional sentences, if the -- I
20 don't have to look at it -- but if the Crown or
21 the independent prosecutor feels that the sentence
22 is in accordance with the law, then that is an
23 exception to the policy not to recommend
24 conditional sentences unless they fall within the
25 exception; correct?

1 A My understanding of the final bullet
2 as far as that particular policy is correct.

3 Q And there's been some evidence here
4 that Mr. Minuk sent you some draft submissions,
5 consulted with you. Did you ever tell Mr. Minuk
6 to change the position on anything that he had a
7 position on?

8 A No, sir.

9 Q And I take it you yourself had had no
10 personal knowledge of Mr. Harvey-Zenk? You didn't
11 know him at all?

12 A Not at all.

13 Q And I take it you have had -- when was
14 the last time you had any dealings with the East
15 St. Paul Police department?

16 A Rarely, if ever, sir.

17 Q Now, there was a comment that was
18 made, I think it was attributed to Mr. Minuk by
19 yourself, and this deals with the, I'll call it
20 the Carter disclosure. And I think the evidence
21 in the Inquiry is that on April 21st, Carter makes
22 the disclosure to Mr. Minuk, and Mr. Minuk asked
23 Mr. Carter to put the disclosure in a report, and
24 that report is dated April 25th. And then
25 subsequent to his receiving the report, the

1 meeting is held with you on May 2nd. And the
2 comment that is attributed to Mr. Minuk was, when
3 he spoke to you on the phone about all this.

4 "I did what you would have advised me
5 to do and that is request a written
6 report."

7 First of all, I'm going to suggest to
8 you that requesting a written report when you get
9 a verbal disclosure of that nature sounds
10 reasonable.

11 A Thank you.

12 Q Would you agree with that?

13 A I'd agree with it.

14 Q Okay. Now, is this what Mr. Minuk
15 said? Did he say to you, I did what you would
16 have advised me to do? The key words are "would
17 have advised me to do." And then tells you that
18 he requested the report, or had you suggested to
19 him to get a report, or was it his idea, do you
20 recall any of that?

21 A I recall that this came, as I thought
22 I had indicated already, his comment, that is
23 Mr. Minuk's comment, because obviously we have had
24 dealings before, certainly as outside counsel to
25 our department, wherein I would sometimes say,

1 well, can you get me something in writing? So he
2 knew usually where I was coming from and he knew
3 this one in particular especially to say that.

4 Q And anyone with any type of
5 experience, I'm going to suggest to you, given
6 disclosure of the kind that we're talking about,
7 would need to have it in writing, fair?

8 A As far as circumstances here, yes.

9 Q Now, the other issue that my friend
10 brought up is the issue of the RCMP investigatory
11 report with respect to the Bakema conduct, if we
12 can use that terminology. And there was an
13 indication that there was a letter, I think from
14 the RCMP, that they were going to send it to you
15 and then on to Mr. Minuk. Is that fair? Do you
16 recall that letter?

17 A I recall the letter. And this is from
18 Madill.

19 Q Correct, May 12th, if I'm not
20 mistaken, or May 15th. In any event, I take it
21 that the idea in this particular case was to have
22 the RCMP conduct an independent investigation with
23 respect to whether there was evidence of
24 obstructing justice by Mr. Bakema; correct?

25 A By him or anyone else as far as East

1 St. Paul, my understanding, yes.

2 Q And then once the report was obtained,
3 another independent counsel was retained to
4 express the opinion as to whether there was
5 evidence of charges; correct?

6 A That's correct.

7 Q And that other independent counsel is
8 then Mr. Doug Abra, now Mr. Justice Doug Abra?

9 A Correct.

10 Q Correct. And that report I think was
11 received in September of 2006, if my memory serves
12 me correctly?

13 A September 6th or 8th, I believe, yes.

14 Q In September of 2006?

15 A Yes.

16 Q And with respect to the prosecution of
17 the Harvey-Zenk matter, do you agree with me that
18 Mr. Bakema was going to have to be a witness for
19 the prosecution; is that correct?

20 A I would have thought so, yes.

21 Q He was the first police officer on the
22 scene; correct?

23 A My understanding, yes.

24 Q Presumably, the officer in charge at
25 the scene at least for the time being; correct?

1 A Correct.

2 Q So he's a crucial witness to the
3 prosecution case?

4 A Would have been a witness, yes.

5 Q And his credibility obviously would be
6 an issue at a trial, correct?

7 A I would think so, yes.

8 Q Particularly if this happened to go to
9 a jury, the jury may be very interested on the
10 credibility of the police investigation; correct?

11 A Yes.

12 Q And obviously, it would be incumbent
13 on Mr. Minuk, as the independent prosecutor, to
14 make full disclosure to Mr. Wolson, the defence
15 counsel?

16 A Correct.

17 Q And that disclosure would have to
18 include the RCMP investigation; correct?

19 A Correct.

20 Q At some point in time, Mr. Minuk would
21 have to receive the RCMP investigation report in
22 order to meet his obligations under Stinchcombe to
23 disclose it to the defence?

24 A Correct.

25 Q Now, with respect to two memos, I like

1 to call them, the one of July 13th and the one of
2 July 15th. Now, you met with Mr. Minuk on the
3 morning of July 13th?

4 A That would be the Friday.

5 Q That would be the Friday?

6 A Yes.

7 Q And you wrote a memo, which is part of
8 R-4 page 3401.22. I don't know whether it's got
9 an exhibit number, Exhibit 48 maybe.

10 A I have 48 and 48 B.

11 Q Do you have the document, the memo,
12 your memo?

13 A Page number would be?

14 Q 3401.22.

15 A Yes, I have that.

16 Q And I know you like to write brief
17 memos to your files.

18 A Thank you.

19 Q And you summarize in the third
20 paragraph, essentially, Mr. Minuk's view of the
21 case, I take it. And actually it's in one
22 sentence.

23 "We spent approximately an hour
24 wherein it was his view that this
25 should be accepted based on the

1 available evidence and exigencies of
2 the police investigation and the
3 provable facts."

4 Do you see that there?

5 A That's what I wrote, yes.

6 Q So what you discuss was the available
7 evidence to the prosecution, correct? The facts
8 that the Crown felt that they could prove beyond a
9 reasonable doubt, correct?

10 A Correct.

11 Q And the exigencies of the police
12 investigation, correct?

13 A Correct.

14 Q We're talking, Commission Counsel here
15 is talking about the difference between a joint
16 recommendation and the true plea bargain, which
17 has been defined as to rely on exigent
18 circumstances. I take it that that would support
19 your view that what took place before Judge Wyant
20 was, in fact, a true plea bargain based on exigent
21 circumstances; correct?

22 A Correct.

23 Q As well as being a disposition of a
24 case that was well within the parameters of the
25 laws of Manitoba at the time. Is that fair?

1 A I think it's fair, yes.

2 THE COMMISSIONER: Mr. Nozik, I think
3 he's answered all of these questions in chief.
4 We're simply going over the same ground again. I
5 appreciate it's your responsibility, but he's
6 answered them, everything.

7 MR. NOZICK: I appreciate that.

8 BY MR. NOZICK:

9 Q And just one more question, if I may
10 because as Yogi also says --

11 THE COMMISSIONER: Yes.

12 MR. NOZICK: -- it's not over until
13 it's over.

14 THE COMMISSIONER: Go ahead.

15 MR. NOZICK: I was waiting to get that
16 one in.

17 BY MR. NOZICK:

18 Q Anyway, July 15th memo, I'm not going
19 to go over it in any detail because it's been
20 presented ad nauseam to you, but in that
21 memorandum Mr. Minuk also refers to the problems
22 or exigencies of his case. Is that fair?

23 A My understanding, yes.

24 MR. NOZICK: Those then are my
25 questions. Thank you.

1 BY MR. GREEN:

2 Q Just briefly, Mr. Kaplan, Mr. Paciocco
3 referred you this morning to an area of the law
4 dealing with the presence of alcohol as being an
5 aggravating factor in sentencing, even if you
6 can't tie that alcohol to the offence itself. Do
7 you recall that discussion with him this morning?

8 A Yes, Mr. Green.

9 Q And you alluded to the opinion of
10 Mr. Richard Peck, which you have had the
11 opportunity to review?

12 A Correct.

13 Q And if I understood your evidence, you
14 agree with the opinion of Mr. Peck that that
15 argument doesn't make a lot of sense and is not
16 the law in Manitoba. Is that fair?

17 A With all due respect, correct.

18 Q Now, Mr. Peck also told us that he and
19 his forces had done considerable research on
20 sentencing and conditional sentencing, as it
21 relates to impaired driving and dangerous driving.
22 He told us that his research had indicated that
23 Manitoba seemed to be more, the Manitoba courts
24 seem to be more agreeable than some of the other
25 provinces in accepting conditional sentences in

1 respect to those two offences. Is that something
2 that you were aware of, sir?

3 A As far as the precedent over the last
4 seven to nine years --

5 Q Yes?

6 A -- out of our courts, I understood
7 that, yes.

8 Q So you understood that Manitoba was,
9 if one equates a conditional sentence as being
10 more lenient, Manitoba was more lenient as regards
11 to those offences than some of the other
12 provinces. Is that fair?

13 A I think that's fair.

14 Q You also said in your evidence, sir,
15 that during the course of all of this, the court
16 proceedings and what have you of the Taman matter,
17 that Mr. Slough said a couple of times that your
18 department and he had full confidence in
19 Mr. Minuk. Do you recall giving that evidence?

20 A Definitely, yes.

21 Q And was that your opinion as well,
22 that you had full confidence in Mr. Minuk?

23 A Definitely.

24 Q And has that prevailed, do you still
25 have confidence in Mr. Minuk and his abilities?

1 A As far as I'm concerned, we are still
2 sending matters to Mr. Minuk, that shows our
3 confidence continues.

4 MR. GREEN: Thank you very much,
5 Mr. Kaplan.

6 BY MR. PACIOCCO:

7 Q Two brief areas, Mr. Kaplan, and you
8 will be on your way. They both arise out of
9 Mr. Green's questions. The first had to do with
10 your endorsement of the opinion of Mr. Peck with
11 respect to the state of the law as to whether the
12 mere consumption of alcohol is an aggravating
13 circumstance. And you expressed the view that
14 that's not the law in Manitoba, or you agreed with
15 Mr. Green when he suggested that. Did you
16 research this area, sir, or have you researched
17 this area?

18 A I can't say recently that I have
19 researched the area, no, sir.

20 Q Because I'm going to share with you my
21 interpretation of those cases. All of the
22 Manitoba cases say it is or could be an
23 aggravating circumstance.

24 A Could be, correct.

25 Q Yes. And if it could be, certainly

1 that's something that is in the hands of the judge
2 to consider as an aggravating circumstance?

3 A Yes.

4 Q So you would agree with me that the
5 law is not that this is not an aggravating
6 circumstance?

7 A Based on "could be," I agree with you,
8 yes.

9 Q Sir, my friend Mr. Green also asked
10 you about the prevailing trend in Manitoba about
11 using conditional sentences, perhaps
12 disproportionate to other jurisdictions, in
13 fatality and serious injury cases?

14 A Yes.

15 Q And you are aware of that trend, sir?

16 A I'm aware, based on whatever research
17 that I have done over the last while, that it
18 appears that Manitoba does have quite a few
19 conclusions of conditional sentences in many of
20 those matters.

21 Q Sir, and of course, if you don't feel
22 comfortable answering this question, then
23 certainly indicate to the Commissioner, but would
24 this be why Manitoba adopted a policy in April of
25 2005 that discouraged Crowns from going into court

1 and effectively requesting conditional sentences?

2 A I believe so, yes.

3 Q It was an attempt effectively to try
4 and stem the prevailing trend of the courts in
5 order to move towards conditional sentences in a
6 way that did not seem to be reflected in other
7 jurisdictions?

8 A I can't speak for the other
9 jurisdictions but, yes, I could agree with that.

10 MR. PACIOCCO: I have no further
11 questions for you, sir. And thank you very much
12 for your evidence.

13 THE WITNESS: Thank you.

14 THE COMMISSIONER: Thank you very
15 much.

16 THE WITNESS: Thank you very much,
17 sir.

18 MR. CLIFFORD: Mr. Commissioner, the
19 next witness will be Brian Gover.

20 THE COMMISSIONER: Thank you. Good
21 morning.

22 THE WITNESS: Good morning, sir.

23 BRIAN GOVER, being first duly sworn,
24 testified as follows:

25

1 BY MR. CLIFFORD:

2 Q Mr. Commissioner, we have Brian Gover
3 present to assist us in three areas. As counsel
4 are aware, he is going to be providing his expert
5 opinion, as did Mr. Peck, in three separate areas,
6 the role of the Crown, Crown discretion and
7 relevant ethical and professional standards.

8 Prior to commencing the examination, I
9 wanted to review with you, Mr. Commissioner, and
10 also for the benefit of counsel, the materials
11 that will be relevant to his testimony, if I could
12 outline the exhibits and the corresponding
13 disclosure reference. At volume Y-1, we have the
14 CV of Mr. Peck, a number of other documents and
15 his opinion; at Y-2, which is Exhibit 226, we have
16 the Curriculum Vitae and the opinion of Brian
17 Gover.

18 And what I wanted to do as well is to
19 ensure that Exhibit 226 contain the additional
20 material that was filed by Mr. Gover. And that's
21 a supplementary expert witness report dated
22 July 9th of 2008. The bulk of that document is
23 comprised by a paper authored by Ken Campbell.
24 The paper is entitled The Crown's Ethical Duties
25 and Resolution Discussions.

1 Can you confirm, Madam clerk, whether
2 that's been filed? It doesn't appear to form part
3 of Exhibit 226. So what we should do is file the
4 balance, the supplementary expert witness report,
5 volume Y-2.

6 THE CLERK: Exhibit 243.

7 MR. CLIFFORD: No, what I'm going to
8 suggest, Mr. Commissioner, subject to your
9 approval, is that this actually, rather than
10 giving it the next exhibit number, it could form
11 as well part of Exhibit 226.

12 THE COMMISSIONER: Yes, it should.

13 MR. CLIFFORD: It should, yes.

14 THE CLERK: Exhibit 226.

15 MR. CLIFFORD: So Madam clerk, I'm
16 going to give you back Exhibit 226. Just put it
17 at the back.

18 We have Exhibit 235, which is volume
19 Y-3. That's the correspondence from Commission
20 Counsel to Mr. Gover and Mr. Peck. We have volume
21 J, which are the transcripts of the proceedings.
22 They may be referred to, Exhibits 6, 7, 8, 9 and
23 10. We have Exhibit 231, which is volume X-1.1
24 through X.2.10, which includes policy and
25 prosecutorial standards. We have Exhibit 215, the

1 disclosure reference is volume G-44. That's the
2 Manitoba Department of Justice prosecutions policy
3 Directive on the issue of appointment of
4 independent counsel, dated January of '05.
5 Exhibit 217, which is found at G.45 in the
6 disclosure, that's the policy directive on
7 conditional sentencing dated April 2005.

8 And that, Mr. Commissioner, should be
9 the majority of the documentation that the witness
10 will be referring to in his opinion, if not all of
11 it.

12 BY MR. CLIFFORD:

13 Q Mr. Gover, I wanted to start your
14 examination by asking you, sir, a little bit about
15 yourself and your background. We understand from
16 your Curriculum Vitae that you began your career
17 as a prosecutor, and I'm wondering if you could
18 provide Justice Salhany with some background
19 information with respect to your legal practice?

20 A Certainly. I began my career as a
21 Crown counsel with the Ministry of the Attorney
22 General of Ontario at the Crown Law Office
23 Criminal. That is a head office unit that is
24 responsible for representing the Crown in the
25 Court of Appeal and in the Supreme Court of

1 Canada, as well as conducting certain special
2 prosecutions which, over the years, included a
3 focus on commercial crime cases and also
4 interferences with the administration of justice.

5 In 1991, I began a secondment as the
6 first executive legal officer to what is now known
7 as the Superior Court of Justice of Ontario, and I
8 held that position on secondment with the Ministry
9 of the Attorney General in 1993, when I returned
10 to the Crown Office Criminal. And as of June 1st,
11 1994, I had been in private practice at the firm
12 where I now practice, Stockwoods LLP in Toronto.

13 Over the course of my career in
14 private practice, I have been retained from time
15 to time to prosecute. And also, I would say that
16 includes criminal cases as well as quasi criminal
17 or regulatory cases. Since going into private
18 practice, my focus has expanded to include cases
19 of professional discipline matters as well as
20 straight civil litigation. So I now have a more
21 generalized litigation practice.

22 Q Sir, I wanted to clarify one point
23 with you. You indicated that you took a
24 secondment to work as the executive legal officer
25 of the Ontario Court of Justice General Division.

1 And I wanted to clarify, for the benefit of those
2 that may not know this, that that would be the
3 equivalent of the Manitoba Court of Queen's Bench.

4 A That is correct. I've had some
5 interest in teaching over the years as well, I
6 might add, and that has included teaching the Bar
7 Admission Course, which included teaching criminal
8 procedure and advocacy, and as well of course
9 involvement in continuing legal education programs
10 and teaching a course in professional discipline
11 law at the University of Western Ontario.

