

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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Monday, July 28, 2008

Volume 21

INQUIRY PROCEEDINGS

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Ms. K. Dixon For Mr. Marty Minuk  
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1 MONDAY, JULY 28, 2008

2 UPON COMMENCING AT 9:15 A.M.

3 THE CLERK: All rise. This Commission  
4 of Inquiry is now opened. Please be seated.

5 THE COMMISSIONER: Good morning.

6 MR. PACIOCCO: Good morning,  
7 Mr. Commissioner.

8 THE COMMISSIONER: Before we start,  
9 we've been jumping around in times and I think  
10 we're falling behind in times. Unless it's  
11 inconvenient, I'll put the onus on counsel, unless  
12 it's inconvenient to counsel, I'd like to start at  
13 9:00 o'clock each morning. And if anybody has any  
14 objection, can you let me know now?

15 MR. KING: Mr. Commissioner,  
16 Mr. Prober is just outside the hallway. He may or  
17 may not have a problem.

18 THE COMMISSIONER: Well, you're here  
19 to help him.

20 MR. KING: This is true.

21 THE COMMISSIONER: And you can be  
22 there, ready to go, if he is unable to arrive at  
23 nine. Thank you.

24 MR. PACIOCCO: Mr. Commissioner, as is  
25 our custom, I will read out the names of the

1 witnesses we expect to hear this week. Detective  
2 Sergeant Girard has returned this morning. We are  
3 thankful for that.

4 We also have Richard Wolson scheduled  
5 as our next witness. We anticipate he will be on  
6 at some point this morning.

7 We have Mr. Martin Minuk who is  
8 present in the body of the hearing room with his  
9 counsel. He will be testifying after Mr. Wolson.  
10 We anticipate that Mr. Minuk's evidence will take  
11 some considerable time because his involvement  
12 extends from the beginning to the end of the  
13 prosecution.

14 We also have an expert witness who is  
15 scheduled to testify on Thursday. This gentleman  
16 is Richard Peck QC from British Columbia.  
17 Mr. Peck is available on Thursday and hardwired  
18 for that date. So we are really finding it  
19 necessary to get Mr. Minuk done before Mr. Peck  
20 gets on, and Mr. Peck is coming on that date. So  
21 this week we have a short list of witnesses, but a  
22 very tight schedule.

23 THE COMMISSIONER: Thank you.

24 BY MR. PACIOCCO:

25 Q Good morning, Sergeant.

1           A     Good morning.

2           Q     When we finished our questioning last  
3 week, we had gone through a list of the interviews  
4 that had been conducted by you and your specific  
5 partner during the course of the investigation of  
6 the history of activities of Mr. Harvey-Zenk,  
7 prior to the collision that took the life of  
8 Crystal Taman. We went through the times that  
9 those interviews took. And, sir, the total of 14  
10 interviews conducted by you, according to my  
11 count, and the total number of minutes that were  
12 spent actually interviewing those witnesses added  
13 up to approximately 225 minutes. It works out to  
14 approximately 15 minutes an individual on average.  
15 And that includes the time to go through the  
16 three-page protocol that existed for each witness.

17                     Sir, with the benefit of hindsight, do  
18 you consider that that degree of intensity, and I  
19 know you can't always just measure it by time, but  
20 do you consider that that degree of intensity was  
21 appropriate for an investigation involving a  
22 fatality, sir?

23           A     Well, you have to realize that these  
24 were, in our minds, were our first interviews with  
25 these officers, and should other information have

1     come forward, we would have reinterviewed,  
2     depending on maybe perhaps what some of the  
3     civilian witnesses said, or if other information  
4     came to light such as contradictions in their  
5     statements.

6             Q     I see. But you would agree with me  
7     that civilian witnesses were interviewed on the  
8     7th of March, sir?

9             A     Let me just double-check my notes.  
10    No, I don't believe so.

11            Q     17th of March?

12            A     I believe the 11th of March is when we  
13    interviewed Ms. O'Halloran.

14            Q     Okay.

15            A     Let me just make sure for you, sir.  
16    Yes, it was the 11th of March.

17            Q     All right, sir. And you had, I think,  
18    six other interviews left after you interviewed  
19    those individuals, six other officers to  
20    interview?

21            A     Roughly, yes.

22            Q     And you didn't see the need to go back  
23    and interview anyone, based on your assessment at  
24    the time, sir?

25            A     Once we interviewed Ms. O'Halloran,



1 no.

2 Q All right. And we'll come back to  
3 that in a bit more detail later, sir.

4 You had a couple of interactions with  
5 Mr. Harvey-Zenk during the course of your  
6 involvement in this file, sir?

7 A Yes, two.

8 Q And both of those involved the  
9 delivery of suspension information, sir?

10 A I believe the first one was delivering  
11 a letter to him that advised him formally of his  
12 administrative leave.

13 Q And the second was as a result of the  
14 suspension hearing, I believe you met with him on  
15 the 30th of March to deliver formal notification  
16 of the suspension hearing outcome, sir?

17 A Yes, and to seize his wallet warrant  
18 card, badge and locker key as well.

19 Q Did you have any information with  
20 Harvey-Zenk during either of those visits, sir?

21 A You know what, it would have been very  
22 brief, nothing specific, probably just something  
23 like, how are you holding out or something like  
24 that. But it wasn't any lengthy conversation  
25 whatsoever.

1 Q No discussion about the events at all,  
2 sir?

3 A No.

4 Q And you didn't record any of the less  
5 formal conversation that you had?

6 A No, it would have been very minimal.

7 Q Fair enough. Do you have authority,  
8 as an investigator conducting a PSU investigation,  
9 to interview subject officers, sir?

10 A Subject officers?

11 Q Yes. Do you, sir?

12 A Yes.

13 Q And is that something that you did in  
14 this case?

15 A No.

16 Q Why is it that Mr. Harvey-Zenk was not  
17 interviewed, sir?

18 A Because he was being dealt with by  
19 East St. Paul.

20 Q Sir, you were also looking into facts  
21 that he had knowledge of, including his activities  
22 leading up to the accident, sir?

23 A Well, we were asked to determine where  
24 he was and who he was with, but there was no  
25 specific request to interview him or interrogate

1 him whatsoever. In my mind, that was East St.

2 Paul's job, not mine.

3 Q You would agree with me that where he  
4 was and who he was with were pieces of information  
5 that one would ordinarily expect an individual to  
6 have, sir?

7 A Yes. But, again, I had no intention  
8 of ever interviewing him because, first off, I  
9 didn't arrest him, I was wasn't involved in the  
10 processing of him. And our instructions were to  
11 determine where he was, but there was never any  
12 mention of interviewing him.

13 Q There was also instructions to  
14 determine his drinking history, sir?

15 A Yes.

16 Q And he would have had knowledge of  
17 that, sir?

18 A I'm assuming he would, yes.

19 Q You also, I take it, have interviewed  
20 other suspect or subject officers on other  
21 occasions, sir?

22 A Yes. When it was my investigation  
23 completely, not when I was asked to do part of the  
24 investigation or assist someone in an  
25 investigation. I felt that if I would have done

1 that, that I would have been overstepping my  
2 bounds.

3 Q Okay. In what sense?

4 A The sense that it was East St. Paul's  
5 file, it was their investigation, it was their  
6 arrest, it occurred in their jurisdiction, and  
7 they didn't ask us to interview him.

8 Q I'm going to show you a document, sir,  
9 and it parlays into the next document that I'm  
10 going to be dealing with. You'll find this at  
11 book Q-2.89.b.31. And I apologize to the clerk  
12 because I don't think I gave her a heads up that  
13 this one was coming. Q 2.89.b.31. This document  
14 is found at page 3063 of volume Q-2. If that  
15 could be made the next exhibit please, Madam  
16 Clerk. That's Exhibit 185, everyone.

17 Now, sir, you are not apparently cc'd  
18 on this e-mail from Jim Poole, but you will notice  
19 that it's an update with respect to the assistance  
20 to East St. Paul and Chief Bakema. It discloses  
21 that a package has been forwarded to independent  
22 counsel, Marty Minuk, containing all interviews  
23 conducted by the PSU relating to the activities of  
24 Harvey-Zenk on the night preceding the motor  
25 vehicle collision. And that file has a PSU number

1 05-017.

2 The paragraph after that, it indicates  
3 that a separate copy of the same PSU report will  
4 ultimately be forwarded to Inspector Katz under a  
5 different PSU report number, PSU 05-019.

6 "This file was opened to determine if  
7 any misconduct existed relating to  
8 other WPS members associated to events  
9 prior to the collision."

10 Do you see that, sir?

11 A Yes, sir.

12 Q And that's apropos of our earlier  
13 discussion of the purpose of this investigation,  
14 and I know your view has been that this was an  
15 investigation that was undertaken to assist East  
16 St. Paul. And I wanted to draw to your attention  
17 that, in fact, the investigation was being used  
18 both for internal purposes and to assist East St.  
19 Paul. Is that news to you, sir?

20 A Well, this e-mail certainly is.  
21 However, as I explained last week, my  
22 interpretation of this document here, regarding  
23 any misconduct that may have existed, my  
24 assumption would be that would be under our rules  
25 and regulations. And as I explained last week,

1 any inquiry into the rules and regulations or  
2 potential breaches is always held until the  
3 criminal investigation and prosecution is  
4 completed. Then we look at it.

5 Q Yes, sir. But you see here that what  
6 this is, is an indication that the same  
7 information is being used for both purposes, and  
8 that is information already gathered; correct,  
9 sir?

10 A Yes.

11 Q And so, sir, when you were conducting  
12 the investigation, were you aware that the  
13 information you were acquiring was also going to  
14 be used for internal purposes?

15 A It usually is. Usually, what will  
16 happen is if we have an allegation, let's just say  
17 an allegation of an assault by an officer, we will  
18 conduct that investigation. And then when that  
19 investigation is concluded, if it goes forward,  
20 then we still hold the regs in abeyance until such  
21 time as that is completed. And if it doesn't go  
22 forward, then at that point we would address the  
23 rules and regulations.

24 Q And, sir, you would agree with me that  
25 the drinking potential of an officer drinking and

1 driving would be something that would be  
2 discreditable conduct within the meaning of the  
3 rules and regulations? Are you able to --

4 A Absolutely, yes.

5 Q Would it not have been something that  
6 you would have been investigating with a view to  
7 the internal investigation as well, sir?

8 A Okay. But I'm not sure what you mean  
9 when you say the internal investigation. Are you  
10 referring to a regulations breach, possibly?

11 Q I'm talking about the investigation  
12 that resulted in a separate file number and  
13 resulted in a delivery to Inspector Katz of  
14 information?

15 A It wouldn't have been something I  
16 would have dealt with at the time, no.

17 Q Was it something that you bothered to  
18 deal with at any point, sir?

19 A That I did?

20 Q Yes?

21 A No.

22 Q Now, sir, I understand that you  
23 forwarded a copy of your report, which is  
24 F-1.33.a. It's Exhibit 184 in this case. You  
25 forwarded a copy of that report on March 23rd,

1 2005 to Mr. Minuk?

2 A Yes, I delivered a package to his  
3 office. Whether there was more in the package  
4 than just my report, I don't know. But there was  
5 a package delivered to his office.

6 Q I take it, sir, that that package also  
7 would have included the report of Sergeants  
8 Roxborough and Epp, which involve the interview of  
9 the balance of the witnesses, sir?

10 A I would assume, yes.

11 Q That one is Exhibit 187. I'm going to  
12 ask that that exhibit be pulled now. Counsel can  
13 find this document at tab F-1.34. I'm going to  
14 ask you to turn to the last page of that document  
15 sir.

