

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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Thursday, August 14, 2008

Volume 29

INQUIRY PROCEEDINGS

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Mr. Vincent Clifford Associate Commission Counsel
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Mr. G. Zazelenchuk and
Mr. S. Schmidt For Robert Taman and Family
Mr. M. Green and
Ms. K. Dixon For Mr. Marty Minuk
Mr. J. Prober and
Mr. B. King For Derek Harvey-Zenk
Mr. R. McDonald and
Ms. B. Bowley For R.M. of East St. Paul
Mr. H. Weinstein and
Ms. L. Labossiere For Mr. Harry Bakema
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Mr. G. McFetridge, Mr. S. Boyd and
Mr. S. Nozick For the Province of Manitoba
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1 Thursday, August 14, 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: Before I call upon
6 you, Mr. Prober, I wanted to address Ms. Hanlin.
7 I read your brief, it is comprehensive and covers
8 all of the issues that were raised by Mr. Paciocco
9 in his argument, and I wanted to commend you for
10 it.

11 I also wanted to apologize to you for
12 my outburst yesterday. We have all been under a
13 lot of stress here, and I've been under a lot of
14 stress in an effort to complete this matter by
15 4:30 today, when we are going to be ejected from
16 this room, and I was anxious to make sure that
17 every counsel had an opportunity to make their
18 submissions to me. So I hope you will accept my
19 apologies.

20 MS. HANLIN: I do. I understand,
21 Mr. Commissioner. Thank you.

22 THE COMMISSIONER: Thank you.
23 Mr. Prober.

24 MR. PROBER: Good morning.

25 THE COMMISSIONER: Good morning. I

1 take it you have your notes up there. You were
2 walking alone, I thought maybe you were just going
3 to --

4 MR. PROBER: Say hello, good morning,
5 and give you the other 11 reasons?

6 THE COMMISSIONER: No, I can assure
7 you, I don't expect it.

8 MR. PROBER: I wouldn't give them to
9 you until after the report in any event.

10 THE COMMISSIONER: Well, we may have
11 another investigation sometime until the future to
12 deal with.

13 MR. PROBER: Oh yes, you and I.

14 THE COMMISSIONER: Yes.

15 MR. PROBER: Mr. Commissioner, you
16 appear to be ready and I'm ready to proceed.

17 THE COMMISSIONER: Yes, thank you.

18 MR. PROBER: This inquiry is not an
19 inquiry into whether Derek Harvey-Zenk was
20 impaired at the time of this tragedy. It's not an
21 inquiry into whether he drank or how much he
22 drank. That's not the focus of this inquiry.
23 Obviously, there was evidence about that, but it
24 is not an inquiry into Derek Harvey-Zenk's memory
25 loss. This is not a retrial, nor should it be.

1 It's not a resentencing, nor should it be. Derek
2 Harvey-Zenk's interest should not be in jeopardy
3 again. He's already been dealt with in the
4 courts.

5 And I ask you to keep in mind, as I
6 know you will, Mr. Commissioner, that this inquiry
7 is into the investigation and prosecution of Derek
8 Harvey-Zenk. He is the subject, was the subject
9 of the investigation. He is not a participant and
10 was not a participant as an investigator. He's
11 the subject of the investigation and he was the
12 subject of the prosecution, not a participant in
13 the prosecution. And as such, I say to you that
14 he has no onus to prove anything, he has no
15 obligation to prove anything. And I'll deal with
16 this a little later.

17 I only want to deal with two areas
18 before I make some closing comments. One is to
19 put the consumption of alcohol in perspective, and
20 two, comments about Commission Counsel's position
21 with respect to Derek Harvey-Zenk's memory loss.
22 And I certainly take issue with some of the things
23 he said.

24 Firstly then, let me deal in a summary
25 way with the indices of drinking and impairment

1 after the accident. There were seven witnesses,
2 that I have counted, that gave evidence in
3 relation to Derek Harvey-Zenk's walk or gait.
4 There were four civilians and three police
5 officers. And the civilians were Beattie, Shaw,
6 Bukowski and even Ms. Taman. The police officers
7 were Carter, Bakema, and Woychuk, who deserves
8 special mention. Briefly, the evidence is that
9 there was no staggering, no stumbling, his walk
10 was normal, his posture was normal, he wasn't
11 falling down and he didn't need assistance in
12 walking.

13 Woychuk deserves special mention
14 because he presented four scenarios over the
15 period of time that he was involved in this.
16 First of all, his notes, his rough notes, final
17 notes, indicated nothing unusual about Derek
18 Harvey-Zenk's walk. His narrative referred to his
19 being unsteady on his feet. The RCMP interview
20 said that he was stumbling a bit. And finally,
21 the Commission interview, he said he was
22 staggering. Well -- and I asked him, would we
23 know which one to choose? He said no. Seven
24 witnesses gave evidence about Harvey Zenk's walk.

25 Secondly, eight witnesses, as I have

1 counted them, gave evidence or made comments about
2 the odour of liquor. Three witnesses said there
3 was no odour. Two civilians at the scene said
4 there was no odour, that is Beattie and Bukowski.
5 One police officer at the scene said there was no
6 odour of liquor emanating from Derek Harvey-Zenk,
7 and that was Bakema. Five witnesses gave evidence
8 that there was an odour of liquor. Two
9 paramedics, Rosser and Fontaine, and three police
10 officers, Pedersen, Woychuk and Carter. And
11 Carter deserves special mention.

12 Carter, for the first time told this
13 Commission that he noticed a strong odour of
14 liquor, and he's the only one to say that there
15 was a strong odour of liquor, when he opened the
16 door of the police car when he was outside the
17 police station, one foot away, and then he put his
18 head in the car, he was one foot away from Derek
19 Harvey-Zenk. We hear this for the first time. As
20 I said, there is nothing in Carter's rough notes,
21 there is nothing about this in his final or clean
22 notes. There is nothing about this in his
23 narrative. And there is nothing about this in his
24 RCMP interview where he specifically says
25 something different. He says that he first

1 noticed the odour of alcohol when Derek Harvey
2 Zenk was put in the interview room. So his
3 evidence about the odour of alcohol is suspect.

4 THE COMMISSIONER: I thought you said
5 you weren't retrying the case.

6 MR. PROBER: No, but I have to,
7 unfortunately -- I thought you might say that.

8 THE COMMISSIONER: Well, I'm only
9 responding to what you said.

10 MR. PROBER: No, no, I understand.
11 And my position is that there was evidence
12 elicited by Commission Counsel about this, and I
13 have to respond and put it in its perspective, it
14 will take me about five more minutes. But I say
15 to you that in the end it's clear, in my
16 respectful submission, there was no evidence that
17 Derek Harvey-Zenk was loaded, in the words of the
18 sentencing judge, unfairly so I say, or that he
19 was intoxicated, or that he was drunk.

20 THE COMMISSIONER: Or that he was
21 impaired.

22 MR. PROBER: Yes.

23 THE COMMISSIONER: What do you say
24 impairment means?

25 MR. PROBER: Well, impairment means --

1 THE COMMISSIONER: I was going to ask
2 Mr. Weinstein, but since I didn't hear the 12
3 reasons why he wanted to say something, I didn't
4 ask him the question.

5 MR. PROBER: If an individual is
6 impaired, it obviously affects adversely one's
7 ability to either navigate a motor vehicle of some
8 sort, or a boat or a motorcycle.

9 THE COMMISSIONER: But need there be
10 substantial impairment --

11 MR. PROBER: No.

12 THE COMMISSIONER: -- excessive?

13 MR. PROBER: No.

14 THE COMMISSIONER: Any form of
15 impairment?

16 MR. PROBER: If the impairment affects
17 adversely the method of driving, then you can
18 certainly consider that impairment, there's no
19 question about that. One can be impaired without
20 being, as we know, without being over .08. One
21 can be impaired by the ingestion of marijuana or
22 some other drugs.

23 THE COMMISSIONER: And often the
24 so-called classical symptoms that the police
25 officers repeat in court and the litany of the

1 usual, glassy eyes, et cetera, et cetera --

2 MR. PROBER: Right.

3 THE COMMISSIONER: -- don't exist, but
4 there still may be impairment.

5 MR. PROBER: Yes, I agree. There's no
6 question about that.

7 THE COMMISSIONER: That's why I'm
8 wondering, if you were concentrating on the
9 various indicia that police officers --

10 MR. PROBER: I am, because that's the
11 evidence we have.

12 THE COMMISSIONER: Okay.

13 MR. PROBER: We have the evidence of
14 his walk, we have the evidence of the odour of
15 liquor. We have one witness who commented on his
16 speech, Constable Pedersen who said it was slow
17 and deliberate, but said that that might be his
18 normal way of speaking. We have two witnesses who
19 commented on his eyes and face, Carter and
20 Pedersen. Pedersen said he had glassy eyes but
21 she said they could be like that normally, or
22 could be tired. Carter described his face as
23 flushed, and he didn't know whether it was
24 normally like that, and he also said glassy,
25 bloodshot eyes, yes, the classical symptoms. But

1 he said he wouldn't know if they were like that
2 because he was tired or because he's normally like
3 that in terms of his eyes. But there were five
4 witnesses that commented directly on the issue of
5 impairment. One civilian, Beattie, who said he
6 was not drunk; two paramedics, Rosser and
7 Fontaine, experienced in this sort of thing, said
8 that, I think Rosser, as I recall said that if he
9 were obviously impaired, he would have noted that
10 and didn't. He acknowledged an odour of alcohol,
11 liquor, and agreed that that does not mean one is
12 impaired. Fontaine said no other signs of
13 impairment except the odour of liquor. Woychuk
14 said, no signs of impairment except the slight
15 odour of liquor. Sergeant Isaak, when he attended
16 the East St. Paul Police Station, saw him at about
17 12:30 and said that he wasn't impaired. So those
18 are my comments on that. And I say to you,
19 Mr. Commissioner, that in the end there was no
20 evidence of substantial impairment, no evidence
21 that he was pissed, loaded or drunk, various words
22 we've heard.

23 There are two areas that I need to
24 touch on before I leave the issue of drinking, and
25 these areas highlight the patently unfair

1 treatment my client received in the media. First
2 of all, you will recall the evidence of Cecil
3 Sveinson, who said that he heard second, third or
4 fourth hand that there was some officers that
5 tried to take Derek Harvey-Zenk's keys away and
6 stop him from driving. Well, we have since
7 learned -- of course, that received front page
8 treatment by some of the media -- then we since
9 learned that it wasn't his keys, but rather Dave
10 Harding's keys, as you mentioned yesterday, and
11 Tracy Fudge in her evidence confirmed that. And
12 when we hear that correction and that
13 clarification, the press is silent.

14 Then we have the other glaring example
15 of what I submit is unfair media coverage. And
16 Commission Counsel was of the view that the
17 wing-eating Super Bowl police officer was Derek
18 Harvey-Zenk, and that's the same person that was
19 at Branigan's who had consumed eight or nine beer.
20 And Commission Counsel appeared to be convinced of
21 that, even in the face of the evidence of Chelsea
22 O'Halloran, who couldn't pick out that person,
23 whom we now know is Chris Guyot. And to his
24 credit, Commission Counsel said, during the
25 examination of Sergeant Girard, and I can indicate

1 for the record, Mr. Paciocco said, and I should
2 indicate for the record that we have since learned
3 through this Commission that it would not have
4 been Derek Harvey-Zenk who had consumed the eight
5 beer that she attributed to him. Front page story
6 when it first appeared, and when it's corrected
7 and clarified, the fourth estate is silent.

8 Those are my comments on the issue of
9 alcohol consumption.

10 The second issue I want to deal with
11 is the issue of the memory loss. Commission
12 Counsel devoted a little space in his argument, in
13 his written aids to argument, and a little time to
14 the issue of Derek Harvey-Zenk's loss of memory.
15 And I say to you, respectfully, that it was little
16 more than rhetoric, bald assertions, speculation,
17 and an attempt by my friend to put an onus on
18 Derek Harvey Zenk to prove something when no onus
19 exists, in my respectful submission.

20 Now, Commission Counsel is very
21 skilled, probably as good as anybody I have ever
22 seen in terms of the use of the English language.
23 Yet I say to you, Mr. Commissioner, and I say to
24 my friend that he did not choose his words well or
25 accurately in this area of his submission. And

1 I'll get to that in a second. And I say to you as
2 well, and I know you will keep in mind that Derek
3 Harvey-Zenk's loss of memory had nothing to do
4 with the -- and was not at all relevant to the
5 prosecutorial decisions that were made by
6 Mr. Minuk. And I would simply refer you to
7 Mr. Minuk's evidence when I questioned him. He
8 confirmed that the staying of the charges had
9 nothing to do with the fact that Derek Harvey-Zenk
10 had no memory of the incident, and the joint
11 recommendation as to sentence had nothing to do
12 with that.

13 I say to you, Mr. Commissioner, that
14 it's wrong to characterize this as a memory loss
15 claim. Derek Harvey-Zenk makes no such claim,
16 it's a fact that he has no memory of most of what
17 happened. And it's a fact that I submit is
18 uncontradicted.

19 Commission Counsel said, unfortunately
20 there's no evidentiary support, just his own word.
21 And I say to you his own word is sufficient, it's
22 uncontradicted, it's unchallenged, and it was not
23 shaken by examination, or rather cross-examination
24 of my friend.

25 In dealing with the issue of a

1 so-called concussion claim, I say to you as well
2 that there is not a claim that was made by Derek
3 Harvey-Zenk, he was simply repeating what he was
4 told. But in terms of the memory loss claim, my
5 friend says it's predicated on, predicated on the
6 fact that he had a conversation with his mother
7 and his psychologist has told him that it may be
8 attributable to post-traumatic stress. Well, it's
9 not predicated on anything except on the fact he
10 can't remember, except as he said, bits and pieces
11 and snippets. And again, the concussion claim,
12 he's not making a claim, he's simply relating what
13 he was told. He does not know what causes his
14 memory loss. He has been told that it's either
15 post-traumatic stress or that there was head
16 trauma.

17 And remember Rosser, my friend
18 referred to Rosser, the paramedic. He said to me
19 on cross-examination that a concussion can emerge
20 later.

21 Now, in dealing with the so-called
22 issue, or with the issue of a so-called concussion
23 claim, Commission Counsel, I am sure
24 inadvertently, misstated the evidence. He said to
25 you that the traffic accident report is important,

1 because in the traffic accident report Derek
2 Harvey-Zenk listed a sore leg and a bloody nose
3 but not a hint of a head injury. Well, my friend
4 was mistaken. If you look at Exhibit 70, and it's
5 in volume E-1 at tab E -- well, you know what, I
6 can read it, it's very short.

7 "On February 25th, at approximately
8 7:00 a.m. I became involved in a
9 collision on Lagimodiere. I was
10 wearing my seat-belt at the time. My
11 air bags deployed as a result of the
12 collision. I sustained a bloody nose
13 and a cut to the inside of my lip."

14 Nothing about a sore leg. And I'm sure, my
15 friend, as I say, inadvertently misstated that
16 evidence and I just wanted to clear that up.

17 I could tell you there's a couple of
18 traffic accident reports, if you're looking at it,
19 Mr. Commissioner, it's at the bottom of -- the
20 page number at the bottom is 501.

21 THE COMMISSIONER: I have it, thank
22 you. I've read it.

23 MR. PROBER: Okay. Thank you.

24 Furthermore, in dealing with the concussion issue,
25 Commission Counsel says Derek Harvey-Zenk was

1 lucid. Well, that is one bald assertion, I say,
2 amongst others, that is without foundation and
3 without proof. The only evidence we heard was
4 that he was distraught, that he was in shock.
5 Bukowski said that, in terms of being in shock,
6 Rosser said that, and Woychuk said it.

7 Now, there's no evidence that my
8 friend pointed to or can point to that indicated
9 that Derek Harvey-Zenk was lucid. My friend said
10 he made complex decisions. That again is a bald
11 assertion. No evidence was pointed to by my
12 friend, it is without foundation, without proof,
13 and there is no evidence of any complex decisions
14 that were made by Derek Harvey-Zenk.

15 My friend says that Derek Harvey-Zenk
16 had relevant evidence to give, that he had
17 information to assist the Commission but chose not
18 to, as if it were a conscious decision that Derek
19 Harvey-Zenk made. Well, he simply couldn't assist
20 the Commission. If my friend says Derek
21 Harvey-Zenk has relevant evidence to give, he must
22 know what it is. But that wasn't put to him.
23 Otherwise, it's simple speculation.

24 What concerns me, Mr. Commissioner,
25 and I say what should concern you is the

1 suggestion that Derek Harvey-Zenk had some sort of
2 onus or obligation to produce a medical report or
3 a medical -- or medical information to explain his
4 memory loss.

5 Derek Harvey-Zenk, I say to you, was
6 and is under no obligation to prove anything at
7 this inquiry. He is a witness, like any other
8 witness. I think to suggest otherwise, to suggest
9 he has some sort of onus flies in the face of the
10 terms of reference of this inquiry.

11 Again, it's not an inquiry into his
12 memory loss. He was the subject of the
13 investigation that this inquiry is looking at, he
14 was the subject of the prosecution, not a
15 participant. He was here as any other witness
16 was. What is more, if my friend had issues about
17 that, he could have easily subpoenaed the hospital
18 records, chose not to do so. He could have
19 subpoenaed Derek Harvey-Zenk's mother, chose not
20 to do so. He could have subpoenaed Dr. Davis,
21 whose report he referred to, that's Exhibit 250,
22 and quotes from that report as if Derek
23 Harvey-Zenk had some memory of the accident. I
24 say to you, Mr. Commissioner, I'm not going to
25 read it to you again, I would urge you to look at

1 the report. I submit that you'll agree that it's
2 taken out of context and that it's misinterpreted.
3 The comment made by Dr. Davis does not reference
4 the accident or Derek Harvey-Zenk's memory of the
5 accident, not at all. And I don't want this to,
6 what I'm about to say, to detract from the
7 position I have advanced, because I am of the view
8 and it is my respectful submission that there is
9 no obligation on Derek Harvey-Zenk to prove
10 anything.

11 However, in writing your report, if
12 you think that the medical report would be helpful
13 to you, Derek Harvey-Zenk is prepared to get one
14 to you. Now, that would not affect anybody else,
15 it would only affect the issue of an explanation
16 for his memory loss. But if you say that you want
17 that, he will get that for you, he's assured me of
18 that. So I make that offer without, hopefully,
19 detracting from the position that I have advanced.

20 And when you consider Derek
21 Harvey-Zenk's evidence and his demeanour on the
22 stand, I would ask you to keep in mind what others
23 said about him. Sergeant Anderson, quiet,
24 well-behaved, respectful, no cause for concern on
25 the job -- quiet, well-behaved, respectful, no

1 cause for concern on the job, a great addition to
2 the shift. Constable McLure, I believe was his
3 partner at some point, said he behaved responsibly
4 when she was out with him, he was a good police
5 officer, did his work diligently, thoroughly and
6 carefully, was a pleasant individual. Sergeant
7 Humniski described him as conscientious,
8 responsible, a quieter member, a steady worker, no
9 problem with him. And you asked him a question as
10 to whether Derek Harvey-Zenk was a type of
11 individual that would accept direction and advice,
12 and he confirmed that he would.

13 Those are my comments with respect to
14 the two issues I want to address. There are three
15 comments I make in my closing remarks.

16 First of all, with respect to the
17 recommendations, Mr. Paciocco and I have discussed
18 this, and I wasn't going to say anything about it
19 but he said, well, maybe you could do something
20 constructive for a change. And I am prepared to
21 suggest to you that rather than, or in addition to
22 a panel of senior criminal defence lawyers, you
23 might consider recommending that could include
24 retired judges. I mean, we have some good judges,
25 both from the Court of Appeal, Justice Twaddle is

1 retired, Justice Helper is retired, Justice Huband
2 is retired, Queen's Bench, Justice Hewak, and you
3 know Chief Justice Hewak, Justice Nurgitz, Justice
4 Simonsen, Justice Morse, and also retired Crowns
5 and also retired Provincial Court judges. So --

6 THE COMMISSIONER: And they need
7 something to do.

8 MR. PROBER: Yeah, exactly. So that
9 was an idea that was sort of, Mr. Paciocco thought
10 was a good one. That's good after six weeks of
11 being with Mr. Paciocco, he thought I came up with
12 a good idea finally.

13 Also, Derek Harvey-Zenk has asked me
14 to indicate to this Commission again, in the same
15 words that he did to Judge Wyant, and he said this
16 to Judge Wyant.

17 "I find it difficult to put into words
18 what I am feeling. I don't know what
19 to say to someone when you have taken
20 away his or her most precious gift. I
21 feel I need to apologize to so many
22 people. Most importantly, I feel I
23 need to apologize to the Taman family.
24 I know that I have caused a great deal
25 of pain and sorrow to a lot of people.

1 Mere words will never be enough to
2 fill the emptiness and loss that
3 everyone must feel. I hope that
4 everyone can hear the sincerity in
5 what I am saying."

6 Continuing on Derek Harvey-Zenk says:

7 "I have taken away someone so loved
8 and cherished and for this I am deeply
9 and profoundly sorry. Everyday I am
10 sorry, I am sorry that your precious
11 wife, mother, daughter, sister and
12 friend was taken from you all. I pray
13 for that, I pray that Ms. Taman and
14 everyone that I have hurt can find
15 peace. I know that I have hurt you
16 all so deeply and I wish I could take
17 away that pain. I don't think I will
18 ever be able to apologize enough to
19 everyone, and I would like everyone to
20 know that everyday I take a loss of
21 life with me. Ms. Taman is always in
22 the forefront of my thoughts. I am so
23 deeply sorry."

24 He wanted me to read that again today.

25 Finally, and I have told Robert Taman

1 this, and to the Taman family I have expressed my
2 own personal sympathy, but also commend them for
3 the courage that they've had to come here everyday
4 and relive this tragedy.

5 And lastly, I would like to thank my
6 friends and you, Mr. Commissioner, and that's all
7 of you, not just Commission Counsel but my other
8 colleagues in the room, for their professionalism
9 and courtesy. And your comments to Ms. Hanlin
10 this morning demonstrate that clearly. I also
11 want to thank the staff of the Commission and the
12 sheriff's officers who have been very helpful to
13 all of us. Thank you.

14 THE COMMISSIONER: Thank you.

15 MR. GREEN: Good morning,
16 Mr. Commissioner.

17 THE COMMISSIONER: I am just noting
18 Mr. Prober's comments on the recommendations.
19 Yes, Mr. Green.

20 MR. GREEN: Thank you,
21 Mr. Commissioner. Yesterday, at coffee when we
22 had coffee break yesterday, there were a number of
23 the lawyers gathered outside with their coffee in
24 hand and the topic of how long each of us was
25 going to be, and our submissions came up

1 understandably. And Mr. Clifford said to me,
2 facetiously, well, Mike, it won't take you very
3 long, I mean, how long does it take to wrap up
4 Richard Peck's opinion, put a bow on it and hand
5 it to the Commissioner. He was being facetious,
6 but, Mr. Commissioner, with the greatest of
7 respect, that report and the evidence of
8 Mr. Richard Peck is, in my submission, really a
9 complete answer to the task that you have been
10 assigned.

11 Mr. Peck has incredible impressive
12 credentials. You heard him give his evidence and
13 you know him from other movies, I suppose, but a
14 most impressive individual. A man of
15 accomplishment, a man of obvious integrity, and a
16 man who calls them as he sees them. With the
17 exception of two rather minor areas,
18 Mr. Commissioner, Mr. Peck gave Mr. Minuk a
19 complete clean bill of health.

20 And Mr. Peck, you know, he is a true
21 expert in the sense, in the traditional sense that
22 he is an assistance to the court, or more
23 accurately to the Commission. He is not some
24 hired gun or shill, that you might see in some of
25 the civil cases that we have these days, he was a

1 true expert. He was, in my submission, impartial,
2 been commissioned by Mr. Paciocco to give the
3 opinion, and he should be paid great heed. I
4 would invite you in your deliberations to read
5 carefully his written opinion and to consider his
6 testimony.

7 Mr. Commissioner, there were, of
8 course, four charges laid against Derek
9 Harvey-Zenk as a result of the death of Crystal
10 Taman. There was criminal negligence causing
11 death, impaired driving causing death, dangerous
12 driving causing death and refuse breathalyzer.
13 Both Mr. Paciocco and Mr. Clifford, in their oral
14 submissions the day before yesterday, conceded
15 that this wasn't really a criminal negligence case
16 at all, and probably that that charge should not
17 have been laid. That's consistent with
18 Mr. Minuk's assessment. And we have the evidence
19 of the Tamans in that regard. You will recall
20 that at the very first meeting that Mr. Minuk had
21 with the Tamans, it was their recollection that he
22 told them that the criminal negligence charge was
23 really overkill and that wasn't likely to go very
24 far.

25 So what we're effectively left with

1 are the impaired driving charge causing death, the
2 dangerous driving and, of course, the refusal.

3 Mr. Commissioner, the evidence is
4 overwhelming that what Derek Harvey-Zenk was
5 potentially facing in the way of sentence, whether
6 he were to be convicted of impaired driving
7 causing death or dangerous driving causing death,
8 was a jail sentence of less than two years to be
9 served in the community. The evidence is
10 absolutely overwhelming on that. That is the
11 opinion of many, many of the people that
12 testified, the experts that testified before you.

13 With the exception of Mr. Gover, who
14 based his opinion on a law that wasn't amenable to
15 the Criminal Code of Canada, that really wasn't in
16 effect at the time, everyone else was of the view
17 that a conditional sentence, regardless of whether
18 a conviction of impaired or dangerous was
19 ultimately made.

20 You can refer to the evidence of
21 Mr. Wolson on that score, Mr. Commissioner.
22 That's the evidence given by him on July 28 at
23 page 5649 of the transcript, Mr. Minuk's evidence,
24 of course, and Mr. Peck and Mr. Kaplan and
25 Mr. Slough. The legal briefs that had been

1 submitted to the Commission confirm that those,
2 that that was likely the result, that there would
3 be a conditional sentence.

4 Four of the cases that were submitted
5 to Judge Wyant and that have been referred to
6 before you, two of which are Court of Appeal
7 decisions, there was significant alcohol involved
8 in those cases. And yet the outcome in each and
9 every case was a conditional sentence, a jail
10 sentence to be served in the community.