12 Q And I understand as well, sir, that
13 since 2004 you have also been an instructor at
14 Osgood Hall?

15 A That's correct, in the trial practice
16 course.

17 Q Sir, I wanted to know what experience
18 you had in the conduct of appeals as well. Could
19 you comment on that, please?

20 A Well, as the Commissioner may be
21 aware, the practice at the Crown Law Office
22 Criminal was to involve Crown counsel in arguing
23 criminal appeals at a very early stage in their
24 careers. And consequently, in my first year of
25 practice, I was thrust into the Court of Appeal,

1 for better or worse. And over the years, as Crown
2 counsel, I have argued, conservatively I would
3 say, a couple of hundred appeals in the Court of
4 Appeal. And I have had sole carriage of 12
5 appeals to the Supreme Court of Canada as Crown
6 counsel. I might say that some of those cases
7 over the years came to involve allegations of
8 Crown misconduct, where a stay of proceedings
9 invoking the doctrine of abuse of process was
10 sought. And that became an area of some specialty
11 for me. In fact, there were two cases I argued in
12 the Supreme Court of Canada that dealt with
13 applications for stays of proceeding.

14 Eventually, my practice as Crown
15 counsel came to include representing the Crown in
16 trial courts where it was alleged that the
17 prosecuting counsel had, for example, not lived up
18 to the Crown's disclosure obligations. And
19 consequently, I would be asked to represent the
20 Crown in matters such as that.

21 Q And do I understand, sir, that in your
22 work representing Crown counsel and abuse of
23 process and breach of prosecutorial duties cases,
24 that you became involved in the Bernardo and the
25 Guy Paul Morin cases?

1 A That's right. Chronologically
2 speaking, the Guy Paul Morin case first. It was
3 alleged that there had been non disclosure and
4 misleading disclosure on the part of Crown
5 counsel. And the pre-trial motion in which an
6 abuse of process was sought prior to the second
7 trial encompassed some eight months. And at the
8 conclusion of that time, the stay of proceedings
9 was denied and the second trial took place.

10 In the Bernardo case, my involvement
11 was again in relation to disclosure. It had to do
12 with the resolution discussions between a very
13 senior Crown counsel, who is now Deputy Attorney
14 General of Ontario, and counsel for Karla Homolka,
15 and the issue was whether the file maintained by
16 Mr. Segal had to be disclosed.

17 Q I understand as well, Mr. Gover, that
18 in your private practice since 1994, you have
19 devoted a significant amount of work acting as
20 Commission Counsel in Commissions of inquiries?

21 A That's correct. I was one of the
22 Commission Counsel at the Walkerton Inquiry. I
23 was again one of the Commission Counsel at the
24 Arar Commission, and I'm finishing a stint now as
25 senior counsel to the Air India Inquiry.

1 Q And I won't go into the specifics,
2 sir, in your resume, but I think you fairly set
3 out at pages 4 through 7 and 8 your experience in
4 legal education, as well as your publications.
5 And safe to say, sir, that you have extensive
6 experience with continuing education for the
7 profession and you have authored a number of
8 publications?

9 A Yes.

10 Q Sir, you are the editor in chief of
11 the Corporate Liability Journal?

12 A I am.

13 Q And finally, sir, on your background
14 credentials, I understand that you have testified
15 previously as an expert witness on the role of the
16 Crown conducting pre-charge interviews and the
17 relationship between police officers and the
18 Crown?

19 A I have. I testified before Justice
20 McDonald, as he then was, of the Nova Scotia
21 Supreme Court in the trial of Gerald Regan, and I
22 was called to give opinion evidence on behalf of
23 the Crown. The issue there was whether Crown
24 counsel had crossed the line and effectively
25 become an investigator. And Mr. Greenspan, on

1 behalf of Mr. Regan, contended that this resulted
2 in the elimination of an important level of
3 discretion being exercised by Crown counsel. So
4 my testimony had to do with the involvement of
5 Crown counsel in pre-charge interviews, and more
6 generally, the involvement of Crown counsel in
7 relation to the police at a pre-charge stage as
8 well as at a post charge stage.

9 Q And, sir, I understand that your
10 testimony was referred to in the Supreme Court of
11 Canada decision involving the Regan case as well?

12 A It was.

13 Q By both the majority and the minority,
14 I understand?

15 A That's correct.

16 MR. CLIFFORD: Mr. Commissioner,
17 that's all I wanted to deal with with respect to
18 his credentials. With your permission, I would
19 now ask questions dealing with the role of the
20 Crown, Crown discretion and relevant ethical and
21 professional standards.

22 THE COMMISSIONER: I'm looking around
23 to see whether any counsel wish to take issue with
24 Mr. Gover's expertise? No takers? All right.
25 Let's press on.

1 BY MR. CLIFFORD:

2 Q Mr. Gover, turning then to your
3 opinion, sir, I'm wondering if we can start by
4 asking you to provide some general observations,
5 sir, on the role of the Crown, and that would be,
6 for those following along with the written
7 version, at volume Y-2, it would be tab C page 2.

8 A Well, Mr. Clifford, we are all
9 acquainted with the maxim that the Crown never
10 wins and the Crown never loses, and any discussion
11 of the role of the Crown in this country begins
12 with the discussion of the Supreme Court of
13 Canada's decision in Boucher v. Queen, which a
14 case involving inflammatory jury address. And
15 that's really the wellspring of the jurisprudence
16 on the role of the Crown.

17 It's important for us to recall that
18 the role of the Crown has been extended to those
19 who prosecute not only in the criminal sphere, but
20 also in quasi criminal regulatory and professional
21 discipline cases. But when we speak of the role
22 of the Crown, we really think of Crown counsel
23 prosecuting criminal cases where the liberty of
24 the subject is at stake.

25 And the Supreme Court of Canada

1 through Justice Rand in Boucher emphasized the
2 importance of the Crown's role and the solemnity
3 that surrounds any sort of consideration of Crown
4 counsel's involvement in the criminal justice
5 system in particular. I think it should be noted,
6 though, that while the Crown must act in a fair
7 way and is sometimes said to be in a special
8 relation to the court, sometimes said to have a
9 quasi judicial role or a court-like role, then we
10 must take into account though that the Crown isn't
11 disentitled to be a strong advocate. And as David
12 Pannick, a leading English barrister said in an
13 excerpt that is quoted by Justice Proulx and
14 Mr. Layton in their text, just because you are
15 prosecutor doesn't mean you can't be a strong
16 advocate; or put differently, because you're a
17 prosecutor doesn't mean you have to be a weak
18 advocate.

19 So, ultimately, the role of the Crown
20 is to ensure that justice is done in a fair way, a
21 fair way that is measured against standards of
22 disclosure, standards of conduct in the courtroom
23 and in all manifestations of the prosecution. But
24 also in a firm way, one that effectively
25 represents the community's interest in the outcome

1 of the case.

2 Q I take it that would be consistent
3 with the role of the Crown as a minister of
4 justice?

5 A Well, in my view, that is consistent
6 with the Crown's role as a minister of justice.
7 And in the Regan case itself, the focus there was
8 on objectivity, independence, and lack of animus
9 toward the person being prosecuted. So all of
10 that tells us that Crown counsel have to be above
11 the fray to dispassionately look at a case and try
12 to determine what an appropriate outcome would be.

13 Q Mr. Gover, could you also comment on
14 the Crown's role as an officer of the court?

15 A Well, as an officer of the court, the
16 Crown, like any other lawyer, is under a duty to
17 be candid in all dealings with the court and to be
18 very careful not to do anything which could be
19 construed as misleading the court. Of course, all
20 lawyers are under an obligation to treat the court
21 or tribunal with respect, and to at the same time,
22 where appropriate, resolutely advance their
23 positions.

24 I think Crown counsel are under a
25 special obligation to ensure that what they do is

1 consistent with public confidence in the
2 administration of justice. And that's a very
3 precious, precious commodity in our system of law,
4 and it's something that can be lost very quickly.
5 So when I think of the Crown's duty to the court,
6 it includes candor, but it also includes promoting
7 respect for the process as a whole.

8 Q Mr. Gover, thank you for that
9 response, sir.

10 Turning now to the issue of Crown's
11 discretion. At page 3 in your expert opinion,
12 sir, on the last line you indicate as follows:

13 "It has been recognized that in
14 performing certain prosecutorial
15 functions, Crown counsel has a broad
16 discretion that is normally not the
17 subject of curial review."

18 Could I ask you to expand upon that, sir?

19 A Well, yes. It is recognized that
20 without the exercise of prosecutorial discretion,
21 our system of justice would not work. And
22 consequently a great deal of deference is extended
23 to prosecutorial discretion. And as we see at
24 page 4 of the report, the Supreme Court of Canada,
25 in a case dealing with disciplinary proceedings,

1 brought by provincial Law Society against Crown
2 counsel described prosecutorial discretion as
3 referring to decisions regarding the nature and
4 extent of the prosecution and the Attorney
5 General's participation in it. The Supreme Court
6 then delineated what the core elements of that
7 discretion are; and there firstly, the discretion
8 whether to bring the prosecution of a charge laid
9 by the police; secondly, the discretion to enter a
10 stay of proceedings; thirdly, the discretion to
11 accept the guilty plea to a lesser charge;
12 fourthly, the discretion to withdraw from criminal
13 proceedings altogether; and fifthly, the
14 discretion to take control of a private
15 prosecution. And the Supreme Court of Canada has
16 emphasized over the past 20 years that discretion
17 is an essential feature of the criminal justice
18 system.

19 Ultimately, the court's disinclination
20 to review prosecutorial discretion may be
21 attributable to the fact that if courts do that,
22 they tend to jeopardize their own independence.
23 And that's something that was recognized by the
24 Supreme Court of Canada in the Power case in 1994.
25 And it's also interestingly something that is

1 routed in the American approach toward deference
2 to prosecutorial discretion, and there's a United
3 States Supreme Court case called U.S v. Wayte
4 W-A-Y-T-E, that is much to the same effect.

5 Q I take it that line of jurisprudence
6 suggests that the independence of Crown counsel
7 could be easily eroded by the court in the event
8 that the court tried to override or meddle with
9 the Crown discretion?

10 A That's right. And conversely, if
11 courts interfere with prosecutorial discretion,
12 they may be seen to be telling prosecutors how to
13 do their jobs, and that in turn impacts on the
14 appearance of the court's independence.

15 Q Now, of course, dealing with a court,
16 a judge in the context of a criminal case is one
17 thing, but in the broad sense, with respect to the
18 role of a Commission, for instance, you're not in
19 that paradigm and thus you are able to give some
20 expert opinion. And your view, and the context is
21 somewhat different when you're before a Commission
22 of Inquiry where a Commissioner can look at the
23 role of discretion. And what I wanted to ask you,
24 sir, is that these decisions are made in
25 contextual circumstances. And I take it you would

1 agree that reasonable people can come to different
2 conclusions working within the same contextual
3 circumstances?

4 A I agree. And in my view, that's
5 rolled up in the nature of discussion that
6 individual judgment is brought to bear.

7 Q It goes without saying, sir, that
8 discretion is obviously subject to ethical
9 obligations, and I wonder if you could expand on
10 that?

11 A Well, in a sense we go back to the
12 Krieger case, and the discussion of the core
13 elements of prosecutorial discretion, those being
14 the decisions regarding the nature and extent of
15 the prosecution and the Attorney General's
16 participation in it. It's interesting, of course,
17 that when we think about the nature and extent of
18 the prosecution, we're dealing with decisions
19 really relating to the case itself. We're not
20 dealing with matters such as disclosure, for
21 example. So it would be an ethical violation now
22 for Crown counsel to fail to live up to disclosure
23 obligations, especially if it's advertent, if
24 counsel has turned his or her mind to it and has
25 made a deliberate choice not to comply with

1 obligations.

2 In terms of ethical violations, we
3 tend also to think of failures to comply with
4 duties to the court and duties to other counsel,
5 the duty of candor and dealing with cases with
6 honesty and integrity.

7 Q What can you tell us, sir, with
8 respect to prosecutors complying with their
9 undertakings?

10 A Well, as lawyers, when we give
11 undertakings, it's just really a fancy way of
12 saying we'll do something, it's up to us to comply
13 with those undertakings. And it's a significant
14 ethical breach not to do so, and prosecutors are
15 held to the same standards as everyone else. From
16 one perspective, though, it would be a more
17 serious violation if it's an undertaking that
18 impacts on the case and ultimately on liberty of
19 the subject. So prosecutors' violation of, or
20 non-compliance with undertakings is and can be a
21 very serious matter.

22 Q Who ultimately controls prosecutors?

23 A Ultimately, that's up to the Attorney
24 General who is accountable for the conduct of
25 prosecutors and individual prosecutions. It's

1 within that system that we afford a measure of
2 independence to prosecutors so that they can
3 discharge their obligations in an effective way
4 and with the necessary degree of independence.

5 Q And I take it, to a large extent,
6 their discretion is supervised by these
7 individuals that you are speaking about?

8 A Well, that's correct. And that
9 supervision can come in a number of forms.
10 Certainly, the trend over the past three decades
11 has been toward codifying guidelines and
12 directives in order that Crown counsel are given
13 guidance, while at the same time those guidelines
14 and directives provide, in a transparent way,
15 information to the members of the public and those
16 directly involved in the justice system as to how
17 discretion might be exercised in an individual
18 case.

19 Q And the Commission has heard evidence,
20 Mr. Gover, with respect to Crown counsel engaging
21 in conferences, et cetera, to obtain approval that
22 we have heard evidence with respect to what takes
23 place when independent prosecutors are appointed
24 and the process that is adhered to.

25 I understand from your practice, that

1 your practice and procedure when you were acting
2 as a Crown was that, in your view, was that what
3 you did was subject to approval, and there were
4 many times when you would have entered
5 discussions, conferences, et cetera, with your
6 superiors?

7 A Well, that's right. Now, this is
8 perhaps a sign of my age, but there was no
9 directive or guideline formalizing the requirement
10 of a case conference such as you have under the
11 Manitoba policy, but that was the practice
12 nonetheless in a case involving a significant
13 decision in the conduct of a case. And that could
14 be the case with a trial or an appeal if, for
15 example, conceding a point necessitated a new
16 trial, or if it, as can happen in the Court of
17 Appeal and Supreme Court of Canada, if it could
18 result in the law taking a different direction.

19 Q Now, if we insert the concept of an
20 independent prosecutor into the equation, and what
21 you would normally expect to happen with respect
22 to seeking approval of significant decisions,
23 having the opportunity to meet with superiors, I
24 understand that the challenge is created with
25 independent prosecutors because, of course, we

1 have a need for them to remain independent. And
2 could you provide your views, sir, on that issue?

3 A Yes, I can. Let me say that
4 independent prosecutors should not be expected to
5 function in a vacuum, that they should be entitled
6 to consult where appropriate, provided that the
7 degree of consultation does not deprive the
8 independent counsel of that all important degree
9 of independence. But obviously independent
10 counsel, and we have to remember why they are
11 retained in the first place, they are retained in
12 this province because of the involvement of
13 someone in the administration of justice as an
14 accused person, and the wisdom of the policy is
15 really related to public confidence in the
16 administration of justice. It has to do with
17 someone potentially receiving or being seen to
18 receive different treatment because of the fact
19 that they are a police officer, a lawyer, or a
20 judge. So on one hand, we should not deny
21 independent counsel the opportunity to consult
22 about important decisions, and on the other hand,
23 that we have to ensure that the decision of
24 independent counsel is final, that they are not
25 being ordered what to do. And in addition, we

1 can't have the degree of consultation become such
2 that every decision is vetted, if you will, or
3 reviewed by senior staff members of the Ministry
4 of the Attorney General or the Department of
5 Justice, as it may be called.

6 Q I take it you would agree -- what
7 would your view be on whether an independent Crown
8 should be required to consult or report?

9 A I would leave that up to the judgment
10 of the independent counsel. I would suggest
11 delineating in the policy factors that the
12 independent counsel might consider in determining
13 whether to consult, and if that decision is taken,
14 the extent of consultation. Because the concern
15 here is going to be that a perception could arise
16 that independent counsel is really being told what
17 to do and hasn't exercised independent judgment.

18 Q On the issue of an independent Crown
19 not operating in a vacuum, sir, I wanted to draw
20 your attention to two documents that you have
21 before you, at volume X-1, tab 3. And could I get
22 the exhibit number reference on that, Madam clerk?

23 THE CLERK: Exhibit 231.

24 MR. CLIFFORD: And that is Exhibit
25 231.

1 BY MR. CLIFFORD:

2 Q We heard with our previous witness
3 that there was a change in policy subsequent to
4 the case that we are dealing with, and it arose as
5 a result of a report prepared by Justice Ruth
6 Krindle. And I wanted to draw your attention,
7 sir, to the document X-1, at page 90 which is at
8 tab 3. Of course, this is forming part of the
9 policy directive from the Manitoba Department of
10 Justice Prosecutions on the appointment of
11 independent counsel. And looking at clause D,
12 sir, at page 99 -- I take it you have had an
13 opportunity to review these documents, sir. And I
14 just wanted you to comment on the policy as it
15 exists with respect to the ongoing relationship
16 that one might expect between the Department of
17 Justice and the independent prosecutor?

18 A Yes. Thank you. So we're actually,
19 at this tab, we have two versions of the same
20 policy with the more recent version being
21 reflected in part at page 99.

