

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

## COMMISSION STAFF:

Mr. David M. Paciocco Commission Counsel  
Mr. Vincent Clifford Associate Commission Counsel  
Mr. R.L. Giasson Chief Administrative Officer  
Ms. Melissa Braun Administrative Secretary  
Ms. Wendy Bergmann Administrative Assistant  
Ms. Sharleen Reid Commission Clerk

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APPEARANCES

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  
Ms. S. Hanlin and  
Mr. M. Jack For Winnipeg Police Service  
Mr. K. Labossiere, Ms. K. Clearwater,  
Mr. S. Hoepfner and Mr. S. Messner  
For Winnipeg Police Assoc.  
Mr. G. McFetridge, Mr. S. Boyd and  
Mr. S. Nozick For the Province of Manitoba  
Court Reporters:  
Debra Kot  
Cecelia Reid

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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           Particularly -- 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.

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Cecelia Reid

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Debra Kot

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