11 The reference to Mr. Kaplan's evidence
12 on that, Mr. Commissioner, is in volume 5,
13 August 5, pages 6687 and 88. Mr. Slough's
14 evidence is volume 26, August 6th, pages 6891 and
15 6892. And we also have the evidence of Mr. Nozik
16 on that score, and you correctly pointed out to
17 him that perhaps he shouldn't be giving evidence
18 from the counsel table at the time.

19 But most confirmatory, I would
20 suggest, Mr. Commissioner, was your exchange with
21 Mr. Slough. I'm sure you recall that. Mr. Slough
22 was the individual who had taken many of the
23 appeals to our Court of Appeal on the question of
24 conditional sentences and drinking and driving and
25 all that sort of thing. And you asked him, I

1 mean, did you ever give up trying to convince the
2 court otherwise? He didn't say that he gave up,
3 but he said that at some time you have to realize
4 that you're banging your head against the wall,
5 and that you have to be selective in the cases
6 that you actually pursued. And he cited to you
7 the Eckert case. And my friend, Mr. Zazelenchuk,
8 has also alluded to that case, but there the facts
9 were extremely different from those here. There
10 was rampant drinking and many, many other
11 aggravating factors to go on.

12 So my point is that the sentence that
13 was agreed to, or recommended I should say, by
14 Mr. Minuk and Mr. Wolson, was exactly -- and
15 ultimately confirmed and found by Judge Wyant --
16 was exactly what was to be expected. It was
17 nothing that was lost in that respect.

18 On its face, Mr. Commissioner,
19 Mr. Gover's opinion, which apparently was endorsed
20 by Mr. Clifford the day before yesterday, that the
21 acceptance of the plea bargain by Mr. Minuk was
22 ill-advised, you will recall that phrase being
23 used. I would suggest that on its face, that
24 makes little sense. The sentence that was
25 recommended was exactly that which was to be

1 expected based upon the jurisprudence and the
2 facts of the case.

3 Your mandate is of course, sir, to
4 determine whether Minuk met acceptable
5 prosecutorial standards.

6 Mr. Gover was asked in
7 cross-examination whether in using the phrase
8 ill-advised, he was or was not saying that
9 expected standards were or were not met. He kind
10 of fudged on the answer, but he said that he felt
11 that expected standards were not met based upon
12 the Crown directive, the Crown policy dealing with
13 conditional sentencing. You will recall that
14 policy, there's been much discussion about it.
15 But Mr. Gover did say, fairly I might add, that he
16 would defer to the opinion of people who actually
17 work with that policy. And I referred him to the
18 evidence of Mr. Kaplan that's to the effect that
19 the sentence was within that policy, that it came
20 within the fourth bullet, that is that there were
21 decisions to the contrary. And Mr. Gover agreed
22 that if that's what Mr. Kaplan said, that he would
23 accede to it.

24 Mr. Kaplan's evidence was clear on
25 that, that he felt that the sentence was within

1 guidelines, was within that policy, and the same
2 was forthcoming in evidence from Mr. Slough. So
3 that effectively, in my submission, removes any
4 suggestion that in accepting, or making the plea
5 arrangement that was made, that there was any
6 deviance from accepted prosecutorial standards.

7 That only leaves Mr. Clifford who
8 apparently still feels that it was ill-advised.
9 But fortunately for Mr. Minuk, Mr. Clifford's
10 opinion doesn't count. Just like Mr. Nozik, he is
11 not entitled to give evidence from the counsel
12 table.

13 So the evidence, in my submission, is
14 overwhelming that there was no failure to meet
15 prosecutorial standards in that regard.

16 The references that I would make in
17 substantiation of that are Mr. Kaplan's evidence
18 found at page 6813 and at 6678, and Mr. Slough's
19 evidence of August 6th found at page 6949.

20 One of the areas that Mr. Peck did
21 have some problems with, Mr. Commissioner, as far
22 as Mr. Minuk's performance is concerned, was that
23 of his having mentioned anecdotal evidence. It
24 was Mr. Peck's opinion, however, that that was
25 overreaching, to use his phrase, on the part of

1 Mr. Minuk, and that perhaps it shouldn't have been
2 mentioned at all.

3 In defence of Mr. Minuk, as respect to
4 that submission to Judge Wyant, I think it's
5 reasonable to cast your mind back to what the
6 circumstances were at that time, Mr. Commissioner.
7 This case had received a tremendous amount of
8 publicity, right from the get-go, that was the
9 case. A lot of publicity about cops out at a bar
10 at night, repairing to Constable Black's place,
11 more liquor being consumed, and ultimately the
12 accident. There was just a great deal of, you
13 know, reporting on that and critical comment on
14 that that really had to be addressed.

15 Unfortunately, the evidence couldn't establish,
16 couldn't establish a tie between the drinking and
17 the accident itself, couldn't make that
18 connection. And that's, in essence, in my
19 submission, what Mr. Minuk was doing when he made
20 that reference to anecdotal evidence, but no
21 adverse effect on Mr. Zenk's abilities, there was
22 no observable discernible effect.

23 THE COMMISSIONER: It was a throw-away
24 line that caused a lot of problems.

25 MR. GREEN: It sure was. But I'm

1 suggesting to you, sir, that it was more than a
2 throw-away line. It was something that really had
3 to be addressed in some fashion. What if
4 Mr. Minuk just went into court that day and
5 entirely ignored the question of alcohol? I mean,
6 what would the outcry then be? There would be a
7 tremendous upsurge of speculation that this really
8 is a deal, there's no mention of alcohol at all
9 being made by the Crown. There must be a, you
10 know, a crooked deal between him and the defence
11 lawyer, et cetera, et cetera. It's bad enough
12 when it was mentioned, but if it hadn't been
13 mentioned, what would the result have been?

14 THE COMMISSIONER: Yes. But
15 prosecutors have an important role. I mean, they
16 can't go in and fudge. They've got to be able to
17 stand up and say, this is what it is. If they
18 want to take on that role, they have to accept the
19 criticism that comes with it. And you can't play
20 both sides. And maybe he was trying to be as
21 polite as he could, because he was being pressured
22 by, or at least concerned about the Taman family
23 and the Sveinson family.

24 MR. GREEN: Exactly, and the public,
25 and certainly the family. They would have been

1 outraged if no mention had been made. Now, again,
2 with the wisdom of hindsight and all the trouble
3 that ensued and all the controversy that resulted,
4 yes, maybe he shouldn't have said anything. But
5 we're living in a media age, unfortunately,
6 Mr. Commissioner, and some of the rules, the
7 purest rules about what's said in a courtroom and
8 what isn't said in a courtroom, they are going to
9 have to somehow be accommodated, but in some ways
10 they are going to have to take a bit of a back
11 seat.

12 THE COMMISSIONER: I think it was
13 Harry Truman who said, if you don't like the heat,
14 get out of the kitchen. And that's the way we all
15 have problems in the administration of justice.
16 Judges have to take strong positions knowing they
17 are going to be criticized. Crown Attorneys have
18 to take strong positions knowing they are going to
19 be criticized, and take the heat, defence counsel
20 as well.

21 MR. GREEN: Yes, but I'm not
22 suggesting it would be just to avoid criticism,
23 I'm not saying that was the motivating factor,
24 Mr. Commissioner. It's something that the public
25 would be interested in, and there was a great deal

1 of public interest in this case, that's for sure.

2 As Mr. Peck has said, that was perhaps
3 something that shouldn't have been done. And
4 again, looking back, I suppose that's right,
5 particularly when one recognizes the fallout, but
6 that doesn't come anywhere near to a breach of
7 expected prosecutorial standards.

8 Another area where Mr. Peck has some
9 criticism is in the alleged failure of Mr. Minuk
10 to make it clear on August 22nd, in his
11 submissions to Judge Wyant, that this was a true
12 plea bargain and not just a joint submission. He
13 does point out that that was rectified in spades
14 on September 12th, as indeed it was. I guess his
15 point is, no harm, no foul. But, again, if we
16 sort of look at all the circumstances, Mr. Minuk
17 really had no basis, in my submission, for
18 suspecting that the judge didn't know that this
19 was a true plea bargain, if you will, straight
20 from the fact that three charges are being dropped
21 and there's a joint submission on sentencing. As
22 many of the witnesses said, yeah, that's a plea
23 bargain, for sure.

24 Additionally, you will recall that on
25 July 17th, at the behest of Mr. Wolson, Mr. Minuk

1 and Mr. Wolson went in to see Judge Wyant
2 beforehand. And the evidence of both of them is
3 that although a great deal of detail wasn't gone
4 into, Mr. Minuk mentioned that there were problems
5 with the case. One would think that that being
6 the case, the judge would know, well, this is a
7 plea bargain. I've got two lawyers here, they are
8 meeting with me beforehand, they have come to some
9 agreement. Of course, it's a plea bargain. And
10 on the way out from that meeting, Judge Wyant
11 says, you know, I'm always mindful of senior
12 counsel and I'm respectful of their opinions. I'm
13 not going to make any judgment, no commitment in
14 advance, but I can tell you that this afternoon, I
15 am sentencing a fellow for manslaughter and I'm
16 giving him a conditional sentence. What inference
17 is going to draw from that? None, I would submit,
18 but that the judge understands that this is a plea
19 bargain.

20 Additionally, you will recall that
21 when Judge Wyant wrote to Mr. Wolson and Mr. Minuk
22 on August 31st, he in fact used the phrase "plea
23 bargain." He said, I'm thinking of going against
24 the recommendation of the plea bargain. And in
25 his opening remarks, his very first sentence that

1 day in court, he uses the phrase "plea bargain."
2 So how is Mr. Minuk to understand that the judge
3 doesn't get it that this is a plea bargain?

4 THE COMMISSIONER: Well, I think the
5 judge went further and said, I'm rejecting the
6 plea bargain, which it's not up to him to reject a
7 plea bargain. He plays no part in the bargain.
8 The bargain is made between counsel. And the
9 judge either --

10 MR. GREEN: Endorses it.

11 THE COMMISSIONER: -- endorses it or
12 is required to give reasons why he doesn't.

13 MR. GREEN: Yeah. I guess my point is
14 we're quite free to go back and parse and dissect
15 every word that Mr. Minuk has in his file.
16 Perhaps we can extend the same courtesy to the
17 judge in this case. People, unfortunately we use
18 the spoken word and it isn't always what we
19 convey, but the message that one would interpret
20 from the judge's letter is that he well knew that
21 this was a plea bargain.

22 And in any event, as Mr. Peck has
23 said, it was cleared up on the 12th. Perhaps
24 fortuitously, because September 12th hasn't been
25 planned. But, again, I would point out in the

1 letter the judge sent to counsel, which set up
2 this meeting of September 12th, no mention was
3 made of any difficulty with understanding it was a
4 plea bargain. All that was said was, I want you
5 to come down and talk to me about a potential
6 higher duty of a policeman.

7 THE COMMISSIONER: Mr. Green, it
8 should be commented upon, Manitoba is the only
9 province that has clearly set out a distinction
10 between a joint submission and a plea bargain.
11 And it's not well understood, or the distinction
12 between the two has not really been commented upon
13 by writers and by the judiciary in the rest of
14 Canada. And Manitoba seems to be the only
15 province that has developed a distinction between
16 the two. And in all fairness to Judge Wyant, it
17 may be that he didn't understand whether this was
18 really a joint submission in which the obligation
19 upon him to follow the submission is not as strong
20 as where it is a plea bargain. Where it is a plea
21 bargain it, in fact, is presented to the judge as
22 a something that he must accept and impose a
23 sentence in accordance with the bargain, unless
24 there are very good reasons to reject it, and
25 which he must explain the reasons. So in all

1 fairness to him, it may be that he just wasn't so
2 sure what it was and that's why he needed counsel
3 to come back and say to him, is this a joint
4 submission or a plea bargain?

5 MR. GREEN: Well, that's I suppose a
6 legitimate point, but if that really was his
7 concern, wouldn't he say that in the letter when
8 he asked them to come back?

9 THE COMMISSIONER: Well, I think
10 asking him to come back and tell him what this
11 really was. That's the impression I get from the
12 letter, even though he refers to it as a plea
13 bargain.

14 MR. GREEN: But my point is, he didn't
15 say that he was having any trouble with whether it
16 was a plea bargain or a joint sentence. That came
17 out on the 12th. What he says was, I want you to
18 address the question of whether there's a higher
19 duty owed by a policeman. That was the thrust,
20 that was all that that letter really said. My
21 reference to the plea bargain was that Mr. Minuk
22 would rightly understand from that that's what the
23 judge understood, that this was a plea bargain.
24 And I -- your point is well taken. Manitoba does
25 seem to be the only province that has developed,

1 that's one word, this area of the law. Whether
2 it's a good development or realistic development
3 is I suppose subject to debate. And it was
4 relatively new at the time. And I infer from what
5 you're saying is that the judge may not have been
6 familiar with that particular jurisprudence.

7 THE COMMISSIONER: I'm not suggesting
8 that, I'm suggesting he wasn't maybe sure whether
9 it was in essence a joint submission or a true
10 plea bargain.

11 MR. GREEN: Well, the criticism has
12 been levelled at counsel for not making it
13 abundantly clear at the August 22nd hearing as to
14 which it was. I would suggest that, why isn't it
15 just as incumbent upon a judge, if he's got any
16 doubt, to ask that question?

17 Another issue that has been raised,
18 particularly by Mr. Clifford, is that of the
19 alleged failure of Mr. Minuk to call evidence of
20 alcohol consumption as an aggravating factor. I
21 will warn you, Mr. Commissioner, that I'm going to
22 have to go against your sort of dictum yesterday
23 that you didn't want people to read from
24 transcripts, but I'm going to have to read to make
25 this point from the transcript of September 12th.

1 It's rather painful, but to make my point, I'm
2 going to have to do it, sir.

3 Mr. Clifford suggested that it was
4 obvious that Judge Wyant was seeking for Mr. Minuk
5 to call evidence of consumption of alcohol as an
6 aggravating factor. He made that statement that
7 almost as a throw away, that, you know, it's so
8 obvious. Well, my point and my suggestion, and I
9 will take you to the transcript on that, is that's
10 not the case at all. You will recall Mr. Minuk's
11 evidence that he did not understand one whit that
12 the judge may have been asking for evidence of
13 alcohol as an aggravating factor in sentencing.
14 His understanding was that the judge wanted to
15 know whether that was still part of the foundation
16 for the plea. You will recall the first session,
17 the August 22nd session, Mr. Commissioner, where
18 the subject of alcohol came up. And that's when
19 Mr. Minuk made his unfortunate remarks about
20 anecdotal evidence, et cetera. And Judge Wyant,
21 almost like a cross-examination, or more like a
22 Court of Appeal appearance, sort of said, well --
23 THE COMMISSIONER: Is that what they
24 do in the Court of Appeal?

25 MR. GREEN: I think everybody here can

1 probably attest to that, yes. Kind of forced him
2 into saying, well, the basis for the plea is the
3 anecdotal evidence of alcohol and the accident
4 itself, running into a parked car at 80
5 kilometres, or a stopped vehicle at 80 kilometres
6 an hour. And that came up later on. And it came
7 up on September 12th. And I'm going to bring you
8 to those references in the transcript,
9 Mr. Commissioner. But in my submission, when one
10 reads those passages, Mr. Minuk's understanding
11 that the judge was interested in knowing whether
12 it was part of the basis for the plea is readily
13 understandable. In other words, he didn't
14 understand that the judge may have been asking for
15 evidence of alcohol as an aggravating factor. I
16 mean, it's a nice, I suppose, academic question,
17 but it doesn't really come, doesn't spring from
18 the remarks of what happened or the remarks made
19 in the courtroom that day. And this is, of
20 course, found in J, volume J, Mr. Commissioner.

21 THE COMMISSIONER: Give me the pages,
22 please?

23 MR. GREEN: 1738.5, .6 and .7;
24 1738.10, .11, .12 and .15. And as I warned you,
25 it's not the easiest read in the world and it's

1 not easiest to comprehend, but it's important in
2 my submission to make the point that I'm trying to
3 make. I'll start at line 5 on page 1738.5, and
4 this is the court, Mr. Justice Wyant speaking.

5 "And I appreciate you bringing this to
6 my attention, because I, I
7 specifically asked the question of
8 Mr. Minuk as we -- and I've gone
9 through page 18 and 19 specifically,
10 asked the question what was the basis
11 upon which the Crown accepted the plea
12 and we have gone through and Mr. Minuk
13 accepted that again today. And on
14 page 59, you talked about the fact
15 that it was inadvertence and not
16 brought up by impairment. Now, that's
17 been elaborated on, but it's in my
18 respectful view a significant
19 difference to go from the fact that
20 when you said not by impairment which
21 Mr. Minuk accepted, and the court has
22 to accept, to the, to the comment now
23 that, that the anecdotal evidence of
24 alcohol is also not a factor, that,
25 that you meant to say that, and that

1 wasn't part of it. That you meant to
2 say alcohol as opposed to impairment
3 last time basically.
4 Mr. Wolson: You know, prior --
5 The Court: Is that, is that what I
6 understand?
7 Mr. Wolson: It is, it is and prior to
8 you raising that with Mr. Minuk today,
9 in my preparation I had in my notes
10 and I have in my notes on the issue of
11 speaking to sentence an area to expand
12 on that. My comments to you today
13 don't come as a result of your
14 exchange with Mr. Minuk. My comments
15 come to you because I had, I had
16 thought that in response to your
17 question at page 59 I had answered the
18 question by telling you it is the
19 defence position that alcohol isn't a
20 part of this case by way of plea. It
21 may be semantical, but I think that's
22 the impression that I tried to create
23 last time. I don't take a different
24 position told and --
25 The Court: Oh, and, and please, I --

1 Mr. Wolson: Yes,
2 The Court: -- I apologize if that's
3 the impression I -- I'm not suggesting
4 that you're taking a different
5 position told as a result of the fact
6 that you're called back to court or
7 anything that I may have said to
8 Mr. Minuk. I accept completely what
9 you've said. But it is, you can
10 appreciate that what you may have
11 meant to say last time is different to
12 what you said last time.
13 Mr. Wolson: Well --
14 The Court: Correct? I mean, and you
15 have clarified it now, I mean by
16 saying that impairment was not a
17 factor that seemed pretty self-evident
18 to me at the time because the Crown
19 had accepted that, and clearly if
20 impairment was a factor we might be
21 talking about a different charge. But
22 by saying impairment when you meant to
23 say consumption of alcohol isn't a
24 factor, that -- and I appreciate you
25 meant to say that.

1 Mr. Wolson: Yes.

2 The Court: But it wasn't said and you
3 can appreciate now that that --

4 Mr. Wolson: Well, and I'm --

5 The Court: -- Significantly changes
6 the position from my position as well.

7 Mr. Wolson: Then I am pleased to have
8 the opportunity to clear that up, but
9 that was the position that I, I
10 attempted to articulate when we were
11 here last time. Sometimes you'll
12 appreciate that when counsel are on
13 their feet the words come out and the
14 point that I was trying to make to you
15 then and I make to you now is that
16 when you consider the factual basis --

17 The Court: Yes.

18 Mr. Wolson: --from the defence
19 perspective, the consumption of
20 alcohol is not a factor, and the
21 absence of the Crown proving so, it's
22 not a factor I should take into
23 account. That's right. But, but my
24 position in attempting to respond to
25 your question last time was to tell

1 you, in effect, that you ought to look
2 at this as momentary lapse, or I
3 should have been clear on in failing
4 to keep a proper look out as the
5 marked departure. That's the offence
6 to which the accused has entered his
7 plea. That's the basis of the
8 dangerous driving.

9 The Court: And, and I understand
10 that.

11 Mr. Wolson: I think you have that
12 point.

13 The Court: I, I have the point. I
14 understand it. I think you can
15 appreciate that would be a different
16 impression now from than I had before,
17 but one that --

18 Mr. Wolson: Well, I'm glad I had that
19 opportunity then.

20 The Court: And that leaves me to the
21 obvious question then, Mr. Minuk. The
22 case law is very clear and you've,
23 you've articulated it earlier. When
24 there's a factual difference in the
25 presentation of a case between

1 counsel, and there clearly is on that
2 point, the consumption of alcohol, the
3 court is obligated up to accept the
4 version given by the defence or the
5 accused through his counsel in the
6 absence of the Crown proving or
7 moving, or asking to prove the fact.
8 So I, I am obliged clearly to ask you
9 if you intend or wish to call any
10 evidence on that point or simply leave
11 the point as it is?

12 Mr. Minuk: What I'd like to do before
13 I answer that question is ask you for
14 five minutes and --

15 The Court: Absolutely.

16 Mr. Minuk: --then I'll come back and
17 answer the question. I could answer
18 the question now but I think that it
19 might take too long, and I prefer to
20 have the five minutes beforehand."

21 Then on page 1738.10, the court says:

22 "I'm just thinking about a little
23 longer actually.

24 Mr. Wolson: 12:30.

25 The Court: 12:45.

1 Mr. Minuk: Okay.

2 Mr. Wolson: Thank you."

3 Et cetera.

4 "So you need to read the transcript to
5 answer the question as to whether
6 you'll call evidence.

7 Mr. Minuk: No. I know that I
8 addressed this issue and told you what
9 it was that the Crown was doing and
10 not doing. And my sense is that I
11 will confirm you that we are not
12 calling evidence, and I just want
13 to --

14 The Court: Okay. We will adjourn to,
15 we'll adjourn to 12:45.

16 Mr. Minuk: Yeah.

17 The Court: Thank you.

18 The Clerk: Order, all rise."

19 Then court is reconvened, Mr. Commissioner.

20 "The Clerk: Court is now re-opened.

21 The Court: Apologize. I was a little
22 bit longer than I anticipated.

23 Mr. Minuk: The answer to your
24 question is no.

25 The Court: I'm sorry?

1 Mr. Minuk: The answer to your
2 question is no.
3 The Court: Is no. And I take it then
4 would go without saying that you would
5 concur with Mr. Wolson that the
6 factual basis for the plea, the
7 factual basis for the plea is still
8 maintained even in the absence of
9 that, that factor that proof of the
10 fact of the consumption of alcohol.
11 Mr. Minuk: The Crown is not calling
12 evidence.
13 The Court: I don't think that was
14 quite my question.
15 Mr. Minuk: I missed the clerk's --
16 missed you through the clerk.
17 The Court: The question was that in
18 the absence of the proof of the fact
19 of alcohol, I am obliged to accept
20 the --
21 Mr. Minuk: Yes, Your Honour is
22 correct on the application of the
23 Gardiner principle."
24 Mr. Minuk is saying that.
25 "The Court: But you accept that, that

1 the factual basis still remains for
2 the plea.

3 Mr. Minuk: Well, if the Crown is not
4 proving otherwise or calling evidence
5 Your Honour has to accept it.

6 The Court: I am asking whether you
7 agree with it.

8 Mr. Minuk: Well, we're not calling
9 any evidence, so you have the position
10 of the Crown.

11 The Court: With respect, I'll accept
12 the answer but I don't think you've
13 answered my question, Mr. Minuk.

14 Mr. Minuk: I'm -- if my position is
15 that we are not proving otherwise, I'm
16 not sure what more I can say to you
17 because --

18 The Court: I'm simply asking whether
19 or not in the absence of proof to the
20 otherwise, do you accept that

21 Mr. Wolson's --

22 Mr. Minuk: I think that the law is
23 that the -- whether the Crown is not
24 proving otherwise, the law is that the
25 court is obliged to accept that.

1 The Court: Right. Absolutely. But

2 that --

3 Mr. Minuk: And whether --

4 The Court: But then I need, I need to

5 know what the position of Crown is, if

6 you have one, on whether or not the

7 factual basis for the plea..."

8 and I'm emphasizing this,

9 "...still remains in the Crown's view.

10 Mr. Minuk: Yes. Oh, yes.

11 The Court: That's my question. Thank

12 you."

13 And then the final remark by the court on page

14 1738.15,

15 "Anything further from my other

16 counsel? All right. It's, it was

17 clear to me before I entered the

18 courtroom today that I would not be in

19 a position to render a decision based

20 on the purpose of this. It's

21 obviously even more apparent at this

22 particular point in time, I have given

23 the matter a great deal of thought,

24 and I'll have to give the matter a

25 great deal of further thought, as I

1 contemplate now what I've heard, and
2 you can appreciate that there is some
3 new information that I have received
4 from you today, both in relation to
5 the factual basis of the plea..."

6 and he goes on.

7 And I am sorry to have taken so much
8 time with that, but I think the point is clear
9 that what the court really was concerned about was
10 whether or not the Crown's position that there was
11 a basis for a plea to dangerous driving remained,
12 despite the fact that alcohol had been taken off
13 the table. That's what Mr. Minuk understood, and
14 that seems from those passages to be what the
15 judge was driving at. Nothing to do with
16 aggravation on a sentencing aspect.

17 THE COMMISSIONER: But I think the
18 point Mr. Clifford was trying to make was that
19 while evidence of alcohol was not part of the
20 plea, evidence of alcohol should still had been
21 submitted on the issue of sentence.

22 MR. GREEN: Well, except that this
23 was, you've got to remember the milieu that this
24 occurred. This was coming back on the 12th at the
25 request of the judge to address a fairly isolated

1 point, the duty of a police officer, whether it's
2 higher or not. And surely, if that's something
3 that the judge was interested in, that's something
4 that he should have set out in spades. He doesn't
5 appear to have had that in mind at all. That's my
6 point.

7 And we can go back and be critical of
8 Mr. Minuk in hindsight for not being a mind reader
9 as to what the judge may have been thinking, but
10 that's not fair, in my submission. And to then
11 come along, you know, two years later and say,
12 well, we have this interesting point about
13 aggravation of sentencing based on the consumption
14 of any alcohol just is not fair, and wasn't in the
15 cards at the time and shouldn't be in the cards
16 today, with the greatest of respect.

17 THE COMMISSIONER: I understand your
18 point. Thank you.

19 MR. GREEN: And on that point, even if
20 you were to accept that Mr. Minuk somehow should
21 have been alive to that as an issue, you would, in
22 order to find there to have been a breach of
23 expected prosecutorial standards, you'd have to
24 make a number of rather startling findings, in my
25 submission.

1 Number one, that the law is clear and
2 settled that consumption of any alcohol is in fact
3 an aggravating factor, not may be an aggravating
4 factor, but is an aggravating factor, you'd have
5 to make a finding of the law to that effect. And
6 that the failure of Mr. Minuk to address that
7 fails to meet standards. In other words, all
8 prosecutors in Mr. Minuk's position would have to
9 know that that was the law. With the greatest of
10 respect, Mr. Commissioner, that is such a stretch
11 that it's outrageous.