22 Q And I can tell you, sir, that was
23 deliberate because there is some value, I think,
24 in a comparative analysis between the two. And
25 that's what I'll also ask you to do as well.

1 A Yes. Thank you. At the outset, in
2 examining this, I think we have to heed the
3 laudable purpose of the policy, which is set out
4 at page 1 of both policies in the third paragraph.
5 And this relates to that all important goal of
6 maintaining public confidence in the
7 administration of justice. So you will see in
8 both policies:

9 "The purpose of this policy is to
10 ensure confidence in the justice
11 process by providing for the
12 appointment of independent counsel in
13 those situations where a reasonable
14 person would perceive that an accused
15 person may receive differential
16 treatment because of his or her
17 relationship with Manitoba Justice."

18 It goes on to say:

19 The likelihood of such a perception is
20 determined in large part by the
21 closeness of the relationship between
22 the accused and the department."

23 So, language used in the first
24 sentence in particular harkens back to, for
25 lawyers at least, to those cases dealing with a

1 reasonable apprehension of bias on the part of
2 courts, or in relation to courts or tribunals,
3 that Committee for Justice and Liberty Test, as
4 it's known. And it's important, in my view, to
5 interpret the policy with that purpose in mind and
6 then to ask ourselves whether either emanation of
7 this policy succeeds in best meeting that purpose.

8 Now, this raises the question of
9 whether independent counsel's consultation with
10 others compromises that independence. And I note
11 that the January 2005 policy reflected at page 94
12 points out that the advice and decisions, this is
13 paragraph C, the advice and decisions in the case
14 are final. And I should back up by giving you the
15 prefatory words. These have to do with the terms
16 and conditions of appointment. So C refers to:

17 "The advice and decisions in the case
18 are final and binding on the
19 Department of Justice for the Province
20 of Manitoba subject only to receiving
21 direction from the Attorney General or
22 Deputy Attorney General, which
23 direction, if given, will forthwith be
24 made public."

25 So seeking to achieve the goal of transparency.

1 Subparagraph D, or paragraph D
2 addresses that concern I have about independent
3 counsel not practising in a vacuum. And then E
4 states:

5 "The independent counsel is to be
6 guided by the prosecution policies
7 issued on behalf of the Attorney
8 General of Manitoba which apply to all
9 provincial prosecutions throughout the
10 province. This includes, for
11 instance, the charge approval
12 standards (see Crown policy on laying
13 and staying of charges) disclosure
14 policies as well as directives from
15 the Attorney General on the position
16 to be taken in cases of gang related
17 crime, violent crime, child victims,
18 et cetera."

19 So the policies there are to achieve uniformity
20 and fairness.

21 MR. CLIFFORD: Now, Mr. Gover, prior
22 to -- I see you are turning towards the January,
23 or February '08 policy. This might be an
24 opportune time to break and we can come back after
25 the lunch break and look at the new policy.

1 THE COMMISSIONER: It is. An hour and
2 15 minutes enough?

3 THE WITNESS: Yes, thank you, sir.

4 THE COMMISSIONER: Thank you.

5 THE CLERK: All rise. This Commission
6 of Inquiry will take a luncheon recess.

7 (Proceedings recessed at 12:48 p.m.
8 and reconvened at 2:00 p.m.)

9 THE CLERK: This Commission of Inquiry
10 is now reopened.

11 BY MR. CLIFFORD:

12 Q Mr. Gover, prior to breaking for
13 lunch, sir, you were examining the Manitoba
14 Department of Justice Prosecution's Policy
15 Directive on the appointment of independent
16 counsel, and you had been referring to the policy
17 as it existed in January of 2005. And I
18 understand that you are about to direct your
19 attention to the February 2008 policy directive,
20 and in particular, clause D at page 99.

21 A That is correct, Mr. Clifford. It
22 might be useful to compare what we see in
23 paragraph D at page 94, which is part of the
24 January 2005 version of this policy, with what we
25 see in paragraph D at page 99, which is from the

1 February 2008 version of the policy, this being on
2 the appointment of independent counsel. And you
3 will see that what we have in the new policy is a
4 departure from what was in the former policy. The
5 former policy simply stated:

6 "The independent counsel has full
7 access to all employees within and all
8 documents and information held by the
9 Department of Justice for the Province
10 of Manitoba."

11 And I won't read the entirety of the new policy's,
12 paragraph D, but I will refer to certain parts of
13 it. You will see that it creates an expectation
14 that there will be an ongoing relationship and
15 indeed ongoing dialogue. And I will refer to the
16 first two sentences in that respect.

17 "It is acknowledged that there will be
18 an ongoing relationship between the
19 Department of Justice and the
20 independent prosecutor in the post
21 retainer period. This relationship is
22 reasonable, necessary and exists for
23 administrative, practical and
24 consultative purposes."

25 It continues:

1 "It does not detract from the
2 independence of the prosecutor."

3 And then reiterating largely what we had at page
4 94 in paragraph D:

5 "As such, the independent counsel has
6 full access to all employees within
7 and all documents and information held
8 by the Department of Justice for the
9 Province of Manitoba."

10 And what is at stake here is something
11 that I alluded to before the lunch break, and that
12 is the perception of the independent counsel's de
13 facto or actual independence, as well as the
14 perception in that regard. The policy, I
15 recognize, has to take into account that there is
16 a spectrum of independent counsel, and they may
17 include counsel from outside the province who may
18 be very dependent upon staff of the Department of
19 Justice in order to understand local practice.
20 And an example would be, and it is something that
21 I wasn't aware of before, but, for example,
22 releasing individuals such as Mr. Harvey-Zenk on a
23 promise to appear without conditions, an example
24 of local practice that it may be useful to know
25 about. So, here, in creating this expectation of

1 ongoing dialogue and an ongoing relationship, the
2 concern is that the balance may not always be
3 achieved between ensuring that the independent
4 counsel doesn't function in a vacuum, in other
5 words equipping independent counsel to do the job
6 on one hand, and on the other, achieving and
7 maintaining that degree of independence which is
8 essential for independent counsel to function
9 properly.

10 And I know that the policy now refers
11 to the independent counsel seeking consultation,
12 and that in my view is the way to resolve the
13 problem of achieving the right balance, is that
14 the policy might be better formulated in terms of
15 setting out factors for the independent counsel to
16 consider when determining whether to consult, and
17 beyond that, the extent of consultation necessary
18 to do the job. And that's going to vary from
19 independent counsel to independent counsel and
20 from case to case.

21 Q If I could, Mr. Gover, ask you to
22 comment as well on, in general, prosecutorial
23 policies and what role you see these policies
24 playing, why they are designed, what they are
25 meant to do, what assistance or --

1 A Well, as we discussed before the
2 break, policies have several purposes. One is to
3 provide guidance to Crown counsel, and in this
4 instance independent counsel, in the exercise of
5 discretion. Another is to provide a degree of
6 transparency so that others, including defence
7 counsel, have an understanding about the way
8 discretion may be exercised in a particular case.
9 There is a third important purpose of Attorney
10 General policies relating to the conduct of
11 criminal prosecutions, and that is to codify an
12 approach or policy to a particular type of crime.
13 And examples that come to mind are, for example,
14 drinking and driving offences. And the now
15 retired Chief Justice McMurty in Ontario, when he
16 was Attorney General between 1975 and 1985, was
17 very active in promoting policies or guidelines
18 for prosecutors that resulted in effecting what I
19 think was an attitudinal change towards drinking
20 and driving offences. That's an example. Another
21 good example would be domestic violence policies
22 relating to the conduct of prosecutions involving
23 spousal abuse, for example.

24 So in those respects, as the person
25 ultimately accountable for the administration of

1 justice in the province, the Attorney General can
2 play an important role in ensuring that his or her
3 counsel, Crown counsel in the province, take a
4 particular approach, and that approach may result
5 in, for example, prosecuting cases that wouldn't
6 previously have been prosecuted. It may involve
7 as well taking the position that a particular form
8 of sentence is inappropriate in a particular type
9 of case. And consequently, that may involve
10 exercising discretion in a particular way to, for
11 example, develop a record before the sentencing
12 court for trial courts in order to ensure that
13 that position can be effectively advocated on
14 appeal.

15 Q This Commission may, of course,
16 ultimately make recommendations with respect to
17 ministerial policies. And can you comment on some
18 of the challenges that exist in communicating and
19 enforcing ministerial policies?

20 A Well, I see the challenges relating to
21 the fact that the exercise of discretion will
22 always involve individual judgment. There will
23 always be some need to allow for a departure from
24 policy to suit the exceptional circumstances of a
25 given case. And in addition, the geographical

1 reality of many provinces will make supervision of
2 individual Crown counsel in the performance of
3 their prosecutorial functions difficult. The fact
4 is that most prosecutors function individually.
5 They may be with others in the courtroom, but
6 seldom is another person in the courtroom also a
7 prosecutor.

8 Q If I could, Mr. Gover, have you
9 comment briefly on the role of the independent
10 Crown, or Crown counsel for that matter, in the
11 investigation?

12 A Well, in approaching this issue we
13 have to keep in mind the lessons of Regan and
14 other cases, about the very distinct roles of
15 investigators and prosecutors. And of course, a
16 central concern in Regan, as I referred to before
17 the break, was that prosecutors, if they become
18 involved in an investigation, may rob the system,
19 and most importantly the accused person, of the
20 proper exercise of discretion. And the concern is
21 always that tunnel vision could creep in, or that
22 as Commissioner Kaufman found in the report
23 involving the proceedings related to Guy Paul
24 Morin, that a certain level of blindness had crept
25 in, in relation to the prosecutor's approach to

1 the case.

2 So when we step back and we analyze
3 what the proper role of Crown counsel is in
4 investigations, my view is that, first of all,
5 Crown counsel have an important role to play in
6 providing advice to investigators. And the
7 Supreme Court of Canada in the Campbell case
8 recognized that that advice is normally cloaked
9 with solicitor-client privilege, which is a
10 remarkable step to take, but it recognizes the
11 importance of advice during the investigative
12 phase.

13 The other point that I would make is
14 that it is quite open to prosecutors to identify
15 gaps in cases and direct investigators to go back
16 and take investigative steps with a view to
17 filling those gaps. That may involve interviewing
18 witnesses who have not previously been
19 interviewed. It may involve obtaining search
20 warrants and seizing items which were not
21 previously seized, steps like that. I see nothing
22 wrong with prosecutors taking those steps. But
23 there may be extreme cases where there were no
24 grounds to lay the charge to begin with, and the
25 charge nonetheless is permitted to remain, and the

1 prosecutor then takes steps to cause what is
2 amounting to a brand new investigation. And in my
3 view, that crosses the line.

4 Q In situations where a prosecutor may
5 determine that an investigation, or a part of an
6 investigation is defective, I take it from your
7 testimony, your expectation is that the prosecutor
8 will identify the deficits in the evidence, and
9 moreover that they should, do I understand you
10 correctly, direct the police to take further
11 investigative steps?

12 A Yes, I see that as being part of the
13 role of the prosecutor.

14 Q What can you say, sir, with respect to
15 the issue of following up with witnesses? If you
16 had determined, for instance, that the
17 investigating officers or police agencies involved
18 didn't properly interview witnesses, do you see
19 that as something that the Crown should do?

20 A The normal step for the Crown would be
21 to direct that investigative interviews take
22 place, further investigative interviews. These
23 may or may not involve Crown counsel. We are
24 speaking here, I want to be clear, of the
25 post-charge stage. It may be that Crown counsel

1 could derive some insight from participating in
2 the interview. Generally, there is no problem
3 with doing that. So the norm would be for it to
4 be purely an investigative interview and the Crown
5 to be given a statement or a will-say, or police
6 officer's notes relating to the interview. There
7 may be some value, as I have said, though, in
8 departing from the norm and Crown counsel actually
9 participating in the interview.

10 Q What do you have to say, Mr. Gover,
11 with respect to the duty on the Crown to prepare
12 their witnesses?

13 A Well, this is fundamental. We have to
14 recognize, though, the exigencies of practice. Of
15 course, I practice in Toronto and I did not have
16 to prosecute at Old City Hall the way some of my
17 old colleagues had to, or the extent that they had
18 to. But it can be impossible before the
19 Provincial Courts to interview witnesses. I would
20 think, though, that in cases of seriousness, that
21 interviewing witnesses would be the norm. And
22 certainly in any case that I would call a special
23 prosecution, I would expect witnesses to be
24 interviewed.

25 Q Mr. Gover, I would like to turn now to

1 your opinions relating specifically to the case.
2 And what we will be referring to is found at page
3 18 and thereafter in your opinion, sir. And
4 again, I wanted to confirm with you that your
5 opinion is based, among other things, with a
6 hypothetical set of facts that you were provided
7 in the correspondence from Mr. Paciocco that I
8 referred to earlier. And I can confirm with you,
9 sir, that the evidence we've received thus far in
10 the Commission has not resulted in any material
11 change to the hypothetical set of facts. Other
12 counsel may have changes or nuances on the
13 evidence that they will put to you. But assume
14 for these purposes that there hasn't been a
15 material change -- you will hear from other
16 counsel about -- that would affect your opinion.
17 So if I could just direct you, sir, to your
18 overview and have you comment on that, please?

19 A Yes, thank you. The overview appears
20 at pages 18 and 19 of my report. And one of the
21 issues I was asked to consider was whether there
22 was any conflict of interest. And, of course, I
23 will deal with each of these points in further
24 detail as we approach each particular item, but I
25 did not consider that the independent counsel,

1 Mr. Minuk, was in a conflict of interest, nor did
2 I consider that it was otherwise inappropriate for
3 him to have acted as prosecutor in this case.

4 There was some discussion about the
5 propriety in the release on a promise to appear
6 without conditions. And let me say that the view
7 expressed in the report was coloured by the
8 Ontario practice, as I understand it. I
9 understand now that it is common in this
10 jurisdiction for offences such as those faced by
11 Mr. Harvey-Zenk to be released on a promise to
12 appear without conditions. And consequently, I
13 have changed my opinion somewhat and concluded
14 that that was -- that Mr. Minuk's agreement to
15 that form of release in these circumstances was
16 not inconsistent with prosecutorial standards.

17 Q And I can examine that with you a
18 little further when we get into the separate
19 factors.

20 A Yes. Something for us to keep in mind
21 as we analyze the way in which discretion was
22 exercised relating to the offences charged is that
23 the police investigation in this case was badly
24 compromised by the outset. And as a result, there
25 were formidable challenges to a successful

1 prosecution for impaired driving causing death,
2 criminal negligence causing death and, in my view,
3 refusing to provide a breath sample.

4 At page 18 of the report, I've
5 referred to the fact that none of the police
6 officers who attended the scene took any steps to
7 determine whether Mr. Harvey-Zenk had consumed
8 alcohol or was impaired, despite several factors
9 which include the unexplained nature of the
10 accident, which involved apparently no attempt to
11 brake from highway speed before the collision. It
12 involved as well the observations of paramedics
13 who interviewed Mr. Harvey-Zenk and reported to
14 the police that they detected the odour of an
15 alcoholic beverage emanating from him. Also
16 Constable Graham detected but failed to note the
17 odour of an alcoholic beverage in
18 Mr. Harvey-Zenk's vehicle. And Constable Woychuk
19 detected an odour of alcoholic beverage while
20 Mr. Harvey-Zenk was in his police vehicle.

21 Now, a particular note, and we will
22 discuss this in greater detail I understand,
23 Mr. Clifford, in relation to the refuse to provide
24 a breath sample charge is the fact that Sergeant
25 Carter had noted that he administered a blood

1 demand. And as we will discuss, in my view, that
2 presented a formidable challenge to a successful
3 prosecution. Overall, there were problems with
4 police officers' notes. I understand that Chief
5 Bakema had two sets of notes, that no officers
6 recorded having been advised by paramedics that
7 Mr. Harvey-Zenk smelled of alcohol. Constable
8 Graham's notes do not record that he smelled
9 alcohol in the Harvey-Zenk vehicle, and there is
10 no record when he detected that odour. And
11 Constable Woychuk reported that Constable Graham
12 and Chief Bakema, reported that they collaborated
13 in preparation of their notes and that Chief
14 Bakema directed him, Constable Woychuk, as to the
15 content of Constable Woychuk's notes.

16 So these were hurdles to overcome, and
17 in some respects insurmountable hurdles for some
18 of the charges.

19 Then turning to other evidence of
20 impairment, we see that the investigation
21 conducted by the Winnipeg Police Service
22 Professional Standards Unit did not provide
23 evidence as to how much Mr. Harvey-Zenk had to
24 drink and when he consumed alcohol.

25 So as we will discuss in a few

1 moments, my view is that the decision to stay
2 proceedings in relation to impaired driving
3 causing death and criminal negligence causing
4 death, as well as refuse to provide a breath
5 sample, was understandable and within acceptable
6 prosecutorial standards in the context of this very
7 tragic case.

8 The Manitoba case law is clear in
9 stating that a true plea bargain must be fully
10 disclosed to the sentencing court. And even in a
11 case with a joint submission as to sentence, which
12 is always given substantial deference by the
13 court, that heightened deference is appropriate
14 where there is a true plea bargain. It appears
15 that that fact was not brought to the attention of
16 Chief Judge Wyant, the sentencing judge. And I
17 will discuss when we get to it, Mr. Clifford, my
18 view as to whether that amounted to a breach of
19 acceptable prosecutorial standards. My view is
20 that was, at its highest, inadvertent. I don't
21 see much problem there.