16 Now, sir, we have heard testimony from  
17 Sergeant Cecil Sveinson of the Winnipeg Police  
18 Service that no one from the wellness office, no  
19 wellness officer or anyone approached him to see  
20 whether he had any requirement for support or  
21 assistance as a result of the death of a cousin  
22 who was killed in the fatality, or in the traffic  
23 incident, sir. At the bottom of page 851, you  
24 will notice that Sergeant Roxborough notes:

25 "Following the interview,



1                   investigators discussed options and  
2                   availability for support offered by  
3                   the service based on Constable  
4                   Nechwediuk's social relationship with  
5                   Constable Harvey-Zenk and his family."

6       Was that something that you were aware of, sir?

7               A     My partner, Sergeant Pearson, and I  
8       were involved in that conversation, yes.

9               Q     Okay. And you don't have any  
10       information, I take it, of any assistance being  
11       offered to Sergeant Sveinson?

12              A     Do I? No.

13              Q     Yes?

14              A     In fact, Sergeant Pearson and I,  
15       during that discussion, said that we did not feel  
16       that it would be appropriate to make any contacts  
17       or ask anyone from the wellness office to get  
18       ahold of Constable Nechwediuk. We were in  
19       disagreement with the other investigators about  
20       it.

21              Q     I see. But this was something they  
22       had already contacted or discussed with her?

23              A     I have no idea what they discussed  
24       with her.

25              Q     So you don't know whether this was

1 with her or between the officers themselves?

2 A This was a conversation that we had  
3 amongst the four of us.

4 Q I see.

5 A What, if anything, was said to  
6 Constable Nechwediuk, I don't know.

7 Q Fair enough. Sir, you indicated that  
8 you delivered a report to Mr. Minuk. Do you know  
9 whether you delivered a copy of documents or  
10 reports to Chief Bakema of the East St. Paul  
11 Police?

12 A I did not, no.

13 Q And, sir, we have learned, and you see  
14 a copy, or reference to it in that letter that you  
15 delivered the report on March 23rd, 2005 to  
16 Mr. Minuk. It wasn't until May 6th, 2005, that  
17 the East St. Paul Police received a copy of the  
18 report, according to the information provided by  
19 Sergeant Poole.

20 Do you have any information about  
21 whether you had any contact at all with East St.  
22 Paul about the report and your findings, sir?

23 A No, no, that would not have been my  
24 duty, I guess, I should say. I submit my report,  
25 it's read by two officers within our unit, and

1 then they take care of the dissemination of that  
2 report.

3 Q Thank you, sir. I want to explore a  
4 little more detail the way that the interview with  
5 Detective Sergeant Black came about and Detective  
6 Sergeant Azaransky.

7 I understand that the interviews of  
8 those two gentlemen occurred on March 11th, 2005,  
9 approximately two weeks after the incident, sir?

10 A Yes.

11 Q We also have looked already at a  
12 document, your notes, where you make a reference  
13 that you wanted to interview Constable Nolet first  
14 and whoever was working with, who was working with  
15 Harvey-Zenk, and anyone else so long as it's not  
16 Constable Black. You didn't want to interview him  
17 right up front?

18 A No.

19 Q Your position as you explained it, as  
20 I understood it, is you wanted to get more context  
21 before bringing this very important and central  
22 witness in?

23 A Yes.

24 Q But you didn't want to delay it  
25 unreasonably either, sir. I think on March 2nd,

1 you indicate in your notes that you want to  
2 interview him "tomorrow night." Do you recall  
3 that, sir?

4 A Yeah, I do recall that.

5 Q You will find if you do need reference  
6 to it in your notes that it's at page 60 of your  
7 notes, which are Exhibit 171.

8 A Thank you.

9 Q You had set that up, and he and his  
10 partner, Azaransky, were going to come down. And  
11 I noted through the interviews that that's  
12 typically what happened. You'd have the two come  
13 together, whether they had a police unit with them  
14 or not. It seemed to be convenient to bring the  
15 partners in at the same time?

16 A Yeah, whoever they were working with  
17 that particular evening.

18 Q Constable Black and Azaransky  
19 cancelled the interview. Do you recall that, sir?

20 A I recall, I believe it was Patrol  
21 Sergeant -- let me just double-check to make sure.

22 Q Page 67 of your notes, sir.

23 A Sixty-seven?

24 Q Yes, sir.

25 A Thanks. Yeah, it was Patrol Sergeant

1 Anderson that provided me with that information  
2 that they'd like to postpone their interviews.

3 Q Sir, could you indicate to the  
4 Commissioner exactly what you were given to  
5 understand?

6 A Yes. Patrol Sergeant Anderson advised  
7 me that Constables Black and Azaransky would like  
8 to postpone their interviews in order to consult  
9 further with the Winnipeg Police Association,  
10 because they were concerned about the future  
11 impact that their statements may have on civil  
12 litigation and/or Winnipeg Police Service  
13 regulations regarding this.

14 Q Sir, I'm not going to say it came as a  
15 shock to you, but you had expected, and you had  
16 received information that Constable McLure, from  
17 Constable McLure, that she was going to come down  
18 with Black and Azaransky --

19 A Yes.

20 Q -- at about 10:19 that evening?

21 A That's correct.

22 Q And it was shortly after  
23 11:00 o'clock, they still hadn't arrived, when  
24 Sergeant Anderson calls and gives you the  
25 information that there's been a change of plan?

1 A Yes.

2 Q So you understood at this point in  
3 time that there were some pressures on these men?

4 A Yeah, I can take it from that that  
5 they felt some pressure, yes.

6 Q They were concerned about the  
7 implications of what it was they were saying?

8 A Yes.

9 Q And that their answers could have some  
10 consequences for them, sir?

11 A Yes.

12 Q On March 7th, 2005, you try again.  
13 There's reference at page 71 of your notes --

14 A No.

15 Q -- to phone mail messages left with  
16 both of these gentlemen?

17 A Yes. First there was a call -- I'm  
18 sorry. Okay, no, I'm sorry that was a different  
19 date. Yes, you are right, there was messages left  
20 at their residence.

21 Q First you contact Sergeant Humniski  
22 and you ask him to set up an interview with Black  
23 and Azaransky for the next day, March 8th?

24 A I actually telephoned him on Friday  
25 the 4th --

1 Q Okay.

2 A -- from my residence.

3 Q And when do you want to speak with  
4 Black and Azaransky when you speak with Humniski?

5 A At that time, I advised him that I  
6 would like to speak on March 8th.

7 Q Okay. That will be Tuesday. Then  
8 March 7th you end up leaving voice mail messages  
9 with each of these officers, sir?

10 A Yes.

11 Q But the March 8th interview does not  
12 happen?

13 A No.

14 Q And in fact, it's not until March 11th  
15 that there is finally an opportunity to interview  
16 these individuals, sir?

17 A Yes.

18 Q And we've seen that Sergeant Black's  
19 interview, probably the longest you conducted,  
20 lasted approximately 29 minutes, 11:36 to 12:05.  
21 Is that correct?

22 A Oh, I'm sorry, yes --

23 Q Okay.

24 A -- I will agree with that.

25 Q And at the end of his interview, sir,

1 I'm going to ask that you be provided with a  
2 document if you haven't already, sir, it's Exhibit  
3 164. For counsel, again it's at tab F-1.35.c, and  
4 I'm referring to page 915 at this time.

5 And I simply want to get your  
6 observations, sir, with respect to the question  
7 that he has at the end of the interview.

8 "Just one question.."

9 he says at line 2,

10 "...and this is something outside of  
11 the matter here, but like I'm being  
12 kind of brought here as a police  
13 witness or as a witness?"

14 Sir, what did you understand him to be asking you  
15 at that point?

16 A I'm looking at that now and I'm not  
17 sure. I would guess that he was asking whether he  
18 was there as a police witness or as a civilian  
19 witness.

20 Q Okay. And you respond as a witness,  
21 sir?

22 A Yes.

23 Q What did you mean by that?

24 A I guess I was just thinking that  
25 because he was off duty, it wasn't something that



1 occurred during the course of his duty.

2 Q So you didn't consider you were  
3 interviewing him as a police witness, in your  
4 mind?

5 A No, I did. I guess, I don't know,  
6 maybe that was just a slip of the tongue or  
7 whatever, but in my mind he was a police officer  
8 who was with Mr. Harvey-Zenk and may have  
9 information for us.

10 Q Okay. And do you agree with me, sir,  
11 that, again, the fact that he poses the question  
12 to you is an indication that he's quite concerned  
13 about the implications all of this is going to  
14 have for him?

15 A Or he's just unclear as to what his  
16 status is. I don't know.

17 Q Did you give any thought as to why his  
18 status would matter to him?

19 A Well, I guess in the grand scheme of  
20 things, yeah, he probably was concerned about  
21 things. I don't know why he would ask that  
22 particularly, though.

23 Q But it didn't trigger any concern on  
24 your part?

25 A No, no.

1           Q     Sir, did he give you a copy of his  
2     statement he gave to his insurance adjuster that  
3     day, which has been made an exhibit in these  
4     proceedings?

5           A     No.

6           Q     It's Exhibit 162, sir. And therefore,  
7     you wouldn't have learned that in the statement he  
8     gave and signed for the insurance adjuster the  
9     same day, based on an interviewed he had a few  
10    days earlier, he recorded, when asked if he could  
11    indicate how much alcohol had been consumed at his  
12    residence, his response was:

13                    "It's hard to say but approximately  
14                    two bottles of Rye and some Bailey's."  
15    You had received information from him that there  
16    was one bottle of Rye put out, sir?

17          A     Yes.

18          Q     No information about a second bottle  
19    or a part bottle or anything like that, sir?

20          A     No, I believe it was a bottle of Rye  
21    and a bottle of Bailey's.

22          Q     And of course, had you known about the  
23    existence of that statement, it would have twigged  
24    you that perhaps the answers you received were not  
25    precise or complete?

1           A     Yes.

2           Q     I note you don't ask him, after asking  
3     him where Derek Harvey-Zenk was sitting at  
4     Branigan's, who was sitting with Derek at  
5     Branigan's?

6           A     Okay. I don't recall all the details  
7     of the interview, but if you're saying that, then  
8     I assume that's correct.

9           Q     And, sir, you would agree with me that  
10    it would have been helpful to be able to pinpoint  
11    exactly who was with Harvey-Zenk, so you could  
12    compare the various answers you received to see  
13    whether anybody was trying to distance themselves  
14    from him?

15          A     Yes. There were a few people that  
16    said they sat with him momentarily, or had some  
17    discussion and then moved on. It sounded like  
18    many people were moving around throughout the  
19    evening.

20          Q     Sir, who was it that said they had  
21    discussion with him?

22          A     I believe Constable McLure, and there  
23    was one other officer, maybe it was Constable  
24    Nechwediuk. I'm not sure, though, but I remember  
25    that there was two officers. One was I believe

1 about the computer system at work.

2 Q Yes.

3 A And the other one, I don't recall what  
4 the person said the conversation was. It may have  
5 been an interview that I didn't conduct.

6 Q It was Nechwediuk.

7 A Okay.

8 Q Those were the only two who indicated  
9 that they had any conversation with him, sir. You  
10 didn't try to pin down Constable Black to see who  
11 else was with Harvey-Zenk at that time?

12 A No.

13 Q Did you find it at all suspicious that  
14 Constable Black volunteered that? When he was  
15 asked where Harvey-Zenk was sitting, he  
16 volunteered that he had his back to me?