12 In any event, it is clear in my
13 submission that this would certainly be an area of
14 some discretion on the part of the Crown Attorney.

15 Mr. Peck and Mr. Slough both used the
16 phrase of a cost benefit analysis, and I think
17 that's a very apt analysis in these circumstances.
18 Look at the available evidence of alcohol and look
19 at what the possible benefit of trying to prove
20 that would be. You know, we have the evidence of
21 the rogues gallery, if I can be so flippant, of
22 Mr. Carter and Woychuk and what have you as to
23 consumption of alcohol. But my friend,
24 Mr. Paciocco, has pretty much decimated any
25 credibility that any of them would have. So

1 really what we are left with is Pedersen's
2 evidence, which Mr. Paciocco also indicated was,
3 its credibility was suspect. And that's the
4 evidence of at the time of fingerprinting that
5 there was evidence of impairment and what have
6 you. Really what we're left with is the two
7 ambulance drivers. And there would be some doubt,
8 I would submit, that their evidence could be
9 proved beyond a reasonable doubt.

10 But even if it could, where would that
11 get you, or where would that get Mr. Minuk, or
12 more importantly, where would it get the
13 sentencing judge? In my submission, nowhere.
14 What you would have is the smell of some alcohol.

15 You saw the very capable work that
16 Mr. Weinstein and Mr. Prober were able to do with
17 the ambulance attendants. Mr. Wolson, believe me,
18 would be quite capable of getting them to state
19 the same, that, okay, there was this minor smell
20 of alcohol but that the other signs weren't there,
21 there wasn't any real evidence of impairment at
22 all.

23 And more significantly on the question
24 of where that leaves you, it leaves you nowhere
25 because of the sentence, of the precedents that I

1 alluded to earlier. In many of those cases there
2 was significant amounts of alcohol, and yet the
3 sentence was conditional. Here we have minor
4 evidence of alcohol on the breath. Certainly not
5 enough, not sufficient to take this case outside
6 the established precedence. And that's the only
7 basis, Mr. Commissioner, upon which, even if it
8 were a joint submission, upon which the Court of
9 Appeal has said a sentencing judge can depart. In
10 other words, if the range of sentence being
11 recommended is not in accordance with the range of
12 sentences established through precedent. Just not
13 the case. In my submission, it's very much a
14 non-issue in the final analysis.

15 Mr. Commissioner, in his remarks on
16 Tuesday, Mr. Clifford was critical of Mr. Minuk's
17 performance in other areas. I'd first point out
18 to you the obvious inherent unfairness in taking a
19 lawyer's brief and going back in time and
20 re-examining every move, every nuance, every
21 letter, every memo, and being critical of it, no
22 lawyer, in my submission, could withstand that
23 kind of an assault in retrospect and come out
24 unscathed. We all make mistakes. But your task
25 here is to determine whether standards were

1 breached or not, and none of the matters raised by
2 Mr. Clifford, I would submit, would by any stretch
3 amount to a transgression of standards. Many of
4 the matters raised by Mr. Clifford, in my
5 submission, are picayune to the extreme.

6 It reminds me of a war story that
7 Mr. Wolson, a legal war story that Mr. Wolson
8 likes to tell. Mr. Wolson, as you may know, was
9 counsel in a very famous criminal case here, Brian
10 Jacks case. There were a number of trials, one of
11 which was held before Mr. Justice Scollin. I
12 don't know whether you know, or knew of Justice
13 Scollin or not, Mr. Commissioner, but he was a
14 Court of Queen's Bench of some renown, some fame
15 here in Manitoba, he was a real character. And
16 one of his greatest abilities was the turning of a
17 phrase, he had no peer on the bench in that
18 department.

19 Mr. Wolson's story is that Justice
20 Scollin had charged the jury, and the jury had
21 departed and Mr. Wolson was making comments about
22 the charge to the jury, not terribly flattering of
23 the judge. And Judge Scollin, Mr. Justice Scollin
24 said, Mr. Wolson, I feel that you are waltzing at
25 the nit-pickers' ball. I'm going to suggest that

1 that's exactly what Mr. Clifford is doing in some
2 of his criticism. He is not only waltzing, he is
3 jitter-bugging at the nitpickers' ball.

4 Particularily -- I don't mean to be
5 unkind to my friend because I respect him.

6 THE COMMISSIONER: But you are being
7 unkind.

8 MR. GREEN: I'll go ahead.

9 THE COMMISSIONER: You don't mean to,
10 but you are.

11 MR. GREEN: Almost laughable, in my
12 submission, is Mr. Clifford's comments about the
13 traffic expert, Blandford. And he's saying, well,
14 Mr. Minuk just rejected his opinion that he might
15 have fallen asleep, that he couldn't discount the
16 possibility that Harvey-Zenk fell asleep. I mean,
17 it's not up to Mr. Minuk to reject evidence, the
18 evidence is what it is. And Blandford said, if
19 I'm asked in cross-examination, if Wolson is smart
20 enough to ask me in cross-examination whether I
21 can eliminate that possibility, I'm going to have
22 to say no, that it is possible. And indeed it's
23 not terribly relevant to Mr. Minuk, but despite
24 the very dramatic performance of Mr. Paciocco
25 counting down the 15 seconds the other day, I'm

1 going to suggest to you that that's probably what
2 did happen here. Mr. Clifford makes the point
3 that this was a long straight road, and that 15
4 seconds is a long time. Well, a long straight
5 road is favourable to the theory of falling
6 asleep. It doesn't -- it isn't contrary to that
7 at all. We have all had the experience of driving
8 along the highway and sort of nodding off and --

9 THE COMMISSIONER: Speak for yourself,
10 Mr. Green.

11 MR. GREEN: Okay. Well, some of us
12 have. I have, I confess. And that can happen.
13 In my submission, it's much more likely that that
14 was the case rather than -- do you know how drunk
15 you'd have to be to plow into a stopped vehicle,
16 ignore all the warning lights and what have you,
17 how drunk you would have to be to plow into the
18 back of a vehicle like that.

19 THE COMMISSIONER: I would have no
20 idea. Maybe you might, Mr. Green.

21 MR. GREEN: Well, I would suggest that
22 common sense tells you, or should tell you, sir,
23 that you would have to be pissed big time. That
24 it's more likely that it was a falling asleep than
25 anything. As I say, that's not really germane to

1 Mr. Minuk.

2 THE COMMISSIONER: No, it isn't.

3 Let's get on with it.

4 MR. GREEN: Mr. Clifford was critical
5 of Mr. Minuk for the failure to get the records
6 from Branigan's. Well, you have heard the
7 evidence that he tried on four separate occasions
8 to get Carter into action on that. And okay, I
9 guess you can say, well, he didn't continue to
10 try. But is that really, you know, a valid
11 criticism in these circumstance? That is wisdom
12 in hindsight of the first order, in my submission,
13 Mr. Commissioner. And you know, that evidence in
14 the final analysis really doesn't amount to very
15 much at all. To my knowledge, we don't have a
16 concept in Canadian criminal law known as guilt by
17 association. So what if you're able to prove that
18 a whole bunch of cops may have had more to drink
19 than they are letting on? The problem was, you
20 couldn't prove that Mr. Harvey-Zenk had anything
21 to drink, and that's the man who was charged,
22 Harvey-Zenk, not the police force.

23 Mr. Clifford alluded to the fact that
24 Mr. Minuk came into information from Black that he
25 had fallen asleep at 4:00 o'clock, and when he had

1 woken up, everybody was gone, and he was somehow
2 criticized for not doing anything about that.
3 Well, what was he to do in those circumstances, I
4 ask you?

5 There was some mention of disclosure
6 and what have you, but I'll remind you when that
7 information came to Mr. Minuk, it was in the very
8 week that the settlement negotiations were going
9 on. Perhaps if matters had have proceeded, that
10 would have been a disclosure issue, but not in
11 these circumstances, sir.

12 He, Mr. Clifford, was critical of
13 Mr. Minuk for not having interviewed the
14 Branigan's witnesses. Well, remember what the
15 Branigan's witnesses' evidence was. He had
16 statements from those people. It was of no
17 assistance whatsoever to the charges that
18 Harvey-Zenk was facing.

19 And the criticism about lay witness
20 preparation and what have you, and that witnesses
21 feel better, you know, they are more comfortable
22 if you meet with them well in advance. Well,
23 that's a perfect standard that's being advocated
24 there. Mr. Minuk has his habits of practice, as
25 we all do, and they differ. There's been no

1 criticism that Mr. Minuk was ever ill-prepared or
2 that he's failed to adduce evidence that was
3 necessary and what have you. That really is
4 jitter-bugging, in my submission,
5 Mr. Commissioner.

6 There's been much made of Mr. Minuk's
7 advice to the Tamans at the time that the
8 Preliminary was adjourned in the spring of '05. I
9 think you've got to cut Mr. Minuk a little slack
10 there. This was a very, very unusual circumstance
11 where you are investigating the chief investigator
12 of the charge that you are trying to prosecute.
13 Common sense would tell you that you would be
14 circumspect and rather closed mouthed about that,
15 never mind the policy of the government that we
16 have seen saying you can't divulge any details
17 about an ongoing investigation. And the Tamans
18 may have gotten the impression that the purpose
19 was to, of the adjournment was to patch holes and
20 what have you, but Mr. Minuk was quite clear that
21 that's not something that he would have said. He
22 would have said, there is a further investigation
23 needed and that's it. And on that score, that
24 makes sense. You would just be getting into
25 trouble to go to the extent that is being

1 suggested in those circumstances, sir.

2 Dealing with the performance of
3 Mr. Minuk as far as the Victims' Bill of Rights is
4 concerned, sir. We have the evidence of
5 McCorrister, Lesley McCorrister that Mr. Minuk
6 went beyond what other Crown prosecutors, line
7 prosecutors would do. He went out of his way to
8 try and help these victims. That he wasn't
9 successful is too bad, it's regrettable, but in
10 the circumstances of what happened here, it's
11 understandable. No family like the Tamans is
12 going to be happy with the ultimate message that
13 was delivered here, that the courts in Manitoba
14 are fairly lenient on these types of offences. No
15 family is going to like that.

16 Mr. Taman, rightfully, if you look at
17 just his position, was under the opinion, the
18 belief, that Mr. Harvey-Zenk should go to jail for
19 life. And you can't blame him for having that.
20 But the expectations can't come down to the
21 reality. That Mr. Minuk wasn't able to bridge
22 that communication gap I suppose is regrettable,
23 but understandable in the circumstances.

24 Additionally, I would point out that
25 he went beyond what was required in his dealings

1 with the Sveinsons at all. You will recall that
2 the letter from the Sveinsons came into the
3 Minister and it was ultimately directed to
4 Mr. Minuk and he said -- and he had been requested
5 by Mr. Kaplan to draft a response. And his
6 reaction was, that's really not the right thing to
7 do here, you know, I should meet with these
8 people. And that's what he did. His intentions
9 were of the very best in my submission,
10 Mr. Commissioner. And he's then excoriated for
11 doing that at the first meeting that he has with
12 Mr. Taman. That's a pretty surprising thing to
13 have happen to you, I would suggest. That you've
14 gone out of your way to do the right thing and
15 that you are immediately criticized for having
16 done the right thing. Okay. Technically, at law,
17 Mr. Taman was the nominated victim. But in
18 reality, that's not getting off on a real good
19 foot, a real good footing as far as intercourse
20 between Mr. Minuk and the Tamans.

21 Additionally, you will recall the
22 meeting in Mr. Minuk's office where he said,
23 Mr. Minuk said to Mr. Taman an explanation for
24 what was going on, that the East St. Paul Police
25 Department had screwed up. And Mr. Taman replied,

1 well, they are not the only one who screwed up, it
2 all -- screwing up extends right into this office
3 as well. Mr. Taman says that Mr. Minuk's reaction
4 to that was, you know, choose your words carefully
5 in this office. Mr. Minuk doesn't recall saying
6 that. But I think we being human beings and
7 having that kind of an assault cast on you, when
8 you feel that you've done a good job, that your
9 reaction to that isn't going to be terribly
10 favourable.

11 The Tamans all testified that they
12 didn't feel that Mr. Minuk had treated them with
13 courtesy and respect, but that's not what the
14 evidence of Lesley McCorrister is. And Lesley
15 McCorrister is an unbiased third party. Her
16 evidence is to be preferred I would suggest.

17 I did want to make one response,
18 Mr. Commissioner, to the remarks of Mr. Paciocco.
19 And it doesn't again directly affect Mr. Minuk,
20 but it has to do with this whole, all the evidence
21 that we have heard in regard to Bakema and Graham
22 and Carter and Woychuk, about the changing of the
23 notes and what is and what isn't included in the
24 notes and the narratives and what have you.
25 Mr. Paciocco's remarks seem to indicate that his

1 suspected motive was either they were trying to
2 cover up, or Bakema in particular was trying to
3 cover up for a fellow policeman, or Bakema was
4 trying to distance himself from being involved in,
5 in effect, ruining a policeman's life. I'm going
6 to suggest, sir, and I do this for hopefully for
7 your benefit when you are deliberating, I'm going
8 to suggest that the first one, that is covering up
9 for a policeman, doesn't make a lot of sense in
10 these circumstances. It really doesn't make a lot
11 of sense.

12 What I'm going to suggest may have
13 been the motivating factor has to do with what
14 occurred at the scene. And I would remind
15 Mr. Commissioner of the evidence of Graham and
16 of -- her name escapes me right now -- Pedersen.
17 You will recall that a year prior to this
18 accident, Pedersen and Graham had been involved in
19 a situation where Graham had put a suspected drug
20 dealer, drug possessor into the back seat of a car
21 and had kept him there for a prolonged period of
22 time. And Pedersen had noted that in her
23 narrative report and she was taken to task over
24 that by Chief Bakema. My point is that the
25 evidence suggests that Graham and Bakema weren't

1 up-to-date at all on what charter obligations were
2 owed to suspects. And that's evident from the
3 time that Mr. Harvey-Zenk was detained in the
4 locked police car, without being given any charter
5 rights whatsoever, no advice as to counsel, no
6 advice that he doesn't have to speak, et cetera.
7 I think the evidence is that those guys just
8 didn't know, or at least it wasn't in their mind
9 at the time.

10 Everybody else however, Carter,
11 Pedersen, laterally Maloney, recognized that this
12 was a problem, what they had done at the scene was
13 a problem. And it doesn't take a great stretch to
14 figure out that when Bakema and Graham got back to
15 the police station that day, that subject came up.
16 What was going on that you kept this guy in the
17 police car for so long without doing anything in
18 the charter department? And I'm suggesting,
19 therefore, sir, that the omissions from notes, the
20 suggested omissions from notes, et cetera, from
21 Bakema to Woychuk, and the fiddling around with
22 the incident reports was directed at that. And
23 that was the motivating factor. And perversely,
24 it wasn't done to help out a fellow cop, it was
25 done to convict a cop. But in the circumstances,

1 I would suggest that that makes more sense than
2 any of the other theories.

3 Mr. Commissioner, a lot has been said
4 about victims in this inquiry, and rightly that
5 has centred on the true victims here, the
6 Sveinsons and the Tamans. But I'm going to
7 suggest to you that there's another victim in all
8 of this, and that victim is Marty Minuk.
9 Mr. Minuk's reputation has been savaged in the
10 media time and time again, right up to and
11 including the present time. And I am suggesting
12 to you that that is completely unfair to him.
13 That in the circumstances, his performance in
14 these circumstances was more than adequate. Sure,
15 you can be critical of him when you go back with
16 your "retrospectoscope," that's for sure. But,
17 Mr. Commissioner, in your report, you have an
18 opportunity, I would suggest, to in some way
19 refurbish Mr. Minuk's reputation, and I would
20 invite you to do so. I would suggest that his
21 performance was exemplary, that the outcome was
22 what was to be expected, no better outcome as far
23 as sentencing was possible, and that in these
24 circumstances you should make a special note in
25 your report, I would invite you to do it, that

1 would assist in re-establishing a deserved
2 reputation, being a very capable counsel, but a
3 reputation that has been severely undermined and
4 unfairly undermined.

5 Those are all of my remarks. Unless
6 you have any questions, I will sit down. I, like
7 other counsel, take the opportunity to thank you
8 and your very able counsel for the courtesy and
9 professionalism shown throughout. I think this
10 inquiry was conducted on a pretty high level and
11 that's in large part to you and your forces.
12 Thank you.

13 THE COMMISSIONER: Thank you. Shall
14 we break?

15 MR. NOZICK: I would appreciate a
16 break.

17 THE COMMISSIONER: You would.

18 MR. NOZICK: Get my wheelbarrow out.

19 THE COMMISSIONER: Maybe if we start
20 right now you would not have much to carry. But
21 we'll take a 15 minute break. Thank you.

22 THE CLERK: Order. All rise. This
23 Commission is in recess.

24 (Proceedings recessed at 10:36 a.m.
25 and reconvened at 10:51 a.m.)

1 THE CLERK: All rise. This Commission
2 of Inquiry is now reopened.

3 MR. NOZICK: Mr. Commissioner, it's my
4 intention to address you with respect to some of
5 the evidentiary issues. You will be glad to know
6 that it's been shortened somewhat, having heard
7 Mr. Green speak. And then Mr. McFetridge will
8 address you with respect to the victim rights
9 issues and with respect to the recommendations of
10 Commission Counsel.

11 I'd like to commence my remarks by
12 reminding you of the evidence of Mr. Slough and
13 Mr. Kaplan, that it's the position of the
14 Department of Justice that they fully support the
15 decision by Mr. Minuk to, first of all, accept the
16 guilty plea to the dangerous driving causing
17 death, and moreover, to agree to a conditional
18 sentence. That was their evidence on that point.

19 It's their evidence that his decision
20 was in accordance both with the laws of Manitoba
21 at the time and in accordance with Manitoba
22 policies that were in existence at that time.

23 THE COMMISSIONER: Now, does that
24 deal, that support extend to the factual basis in
25 which no evidence of alcohol was presented and the

1 sentence in which no evidence of alcohol was
2 presented.

3 MR. NOZICK: They accept that in their
4 evidence, that there was not evidence to prove
5 beyond a reasonable doubt the consumption of
6 alcohol. And I'm not going to go into all of the
7 evidence, everybody else has done that that you
8 are aware of that.

9 THE COMMISSIONER: All right. I just
10 want to understand the position.

11 MR. NOZICK: That is their position.

12 THE COMMISSIONER: All right, thank
13 you.

14 MR. NOZICK: And both of the experts
15 in this matter, Mr. Peck and Mr. Gover, agreed at
16 least to the extent that the plea to the dangerous
17 driving causing death was acceptable. They differ
18 with respect to whether or not the conditional
19 sentence ought to have been recommended. But
20 Mr. Gover's evidence was interesting with respect
21 to this. If Mr. Peck is correct, Mr. Minuk and
22 all the others are correct in their determination
23 that not all evidence was a proper decision, then
24 Mr. Gover would revisit his decision with respect
25 to the appropriateness recommending the

1 conditional sentence. And I refer you to his
2 evidence, volume 25, page 6808 to 6809. I'm not
3 going to read that, but essentially what he said
4 is that if the issue of proving alcohol could not
5 be proved beyond a reasonable doubt, then that
6 would then be not a factor in his opinion with
7 respect to the appropriateness of the sentence
8 that was imposed here.

9 THE COMMISSIONER: Now, it's always
10 very difficult for Crown counsel to determine
11 whether something can be established beyond a
12 reasonable doubt, because they are not making that
13 decision, are they?

14 MR. NOZICK: No, they are not.

15 THE COMMISSIONER: And to say, well,
16 if he can prove it beyond a reasonable doubt, it's
17 okay to call it. But how do you know you can
18 prove it unless there is -- unless it is run by
19 the judge, unless it is so weak that you can
20 assess from the beginning that it is not worth
21 putting before the judge.

22 MR. NOZICK: It's always an opinion
23 and it's always the test of the cost benefit
24 analysis. And I agree. But if you look at the
25 evidence in this case, and I'm not going to deal

1 with it, but if you listen to Mr. Paciocco's
2 submission with respect to the credibility of the
3 Crown's case, and Mr. Green's submission with
4 respect to what was, what evidence did the Crown
5 have available, essentially they just had the two
6 ambulance drivers smelling alcohol in the vehicle.

7 THE COMMISSIONER: Your point being
8 that if you assess the evidence, it wouldn't even
9 amount to reasonable probability, which is a
10 standard which seems to now being used by Crown
11 counsel, and I think it was in the Martin report.

12 MR. NOZICK: Yes. And also
13 Mr. Zazelenchuk referred to the McVey case, and
14 you are much more familiar with that case than I
15 am, I can tell you. But I noticed in the article
16 that I provided to you that was written by
17 Mr. Paciocco at page 32 that he did refer to the
18 McVey case. And his comments, I don't know if you
19 have the article there or not?

20 THE COMMISSIONER: No.

21 MR. NOZICK: It's about two lines, I
22 will just read it.

23 "The fortunes of the McVey approach
24 were cast into doubt after the 1996
25 sentencing amendments which gave new

1 emphasis to restorative justice
2 initiatives. These amendments were
3 calculated to reduce the focus on
4 incarceration and seemed poised to
5 reinstate a rehabilitative approach in
6 the sentencing of impaired driving
7 offences."

8 So there's that addendum, if you will, to the
9 McVey case that Mr. Zazelenchuk --

10 THE COMMISSIONER: Mr. Nozick, it is
11 always mean to throw the writings of an author
12 back into their face. That's an experience I've
13 had many times. Thank you.

14 MR. NOZICK: But I make that point,
15 and I take it when Mr. Paciocco wrote that article
16 that it was well taken. I have no doubt of that.

17 THE COMMISSIONER: Well, some years
18 ago, there was a famous lawyer in the Supreme
19 Court of Canada arguing a point. And the Chief
20 Justice turned to him and said, you know, I
21 remember you five years before arguing the exact
22 opposite. And counsel said to him, yes, and
23 wasn't it a silly argument.

24 MR. NOZICK: In any event, I have your
25 point on that, Mr. Commissioner.

1 I'm going to move on now. The only
2 other comment I'd make is with respect to the
3 chambers meeting, if we can use that, that
4 Mr. Gover testified with respect to that, and I
5 just would refer you to the reference. He made a
6 comment with respect to what an experienced lawyer
7 and experienced judge ought to have gleaned from
8 the nature of the submissions. He was unaware
9 that there had also been this chambers meeting
10 prior to court on July 17th, and it was put to him
11 in volume 25 at page 6785 and 6787. So I just
12 leave that for you to refer.

13 I do wish to deal with the issue of
14 the independent counsel. The policy was set out
15 in exhibit number 215 which is found in volume
16 G-44. That would be the January 2000 -- you won't
17 need to look at these policies, I'm speaking
18 basically for the record -- that was a policy of
19 January 2005. And that, as you know, was reviewed
20 by Justice Krindle in volume N, Exhibit 242, at
21 page 2101. Particularly, I will refer to you page
22 13. I know you have read it and you will read it
23 again. But it's significant that the Department
24 of Justice reacted very quickly in response to
25 that report, and they drafted the new policy which

1 is Exhibit 231, volume X-1, tab 3, where the
2 evidence in this case is that clause D essentially
3 codified the existing policy and made it more
4 transparent.

5 Both Mr. Peck and Mr. Gover agreed,
6 and I think this is important, Mr. Commissioner,
7 that it is acceptable for the independent counsel
8 to consult with members of the Department of
9 Justice. In fact, the new policy encourages
10 consultation between independent prosecutors and
11 the Department of Justice.

12 The issue is whether at some point
13 these consultations cross an inadvisable line and
14 amount to some type of a direction or interference
15 with the autonomy of the independent prosecutors,
16 whose decisions are said to be final and binding
17 on the Department of Justice.

18 And I would like to, would like your
19 indulgence to refer to Mr. Slough's evidence, very
20 briefly. That's in volume 266 at page 6922. And
21 he was asked questions, well, what was Mr. Minuk
22 doing phoning Mr. Kaplan, et cetera. And what he
23 said at line six:

24 Mr. Minuk was doing, was seeking, he
25 was conveying information which I

1 think we -- we would, we would need
2 from him. He was, when he had
3 difficult decisions he had to go
4 somewhere to discuss those decisions.
5 It seems to me, though, that he was
6 ultimately making the decisions. And
7 I think that is the essence of the
8 policy."

9 Line 16:

10 "But in my view, the essence of the
11 policy is that the independent
12 prosecutor makes the critical
13 decisions and that is what happened
14 here, in my opinion."

15 And then at page 6923, at line three he commented
16 in response to a question:

17 "I don't accept that he lost his
18 independence."

19 And you asked him a question at page 6946,
20 Mr. Commissioner, at line 21:

21 "So really what you want to do is you
22 want to be kept up to date as to what
23 the independents are doing just in
24 case they do go off?"

25 He said:

1 "You want to be kept up to date and
2 you want to understand why they are
3 doing what they are doing in a
4 difficult case like this."

5 So that is the essence of Mr. Slough's
6 interpretation of what was taking place with
7 respect to the contacts between Mr. Minuk,
8 Mr. Kaplan and Mr. Slough.

9 It is the position of the Department
10 of Justice that the consultations that took place
11 in this case were in accordance with government
12 policy and they did not cross the so-called
13 invisible line.

14 Commission Counsel has highlighted,
15 both in the tail end of his cross-examination of
16 both Mr. Kaplan and Mr. Slough and in his
17 submission, certain areas that they say may or
18 ought to cause some concern with respect to the
19 nature of the consultations. They first of all
20 referred to Exhibit 218, that's this time sheet of
21 Mr. Minuk's, nicely highlighted in blue for all
22 the contacts. And they said there's over 40
23 contacts here between Mr. Minuk and the Department
24 of Justice. Ten of those contacts, because I have
25 added them up, and I invite you to do the same,

1 occurred after the sentencing on September 12th.
2 So we're talking approximately 30 contacts between
3 February 25th, 2005 and September 12th, 2007, some
4 two and a half years, approximately.