22 Now my opinion with respect to the
23 joint position about a conditional sentence of two
24 years less a day, on the conditions specified, and
25 then the decision not to seek a discretionary

1 driving prohibition is something that I have
2 wrestled with. And in my opinion, I came down
3 rather firmly in saying that that was not
4 appropriate, that it was, in effect, so inadequate
5 as to bring the administration of justice into
6 disrepute. That may be stating it too baldly, and
7 I think we have to look at the totality of the
8 circumstances here in order to understand why I
9 say that that was not in the public interest. And
10 I know that you and I will discuss that further.
11 But for present purposes, I think it is sufficient
12 to say that here the understanding, as of
13 August 22nd, 2007, was that we had a police
14 officer who had been drinking, and evidence of
15 alcohol consumption is an aggravating factor for
16 the purposes of sentencing for this dangerous
17 driving causing death offence. And that was
18 something that, in the factual matrix, was
19 something that Chief Judge Wyant was troubled
20 about, that he viewed as distinguishing this case
21 from other cases where conditional sentences had
22 been imposed.

23 So for various reasons that I know we
24 will discuss in greater detail, Mr. Clifford, I
25 maintain the view that the agreement to the joint

1 submission on penalty here, and I stress the word
2 "agreement," was inappropriate and did not comport
3 with the public interest. And it is for that
4 reason that I move somewhat from the very firm
5 position taken in the written opinion. My
6 position, on reconsideration, is that the Crown's
7 participation in the joint submission was
8 ill-advised.

9 So that's an overview then of the
10 opinion that I've provided to this Commission of
11 Inquiry.

12 Q Thank you, sir. And in an attempt to
13 perhaps address these issues with more detail, I
14 will go through the separate questions that were
15 put to you. And what I propose to do, Mr. Gover,
16 is deal with them thematically, and there will be
17 times where I will put two or more questions to
18 you.

19 On the issue of conflict, sir,
20 question A as posed by Mr. Paciocco, whether it is
21 a conflict of interest or is otherwise
22 inappropriate to act as a prosecutor where the
23 police officer is an accused after acting in the
24 past for police officers, and the second question
25 put to you on this theme was whether there is a

1 conflict of interest or it is otherwise
2 inappropriate to act as a prosecutor in a case
3 where a defence lawyer has, in the past, acted for
4 a co-accused in a joint trial where you were
5 counsel for another accused person?

6 A Well, I think I would preface my
7 answer by referring to something that I said
8 before the lunch break, which is that particularly
9 when you act as prosecutor, you must ensure that
10 what you do in a courtroom and outside the
11 courtroom indeed promotes public confidence in the
12 administration of justice. Here, when we look at
13 the policy, and I'm actually back at exhibit 231,
14 the policy regarding appointment of independent
15 counsel, and that third paragraph on the first
16 page which hasn't changed between the January 2005
17 policy and the February 2008 policy. Of course,
18 we see the purpose of the policy is to ensure
19 confidence in the justice process by providing for
20 appointment of independent counsel in situations
21 where a reasonable person would perceive that an
22 accused person may receive differential treatment
23 because of his or her relationship with Manitoba
24 justice. And in dealing with this question of
25 conflict of interest, I approached the issue with

1 that in mind.

2 So my answer is that this is probably
3 a matter of degree. And I have been provided with
4 no information that causes me to think that
5 Mr. Minuk was in a conflict of interest or could
6 reasonably be perceived to be in one. The fact
7 that he had acted for police officers at some time
8 in the past, without knowing more, doesn't lead me
9 to the conclusion that he was in a conflict of
10 interest or that the spirit of this policy was
11 violated.

12 Q And if you were aware that it was in
13 the range of 15 years, I take it that it would
14 catapult you into the conclusion that it was not a
15 conflict?

16 A Exactly, Mr. Clifford, yes. And in
17 the opinion I refer to the fact that in Toronto
18 there is some lawyers whose practice consists
19 primarily of defending police officers. And I use
20 that as the extreme in the other direction,
21 because if one of them were to be appointed an
22 independent counsel to prosecute police officers,
23 then I think a perception could arise that
24 deferential treatment might occur. Of course,
25 perception and actuality are two different things,

1 but the policy is directed to perception as well
2 as actuality.

3 Q On the issue of acting for co-accused?

4 A Well, here my view is that this would
5 not cause a conflict of interest to arise, and it
6 is rightly assumed that members of our profession
7 will act in accordance with ethical standards
8 regardless of their acquaintance with opposing
9 counsel. So the fact that Mr. Minuk and
10 Mr. Wolson may have acted for co-accused in the
11 past, in my view, does not ground any tenable
12 basis for concluding that there is a conflict of
13 interest.

14 Q Moving then, sir, to the third
15 question that was put to you, and this is dealing
16 with the acceptable prosecutorial standards to
17 either recommend or express agreement with the
18 release on a promise to appear without conditions
19 a person charged with crim neg causing death,
20 impaired driving causing death, dangerous driving
21 causing death, and refusal to provide a breath
22 sample. And I understand, sir, that you have
23 opined in your written opinion, and referred to
24 section 498, you have made reference in earlier
25 testimony with respect to an additional section of

1 the Criminal Code, and you've had further
2 opportunity to reflect on the question.

3 A I have. And in doing so I've referred
4 to what I regard as the authoritative text, which
5 is The Law of Bail in Canada by Gary Trotter, now
6 Justice Trotter of the Superior Court of Justice.
7 And it refers, starting at page 58, to section
8 498, subsection 1, and then section 503,
9 subsection 2, and the commentary that various
10 legal writers, including I recognize the
11 Commissioner and his book, Canadian Criminal
12 Procedure, fourth edition, of 1984.

13 Q I was going to ask when you were going
14 to get to that.

15 THE COMMISSIONER: You haven't read
16 the sixth yet?

17 THE WITNESS: Well --

18 THE COMMISSIONER: Go ahead.

19 THE WITNESS: I will get to that,
20 Mr. Commissioner, but the point is made that
21 section 503(2) uses very expansive language which
22 appears to authorize the officer in charge to
23 release, in a broad spectrum of circumstances
24 beyond those which are referred to in section
25 498(1), which would appear to be restricted to

1 cases where the maximum is imprisonment for five
2 years.

3 BY MR. CLIFFORD:

4 Q And knowing that, sir, and referring
5 to those materials, I take it that modifies your
6 position with respect to whether a more
7 restrictive form of release was, in fact,
8 required?

9 A Well, certainly in Ontario I would
10 have expected a more onerous form of release. I
11 would have expected conditions relating to
12 non-consumption of alcohol, and I may well have
13 expected a condition that the accused person not
14 drive. And it is true that there is an automatic
15 suspension for a period roughly of 90 days, but
16 the question is always, what about the 91st day?
17 So the Ontario position appears to differ from the
18 position here in Manitoba, and I understand as
19 well from the position in British Columbia.

20 Q On that point, sir, I understand that
21 you are aware of Mr. Peck's opinion that releasing
22 on a promise to appear without any conditions is
23 entirely appropriate and within acceptable
24 prosecutorial standards?

25 A I have been made aware of that, yes.

1 Q And he, of course, referred to the
2 local practice in British Columbia and what he
3 understood to be the local practice here?

4 A Right. As I've said, I wasn't aware
5 of the Manitoba practice, and I would certainly
6 defer in these circumstances to what I understand
7 now to be the Manitoba practice. And that leads
8 me to the conclusion that it was within acceptable
9 standards to authorize release by the officer in
10 charge in the form of a promise to appear without
11 conditions.

12 Q In the event that there was a history
13 or some evidence suggesting an ongoing problem
14 with alcohol, in those circumstances, would you
15 think that it would be appropriate to give an
16 undertaking to a peace officer?

17 A Absolutely, yes.

18 THE COMMISSIONER: Is it acceptable,
19 in your opinion, to release accused into the hands
20 of a lawyer, if an officer in charge has come to
21 the conclusion that he is impaired, as in this
22 case, and there is the risk that he might repeat
23 the offence, which is one of the ingredients, or
24 one of the terms in which bail is refused, in this
25 case he was released into the custody of

1 Mr. Wolson's junior, as I understand it. Is that
2 considered an appropriate practice -- not in the
3 custody, but I guess into her car -- there doesn't
4 seem to have been any assurance that she would
5 take him straight home, or not leave him on the
6 street, or put him in a position where he might be
7 able to drive again. That's the matter that has
8 concerned me most.

9 THE WITNESS: You would expect,
10 Mr. Commissioner, there to have been a discussion
11 and representations made by counsel, approaching
12 an undertaking from counsel, that in fact steps
13 would be taken to make sure that the accused
14 person didn't drive, that he would be taken
15 directly home. So I would expect more than simply
16 turning over Mr. Harvey-Zenk, in our situation, to
17 counsel.

18 BY MR. CLIFFORD:

19 Q Mr. Gover, I would like to address
20 questions D and E presented to you, being whether
21 it is within acceptable prosecutorial standards
22 and consistent with the Manitoba Crown policy
23 directives to stay the charge of refusing to
24 provide a sample on the hypothetical facts that
25 you were provided?

1 A I saw the notation, I understand that
2 it is reflected in three places, that Sergeant
3 Carter administered a blood demand to be fatal to
4 proof of refusing to provide a breath sample. So
5 my view is that the actus reus of the offence
6 could not be proven. Rightly or wrongly, my view
7 is that in prosecutions of this type there has to
8 be absolute clarity about the demand itself. And
9 consequently, my opinion is that the decision to
10 stay or withdraw a charge of refusing to provide a
11 breath sample on the hypothetical facts was a
12 reasonable one.

13 Q Would your opinion change, Mr. Gover,
14 if the evidence was that Officer Carter maintained
15 that the reference to blood as opposed to the
16 appropriate breathalyzer demand was a clerical
17 error recorded in three different places and he
18 had, in fact, given the breathalyzer demand?

19 A Well, I would expect there to be some
20 explanation for it, and I have actually factored
21 that into my opinion. Ultimately, my opinion
22 wouldn't change. I would conclude that the
23 offence simply couldn't be proven in view of that
24 fact.

25 Q The fact that it had been recorded as

1 blood in a number of areas in the case would be
2 detrimental, despite the fact that it was
3 explained as a clerical error?

4 A Yes. Yes. In my view that's a
5 significant hurdle to proof beyond a reasonable
6 doubt.

7 Q Now, I note in your expert written
8 opinion, sir, that you didn't refer to or seem to
9 consider some other difficulties with respect to
10 the refusal charge. Did you discern any possible
11 Charter issues with respect to refusal?

12 A Well, we know that Mr. Harvey-Zenk
13 was, in my view, detained when he was taken by the
14 police car from the scene of the accident to the
15 police station without the benefit of advice as to
16 right to counsel under section 10(b) of the
17 Charter, so there could be an additional problem
18 there. My view was that the problems created by
19 the nature of the demand itself were so striking
20 that we didn't have to reach back and consider
21 Charter issues as well.

22 Q Dealing then with questions F and G,
23 sir, essentially the same question, centering on
24 the charge of impaired driving, whether it was in
25 acceptable general prosecutorial standards and

1 consistent with Manitoba policy directives to stay
2 the impaired driving death on the hypothetical
3 facts you were provided.

4 A Yes. And I've considered this issue
5 and, of course, here we have an unexplained
6 accident, we have a complete failure to brake from
7 highway speed before a rear-end collision. On the
8 other hand, the evidence of impairment is highly
9 questionable. We have some of the standard
10 indicia of impairment that we are all familiar
11 with from attending court, for example,
12 unsteadiness on the feet, glassy eyes and so on.
13 But you would have to take into account the fact
14 that Mr. Harvey-Zenk had been in a significant car
15 accident and, accordingly, there may be
16 explanations for his state as observed by some of
17 the officers. And in addition, we would have to
18 take into account the fact that there was no
19 erratic driving just prior to the accident, and in
20 addition, although this was evidence of alcohol
21 consumption, there wasn't evidence of impairment
22 through other means. In other words, the police
23 officers with whom Mr. Harvey-Zenk had been
24 earlier in the evening did not quantify the amount
25 of alcohol that he had consumed. And accordingly,

1 my view ultimately was that impaired driving
2 causing death could not be proven, and that it was
3 within acceptable prosecutorial standards for the
4 independent counsel, Mr. Minuk, to stay the charge
5 of impaired driving causing death.

6 Q I take it, sir, your opinion with
7 respect to the Manitoba Crown Policy Directives
8 would be the same for the same reasons?

9 A Yes, it would be.

10 Q Dealing, sir, with questions H and I,
11 whether it was within acceptable general
12 prosecutorial standards and consistent with the
13 Manitoba Crown Policy Directives to stay the
14 criminal negligence causing death charge on the
15 hypothetical facts you were provided. Could you
16 comment on that, sir, please?

17 A Yes. I would preface my testimony in
18 this regard by emphasizing how difficult it can be
19 to prove criminal negligence causing death.
20 Dangerous driving cases, we look for a marked
21 departure from what a reasonable person would do
22 in the circumstances. In criminal negligence
23 cases, we look for a marked and substantial
24 departure from the conduct of a reasonable person.
25 We look for a wanton and reckless disregard for

1 the lives and safety of other persons. And
2 clearly this is a very tragic case with terrible,
3 terrible consequences. But when we look at the
4 proveable conduct, whether it was a marked and
5 substantial departure from the conduct of a
6 reasonable person in the circumstances, whether it
7 evidenced a wanton and reckless disregard for the
8 lives and safety of other persons, based on what
9 can be proven, my conclusion is that the charge of
10 criminal negligence causing death could not be
11 proven. And consequently, I've concluded that it
12 was within acceptable prosecutorial standards for
13 the independent counsel to decide to stay the
14 charge of criminal negligence causing death. I've
15 also concluded that it was within the scope of the
16 Manitoba Crown Policy Directive to make that
17 decision.

18 Q Questions J and K, Mr. Gover, dealing
19 with a plea bargain arrangement and the
20 conditional sentence, questions were posed to you
21 as to whether it was, or is within acceptable
22 general prosecutorial standards to agree on
23 hypothetical facts, and whether it was consistent
24 as well with the Manitoba Crown Policy Directives
25 to a plea arrangement that would result in the

1 staying of charges of criminal negligence causing
2 death, the impaired driving causing death, the
3 refusing to provide a sample, in exchange for a
4 plea of guilty to a dangerous driving causing
5 death plea and a joint position for a conditional
6 sentence of two years. I understand, sir, that
7 you have addressed this in your written opinion in
8 essentially two sections, one dealing with the
9 plea bargain generally, and the other dealing with
10 the fitness of the conditional sentence?

11 A Yes. And as I say in my written
12 opinion, this is what I consider to be the most
13 problematic aspect of this case. And I concluded
14 that it was ill-advised for the independent
15 counsel to agree to the conditional sentence of
16 two years less a day, and further to agree that
17 the sentencing court's discretion should not be
18 exercised to impose a driving prohibition. Here
19 in my submission, or in my opinion, it is
20 important to bear in mind that the accused person
21 was a police officer, who on the evidence, as read
22 in on August 22nd, 2007, had consumed alcohol and
23 was driving. And that set of factors was clearly
24 in the mind of Chief Judge Wyant. As we see, he
25 articulated what he understood to be the basis for

1 the plea of guilty to dangerous driving causing
2 death, and included reference to the fact of
3 alcohol consumption by Mr. Harvey-Zenk. He also
4 referred to the fact that police officers should
5 be held to a higher standard. And that relates
6 directly to the issue of drinking and driving. So
7 I view, and I believe the courts of most provinces
8 in this country view the fact of drinking before
9 engaging in dangerous driving as an aggravating
10 factor. And so all of those things present a
11 factual matrix which called into question the
12 propriety of agreeing to a conditional sentence of
13 two years less a day.

14 Q Now, Mr. Gover, you commented on your
15 view of the law. And as I take it, your view is
16 that the mere consumption of alcohol can be
17 regarded by a court as an aggravating factor. And
18 have I got that correct, sir, are you saying that
19 it should be, it could be, or it can be regarded
20 by a court as an aggravating factor?

21 A I'm saying that a court is entitled to
22 consider it an aggravating factor, and the weight
23 to be attached to alcohol consumption as an
24 aggravating factor will be up to the court. The
25 court may conclude that it took place so far prior

1 to the driving that it should not be a factor at
2 all. But my view is that it is an aggravating
3 factor, without proof of effect on driving per se.

4 Q And when you make reference, sir, to
5 the law and the cases, did you conduct research
6 into that specific issue?

7 A I looked at that issue in formulating
8 my opinion, and I also reviewed a memorandum
9 prepared by Commission Counsel which fortified my
10 conclusion in that regard.

11 Q And with respect to the Manitoba
12 jurisprudence, you are aware of the cases that
13 deal with alcohol as a -- the consumption of
14 alcohol as an aggravating factor?

15 A Yes.

16 Q Now, your colleague, Mr. Peck,
17 presented evidence to the Commission, and you and
18 he are miles apart, if I can put it that way, on
19 this issue, and you are aware of that. And I
20 wanted to get your comment on Mr. Peck's opinion
21 to the extent that you were privy to his report
22 and on his legal research?