17 A Did I find it suspicious?

18 Q Yes, sir?

19 A No.

20 Q And you never asked Constable Black  
21 whether he had any dealings or involvement with  
22 Derek Harvey-Zenk at Branigan's. Was that --

23 A I don't know whether I asked -- I may  
24 not have asked him that question specifically. I  
25 think I asked him if he observed what he was

1 drinking or how much he may have had to drink or  
2 eat?

3 Q But you never really asked him about  
4 his opportunities to observe the gentleman, or  
5 what might have been in front of him, or anything  
6 like that, sir?

7 A Without reviewing the statement, I  
8 couldn't say for sure, but I don't recall asking  
9 him that directly, no.

10 Q And he indicated, when you asked him  
11 whether anybody was showing signs of intoxication  
12 or impairment at Branigan's, he indicated only  
13 Dave Azaransky. Do you believe that?

14 A I believe, I don't think it was  
15 Azaransky, I think it was Constable Harding.

16 Q I apologize, you're right, it was  
17 Constable Harding. And that was his answer, only  
18 Constable Harding, sir?

19 A Yes, as I recall now, yeah.

20 Q Did it occur to you that it might be  
21 useful to confront him with Gerardy's information  
22 that there were several people who caused him  
23 enough concern that he checked to see whether they  
24 had designated drivers, sir?

25 A I'm just trying recall if I -- I don't

1 think I had spoken with Mr. Gerardy at the time.

2 Q It was later that day, sir?

3 A I believe so. I'm just going to  
4 double-check to make sure for you. Yeah, I didn't  
5 speak to Mr. Gerardy until later that afternoon.

6 THE COMMISSIONER: Did you think of  
7 calling Constable Black back and confronting him  
8 with Gerardy's statement?

9 THE WITNESS: At that point, no.

10 BY MR. PACIOCCO:

11 Q Now, you also ask him, of course,  
12 questions about what transpired at his residence?

13 A Yes.

14 Q The only question you asked him about  
15 alcohol consumption, about Harvey-Zenk's alcohol  
16 consumption was:

17 "Do you know how much Derek had to  
18 drink at your residence?"

19 And you never probed or followed up to find out  
20 whether he had information about, whether he saw  
21 Derek Harvey-Zenk drink, and if so, what kind of  
22 alcohol he had. I mean, asking somebody how much  
23 is a fairly specific question, which differs from  
24 did you see him drink. Did you not feel that you  
25 should have followed that up, sir, and try to get

1 whatever details you could from him?

2 A In hindsight, I probably should have.  
3 I'm skeptical as to whether it would have made a  
4 difference in the long run.

5 Q Well, sir, that may be, but I'm asking  
6 questions about the way the investigation was  
7 conducted.

8 A Yes, I did answer that. I should have  
9 been more direct, yes.

10 Q No questions about how the alcohol was  
11 secured and whether he observed Harvey-Zenk go up  
12 to get liquor at any point?

13 A No. I mean, ultimately what I was  
14 concerned about was what was Mr. Harvey-Zenk's  
15 state when he left, if they could tell me that.

16 Q Sir, you would agree with me that  
17 getting as much information as possible about his  
18 drinking patterns could help you maybe determine  
19 that, and certainly test whether you are getting a  
20 complete story from the witnesses you were  
21 interviewing?

22 A Yes, I would agree with that.

23 Q Now, you received information from him  
24 that a bottle of Rye had been put out along with a  
25 bottle of Bailey's?

1 A Yes.

2 Q Why didn't you ask him who was  
3 consuming from the bottles, sir?

4 A I guess I was just thinking that I  
5 wanted to know about Mr. Harvey-Zenk.

6 Q Sir, you had asked a number of these  
7 officers what they had to drink?

8 A Um-hum, okay.

9 Q And I think you would agree with me  
10 that it would have been relevant to your overall  
11 investigation to find out how forthcoming they  
12 were, and to help you determine how much general  
13 consumption had occurred during the course of the  
14 evening?

15 A Are you saying -- I'm sorry, can you  
16 repeat that?

17 Q Sir, I think you did ask some  
18 witnesses how much they had to drink?

19 A Yes.

20 Q And I put to you that that would be  
21 relevant --

22 A Yes.

23 Q -- to assist you in determining  
24 whether they could be relied upon for the evidence  
25 they gave, sir?



1 A Yes, I would agree with that.

2 Q But you didn't seek to cross-check  
3 Constable Black's observations about the  
4 consumption of Rye from his own bottle to  
5 determine whether all of the witnesses would be  
6 giving you a complete account of what took place?

7 A No, I didn't think of that, no.

8 Q Now, Constable Black also during the  
9 course of your interview -- if you turn to page  
10 907?

11 THE COMMISSIONER: I'm sorry, page?

12 MR. PACIOCCO: 907. In fact, it's  
13 best to start, Mr. Commissioner, at page 906  
14 because the question in issue begins at the very  
15 bottom.

16 BY MR. PACIOCCO:

17 Q At line 22 Constable Black says:  
18 "I do recall Chris Humniski leaving,  
19 but I know he lives in the area. I  
20 remember talking to him. T.J., the  
21 young guy on the shift, he left pretty  
22 early himself. I do recall the girls  
23 leaving and being concerned about  
24 people drinking."

25 Sir, did you note that comment when it was made to

1 you?

2 A Sorry, I can't find that on the --

3 Q At page 17 and 18 of the interview of  
4 Sergeant Black.

5 A Oh, sorry, I was on the wrong page.

6 Q And right at the bottom of page 17?

7 A Yeah.

8 Q The sentence I'm interested in is,  
9 "I do recall the girls leaving and  
10 being concerned about people driving."  
11 Do you see that, sir?

12 A Yes.

13 Q Did you note that at the time that  
14 that information was being communicated to you?

15 A You know what, I'm not -- I don't  
16 specifically recall that. I know that later on he  
17 had indicated that he was, when he made the offer  
18 for people to stay at his residence, that he was  
19 more concerned about fatigue and the fact that he  
20 lived outside of the city. So with this, I don't  
21 know what he was referring to specifically.

22 Q Fair enough. But you didn't follow it  
23 up, did you, sir?

24 A No. Other than later on, I believe,  
25 it is when we asked him about specifically why he

1 was concerned, and he said -- or asked him about  
2 why he was concerned, and he said it was more to  
3 do with fatigue. But this specifically here, no.

4 Q And you didn't follow it up with the  
5 girls he is referring to, which would have been  
6 McLure and Fudge?

7 A No.

8 Q I'm going to ask you to turn, please,  
9 to page 912? 912 follows on a discussion about  
10 how much Derek had to drink at the residence, and  
11 Constable Black doesn't know. Sergeant Pearson  
12 asked:

13 "What did Derek look like, his  
14 physical appearance when he left?"

15 Constable Black says:

16 "To mine?"

17 Pearson said:

18 "Yeah. Did he look like he was  
19 fatigued? I understand there was a  
20 lot of overtime --"

21 And then subsequently at line 19 Sergeant Pearson  
22 says:

23 "Okay. I guess it's safe to assume  
24 that Derek was probably feeling the  
25 same thing. You know, he had been up

1                   all night too. He didn't sleep when  
2                   he was at your house?"

3 Do you see that passage, sir?

4           A     Yes.

5           Q     And if you go through that page, it  
6 strikes me, sir, and you may disagree, but it  
7 strikes me almost like a cross-examination  
8 designed to get a witness to acknowledge that  
9 fatigue is an issue, or is the issue. Did you  
10 have any concern at all about the way those  
11 questions were posed by Sergeant Pearson?

12          A     At the time, no.

13          Q     Do you see now, sir, at line 13:  
14                "Yeah, did he look like he was  
15                fatigued? I understand there was a  
16                lot of over time --"

17          A     Um-hum.

18          Q     Do you not find that to be a very  
19 leading question to be asking a witness in the  
20 context of an investigation where you're trying to  
21 determine whether he's impaired, somebody  
22 suggesting to him that fatigue might be the reason  
23 why this accident occurred? Is that not implicit  
24 in the question that's being asked, sir?

25          A     I can understand why you'd see it that

1 way, yes.

2 Q Sir, you also had the overtime slips  
3 by this point?

4 A I believe so.

5 Q And they have been made an exhibit in  
6 this matter, and they are at tab F-1.33.c. And  
7 I'm not going to take you to them, sir, unless you  
8 have a different recollection of what's in them.

9 A I have no recollection at all of  
10 what's in them.

11 Q Well, I can indicate to you, sir, that  
12 there are only two slips relevant to Harvey-Zenk,  
13 and together the two slips add up to net one-half  
14 hour of overtime --

15 A Okay.

16 Q -- during the preceding week I take  
17 it, sir, you would have looked at those slips when  
18 they were furnished to you through the assistance  
19 of the police investigator who forwarded them to  
20 you?

21 A Likely would have, yes.

22 Q And you would have taken the time to  
23 measure whether there had been a lot of overtime  
24 work by Harvey-Zenk, that's why you would have  
25 looked at them?

1 A Yes.

2 Q Here you have Sergeant Pearson saying,  
3 I understand there was a lot of overtime, which  
4 seems to be inconsistent with information you had,  
5 sir?

6 A Um-hum, yeah.

7 Q And it never occurred to you at that  
8 point to interject and perhaps stop?

9 A No, it didn't.

10 Q Now, sir, I know that Constable Black  
11 told you that his concern was fatigue, and that's  
12 why he invited people to stay over at his place.

13 A Yes, with the exception of Constable  
14 Harding.

15 Q Yes. Did you not find that an answer  
16 that was unsatisfactory, given that these people  
17 had been at Branigan's drinking together from,  
18 some of them as early as 11:00 o'clock, through to  
19 the time the place closed, and then at his place  
20 where alcohol was again served from 2:45,  
21 3:00 o'clock until in some cases, 6:00, 6:30 in  
22 the morning, sir?

23 A To be honest with you, I was only  
24 concerned about the time, once they were at  
25 Constable Black's residence. I wasn't concerned

1 about Branigan's at that point.

2 Q But, sir, when someone indicates to  
3 you that their only concern is fatigue, after they  
4 have been out in locations where alcohol has been  
5 served the whole night with people they expressed  
6 concern about, did that not strike you as a bit  
7 unusual that only fatigue would be a concern?

8 A At the time, no. He was just offering  
9 me his opinion as to what he was concerned about.

10 Q Did you ever ask Constable Black about  
11 why he chose not to come in for the first  
12 interview, what concerns he had, why he delayed  
13 coming in? Did you not pursue that with him, sir?

14 A No.

15 Q The information you had was that he  
16 was with Azaransky at the time and he was going to  
17 be coming with McLure. Did you not feel it  
18 important to check with McLure and Azaransky about  
19 their concerns and their involvement in this?

20 A No, because I didn't speak with any of  
21 them.

22 Q You didn't call them back in --

23 A No.

24 Q -- for further interviews. It wasn't  
25 something you felt you should follow up on, given

1 that you now had information that Azaransky had  
2 the same concern and McLure was privy to it, sir?

3 A I'm not sure I understand what you're  
4 saying?

5 Q Well, sir --

6 A Are you talking about the night when  
7 Patrol Sergeant Anderson called me to advise they  
8 weren't coming in.

9 Q Correct?

10 A No, I didn't. They were witnesses  
11 after all.

12 Q And, sir, what difference does that  
13 make, sir, that they were witnesses?

14 A Well, if they were a subject officer  
15 where they were the subject of the allegation of a  
16 criminal wrongdoing or, you know -- then when  
17 those interviews are set up, we try to ensure that  
18 those are kept. We give them ample notice. But  
19 with a police witness, or civilian witness, if  
20 they have a concern, I let them address their  
21 concern prior to coming in. I'm not going to push  
22 them.