5 And I think that when you are looking
6 at these contacts, it has to be looked at in that
7 perspective. As well I invite you to examine my
8 cross-examination, not because it was mine, of
9 Mr. Minuk, where I put to him many of the contacts
10 that were on that time sheet and suggested various
11 explanations for those contacts. And if you look
12 at it in that light, it not only minimizes the
13 number of areas that the Commission Counsel might
14 have concern, but it puts everything into
15 perspective, and I invite you to do that at your
16 leisure.

17 The first area that Commission Counsel
18 highlighted with respect to the questionable
19 consultation was the request by Mr. Kaplan, I
20 think it was on September 21st, to have
21 Mr. Minuk -- and the wording in the fax was draft
22 a response to the letter that the Sveinsons had
23 written to the Attorney General. And I believe
24 this is in evidence and I don't want to give
25 evidence on this point, but I can tell you my

1 experience is that when a letter goes to the
2 Attorney General, very rarely would the Attorney
3 General respond to that letter himself. And that
4 letter goes down the ranks right to the bottom.
5 And at one point I was at the bottom writing these
6 type of responses.

7 And sure, in retrospect the
8 terminology that was used may not have been the
9 correct semantics, it would have been better, in
10 my view at least, had Mr. Kaplan said, can you
11 provide me with a memorandum with respect to your
12 contact with the Sveinsons to enable me to draft
13 the response? He didn't use that terminology. In
14 hindsight, he should have, but ought not, in my
15 respectful submission, be criticized for that.

16 The second major area that the
17 Commission Counsel has concern with is with
18 respect to Mr. Minuk's contact with the department
19 once he receives what I call the Carter
20 disclosure. And then he is asked for assistance
21 in drafting a letter that I have no doubt he could
22 write in his sleep. But one has to appreciate the
23 circumstances under which that disclosure was
24 made.

25 First of all, it would have been

1 totally irresponsible for any independent counsel
2 not to have informed the Department of Justice
3 that there is an allegation being made by one
4 police officer that the chief of his particular
5 police department, who is a major investigator in
6 the case, may be guilty of obstructing justice.
7 You can't sit on that information. And he didn't.

8 So he contacts Mr. Kaplan. He
9 eventually involves the RCMP conducting an
10 investigation with respect to whether or not there
11 is an obstruct justice charge here. It involves
12 the report being sent to another independent
13 counsel, Mr. Doug Abra, for an opinion.

14 So what is the criticism here? The
15 criticism is that they had a meeting to discuss,
16 how can we approach this with Mr. Wolson? The
17 Preliminary Hearing is coming up in June, we are
18 now May 2nd, it's less than a month away. This
19 investigation has to be conducted. You can't
20 proceed with the case with that cloud over the
21 chief investigator. So they discussed the wording
22 of the drafting of the letter and some suggestions
23 were made by Mr. Lawlor.

24 I'm suggesting there was really
25 nothing improper, there was nothing done to direct

1 Mr. Minuk. He came to them seeking assistance on
2 a very delicate matter. Because he can't go to
3 Mr. Wolson and say, well, you know our chief
4 investigator may be charged with obstructing
5 justice, we've got to look into this. You can't
6 reveal any of that at that particular time.
7 Obviously, once you get the reports, disclosure
8 has to be made, and disclosure was made in this
9 particular case. And it was devastating to the
10 Crown's case, in my respectful submission.

11 Mr. Gover discusses the degree of
12 consultation at volume 25, pages 6711 to 6712.
13 And he concludes essentially that there should be
14 consultation. He recognizes that. Mr. Peck
15 recognizes that. But Mr. Gover would leave the
16 degree of consultation to the judgment of the
17 independent prosecutor. Some people, some
18 independent prosecutors are not going to have any
19 consultation with members of the Department of
20 Justice. Others may, in their own judgment,
21 require more consultation. And Mr. Gover, as an
22 expert, says he leaves that to the judgment of the
23 independent prosecutor.

24 The next area that the judgment of
25 this independent prosecutor was to provide the

1 submissions, as you have heard, of August 22nd,
2 September 12th, to either Mr. Kaplan or
3 Mr. Slough, or both, depending on what their
4 memories were.

5 And you have to look at that in the
6 context of what was taking place. Mr. Green
7 touched on this. Because Mr. Minuk was being
8 vilified in the press with respect to all kinds of
9 things, all kinds of things that the Commission
10 Counsel says isn't even, shall not be a factor.
11 Was he in conflict because he represented some
12 police officers 15 years ago? Was he in conflict
13 because he had a case with Mr. Wolson shortly
14 before this? And all of that was being reported
15 in the press, and he was under tremendous pressure
16 and stress at that particular time.

17 He wasn't, Mr. Kaplan or Mr. Slough
18 didn't request Mr. Minuk, send us a copy of what
19 you're going to say. They provided no directions
20 to him, they provided no changes, and they
21 recognize, as in the evidence of Mr. Slough, the
22 independence, and they recognize that his
23 decisions were final and binding. Mr. Minuk,
24 because of the pressure that he was under, and
25 probably pressure from the family as well,

1 decided, well, I want to send it to them. And
2 Mr. Slough doesn't ever remember reading it.
3 Mr. Kaplan says he would have read it and that
4 would have been it. But I'm suggesting that that
5 doesn't affect, in my submission, the independence
6 of the independent counsel.

7 And with respect, the other concern
8 with respect to the involvement of members of the
9 Department of Justice is whether they were
10 consulted on the phone on September 12th on the
11 issue of whether or not to call the alcohol
12 evidence, consumption of alcohol evidence. And
13 you will recall it was an academic call, because
14 Mr. Wolson had expressed his concern at a much
15 earlier point in time. I'm not sure whether he
16 said after August 22nd or whether he said after
17 August 31st, but certainly well before September
18 12th. What does he do -- because he's concerned
19 with this anecdotal historical evidence, the
20 drinking comment that was made? He phones them up
21 and says Mr. Minuk, or Marty, I'm sure they are on
22 a first-name basis, Marty, we are not agreeing to
23 the evidence of the consumption of alcohol. And
24 Marty Minuk, according to Mr. Wolson's
25 recollection, undertakes not to call evidence with

1 respect to the consumption of alcohol. And he
2 does that in the same phone call that Mr. Wolson
3 is making. He doesn't say, look, Mr. Wolson, I've
4 got to get back to Mr. Kaplan or Mr. Slough and
5 consult with them, I'll call you back. He makes
6 that decision on his own, and that decision is
7 final and binding, and the undertaking undertakes
8 not only Mr. Minuk, but undertakes any member of
9 the Department of Justice.

10 So why he decided -- and I can surmise
11 why he would have made this phone call, because of
12 what was taking place in court. The case was
13 falling apart around him. The judge, who they --
14 as Mr. Green indicated -- had indicated, or at
15 least, not indicated but at least they were under
16 the impression that the judge was going to go
17 along with the plea bargain, all of a sudden is
18 saying, hey, you didn't mention this on
19 August 12th, you didn't mention this on August,
20 you're saying something different here. All of
21 this is coming down on him, in conjunction with
22 the pressure that he's already under, and he makes
23 the phone call. But what could they do? They
24 can't say to him, you change your undertaking,
25 call the evidence, you've made the undertaking.

1 So it was an academic or superfluous call that he
2 made.

3 THE COMMISSIONER: Well, if it was
4 superfluous, why make it?

5 MR. NOZICK: He says in the
6 transcript, and that was at volume J at page
7 1738.7, and that was the comment where they are
8 discussing whether or not to ask for an
9 adjournment, and he says, I can make the decision
10 right now but I want to have a few minutes. And
11 my surmising is, because of the pressure and
12 because of the questions that are being asked, he
13 wanted to run it by either Mr. Kaplan or
14 Mr. Slough. Yet he was in the position where he
15 had no choice, he's already made that decision,
16 he's undertaken to Mr. Wolson. And Mr. Minuk is
17 an honourable person. His integrity is, according
18 to Mr. Wolson, beyond reproach. He gives his
19 word, but he's being barraged by all this
20 publicity and all what was taking place.

21 Some people can cope better than
22 others, but he decided to make the phone call.
23 And what is Mr. Kaplan supposed to do? I'm not
24 talking to you, you are independent counsel,
25 good-bye. I mean, as a matter of courtesy, he

1 would have to listen to what is being said, but
2 I'm suggesting there's nothing improper that can
3 be attached to that phone call.

4 The last issue that I'll deal with is
5 the July 13th meeting, which resulted in the
6 memorandum at R-4.3401.22, and at this point in
7 time, it's July 12th, Mr. Minuk and Mr. Wolson are
8 having these so-called resolution conferences, and
9 they basically resolved the matter subject to
10 Wolson having a meeting with his clients on the
11 weekend. So on July 12th, Mr. Minuk calls Kaplan
12 at home. And whether he should call him at home
13 or call him at the office really doesn't matter.
14 But he called him at home, and it would be
15 irresponsible for him not to call the director of
16 prosecutions, or regional prosecutions, and advise
17 him, look, here is this high sensitive case, we
18 had a resolution conference, we have agreed at
19 least in principle with respect to this matter,
20 subject to Wolson getting back to me. And Kaplan
21 says, he goes to bed early, he's tired, he's at
22 the office at 6:00 o'clock in the morning, so he's
23 going to sleep on it and meet with Marty Minuk in
24 the morning and discuss Marty's decision that he
25 had made. And they do that. He wanted to hear

1 the decision. He wanted to hear it because he has
2 to be informed on this. He has to make a
3 determination whether the decision -- I mean,
4 after all you're talking about a police officer
5 allegedly drinking all night, getting into a fatal
6 accident, tragically killing a young lady on her
7 way to work. I mean, it's a horrendous situation.

8 THE COMMISSIONER: What does he have
9 to consider? He's been informed. What does he
10 have to consider? Why sleep on it?

11 MR. NOZICK: Well, sleep on it, again,
12 is a term that he used, and he explained it and
13 I'm not going to put words into his mouth. I
14 probably, hopefully, would not have used that
15 word.

16 THE COMMISSIONER: It's all
17 perception. Isn't the whole thing perception?

18 MR. NOZICK: I'm going to get to that.

19 THE COMMISSIONER: In the end, they
20 leave it to Mr. Minuk to make the decision, but
21 it's perception. And that's the thing that has
22 pervaded this whole inquiry, public perception of
23 what goes on behind closed doors.

24 MR. NOZICK: I'm going to deal with
25 that in a moment. And I know Mr. McFetridge is

1 going to deal with it in more detail, so I'm going
2 to pass the buck. When the questions get hard, I
3 got backup. I need help. It's called a tag team.

4 In any event, the bottom line is, I
5 can tell you what I would have said if Minuk
6 phoned me at home, call me in the morning or I'll
7 see you in the morning and we'll discuss it. But
8 Kaplan, he used the term "he'll sleep on it." But
9 in any event, he said he didn't have any impact in
10 the decision. It was important for him to get the
11 information, to be aware of the basis of why the
12 plea bargain was being made. Because, obviously,
13 as soon as it happens, it's going to hit the front
14 pages, and becomes a political hot potato, if you
15 will. And they have to know the information, and
16 that's what was happening.

17 It generated, as you know, a
18 controversial issues alert. But both Kaplan and
19 Slough, and this is their opinion, which I ask you
20 to accept, that the plea bargain did not infringe
21 government policy.

22 And I want to say that in my
23 semi-conclusion, if I can use that term, that the
24 consultation between Mr. Minuk and the department
25 was within the guidelines of the policy, that the

1 nature of the discussions did not cross the
2 invisible line, and that the policy, even the old
3 policy, according to Justice Krindle, is more
4 rigorous, transparent, and far less subject to the
5 exercise of departmental discretion than any other
6 jurisdiction. I refer you to page 2102, Exhibit
7 242, volume N.

8 That's the irony I think in this case,
9 is that Justice Krindle compared the Manitoba
10 policies to all of the policies across Canada, and
11 it's the Manitoba policy that's the one that's
12 being criticized, and it's the most rigorous
13 across Canada, if you accept her opinion.

14 THE COMMISSIONER: It's well-known
15 that Manitoba has always lead the other provinces
16 in every way.

17 MR. NOZICK: Yes, and they have. And
18 the new policy is even more rigorous, but it's
19 more transparent.

20 Now, on the issue of perception, I
21 have a note here to address the issue of
22 perception, and that's whether there is government
23 interference with respect to the decisions made by
24 the independent prosecutor. And I put this to one
25 of the witnesses, that perception is in the eye of

1 the beholder. No matter what the facts are,
2 there's always going to be a contingent of the
3 population or the press who will question the
4 degree of independence, no matter what the policy
5 is. And I'm going to suggest a test. It should
6 be when a reasonable person being apprised of the
7 true facts reasonably perceive that independent
8 prosecution is truly independent or not, and that
9 is, I suggest, a test that has to be applied. And
10 I'm going to suggest to you that if you apply that
11 test, that that test has been made in this case.

12 That is my submission,
13 Mr. Commissioner. I, like the other counsel,
14 would like -- I know I came to these proceedings
15 fairly late in the game, so to speak, but I'd --

16 THE COMMISSIONER: But your presence
17 was known the moment you arrived.

18 MR. NOZICK: In any event, I want to
19 take this opportunity to appreciate the effort
20 that has been made by you yourself and Commission
21 Counsel and the other lawyers that are involved in
22 this proceedings. I can appreciate the amount of
23 work that has been involved by all parties to
24 become apprised of the vast disclosure and the
25 issues involved here. I do want to issue a word

1 of caution to you though, Mr. Commissioner. I
2 have known Mr. Weinstein for quite a number of
3 years --

4 THE COMMISSIONER: I'm sorry?

5 MR. NOZICK: I have known
6 Mr. Weinstein for quite a number of years, and if
7 I were you, I wouldn't hold my breath waiting for
8 those 12 points. Thank you.

9 THE COMMISSIONER: Thank you.
10 Mr. Green wishes to say something.

11 MR. GREEN: Mr. Commissioner, I rise
12 with some reluctance, but I think it's important
13 that I say this now, right after my friend
14 Mr. Nozick spoke. There is a lot of commonality,
15 obviously, between the positions of Mr. Minuk and
16 Mr. Nozick's client. But I want to, on behalf of
17 Mr. Nozick, disassociate him from the argument
18 that there was some sort of an undertaking that
19 played a role in the decision not to call
20 evidence. That is not Mr. Minuk's position and is
21 contrary to the evidence of Mr. Slough about the
22 telephone call. Mr. Minuk's recollection is that,
23 he didn't have a distinct recollection, but he
24 would have told Mr. Wolson that he had no
25 intention of calling evidence. That's not in

1 dispute. But that wouldn't amount to an
2 undertaking, nor any part of the deal, nor did it
3 play a part in the decision not to call evidence.
4 Thank you, sir.

5 THE COMMISSIONER: I'm sorry, I'm
6 having some difficulty with that. If he's not
7 going to do it, isn't it a form of undertaking
8 that he's not going to do it?

9 MR. GREEN: It was in a conversation
10 where he was asked whether he was going to be
11 calling evidence, and he said no. And the reason
12 for that is obvious, sir, that he didn't think the
13 evidence was capable of proving anything. And
14 that's as far as it went.

15 THE COMMISSIONER: I know, but it's a
16 statement that Mr. Wolson would rely upon,
17 wouldn't he? If I said to you or -- let's deal
18 with Mr. Minuk and Mr. Wolson. You say, are you
19 going to call evidence, and Mr. Minuk says no,
20 isn't that understood between lawyers as an
21 undertaking? If at the last moment, Mr. Minuk had
22 called evidence, Mr. Wolson would have been
23 terribly upset saying, I relied on his statement
24 to me.

25 MR. GREEN: That may have been, but

1 that was academic in these circumstances, because
2 Mr. Minuk had no intention of calling evidence on
3 alcohol at that sentencing. That is my point.
4 And it played no part in his decision at all.
5 Remember again, the circumstances under which this
6 discussion took place. There was no thought of
7 calling evidence at that point. That only came
8 up -- with respect, if I may finish, sir -- that
9 only came up at the prodding of the judge.
10 Mr. Wolson, throughout, are you going to be
11 calling evidence? No, I'm not.

12 THE COMMISSIONER: Are you saying it
13 was part -- it wasn't part of the bargain?

14 MR. GREEN: No.

15 THE COMMISSIONER: Oh, okay, I
16 understand your point. Thank you.

17 MR. GREEN: Thank you.

18 MR. McFETRIDGE: Thank you,
19 Mr. Commissioner. I am going to deal briefly,
20 very briefly with the Victims' Bill of Rights
21 aspect, and then also I'll have some comment on
22 behalf of the government in respect to the --

23 THE COMMISSIONER: You're going to
24 deal with the Victims' Bill of Rights?

25 MR. McFETRIDGE: Yes.

1 THE COMMISSIONER: Before we start,
2 maybe you can just help me with something. The
3 victim impact statement under section 722 of the
4 Criminal Code defines victim to include not only a
5 the actual victim, but members of the family,
6 relatives. And then it goes on to say, if I could
7 just get it here, where a person described in
8 paragraph A is dead, ill or otherwise incapable.
9 The definition under the Victims' Bill of Rights
10 doesn't take that into account. So you may have a
11 victim who has been badly injured in an accident
12 or is ill, and it doesn't take into account that
13 there should be relatives, or husbands, or
14 common-law husbands to stand in their stead during
15 that period. Has any thought ever been given to
16 that? In other words, she's in a car accident and
17 she's in a coma. Her right to information cannot
18 be transferred to her husband or members of her
19 family. There seems to be some, how shall I say,
20 missing recognition in there. It's never been
21 addressed, it was never a matter that came up.
22 But I was reading, in fact, this morning and last
23 night this brief, it came to my attention there
24 was a problem.

25 MR. McFETRIDGE: When you look at the

1 definition of victim in the Victims' Bill of
2 Rights that I found in section 1.1, and it is in
3 our short brief that I did give you, victim means
4 an individual or a corporation, et cetera, when an
5 offence is committed or is alleged to have been
6 committed, and when the victim is an individual
7 who is deceased means an individual other than the
8 alleged defender at the time, the defence was
9 married, blah, blah, blah, blah, and goes on. And
10 it talks about, if you go further on in the next
11 page, in the definition of nearest relative, in
12 section 2.1, it talks about nearest relative and
13 goes through a line-up here, child, whatever.

14 Now, I think you have to read anything
15 in a contextual approach. And if the circumstance
16 that you say arise, did arise, I mean, obviously
17 the situation would be used that there would be an
18 appropriate person going down the line here of the
19 definitions as to who would step into the shoes
20 if, in fact, the primary victim is in fact
21 incapable of doing it. I mean, you have to read
22 legislation in a logical fashion, to fulfill the
23 obligations of the legislation. And if that
24 situation came up, I'm sure it would be dealt
25 with.

1 Indeed, the way the process is looked
2 at, I mean obviously the department endeavours to
3 deal with the primary victim as defined in the
4 legislation, if that person comes forward, or has
5 been automatically registered in some cases and
6 obviously identifies that they want to be the
7 victim, but the department does deal with the
8 other people. And that happened in this case.

9 THE COMMISSIONER: It's well
10 recognized that the Manitoba legislation is ahead
11 of every other province. I was just wondering
12 whether they ever gave consideration to
13 amending --

14 MR. McFETRIDGE: That's a possibility.

15 THE COMMISSIONER: -- amending the
16 definition where it says where the victim is an
17 individual who is deceased, and then it goes on to
18 say if they are deceased, et cetera, the following
19 people become the victim. But have they ever
20 thought of adding the words, who is deceased, ill,
21 or incapable of exercising their rights under the
22 bill, and then the other people would be the
23 registered victim. And for the purposes of this
24 Act, what you want, or your intention is to have a
25 single registered individual so that the services

1 can communicate with that victim, who can then
2 hopefully disseminate the information to the rest
3 of the family.

4 MR. McFETRIDGE: And if somebody is
5 incapacitated, I mean, there's obviously
6 provisions in other pieces of legislation,
7 Mr. Commissioner, where people can stand either as
8 a vulnerable person, or a committee, or whatever.
9 I mean, there are various mechanisms where people
10 who cannot manage their affairs -- manage their
11 affairs, somebody else will step in, in their
12 stead, either whether they do it through a legal
13 process or just even a common sense process.

14 THE COMMISSIONER: Yes. But you don't
15 want disputes between members of the family, you
16 don't want disputes between a parent and a
17 husband. And it might -- I'm only suggesting they
18 might give some consideration to amending it to be
19 more specific and avoid problems, rather than to
20 leave it up to the department to exercise some
21 sort of judgment.

22 MR. McFETRIDGE: And the last comment
23 I think with respect to this legislation,
24 Mr. Commissioner, you are always going to have
25 disputes in this situation.

1 THE COMMISSIONER: Thank you.

2 MR. McFETRIDGE: It is part of this
3 system. I mean, this case is a prime example, in
4 the sense where, for whatever reason, we have
5 competing members of the family who are not
6 communicating with each other and are not prepared
7 to share information with each other. In that
8 particular circumstance, the department did meet
9 with the parents and the Victims' Services Branch
10 did meet with the parents and talked with them.
11 They are still recognizing the rights of the
12 designated victim and respecting that person's
13 rights. But, I mean, the bill is, what it says,
14 and it has four letters, but in practicality the
15 department is working with situations that come up
16 in the everyday world. And we'll get to that when
17 we get to the --

18 THE COMMISSIONER: They had a lot of
19 problems in this case, didn't it?

20 MR. McFETRIDGE: It had problems, but,
21 with respect, from the point of view of Victim
22 Services, I mean, it would be nice if everybody
23 was happy and everybody had a positive thing to
24 say about everything that had been done and wasn't
25 done. And there's no doubt that Mr. Minuk, in his

1 dealings with the family, was in a difficult
2 position. We have heard Mr. Green's submission on
3 that and I'm not going to add anything further to
4 that, but I think it's very fair that at least
5 when you look at the time entries and when you
6 look at PRISM, there are many indications where
7 this family has been met with, dealt with. You
8 only have to read the narrative notes of
9 Ms. McCorrister in the PRISM notes. And as
10 Mr. Green indicated, I mean, she's there, she's
11 not taking a point of view of either side,
12 explaining things are being talked about, I mean,
13 the family is in a crisis situation and I
14 understand that. But there's only so far you can
15 go. And the Act and the bill recognizes that.
16 And it sets out -- and Mr. Clifford in his
17 preamble, indicated the preamble speaks to what
18 the requirements are of this Act. Also in that
19 preamble, at the end of the day, at least so far
20 as the prosecutor, at the end of the day the
21 prosecutor still has to make the professional
22 decisions as to what is right in the law, pursuant
23 to policy, pursuant to public policy. These are
24 all competing factors that are talking place. The
25 Act tries to recognize that. And this was the

1 case, a difficult case from the Victims' Bill of
2 Rights point of view. There are certainly things
3 that could, in hindsight, perhaps be done better
4 from all sides. But they still have to deal with
5 the families. You can have families that are
6 fighting amongst themselves. I mean, sure, you
7 can have families that disagree with even the
8 family that is getting along as to what the
9 results should be, what the process has been, who
10 is talking to whom. And I'll deal with that to
11 some degree when we get to the recommendations
12 made by Commission Counsel, because we appreciate
13 them and they are all very relevant to the issue
14 before you. But there are concerns, and we'll
15 highlight those for the Commissioner.

16 Just in terms of the Victims' Bill of
17 Rights, I have given you a brief. I am not going
18 to read it into the record.

19 THE COMMISSIONER: Very helpful.

20 MR. McFETRIDGE: And I've tried to
21 reference the relevant portions in the evidence.
22 And we have various policies that have been
23 adopted in Manitoba pursuant to this. So we first
24 of all have the bill itself, and it speaks for
25 itself, and there are obligations that are imposed

1 upon the Department of Justice and also law
2 enforcement agencies, but I'm mainly going to deal
3 with the Department of Justice.

4 First of all, there is a lot of
5 responsibilities conferred upon the prosecutions
6 branch. And you have heard the evidence that a
7 lot of those nominal responsibilities that are
8 conferred upon the director of prosecutions are in
9 fact taken over by the Victims' Services Branch
10 and that makes sense. The Act speaks to the
11 directors to do these, but things like keeping
12 victims advised of hearing dates, and explaining
13 in general terms the court process. There isn't
14 enough time in the day for a prosecutor to be
15 doing those duties and actually sitting down with
16 the victims on a regular basis to go through that
17 process. The department has developed through the
18 Victims' Service Branch a lot of pamphlets, a lot
19 of documents, and they have in fact set up a
20 specific branch and assigned workers to deal with
21 these areas.

22 And in this case, you will note from
23 the evidence, very shortly after this tragic
24 incident, in fact, because this was an accident it
25 was automatically, or an offence that was

1 automatically registered, the department seeks out
2 the victim. Correspondence went to the Taman
3 family. That was received, and very shortly
4 thereafter Mr. Taman contacted Ms. McCorrister
5 based on that letter and things got connected.

6 And we have seen from exhibit, or
7 Volume L, I believe it was marked as Exhibit 11,
8 the process starts. And there's a lot of
9 contacts. They may not have all been satisfactory
10 contacts from the family's point of view. And I
11 think it's hard for victims to understand that
12 when these cases get in the system, they do take a
13 long time. You're not going to be contacted every
14 day. A lot of it is you contacting us when you
15 need help, and then we'll keep you advised as to
16 when key dates are coming up. For the most part
17 that took place.

18 I'm not going spend a lot of time with
19 those policies that are in there. I think it's
20 important, just for the purposes of the summation,
21 Commission Counsel, at least in their submissions
22 have not made any criticisms of the documentation
23 in terms of the Victims' Services Branch that they
24 issued. Indeed, they haven't made any
25 recommendations or directions or criticisms of the

1 way the Victims' Services staff has dealt with
2 this issue. Indeed, I think the evidence was that
3 in fact the workers who dealt in this case were
4 dealing with the family in the way they should be,
5 in a compassionate way. Maybe they are telling
6 them things they don't want to hear or don't like
7 to hear. It's a confusing process, I don't think
8 anybody denies that.

9 The same thing with the prosecutions
10 branch itself. They have set out detailed
11 guidelines. And those are referenced in our
12 brief, and there's two policy directives and
13 guidelines that are issued to prosecutors. Those
14 are in the material. Again, I haven't heard any
15 criticism from Commission Counsel in respect to
16 those particular guidelines or that any amendments
17 need to be made to them.

18 There's also an issue that not only
19 are there guidelines but, indeed, in-house memos
20 have frequently gone out to prosecutors on this
21 legislation to keep them advised as to what's
22 going on, or what recent updates there are, what
23 new offences may now be registered automatically,
24 that you're going to be -- know that you are going
25 to have to be dealing with victims and their

1 families on this.