23 A Well, I have tremendous respect for
24 Mr. Peck, who is a very senior counsel and very,
25 very experienced. I note that in his report when

1 he refers to alcohol consumption and suggests that
2 the mere fact the alcohol consumption should not
3 be considered an aggravating factor for the
4 purposes of sentencing, he refers to a 1973
5 decision of the British Columbia Court of Appeal.
6 But he acknowledges some debate in the area, and
7 then cites three decisions from the British
8 Columbia Court of Appeal, all decided within the
9 last ten years. And my view is that this issue
10 has been resolved in British Columbia as well in
11 the manner in which I've suggested.

12 Of course, you know, when confronted
13 with aggravating factors and mitigating factors,
14 sentencing judges always try to achieve the right
15 balance, that involves attaching as much weight to
16 each of those factors as is deemed appropriate.
17 But, in my view, what Mr. Peck says at page 23 of
18 his report in referring to the PISLER, P-I-S-L-E-R
19 case from the British Columbia Court of Appeal in
20 1973, is inconsistent with the authority, the
21 subsequent authority of that court as well as the
22 weight of authority from the appellate courts of
23 other provinces.

24 And indeed when we discuss, and I know
25 we will come to this, Mr. Clifford, the decision

1 not to prove alcohol consumption, I see that as
2 being bound up with this issue of an aggravating
3 factor and one that clearly was averted to on
4 August 22nd, and which in my view the sentencing
5 judge was entitled to know about and to have
6 proven.

7 Q Am I correct in taking from your
8 testimony, sir, that your opinion with respect to
9 the fitness of the conditional sentence is
10 predicated largely on the fact that you feel as
11 though alcohol should have been considered as a
12 factor?

13 A That's right, in the circumstances of
14 this case with an offender who was a police
15 officer at the time.

16 Q But ultimately in the end, as we know
17 from the transcripts, the plea was based on no
18 proof of alcohol consumption, or that alcohol
19 consumption was not to be considered a factor?

20 A Yes.

21 Q Does that affect your opinion?

22 A Well, ultimately if -- that, of
23 course, has to be the basis upon which Chief Judge
24 Wyant sentenced Mr. Harvey-Zenk. If those are the
25 facts before him, then the issue that I think the

1 trial judge was so concerned with, and that was
2 consumption of alcohol by a police officer who
3 ought to be held to a higher standard, that
4 becomes a non-issue, and then the sentence
5 ultimately imposed becomes within the acceptable
6 range.

7 Q Sir, there is one other area that I
8 wanted to address with you on the issue of the
9 fitness of the conditional sentence. I noted in,
10 at page 26 in your written opinion, that one of
11 the arguments that you are making, or comments
12 that you are making, sir, in support of your
13 opinion is the fact that parliament has expressed
14 a view that conditional sentences should not be
15 available for those convicted of this type of
16 offence. And, sir, I wanted you to comment on
17 that in light of the fact, sir, that section 11(i)
18 of the Charter gives the accused person the
19 constitutional entitlement to the sentencing
20 regime in force at a relevant time, and whether it
21 could be seen as extraordinarily lenient to rely
22 on a sentence that is constitutionally available
23 at the time. So he was entitled to the sentencing
24 regime as of the time and --

25 A I recognize that Mr. Harvey-Zenk was

1 entitled to the benefit of the lesser punishment
2 under section 11(i) of the Charter. And at page
3 27 of my report, I say:

4 "While section 11(i) of the Charter of
5 Rights would have guaranteed
6 Mr. Harvey-Zenk the benefit of the
7 lesser punishment if he were sentenced
8 after December 1st, 2007 - meaning
9 that as a matter of law the
10 conditional sentence would have
11 remained available to the sentencing
12 court - the Crown could reasonably
13 cite the amendment as evidencing
14 Parliament's intention that
15 conditional sentences not be granted
16 for this type of offence."

17 In other words, what I'm trying to say there is
18 the Crown could reasonably submit that the public
19 interest militated against a conditional sentence.

20 And here we ought as well to refer to
21 the Manitoba Department of Justice Policy
22 Directive on conditional sentences, dated
23 April 2005. And I understand it is exhibit 217 in
24 your proceedings, but I may be mistaken,
25 Mr. Clifford, but it provides that Crown attorneys

1 are instructed that generally a conditional
2 sentence should not be recommended in cases
3 involving death or serious bodily harm. And
4 that's under the policy statement part under
5 principles, still at the first page. It says:

6 "Generally, Crown attorneys should not
7 recommend the granting of a
8 conditional sentence, either as part
9 of a plea arrangement or as a
10 submission on sentencing or appeal, in
11 cases involving death or serious
12 bodily harm."

13 And my view is that what was problematic here was
14 entering into the agreement for the conditional
15 sentence in the circumstances that I've alluded
16 to. And it is true that the policy refers to
17 exceptional circumstances, but in my view, and I
18 know from experience, in arguing sentence appeals
19 before the Ontario Court of Appeal when I was a
20 Crown counsel, of course, people will always point
21 to something as being an exceptional circumstance
22 warranting departure from a general proposition.
23 And here my view is that the policy, coupled with
24 the clear direction which Parliament was going,
25 really ought to have caused the independent

1 counsel to refrain from entering into an agreement
2 that a conditional sentence in the circumstances
3 of this case was appropriate.

4 Q And not that I want to make this the
5 sole topic of conversation, but one might argue
6 that the independence of the judiciary might
7 require that they not bend to the whim of
8 Parliament and they impose the law that was in
9 place at the time?

10 A Certainly. I was speaking of a
11 reasonable submission that counsel could make.
12 And clearly, our law recognizes the broad
13 discretion of courts in sentencing offenders,
14 which is something that makes our system of law
15 stand apart from, for example, the Federal system
16 in the United States.

17 Q Research conducted by the Commission
18 and other lawyers that assisted us have suggested,
19 sir, that the sentence that was imposed, with
20 respect to the Manitoba jurisprudence, was a fit
21 and common sentence in this jurisdiction. You
22 alluded earlier to the practice, the local
23 practice with respect to releasing on a promise to
24 appear. I take it you had an opportunity to
25 review the Manitoba jurisprudence that was cited

1 in the sentencing submissions and the oral
2 argument made by counsel?

3 A I have reviewed all of those cases.
4 And I note what Chief Judge Wyant noted, which was
5 that none of them involved a police officer. And
6 you have my point and we've had the discussion, I
7 believe, that once the fact of drinking prior to
8 the collision was taken off the table, the fact
9 that Mr. Harvey-Zenk was a police officer at the
10 time lost much of its significance.

11 Q I wanted to ask you, sir, about the
12 policy directive on the plea bargain, at page 253.

13 A So I'm now at exhibit 231, tab 8, page
14 253.

15 Q What I'm interested in, sir, is the
16 policy handbook indicates that it is proper for
17 Crown counsel to make agreements respecting pleas
18 or sentence with the view to avoiding an
19 unsuccessful prosecution, at page 253. And can
20 you comment, sir, on your experience with this?

21 A Well, it is recognized that plea
22 arrangements are appropriate in circumstances such
23 as that, that take into account the exigencies of
24 the case. The policy recognizes the practice that
25 occurs elsewhere in Canada. The policy also, in

1 paragraph five, points out that no agreement
2 should be made on the basis of convenience or
3 expediency. And then of interest in relation to
4 the balance of my opinion, in point 9 at page 254,
5 states:

6 "Crown counsel should not agree to
7 sanitize or play down certain facts in
8 exchange for a guilty plea. All of
9 the facts relating to the incident
10 which can be proved and which are of
11 significance must be disclosed to the
12 judge."

13 Q Now, obviously in embarking on this
14 plea bargain and making the submissions that were
15 made dealing with the case in this fashion, the
16 policy directives with respect to conditional
17 sentences were also in play. And I understand,
18 sir, that you were recently furnished, and this is
19 as a result of an oversight of Commission Counsel,
20 with policy guideline 4:CON1, and this is dealing
21 with conditional sentences dated April 2005?

22 A That's right.

23 Q Now, sir, the fact that you didn't
24 have this originally, and you received it recently
25 and reviewed it, does it in any material way

1 change your opinion?

2 A Well, it doesn't. It, in some
3 respects, fortifies my opinion because, as I've
4 said, a key fact here is the agreement to submit
5 that a conditional sentence would be appropriate,
6 on its face that appears to be inconsistent with
7 the policy. And I recognize that the policy, and
8 this again I understand is exhibit 217, the policy
9 says at page 2 in the last bullet point in
10 relation to paragraph A:

11 "A Crown Attorney is not required to
12 argue that a conditional sentence is
13 inappropriate in the face of clear
14 authority to the contrary."

15 And my view is that that does not become a licence
16 to agree that a conditional sentence would be
17 appropriate, even in the face of the Manitoba case
18 law to which you've pointed me.

19 Q Let me move then, sir, to question L,
20 because I sense that some of this will overlap
21 when we deal with this issue. The question here
22 is whether it is within acceptable general
23 prosecutorial standards to agree, or decide not to
24 prove that the accused had consumed alcohol after
25 that allegation fell into issue on the

1 hypothetical facts that you were provided.

2 A Yes. And I realized that this was the
3 other major area in which Mr. Peck and I disagree.
4 And in analyzing this issue I referred
5 extensively, starting at page 27, to the
6 transcript of proceedings on August 22nd, 2007.
7 And reference was made to anecdotal historical
8 evidence of alcohol consumption. And I believe
9 even before that excerpt there was an earlier
10 reference to alcohol consumption at page 6 of that
11 transcript. And then it is clear that Chief Judge
12 Wyant wanted to know the role of alcohol
13 consumption in the facts underlying the plea, and
14 said, as I excerpt at page 28 of the report:

15 "So is it fair to say in essence the
16 factual circumstances surrounding the
17 Crown's acceptance of the plea to
18 dangerous operation of a motor vehicle
19 causing the death of Mrs. Taman was a
20 combination between the evidence of
21 consumption of some alcohol, along
22 with an accident that appears to be
23 unexplained where speed was -- there
24 doesn't appear to be any evidence of
25 excessive speed but, but a --

1 Mr. Minuk: Well, that, and --

2 The Court: -- but an accident that
3 occurred without braking at a red
4 light?

5 Mr. Minuk: Absolutely, yes, an
6 accumulation of what would otherwise
7 be Highway Traffic violations that set
8 this apart from --

9 The Court: And that's the marked
10 departure, the combination of those
11 factors is the marked departure?

12 Mr. Minuk: Correct, yes, that this is
13 not just a pure accident."

14 So Chief Judge Wyant, the sentencing
15 judge here was, in determining whether the facts
16 of dangerous driving causing death had been made
17 out, referred to those facts in combination, which
18 included alcohol consumption, as constituting the
19 marked departure, the gravamen of the defence.

20 So in analyzing this, my view is that
21 we have to ask ourselves what would have happened
22 had the trial judge not asked for further
23 submissions on this issue? And I think the answer
24 to that is that he would have proceeded to
25 sentence based on his understanding that alcohol

1 consumption had occurred. And that's a point that
2 is made at page 30 of the report in the last
3 paragraph, under paragraph L.

4 So my conclusion here is that, when we
5 look at the policy on plea bargaining, that this
6 was tantamount to taking away a fact that the
7 sentencing court was entitled to know. And as
8 I've said, the case law treats it as an
9 aggravating circumstance for the purposes of
10 sentencing. So my view is that the decision not
11 to attempt to prove consumption of alcohol was
12 tantamount to an agreement not to place a material
13 fact before the court.

14 Q What if the Crown indicated that he
15 felt he wasn't in a position to do that? In other
16 words, that he couldn't comply with Gardiner, for
17 instance?

18 A One would question why the issue was
19 raised if Crown counsel were to concede that he
20 couldn't prove that fact.

21 Q And that's what you seem to indicate
22 in your opinion, is that the fact that it is
23 raised on one day and it is not proven on another
24 creates, I see, a great difficulty in your view?

25 A It does. And I know that the issue of

1 the Crown proving this didn't really arise until
2 September 12th on the re-attendance. And what
3 Mr. Wolson said at page 55, lines 26 through 31,
4 of the August 22nd transcript -- maybe we could go
5 there briefly, this is the August 22nd transcript,
6 page 55, this is in the course of submissions
7 about the cases that were contained in the joint
8 case book. And by the way, let me make it clear,
9 I don't see any problem with Crown and defence
10 counsel preparing a joint case book. In my
11 experience, judges appreciate that sort of thought
12 being put into the materials before the court.
13 But you see at page 55 here, starting at line 26,
14 Mr. Wolson say, in the course of these submissions
15 about the cases, some of which involved alcohol
16 consumption:

17 "But every other case before you,
18 whether there is either alcohol
19 involved to an extent of readings over
20 .08, to where no alcohol is involved,
21 to where like in this case there is
22 mention of it by the Crown but no
23 proof of it, in all cases, in cases
24 that the facts were more egregious
25 than the one before you, in the

1 McKenzie case, for instance, at tab 6,
2 blood alcohol in the range of
3 100 milligrams per cent, and the
4 evidence of the author of the
5 pre-sentence report noted that the
6 accused was a medium risk to reoffend,
7 even in those circumstances where the
8 accused had a limited prior record,
9 the imposition of a conditional
10 sentence was imposed."

11 The point that I take from this, and I know that
12 Mr. Peck has referred to that excerpt in his
13 report, but the point that I make about this is
14 that it is at best an oblique way of saying that
15 you are putting the Crown to the proof of the fact
16 of alcohol consumption, and that here it obviously
17 failed to alert the Chief Judge that alcohol
18 consumption was not admitted.

19 Q You testified earlier with respect to
20 the ethical duty of a Crown to adhere to an
21 undertaking. And could you comment on the
22 propriety of giving of an undertaking in the
23 circumstances of this case not to call evidence on
24 alcohol consumption, based on the fact that you
25 may feel as though you couldn't meet the Gardiner

1 standard?

2 A Well, if you couldn't meet the
3 Gardiner standard, then there would be no harm in
4 giving the undertaking, because you couldn't prove
5 the fact. I think that the discussion that we see
6 in Crown policy manuals, and in the Proulx and
7 Layton text, and in the article prepared by
8 Mr. Campbell that is appended to my supplementary
9 report, that discussion is premised on the ability
10 to prove the material fact.

11 Q I take it, conversely, that if you
12 could prove it, that you ought not to enter into
13 an undertaking not to prove it?

14 A Well, that's right. And I won't take
15 you to all of the passages in the various Crown
16 policy manuals, for example, the Federal
17 Prosecution Service desk book, the Ontario Crown
18 Policy Manual, as well as the Proulx and Layton
19 text, and the Martin committee report. In my view
20 each of them stands for the proposition that the
21 duty of the court entails that you not withhold
22 material facts from the court.

23 Q So in a sense, it is distilled down to
24 a fundamental decision about what can I or what
25 can I not prove?

1 A That's right. And that's distinct
2 from the weight to be assigned to it, I would add.

3 Q And a decision that's made in the
4 context of exercising discretion?

5 A That's right.

6 Q I'm going to ask you to turn now to
7 question M, and what we will do with M, N, and O,
8 I know they could easily fall into, and do fall
9 into the same theme, but because of the specific
10 nature of the questions, I'm going to deal with
11 them one at a time, Mr. Gover. And maybe we will
12 do M, Mr. Commissioner, before the typical 3:15
13 break. Would that be suitable?

14 THE COMMISSIONER: Well, we are close
15 to it.

16 MR. CLIFFORD: I could probably knock
17 this question and answer off, if we can do this,
18 Mr. Gover, in three or four minutes.

19 THE WITNESS: Yes.

20 BY MR. CLIFFORD:

21 Q Whether it is within acceptable
22 prosectorial standards and/or ethical principles
23 to present a joint submission to a judge without
24 making it clear to the judge that the joint
25 position was arrived at as the result of a plea

1 bargain?

2 I apologize, Madam Reporter.

3 A And it is clear that the Manitoba
4 authority, and this is from the Court of Appeal
5 from this province, makes it clear that there is
6 an obligation on counsel to alert the sentencing
7 court to the fact that a joint position is the
8 result of a true plea bargain, where there has
9 been a quid pro quo, and that obligation
10 particularly rests with the prosecutor where the
11 exigencies of the case have motivated the Crown to
12 enter into the agreement. That's what is
13 stipulated by the case law.

14 And my conclusion is that a
15 prosecutor's failure to provide this information
16 would not normally amount to an ethical breach,
17 given that defence counsel is equally well
18 positioned to provide that information, and that
19 defence counsel, of course, has an interest in
20 providing that information and seeing that the
21 joint submission is accepted. And further, that
22 trial judges are under an obligation to inform
23 counsel when they are inclined to reject joint
24 submissions and to invite further submissions on
25 that issue.

1 Q Although the Sinclair decision, sir,
2 that you do refer to in your written opinion, does
3 stipulate that the duty rests primarily with the
4 Crown?

5 A Yes. Now, I recognize that's the
6 court's expectation. I don't think that it
7 amounts to an ethical breach, though, because of
8 the fact that there are fail-safes built into the
9 adversarial process.