23 Q Are you not going to push them to find  
24 out the nature and depth of their concern so you  
25 can evaluate whether it might impact upon the



1 evidence you're getting, sir?

2 A I'm not sure I understand what you  
3 mean?

4 Q Well, sir, if somebody has a concern  
5 about what they say may be used to harm them, you  
6 would agree with me that that might be a warning  
7 signal that they might not be as forthcoming with  
8 you as if they didn't have a stake?

9 A I would think everyone that comes in  
10 to see someone in Professional Standards has that  
11 concern to some extent. I've had officers that,  
12 after reviewing the reports, clearly have nothing  
13 to hide, and yet sometimes they show up with  
14 counsel.

15 Q Sir, you would agree with me --

16 A It's a very intimidating process to go  
17 through.

18 Q You would agree with me that you had  
19 specific information about these officers and that  
20 the concern was of enough intensity that they  
21 cancelled an interview to go and decided to go and  
22 get advice?

23 A Yes.

24 Q And that didn't cause you to probe  
25 that any further, I take it?

1           A     No.  Because, as I said, I've had  
2     witness officers that had very little involvement  
3     in matters show up with legal counsel.

4           Q     Now, sir, you indicated that you  
5     didn't want to push too hard.  Remind me of a  
6     comment you made in your interview with  
7     Mr. Clifford of our office.  Do you have your  
8     transcript in front of you, sir?

9           A     Yes, I do.

10          Q     I am going to ask you to look at page  
11     43, please?  I'm interested, sir, in line 16 at  
12     page 43?

13          A     Um-hum.

14          Q     Now, line 16 at page 43 you say:  
15                 "And one of my concerns, thinking back  
16                 on this now, was that they were  
17                 witnesses, so I wasn't going to push  
18                 it too hard."

19          A     Yes.

20          Q     So you made a decision that because  
21     the people you were interviewing were not subject  
22     or suspect officers, you weren't going to push  
23     them, you were just going to get them to narrate  
24     their information and you weren't going to probe  
25     it in any aggressive way, sir?

1           A     I was going to treat them the same as  
2     I would any other witness coming in. One of the  
3     things that, over my time in Professional  
4     Standards, that I was told when I got and I  
5     learned it subsequently in the three years that I  
6     was there, that it's very important to maintain  
7     consistency in order to maintain the credibility.  
8     I mean, we don't want to be treating -- like if  
9     someone is coming in as a subject officer, we try  
10    to treat them all in the same manner. And if  
11    someone is coming in as a witness officer, we try  
12    to keep that consistent as well. So this was a  
13    departure from the way that we normally would get  
14    witness officers in. Sometimes it would be three,  
15    four weeks down the road, or longer, depending on  
16    the work schedule and the different factors that I  
17    spoke about on Thursday. So this, in comparison  
18    to that, was quite quick.

19           Q     Sir, do you not agree that the  
20    priority in conducting an investigation should be  
21    on the integrity of the information you are  
22    receiving rather than on the consistency in  
23    dealing with officers?

24           A     We have to balance it all.

25           Q     I'm sorry?

1           A     In Professional Standards, it has to  
2     be a balance.  Because one of the things that I  
3     was told was that we are not -- let me just think  
4     about the right way to word this.  In order -- we  
5     basically had four stakeholders that we were  
6     serving, in the sense of our duties; that being  
7     the citizens of Winnipeg, the City, the service,  
8     and our members.  So we had to make sure that  
9     there was a balance, that we did things the right  
10    way, to maintain credibility with all of those  
11    groups.  It was difficult to do the work if you  
12    don't have any credibility.

13           Q     So it was an exercise in compromise?

14           A     I would use the word balance more than  
15    compromise.  And, again, as I stated, had we  
16    followed the normal procedure, the interviews  
17    would have taken place much later than March 11th.

18           Q     Sir, I'm going to ask you just a  
19    couple of questions relating to the interview with  
20    Azaransky --

21           A     Okay.

22           Q     -- which is at F-1.35.a, that is  
23    Exhibit 166.

24                     Now, sir, again, you have had  
25    information from Constable Black, through Sergeant

1 Anderson, that Azaransky and Black are concerned  
2 about the impact that their interviews are going  
3 to have on their potential civil liability and  
4 ultimately on their potential personal discipline,  
5 the Winnipeg Police Association issues. And the  
6 end of his interview, Constable Azaransky also  
7 asks you questions about the nature of his  
8 involvement and what he's doing there, and what  
9 you're looking for.

10 I'm going to take you to page 873,  
11 sir. And after some discussion with Azaransky, he  
12 says:

13 "Well, more so inquiring into whether  
14 you guys are looking for any sort of  
15 back door omission that --"

16 And then you interrupt him, Sergeant, and you say,

17 "To be quite blunt with you, we're not  
18 looking for anything."

19 A I'm sorry, where is that?

20 Q This is at page 873 or page 22 of the  
21 interview that you have?

22 A Oh, at the top.

23 Q Line two.

24 "Well, more so inquiring into whether  
25 you guys are looking into any back

1 door omission that --

2 Sergeant Girard: To be quite blunt  
3 with you, we are not looking for  
4 anything."

5 I was wondering what you meant by that?

6 A I can't -- I don't understand why I  
7 would say that. I don't know what the context is.  
8 I'm just going to read a little further back.

9 Q Make yourself comfortable with that,  
10 sir.

11 A Okay. From reading back a couple of  
12 pages, the only thing I can think of for that  
13 would be that I was maybe referring at that point  
14 to any breach of the rules and regulations.  
15 Because I would not have told him that we're not  
16 looking for anything regarding assisting East St.  
17 Paul.

18 Q If you had found information about a  
19 breach of regulations, I take it you would have  
20 felt duty bound to move on that and to act on it,  
21 sir?

22 A Not immediately, no.

23 Q I'm going to turn you, please, to the  
24 next page where Sergeant Pearson starts to  
25 contribute to the conversation, where Constable

1 Azaransky was expressing some concern about the  
2 focus that you have, line 11 on page 874. It  
3 should be page 23 at the top of your document,  
4 sir?

5 A Yes.

6 Q Sergeant Pearson says:

7 "And from what we have seen -- there  
8 is nothing. First of all, there's no  
9 complaint that there was a big raunchy  
10 party going on and a big shift  
11 (inaudible) and that's certainly not  
12 the case. On your behalf we can tell  
13 people that's not the case. And no  
14 other complaint from anybody has come  
15 forth."

16 Sir, what do you think of the appropriateness of  
17 Sergeant Pearson communicating to Sergeant Girard  
18 the conclusions that there was no party and that,  
19 on your behalf, Constable Azaransky, we can tell  
20 people that's not the case. What's your view on  
21 the propriety of that type of observation being  
22 made in an interview that is designed to determine  
23 what was going on that night?

24 A All I can say to that is he may have  
25 been saying that, it's just to try to put him at

1 ease about that issue. Other than that, I really  
2 don't know what I can say to you about it.

3 Q Were you aware that there were at  
4 least six other officers who required interviewing  
5 at that point?

6 A I knew there were more at that time.  
7 The exact number, I don't know.

8 Q And for an investigator to come to a  
9 conclusion like that before concluding all those  
10 interviews and to basically tell the subject that,  
11 we can tell people this on your behalf, do you  
12 think that was appropriate, sir?

13 A I don't think it was appropriate to  
14 say it, but I can also say, knowing Sergeant  
15 Pearson, neither one of us would have been saying  
16 anything like that to anyone else.

17 Q I'm sorry?

18 A We would not have been proclaiming to  
19 everyone that something like this, like we  
20 wouldn't be speaking on his behalf to anyone else  
21 in the service and assuring them that this wasn't  
22 a big raucous party.

23 Q I know you can't speak on behalf of  
24 Sergeant Pearson, sir, but you agree he's telling  
25 Azaransky he can, he's now in a position to do so.



1 On your behalf, we can tell people that's not the  
2 case?

3 A Yeah, but we would not have done that.

4 Q Sir, turn back please to page 18 of  
5 your interview page 869?

6 You're trying to get information from  
7 Constable Azaransky about the condition of  
8 Harvey-Zenk, and you have asked him questions  
9 about whether he noticed him drinking? And  
10 Constable Azaransky says no.

11 "They are all sitting around the same  
12 table?"

13 His answer is no. The questions continue.

14 Constable Azaransky says at line 18,

15 "Normal, as far as sobriety goes,  
16 normal, you know, he does all of the  
17 time.

18 Sergeant Pearson: Okay."

19 And then you make the following comment:

20 "Probably he was tired just like  
21 everybody else."

22 That's at line 22:

23 "Probably he was tired just like  
24 everybody else."

25 Again, sir, do you not feel that it's a bad

1 investigative technique to suggest to a witness,  
2 when you're trying to get information about the  
3 condition of an individual, that that person might  
4 be tired?

5 A Yeah, I would agree with that.

6 Q There are other comments that I could  
7 draw your attention to. I'm only going to use two  
8 of them, sir. If he can be given the interview  
9 for Constable Mikawoz?

10 A Sorry, just one thing I want to say.

11 Q Yes, sir.

12 A I certainly had no intention of  
13 planting any suggestion in his mind or anything  
14 like that. I just want to be clear on that.

15 Q Thank you. If he could be given the  
16 interview for Constable Mikawoz, which is at  
17 F-2.35.u? Look at two, I'd ask everyone to look  
18 at page 1189.

19 Now, you're setting out to try and  
20 determine how much Derek Harvey-Zenk had to  
21 consume. And Sergeant Epp asks him at line 5, and  
22 I know this is not your interview, sir, but you  
23 are overseeing this investigation.

24 A My partner and I were, yes.

25 Q Sergeant Epp says at line 5:

1 "Can you tell us what he was drinking  
2 that evening?

3 Constable Mikawoz: No idea actually.  
4 I believe it was beer, but I don't  
5 know.

6 Sergeant Epp: Okay. And you know  
7 what, as everyone gets talking and  
8 stuff and we get busy with our own  
9 conversations, would you have been in  
10 a position to say how many beverages  
11 he had that evening?"

12 Sir, do you not agree with me that what Sergeant  
13 Epp is essentially doing is he is suggesting to  
14 the witness, before the question is even put about  
15 how much this individual had to drink, that this  
16 individual wouldn't have noticed, because  
17 everybody gets talking and stuff and gets busy  
18 with their own conversations? Do you feel, and I  
19 know you're in an awkward position because he's a  
20 colleague of yours, Sergeant Epp?

21 A She.

22 Q She's a colleague of yours. But do  
23 you not feel it was inappropriate for Sergeant Epp  
24 to put that suggestion to the witness?

25 A I think, reading it here, yes.

1     However, I don't believe that her intention was to  
2     do that.

3             Q     Sir, I'm going to take you to one  
4     more. This is at F-2.35.q, this is the Veldman  
5     interview, F-2.35.q. At line 4 on page 1123 of  
6     that interview, sir, you are asking the question:

7                     "Okay. Do you know what Derek was  
8                     drinking that night?

9                     Constable Veldman: No, I don't.

10                    Sergeant Girard: Okay. What about  
11                    any food?

12                    Constable Veldman: I don't know if he  
13                    had any food.

14                    Sergeant Girard: Okay. All right.  
15                    Was anyone at this gathering obviously  
16                    intoxicated?