2 That system is all incorporated into
3 the PRISM system. And I know there are some
4 recommendations in respect to that system insofar
5 as it applies to the independent prosecutors, and
6 I'll deal with that later. But certainly for
7 in-house counsel, the PRISM system is essential,
8 in terms of it's a way of not only dealing with
9 the prosecution files, but it also keeps them
10 involved with the victims and the contacts and
11 everything else that's going on, because it's
12 accessible by both the Victim Services branch, but
13 also by the prosecutor themselves.

14 We have heard that maybe some of these
15 in-house memos weren't going to independent
16 prosecutors. I think the evidence from Mr. Minuk
17 was that he is now receiving those, and that is a
18 good thing, and that should happen. There are a
19 lot of in-house memos that may not find their way
20 into a policy directive. But prosecutors have to
21 fulfill their obligations under that as well, if
22 they are sort of advice notes or in-house memo
23 saying how you should deal with things or new
24 developments, they should be advised of that. And
25 that's been changed and, in fact, that is now

1 happening. You'll see several in-house memos that
2 in the past have gone only to in-house
3 prosecutors, those are now going to the
4 independent prosecutors as well.

5 The big complaint, and I can hear it,
6 subject to any questions you may have specifically
7 on the programs that are offered by the Victims'
8 Bill of Rights and the type of services that are
9 offered, because all that material is before you.
10 And a system that is evolving over time and
11 there's changes constantly being made, and it's to
12 some degree still a trial and error process, and
13 it's a difficult process. The big complaint seems
14 to be, well, what does consultation mean? Well,
15 as Mr. Paciocco calls it --

16 THE COMMISSIONER: It's a remedy
17 without rights.

18 MR. McFETRIDGE: Well, I don't think
19 that's correct.

20 THE COMMISSIONER: Well, what rights
21 do the victim really have? And I'm not saying
22 there should be any changes in the law, because
23 the law is reflective of our history and our
24 adversarial system. It is not, and has never
25 been, for at least since 1200s, a trial between

1 the victim and the accused.

2 MR. McFETRIDGE: And it's not that
3 kind of right, Mr. Commissioner. It's a right to
4 be heard.

5 THE COMMISSIONER: That's what I say,
6 it hasn't been, it's a trial between the state and
7 the accused.

8 MR. McFETRIDGE: Yes. And it's not
9 that right to be involved in the prosecution, but
10 they are a victim, they have a right to be heard,
11 they have a right to be kept informed as to what's
12 happening in respect to that, and that's what the
13 Act tries to do. There are decisions that are
14 being taken place in this adversarial process that
15 affect them and they want to know about it. And
16 they felt left out. And that indeed I think is
17 what the legislature is trying to say, is can we
18 be a bit more involved in it, be kept informed of
19 the process, maybe give some help? What is
20 happening out in this legal process when something
21 is stayed, or there's a plea bargain, or there's a
22 sentencing, what does some of this stuff mean?
23 They like to hear that, they'd like to be informed
24 about it, they'd like to keep informed. That's
25 what the Act tries to do, I would submit, when you

1 look at all these sections and what's involved on
2 a prosecutor, or what they are supposed to do to
3 keep them informed and what they are doing. All
4 these cognizant in the Act, and it is in the
5 policies, this is a very fluid process. It's a
6 busy system, things often happen quickly, as they
7 did in this case. Things can change on the
8 courthouse door. People aren't around when you
9 want them, people aren't there when you want them,
10 people have other files to do. There's a lot of
11 competing interests that have to take place. And
12 that's the real dynamic in the real world that the
13 workers have to deal with and the prosecutors have
14 to deal with, and the victims have to appreciate,
15 and that's also an explanation that they have to
16 be made aware of.

17 THE COMMISSIONER: But in the end, the
18 prosecutor has to make an independent decision.

19 MR. McFETRIDGE: Absolutely.

20 THE COMMISSIONER: Not in the interest
21 of the victim, but in the best interest to the
22 administration of justice.

23 MR. McFETRIDGE: And that is what the
24 Act says, and that says that --

25 THE COMMISSIONER: That is a problem

1 with the word consult. Consult means to consider.
2 What can a victim say that will influence a
3 prosecutor in making a decision that affects the
4 administration of justice?

5 MR. McFETRIDGE: The word is there.

6 THE COMMISSIONER: I'm sorry?

7 MR. McFETRIDGE: The word is in the
8 Act.

9 THE COMMISSIONER: That's been a
10 problem. Your witness, or the witnesses from the
11 government seem to think that the word itself
12 gives the victims a false impression of their
13 ability to influence the prosecution.

14 MR. McFETRIDGE: That's the impression
15 that they get from talking to the victims on the
16 street.

17 THE COMMISSIONER: Yes.

18 MR. McFETRIDGE: There's no doubt that
19 impression is there. On the one hand, though, you
20 have the legislature putting those words in the
21 legislation.

22 THE COMMISSIONER: What they can put
23 in, they can take out, if it leaves a false
24 impression.

25 MR. McFETRIDGE: If that in fact is

1 the reality of the world. I mean, I have gone
2 through a legal analysis on a very slight nature
3 in the brief that, in fact, consult does mean to
4 consider, to inform, and everything else. Whether
5 that was why that word was chosen in the ultimate
6 drafting, I don't know. The bottom line is, when
7 you look at the policy and the guidelines of our
8 own province, and the prosecution's policy, and
9 the very recommendation that has been met by
10 Mr. Paciocco is taken verbatim out of the victims'
11 guideline and the prosecution manual, inform and
12 seriously consider their views. That's taken
13 right from the prosecution guideline policy.

14 THE COMMISSIONER: What view can they
15 give?

16 MR. McFETRIDGE: Well, I guess that's
17 an interesting question. What view can they give?

18 THE COMMISSIONER: That's the problem.

19 MR. McFETRIDGE: They give one view,
20 an important view, and it's recognized of course
21 in the Criminal Code. They can give their view
22 from a victim's point of view as a victim impact
23 statement, as to how it this affected them, how it
24 affected their life, how it affected them
25 personally. That's one view they can express.

1 But, again, the other view, and again
2 that's not a view reflected, and I agree with you,
3 in the ultimate prosecution, is how the system
4 works and how it is working, and how it's working
5 for this family, and also for the public interest
6 in trying to resolve this offence. That's all I
7 can say. That's what the Act contemplates when
8 you read it as a whole, and that's how you have to
9 read it. All subject to the one big caveat at the
10 end of the day that the ultimate decision on the
11 prosecution, it is the prosecutors who have to
12 make that, on the overriding interest, on what the
13 law is, what the policies are, and what the
14 general public interest is, and not the victim.

15 The other big issue that was raised, I
16 don't know if it's a big issue, it was raised by
17 Mr. Clifford, was with respect to the victim
18 impact statements themselves. And the concern
19 was, whether it's a concern, we are not clear
20 whether it's a concern being raised by Commission
21 Counsel, or a concern being expressed by
22 Commission Counsel on behalf of victims, but at
23 least insofar as the Taman family is concerned,
24 that they have very little understanding of how
25 the victim impact statement worked, how they

1 should use it, they needed some help.

2 THE COMMISSIONER: Well, the code is
3 clear.

4 MR. McFETRIDGE: Preparing, yes.

5 THE COMMISSIONER: The code is clear
6 what can be included.

7 MR. McFETRIDGE: Yes. I would suggest
8 to you that what they describe, there seem to be
9 too many "don'ts" of what we can't do as opposed
10 to what we can do. Well, when you look at the
11 "don'ts" and what you can't do, they basically
12 reflect what the code and the courts, as they have
13 interpreted the code as saying you can't do. And
14 the basic thing what you can't do is use the
15 victim impact system as a means of criticizing the
16 justice system, or the members of the justice
17 system, or criticizing the accused.

18 We heard evidence of Mr. Taman, and we
19 heard evidence of his family, that they felt they
20 didn't know how to deal with the victim impact
21 statements and what should go in there and what
22 should be done. Well, we know the evidence of
23 Mr. Taman was that he never did contact anybody
24 from Justice that he needed some help on that.
25 Indeed, his own evidence, and that can be found

1 at, Mr. Taman's evidence at volume 20.1 of his
2 evidence, I believe it's page 245, that he
3 basically indicated, I didn't talk to anybody, I
4 didn't talk to anybody, Mr. Minuk about what
5 should go in there. What I did is I read the
6 guidelines, I followed the guidelines, and I wrote
7 my statement. It was difficult. But at the end
8 of the day, we know from the evidence of the
9 victims impact workers at least that these were
10 some of the most powerful statements they had ever
11 heard.

12 So you can say the guidelines weren't
13 clear enough, but obviously the Taman family was
14 able to follow those guidelines, nothing had to be
15 removed from their victim impact statements, and
16 they were very forceful. And I would suggest that
17 they did what they were supposed to do. What if
18 any impact they had at the end of the day, they
19 don't know. Whether it makes them feel better,
20 whether it's influence of the judge, but they are
21 there. It fulfills an obligation that's given
22 under the code and under our legislation. Whether
23 there can be improvements and better assistance in
24 doing that, certainly everything can be done
25 better. But at the end of the day, it should not

1 be the workers, and they can't be the people who
2 are preparing the statements, because that would
3 not be fulfilling the requirement of the code. We
4 don't want simply a situation where we are having
5 mirror image victim impact statements coming into
6 the court. And you will have some Crown, or
7 accused's counsel standing up, this isn't any
8 victim impact statement, the Crown wrote this, not
9 the victim. That's what it's for. They are
10 difficult, they are hard to do. The code is
11 trying to recognize it, our Act is trying to
12 recognize it. We can give as much assistance as
13 possible as to what can go in them and what can't.
14 But at the end of the day, it is ultimately the
15 victim who has to write them, as best they can do,
16 in their own words, how it has affected them.
17 Whether there can be more information and better
18 advice beforehand as to how to help them
19 understand what can go if there, there's always
20 room for improvement. But there's always a
21 resource issue as well.

22 And it's interesting in respect to
23 even Jordan Taman, I had asked him in
24 cross-examination, what don't you -- or what of
25 the don't section, what is it you didn't like?

1 What he didn't like was that he couldn't comment
2 on the prosecutor, he couldn't comment on the
3 police. But those are the very things,
4 unfortunately, that he cannot comment on. That is
5 not what the purpose of a victim impact statement
6 is. That is what the guidelines and the brochures
7 and the people talking are trying to convey to
8 these people, that in fact that cannot go into
9 their statements, as much as they want to express
10 those concerns, that is not what that victim
11 impact statement is for.

12 I'd like to say that Manitoba, and
13 you've said it, is in the forefront of this area.
14 It's an extra burden -- it is not a burden, it is
15 an extra, a lot of work for the prosecutors to do
16 this. They have a busy job. And they do spend
17 the time. In respect to Mr. Minuk, even though
18 all the difficulties in there, I mean, it is very
19 clear that he met not only with these victims on
20 many occasions for long periods of time. Whether
21 those were successful meetings from the victim's
22 point of view, obviously they weren't from their
23 perspective. Mr. Minuk's perspective, indeed, I
24 think the perspective of Ms. McCorrister is she
25 said, well, I believe at one time she said in her

1 evidence, Mr. Minuk, well, he is a lawyer, maybe
2 he talks like a lawyer, but he did meet with them,
3 he met with them for long periods, he was going
4 over things like sentencing, he was talking about
5 conditional sentences. It appears indeed he was
6 giving them advice as to what possible outcomes
7 could be well in advance of the ultimate decision.
8 As required, before this matter went to the plea
9 in July, he met with them immediately after he had
10 met with Mr. Kaplan, the very next people he met
11 with were the Tamans, Mr. Taman and his son.

12 Again, there doesn't appear, at least
13 from the Tamans, that they didn't maybe understand
14 fully what was going on. Mr. Minuk's evidence is
15 he did the best he could, from his perspective, of
16 explaining to them what was going on. That is
17 just a matter of human nature. I guess we're not
18 all perfect communicators. And in a situation
19 like this, and that type of circumstances, people
20 will be hearing things they don't want to hear, or
21 aren't hearing things because they don't want to
22 hear them. That often happens. It happens in
23 court, it happens in the real world. People do
24 the best they can.

25 I'm not sure what you can do to change

1 the intent of the Act, because the Act can't
2 change the everyday real life realities that you
3 are dealing with individuals who have to deal with
4 individual situations.

5 I have included in our brief, I don't
6 know if it's of assistance to the court, but I
7 think the province has endeavored to comply with
8 the case law in setting out what should be in a
9 victim impact statement and what shouldn't be. I
10 would disagree that there are in fact more you
11 can't do than what you can't do. The form itself
12 does set out the different areas. It gives
13 examples of the different areas. But what the
14 form should not be doing is saying, well, here is
15 an example of what you could write down. That's
16 not what a form should be doing. Those words have
17 to be the victim's words, how it impacts you on
18 those areas. Every victim will explain it a
19 different way. And the fact that one victim may
20 be not as articulate as another doesn't mean it is
21 not -- it's just not the same force as someone
22 else. It can be. Because you have to reflect the
23 person you are dealing with. That person may need
24 interpretative help, they may not be able to read
25 or write. Those kind of services can be given by

1 Victims' Services. But the actual writing of that
2 statement cannot be given by them, and they don't
3 do that, and they shouldn't be doing that.

4 Subject to any questions you have on
5 the Act and any -- I am going to move to the
6 recommendations of Commission Counsel.

7 I am here speaking on behalf of the
8 government, Mr. Commissioner. And as in
9 government, it would take government a long time
10 to digest all of these recommendations and even
11 get to consensus on any recommendation that has
12 been made by Commission Counsel. But we
13 appreciate the comments that were made and the
14 recommendations by Commission Counsel, and we
15 appreciate them being given to us in advance so,
16 indeed, we could have a look at them before you
17 make your decision, because you are ultimately the
18 one who is going to be writing a report and making
19 recommendations.

20 So when I make these comments about
21 these recommendations, they are not necessarily
22 the position of the government. I have talked to
23 people within the Department of Justice, senior
24 people within these, no decision has been made one
25 way or the other on any of these points. But some

1 of them, when they read them, from a practical
2 point of view, they do have some concerns. And
3 they would like to simply bring them to your
4 attention. It's not that they are opposed to
5 anything in principle, but they want to alert you
6 that you have to sometimes step back when you're
7 making recommendations, think of what they may be
8 doing, and how they will assist and take them in
9 that context.

10 And I'm going to try to go through the
11 recommendations that have been made by Commission
12 Counsel in the order they are done, all of which
13 are of course directed at the Minister of Justice,
14 who has requested you to look into all these
15 areas. And so they are obviously made to that
16 person.

17 And the first is to do with the East
18 St. Paul Police Department, and two
19 recommendations are made there. One in respect to
20 whether or not any further investigation should be
21 taken into account of the individuals named there,
22 and also whether or not there should be a further
23 investigation into the training available to the
24 qualifications of the East St. Paul Department.

25 In respect to the first one, in

1 respect to the individuals, all I can say is, I
2 mean, this is a decision for you to make. As in
3 fact -- as has been indicated by some of the other
4 counsel, in fact, there has already been an
5 investigation to some degree arising out of this
6 prosecution, by the RCMP, of a lot of the
7 allegations, indeed most of the allegations, and
8 certainly did have the degree of evidence that was
9 here, as to whether or not there was possibility
10 for charges. And that went to Mr. Abra, and a
11 separate opinion was given on that, and we know
12 what that said.

13 Having said that, you were aware of
14 that, we would like, if this recommendation is
15 going forward, if you can be as specific as
16 possible as to what areas you think further
17 investigation should be done, what they possibly
18 never knew before.

19 We did hear Mr. Weinstein's comment,
20 and we're not endorsing that, but at times enough
21 is enough. And that's not necessarily a position
22 of the government, but I'm just saying, if a
23 recommendation is going in that particular area,
24 based on we've had this inquiry, we've had a
25 previous investigation from the RCMP and

1 everything else, we would like the Commissioner to
2 identify the areas where that should be. And if
3 possible, we would want to know the reasons why,
4 so the government can carefully consider those,
5 consider decisions.

6 In respect to the East St. Paul
7 practice, again, as Mr. McDonald indicated, as a
8 result of this case, and even before this inquiry,
9 almost simultaneously with this inquiry being
10 called, in fact, the RCMP did another full
11 investigation of the East St. Paul Police
12 practices. And Mr. McDonald has already commented
13 on that.

14 Again, on that issue, and I can say
15 that certainly the government and Minister
16 welcomes any comments you may have as to anything
17 further that should or shouldn't be done. What I
18 can indicate is, in terms of police as well, and
19 the Minister has announced this, is the Police Act
20 in Manitoba is under complete review at this time.
21 The idea is to build on the best elements of other
22 provincial legislation. I mean, our Act is an old
23 Act, it's been there for a long time, and there
24 are all kinds of problems with it that need to be
25 revised and updated. Certainly, as part of that

1 review, there is going to be a review of standards
2 within the police system. And we would suggest,
3 as opposed to a specific recommendation against
4 one police force -- and this is not binding on
5 you, I mean, what you think needs to be done, if
6 you feel something further needs to be done within
7 East St. Paul, certainly the government is going
8 to look at the recommendation. But we think if
9 the Commissioner agrees with the recommendation of
10 your Commission Counsel, that there should be
11 review of police standards and practices, because
12 although peripherally you have gone --

13 THE COMMISSIONER: It's not part of my
14 mandate.

15 MR. McFETRIDGE: It is not part of
16 your mandate.

17 THE COMMISSIONER: No.

18 MR. McFETRIDGE: A fitting
19 recommendation would be more that the Minister
20 evaluate -- when the new Act is being reviewed, to
21 address standards and training for all police
22 forces, if that is in fact something they should
23 be looking at. I mean, if they are going to be
24 doing that, I mean, we are already under a review
25 there, and this is going to be part of the review.

1 Sometimes there can be too many reviews going on
2 at once, when one thing is going on.

3 Again, in respect to the Winnipeg
4 Police Service recommendations, again, as I have
5 just indicated, the current Police Act initiative
6 is looking at issues of police oversight in
7 criminal investigations of police. This is a
8 topical issue, it's an issue that's been going on
9 for a long time, it's not unique to this province.
10 Again, I'd even hate to use this word, anecdotal,
11 but this Commission has heard anecdotal evidence
12 that there is --

13 THE COMMISSIONER: Why don't you just
14 use historical.

15 MR. McFETRIDGE: Historical, better --
16 that there is an SCU unit in Ontario, but as the
17 Commissioner indicated yesterday, it's under fire
18 as well.

19 THE COMMISSIONER: Yes, but that may
20 be for different reasons.

21 MR. McFETRIDGE: Yes, different
22 reasons. There is always going to be an element
23 of perception in the justice system.

24 THE COMMISSIONER: Always a lot of
25 business for lawyers.

1 MR. McFETRIDGE: Yes. Well, these
2 lawyers could be appointed a judge the next day.

3 THE COMMISSIONER: That's right.

4 MR. McFETRIDGE: And then people are
5 going to -- well, how could that person who is
6 prosecuting one day can be judging the next? It
7 happens. The system, unfortunately, the justice
8 system has potentials for that all over. There
9 are --

10 THE COMMISSIONER: You should always
11 be trying to improve it.

12 MR. McFETRIDGE: Absolutely, and we
13 welcome your recommendations on that. As I have
14 indicated, though, the Police Act initiative is
15 under way, much work has already been done in
16 terms of governance, civilian oversight of
17 criminal allegations against police, studies, and
18 there's a lot of studies and there is a lot of
19 models already out there, all competing models,
20 and they are all being looked at. I don't know
21 what's the best model.

22 One of the recommendations here is
23 cause a study to be commissioned to identify
24 suitable alternatives. Well, we are already
25 reviewing our Police Act. There are already a lot

1 of models and studies out there, all of which are
2 being reviewed. But we welcome the Commissioner's
3 recommendations, and indeed your report is very
4 important, because this is an issue, because it is
5 a perception issue as to who should be
6 investigating the police and how that is most
7 appropriately done. I mean, there's no doubt in
8 the Province of Manitoba that we have several
9 police forces. We have the RCMP. We have the
10 Winnipeg City Police. We have municipal forces.
11 You are always going to have a police force
12 investigating a police force. Somebody has to do
13 it. Obviously, the best perception is do a
14 qualified investigation and do a good
15 investigation, and any perception at the end of
16 the day is going to be removed. But having said
17 that, should there be systems in place that
18 prevent at least as much as possible that
19 perception? We welcome your recommendations, but,
20 again, the only caution we have, oftentimes
21 recommendations come of another study when a
22 current study is going on, they do sometimes
23 become counter productive.

24 And in that regard, we welcome options
25 as to areas that could be looked at and reviewed

1 and should be taken into account. The government
2 welcomes those because you obviously would have a
3 great insight in this case. It can be used as
4 illustrations of what could, or might be the
5 perception that is out there, and how they perhaps
6 could be alleviated, or better, public could be
7 better informed as to why things are done a
8 certain way.

9 The independent prosecutor, as
10 Mr. Nozick has indicated, this policy was reviewed
11 after again this case by Madam Justice Krindle.
12 She did a thorough review of all the jurisdictions
13 as to what policies are in place. And to my
14 surprise, I was surprised that actually Manitoba
15 has probably the most detailed policy, at least a
16 public policy, and ours is a public policy that is
17 available to everyone. Everyone may have other
18 policies that we are not aware of, where they go
19 through the same process, but certainly in terms
20 of a public policy, Manitoba and probably British
21 Columbia have the most transparent of those
22 policies as to what is done and why. She has made
23 some recommendations, not that the practice has
24 changed, she's not changing the practice, but
25 she's changed -- she said the policy should be

1 beefed up to indicate what is involved in this
2 information sharing process. And those have been
3 incorporated into the policy, according to her
4 recommendations. We certainly welcome any further
5 recommendations in that regard and, indeed, your
6 comments as to whether you feel that policy is
7 appropriate.

8 What this policy is, and you have to
9 remember that the independent prosecutor is the
10 agent in the face of the Attorney General. He is
11 prosecuting in the public interest. He has all
12 the obligations of a prosecutor. He has the
13 obligations to the public, he has obligations to
14 the court, he has the obligations to the accused.
15 And he also has the obligations to the department,
16 that their policies that they have set out -- and
17 these are policies. And policies, as you are well
18 aware, in most cases are ways of assisting
19 prosecutors in exercising the prosecutor's
20 discretion. Not all policies are that way, a lot
21 of them are political policies going towards a
22 system, but most policies are how prosecutors
23 should exercise to assist them in exercising their
24 prosecutor's discretion, which is a very important
25 part of their function. And that's so that, in

1 fact, as much as possible that can be exercised
2 uniformly across the province. Indeed, then the
3 prosecutors have to be aware of the law, kept up
4 to date of the law.

5 And I think it's trite to say that
6 those who are most familiar with Crown policies,
7 the obligations of the Crown, not that all lawyers
8 don't have some dealings with that, but the
9 prosecutors are the ones who know that, they have
10 to operate within that milieu everyday of the
11 week, and what their responsibilities are to a
12 whole variety of stakeholders. That independent
13 prosecutor, however experienced they are, the
14 prosecution branch still at the end of the day has
15 to know that those decisions being made are in
16 concordance with the law, in accordance with their
17 policies. That prosecutor has to make the
18 decision on the facts. He has the case before
19 him, but he also -- and he has to put it in. He
20 also, however, has to be aware of the policies of
21 the law and that they are being complied with, and
22 they should be keeping the department advised.
23 And the department should be, on a periodic basis,
24 if they see something out of the ordinary, should
25 be advising the prosecutor, are you aware of this,

1 if they aren't, and in most cases they aren't.
2 And if somebody comes to them and says, this is
3 what we're going to do, and this is my decision,
4 the prosecution's branch is entitled, and I would
5 suggest required under our policy and I would say
6 under law to make sure, in fact, that what you're
7 doing is according to the law and according to our
8 policies. They are not there to direct them to do
9 something. But if it's wrong, they have a right
10 under our policy to step in. And our policy
11 indicates what in fact is going to happen if you
12 step in, that is done publicly and that we have
13 made that decision. Whether that is right or
14 wrong, that is the policy. It has always been the
15 policy, and is reflected more clearly in our
16 policy, we are not interfering with the day-to-day
17 operations. We are not making the witness list
18 decisions, we are not interviewing the witnesses,
19 but we are wanting to know what is happening. And
20 if a prosecutor, independent prosecutor comes in
21 and says, this is what I'm doing, if a question
22 was asked hypothetically, well, are you aware
23 that's contrary to our policy? They have an
24 obligation, I would submit, to advise that
25 prosecutor. And the prosecutor who then goes and

1 says, you are right, I forgot about that, or I
2 wasn't aware of this most recent decision, and
3 goes back and perhaps changes his decision, this
4 gets to the recommendation, a long way around to
5 the recommendation, is a substantial change to
6 that one clause in the policy as to what role the
7 prosecution branch should be playing. And it is
8 requiring, as I read it, any time someone comes
9 in, and even on the most minor situation, if they
10 came in and a prosecutor, for example, was told,
11 well, you haven't considered our conditional
12 sentence policy when looking at this, please go
13 back and consider that. If, in fact, that
14 happened in a situation, somehow that would have
15 to then be published and gazzeted that somehow the
16 Department of Justice has interfered or directed
17 them to do something. That is not a direction.
18 That is a consultation and an advice that is being
19 formed.

20 This is an issue that is important, as
21 to what is the appropriate way to deal with these
22 conflicts. We feel the policy as adopted and
23 reviewed by Madam Justice Krindle is a good
24 policy. However, we welcome recommendations in
25 respect to that. We have concerns about

1 recommendation made by Mr. Paciocco, because it
2 puts in place micromanaging, in many respects,
3 individual discussions. And when people are
4 talking, are they not putting -- am I being
5 directed, or are they simply giving me
6 information, what do I do with this?

7 The policy we submit is up front, it
8 indicates what's being done. And the bottom line
9 of the policy is, if there is a direction you have
10 to do something coming from prosecutions, that
11 that is put on the public record, and the public
12 is notified by that. That is the current policy.
13 As Mr. Kaplan said, it has never happened to date,
14 but if it would happen, that's the method that it
15 would be done.