10 Q You comment, sir, on whether you view
11 this situation --

12 THE COMMISSIONER: Mr. Clifford, we
13 have 3:15 coffee closing in the little restaurant,
14 and I note that counsel are anxious to get out
15 there and grab their last.

16 MR. CLIFFORD: I got caught up in full
17 flight there for a moment and missed the coffee --

18 THE COMMISSIONER: I hate to interrupt
19 you.

20 MR. CLIFFORD: I deserve it and I
21 apologize.

22 THE COMMISSIONER: Let's take 15
23 minutes.

24 THE CLERK: All rise.

25 (Proceedings recessed at 3:15 p.m. and

1 reconvened at 3:30 p.m.)

2 BY MR. CLIFFORD:

3 Q Mr. Gover, now moving to question N,
4 can you comment, sir, whether, on judging from the
5 transcripts that you received, sufficient efforts
6 had been undertaken by the prosecutor in the
7 context of all the submissions made to alert the
8 presiding judge to the fact that the joint
9 position was arrived at as a result of a plea
10 bargain?

11 A It is apparent from the transcript of
12 August 22nd, 2007, that the prosecutor did not
13 alert the trial judge to the fact that this was a
14 true plea bargain involving a quid pro quo. I
15 conclude that the trial judge was correct in
16 stating, as he did on September 12th, that nowhere
17 in the August 22nd transcript did either counsel
18 talk about the exigencies of the evidence, a quid
19 pro quo, a plea bargain. Those words were never,
20 those words never existed. In fact, the whole
21 representation from that date from both counsel
22 was that this was a joint recommendation supported
23 by the evidence. So the whole discussion about
24 the problems in proving dangerous driving causing
25 death occurred in the context of the attendance on

1 September 12th. And accordingly, any sort of
2 notion of a quid pro quo didn't really arise from
3 the August 22nd transcript. The discussion there
4 focused on problems in proof of the other
5 offences, as opposed to any sort of exigencies
6 arising in prosecuting the dangerous driving
7 causing death offence.

8 Q It is a dramatic change, of course,
9 that we see emerging in the transcript on
10 September 12th, with respect to comments between
11 the court and Mr. Minuk. And what do you have to
12 say, sir, with respect to his efforts on that day?

13 A Well, on that day it is clear that
14 Mr. Minuk took strides to inform the court that,
15 in fact, this was a true plea bargain or a quid
16 pro quo, and strove to alert the court to what
17 were termed exigencies in the case. I take the
18 same position that Mr. Peck does, though, that
19 while there were problems in proof of criminal
20 negligence causing death, impaired driving causing
21 death, and refusing to provide a breath sample,
22 that by comparison the dangerous driving causing
23 death offence was, and the evidence in that case
24 was relatively strong. So for me, although
25 information was given that this was a true plea

1 bargain, that it was a quid pro quo situation, I
2 question what was gained by the prosecution in
3 exchange for taking the position it did on
4 sentencing.

5 Q Now, I want to clarify with you,
6 Mr. Gover, what you mean when you say you are
7 consistent with Mr. Peck's opinion, or that you
8 side with him, as we know, his view in dealing
9 with questions M and N was that a mistake was made
10 by the Crown in terms of the explanation of the
11 joint submission, but he is quite clear, sir, that
12 he categorizes this omission as one of
13 inadvertence. Are you in agreement with that?

14 A Well, first of all, when I refer to
15 what Mr. Peck had to say, it had to do with the
16 relative strength of the dangerous driving causing
17 death evidence, and proof of that offence. And
18 when Mr. Peck characterizes this as inadvertence
19 in failing to bring the quid pro quo to the
20 attention of the trial court, I don't disagree
21 with that. If it was a true quid pro quo, one
22 would wonder why, if there could possibly be any
23 other reason for failing to bring it to the
24 attention of the trial court. In that sense, I
25 tend to agree with Mr. Peck that this could be

1 attributed to inadvertence.

2 And generally I would say this,
3 Mr. Clifford, that joint positions advanced by
4 counsel can be remarkably demanding in terms of
5 advocacy. I don't think that we stress the
6 importance of sound practice in joint submissions
7 to the extent we should. Too often in advocacy
8 courses we stress cross-examination, and typically
9 overemphasizing impeachment. But when we think
10 about advocacy in courts and the way, frankly,
11 that a majority of cases can be resolved on some
12 court dockets, we ought to think about how
13 advocacy could be better exercised in terms of
14 joint positions. And in a special prosecution
15 like this involving an independent counsel and
16 involving circumstances which could significantly
17 impact on the public confidence on the
18 administration of justice, clearly transparency
19 would have been enhanced by having a written
20 agreed statement of facts, and that would have
21 provided clarity as to the factual underpinnings
22 for the guilty plea, and all of the circumstances
23 that the sentencing court was entitled to take
24 into account in sentencing.

25 Frankly, it is remarkable that in

1 run-of-the-mill professional discipline cases,
2 counsel prepare written agreed statements of fact,
3 and yet in significant criminal cases, we see that
4 we are reliant on transcript, counsel's
5 understanding, exchanges such as are those facts
6 substantially correct, and so on.

7 Q Sir, is this a suggestion that you are
8 making, or an expectation that you have that the
9 Crown and defence, in a case of this nature, with
10 this sensitivity, would memorialize their shared
11 understanding of the factual underpinning?

12 A I think it is safest to put in terms
13 of a suggestion, because I recognize that the
14 practice is going to vary. I think that sound
15 practice will be to place this in an agreed
16 statement of facts, so that everyone is clear
17 about the basis for the plea and the basis for the
18 sentencing proceedings.

19 Q Mr. Gover, I wanted to ask you about
20 one other point that you raise in your opinion.
21 You do indicate at page 31 that it would seem
22 unusual to you that an experienced judge or lawyer
23 would not have either recognized or assumed that
24 the joint submission or position advanced by
25 counsel in this case was the result of a true plea

1 bargain. And can I ask you to expand upon that?

2 A Well, yes. And my view is that

3 experienced counsel and judges, when encountering

4 proceedings such as those that unfolded on

5 August 22nd, 2007, certainly in Ontario, would

6 expect that there had been substantial

7 negotiations between counsel resulting in the

8 joint position being advanced. And I would have

9 thought, and perhaps this is because we don't have

10 the same approach in Ontario where we provide

11 heightened deference to joint positions that

12 result from true plea bargains or quid pro quo

13 situations. But in reviewing this, and having

14 reviewed many thousands of pages of sentencing

15 transcript over the years, my initial reaction on

16 reading August 22nd, the transcript, was to

17 conclude that this had been negotiated, and likely

18 carefully so. And that's how, for example,

19 conditions for the conditional sentence, which of

20 course included non-consumption of alcohol and so

21 on, which included not as a condition, but as an

22 additional item, that there would be no driving

23 prohibition, all of that strikes me as being the

24 product of negotiation, reasonably viewed as such.

25 And it just strikes me as being highly

1 coincidental if that were the position that each
2 counsel had come up with independently.

3 Q Mr. Gover, you make the recommendation
4 that an agreed statement of fact would have been
5 beneficial. I understand and see in your report,
6 sir, that you make a further recommendation to the
7 Commission regarding the policy of Manitoba
8 Justice on requiring Crowns to indicate whether a
9 plea bargain is, in fact, a true quid pro quo plea
10 bargain. And that's found at page 10, sir, of
11 your written opinion.

12 A Yes. And just, if I may briefly
13 expand on that. It is said that Crown policy
14 manuals and the Federal Prosecution Service desk
15 book are living documents, that they are subject
16 to perpetual amendment. And one of the concerns
17 would be that if principles are developed in the
18 courts that impact on the manner in which Crown
19 counsel conduct themselves, that Crown policies
20 should reflect the evolution of the law in that
21 respect. So, my view is that the Crown policy
22 guideline or directive dealing with plea bargains
23 ought to be revised to make clear, as a matter of
24 best practice, that Crown counsel should bring to
25 the attention of sentencing courts the fact that,

1 if this is the case, that a joint position is the
2 result of a true plea bargain or a quid pro quo.

3 Q And such a policy directive would
4 certainly be more in line with the current
5 Manitoba jurisprudence, it draws a distinction
6 between a quid pro quo and a mere joint
7 recommendation?

8 A Precisely.

9 Q Now, you've alluded to the fact that
10 joint submissions can present a challenge from an
11 advocacy perspective, and that leads me into
12 question O in your opinion, sir, whether on the
13 transcripts and in light of the hypothetical
14 facts, adequate information was furnished by the
15 prosecution to satisfy the ethical and
16 professional obligations of the prosecutor
17 presenting the factual underpinning of the plea of
18 guilty?

19 A Here I return to the question of
20 failing to prove the aggravating factor of the
21 consumption of alcohol. And nuance to that
22 discussion in the written report is being provided
23 by the discussion we had just before the afternoon
24 recess, Mr. Clifford, where you asked about giving
25 an undertaking not to try to prove something that

1 you know you can't prove, according to the
2 Gardiner standard. I accept that. But here my
3 view is that the accepted standards for
4 prosecutors, as articulated in the Martin
5 committee report, in the Proulx and Layton text,
6 and in various Crown policy manuals, is that if an
7 aggravating factor can be proven, it ought to be
8 proven. And here, of course, alcohol consumption
9 by a police officer prior to engaging in conduct
10 that amounted to dangerous driving causing death
11 would fall into that category.

12 Q And I think we dealt rather
13 comprehensively with that issue and I won't cover
14 that with you again, sir. Those are the facts, A
15 through O, and with that, sir, I can complete your
16 examination in chief, and ask you to remain seated
17 and other counsel may have questions for you.

18 THE WITNESS: Thank you.

19 THE COMMISSIONER: You indicated that
20 if an aggravating factor can be proven, then there
21 is an obligation on the Crown to do so?

22 THE WITNESS: That's my view, yes.

23 THE COMMISSIONER: Then you turned it
24 into a Gardiner application, the Crown may believe
25 he can, he or she can, call the evidence, and then

1 leave it up to the judge to decide whether or not,
2 based on Gardiner, the evidence has been
3 established beyond a reasonable doubt?

4 THE WITNESS: That's right.

5 THE COMMISSIONER: Are you aware that
6 in Manitoba there is an unusual practice, at least
7 it is unusual as far as my experience is
8 concerned, because I haven't been -- I have been
9 off the bench ten years and I haven't been
10 practising in Toronto in 40 years. But the
11 practice here, as Mr. Wolson explained it, is
12 that -- it happened in this case -- counsel
13 appear, indicate that it is not necessary to
14 arraign the accused, not necessary to put him to
15 his election, and then there shall be a plea of
16 guilty to a particular offence, and then the
17 matter is -- the accused enters his plea, the
18 judge will warn him of the consequence of a plea,
19 and then the matter is put over to another day.
20 There are no factual underpinnings recited by the
21 Crown on that day, but yet the judge does make a
22 finding of guilt, or may make a finding of guilt,
23 I couldn't find a finding of guilt in the record.
24 But then it goes over, as it did in this case, to
25 August 22nd. And that's when the problem of the

1 factual underpinnings arose. But I understand
2 that that's, from Mr. Wolson in any event, that
3 that's a very common practice. Are you aware of
4 that practice being conducted in Ontario in the
5 Provincial courts?

6 THE WITNESS: I'm not aware of that
7 practice in Ontario or anywhere else in Canada,
8 save for Manitoba. It strikes me as being
9 somewhat idiosyncratic.

10 MR. CLIFFORD: Nothing arising.

11 MR. ZAZELENCHUK: I have no questions
12 of this witness.

13 MR. McDONALD: No questions.

14 MR. HOEPPNER: No question.

15 MR. WEINSTEIN: No questions.

16 MR. JACK: No questions.

17 MR. NOZICK: I have questions.

18 THE COMMISSIONER: Oh, what a
19 surprise. I am glad you have some questions.

20 MR. NOZICK: I should point out,
21 Mr. Commissioner, volume J, the July 17th
22 transcript, exhibit 7, you indicated that you
23 couldn't find in the record that the plea had been
24 accepted. I think it is at page 1613 of volume J.

25 THE COMMISSIONER: 16 -- and that's

1 before?

2 MR. NOZICK: It is at tab 61.

3 THE COMMISSIONER: And the judge
4 makes --

5 MR. NOZICK: July 17th, when they went
6 through the exercise of waiving the information.

7 THE COMMISSIONER: So the judge
8 accepts the plea without factual underpinning?

9 MR. NOZICK: Here is what he says.

10 "Pursuant to the Criminal Code, I will
11 accept the plea and the election and
12 accord a guilty plea to the charge of
13 dangerous driving causing death."

14 And I just bring that to your attention because it
15 is probably one of the few things that I'm aware
16 of.

17 THE COMMISSIONER: Thank you. I don't
18 know how a judge can accept a plea and make a
19 finding of guilt without hearing what the facts
20 are. It is certainly not consistent with the
21 Criminal Code, with the case law.

22 MR. NOZICK: I don't want to give any
23 evidence in this case.

24 THE COMMISSIONER: Please don't give
25 any evidence, we have had --

1 MR. NOZICK: I have had a little
2 experience in this jurisdiction --

3 THE COMMISSIONER: Thank you.

4 MR. NOZICK: -- having been a
5 classmate of Mr. Prober's.

6 In any event, my name is Stan Nozick,
7 I'm co-counsel for the Government of Manitoba, I
8 have a few questions for you.

9 You were kind enough not to refer to
10 my leaving the podium to get my material, not like
11 Mr. Wolson.

12 BY MR. NOZICK:

13 Q First of all, with respect to the
14 independent prosecutor, I take it that what you've
15 basically said, it is a balancing act between the
16 independent prosecutor needing to consult with
17 somebody, but not going over the line, where the
18 advice that he gets infringes on the degree of
19 independence that he has. Is that a fair summary?

20 A That is a fair summary, yes.

21 Q And this is what the policies that
22 have been referred to attempt to delineate; is
23 that fair?

24 A That's what I understand.

25 Q Were you aware of the report done by

1 former Justice Ruth Krindle with respect to
2 reviewing the independent policy of the
3 department?

4 A I've only been advised of that
5 recently and somewhat cryptically.

6 Q I take it, you haven't seen her
7 opinion?

8 A No, I haven't.

9 Q Were you advised that as a result of
10 her opinion, the new policy was enacted in
11 February of 2008?

12 A I was advised that her opinion had
13 been sought and the February 2008 policy was the
14 result, yes.

15 Q So that the department acted fairly
16 quickly with respect to her recommendations, I
17 take it?

18 A That's a fair statement.

19 Q Now, you have had occasion, I guess,
20 to review the Peck report, which is volume Y-1,
21 exhibit 228?

22 A I have, yes.

23 Q And that was provided to you. And
24 there is a lot of points where you and Mr. Peck
25 are in agreement; is that fair to say?

1 A It is.

2 Q You are in agreement with respect to
3 whether Mr. Minuk was in a conflict or not --

4 A Yes.

5 Q -- for the reasons that both of you
6 have given?

7 A Yes.

8 Q You are in agreement that the police
9 investigation was flawed or compromised, or
10 terminology to that effect?

11 A We are in agreement about that, yes.

12 Q Tell me, sir, in your view, when you
13 have a case of this nature, which is obviously a
14 high profile case, sensitive case; correct?

15 A Yes.

16 Q When you have a case, is it important
17 for the Crown to be able to present a credible
18 case, particularly if the election ends up being
19 before a jury?

20 A Oh, I would say absolutely and it
21 comes back to that point about maintaining public
22 confidence in the process.

23 Q I don't know, have you had a lot of
24 experience doing jury trials?

25 A I have done a few, yes.

1 Q And sometimes the law may be clear,
2 but juries are in a different position as the
3 triers of fact in putting a spin or interpretation
4 on the law; is that fair?

5 A Having lost a few jury trials, I would
6 say that's fair, yes.

7 Q Yeah, I have lost my share as well.
8 In any event, what would your opinion be for the
9 Crown to present a case where one officer, in
10 effect, is accusing the chief of his department of
11 attempting or obstructing justice, how do you
12 think that would play out in front of a jury?

13 A I think a jury would be troubled by
14 that. You know, I'm also reminded, though, of the
15 wisdom of Justice Dickson, as he then was in the
16 Vetrovec case about the wisdom of juries and how
17 they use their common sense and step up and do
18 justice in individual cases.

19 Q Might have to be a Vetrovec warning in
20 this case with respect to the Chief of the East
21 St. Paul Police; is that fair?

22 A There might have to be some caution
23 administered about some of the evidence in the
24 case, yes, sir.

25 Q But that, I'm going to suggest to you,

1 would amount to a real exigent circumstance in the
2 Crown's case, is that fair?

3 A Well, you would have to ask, the
4 Crown's case for what? I've accepted problems in
5 relation to the criminal negligence causing death,
6 the impaired driving causing death, and the refuse
7 breath sample. My view, and it is one of those
8 areas where Mr. Peck and I seem to agree, is that
9 the dangerous driving causing death case could be
10 strong. I take your point, though, that when you
11 prosecute a jury case, you can have distractions
12 arise, problems in proof that could perhaps not be
13 related to direct proof of the offence.

14 Q There is no question that on paper the
15 dangerous driving appears to be clear with respect
16 to the unexplained accident, subject to the Beatty
17 case and that type of law?