17                    Constable Veldman: Not that I  
18                    noticed, no.

19                    Sergeant Girard: Okay, so pretty  
20                    quiet gathering then. All right."

21     You would agree with me that asking somebody  
22     whether they noticed anyone who is obviously  
23     intoxicated does not necessarily mean it's a  
24     pretty quiet gathering?

25             A     No.

1           Q     Yet you make that conclusion and you  
2     don't ask them about the ambiance or the  
3     atmosphere in the room, based on the answer that  
4     you received about obvious intoxication, sir?

5           A     No, I didn't.

6           Q     Do you feel that that was an effective  
7     way to try and figure out what was going on at  
8     Branigan's that evening, sir?

9           A     No, I could have been more detailed  
10    for sure.

11          Q     I'm going to ask you some questions  
12    about the civilian witnesses.

13          A     Yes.

14          Q     You go to Branigan's, I understand,  
15    and my notes have it that it's March 7th, 2005,  
16    and I understand that it was to set up the  
17    interviews that later occurred on March 11th,  
18    2005?

19          A     It was to determine who was working  
20    that night.

21          Q     You meet with Dave Zulak, the  
22    assistant general manager, and get a list of  
23    employees, and you identify the ones who are  
24    relevant to your investigation, sir?

25          A     Yes.

1           Q     And he mentions to you that the guys,  
2     referring to the police officers, are good to  
3     them, reserving, no problems?

4           A     Yes.

5           Q     Did you have any concern going into  
6     the interviews with the Branigan's people that  
7     this incident and this investigation could have an  
8     impact on them?

9           A     I wasn't thinking that at the time,  
10    no.

11          Q     You understand that they had a  
12    business interest with the police?

13          A     I didn't find out until, I believe,  
14    the interviews with Mr. Bravo and Mr. Rodriguez  
15    that they were regulars there. I didn't know it  
16    until that time.

17          Q     So nobody who you had interviewed from  
18    the Winnipeg Police Service offered that to you,  
19    sir?

20          A     I don't believe so, no.

21          Q     And sir, you certainly discovered it  
22    with the interviews with them, but you also would  
23    have inferred it from what you were told by David  
24    Zulak right then and there? These guys are good  
25    to us, reserving, et cetera, there were no

1 problems?

2 A Yeah. But I would have no idea how  
3 many times they had been in or whether there was  
4 any relationship between them.

5 Q So it never caused you enough concern  
6 to ask about the regularity of their attendance?

7 A No.

8 Q And whether any business interests  
9 could impede upon the information you are going to  
10 get?

11 A No, I didn't think of it at the time.

12 Q And I take it you didn't think about  
13 the potential liability concerns that taverns can  
14 have, and waitresses and waiters can have when  
15 they over-serve, sir?

16 A I wasn't thinking that at the time,  
17 no.

18 Q So, you tried to set up the interview  
19 with Chelsea O'Halloran, and I understand that she  
20 didn't show up for her set interview, sir?

21 A Yes.

22 Q And that happened twice, once to view  
23 the photos and once to actually come in and do the  
24 interviews?

25 A Yes.

1           Q     Sir, did that give you any cause to be  
2     concerned about whether she was really interested  
3     in participating in the interview process, may not  
4     want to come in?

5           A     No. No, she offered an explanation to  
6     me and I was satisfied with it.

7           Q     Now, you are aware that she has since  
8     recanted the information that she furnished to  
9     you, sir?

10          A     Yes.

11          Q     And her explanation was that her  
12     general manager, Rodrigo Bravo, who of course  
13     denies this, told her to play dumb and not to  
14     remember things because of the need to protect the  
15     officers and avoid civil liability. Were you  
16     aware of that, sir?

17          A     When? Like now?

18          Q     Now.

19          A     Oh, yes, I read about that, yes.

20          Q     But this wasn't something that  
21     occurred to you as a possibility at the time, that  
22     this could happen?

23          A     Not at all. No. I was actually  
24     quite -- with my interview with Mr. Clifford, I  
25     was quite surprised when he asked me if I knew of



1 any relationship between the people at Branigan's  
2 and any officers. I had no idea there was.

3 Q So that was not something that your  
4 investigation uncovered?

5 A No.

6 Q In spite of the fact that she has now  
7 recanted the information and provided a more  
8 aggressive account, if you will, of how much  
9 alcohol was being served and who was drinking  
10 what, you had some information from her about  
11 drinking, and I'm going to ask you whether it  
12 caused you any concern. Her interview is at, it's  
13 Exhibit 154, and I'm going to ask the clerk to  
14 provide it to you. Counsel will find it in book  
15 F-3 at tab 38.b, book F-3, tab 38.b. And I'm  
16 going to take you to page 1334, sir, line 22.

17 "Sergeant Girard: Now, do you recall  
18 if any one person or people there had  
19 an excessive amount to drink?

20 Ms. O'Halloran: Probably about, I  
21 wouldn't say excessive, but a couple  
22 of them had more than the others had.

23 Sergeant Girard: Okay. Do you  
24 remember how many, like the people  
25 that had more, how many would they

1                   have had?

2                   Ms. O'Halloran:   Probably about eight.

3                   Sergeant Girard:   Beers?

4                   Ms. O'Halloran:   Yes."

5    Sir, did any officer indicate to you that they had  
6    had eight beers at Branigan's, or anything close  
7    to it?

8                   A     No.

9                   Q     I noticed that Dave Harding, who had  
10   been earmarked as the impaired officer that  
11   evening, was not asked how much he consumed at  
12   Branigan's, sir.  It was an omission on your part?

13                  A     I guess he -- everyone was saying he  
14   was intoxicated, so I didn't think to ask him how  
15   many he had.  He might not remember.

16                  Q     Did you not think that the eight beer  
17   was something that you should follow up with, with  
18   the officers you had interviewed, to try and find  
19   out who she could have been referring to, sir?

20                  A     Well, I think by the time my interview  
21   with Ms. O'Halloran was concluded, no.

22                  Q     Why was that, sir?  She told you that  
23   eight beer had been consumed by two people.  Did  
24   you not feel it important to find out who they  
25   were, sir?

1 A By two people?

2 Q "A couple of them had more than the  
3 others had.

4 Do you remember how many, like the  
5 people that had more?

6 Probably about eight beers."

7 A No. Because at the conclusion, I  
8 mean, I asked her a very specific question about  
9 whether anyone was intoxicated when they left the  
10 bar? And she said clearly that nobody was.

11 Q Yeah, and I was going to take you to  
12 that next, sir. She tells you at page 1338, at  
13 line 22 you say:

14 "Okay. All right. So no one  
15 appeared --

16 No.

17 You had no concerns about anybody that  
18 may have gotten into a vehicle to  
19 drive somewhere then?

20 Ms. O'Halloran: No."

21 That's what you're referring to, sir?

22 A I'd have to review the whole  
23 statement, but, yeah.

24 Q But, sir, would you have concerns  
25 about somebody getting into a vehicle who had

1 eight beer?

2 A I would, yes.

3 Q And, sir, anybody with any experience  
4 in alcohol would understand that eight beers is  
5 too many beer to be getting into an automobile?

6 A Well, I asked her the question and she  
7 replied that she didn't have any concerns.

8 Q But didn't you find that inconsistent  
9 with the answers she gave you two pages earlier  
10 about two people having consumed as many as eight  
11 beer each?

12 A I guess I didn't at the time, no.

13 Q And what about the amount of the bill,  
14 sir, over on page 1340, from 1339, you ask her at  
15 the bottom of page 1339 at line 22:

16 "All right. Okay. What was the  
17 ballpark figure of the total then of  
18 the bill?

19 Ms. O'Halloran: Of each item -- I  
20 don't know the total of the full bill,  
21 but individually I could say probably  
22 approximately, we gave them \$2.75  
23 pints and 35-cent wings.

24 Sergeant Girard: \$2.75 a pint?

25 Ms. O'Halloran: Yes, and 35-cent

1 wings. So, roughly, I would say about  
2 25, \$30 each bill. I don't know how  
3 much the full bill was because I had  
4 billed them individually, so  
5 approximately 25 to \$30 each."

6 Now, you received that answer from her, sir. Now,  
7 your estimate in another document was that people  
8 had approximately 10 wings each. Gerardy told you  
9 the average might have been 10 to 20?

10 A Okay.

11 Q So even taking 20, we've got \$7 worth  
12 of wings. You've got bills of 25 to \$30 that  
13 she's talking about at beer at \$2.75, sir. Did  
14 you take the time to critically evaluate how many  
15 beers that would have meant, according to the  
16 evidence she was giving you, that these average  
17 bills would have had to consume to get to that  
18 point, sir?

19 A No, I didn't.

20 Q Because you're basically talking \$18  
21 worth of \$2.75 beers, according to the information  
22 she's giving you?

23 A According to her estimate, yeah.

24 Q And that didn't twig for you, sir,  
25 that wasn't something that you felt at the time

1 was an indication that maybe you weren't getting  
2 the whole story?

3 A No, apparently not.

4 Q And I understand you had some reason,  
5 given the answers she gave, to think that one of  
6 the people who drank eight beers could be Derek  
7 Harvey-Zenk?

8 A Yes, because of a story she told about  
9 someone having been in for a Super Bowl party.

10 Q Yes, and having a pregnant wife, and  
11 you had learned that Derek Harvey-Zenk's wife was  
12 pregnant through the wellness officer, during that  
13 interview?

14 A Yes.

15 Q She described this person who had  
16 eight beers as a big wing eater and, you had  
17 information about Harvey-Zenk having a lot of  
18 wings, sir?

19 A Yes.

20 Q She described him as one of the first  
21 people to come in that night. And you had  
22 information that Harvey-Zenk was one of the first  
23 people to get there, sir?

24 A I believe one of four, yeah.

25 Q Yeah. So you had lots of

1 circumstantial indications that it could be him.

2 I understand that you composed a photo  
3 line-up, sir?

4 A Yes.

5 Q Could you tell the Commissioner about  
6 how that went? What the process was?

7 A Oh, the process?

8 Q Yes?

9 A Utilizing our Niche records system, I  
10 viewed 700 photos, and I looked for nine photos in  
11 addition to Mr. Harvey-Zenk's, that I could show  
12 to Ms. O'Halloran, looking for generally similar  
13 characteristics, whether it be hair colour, hair  
14 length, things like that. I assembled a group of  
15 10 photos and I made arrangements to show her that  
16 pack.

17 Q All right, sir, and you also used a  
18 Winnipeg Police Service photo line-up form, I  
19 understand?

20 A Yes.

21 Q That photo line-up form, I am about to  
22 put in as an exhibit, the clerk does not have it  
23 right at the moment. The photo line-up form was  
24 disclosed to us late because apparently it was  
25 misfiled; correct?

1 A Yes.

2 Q This never went to the East St. Paul  
3 as part of the investigative package, or to  
4 Mr. Minuk?

5 A I'm not aware of whether it did or  
6 not, but I had some difficulty finding it.

7 Q And I can indicate to you, sir, that  
8 it was not contained in any of the disclosure we  
9 had received through the investigation, and has  
10 only recently been furnished to us, sir?

11 A Um-hum.

12 Q And I'm going to put this into  
13 evidence. Unfortunately, counsel don't have a  
14 copy yet, but we will arrange to have this made.  
15 But the date is the 22nd of March, 2005, 1140  
16 hours. This investigation is regarding, and you  
17 have written in "assist East St. Paul Police."  
18 The form lists a number of instructions. First:  
19 "The person who is suspected to have  
20 committed the alleged offence may or  
21 may not be in the photo line-up. You  
22 are not obligated to choose any of the  
23 photos."  
24 That's familiar to you, sir, as the first  
25 instruction?