16 There have been made recommendations
17 here about what resources should be made
18 available. As I indicate, this policy is
19 primarily to ensure that prosecutions that are
20 handled by the independent prosecutor are the same
21 or similar to the standard that would have been
22 done if it was done by Crown in-house prosecutor.
23 That is it. They are not going into the minutia
24 of a case, they are not going into the what do I
25 do next, what do I do next? Is that not making

1 them independent? We invite your recommendations
2 on that.

3 And I will submit, when I review the
4 Krindle report and her review of all the other
5 policies in other jurisdictions, Manitoba's is not
6 substantially different from those other
7 jurisdictions. If anything it is more public, it
8 is available on the public website.

9 The independent prosecutor has to have
10 resources made available to him. Some of those
11 resources may be access to information from the
12 Crown's office in respect to policy decisions,
13 they may even be in respect to doing some mundane
14 matters, going down and getting the remand done or
15 something like that. Madam Justice Krindle
16 recognizes that. That should be happening. The
17 key is, at the end of the day, are they being
18 directed as to what to do, or is it simply a
19 matter of information, bringing it to their
20 attention, or even asking the question, does this
21 in fact comply if a prosecutor, independent
22 prosecutor, your current policy? That question
23 surely can be asked without affecting the
24 independence of an independent prosecutor.

25 Oftentimes the independent prosecutor

1 may not have the resources within his own office
2 to discuss that.

3 Now, the recommendation has been made,
4 should we be setting up separate sort of group of
5 lawyers on the side that this independent
6 prosecutor can review? I mean, every province has
7 its different resources. It is necessary, as a
8 reference in the Commission report, or Krindle
9 report, and was acknowledged by Commission Counsel
10 to permit independent counsel to access technical
11 and legal expertise is one thing, but they have to
12 have a place that they can go to other than the
13 Department of Justice to get an opinion. Well,
14 they are not going to the Department of Justice to
15 get an opinion, they are going to the Department
16 of Justice when they do to inform what's going on,
17 but also to confirm.

18 THE COMMISSIONER: To what?

19 MR. McFETRIDGE: To confirm to some
20 degree.

21 THE COMMISSIONER: Confirm what?

22 MR. McFETRIDGE: Well, to confirm,
23 this is what I gave you, they are not asking for
24 that confirming information, but they could be
25 told, this is not in compliance with policy, you

1 have not looked into an individual --

2 THE COMMISSIONER: Are you talking
3 about to the standing panel? Are you talking
4 about that?

5 MR. McFETRIDGE: No.

6 THE COMMISSIONER: I'm sorry.

7 MR. McFETRIDGE: I'm sorry, I went
8 ahead. Independent forum, someone to bounce ideas
9 off, maybe there should be something like that. I
10 don't know what the right answer to that is.

11 THE COMMISSIONER: It may be simply
12 that the other, that the other independent
13 prosecutors are on retainer, somebody -- they
14 should be able to bounce it off them without going
15 to members of the Minister. I mean, line
16 prosecutors have that, enjoy that privilege all
17 the time. They just walk into a colleague's
18 office and say, look, I got this case and I don't
19 know how I can prove this, and I don't know
20 whether I should go ahead, what do you think?
21 These independent prosecutors don't have that.
22 And maybe, maybe the suggestion of a panel of
23 criminal lawyers or trial judges, it may be beyond
24 what should be done, but at least they should be
25 directed towards their colleagues who are doing

1 independent work, so they can call them up and
2 say, I have got this difficult case, what do you
3 think? They shouldn't be left out on a limb.

4 MR. McFETRIDGE: You know, what is the
5 answer to that? I don't know what the answer to
6 that is.

7 THE COMMISSIONER: Well, I don't know
8 either. I was an independent prosecutor too for
9 the Federal Government, and it was a problem, I
10 can tell you. There is nobody to talk to. And so
11 you had to make hard decisions.

12 MR. McFETRIDGE: We welcome your
13 recommendation on that.

14 THE COMMISSIONER: Thank you. Thank
15 you. All right.

16 MR. McFETRIDGE: There's a
17 recommendation we consult, consultation with
18 Crowns on after the fact public disclosure.
19 Commission Counsel has suggested that whenever
20 legal assistance provided by Manitoba Justice
21 results in a change in independent counsel's
22 position or strategy, it should be disclosed to
23 the public after the verdict is stayed. We are
24 not aware of any such policy anywhere in Canada.
25 We are concerned that this is not a practical

1 solution to the objective we share with Commission
2 Counsel, that real and perceived independence of
3 independent prosecutors should be maintained. I
4 am not sure how that's going to work.

5 THE COMMISSIONER: Which one are you
6 referring to? I'm lost.

7 MR. McFETRIDGE: And that is the
8 Commission Counsel recommendation on how they want
9 to amend paragraph C of the policy.

10 THE COMMISSIONER: Oh, we're back at
11 that.

12 MR. McFETRIDGE: Yeah.

13 THE COMMISSIONER: All right.

14 MR. McFETRIDGE: We have a concern
15 with that, and we don't think that is a practical
16 solution, and we would recommend the Commission
17 look at that carefully.

18 THE COMMISSIONER: Thank you.

19 MR. McFETRIDGE: What is that line,
20 what is that bright line, I mean, that is a
21 decision that has to be made, as to when you are
22 directing somebody and when you're not. That is a
23 decision that has to be made. And we welcome a
24 recommendation on this area, but we feel that this
25 recommendation goes too far.

1 Presentation in the guilty plea, we've
2 heard evidence that perhaps Manitoba's practice is
3 different than other practice.

4 THE COMMISSIONER: First time I have
5 heard of it.

6 MR. McFETRIDGE: Yeah. I mean --

7 THE COMMISSIONER: Mr. Weinstein and
8 Mr. Gover, who live in the Provincial Courts,
9 didn't comment on it at all. I assume that that
10 is the practice.

11 MR. McFETRIDGE: We don't disagree
12 that the presentation of factual foundation at the
13 time of the plea is generally a good practice and
14 may be helpful in terms of clarity and
15 transparency. This does occur in Manitoba, and
16 sometimes it does and sometimes it doesn't.
17 However, Manitoba suggested this is a matter of
18 practice and should be recommended to Crowns to
19 attempt to do this where practical, rather than
20 incorporate it as a directive in a policy. I
21 mean, there are other stakeholders involved in
22 this, Mr. Commissioner. For example, the courts
23 themselves, obviously the defence are --

24 THE COMMISSIONER: Well, this is a
25 recommendation --

1 MR. McFETRIDGE: Yeah.

2 THE COMMISSIONER: -- that the
3 prosecutors should conduct themselves in this way,
4 and it should come as a direction from the
5 Minister. It would have solved a lot of problems
6 in this case.

7 MR. McFETRIDGE: Well, it's true
8 enough. Every case is individual and, I mean,
9 care needs to be taken --

10 THE COMMISSIONER: This is an unusual
11 one.

12 MR. McFETRIDGE: Yeah. I mean, care
13 must be taken to ensure that this recommendation,
14 if in fact you follow Commission Counsel, does not
15 create unintended consequences. I mean, there is
16 a system that's set up in Manitoba. Whether it
17 works or not, you're looking at one particular
18 case, I mean --

19 THE COMMISSIONER: Well, let me put it
20 to you bluntly. It's contrary to case law. There
21 is a provision in the code that says -- if I am
22 correct, I'm sure I'll be corrected by counsel --
23 that a plea of guilty is an admission of all of
24 the essential facts. But then the judge has a
25 responsibility to ensure that the facts in support

1 of the plea constitute an offence. There's an
2 authority that goes back long before that
3 provision in the code was enacted some years ago.
4 And so that was what happened in this case. And a
5 simple memorandum to the Crowns to deal with this
6 would have avoided this long session between the
7 judges and Mr. Wolson and Mr. Minuk -- the judge,
8 Mr. Minuk, Mr. Wolson. So I see no great moment,
9 but it should be, it should at least be a practice
10 that's followed.

11 MR. McFETRIDGE: And our only comment
12 on the recommendation, I understand your comments,
13 and it came up many times during the course of
14 this inquiry, it was asked of many people. As I
15 indicated, there are a lot of issues and a lot of
16 stakeholders involved in that, and certainly the
17 comments are welcomed, but it involves the court,
18 the defence bar, and what area, if in fact there
19 is such a practice in Manitoba. And I will
20 suggest that it goes on, on an individual basis.
21 These are issues that are involved of a nature
22 that have to be discussed with many stakeholders.
23 And it may have unintended consequences such as
24 the creation of an unacceptable backlog the way
25 the system is set up here. Because a lot of these

1 things go through a plea bargaining court, and
2 then the next thing they are sent off to
3 sentencing, where the facts are gone into. If the
4 process is going to be changed, we welcome your
5 comments on those issues. When the recommendation
6 is made to the Minister to do something, the
7 Crowns have to do something. They then have to
8 deal with all the other players in the system that
9 have to do it, and buy into that system. That
10 involves consultation with everybody. And the
11 recommendation is welcomed as to the issue. How
12 that issue is worked out has to involve all the
13 stakeholders if, in fact, that is a recommendation
14 the Commissioner wishes to consider.

15 Agreed Statement of Facts, and you
16 moved onto that, Manitoba agrees an Agreed
17 Statement of Facts would have been helpful in the
18 present case, no doubt about it. However, the
19 proposed recommendation is very problematic.
20 Mr. Commissioner, you obviously have a great deal
21 of background in the criminal bar. You, as well
22 as anybody, would know all the negotiations that
23 go on between defence, inquiry counsel, on even
24 the simplest of facts. To get anybody to agree on
25 anything, even on a plea resolution as to whether

1 you are stabbed ten times, nine times, eight
2 times, six times, here in the head, in the back or
3 whatever. To get all these facts -- Agreed
4 Statement of Facts are important, and Commission
5 Counsel uses the word in serious cases. And how
6 it will be defined by prosecutions, what is a
7 serious case? All cases are serious to whoever
8 they are. A murder case may be serious, but it
9 may be very simple. Somebody walked up to
10 somebody and put a gun to their head, and it was
11 witnessed by 20 people, and he was shot dead.

12 Issues when there are joint
13 recommendations coming before counsel, and there
14 are contentious issues of facts, there is no doubt
15 that if it can be put down in writing and agreed
16 to, do it. You always have -- run the inference,
17 are counsel in any way sanitizing the evidence
18 when it comes in? That's not permitted. Nobody
19 should do it. And the normal practice is, when
20 you come in, Crowns will read their version of the
21 facts on the sentencing, whether from police
22 statements or whatever, there may be submissions
23 the other way. When there's contentious issues,
24 and when the parties can agree and they come in on
25 a joint submission, as in this one, and it appears

1 the parties are very close, you can get it in an
2 Agreed Statement of Facts, yes. There is
3 certainly a potential that we would say
4 contentious matters on joint submissions, and
5 probably other cases where Agreed Statement of
6 Facts are appropriate and indeed probably
7 possible. However, the recommendation as given by
8 Commission Counsel may cause a lot of problems
9 without consideration. And we welcome --

10 THE COMMISSIONER: What is the
11 problem? When I prosecuted, long before
12 Stinchcombe, I took the Crown brief, if counsel
13 wanted to plead guilty and I gave it to them, and
14 I said, what do you agree upon? And it was very
15 simple. Page -- I'm sure you call it here the
16 dope sheet -- you hand it to the defence counsel,
17 just as I expected the Crown to do to me, and I
18 look at it if I was going to plead. You agree to
19 it, sir, I agree to this, I don't agree to this,
20 and that's all. You read it in, it is very quick,
21 very expeditious. This system which is done, you
22 take a plea, and you go to another day and decide
23 what facts are going to read, and you haven't
24 agreed to, it causes a problem.

25 MR. McFETRIDGE: That's a different

1 issue, Mr. Commissioner. This is an issue
2 specifically with respect to the written
3 statement, and that was an issue before that in
4 respect to whether the plea should be done and the
5 facts should be written in at the time of the plea
6 as opposed to during the sentencing issue. If an
7 issue -- and I agree, it could be done and it
8 should be done. That is not apparently the
9 practice today in Manitoba. And that involves
10 involving all the stakeholders at that point. And
11 all we say is, if that recommendation is to be
12 made, it certainly should be brought to the
13 attention of all of the stakeholders as to how
14 that should be done.

15 In respect to the written statements,
16 we have a disagreement on that, as they are
17 useful, we agree. To make it mandatory as
18 suggested may cause problems in the everyday
19 practice of law. We welcome your comments on that
20 as to when they are appropriate. We do not think
21 the word serious is the appropriate word. If it
22 is going to be used, it should be contentious
23 issues. If they can be resolved, it's certainly
24 obviously something that would be recommended, if
25 it's in writing. But at the same time, you want

1 every party, as much as possible, to give as much
2 evidence and as many facts before the court as
3 possible. And whether that's through reading
4 witness statements in from transcripts from
5 Preliminary Hearings or whatever, the most
6 important part is the court knows the factual
7 basis before it.

8 And this gets to the next issue of
9 stipulating compromises and concessions made in
10 securing a guilty plea, and exploiting the
11 exigencies during the sentencing process. An
12 important issue that arose in this case came
13 during the course of Mr. Justice Wyant's
14 indication that he might reject the joint
15 recommendation respecting the sentence. To a
16 large degree, the issue eventually, and not the
17 whole degree because it was a moving target to
18 some degree, but obviously during the course of
19 the September hearing, and obviously the decision
20 of our Court of Appeal in R versus Sinclair became
21 an issue. Mr. Commissioner, you have alerted to
22 it, you are aware in that case Madam Justice
23 Steel, in her opening paragraph of her decision --
24 and I believe you have a copy, and I certainly can
25 provide it to you. Her opening comments in that

1 decision were the difficult question of when it is
2 appropriate for a court to deviate from a joint --

3 "The difficult question before the
4 court was when it was appropriate for
5 a court to deviate from a joint
6 recommendation as to sentence."

7 And then she went on to indicate in paragraph
8 eight of her decision:

9 "Plea bargaining has become a routine
10 part in the process of handling
11 criminal cases. The bargaining
12 process is undermined if the joint
13 recommendation is too readily rejected
14 by the sentencing judge. This was
15 recognized by the Martin committee in
16 1993, which suggested that the proper
17 test for justifying departure is
18 whether the proposed sentence brings
19 the administration of justice into
20 disrepute or is otherwise contrary to
21 the public interest."

22 This is obviously an important
23 decision of Manitoba, and I understand Commission
24 Counsel and you, in fact, indicated may be unique
25 to Manitoba. What Justice Steel said at paragraph

1 13 and 14 of her decision was:

2 "The clearer the quid pro quo, the
3 more weight should be given to an
4 appropriate joint submission by the
5 sentencing judge. Recognizing the
6 cases follow various places on the
7 continuum, the essence of the plea
8 bargain or joint submission should be
9 placed on the record in open court.
10 The judge must have a solid factual
11 basis on which to make an independent
12 reasonable decision. If a trial judge
13 is not given or fails to inquire into
14 the circumstances underlying the joint
15 sentencing submission, he or she will
16 be hard pressed to determine whether
17 there is good cause to reject that."

18 That leads to our current policy. You
19 have before you our plea bargaining guideline, and
20 it's dated October 10th, 1990, and that's at
21 Exhibit 231, I believe, of the materials that's in
22 volume X-2.8.

23 THE COMMISSIONER: What's wrong with
24 this recommendation? All it says is that the
25 Crown should tell the judge, as the Martin

1 Commission says, and as Madam Justice Steel says,
2 tell the judge and the public the basis upon --

3 MR. McFETRIDGE: And I agree with
4 that. What we are suggesting is done, on many of
5 our policies, and because a lot of policies are
6 local in nature, there clearly should be in our
7 plea bargaining policy -- and when you look at
8 that policy under paragraph four, which is our
9 current plea bargaining policy.

10 THE COMMISSIONER: Well, if it's
11 there, you know, I don't need the recommendation.

12 MR. McFETRIDGE: Well, no, it's not
13 there. In the sense, when Crown Attorneys may
14 agree with defence counsel adopt a particular
15 position on sentencing, we agree that it's
16 important that they are bargaining, the plea
17 bargaining policy should be updated to reflect the
18 Sinclair decision. I mean, it's clear that that
19 should be done, should be put in our policy.
20 Indeed, a lot of our policies reflect case law.
21 And that is one way we submit the Commission can
22 go, and that probably would be done even before
23 your recommendation, that is one way to go. I
24 mean, the bottom line is, the full facts have to
25 be put out there as to why this joint submission

1 on sentencing is being made and the facts in
2 support of it, to comply with the type of problem
3 that at least Judge Wyant perceived wasn't being
4 dealt with here.

5 Certainly Crown Attorneys are well
6 aware of Sinclair, but the policy hasn't been
7 updated to reflect it, and it should be.

8 Moreover, and I'm getting to --

9 THE COMMISSIONER: We're going to
10 break soon.

11 MR. McFETRIDGE: I'm almost finished.
12 In respect to the specific proposal given by
13 Mr. Paciocco, we support the ideas in this. We
14 don't disagree with them. The majority of cases
15 result by way of a guilty plea and most Crowns
16 reference the reasons for resolutions, in a
17 general way, during their submission. There's no
18 doubt about that, and they should. However, to
19 make this a policy directive required in each and
20 every case with specificity may be problematic on
21 sentencing. That's the only issue. It's always a
22 matter of degree as to what can be said on the
23 record. And maybe Mr. Paciocco is meaning that.
24 There are issues of confidentiality, there are
25 issues of privacy on certain cases. And if that's

1 what the policy being recommended by Mr. Paciocco
2 is intended to reflect, that those type of
3 circumstances have to be taken into account --

4 THE COMMISSIONER: I also recognize
5 there may be circumstances where you can't reveal
6 it, the undercover officer, the witness who
7 doesn't wish to testify because of harm,
8 emotionally or physically, I understand. But the
9 judge -- and the practice that I adopted, and I am
10 sure judges do it, is you tell a judge in chambers
11 what the plea is and the reason, and the judge
12 then says something in open court in such a way so
13 that the bargain is as transparent as possible
14 without revealing the reason why.

15 MR. McFETRIDGE: Absolutely, and I
16 don't disagree with that.

17 THE COMMISSIONER: Okay.

18 MR. McFETRIDGE: We are concerned when
19 we get into the specificity that Mr. Paciocco is
20 suggesting, and you have to take these other
21 factors into account.

22 There is a reference to the PRISM
23 system, it would be nice -- and I think,
24 Mr. Commissioner, you referenced that -- if the
25 prosecutors can use it. They can't. It's not

1 geared up at this stage.

2 THE COMMISSIONER: It's something that
3 you can consider in the future.

4 MR. McFETRIDGE: Absolutely. The
5 training and the VPR issues, no issue with that.
6 I mean, obviously prosecutors should have
7 availability of the same training as any other
8 prosecutor. The only suggestion I would make is
9 the word "require" is a minor suggestion, at the
10 end they have to -- are they required to attend
11 every subsequent information? It's like anything
12 else. They are welcome to come, they are invited.
13 Like anybody, everybody can't make everything.
14 It's just semantics.

15 THE COMMISSIONER: Do they get a
16 little star if they do attend?

17 MR. McFETRIDGE: Well, I don't know.
18 It's not something that should be in a directive
19 in any event. It's obviously good practice,
20 everybody recognized that.

21 Mr. Commissioner, I've gone through
22 the recommendations. We welcome your report.
23 It's been a very long hearing. We thank you for
24 your time and effort, both you and your counsel
25 put into this. We look forward to your report.

1 THE COMMISSIONER: Thank you very
2 much. Are you going to have the time this
3 afternoon to reply? If not we'll take an hour.

4 MR. PACIOCCO: We'll definitely have
5 time to reply. You know, a shorter break than
6 usual would suffice, but I know that Mr. Clifford
7 probably has 20 minutes, maybe more, and I've got
8 to respond to the recommendations of the five
9 counsel, so I've probably got about 45 minutes.

10 THE COMMISSIONER: So that's two
11 hours.

12 MR. PACIOCCO: No, I think it is about
13 an hour and a half.

14 THE COMMISSIONER: If we break now and
15 come back at 2:00, can we get it all in?

16 MR. PACIOCCO: Yeah, we can get it all
17 in, for sure.

18 THE COMMISSIONER: And then we have to
19 vacate this place very quickly.

20 All right. Well, if you can do it,
21 we'll come back at 2:00 o'clock or ten to 2:00,
22 what do you suggest?

23 MR. PACIOCCO: Let's do ten to 2:00
24 and then we get an early recess.

25 THE COMMISSIONER: Thank you. That's

1 fine.

2 THE CLERK: Order, all rise. This
3 Commission of Inquiry is in recess.

4 (Proceedings recessed at 12:43 p.m.
5 and reconvened at 1:50 p.m.)

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

8 MR. CLIFFORD: Good afternoon,
9 Mr. Commissioner.

10 THE COMMISSIONER: Good afternoon.

11 MR. CLIFFORD: Sir, while I appreciate
12 Mr. Green confirming my prediction as to the focus
13 of his submissions, I must humbly confess that in
14 view of who his client is, it wouldn't require any
15 great clairvoyance in making that prediction that
16 he would refer to Mr. Peck's report.

17 Let me say facetiously that when you
18 only have one card in your hand, it's not a great
19 stretch that that's the card that you're going to
20 play.

21 What these experts indicated to you,
22 sir, was a divergence of opinion, and
23 fundamentally where they departed ways was on the
24 issue of mere alcohol consumption as an
25 aggravating factor. And while Mr. Peck and Mr.

1 Gover both have tremendous credentials, the case
2 law in Manitoba and elsewhere clearly supports the
3 position advanced by Commission Counsel, the
4 opinion of Mr. Gover and the opinion of Chief
5 Justice Wyant that I'll refer to later.

6 Mr. Green commented, Mr. Commissioner,
7 on the evidence of the civilian witnesses and I'd
8 like to respond to that as well. What he
9 suggested to the court was what might have been
10 taken from that evidence in light of the
11 interviews from the Winnipeg Police force. And
12 what could have been taken in response to that is
13 that Chelsea O'Halloran made reference to eight
14 beers and Darcey Gerardy made reference to a very
15 distinct concern about officers driving.

16 Also with respect to interviewing lay
17 witnesses, Mr. Green spoke to a standard of
18 perfection or the perfect standard. And that is
19 not what we are suggesting, nor was it the
20 standard that was endorsed by Mr. Peck and Mr.
21 Gover where the witnesses, the expert witnesses,
22 testified that you simply have to prepare your
23 witnesses.

24 I'd like to take a brief minute or two
25 to comment and respond to the thrust of

1 Mr. Green's submissions. And they related to two
2 areas primarily. One was did Mr. Minuk make
3 sufficient comments as to make the judge aware on
4 August 22nd for the basis of the plea bargain, and
5 whether in fact it was a plea bargain. And the
6 second thrust of his submissions was with respect
7 to was alcohol, absent impairment, should that
8 have been placed before the court as an
9 aggravating factor. In other words, should that
10 have been proven. And there was some discussion
11 in Mr. Green's submissions about what was said
12 about these things, was what was said by Mr. Minuk
13 sufficient, what did it mean to the judge, and
14 what did the judge understand, based on what
15 Mr. Minuk indicated?

16 And Mr. Green referred you to a good
17 portion of the transcript. And I'd like to refer
18 you to a part of the transcript, but very briefly.
19 There are just a few areas that I think could be
20 of great assistance in responding to what
21 Mr. Green had indicated to you.

22 Now, dealing with the difference
23 between September -- between August 22nd and
24 September 12th, and bearing in mind that
25 Mr. Green's submissions centred around what would

1 the judge have thought, and what was counsel
2 trying to articulate to the judge? Well, we have
3 the actual final reasons of the judge on the 29th.
4 So I can respond to Mr. Green's submissions to you
5 by referring you to page 5 of the reasons of
6 October 29, 2007. And I'll read to you very
7 briefly.

8 MR. GREEN: Mr. Commissioner, I have
9 trouble seeing how this is proper reply. I didn't
10 mention anything about the judge's reasons on the
11 last day. My point was that those were matters
12 that went on on the day when he was being, he
13 being Mr. Minuk, was being asked if evidence will
14 be called or not. My friend's remarks surely
15 should be restricted to that day and not some
16 clarification that the judge may have made
17 subsequently, several months later.

18 MR. CLIFFORD: I can respond to that
19 very simply, Mr. Commissioner. What Mr. Green was
20 referring to in his submissions was what Judge
21 Wyant would have been thinking when these counsel
22 were making their submissions and what impression
23 he was left with. And in responding to that, I
24 can point you to exactly the impression that he
25 was left with, by making a very quick reference to

1 the October 29th decision. This issue was raised
2 by Mr. Green when he made his submissions and sort
3 of left it out there, well, what would the judge
4 have been thinking based on what the counsel had
5 submitted to him?

6 MR. GREEN: That wasn't my argument at
7 all. My argument was what would Mr. Minuk
8 understand from what the judge said, and I quoted
9 the judge's remarks to that effect. Surely we're
10 not going to engage in a mind reading exercise of
11 what the judge was thinking. We're going to go
12 hopefully by what the record states, and that's
13 what I quoted. If my friend has something to
14 contradict what the judge stated, fine, let him
15 quote it, but otherwise this isn't proper reply.

16 MR. CLIFFORD: That's precisely my
17 point. We don't have to go into a mind reading
18 exercise, because the judge made it clear when he
19 came back on the 29th what he thought about the
20 way submissions were made -- the way counsel made
21 their submissions and the impression that counsel
22 left him with, on whether it was appropriate on
23 August 22nd to have said only what was said.

24 THE COMMISSIONER: Let me hear what he
25 has to say. I have your objections, and I know

1 what your submissions are. Just let me hear what
2 he has to say.

3 MR. GREEN: Could I just make one
4 remark, and I'll sit down and probably stay there,
5 not rise again. This is a little bit unusual in
6 the first place for counsel to be having reply.
7 Nobody else will get any opportunity to have sur
8 rebuttal, I'm assuming.

9 THE COMMISSIONER: No, no, you had an
10 opportunity to reply to them. So they are
11 replying to you.

12 MR. GREEN: If it's done in accordance
13 with the rules of procedure and this in my
14 submission is not, and we should be strict about
15 this because this is going to be the last
16 opportunity. So I think, in fairness, you should
17 be vigilant about whether it's proper or not.
18 Thank you.