18 A That's right, sir.

19 Q But when you factor into the exigent
20 circumstance with respect to the conduct of
21 Mr. Bakema, it was not, I'm going to suggest to
22 you, a slam dunk for the Crown to get a
23 conviction, even on the dangerous driving causing
24 death; is that fair?

25 A Well, I viewed it as a relatively

1 strong case. Was it a slam dunk? I viewed it as
2 a strong case; slam dunk, maybe not.

3 Q Now, you agreed with Mr. Peck with
4 respect that it was proper, using the terminology
5 that you both used when posed the question, to
6 stay the refusal and stay the cause death by
7 criminal negligence and causing death by impaired
8 driving?

9 A That's correct.

10 Q There is some slight difference, I
11 take it, between you with respect to what I'll
12 term the true plea bargain issue. He expressed,
13 and I think you basically agreed with him, that on
14 August 22nd, Mr. Minuk did not present the
15 agreement as a true plea bargain, but he corrected
16 it on September 12th; is that fair, or tried to
17 correct it?

18 A That's a fair statement, yes.

19 Q And you attribute that, and Mr. Peck
20 attributes it basically to the inadvertence of
21 Mr. Minuk; correct?

22 A I would.

23 Q An inadvertent omission, I think is
24 how it is termed?

25 A I think I would come to the same

1 conclusion, yes.

2 Q And you make the point at page 31 in
3 your report that counsel has already gone over,
4 and with Mr. Commissioner's indulgence, I will
5 just refer to. You say that in any event the
6 trial judge should have realized that the joint
7 position advanced by counsel in this case was the
8 result of a true plea bargain. You made that
9 point?

10 A What I say is it seems unusual that an
11 experienced judge or lawyer would not have either
12 recognized or assumed that the joint position
13 advanced by counsel in this case was the result of
14 a true plea bargain.

15 Q All right. Now, were you ever advised
16 that there had been a pre-trial meeting
17 immediately prior to the plea being entered on
18 July 17th, in chambers between counsel and Chief
19 Judge Wyant? Was that ever brought to your
20 attention?

21 A No.

22 Q I don't know if that's the practice in
23 Ontario, but it appears to be the practice at
24 least from time-to-time here in Manitoba. Is it
25 the practice in Ontario, first of all?

1 A I would say it varies from
2 jurisdiction to jurisdiction within Ontario and
3 perhaps from judge to judge. Some don't entertain
4 chambers' attendances to the extent that others
5 do.

6 Q I think it was more prevalent 10 or 15
7 or 20 years ago than it is today?

8 A Fair enough.

9 Q Okay. Now, in fact, that's what
10 happened here. Mr. Wolson testified that he asked
11 Mr. Minuk to arrange a meeting in chambers with
12 Judge Wyant because he wanted to alert Judge Wyant
13 to the nature of the case, some of the facts were
14 explained. Mr. Wolson said, for example, that he
15 told Judge Wyant that the accused was a police
16 officer, that there were ramifications to his job,
17 he was either going to have to quit his job or he
18 would be fired as a result of conviction.
19 Mr. Minuk gave a brief recitation of some of the
20 facts, we are not sure exactly what facts were
21 presented, and indicated that there were some
22 problems to the case. And Mr. Wolson particularly
23 indicated that when the matter -- Judge Wyant, of
24 course, did not commit himself to the plea
25 bargain, but Mr. Wolson indicated that when things

1 evolved the way they did, as you have read in the
2 transcript, that he was quite surprised that they
3 evolved in that matter because he felt that Judge
4 Wyant was prepared to go along with the plea
5 bargain, or joint recommendation. How would that
6 meeting factor into the inadvertence to, I'm going
7 to put, these are my words, cross the T's and dot
8 the I's in front of Judge Wyant on August 22nd, by
9 referring to the true plea bargain as opposed to a
10 joint recommendation?

11 A If a true plea bargain had been
12 brought to Chief Judge Wyant's attention in that
13 pre-trial conference attendance, or chambers
14 attendance in July, then I would have no
15 difficulty in characterizing the failure to bring
16 the nature of the agreement to Chief Judge Wyant's
17 attention in August as pure inadvertence.

18 Q Now, another difference between your
19 report and Mr. Peck's report, and even his
20 testimony, is with respect to the issue as to
21 whether the Crown should have attempted to prove
22 that there had been alcohol consumption. The
23 evidence in this particular case appears to be at
24 best, at best, that there was a smell of alcohol
25 noticed by one or two of the ambulance drivers at

1 the scene. There appears to have been a smell of
2 alcohol in the vehicle that was noticed by
3 Constable Graham, but not noted in his notes, and
4 some indication that there had been a gathering at
5 a bar the night before and a party that followed
6 that gathering.

7 I take it that there is very little --
8 there was no indication that there was ever a
9 roadside screening test either requested or
10 performed. What then does the smell of alcohol
11 mean in that context? It would mean, I'm going to
12 suggest to you, that there is an indication that
13 at some point in the past that he may have
14 consumed some alcohol. Is that fair?

15 A Well, it would. I understand as well,
16 and I reflect this at page 18 of my report, that
17 Constable Graham detected but failed to note the
18 odour of an alcoholic beverage -- or pardon me, it
19 was Constable Woychuk who detected the odour of an
20 alcoholic beverage while Mr. Harvey-Zenk was in
21 his vehicle. So there may be more observations at
22 the scene. But I take your point that this,
23 coupled with the evidence of drinking in the bar
24 and uncertainty as to what transpired at the house
25 party that followed, leaves us in the position of

1 not knowing when alcohol was consumed and how much
2 was consumed.

3 Q Yes?

4 A So my view remains, though, it is an
5 aggravating factor, but the weight to be assigned
6 to it is really going to depend on the sentencing
7 judge.

8 Q I will come back to the issue as to
9 whether it is an aggravating factor, because you
10 and Mr. Peck disagree with respect to that. You
11 are aware of that?

12 A Yes.

13 Q With respect to what -- Mr. Peck
14 referred to the decision as to whether to call
15 evidence or not on this issue as a cost benefit
16 analysis, i.e., what benefit is the Crown going to
17 get from going through the exercise of calling
18 this evidence, and is it going to be that
19 important of a factor? Do you agree with that,
20 first of all, that it is a cost benefit assessment
21 that the Crown has to make?

22 A I have difficulty accepting that in
23 view of what the various Crown policy manuals and
24 the Martin committee had to say. And maybe my
25 experience is coloured by the Ontario experience

1 where, of course, the Martin committee report
2 effected pretty significant changes in how Crown
3 counsel go about doing their duties.

4 Q The cost in this case would be for the
5 Crown to try and prove that there had been alcohol
6 consumed, because that's the best evidence that
7 you could produce, correct?

8 A If you engage in that analysis, that
9 would be part of the calculus, yes.

10 Q In order to prove that, he would have
11 to call one or two of the ambulance drivers and
12 perhaps Constable Graham; correct?

13 A Yes.

14 Q And that would leave the door open for
15 the defence to now call evidence with respect
16 to -- on that issue, correct?

17 A Yes, and to vigorously cross-examine
18 them, and Constable Woychuk, if he were called as
19 well.

20 Q And Bakema and -- basically, the whole
21 Crown case could be put at issue by defence on
22 this issue on sentencing; is that fair?

23 A Well, you would run into the trial of
24 an issue about consumption of alcohol, yes.

25 Q And that would be a major exercise in

1 going through, as far as the cost to the Crown;
2 right?

3 A It could be, yes.

4 Q And that would have to be weighed at
5 what possible benefit the evidence would prove?

6 A That's right.

7 Q I'm going to suggest to you that it
8 wasn't untoward in making the decision not to
9 pursue that area when you do the cost benefit
10 analysis?

11 A Well, untoward -- you have to
12 remember, and I know I won't see that in a Crown
13 policy manual or the Martin committee report, or
14 the Proulx and Layton text, but the benefit would
15 have been apprising the sentencing court of an
16 additional factor that an off-duty police officer
17 had been drinking prior to driving. And when we
18 come back to that analysis, I think we have to
19 bear that in mind. Would it be untoward? If you
20 accept Mr. Peck's view that there was a discretion
21 about this, then it would not be untoward if your
22 conclusion was that the game wasn't worth the
23 candle. I have difficulty accepting the
24 proposition that something like this could be
25 taken away from the trial judge's consideration.

1 Q But in the last analysis, it is a
2 judgment call, isn't it, for the Crown to make,
3 the independent prosecutor?

4 A Well, I don't think it is, save for
5 the situation that Mr. Clifford and I discussed,
6 and that's where it couldn't be proven. If on
7 second view, it would have been impossible to
8 prove it, then, of course, I fully understand the
9 decision.

10 Q And essentially Mr. Minuk took the
11 position that he wasn't able to prove it. He was
12 put to the Gardiner test and made a judgment call,
13 rightly or wrongly, that he didn't feel that he
14 could prove that particular issue. Is that fair?

15 A Well, I don't know that. I know the
16 transcript reflects his decision not to call
17 evidence on that point.

18 Q But that's what he said to the judge,
19 did he not, that in light of the Gardiner test, in
20 his opinion, that he doesn't prove that.

21 A If I might have a moment?

22 Q Sure. I will try and find it as well.
23 He says at page 32, at line 7, it is 1718 of
24 volume J:

25 "What I'm telling Your Honour is that

1 the Crown needs to have the available
2 legal proof to do the prosecution.
3 That's what I told you, that's the
4 law."

5 And that was with respect to the dangerous driving
6 issue.

7 A And the indication that he was not
8 calling evidence on the issue is at pages 62 and
9 63 of the September 12th transcript.

10 Q Yes. And he says at page 63, he
11 refers to line 13, the Gardiner principle?

12 A Yes. That's in response to a
13 question, though, from the court. The question
14 was that in the absence of proof of that fact of
15 alcohol, I'm obliged to accept --

16 And he says:

17 "Yes, Your Honour is correct on the
18 application of the Gardiner
19 principle."

20 Q Right. The point is that he was aware
21 of the Gardiner case and the principles in that
22 case, and basically made that decision, it
23 appears, with the knowledge of that particular
24 case?

25 A Well, he referred to the Gardiner case

1 there, and earlier in his submissions he referred
2 to Boucher and Gardiner. I don't see him directly
3 linking the decision not to call evidence here to
4 an inability to prove the fact. That's all I say
5 in response. That may well have been on his mind
6 but it is not expressed in the transcript.

7 Q I'm not going to suggest that
8 Mr. Minuk was as clear as he might have been, by
9 any stretch of the imagination. But I'm going to
10 suggest to you that the inference at least can be
11 drawn from his comments that he felt that he
12 wasn't able to comply with the Gardiner principles
13 with respect to the issue of alcohol consumption.
14 Is that a fair inference?

15 A I think it is a fair inference that,
16 or one of the inferences that could be drawn is
17 that he felt he couldn't prove beyond a reasonable
18 doubt consumption of alcohol.

19 Q Now, with respect to this, the major
20 difference, as I take it, between you and
21 Mr. Peck, as I see it -- you correct me if I'm
22 wrong, and you will, I know -- is with respect to
23 the effect of proving alcohol consumption. And
24 Mr. Peck in his evidence, and I have the advantage
25 of the transcript of his evidence, and I am going

1 to refer -- I don't know if the Commissioner has a
2 copy of the actual transcript or not?

3 THE COMMISSIONER: I am sorry, I was
4 making an important note of your last question in
5 cross-examination.

6 MR. NOZICK: Glad to see that, but I
7 have moved on.

8 THE COMMISSIONER: What did you want
9 me to look at?

10 MR. NOZICK: I was asking you whether
11 you had a copy of Mr. Peck's evidence that he gave
12 the other day, July 31st?

13 THE COMMISSIONER: Yes, it is here
14 somewhere.

15 MR. NOZICK: I must commend the
16 transcription services.

17 THE COMMISSIONER: I don't have his
18 evidence, I am sorry. You get the transcripts
19 much faster than I do.

20 MR. NOZICK: That's because I have a
21 printer. In any event, I'm going to give you a
22 page reference to his evidence, and when you do
23 get the transcript -- at page 6473 of his evidence
24 on July 31st, 2008 -- Mr. Gover, I don't think you
25 will have a copy of this.

1 THE WITNESS: No, I don't.

2 BY MR. NOZICK:

3 Q He made this following conclusion and
4 it is at the end of a long answer, but he said:

5 "So my conclusion was that the mere
6 fact of the consumption of some
7 alcohol, I didn't see that as being a
8 particularly relevant factor in the
9 sentencing process. The evidence was
10 just so scant on this point."

11 And I put that to you and ask you
12 whether you agree or disagree with that?

13 A Well, I disagree, because Mr. Peck's
14 entire approach is premised on the fact of alcohol
15 consumption not being an aggravating factor, and
16 that's apparent from his report in the discussion
17 at page 23 and elsewhere. So to that extent,
18 although I have great respect for Mr. Peck, I just
19 can't agree with him.

20 Q What he says at the previous page,
21 6471, or a couple of pages previous, he said:

22 "Logically, the proof of consumption
23 of alcohol would be considered an
24 aggravating factor on sentencing in a
25 case of this nature if it could

1 somehow be linked to the accident."

2 Would you agree with that statement?

3 That would be at line 20, Mr. Commissioner.

4 A And again, I don't agree that that's
5 the state of the law. It has attraction as a
6 logical proposition, but given my understanding of
7 the law and the weight authority from around the
8 country, I disagree.

9 Q Because he next says with respect to
10 the law, he says:

11 "There is disagreement in the courts
12 on this point."

13 Then he explained the differences in opinion of
14 various courts, and came to the conclusion
15 eventually that the law was unsettled.

16 Now, do you agree with that or do you
17 feel that the law is settled on this particular
18 point?

19 A Well, it is always difficult to say
20 whether a point is settled, barring a decision
21 from the Supreme Court of Canada. And here the
22 discussion that Mr. Peck engages in at page 23 of
23 his report, in my view, points to a position which
24 is reflected by the minority of the Provincial
25 appellate courts and, indeed, not even the British

1 Columbia Court of Appeal. I've also had the
2 benefit of reviewing a memorandum that was
3 prepared for Commission Counsel, and it caused me
4 to conclude that, in fact, most Provincial
5 appellate courts have concluded that consumption
6 of alcohol, even in the absence of some evidence
7 as to effect on driving, but consumption of
8 alcohol coupled with driving is an aggravating
9 factor for the purposes of offences such as
10 dangerous driving causing death.

11 THE COMMISSIONER: Excuse me, if the
12 consumption of alcohol in some way affected his
13 ability to drive, wouldn't he be guilty of
14 impaired driving?

15 THE WITNESS: He would be.

16 THE COMMISSIONER: Yes. So I'm also
17 having difficulty with the argument that it has to
18 be linked in some way. Because impairment is
19 impairment. It is not substantial impairment, or
20 partial impairment, it is impairment.

21 THE WITNESS: It is impairment and, of
22 course, proof of impairment leading to a
23 conviction of impaired driving causing death would
24 have resulted in Mr. Harvey-Zenk being subject to
25 potentially a higher sentence.

1 BY MR. NOZICK:

2 Q You've expressed your opinion, and
3 obviously you are entitled to that opinion, and it
4 appears that Mr. Peck has expressed an opinion
5 that's contrary to yours. So experts differed on
6 opinions, I take it, you are well aware of that?

7 A Yes.

8 Q And Mr. Minuk may have had an opinion
9 with respect to what the law was with respect to
10 calling that evidence or not as well?

11 A Yes.

12 Q So it is a question of exercising a
13 discretion, based on your view of the law, in the
14 case of an independent prosecutor?

15 A That's correct.

16 Q Now, with respect to the other major
17 area that you disagree with Mr. Peck, and that is
18 with respect to the agreement to make a joint
19 recommendation with respect to a conditional
20 sentence. And you, if I can use this vernacular
21 term, watered down your opinion somewhat from your
22 written opinion to your testimony, or oral
23 evidence?

24 A Yes.

25 Q And you have given the reasons for it

1 and I appreciate that.

2 I notice in reviewing both your report
3 and Mr. Peck's report that he went to some length
4 to detail his discussion with respect to the case
5 law on this point. Do you notice that in his
6 report?

7 A With respect to --

8 Q The Manitoba cases and the cases --

9 A Yes.

10 Q You have indicated that you have read
11 these authorities?

12 A Yes.

13 Q But you haven't referred to them in
14 your opinion?

15 A No.

16 Q And Mr. Peck came to the opinion that
17 it was a proper -- that the recommendation was in
18 accordance with the prevailing law in Manitoba at
19 the time of the sentencing?

20 A Yes.

21 Q And I just want to cite to you a
22 couple of passages that I was able to find, and I
23 want you to tell me whether you agree with some of
24 these passages.

25 Do you agree with me that a

1 conditional sentence can be controversial, but
2 they have the virtue of attempting to combine in
3 one sentence both punitive and restorative
4 sentencing objectives, they can therefore be a
5 useful sentencing tool in the right kind of case?

6 A I agree.

7 Q Do you agree with this passage: That
8 offenders serving a conditional sentence generally
9 have to abide by a more stringent set of
10 conditions than offenders on parole. While
11 serving the sentence, the offender is required to
12 abide by a number of particularly punitive
13 conditions, usually being house arrest or a strict
14 curfew. If the offender violates one of these
15 conditions without lawful excuse, there is a
16 presumption that he will be incarcerated for the
17 remainder of the sentence that was imposed.