1           A     Yes.

2           Q     Do you read these instructions to --

3           A     I read them to the letter.  I never  
4 deviate from that form.

5           Q     So if Ms. O'Halloran told us that she  
6 was told that the person was in the photos --

7           A     That is not true.

8           Q     -- she misunderstood or she has not  
9 remembered correctly.

10          Number 2:

11                   "View each of the photos carefully  
12 before making any comments.  Consider  
13 that the photos may be recent or old,  
14 hairstyles change and people alter  
15 their appearance by growing or  
16 removing hair."

17          Three:

18                   "Each photo has a number on the back.  
19 If you recognize an individual, write  
20 the number of the photo in the space  
21 provided and enter in the comments  
22 section below how the individual is  
23 known to you."

24          Then it goes on:

25                   "I declare I have read and understand

1                   the above instructions. I have  
2                   selected photo number...

3 blank, and in this case it's left blank?

4           A     Yes.

5           Q     "I have not received any other  
6                   instructions or comments regarding the  
7                   photos."

8 Correct, sir? The comment that is written here  
9 is:

10                   "I don't recognize any of them."

11          A     Okay.

12          Q     Correct? Did you have any further  
13 comments from Ms. O'Halloran, apart from that one  
14 statement:

15                   "I don't recognize any of them."

16          A     Comments from her?

17          Q     Yes, sir?

18          A     There may have been some conversation  
19 after, but comments regarding her viewing of the  
20 pack, no, I would have written down exactly what  
21 she said.

22          Q     Okay. So you're trained to do that,  
23 because you understand the importance of capturing  
24 the precise observations of the witness at that  
25 time?

1 A Yes.

2 Q You would agree with me that he's not  
3 there is different from I don't recognize them,  
4 for example, and it's important that you have a  
5 precise, crisp --

6 A We just want to get a quote of exactly  
7 what they said, yes.

8 Q For that reason, sir, because it can  
9 have a different impact on what it is they are  
10 telling you?

11 A Yeah.

12 Q Correct. And I don't mean to berate  
13 you on this, sir, but it's really important for  
14 whoever understands what happened during that  
15 line-up, the prosecutor, in particular, to know  
16 exactly what was said at the time, sir?

17 A Yes.

18 Q So it's important for them to have  
19 this document so that they can properly understand  
20 what took place?

21 A Yes.

22 Q And in this case, you don't have any  
23 information as to whether this document went to  
24 the Crown or the other investigating police force,  
25 but you do understand that -- it was you, I take

1 it, who had an managed to dig this up --

2 A Yes.

3 Q -- from an improper file?

4 A Yes.

5 MR. PACIOCCO: I'm going to have this  
6 made the next exhibit, please.

7 THE CLERK: Exhibit 207.

8 (EXHIBIT 207: WPS Photo Line-up Form  
9 dated 05-03-22 11:40 hrs Incident  
10 Number 05-017)

11 BY MR. PACIOCCO:

12 Q Sir, did you not think it was  
13 important when you had that answer, "I do not  
14 recognize any of them," to follow up with the  
15 other circumstantial indications that this could  
16 be Derek Harvey-Zenk?

17 A No.

18 Q Because I noticed you didn't,  
19 according to your notes at least, or any of the  
20 information we have received, make any effort to  
21 determine who had pregnant wives at the time among  
22 the officers in question --

23 A No.

24 Q -- to try and eliminate all other  
25 possibility?

1           A     No.

2           Q     You would agree with me that if you  
3 did that, and Derek Harvey-Zenk had proved to be  
4 the only one with a pregnant wife, that could be  
5 pretty good circumstantial evidence, even though  
6 she's not able to pick out the photo?

7           A     She wasn't able -- she didn't  
8 recognize any of them. So in my mind, the person  
9 either wasn't there or she just didn't recognize  
10 him any longer.

11          Q     You didn't feel it was important to  
12 cross-check that, to see whether or not there was  
13 anybody else who had a pregnant wife, sir?

14          A     No.

15          Q     And I can indicate for the record, and  
16 I should indicate for the record that we have  
17 since learned through this Commission that it  
18 would not have been Derek Harvey-Zenk who had  
19 consumed the eight beer that she attributed to  
20 him, because his wife was only very modestly  
21 pregnant at that time and would not have been  
22 showing. And we have information that Christian  
23 Guyot's wife was very big at the time, which was  
24 the description that Ms. O'Halloran gave. But  
25 that's not something you dug up, sir?

1 A No.

2 Q And would you agree with me, sir, that  
3 this could cause some distraction to whoever was  
4 continuing the investigation of the prosecution by  
5 perhaps continuing to focus on the possibility  
6 that it could be Harvey-Zenk because of the  
7 pregnant wife information, and this really should  
8 have been cleaned up?

9 A It didn't occur to me at the time, no,  
10 because she didn't pick him out.

11 Q Now, you conducted an interview as  
12 well with Darcey Gerardy, sir?

13 A Yes.

14 Q This interview is found at tab  
15 Q-1.89 -- actually, you know what, it won't be  
16 there. F-3.38.a, F-3.38.a. This is Exhibit 157.  
17 You are now aware of suggestions at least that  
18 Branigan's had a bit of a stake in what would  
19 happen during this investigation, from the  
20 testimony that Chelsea O'Halloran has given.

21 Rodrigo Bravo is the general manager,  
22 sir, of Branigan's at the time, according to the  
23 information you received?

24 A I believe so, yes.

25 Q And he comes for the interview with

1 Darcey Gerardy, who is his employee, sir, who was  
2 the night manager; correct?

3 A Yes.

4 Q And would you not agree with me, sir,  
5 that they both have relevant information to give?

6 A Well, at the time I didn't think that  
7 Mr. Bravo did because he wasn't present the night  
8 that this occurred.

9 Q You had learned from Chelsea  
10 O'Halloran, you had asked her about whether she  
11 reviewed the records of the sales that evening,  
12 and she told you that she hadn't and that she was  
13 told that her manager would provide them to you,  
14 sir?

15 A I believe so, yes.

16 Q So you knew that he would be the best  
17 person to go to in an effort to get the records  
18 from the evening, sir?

19 A He was the person to ask, yes.

20 Q And Gerardy was the person to ask  
21 about his observations that evening --

22 A Yes.

23 Q -- because he was right there?

24 A Yes.

25 Q Did you learn, sir, through the

1 interview, and I think you answered this earlier,  
2 that Mr. Bravo and Constable Black were close  
3 friends?

4 A I did not know that.

5 Q Why did you interview Darcey Gerardy  
6 and Rodrigo Bravo together, sir?

7 A Well, it certainly wasn't our  
8 intention. We attended and we spoke with  
9 Mr. Gerardy, and Mr. Bravo came up and introduced  
10 himself, and he said that there was just one thing  
11 that he wanted to say in regards to all of this.  
12 So the intention was just to have him sit and  
13 wait. And I don't have a good explanation for you  
14 as to why we did that. It should never have been  
15 done. I had never done that prior in my entire  
16 career, and it was definitely wrong to do that.  
17 There was nothing intentional on our part, it was  
18 just, we just kind of looked at each other,  
19 because he said, well, do you mind if I sit in,  
20 and Con Pearson and I looked at each other and  
21 just went, okay. But I agree with you 100 per  
22 cent, it should not have been.

23 Q This was just after he told you there  
24 was just one thing he wanted to add, so he told  
25 you he had relevant information?



1           A     It was just a comment he wanted to  
2     make was what he said.

3           Q     You would have assumed that it had  
4     something to do with your investigation?

5           A     I didn't know whether it did or not,  
6     but, yes, that would be a safe assumption.

7           Q     Now, you received again some  
8     information from Mr. Gerardy that seemed to be  
9     different from the information you were getting  
10    from the officers, sir?

11          A     It was a little bit different from  
12    what the officers and Ms. O'Halloran had said,  
13    yes.

14          Q     It was pretty centrally different, was  
15    it not, sir? I mean, he had talked to you about  
16    having concern about a few people having too much  
17    to drink to drive and he wanted to make sure they  
18    were taken care of; correct?

19          A     Yeah. I believe he said that he had  
20    been assured they were being taken care of.

21          Q     Yes, sir. And that was inconsistent  
22    with the information you were receiving from the  
23    officers and from Ms. O'Halloran about the state  
24    of sobriety of people and the amount of drinking  
25    that was going on in that establishment?

1           A     Yes. Well, I guess what I can say  
2 about that is I put more stock in what  
3 Ms. O'Halloran said because she was serving them  
4 all night.

5           Q     But, sir, that's a pretty significant  
6 observation, isn't it? He's concerned enough  
7 about what he sees, as the general manager, or the  
8 night manager, to actually go and confront police  
9 officers about individuals not driving?

10          A     I don't know that he confronted them.  
11 He just indicated that to us that he was  
12 concerned.

13          Q     Well, they said they were not driving  
14 or that they had been taken care of is what he  
15 told you, sir?

16          A     Yes. Okay. Let me just say, maybe  
17 confront isn't -- maybe he confronted them, maybe  
18 he just asked them, are these guys going to be  
19 taken care of, or these people? I don't know what  
20 he did.

21          Q     You would agree with me that you  
22 really didn't follow it up with him in much  
23 detail, trying and find out exactly what he was  
24 getting at?

25          A     No, I was thinking about what

1 Ms. O'Halloran said and I put more stock in what  
2 she was saying, because of the fact that she  
3 served them all night.

4 Q You didn't make any attempt to have  
5 him describe who these people were?

6 A No. No, it was an oversight.

7 Q And Bravo tells you that five or six  
8 cars were left behind?

9 A He said there was five or six cars in  
10 the parking lot the next day, yes.

11 Q And he also told you that those cars  
12 were not stolen cars, he checked them?

13 A Um-hum. But it doesn't mean those  
14 cars belonged to the officers either. There would  
15 had to have been some inquiries as far as either  
16 recording of the licence plates or something,  
17 otherwise we were just assuming that it belongs to  
18 some of them.

19 Q You could have found out, sir, by  
20 going back, confronting the officers over who may  
21 have left their car behind?

22 A I could have, yes.

23 Q And you didn't, sir?

24 A No.

25 Q You, after learning from

1 Ms. O'Halloran, and you probably thought about  
2 this on your own, sir, that the receipts from that  
3 night would be obtainable from the general  
4 manager, sir. You had some off the record  
5 discussion with Mr. Bravo and Mr. Gerardy about  
6 the receipts, sir?

7 A Yes, we asked him for any records or  
8 receipts for that night.

9 Q And what Ms. O'Halloran had told you  
10 is she gives all the receipts at the end of the  
11 night, and the manager would have them, right?

12 A I believe that's what she said, yes.

13 Q And this is less than an hour later  
14 when you're having your interview with Bravo and  
15 Gerardy; correct?

16 A Yes.

17 Q And you get information from Bravo  
18 that they are unable to provide receipts or  
19 records of transactions, sir?

20 A Yes.

21 Q Did you ask him about the kind of  
22 inventory system he had?

23 A What he explained to me was that at  
24 the end of the day, they compare the money taken  
25 in versus the stock that they used. And he said

1 that that would be the only record that they would  
2 have.

3 Q Did you inquire of anyone as to how  
4 realistic that answer was, sir, any accountants --

5 A No.

6 Q -- or anybody else who might have  
7 information?

8 A No.

9 Q Did you try and identify the specific  
10 form of inventory system he was using and educate  
11 yourself?

12 A No. Sergeant Pearson and I spoke  
13 about it, and Sergeant Pearson's wife was involved  
14 in business, and he thought that it was feasible.  
15 So we didn't pursue it any further, which we  
16 should have.