19 THE COMMISSIONER: Thank you. What's
20 your point, Mr. Clifford?

21 MR. CLIFFORD: The point is, sir, on
22 the issue of what occurred between August 22nd and
23 September 12th, any suggestion that you don't know
24 what the judge was thinking or you'd have to be a
25 mind reader, I just simply want to refer you to

1 two passages with respect to, and I'll cover both
2 of these points with these passages, the
3 difference between August 22nd and September 12th,
4 making the judge aware of the existence of a plea
5 bargain, and what the judge would have thought of
6 alcohol consumption.

7 And Mr. Green specifically indicated
8 in his submissions that, look, I asked Mr. Gover,
9 you could assume that the judge would have thought
10 that was an aggravating factor, right? He said,
11 well, what does that tell us? That doesn't tell
12 us that the judge would have considered it to be
13 so. So by referring you to two brief passages I
14 think I can respond to that entire submission.
15 May I?

16 THE COMMISSIONER: Yes, of course.

17 MR. CLIFFORD: At page 5 of the
18 October 29th transcript, line 33, Judge Wyant
19 indicated:

20 "What happened at the subsequent court
21 hearing on September 12th was very
22 troubling to me. For the first time
23 in court I heard that this joint
24 recommendation was made as a result of
25 a plea bargain. Nowhere was the term

1 plea bargain mentioned to me in
2 August."

3 He went on and indicated at page 8 at
4 line 4, that on that day, it was the first time he
5 heard the word exigencies. And then he went on at
6 line 15 and said:

7 "I will confess that I wondered why
8 all of this was not mentioned before.

9 I can only conclude that this was a
10 serious but inadvertent omission."

11 Sounds very much like what Mr. Peck
12 and Mr. Gover had suggested to the Commission.

13 Now the key that deals with the
14 submission that we don't know whether Judge Wyant
15 would have considered alcohol, mere alcohol
16 consumption as opposed to impairment, as being an
17 aggravating factor, when I said to Mr. Gover, you
18 could assume that he would conclude that, Mr.
19 Gover said, yeah, that would be a safe assumption.
20 I refer you to page 9, line 3. Chief Justice
21 Wyant stated as follows:

22 "While alcohol consumption does not
23 mean that the accused was impaired, it
24 is a factor, an aggravating factor in
25 this case and an important factor in

1 weighing the appropriate sentence and
2 then assessing the joint
3 recommendation. So in these two
4 important ways the case in September
5 was disturbingly different to me. In
6 the end, though, I must accept what
7 has now been presented and clarified."
8 That's all I wanted to say on that
9 point.

10 THE COMMISSIONER: Okay, all right.

11 MR. CLIFFORD: And where that takes us
12 in law is you have the Manitoba jurisprudence
13 before you that says, and other provinces, that
14 say alcohol, mere alcohol consumption is an
15 aggravating factor that can be used by the Crown.

16 And the next case that you could rely
17 on is the decision of the Chief Justice in this
18 case, because he clearly states that if he had
19 that, this is how it would have been considered.

20 Moving to comments made by and
21 arguments made by Mr. Kaplan, referring to the
22 conditional sentence, and he made reference to my
23 colleague's paper, Mr. Paciocco's paper. Mr.
24 Kaplan referred to --

25 MR. GREEN: This is Mr. Nozick.

1 MR. CLIFFORD: Oh, I apologize. Mr.
2 Nozick was commenting on something that Mr. Kaplan
3 had referred to, and then in dealing with it made
4 reference to Mr. Paciocco's paper. And that was
5 the discussion about the conditional sentence
6 policy and the appropriateness of it. And there
7 was the reference to the fact that where there is
8 a mixture of denunciatory and rehabilitative
9 factors, that the Supreme Court in Proulx has
10 indicated that that could militate in favour of a
11 conditional sentence. In this case, of course,
12 you realize that there was no evidence whatsoever
13 before the sentencing judge with respect to any
14 necessity for rehabilitation of Derek Harvey-Zenk.
15 One might argue that the inclusion of a condition
16 of alcohol counselling might indicate some need
17 for rehabilitation. But that really came through
18 as an unexplained condition in the end.

19 On the issue of Exhibit 218, the blue
20 docket, so to speak, Mr. Nozick referred you to
21 the fact that there's ten contacts after the
22 sentencing, and to look at it from a mathematical
23 or numerical perspective. But in my submission
24 there's no calculus in looking at necessarily the
25 number of contacts. They are what they are, up to

1 the point of the sentencing. The key here is for
2 you, I think, to assess the substantive nature of
3 the contact and the suggestion that things are
4 being vetted. And I simply refer you to the
5 interview of Mr. Minuk and the four points on the
6 vetting.

7 Mr. Nozick in his argument referred
8 you to the September 12th call as well to Mr.
9 Kaplan and Mr. Slough, and there was some exchange
10 between you and he about the call and what might
11 happen. But in our submission this is a clear
12 demonstration of the lack of independence, because
13 what Mr. Minuk tells us in evidence, and he told
14 us in his Commission Counsel evidence and it also
15 came through with three other witnesses, that
16 contrary to Mr. Nozick's argument that this might
17 be seen as acceptable or not highly unusual, at
18 the end of the day we know that it lead to,
19 according to Mr. Minuk on his words, what he would
20 have done there when he indicated that as a result
21 of that telephone call, "And the response that I
22 gave to the judge was as a result of that
23 conversation." Now that really begs the question
24 that I think Mr. Nozick and Mr. Green addressed
25 when Mr. Green got up at one point and indicated

1 that, look, I don't necessarily agree with the
2 position on whether Mr. Minuk undertook, or I
3 don't understand the basis upon which he would
4 have entered this telephone conference if there
5 was an undertaking. In order to assist you in
6 looking at that issue, Mr. Commissioner, I would
7 refer you to the evidence of Mr. Wolson when he
8 testified before the Commission. And what I would
9 refer you to on that point is at page 5577,
10 actually page 5575 at line 5. Mr. Wolson is being
11 asked questions specifically about this issue.

12 "Q And I take it based on your
13 communications with Mr. Minuk your
14 only explanation, your only
15 expectation was that he would not try
16 to prove it based on your agreement
17 with him.

18 A Without question."
19 Mr. Wolson went on further at line 19:
20 "I couldn't have imagined that he was
21 going to do something contrary to what
22 he had already told me already, and
23 that he wasn't going to do that. And
24 I should tell that you I put on the
25 record on the September 12th hearing,

1 I put on the record in two separate
2 places, that I had told Mr. Minuk that
3 I was going to raise this issue about
4 alcohol consumption not being part of
5 this plea."

6 At page 5577, Mr. Commissioner, at
7 line 21, I put the question to Mr. Wolson:

8 "And in fact, do I understand that he
9 confirmed with you that he wouldn't
10 take issue with you putting it on the
11 record?

12 A Yes, of course not."

13 And finally on this point, the
14 examination by Mr. Nozick of Mr. Wolson, and
15 although Mr. Nozick is using the word undertaking,
16 he is careful to consider the response of
17 Mr. Wolson to the word being used in the question,
18 in reference to Mr. Minuk. Page 5461, Volume 21:

19 "Q His integrity is beyond reproach,
20 would you agree with that?

21 A I would.

22 Q When the issue came up in court on
23 September 12th, you would have no
24 difficulty with that, in view of his
25 undertaking not to call that evidence,

1 correct?

2 A I had no problem with it."

3 On the issue of the policy, the
4 conditional or the consultation policy and dealing
5 with victims, so the 2005 victims' policy and what
6 it states. Without going into detail, because I
7 know my colleague Mr. Paciocco will deal with it
8 in large measure on the recommendations. We're
9 simply indicating, the thrust of our position is
10 that the law, the Victims' Bill of Rights, should
11 reflect the policy, it should be in line, not
12 inconsistent.

13 And on the victims' impact statements,
14 I heard the submissions of Mr. McFetridge and,
15 yes, the Taman family in the end did do an
16 excellent job and prepared very moving victim
17 impact statements, but we have to recall their
18 evidence that I referred you to that it was very
19 difficult for them to do that. Recall the
20 evidence of Mr. Taman sitting for hours, and
21 recall as well the evidence of Ms. Dyck who spends
22 a lot of time on these issues, and she told you
23 it's a very difficult thing to provide a victim
24 impact statement. It's a very emotional process
25 for people. So what we are suggesting in large

1 measure is to open the doors, indicate to the
2 victims that there's help that can be provided to
3 them.

4 And I think you'll be happy to hear,
5 Mr. Commissioner, that that's the extent of my
6 reply. Thank you.

7 THE COMMISSIONER: Thank you.

8 MR. PACIOCCO: Mr. Commissioner, I
9 want to begin by making some observations about
10 submissions that have been made about how facts
11 are to be found. On at least three occasions in
12 the presentations that we've listened to over the
13 last couple of days, there was a suggestion that
14 where you have a direct denial of wrongdoing or a
15 specific indication of a witness that a particular
16 set of facts exists, and you have no direct
17 evidence to contradict it, that that's the
18 evidence you have and, therefore, the evidence is
19 uncontradicted and the suggestion was that you're
20 stuck with it.

21 It was a suggestion, as I understood
22 it, from Mr. McDonald with respect to Mr. Carter's
23 motive. It was a submission made to you from
24 Mr. Labossiere with respect to Mr. Black's
25 testimony about what was in the two bottles. It

1 was a submission made to you today by Mr. Prober
2 with respect to Mr. Harvey-Zenk's memory. In all
3 cases it was suggested it was uncontradicted and
4 that's the only evidence you have.

5 I'm sure that it's not the law in this
6 jurisdiction that when a witness takes the stand
7 and makes a claim that is contradicted by other
8 evidence, albeit circumstantial, a word is
9 inconsistent with the facts in the context where
10 it's inherently incredible for some reason, that
11 an adjudicator is not bound by the denial that's
12 been presented, but is entitled to evaluate that
13 denial in the context of all the evidence
14 presented.

15 Where we have made submissions about
16 the state of mind of individuals, suggestions in
17 some cases of bad faith, we have made those
18 suggestions where, in our view, the evidence
19 demonstrates the state of mind that we are
20 representing to you. It is not necessarily the
21 case that there will be direct evidence. But when
22 you examine the testimony of those witnesses in
23 the context of the facts that are known, the
24 claims can, in our respectful submission, be
25 rejected and the implication that is left is that

1 those claims are false and that you may in fact
2 have, depending on the circumstances, bad faith or
3 inaccurate representation to you.

4 I'm going to deal first with the
5 submissions made by Mr. Prober today. He
6 submitted that this is not an inquiry into memory
7 loss and certainly that's true. He said that Mr.
8 Harvey-Zenk had no onus, no obligations. When he
9 suggested he had no obligations, I think he over
10 stepped it a little bit because he was a witness
11 who testified under subpoena and under oath, quite
12 clearly was obliged to provide truthful and
13 complete evidence in response to the questions he
14 was asked.

15 You, Mr. Commissioner, are obliged to
16 evaluate the evidence that is presented before
17 you. And you have the right to comment on it, and
18 to protect the integrity of the process. If you
19 conclude -- and it, of course, sir, is your
20 decision -- that if you conclude that a witness
21 has provided this tribunal with inaccurate
22 information, it is entirely appropriate and in
23 some cases necessary for you to make clear in your
24 report that that is what has happened. Because
25 you were asked to make your report on the basis of

1 the evidence called. And if the evidence called
2 by certain witnesses is not helpful to you in a
3 way that it should have been, that is quite
4 rightly within your mandate to respond to and
5 indeed my suggestion to you is that you should.

6 There was never a suggestion that
7 Derek Harvey-Zenk had a legal onus to prove
8 anything. But when he took the stand and
9 testified, his credibility certainly fell into
10 issue. We're talking about tactical choices that
11 are made on his behalf or by him directly. And it
12 is quite clear that the representation of a memory
13 loss that was presented in this case is
14 problematic in the context of other evidence that
15 has been presented to you. It is problematic to
16 the extent that he did offer explanations for it.
17 Of course, he didn't purport to be giving you a
18 definitive diagnosis, but he certainly floated the
19 possibility of concussion. It's entirely relevant
20 when you have evidence that is inconsistent with
21 the existence of a concussion to consider it. My
22 friend Mr. Prober suggested there was absolutely
23 no evidence of lucidity or complex
24 decision-making, and challenged Commission Counsel
25 to present such evidence. That evidence was

1 presented. When he was at the East St. Paul
2 police station, Mr. Derek Harvey-Zenk asked for a
3 pen and paper when he went in to contact his
4 counsel. He asked what time he contacted his
5 counsel. He determined that he would not provide
6 a sample. He was asked whether he understood what
7 the demand was. He asked whether he been given
8 the demand yet. He signed a promise to appear.
9 He made a decision, notwithstanding that he was
10 not legally obliged to at that particular moment,
11 to go through the process of the Identification of
12 Criminals Act. All of those decisions were taken.
13 Some with the assistance of counsel and others by
14 himself.

15 And the point that I was making, sir,
16 is this is not a man whose mind was addled and
17 confused in the aftermath of the accident. He was
18 someone capable of discriminating decisions and in
19 some cases sophisticated decisions, and that was
20 the point that was being made.

21 Ultimately, though, the suggestion
22 that there was no contradiction of the claim of
23 memory, based on Mr. Prober's suggestion that the
24 report of the doctor was ambiguous, is one for you
25 to evaluate. When you take a look at that report,

1 and it is on page 243 of the compiled materials
2 that I furnished you with, you will see that it
3 specifically provides the opinion of that
4 psychologist, that there was no evidence of memory
5 loss. And it does it in a context where he notes
6 that every time the discussion turned to the
7 accident or to its aftermath, Mr. Harvey-Zenk had
8 trouble composing himself. It.

9 Should be an easy matter for you to
10 conclude, Mr. Commissioner, that the accident was
11 discussed. The suggestion that the memory loss
12 was not referable to the accident, that was put
13 forward by Mr. Prober, is one that in my
14 respectful submission is contextually untenable.
15 This was an examination in preparation for
16 sentencing in connection with the criminal
17 allegation being made against Mr. Derek
18 Harvey-Zenk.

19 Memory loss is memory loss. Quite
20 clearly this individual would not be commenting on
21 him not having memory loss of such things, for
22 example, of whether he was captain of the football
23 team, this had to do with the general condition of
24 memory loss. The only evidence, and it was put
25 forward by his counsel on his behalf as credible

1 evidence, suggested that there was no memory loss.
2 Yet, for whatever reason, Mr. Harvey-Zenk chose to
3 testify without bringing forward evidence that
4 would support the claim that was being made.

5 Now I attended to the invitation that
6 was extended by Mr. Prober to furnish a medical
7 report at this point in time. If after you have
8 considered the evidence you were inclined to
9 reject the position of Derek Harvey-Zenk, it's the
10 first time in my experience when I have seen a
11 lawyer make a submission to a judge, go away on
12 the basis of the evidence that we presented during
13 the hearing, go away, even though we had standing
14 and we had an opportunity to call on evidence, and
15 if you're going to make a decision adverse to the
16 position on the basis of the evidence that we saw
17 content to give, then call us back and give us
18 another chance to try and present that evidence at
19 that point in time. Bringing in something like a
20 belated medical report when there is no
21 opportunity after the close of evidence to
22 evaluate it and cross-examine upon it, is
23 certainly an inadequate way to respond to this.
24 The invitation, while kind in its own right, is a
25 Johnny-come-lately invitation and in my respectful

1 submission is not one that should be taken up.

2 I'm going to respond now to some of

3 the submissions made by Mr. McDonald, and I'll do

4 it as thematically as I can. The first deals with

5 notes. Constable Glenda Pedersen was certainly a

6 person of high quality. Sometimes you get the

7 measure of an individual very quickly, and it was

8 apparent that she was a person of high quality and

9 integrity. Notwithstanding that, there were

10 serious problems with Glenda Pedersen's notes, and

11 it's not easy for counsel to stand up and say such

12 negative things in the context of an individual of

13 that quality, but the suggestion made by Mr.

14 McDonald must be responded to. He said that she

15 gave an explanation for not recording the

16 observations of Derek Harvey-Zenk in her notes

17 that had "an air of reasonableness to it." Well,

18 Mr. Commissioner there is absolutely no air of

19 reasonableness to the suggestion that a police

20 officer would not record observations of

21 intoxication or impairment on the part of a

22 suspect who is being processed in connection with

23 an impaired driving case simply because he's

24 already been officially released or simply because

25 if he came for his Identification of Criminals

1 Process down the road, there would be no
2 opportunity to make those observations.

3 This Commission of Inquiry was called
4 in part to reaffirm for the future best practices.
5 This is not an example of best practice. It is an
6 example of malpractice. And it is very important
7 that you not accept the submission that there is
8 an air of reasonableness to that kind of
9 explanation. The objective is to clean things up
10 in the future, and when you discuss notes, you
11 should make it very clear that officers are to
12 record all relevant information, regardless of the
13 particular status that they hold at a given point
14 in time.

15 With respect to Chief Carter, and the
16 critique that was made of Mr. Clifford questioning
17 him about things that weren't in his notes, but
18 were in his incident report, Mr. McDonald
19 suggested that it bordered on harassment, and he
20 made the observation that Commission Counsel is
21 supposed to be neutral. I know that he didn't
22 intend anything inappropriate by it, but quite
23 clearly, familiarity with the way criminal cases
24 are conducted and notes are used would have
25 prohibited or prevented that type of submission.

1 As you are aware, Mr. Commissioner,
2 there is a huge difference between notes and
3 incident reports, or occurrence reports as we call
4 them in Ontario. Notes are aid memoires to assist
5 the officer in his or her testimony. They are to
6 be complete and thorough because they purport to
7 record all of the material observations made by
8 the officers. They are not easily changed once
9 information is recorded in those notes. There are
10 protocols for the recording of notes and the
11 preservation of notebooks. The pages are
12 numbered. There are only so many spaces. The
13 notebooks have to be kept. And any notebook that
14 is lost, has to be accounted for. And you'll find
15 all of these protocols in place in the East St.
16 Paul protocol document that was referred to during
17 the testimony.

18 Incident reports, on the other hand,
19 are there to assist the Crown in giving the Crown
20 a summary of the case and to assist the defence
21 counsel in understanding the general observations
22 made. As you saw through the logs that were
23 prepared in this case, incident reports are very
24 easy to change and they do not record information
25 with the permanence that notes do.

1 And getting back to the overall
2 objective of best practices, you must, sir, make
3 it crystal clear that recording something in an
4 incident report is no substitute for its record in
5 notes. The criminal law depends upon the kind of
6 records that should have been kept in the context
7 of notes, and your report, sir, must make that
8 clear.

9 The second point has to do with intent
10 or the second theme, and the suggestion that
11 Mr. Woychuk had no bad faith because he had no
12 intent and no motive. And there was a close
13 equation drawn between motive and intent in the
14 submissions made to you. Constable Woychuk
15 falsified his notes. He falsified them on his own
16 admission. He falsified them under the direction
17 of Chief Bakema, and he did it to deal with
18 problems in the case as a result of the delay in
19 processing Mr. Harvey-Zenk. He said he knew it
20 was wrong. He recorded that he brought the man to
21 the station for a traffic accident report. He
22 knew that that's not why he brought the man to the
23 station. This change was intended to pave over a
24 charter breach, whether it would have been a
25 successful stratagem or not is not the point.

1 His evidence, and you can find it at
2 volume 9, page 2328, volume 9, page 2328, line 18,
3 he talked about how he was advised not to put
4 anything that should have lead him to form an
5 opinion as to the grounds for impaired driving.
6 This, sir, is an admission of intention. It is an
7 admission of a material misrepresentation of the
8 facts of the case, in notes, notes that would
9 ultimately, if there had not been a change of
10 heart on Mr. Woychuk's part, been the foundation
11 for testimony given in future cases. It was quite
12 clearly intent and it was intent to mislead.

13 With respect to the alcohol insertion
14 in his notes, the slight odour of alcohol shown
15 while he was on his way to the station,
16 Mr. McDonald read a passage from the friendly
17 cross-examination of Mr. Weinstein. And I say it
18 was friendly because he was presenting answers to
19 the witness that would be in the witness's
20 interest in asking the witness whether it was
21 correct or not correct. Take a look at
22 Mr. Woychuk's testimony in chief and you will find
23 that in volume 9 at page 2355, line 14, and
24 consider this when you consider the submission
25 that the testimony of Mr. Woychuk was inconsistent

1 with Commission Counsel's theory that this was a
2 later insert, because this is what he said. These
3 are his words.

4 "It would appear that it was added at
5 some point in time. I don't recall
6 when though."

7 He's acknowledging that this was added
8 to his notes. The circumstances in the context
9 make it clear that it was added as part of the
10 later insertion of alcohol information.

11 I also feel I have to comment on the
12 comparison that was attempted between Jason
13 Woychuk and Ms. O'Halloran, and this was done in
14 the context of Mr. McDonald's suggestion that it
15 would be inappropriate to recommend investigation
16 in the case of Mr. Woychuk and not Ms. O'Halloran,
17 when they essentially did the same thing.

18 Ms. O'Halloran is a young woman who
19 was intimidated by her employer, who used her own
20 potential liability to influence the information
21 she would disclose. Jason Woychuk was a police
22 officer. A police officer sworn to uphold the
23 law, entrusted to conduct an investigation into a
24 major crime. Along with his colleagues at the
25 scene, he had complete control over society's

1 interest and over the interest of the Taman
2 family. The investigation and prosecution was
3 compromised in large measure because he chose to
4 do nothing, albeit under the influence of a
5 superior officer, and it was compromised when he
6 falsified his notes. If you do, sir, decide not
7 to recommend investigation in connection with
8 Jason Woychuk, do it because you feel he's purged
9 his complicity, not on the basis that there is no
10 evidence that he intended to mislead.

11 With respect to Sergeant Carter, again
12 Mr. McDonald suggests there's no evidence of bad
13 faith on his part, no intent, no motive and he
14 points to the testimony of Sergeant Carter that he
15 made the change to his incident report to "reflect
16 what Woychuk told him." This is a good example of
17 a situation where, even though there's no direct
18 witness who came in and says Carter did that for
19 this reason, the circumstantial evidence in the
20 context and common sense, make it clear that that
21 assertion is not credible and that in fact that
22 change was made to help pave a way to a charter
23 violation. First, it is in his own incident
24 narrative. And I invited you at the time to read
25 through that and you will see that it purports to

1 record his observations. It does not record the
2 observations of other officers.

3 Second, Carter, himself was a witness
4 to the conversation with Woychuk. He knows what
5 Woychuk said. He's not going to change his
6 incident report to reflect Woychuk's remembrance
7 of what took place in a conversation he was a
8 party to. And third, look at the nature of the
9 change. The change goes and carries the incident
10 report from a state where it was an obvious and
11 clear charter violation with no possible
12 explanation, to one that on its face purports to
13 remove the unlawful detention, essentially
14 suggesting that they were just bringing Mr.
15 Harvey-Zenk in so he can do his accident report.

16 Without the benefit of a witness
17 providing you with direct testimony as to what was
18 on his mind, I suggest, sir, that you can read the
19 facts and come to that collusion for there is no
20 other conclusion that is available.

21 With respect to the disclosure of the
22 report logs and the suggestion by Mr. McDonald
23 that somehow this might assist you in finding that
24 Carter had no bad faith because Mr. McDonald
25 ultimately produced the report logs, Mr. McDonald

1 is certainly aware that there was a disclosure
2 obligation to produce relevant information, and it
3 is commendable that he dug and secured the
4 information, but it is no evidence of
5 consciousness of innocence. And while there is a
6 different remembrance of how those logs came
7 about, it doesn't profit this Commission to have
8 the facts disputed about how they were produced
9 laid bare. The fact of the matter is it's not
10 relevant.

11 With respect to Mr. Weinstein's
12 comments about Harry Bakema, one of the points he
13 made was he equated Bakema's failure to smell
14 alcohol at the scene with the failure of the
15 civilian witnesses to smell alcohol at the scene,
16 and the ability of those who did smell alcohol to
17 smell it in confined spaces. The first difficulty
18 that Chief Bakema has with this testimony is if
19 you look at his own version of events as presented
20 to this Commission, he says he tried to smell
21 alcohol. None of the other civilians or none of
22 the civilians present tried to smell alcohol.
23 They were lay people caught up in a situation of
24 tremendous tension and upset, and it was not their
25 mandate to investigate, but it was his. And his

1 evidence is not just that he didn't smell it, it's
2 that he tried and failed.

3 He also testified that his arm was
4 around the man as he walked him over and on at
5 least two occasions he bent down to look at his
6 face, putting himself in much greater proximity
7 than any of those civilian witnesses. But the
8 point, sir, is not to suggest to you that you
9 should accept Harry Bakema's version of events
10 that includes those two facts, it's to show how
11 problematic his testimony is. It's to show that
12 his false accounts enmesh him in inconsistency.
13 The real point is he made a conscious choice not
14 to investigate. And Commission Counsel is
15 suggesting to you that when he tells you he tried
16 to smell for alcohol and failed, don't believe it.

17 The suggestion that Commission Counsel
18 put to you that he suppressed information is not
19 based on the inference that he must have smelled
20 alcohol and he has not put it in his notes, it's
21 based, sir, on his own words. It's based on the
22 account furnished to you by Jason Woychuk that
23 when he approached the car with Mr. Harvey-Zenk,
24 Mr. Bakema said he's possibly impaired or he's
25 impaired, or on the other version that's been

1 furnished to you, he was pissed. I have already
2 explained to you in our submissions as to why
3 Jason Woychuk is a credible witness on that point,
4 notwithstanding the recognition of the serious
5 problems of credibility he has generally. Context
6 and circumstance make it very clear that his
7 testimony was truthful, not the least of which is
8 the fact that Harry Bakema's evidence and his
9 notes show that he attempted falsely to diminish
10 his opportunity to observe Mr. Harvey-Zenk.

11 Now again getting beyond direct
12 evidence to inference, you have to ask yourself,
13 why would he do that? Why would he attempt to
14 make it look like he had very little contact with
15 the individual? And the answer in context,
16 coupled with the evidence that supports Jason
17 Woychuk, makes it very clear, in my respectful
18 submission, that he made observations, he relayed
19 the generic conclusions he came to from those
20 observations to Jason Woychuk and he did not in
21 any measure record it or produce it as evidence
22 that could be used in a subsequent prosecution.
23 And that's the foundation for the suppression
24 submission that was made to you.