18 A I agree.

19 Q Do you agree with this: That the
20 attraction of a conditional sentence is that it is
21 designed to be effective in achieving punitive
22 objectives such as denunciation and general
23 deterrence, as well as the goals of rehabilitation
24 and restorative justice.

25 A Yes, I agree.

1 Q That punitive objectives can be met
2 because conditions imposed will restrict the
3 offender's liberty?

4 A Yes.

5 Q Do you agree with this: In our system
6 of precedent, the law is what the appeal courts
7 say it is and it is therefore necessary to look to
8 what those courts say when attempting to identify
9 the law?

10 A Yes, we look to them for guidance.

11 Q And do you agree that where a
12 combination of both punitive and restorative
13 objectives may be achieved, a conditional sentence
14 would likely be more appropriate than
15 incarceration?

16 A Well, that's going to be driven by the
17 circumstances, but as a general proposition, I
18 think it certainly merits attention.

19 Q It comes from the Supreme Court in
20 Proulx?

21 A Yes.

22 Q You recognize that?

23 A Yes. But, of course, sentencing is
24 highly circumstance driven.

25 Q The article that I have been referring

1 to, Mr. Commissioner, and I have copies available,
2 you are aware of a fellow by the name of Professor
3 David M. Paciocco. He was one of the authors of
4 this.

5 A A learned author.

6 Q And I'm glad that you agree with
7 everything that he says in here.

8 THE COMMISSIONER: You better wait for
9 the next edition, it might be changed.

10 MR. NOZICK: I'm sure it will be.

11 BY MR. NOZICK:

12 Q Now, you came to the basis of your, or
13 one of the factors that you considered in coming
14 to the conclusion that the recommendation wasn't
15 justified was the amendment to section 742.2,
16 which received Royal assent on May 1st, and was to
17 come into force on December 1st of 2007.

18 A That's right. What I say is that
19 Crown counsel could make a submission based on
20 that, that essentially we recalibrate the public
21 interest, but of course the sentence in court has
22 to bear in mind section 11(i) of the charter.

23 Q Not only section 11, I mean, that was
24 the common law for years that an offender was
25 entitled to the more lenient of the sentence

1 between the time of the offence and the date of
2 the sentencing, always?

3 A I'm sure that was the understanding
4 before April of 1982.

5 Q And I'm going to suggest to you that
6 it would be improper for a Crown, in assessing
7 what a proper sentence should be, to consider a
8 pending amendment to the sentencing provisions,
9 keeping in mind section 11(i) and keeping in mind
10 the law with respect to how an offender is going
11 to be sentenced?

12 A I don't think that's the case. I
13 think that where Parliament has spoken and has
14 made a change like this, I think that when we
15 analyze where the public interest lies, I think we
16 are entitled to recalibrate our positions and ask
17 whether it is appropriate, in this case, even
18 though available in law, to impose a conditional
19 sentence. And of course, there are other
20 considerations here too such as the Crown policy.

21 Q Were you aware that prior to September
22 the 12th, apparently Mr. Wolson contacted
23 Mr. Minuk, and as a result of that they had a
24 discussion in which Mr. Wolson indicated, and this
25 is before September 12th, that he was not agreeing

1 to any evidence of consumption of alcohol, and
2 that Mr. Minuk agreed in advance to September 12th
3 that he would not be calling evidence with respect
4 to that issue?

5 A I wasn't aware of all of that.
6 Mr. Paciocco and I had a conversation last week in
7 which we -- and I believe it was on Friday, in
8 which he told me that Mr. Wolson had testified
9 that he wanted to address some aspect of the
10 proceedings of August 22nd.

11 Q I'm telling you, and my recollection
12 at least is that that was the agreement, that
13 prior to September 12th, Mr. Wolson indicated to
14 Mr. Minuk that he was concerned with respect to
15 that the anecdotal historical evidence of drinking
16 that had been referred to on August 22nd. And
17 sometime between, I think he said between
18 August 31st and September 12th, that he contacted
19 Mr. Minuk, and Mr. Minuk agreed not to call
20 evidence with respect to that.

21 A And I will accept that. I was merely
22 in my previous answer telling you what I
23 understood.

24 Q Assuming you now know that, what
25 effect does that have with respect to what took

1 place on September 12th? Let me put it another
2 way. Mr. Minuk would obviously have made an
3 undertaking and be bound by that undertaking;
4 correct?

5 A If Mr. Minuk had undertaken pursuant
6 to that discussion not to lead evidence of
7 consumption of alcohol, yes, he would be bound by
8 the undertaking.

9 Q And you make the point in your opinion
10 that not only is he bound by the undertaking, but
11 the members of the Department of Justice would
12 also be bound by that undertaking?

13 A Yes, it is a serious matter.

14 Q One time I think it was expressed that
15 the Crown speaks as one or as a whole; right?

16 A But the one indivisible proposition,
17 yes.

18 Q All right. So any phone calls that he
19 made, and you are aware that he apparently phoned
20 members of the Department of Justice on
21 September 12th, would be superfluous to that
22 agreement; fair?

23 A Sorry, I don't quite understand what
24 you are saying?

25 Q If Mr. Minuk made an undertaking that

1 he was bound by, that the members of the
2 Department of Justice would be bound by prior to
3 September 12th, when he made his phone call on
4 September 12, when he took the break, any
5 information that he provided or received would
6 have been superfluous to that decision?

7 A If he had given the undertaking, he
8 would be bound by it. And if during the break in
9 proceedings that we see preceding that colloquy at
10 pages 62 and 63 of the transcript, he discussed
11 this with members of the Department of Justice,
12 yes, that would not change the position that he
13 had adopted in the undertaking.

14 Q And in fact, it was pointed out by
15 other counsel at page 59 of the September 12th
16 transcript, in volume J at page 1738.7, when he
17 was asked whether he wanted to take a break, he
18 said that, line 26:

19 "What I would like to do before
20 answering is ask you for five
21 minutes?"

22 The Court said absolutely.

23 "And then I will come back and answer
24 the question. I could answer the
25 question now, but I think it might

1 take too long and I prefer to have the
2 five minutes beforehand."

3 So that would be consistent with him, having made
4 that undertaking to Mr. Wolson beforehand, that he
5 could answer that question now, in view of the
6 undertaking.

7 A That's fair, yes.

8 Q So did I understand -- I'm almost
9 finished, Mr. Commissioner.

10 THE COMMISSIONER: I'm listening
11 patiently.

12 BY MR. NOZICK:

13 Q Did I understand you to say that the
14 reason that you find the agreement for the
15 conditional sentence to be unacceptable, if I can
16 use that term, is because you thought that the
17 evidence of the alcohol should have been called,
18 because it might affect that. Is that fair?

19 A I see the issues as being connected,
20 yes.

21 Q But if the evidence of the consumption
22 of alcohol was not proveable -- and it has to be
23 proved beyond a reasonable doubt; correct?

24 A Yes.

25 Q So if it wasn't provable beyond a

1 reasonable doubt, then it would have no bearing on
2 whatever sentence might be imposed. Is that fair?

3 A That would be my understanding and I
4 believe I said as much to Mr. Clifford.

5 Q I'm just trying to understand it
6 myself.

7 So the bottom line, if the evidence of
8 the proof of the consumption of alcohol is not
9 sufficient to prove that fact beyond a reasonable
10 doubt, and you are left without that fact, then
11 the conditional sentence was within the acceptable
12 range; correct?

13 A That's correct. And the major concern
14 of Chief Judge Wyant would disappear, which had to
15 do with police officers and a higher standard of
16 conduct.

17 Q Yeah. We have come back to that,
18 police officers and higher standard of conduct.
19 That was dealt with in the submissions of counsel
20 on September 12th?

21 A That is correct.

22 Q And they dealt with the various cases,
23 and I don't have that degree of familiarity with
24 the cases as I probably should have, but my
25 recollection is that there were a number of cases

1 that police officers were treated in a similar
2 manner to civilian persons in the same position,
3 correct? The case can go both ways?

4 A They do. Chief Judge Wyant
5 characterized the leading case as a Nova Scotia
6 case from 1978, of a decision of Justice Hart that
7 he said stood for the proposition that police
8 officers are held to a higher standard, and that
9 it can be taken as a factor calling for a
10 heightened sentence.

11 Q But there were Manitoba cases cited to
12 Judge Wyant that were to the contrary?

13 A That's right.

14 MR. NOZICK: Thank you, sir, those are
15 my questions.

16 THE WITNESS: Thank you.

17 BY MR. GREEN:

18 Q Mr. Gover, my name is Mike Green, I'm
19 Marty Minuk's lawyer.

20 A Good afternoon.

21 Q It is late in the day and I can tell
22 you that I intend to be rather brief.

23 In your opinion you don't, in your
24 written opinion you don't list any of the Manitoba
25 cases setting out an appropriate range of

1 sentences for these types of charges; correct?

2 A That's right, I don't.

3 Q Mr. Peck and others have said that
4 they have done the research, and that in their
5 opinion the range of sentence here was appropriate
6 in that both cases where drinking, where alcohol
7 was involved and cases where alcohol was not
8 involved, often attract conditional sentences in
9 Manitoba. Are you aware of those opinions?

10 A I'm aware of the opinions and I'm
11 aware of the cases too.

12 Q Okay. Are you aware that Mr. Minuk
13 testified when he was on the stand last week that
14 he didn't understand Judge Wyant to be asking him
15 about the consumption of alcohol as an aggravating
16 factor in sentencing. Were you aware of that
17 testimony?

18 A No, I wasn't.

19 Q You will accept my say so that that
20 was his testimony?

21 A I will.

22 Q And it was his understanding, sir,
23 that the reason that the judge was raising the
24 question of consumption of alcohol was the
25 foundation of the plea. And would you agree with

1 me that in reading the transcript that is
2 certainly a logical interpretation to put on all
3 of that discussion of consumption of alcohol?

4 A I agree that in reading the
5 August 22nd transcript that is a logical
6 conclusion, because the chief judge referred to it
7 as forming the basis for the marked departure.

8 Q Yes. Now, did you say that this
9 distinction between a pure plea bargain and a
10 joint recommendation as to sentence isn't
11 something that is the law in your province,
12 Ontario?

13 A It is, to the best of my knowledge, it
14 is not part of our law. We extend deference to
15 joint positions more generally.

16 Q All right. Do you know whether it is
17 the law in any of the other provinces apart from
18 Manitoba?

19 A I don't. And I'm trying to recall
20 Sinclair and other cases. I don't believe they
21 cite authority from outside of Manitoba, but I
22 could be mistaken.

23 Q But the law in all of the provinces,
24 I'm assuming you will agree, is that deference
25 should be paid to these types of settlements,

1 regardless of whether they are pure negotiated
2 pleas or joint recommendations?

3 A Yes.

4 Q And what is the basis in your
5 province, Ontario, from departing from a joint
6 recommendation?

7 A The Ontario Court of Appeal has said
8 that a sentencing court is entitled to depart from
9 a joint submission on penalty only where the
10 proposed sentence would be outside the appropriate
11 range of sentence, such that it would bring the
12 administration of justice into disrepute or would
13 otherwise be contrary to the public interest.

14 Q And that, your understanding, is the
15 law in Manitoba as well, is it?

16 A That's what I take from the Manitoba
17 authority as well.

18 Q You said to Mr. Clifford that it was
19 your opinion that Mr. Minuk's entering into this
20 arrangement with defence counsel was ill-advised.
21 Is that correct?

22 A Yes.

23 Q Are you saying by ill-advised that he
24 failed to meet acceptable prosecutorial standards?

25 A Well, if you consider the policy on

1 conditional sentences, on its face, it doesn't
2 authorize entering into an agreement of this type.
3 I recognize that independent counsel are in a
4 somewhat awkward and unique position in that they
5 can't hold case conferences with senior
6 prosecutors as readily as staff prosecutors can.
7 But on its face, my view is that the conditional
8 sentence policy of April 2005 strongly discouraged
9 recommending the granting of a conditional
10 sentence. So often in advocacy it is a matter of
11 choice of language. Agreeing to one is
12 inconsistent with the policy.

13 Q We heard evidence from Mr. Kaplan this
14 morning, who was the person that referred this
15 file to Mr. Minuk, that he wouldn't agree with
16 your interpretation on that score. Would you be
17 prepared to defer to his opinion?

18 A I didn't hear his testimony. I would
19 defer to someone who deals with the Manitoba
20 conditional sentence policy on a regular basis.

21 MR. GREEN: Thank you very much, sir,
22 those are my questions.

23 BY MR. CLIFFORD:

24 Q Just a few very brief areas,
25 Mr. Commissioner.

1 Mr. Gover on the issue of proof and
2 Gardiner, and following on the questions of my
3 colleague, Mr. Nozick, I take it you are clear in
4 the distinction between proving, or being put to
5 the proof of mere alcohol consumption versus
6 alcohol consumption affecting the driving?

7 A Yes.

8 Q And when Mr. Nozick indicated to you
9 that in cases that seemed to suggest that alcohol
10 consumption is an aggravating factor, that it has
11 to be linked to the accident. In the cases that
12 you've reviewed, sir, that you maintain stand for
13 the proposition that mere consumption -- they
14 don't indicate that it needs to be linked to the
15 accident, do they?

16 A No, they don't.

17 Q In fact, they suggest that on the
18 basis of, and I'm not quoting the jurisprudence,
19 but I think I'm fairly characterizing it, that
20 they link it to a broad societal concern about the
21 practice of consuming alcohol and then driving,
22 and the recognition that it is, and I will quote
23 the jurisprudence "unwise to do so"?

24 A That's right. And in reviewing those
25 cases and the summaries of them that were provided

1 to me, I was reminded of the approach taken by
2 Provincial Appellate Courts, and one in particular
3 that comes in to mind, the Ontario Court of Appeal
4 in a case called McVey in 1985, the result of that
5 attitudinal change effected through, among other
6 means, Attorney General policies about prosecution
7 of impaired driving cases. And they really stand
8 for the proposition that drinking and driving is
9 unacceptable, that's the profound "C" change that
10 we needed to affect in attitude. And those cases
11 echo the policy of the courts acting on the urging
12 of Provincial Attorney General.

13 And sir, on that issue as well,
14 Mr. Nozick referred to the debate that may exist
15 with respect to this issue and the jurisprudence.
16 In looking at the transcripts, sir, of the
17 sentencing hearing, would you agree that it is a
18 fair reading that, in Judge Wyant's view, he was
19 considering it as a factor certainly in the
20 sentencing?

21 A I would say clearly he was, and the
22 link there is to the status or occupation of
23 Mr. Harvey-Zenk as a police officer in particular.

24 Q And he did so consider it until such
25 time as he was not permitted in law to continue to

1 do so?

2 A That's right. And that lead to his
3 comment in the sentencing proceedings on
4 October 29th, when he actually rendered judgment
5 on sentencing that this was a tale of two cases.

6 Q And on the basis of that, one can
7 easily conclude, would you not agree, that in
8 characterizing that fact as an aggravating or
9 neutral or mitigating fact, based on the final
10 thing that Judge Wyant had to say about this case,
11 he would have considered it to be an aggravating
12 fact?

13 A That's a very safe assumption, yes.

14 Q And the final area, again flowing from
15 Mr. Nozick's questioning, meeting a judge in
16 chambers, I take it does very little to comply
17 with the transparency that's required in an open
18 court, on the record, before the public?

19 A I agree entirely.

20 MR. CLIFFORD: That's everything in
21 re-direct. Thank you, Mr. Gover. And on behalf
22 of the Commission I would like to thank you for
23 your appearance here today and assisting Justice
24 Salhany.

25 THE WITNESS: Thank you.

1 THE COMMISSIONER: Thank you.

2 MR. NOZICK: Mr. Commissioner, I do
3 have copies of the article by Mr. Paciocco that I
4 will provide to the court.

5 THE COMMISSIONER: Well, we are going
6 to have submissions, but I would be grateful if
7 you could give it to me, since it is pretty heavy
8 and I would like to read it well in advance.
9 Maybe it will cut down the length of the argument.

10 MR. PACIOCCO: I would also like to
11 have time to prepare the royalty slips.

12 THE COMMISSIONER: Well, we are early
13 today, so we will start tomorrow morning. You
14 don't have any more witnesses ready to go? You
15 see, I come from the day where, when I practiced
16 law, the judge would say at 11:00 o'clock at
17 night, let's call the next case. That was a long
18 time ago.

19 MR. CLIFFORD: It is much more
20 generous nowadays.

21 THE COMMISSIONER: Reflecting on
22 Mr. Gover's appearance in the Court of Appeal in
23 Ontario, in his early years, and he is lucky that
24 he was not there ten years before when you never
25 had to call on counsel for the Crown. Thank you.

1 THE CLERK: All rise.

2 THE COMMISSIONER: Nine o'clock

3 tomorrow morning.

4 (Proceedings adjourned at 4:40 p.m.)

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COURT REPORTERS' CERTIFICATE

Debra Kot and Cecelia Reid, court reporters in the Province of Manitoba, do hereby certify the foregoing pages are a true and correct transcript of our Stenotype notes as taken by us at the time and place hereinbefore stated.

Cecelia Reid

Debra Kot

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