17 Q You are aware, of course, that  
18 businesses have to maintain enough records to be  
19 able to account for provincial sales tax and other  
20 taxes that might be owed?

21 A I'm not aware of the details of any of  
22 it. I don't have any knowledge of business or  
23 business taxes or anything like that.

24 Q And it never occurred to you that this  
25 was something that probably should have been

1 followed up, sir?

2 A At the time it didn't, no.

3 Q Why not just ask him to give you what  
4 he had?

5 A I don't know why I didn't.

6 Q Because we have managed to secure  
7 records from Branigan's?

8 A Yes.

9 Q And while we were unable to get the  
10 specific records that we now are given to  
11 understand existed for each and every transaction,  
12 we have a global set of records, sir, about the  
13 amount of alcohol that was consumed that day in  
14 the establishment. We have learned, for example,  
15 that 68, \$2.75 pints of beer were consumed that  
16 evening and that they were only available to the  
17 officers?

18 A Okay.

19 Q And we have also learned of at least  
20 10 bottled or tapped beers, that are not \$2.75  
21 pints, just through asking three witnesses,  
22 knowing that we can account with some degree of  
23 certainty for at least 78 beer being consumed that  
24 evening, and lots more on the inventory, there  
25 were 130 bottles sold. And sir, we have also

1 received information that there were 19  
2 complimentary drinks given out that day.

3 A Okay.

4 Q You had information that there were  
5 three officers who didn't drink at all, of the 24  
6 that were there, and that some people left a  
7 little early. You had -- we have received  
8 information about pitchers of beer being on the  
9 tables. Do you not agree with me, sir, that  
10 there's a lot of learning to be had in the records  
11 that we had managed to obtain?

12 A I would agree, yes. And should we  
13 have pursued it more vigorously? Yes, we should  
14 have.

15 Q You even had a couple of officers, one  
16 in your case, and that would be Toews, and the  
17 others by Sergeant Epp, that would be Mikawoz, who  
18 made specific reference to having receipts of  
19 their purchases that night. One of them had their  
20 receipt with them. And nobody asked for those  
21 receipts, sir. Do you think that was an intense  
22 investigation, not to even look at the receipts  
23 that they had for their own consumption?

24 A I suppose we could have. I didn't  
25 think of it at the time.

1           Q     You acknowledged when Mr. Clifford was  
2 asking you similar, but less complete questions,  
3 because of the relative lack of information he had  
4 at the time, that this was definitely an oversight  
5 on your part, not going after the records, sir?

6           A     Well, I asked him a few times about  
7 the records, and at that point we decided that  
8 there wasn't much else we could do, based on what  
9 they were telling us, so we left that.

10          Q     With the benefit of hindsight, sir,  
11 those are your words --

12          A     Yeah.

13          Q     -- that was definitely an oversight?

14          A     In hindsight, I don't think we would  
15 have been able to obtain a search warrant for the  
16 records, but in hindsight, I would have liked to  
17 have tried and been denied rather than --

18          Q     All right. I'm going to ask you to  
19 view a couple of documents that we have put  
20 together, to take a look at the global picture of  
21 the answers you were receiving, sir.

22                     The first document is Winnipeg  
23 Professional Standards unit interviews on personal  
24 alcohol consumption. This is a three-page chart  
25 that I'm going to have the clerk furnish a copy of



1 to you, sir, and if this can be made the next  
2 exhibit, please?

3 THE CLERK: Exhibit 208.

4 MR. PACIOCCO: Exhibit 208.

5 (EXHIBIT 208: Table 2 - Personal  
6 Alcohol Consumption chart 1)

7 BY MR. PACIOCCO:

8 Q Now, sir, you had asked a number of  
9 the witnesses about what they had to drink, and  
10 what we had done is we have taken, for Branigan's  
11 on the left-hand side of the page and Black's  
12 place on the right-hand side of the page, the  
13 comments from the transcripts relating to the  
14 personal consumption of each of the officers.

15 And with respect to Branigan's, you'll  
16 see that there are eight officers who were not  
17 asked about their own alcohol consumption at  
18 Branigan's, a couple who were not really followed  
19 up, they talked about having a couple of drinks  
20 and there really was no attempt to try and pin  
21 them down any more than that, sir. And of the  
22 witnesses who were asked, sir, we have accounted  
23 for 19 and a half beers, which is quite disparate  
24 from the records we have secured.

25 Do you agree with me, sir, that

1 looking at this, you didn't follow up intensely  
2 enough to really get an accurate picture of the  
3 level of alcohol consumption occurring at  
4 Branigan's?

5 A I would agree with that. But, again,  
6 my concern was trying to determine how much  
7 Constable Harvey-Zenk had.

8 Q Yes, but you were looking at this same  
9 issue with some of the officers, sir?

10 A Yes.

11 Q And not with others.

12 A There were a lot of things in our  
13 investigation that could have been done more  
14 thoroughly, yes, in hindsight.

15 Q And I really don't mean to belabour  
16 that point with you, but I do have to have some  
17 specifics for the Commissioner, so I am going to  
18 continue a little bit, sir.

19 Constable Black's house, in the  
20 right-hand column you get some saying, I believe I  
21 had a couple of drinks, I had a drink, I had a  
22 couple of drinks, I had a couple of Ryes, I had a  
23 couple of drinks. Again, you had three officers  
24 there who weren't asked about their own  
25 consumption. And of the officers who were asked,

1 you account for about 10 drinks of Rye and one  
2 Bailey's. That's the sum total of what you get,  
3 sir. Which, again, doesn't seem to add up, given  
4 the amount of alcohol that we know to have been  
5 consumed over all that evening, sir.

6 Were you not curious about whether or  
7 not the beer that was in the house at the time had  
8 been put out?

9 A I didn't know that there was any beer  
10 that was put out.

11 MR. PACIOCCO: The other chart I'm  
12 going to give you, sir, is Winnipeg Professional  
13 Standards Unit interviews on Derek Harvey-Zenk  
14 alcohol consumption. This is going to be made  
15 Exhibit 209, I believe.

16 THE CLERK: That's correct, 209.

17 (EXHIBIT 209: Table 2 - Harvey-Zenk  
18 Alcohol Consumption chart 2)

19 BY MR. PACIOCCO:

20 Q Now, sir, I take it you would agree  
21 that as an investigator trying to find out what  
22 kind of alcohol consumption Derek Harvey-Zenk had  
23 engaged in, you wouldn't expect officers to be  
24 able to count exactly the number of drinks he had?

25 A I wouldn't expect anyone to.

1           Q     All right.  But I think you would  
2     agree with me that if there were observations  
3     about whether someone wasn't drinking at all, or  
4     whether they were drinking heavily, or whether  
5     they were drinking lightly, people would be able  
6     to give you a kind of a range, or at least some  
7     people would?

8           A     Just thinking from my own experience,  
9     having been out with members of my platoon,  
10    usually, I don't pay attention, and people don't  
11    pay attention to what other people are consuming  
12    until the person starts to draw attention to  
13    themselves.  I know that's been my experience.  
14    Until I see something that doesn't seem right to  
15    me, I don't count people's drinks, I don't pay  
16    attention to it.

17          Q     Yeah, we're not talking about counting  
18    people's drinks.  But, sir, if you're sitting at a  
19    little table, three feet, we've got evidence these  
20    tables were approximately three feet around, and  
21    there's four of you sitting there and the guy  
22    across from you is having a beer, you're going to  
23    notice he is having a beer, sir?

24          A     Oh, certainly.

25          Q     And if the waitress comes back three

1 or four times, putting drinks around the table, if  
2 that happens to occur, you're going to notice that  
3 too?

4 A Maybe. It depends what I'm doing at  
5 the time, if I'm involved in some conversation  
6 with people, I may or may not.

7 Q There may be one put in front of you  
8 and one put in front of the other person at the  
9 same time. I mean, you're going to have some idea  
10 of the level of consumption even if you don't know  
11 the specifics of it.

12 A I would think so.

13 Q Well, here's the answers you get at  
14 Branigan's, sir.

15 Jim Anderson and Humniski you didn't  
16 ask. They were the first guys to come in and it  
17 was not a line of questioning that you had opened  
18 up, certainly in Anderson's case, I don't know --  
19 I think maybe Humniski was indeed asked. But here  
20 are the answers you get to whether these people  
21 saw Derek Harvey-Zenk drink and how much he had to  
22 drink. And I'm just going to read the ones in  
23 red.

24 "I didn't see what he was drinking."

25 Number one.

1 "No, no, like I said, I couldn't even  
2 tell you."  
3 Number two.  
4 "But drinking, no, no idea."  
5 Number three.  
6 "Drinking, I have no idea."  
7 Number four.  
8 Number five:  
9 "No idea, no idea."  
10 Number six:  
11 "At Branigan's, definitely not because  
12 I wasn't there with them."  
13 Number seven:  
14 "No, you know what, I don't know, I  
15 wasn't paying attention."  
16 Number eight:  
17 "I have no idea. I don't know, I  
18 didn't pay attention to how much he  
19 was drinking."  
20 Number 11:  
21 "No, I did not. No, I have no idea."  
22 Number 12:  
23 "I couldn't see how many, how much he  
24 was drinking."  
25 Number 13:

1 "No idea actually. I believe it was a  
2 beer but I don't know, no."

3 Next one:

4 "I'm guessing at what was in front of  
5 him as far as liquor goes, and I  
6 believe it was some kind of draft  
7 beer."

8 This is a person at, or next to his table. Next:

9 "I'm not sure that -- I know for sure  
10 there was a beer in front of him but I  
11 don't know how much he had."

12 That's Nechwediuk, who spent some time in  
13 conversation with him.

14 Kapka:

15 "No."

16

17 Sammi Haddad:

18 "No clue."

19 Christian Guyot:

20 "No, I have no idea."

21 Brian Neumann:

22 "I was there, I didn't see him drink  
23 anything."

24 Gord Schneider:

25 "And to be honest, I only saw a glass

1 in front of him, I didn't actually see  
2 him touch it. No, I don't know what  
3 he was drinking."

4 Lloyd Swanson:

5 "With him and what appeared to be, I'm  
6 guessing, a draft, it was in a draft  
7 glass and it looked like a draft."

8 Werner Toews:

9 "Again, his back was towards me and I  
10 was sort of facing off. I can't say  
11 100 per cent what he was drinking."

12 Shaun Veldman:

13 "I don't know."

14 Al Williams, who was sitting with him:

15 "Beer. Quantity? No, I have no  
16 idea."

17 Sir, does it not strike you as strange  
18 that that many witnesses would have no  
19 information, other than a couple saying I think he  
20 had what looked like a beer in front of him, or he  
21 had a beer in front of him, that that's all you'd  
22 get out of all those witness?

23 A I would agree, that's strange.

24 Q Even the people who you identified  
25 being with him, Schneider, Veldman, Buors, Haddad.



1 Veldman, no, I don't. Haddad, no clue.

2 Schneider, a glass and probably a drink in there.

3 Buors, a beer. That's all you get.

4 And then Black's, on the right-hand  
5 column.

6 Anderson:

7 "I wasn't aware of what anyone else  
8 drank."

9 Azaransky:

10 "At the end I know he wasn't  
11 drinking."

12 Bauer:

13 "I'm not really paying attention to  
14 what everybody else does."

15 Sean Black:

16 "No."

17 Tracy Fudge:

18 "Again, I wasn't paying attention to  
19 that."