25 With respect to Mr. Shaw on the

1 question of conversations and contradictions, my
2 friend, Mr. Weinstein, told you that Shaw's best
3 evidence was that there was only one person, one
4 police officer speaking to Harvey-Zenk. And he
5 used this to discredit the testimony that you
6 received from Kathleen Beattie. What he left out
7 was the comment made by Mr. Shaw that it is
8 possible there was more than one officer. You
9 will find it at volume 6 at 1476, volume 6 at
10 1476. And this is precisely what he said:

11 "Yes, there is always a possibility
12 but I don't recall."

13 That was his evidence. His best
14 evidence, his best recollection, his belief is
15 there was one, but he allows for the possibility
16 that he could be wrong.

17 With respect to the time of the
18 conversation, my friend also suggested to you that
19 he allowed that it could be less than five
20 minutes. It's true he did. But Mr. Shaw also at
21 volume 6, at 1475, said that the conversation,
22 although he couldn't time it precisely was medium
23 to long.

24 The significance of that, sir, is that
25 medium to long conversations do not consist of two

1 exchanges, one nod of the head, and a turn and a
2 simple yes. That's what Harry Bakema tried to
3 present to you. It's always of concern when
4 evidence is provided in generality because at
5 times precision is important.

6 We all make mistakes, and I certainly
7 did in connection with the traffic accident
8 report, suggesting that it made reference to an
9 injury to the leg of Mr. Harvey-Zenk when it does
10 not. It happens. But when Mr. Weinstein was
11 describing the statements made by Mr. Sveinson in
12 his evidence, he used the term "whisked away
13 quickly" to describe Mr. Sveinson's evidence. And
14 he used the term twice. Exactly what was said or
15 attributed by Mr. Sveinson to Harry Bakema was "we
16 had to get him out of here." Now that may connote
17 "whisking him away quickly", that's for you to
18 decide, sir, but you should be aware that the
19 exact words were not "whisked away quickly" they
20 were "we had to get him out of here."

21 On the notes and the suggestion that
22 Jason Woychuk really didn't change his notes as a
23 result of any influence of Harry Bakema,
24 Mr. Weinstein suggested that the traffic accident
25 report does not mesh with the notes of Woychuk and

1 that this helps disapprove Woychuk's story. There
2 are two responses to that, sir. The first is
3 Harry Bakema does not in his notes offer an
4 explanation for transporting Mr. Harvey-Zenk to
5 the station. So there's nothing to mesh. The
6 only coincidental activity between the two men
7 that is referred to in each of their notes is
8 putting Mr. Harvey-Zenk in the vehicle. And as I
9 mentioned to you, both record the clearly
10 erroneous time of 7:42. That's where the mesh is.

11 The second point, and it's an
12 important one, is Mr. Woychuk indicated that the
13 changes to his notes were not only to align with
14 the notes of Bakema, they were also to deal with
15 the problem of delay. And that that was one of
16 the objectives. The reference to the traffic
17 accident report is an attempt to deal with the
18 problem of delay.

19 My friend said there is no need to
20 investigate Harry Bakema because there has already
21 been an investigation by the RCMP, and the Abra
22 report suggested that it was not appropriate to
23 proceed further. Mr. McFetridge called in to aid
24 the same report. I have two observations to make
25 about that. The first is the Abra report has been

1 overtaken by two things. The first thing that it
2 has been overtaken by is that there has been new
3 information presented before this Commission of
4 Inquiry. A point alluded to in generality by
5 Mr. McFetridge. For example, Mr. Abra did not
6 have the benefit of the revision logs showing the
7 changes to the notes of Jason Woychuk and the
8 timing. Mr. Abra's opinion was also premised upon
9 the absence of motive on the part of Harry Bakema
10 to do this. We have made submissions that you may
11 or may not accept. But in our submission, there
12 is evidence of motive in the sense of the personal
13 knowledge of Harvey-Zenk by Mr. Bakema, coupled
14 with his stature as a police officer.

15 The second point of departure that may
16 warrant investigation at the discretion of the
17 Attorney General or Minister is the clarification
18 in the Supreme Court of Canada authority that
19 obstruct justice is an offence that can be
20 committed by omission. And that you need not find
21 that it was an attempt to protect Derek
22 Harvey-Zenk from any criminal allegation in order
23 to find that that offence was made out. A failure
24 to fulfill one's duty intended not to allow
25 justice to operate is sufficient for the purposes

1 of potential liability.

2 Now, sir, contrary to one of the
3 headlines in a local newspaper, the Winnipeg Free
4 Press, Commission Counsel is not coming before you
5 and recommending a criminal investigation of
6 anyone. Commission Counsel has recommended to you
7 that if you agree that there are findings of bad
8 faith to be made, that you recommend the Minister
9 of Justice to recommend to the Attorney General to
10 conduct such investigations as the Attorney
11 General sees fit. And the recommendation was put
12 that way because it, of course, is not your
13 responsibility to conclude criminal liability, and
14 it was felt that that would be the most prudent
15 way to permit the individuals in positions of
16 responsibility in Manitoba to decide whether any
17 findings of bad faith you make warrant any further
18 steps. Any decisions that may be taken would be
19 taken by individuals at the Ministry or at the
20 Attorney General's office, and are not for us to
21 make.

22 Moving on to the submissions of the
23 Winnipeg Police union and Mr. Labossiere. It's a
24 secondary point, but it's worth making. He
25 suggested that Mr. Gerardy commented on how the

1 Winnipeg Police Service guests acted responsibly.
2 He did. But, of course, the concern isn't with
3 whether they were shooting up the ceilings, it has
4 to do with the issue of whether there was accurate
5 disclosure by the Winnipeg police officers about
6 the nature of the evening, and the consumption of
7 alcohol. Mr. Gerardy's idea of responsible
8 behaviour, and I'm not saying this to criticize
9 him, but it includes drinking to the point where
10 you cannot drive, because he characterized the
11 Winnipeg Police Service officers as acting
12 responsibly, even though he had to take the
13 initiative in his mind of ensuring that a few of
14 them not drive because they had consumed enough
15 alcohol that they should have been cut off. So
16 the observation that Mr. Gerardy considered the
17 Winnipeg Police Service to act responsibly is not
18 one that in any way is inconsistent with the case
19 that has ultimately been synthesized and presented
20 to you based on the evidence by Commission
21 Counsel.

22 But of much more central concern is
23 the attack that took place on the credibility of
24 Chelsea O'Halloran. Mr. Labossiere said it was,
25 "a bizarre proposition", that she, the only

1 confirmed liar, is being believed. The reason why
2 Commission Counsel is putting her evidence forward
3 is because the confirmed lie is the initial
4 account that Ms. O'Halloran gave, that is the same
5 account that was basically presented to you by the
6 Winnipeg Police Service officers. The lie is, as
7 I argued, confirmed for a number of reasons,
8 including that the disclosure of the lie was made
9 by this young woman as a statement profoundly
10 against her interests. She came forward under the
11 weight of her conscience and acknowledged
12 suppressing information in connection with an
13 investigation. And that is an important factor
14 that must be considered in deciding which of the
15 stories, if any, can be believed. Why would she
16 do that?

17 Then there are the contradictions
18 contained in the statement given to the
19 Professional Standards Unit, the inherent
20 nonsensical observations that some may have had
21 eight beer and yet nobody was unfit to drive.
22 They show that that statement itself was not an
23 accurate account. The statement of O'Halloran was
24 confirmed in tenor by Gerardy's observations about
25 impaired officers, and it was confirmed in tenor

1 by the records produced.

2 My friend suggests that her standard
3 for judging impairment is suspect, because it's
4 based on changes in behaviour. You will have
5 noticed, Mr. Commissioner, that both Constable
6 Black, as he then was, and Constable Fudge used
7 exactly that description to explain how they knew
8 that Dave Harding was impaired. The change in his
9 behaviour. He says that she was a person prepared
10 to guess. He cited her statement about the number
11 of beers the Super Bowl man may have had and
12 quoted, "I would have to guess". Let's take a
13 look at exactly what she did say when that
14 question was put to her. This is from volume 15
15 of the testimony, page 3818 on that to 3819.

16 Question at line 20:

17 "Were you counting the number of beers
18 that Sean Black had?

19 A No, but I have a guess of how many
20 a few of them had because I know that
21 when they had come in beforehand,
22 before, a couple of other times,
23 that's how much they would drink and
24 so I prepared myself for this.

25 Q Okay. Whether you prepared

1 yourself, you just said it's a guess.

2 You can't tell us exactly the number
3 of drinks he had.

4 A No, I can't.

5 Q No. And if you say eight or nine
6 that is a guess, is it not?

7 A It is. But it's a pretty accurate
8 guess."

9 My friend says that her testimony
10 about the amount of alcohol consumed was
11 inaccurate or was questionable because she said
12 that the police officers consumed most of the
13 alcohol, but then she testified that the only
14 thing the officers drank were the 68, 2.75 beer.
15 She did say that, sir, but it is evident from the
16 testimony you heard that her recollection of the
17 kinds of alcohol being consumed by the officers
18 was in error. You heard Constable Black testify,
19 now Sergeant Black, that he had four Miller
20 Genuine Drafts. You heard testimony from Anderson
21 and you heard testimony from Michalik that they
22 drank Labatt's products. Labatt's Blue and Blue
23 Light. It was ten beer and they were not the
24 \$2.75 pints. Was she in error when she made that
25 particular statement during her testimony? Yes.

1 Does it demonstrate that her overall assessment
2 was wrong? No, it does not.

3 My friend also pointed out, in his
4 mind, that Commission Counsel had offered
5 inconsistent positions about the Minuk statements
6 about the police officers. In the morning I had
7 used those statements to discredit the officers,
8 and in the afternoon Mr. Clifford used those
9 statements to discredit Mr. Minuk. I think
10 Mr. Labossiere missed the point of Mr. Clifford's
11 criticism. It was that Mr. Minuk had been
12 provided with statements that were inconsistent
13 with the disclosure he had received, yet he never
14 confronted the officers to try and get to the
15 bottom of those inconsistencies, and went into
16 court and represented the oral statements as
17 facts, notwithstanding that they clashed with
18 written disclosure he had received, without
19 sorting it out.

20 The concern with Mr. Minuk was not
21 getting to the bottom of the inconsistency. It
22 wasn't that there wasn't an inconsistency. There
23 is nothing inconsistent between the position
24 offered by Mr. Clifford and the one that I put
25 forward.

1 Mr. Labossiere also suggested that
2 your mandate should prevent you from making a
3 conclusion about the credibility of the evidence
4 furnished to you by Constable Black. He says you
5 shouldn't be expressing findings that witnesses
6 have not been credible. Sir, it's my advice to
7 you otherwise. Never heard of an adjudicator not
8 having the authority to make express findings of
9 credibility. If you cannot make express findings
10 of a lack of credibility, can you make findings
11 that a witness is credible? If you have no
12 mandate to do this, sir, does that mean that you
13 cannot make a comment on what happened with the
14 Graham fiasco when he came into this Commission
15 and approached and reproached a witness before
16 testifying? This is a public inquiry. You are
17 entitled to reveal the nature and quality of the
18 evidence that came before you and the incidents
19 that contributed to your conclusions. And you are
20 entitled to comment adversely on any episode that
21 happened during the course of these proceedings,
22 whether it be the reproach of a witness or the
23 testimony of a witness, and you should.

24 With respect to the Winnipeg Police
25 Service submissions, there's only one point that I

1 want to address. It was the suggestion made that
2 we argued that the only explanations that
3 Mr. Black gave for his lack of opportunity to
4 observe was the particular location of his chair
5 relative to the chair of Mr. Derek Harvey-Zenk,
6 and the popcorn machine. That of course, sir,
7 wasn't our point. The point was that each of
8 those explanations are so contrived, so silly,
9 that they quite clearly are attempts made to
10 explain a position, a lack of opportunity to
11 observe, that are not truthful and casts doubt on
12 the claim of a lack of opportunity to observe.

13 Sir, with respect to the
14 recommendations, I certainly was aware of it
15 before I came here, but remain impressed at the
16 leadership role that the Government of Manitoba
17 has taken in the Victims' Bill of Rights area, and
18 now I know in the independent counsel area, and I
19 understand that they have an idiosyncratic, but
20 interesting, jurisprudence on the practice with
21 respect to presentation of pleas. I know that
22 this is not a province where anyone wants to rest
23 on their laurels, it's a province that has
24 demonstrated a progressive approach and as with
25 all of us where there's opportunity to improve,

1 even on what is very good, it's an opportunity
2 that should be taken up. But I have to comment
3 that the kind of submissions made with respect to
4 the recommendations that we offered, with the few
5 exceptions, represented an attempt to maintain the
6 status quo. There was a flavour that perhaps
7 ossification is a good thing, and that moving
8 forward may not be advisable, and that was, I'm
9 afraid, the flavour I was left with listening to
10 the submissions that you were offered.

11 With respect to the question as to the
12 investigation into the investigative training
13 available to and qualifications required of the
14 East St. Paul police officers, Mr. McFetridge
15 suggested the Police Act is under review, as we
16 speak, and that it would be best if it was
17 permitted to be done generally for all police
18 agencies. That may well be, sir, but I do caution
19 you about the limits of your mandate and whether
20 you really should be coming out and making a
21 recommendation that there be an investigation into
22 these types of approaches for all police forces.

23 Certainly one of the things that is
24 very valuable in this Commission of Inquiry is you
25 have been provided with indepth analysis of a case

1 study that epitomized problems. And I am
2 concerned if your recommendation becomes generic,
3 it will allow the episode, the unfortunate episode
4 that occurred in this case to become a mere
5 backdrop against which the Police Act is viewed,
6 when it should be at the forefront for having
7 exposed problems. And I have no doubt that the
8 wise people of the Province of Manitoba, if when
9 examining the implications of this case, develop
10 learning that can be applied to other police
11 forces, then their review of the Police Act will
12 profit. But I would urge you, sir, to be careful
13 about allowing another ongoing examination to bowl
14 over any focus that this case has, because it
15 certainly deserves focus.

16 And with respect to the independent
17 prosecutor's policy, I hear the wisdom in the
18 words that Mr. McFetridge provided. What we
19 endeavour to do with the independent prosecutors'
20 policy was to take the existing wording and
21 redraft it in a way that would allow for the
22 concerns that arose during this case. It was
23 never our intention to micro-manage things, and I
24 think it would be preferable for that
25 recommendation to be reworded in more general

1 terms, rather than attempt to actually provide
2 specific wording that could be inserted. No one
3 is intending to create unintended consequences.
4 And no one is promoting approaches that are
5 impractical. And if the wisdom ultimately of the
6 Attorney General's office is that specific
7 recommendations made are impractical, then, of
8 course, they shouldn't be implemented.

9 But there are several things that must
10 be made clear. The first is that independent
11 prosecutors are required to keep the Department of
12 Justice advised of all significant decisions they
13 take. The first sentence of that proposal should
14 remain intact and it does reflect the existing
15 policy. But what should be clarified is why this
16 occurs. And I would suggest that whatever general
17 recommendation be made, focus on the objective,
18 this should be done solely to keep the Department
19 of Justice officials apprised of the status of the
20 case and to enable them to exercise that
21 overriding discretion that is recognized in
22 provision C of the policy.

23 As for the details that follows, sir,
24 those were directed at the problem that occurred
25 in this case. The sense that it is appropriate to

1 go, when you are an independent prosecutor who is
2 retained to be independent and distant from the
3 prosecutorial agency, to go and bounce ideas off
4 of them, to go and consult with them, to go and
5 use them as a sounding board, or even to use
6 Mr. McFetridge's word, confirm. If you have to go
7 to the very agency you're supposed to be
8 independent of to get confirmation or approval of
9 any kind, or if it appears that you have the kind
10 of persistent contact that occurred in this case,
11 it undermines the whole point in independence.

12 So the challenge is to find a way in
13 which you can allow independent counsel to tap the
14 specialized expertise of the Attorney General's
15 office without compromising that objective. And I
16 think that that can be the recommendation. You
17 need not solve the problem, but it's very clear
18 that you point it out, or it's very important that
19 you point it out and that you suggest that
20 measures be taken to try and clarify that point.

21 There is a mischief that has to be
22 addressed here, and the mischief is the sense of
23 comfort that was demonstrated on the part of
24 Mr. Minuk in going to the people he was supposed
25 to be independent of for every single decision

1 made, and clearly not just in an informational
2 way. The mischief that has to be addressed is the
3 concern that independent prosecutors will end up
4 being persuaded, even if not directed by the
5 advice they receive, to act in ways they otherwise
6 wouldn't. If it is simply to comply with a
7 policy, that is entirely understandable. If it is
8 simply in light of learning of new case law or new
9 statutory provisions, that's entirely
10 understandable that they would change their
11 position. But what must be addressed is the
12 suggestion that it is appropriate and consistent
13 with the concept of independence to allow sounding
14 board contact.

15 The response with respect to the
16 established group of experienced criminal lawyers
17 sounded to me, sir, as though it was predicated
18 upon concern about cost. This is an important
19 recommendation and Commission Counsel stands by
20 it.

21 With respect to the ministerial policy
22 and the presentation of guilty pleas, the
23 suggestion that there are lots of stakeholders and
24 that they have to be consulted, and that this is
25 complex and there might be unintended consequences

1 is one that, in my respectful submission, you
2 should push aside. When a prosecution file is
3 taken into court, it is the prosecutor's file.
4 They are carrying that file. And to have
5 prosecutors say to defence lawyers, look, when you
6 enter the plea, I'm going to read in the facts,
7 that's entirely within the purview of the
8 prosecutor. You don't need somebody's consent to
9 do that. And it's important that it be done
10 because the code requires it, the law requires it.
11 And if practices have deviated from the core
12 function of guilty pleas and the ability of judges
13 to accept pleas without facts, then it's important
14 that they be corrected. And it's part of the
15 function of the Attorney General to correct errors
16 in law. And if through the good offices of his
17 prosecutors, he can dictate the way in which
18 practices are done in court, in my respectful
19 submission, he should, and should not be concerned
20 about unintended consequences of following the law
21 or how other people might feel about it. It needs
22 to be done.

23 With respect to the reference to
24 serious cases where prosecutors shall attempt to
25 secure in writing an Agreed Statement of Facts.

1 When my friend was making his submissions, it
2 sounded to me as though he hadn't seen the words
3 "shall attempt." Of course, you can't force
4 defence counsel to agree to a set of facts, but
5 you can have your prosecutors, in light of the
6 importance of doing so, understand that they
7 should use their best efforts to secure that.

8 As for the reference of complex or
9 serious cases, he suggests contentious cases.
10 Contentious cases, of course, are cases where
11 there is no agreement, in which case when are you
12 ever going to get an Agreed Statement of Facts?
13 It is a meaningless term. By serious cases, I was
14 trying to invoke the same basic division that
15 occurs in the Victims' Bill policies that this
16 government follows. There are cases where you're
17 automatically registered as a victim because of
18 the seriousness of the case. Surely, a list of
19 cases where the prosecutors are required to
20 attempt to secure in writing Agreed Statement of
21 Facts would be an easy matter. It's not a matter
22 of obstacle at all.

23 With respect to number nine, the
24 reason why there was reference to specificity in
25 there is because I think that's required by the

1 authority. You will remember Mr. Slough's
2 evidence that, to Mr. Minuk, his advice to
3 Mr. Minuk is put as much detail as possible about
4 the plea bargain. What I was trying to deal with,
5 sir, is the apparent penchant, as described by
6 Mr. Wolson, to use buzz words. Exigencies, he
7 says, has become the buzz word in these cases. It
8 does no one any good, in terms of understanding
9 the nature of a plea or having a transparent
10 system for the public, to have a lawyer get up and
11 say we have exigencies. What are they? To the
12 extent they can be disclosed without violating
13 privilege, without violating public policy, they
14 should be there.

15 Now, if you feel better about simply
16 recommending that the government require in its
17 Ministerial Policies that the law in Manitoba
18 relating to the presentation of guilty pleas be
19 followed, and then have the Manitoba Justice craft
20 their understanding of the law, Commission Counsel
21 is certainly comfortable with that. But the
22 general thrust of that provision is important and,
23 in my respectful submission, should be given
24 effect to, and indeed was recommended by Mr. Gover
25 in his report.

1 With respect to the Victims' Bill, the
2 reference to consult, it's surprising, in my
3 respectful submission, to hear Mr. McFetridge
4 defend the use of the term consult, when all of
5 the agents of his government who testified said it
6 was problematic. And the language we put in
7 there, as he himself points out, comes directly
8 from the way in which that term is interpreted and
9 carries a clarity that the term consult does not.

10 The government can decide not to act
11 on the recommendations you make, and you should
12 not be afraid of making recommendations simply
13 because there have been submissions to you that
14 it's not desirable to counsel. If they choose not
15 to do it, that should be their choice. And if
16 it's not a wise recommendation that gets made,
17 then that would be something that they can easily
18 explain.

19 With respect to the statements, the
20 victim impact statements, the suggestion in the
21 policy isn't to have government officials write
22 victim impact statements. It was responsive to a
23 demonstrated problem in this case. They should
24 examine methods for ensuring that victims are
25 offered, and on request are provided with personal

1 assistance in preparing victim impact statements.
2 They are in control of how that gets done.
3 Surely, it was never intended to suggest that they
4 draft the impact statements for the victim. But
5 you heard how difficult this is. There are many
6 people out there, and often unfortunately victims
7 of crime, who are ill-educated, they are incapable
8 of exercising these kinds of decisions on their
9 own, and as a result it doesn't get done. If you
10 give them the opportunity to come in and you
11 explain to them in general terms what a victim
12 impact statement is, and maybe even if you scribe
13 their words, you are going to produce a better
14 quality. This is not going to cost a lot of
15 money. And you'll remember hearing the victims
16 worker suggest that this wouldn't be problematic.

17 Sir, finally with respect to the
18 citation of my article by Stanley Nozick, and your
19 defence of me in suggesting it's inappropriate to
20 put articles in the face of an author, I actually
21 quite like it when lawyers do that. If he's
22 quoting me as authority on that, then he's
23 certainly incidentally endorsing the authority of
24 the other submissions I make, so I want to thank
25 him for that.

1 MR. NOZICK: Don't bet on it.

2 MR. PACIOCCO: With respect to the
3 wrap-up comments, it's become customary to stand
4 up here and thank you, Mr. Commissioner, and I
5 certainly personally want to do that. I want to
6 commend you, sir, for the discipline that you have
7 demonstrated, for the diligence and for the energy
8 that you have shown in sitting long, long hours in
9 a very, very difficult case.

10 The people of Manitoba, sir, are very
11 fortunate to have had you for their Commissioner.
12 And I know with your tradition of independence and
13 tradition of scholarship, you will produce a
14 report that will be credible and will be
15 tremendously helpful to this province.

16 I also want to take the opportunity to
17 do what I chose not to two days ago, which is to
18 thank my new colleagues here in Manitoba. I'm not
19 just saying this. They have never treated either
20 me or Mr. Clifford as the outsiders that we are.
21 We felt that we were part of the group and that we
22 were treated professionally, notwithstanding, and
23 even after we took positions overtly before this
24 Commission that were inconsistent with the best
25 interests of their client. That is in the truest

1 traditions of the profession and we are honestly
2 grateful for that.

3 I want to thank the staff of this
4 Commission of Inquiry. It's quite evident that
5 the level of organization that has been achieved
6 here was not achieved by the lawyers, it was
7 achieved by the administrative staff. Everything
8 from booking the room, to arranging the security,
9 to getting the feeds to the press, to having stuff
10 on-line, it was a remarkable display of
11 efficiency, and this is a group that I was very
12 proud and privileged to have the opportunity to
13 work with.

14 As for Mr. Clifford, I think you
15 understand, sir, that you didn't have counsel and
16 co-counsel, you had two co-counsel. This job
17 would not have been possible without his diligence
18 and the excellent work that he provided. And I
19 want to say this, after he has withstood critiques
20 of the positions he took with respect to
21 Mr. Minuk, and the suggestion that Mr. Clifford
22 did this and Mr. Clifford did that, that those
23 decisions were decisions taken by both of us, and
24 when he spoke, I am proud to say he spoke on my
25 behalf as well.

1 I want you to know that if he was
2 jitter-bugging at the nit-pickers ball, I'm the
3 one in the poodle skirt spinning around with him.
4 Finally, I would like to say that, and
5 I think I can say this without raising concerns
6 about partiality. I know my friends understood
7 that when we came in and probed very deeply the
8 positions taken by the family to see whether their
9 complaints were true or verified, we were doing
10 that as part of our mandate and not as their
11 counsel. When we came forward after all the
12 evidence was in and argued in favour of many of
13 the positions they took, I think my friends
14 understood that we did that because that's where
15 the evidence lead, and not because we had adopted
16 the position of being their counsel. And so I
17 think my friends will understand when I stand here
18 and I say that I want to commend the family, and
19 point to them in particular for the strength and
20 the courage that they have demonstrated in coming
21 here, day in and day out, and listening to
22 evidence that had to be extremely painful. It's
23 not easy to sit through a court proceeding, but to
24 do it day after day, and when you're emotionally
25 wrought, is an act of raw courage, and they are to

1 be commended for it. Thank you very much,
2 Mr. Commissioner.

3 THE COMMISSIONER: Thank you,
4 Mr. Paciocco. I too want to thank counsel and
5 their juniors for the assistance that has been
6 provided to me and to Commission Counsel
7 throughout these proceedings. And I don't regard
8 the task ahead of me to be an easy one. You have
9 made it easier, and I thank you for that.

10 I want to thank the clerks, the
11 reporters, and the sheriff's officers who looked
12 after me and looked after this courtroom, and the
13 Commission staff.

14 For those of you who found me a little
15 testy at times, I apologize. I'm a lot better
16 than I used to be. But our system of justice is a
17 wonderful one, and when counsel, as you have here,
18 demonstrated your zeal for your positions and your
19 skill in examining the witnesses, it makes me very
20 proud. I am, as you know, retired. I have been
21 retired for seven years from the Superior Court,
22 and I found this Commission and the inquiry and
23 the evidence and the issues that were raised very
24 interesting and stimulating.

25 I shall do my best. I will read all

1 of the material, I can assure you. I have to get
2 the report out by the end of September. I will
3 make every effort to do so. I'm going to take a
4 few days off for some rest, but I'll get to it as
5 soon as I can.

6 Thank you all again, and we'll now
7 rise.

8 THE CLERK: Order, all rise. This
9 Commission of Inquiry is now closed.

10 (Proceedings concluded at 3:08 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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