20 Dave Harding:

21 "I didn't notice."

22 Chris Humniski:

23 "I really didn't even notice him."

24 Kelly McLure:

25 "I didn't notice if he was drinking or

1 not. I couldn't say one way or  
2 another at Branigan's.  
3 I didn't see him specifically with any  
4 drinks."

5 That's at Black's.

6 Jay Nolet:

7 "I don't know. I wasn't paying  
8 attention to what he was drinking and  
9 who wasn't."

10 Jack Spruyt:

11 "No, not that I noticed, like I don't  
12 know. And I honestly couldn't tell  
13 you whether there was alcohol in them  
14 or not. There was glasses out. I  
15 can't tell you whether there was  
16 alcohol in them or not. I really  
17 wasn't paying attention."

18 You came up completely empty, sir --

19 A Um-hum.

20 Q -- with 10 officers in a kitchen.

21 Does that not strike you as strange that nobody  
22 can tell you what he was drinking?

23 A Yes.

24 MR. PACIOCCO: Sir, I have no further  
25 questions for you. Other counsel will.

1 THE COMMISSIONER: Let's take a break.  
2 Fifteen minutes.

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

5 (Proceedings recessed at 10:42 a.m.  
6 and reconvened at 11:02 a.m.)

7 THE CLERK: All rise, please. This  
8 Commission of Inquiry is now reopened. Please be  
9 seated.

10 BY MR. ZAZELENCHUK:

11 Q Sir, in March of 2005, your immediate  
12 superior was then Staff Sergeant Poole?

13 A Yes.

14 Q Yes. He's now Inspector Poole?

15 A Yes.

16 Q And it would have been now Inspector  
17 Poole who briefed you on your assignment with  
18 respect to this?

19 A Yes.

20 Q Yes. I wonder if Madam Clerk would  
21 give you exhibit 186, and that can found at  
22 Q-2.89.b.36.

23 THE COMMISSIONER: Page again, please?

24 MR. ZAZELENCHUK: 3068, sir.

25

1 BY MR. ZAZELENCHUK:

2 Q Now that's a memo from the Deputy  
3 Chief to your immediate superior, Staff Sergeant  
4 J. Poole. And I want to direct your attention to  
5 the last two lines of the second paragraph.

6 Do you see those, sir?

7 A Yes.

8 Q And they read:

9 "...into aspects of the off-duty  
10 conduct of Harvey-Zenk and potentially  
11 other off-duty officers that may have  
12 been with him in the hours preceding  
13 the accident."

14 Do you see that?

15 A Yes.

16 Q Yes. Now, that tells me that the  
17 terms of reference that you should have been  
18 working with was not only seeing what Derek  
19 Harvey-Zenk was doing at Branigan's and at  
20 Black's, but potentially anybody else that was  
21 with him that was a police officer?

22 A That's not the way it was explained to  
23 me by Staff Sergeant Poole, though.

24 Q I see. So your evidence today is that  
25 that's not the way -- you'll agree with me that

1 that's what that reads here?

2 A Yes, I can see how you'd see that.

3 Q Yeah. And your evidence today is  
4 that's not what Staff Sergeant Poole instructed  
5 you?

6 A What we were instructed was that we  
7 would look at trying to determine where Constable  
8 Harvey-Zenk was and what he had consumed prior to  
9 the accident, and that should there be any alleged  
10 or apparent breaches of the regulations, that we  
11 would be dealing with that subsequent to this  
12 investigation.

13 Q Okay. Now, at one point a couple of  
14 your colleagues assisted you. That would be,  
15 forgive me, I don't know their ranks, Roxburgh and  
16 Epp?

17 A Yes. Sergeant Roxborough and  
18 Detective Sergeant Epp.

19 Q I am sorry, I thought it was Roxburgh.  
20 Roxborough?

21 A Yes.

22 Q Yes. And they assisted you by  
23 conducting some interviews, just to help out  
24 because you had the --

25 A Just the first evening, yes.

1           Q     Yes.  And the interviews were  
2     recorded, as all interviews are supposed to be.  
3     What happened, like how did you find out about the  
4     interviews?  Did you listen to the tape or did  
5     they --

6           A     No, we had a short discussion the next  
7     day, just briefly going over it, and then when  
8     they prepared their report is when I had a look at  
9     it.

10          Q     And you would have read their reports?

11          A     Yes.

12          Q     Okay.

13          A     I don't recall specifically when I  
14     read it in the context of the investigation, but I  
15     would have read it.

16          Q     Now, you have your notes in front of  
17     you, do you?

18          A     Yes.

19          Q     And just for the record, they are  
20     Exhibit 171 and they are at Q-1.89.b.3, and I'd  
21     like to go to page 2884, which is 71 in your  
22     notebook, Officer, at the top of the page.

23                     Now, on March 7th, is it, or is it  
24     March 10th?

25          A     I believe it is March 7th.

1 Q Yeah, I thought it was so too. On  
2 March 7th, you and your partner attended to  
3 Branigan's; is that correct?

4 A Yes.

5 Q And you speak with a chap called  
6 Zulak?

7 A Yes.

8 Q He is the assistant general manager?

9 A That's what he told me, yes.

10 Q And I got the impression from your  
11 notes that Mr. Zulak was being a good citizen, he  
12 was cooperating with you?

13 A Yes.

14 Q Yes. You asked him -- you told him  
15 why you were there. He didn't ask you to leave?

16 A No.

17 Q You told him you were looking into the  
18 events on a certain night and he tried to tell you  
19 who the employees were that night?

20 A Yes.

21 Q He gave you names, yes?

22 A Yes. I recall asking him who was  
23 working on a particular evening. Sure.

24 Q So he gave you names, he gave you  
25 contact information, he was being cooperative?

1 A Yes.

2 Q Yes.

3 A I'm sorry, but he didn't give us  
4 contact information. He said that he would get  
5 ahold of those employees and ask them to contact  
6 us.

7 Q Okay.

8 A We were just given the names.

9 Q That's correct. But he indicated, he  
10 offered to do that for you?

11 A Yes.

12 Q Yes. Did it occur to you at this time  
13 to ask him to see what records they had of that  
14 evening?

15 A No, it didn't.

16 Q No. And can you give us a reason why?  
17 It wasn't something on your mind?

18 A At that time, no.

19 Q Okay. Following up on your meeting or  
20 your interview, your very brief interview with  
21 Mr. Zulak, Chelsea O'Halloran eventually contacted  
22 you?

23 A Yes.

24 Q And she attended for an interview?

25 A Yes.



1 Q And we have that interview I don't  
2 know that we necessarily have to go to it, but  
3 it's Exhibit 154.

4 Now, Chelsea tells you towards the end  
5 of the interview that her manager has certain  
6 records; is that correct, do you recall that?

7 A Specifically, no.

8 Q Okay. Let me help you out.

9 A Sure.

10 Q F-3.38.b, Exhibit 154, do you have  
11 that in front of you, witness, because it was  
12 referred to in your --

13 THE WITNESS: Which exhibit was it?

14 MR. ZAZELENCHUK: 154. Madam Clerk,  
15 the witness has found it.

16 THE CLERK: Thanks.

17 BY MR. ZAZELENCHUK:

18 Q If we could go to page 15, which is  
19 1340 for those of us with the book. And you see  
20 there at line 10, you say:

21 "Okay. All right."

22 And then your partner says:

23 "You said you looked at -- do you  
24 still have access to that record?"

25 And then Ms. O'Halloran says:

1 "I don't have access to it. My  
2 general manager does. I gave him all  
3 my cashout, everything at the end of  
4 the night, all the receipts."

5 And then your partner says:

6 "Did you have a chance to look that  
7 over before you came?"

8 And Ms. O'Halloran replies:

9 "I did ask him and he said he would  
10 give it to you guys."

11 Do you recall that exchange now?

12 A Yeah.

13 Q Okay. So after this interview with  
14 Ms. O'Halloran, you attended at Branigan's;  
15 correct?

16 A Yes.

17 Q And if we could go back to your notes,  
18 and I think it's 66, I have a very bad copy. It's  
19 2890 at the bottom of the page. Is that 66?

20 A Page six.

21 Q Oh, six?

22 A Yeah. You're referring to attending  
23 at 1410 hours to Branigan's?

24 Q Yes?

25 A Yes, that's page 6.

1 Q Okay. Now, you attend at Branigan's  
2 and you interview Gerardy and Bravo?

3 A Yes.

4 Q Correct. And as a standard practice,  
5 you tape-record the interview?

6 A Yes.

7 Q And then the interview finishes,  
8 correct?

9 A Yes.

10 Q And it's after the interview that you  
11 ask about the records?

12 A Yes.

13 Q Why did you ask about the records  
14 after the interview without the tape-recorder  
15 running?

16 A I don't know. I should have done it  
17 on the recorder as part of the interview.

18 Q And even after you asked afterwards,  
19 would it have not have made sense to turn the  
20 tape-recorder back on and say, you know, I forgot  
21 to ask you this and we talked off the record, but  
22 would you mind saying that again for the  
23 tape-recorder so we could have an exact  
24 explanation as to the records?

25 A Yes, I agree with you.

1 Q Yeah. And that wasn't done?

2 A No.

3 Q No. You interviewed Officer Toews?

4 A Yes.

5 Q And he indicated to you that he had a  
6 receipt?

7 A If it's in his statement, then, yes,  
8 he did.

9 Q It's Exhibit 188, is that one of the  
10 exhibits you have?

11 A No, I don't.

12 MR. ZAZELENCHUK: Exhibit 188, Madam  
13 Clerk, and it's F-2.35.p for those of us with the  
14 book. And it's page 1108.

15 BY MR. ZAZELENCHUK:

16 Q Is that how your pages are marked off,  
17 sir?

18 A Yes.

19 Q Yes. And at line 14, Officer Toews is  
20 telling you, and I quote, here is his quote.

21 "I stayed there for approximately one  
22 hour. I have a receipt here that  
23 shows what time I left. And that was  
24 basically it."

25 And you didn't think to photocopy that receipt or

1 to look at it?

2 A No.

3 Q No. And can you give us --

4 A It's hard to remember whether he had  
5 it with him or whether he was just referring to  
6 it. I don't recall. It does say I have a receipt  
7 here, yes.

8 Q He does say I have a receipt here?

9 A Yeah.

10 Q Yeah?

11 A If he had it with him, I didn't think  
12 to photocopy it.

13 Q So you didn't think of photocopying it  
14 or looking at it, or making notes of it?

15 A No.

16 Q Are we agreed on that?

17 A Yes.

18 Q As a matter of fact, you went so far  
19 as you didn't think to include it in your report?

20 A If it's not in my report, then, no, I  
21 didn't.

22 Q Well, do you want to see your report,  
23 sir?

24 A No, I trust you, sir.

25 Q It's not in your report.

1 A Okay.

2 Q Your associate Roxborough was told  
3 about a receipt, correct?

4 A I don't know if he was.

5 Q Q-2.89.b.18. Now that document  
6 appears somewhere else with another exhibit, with  
7 an exhibit?

8 A If you're saying it's in his report,  
9 then that's fine, but I just don't have a  
10 recollection myself right now of the contents of  
11 his report.

12 Q Well, it is in his report and you told  
13 us that you read his report. Is that correct?

14 A Yes.

15 Q And I'll just read you the pertinent  
16 sentence, it's the bottom of page 3032.

17 "Witness..."

18 meaning Mikawoz,

19 "...indicates that he looked at his  
20 bill the previous night to confirm  
21 what time he left. He states he still  
22 has his bill and the name of the  
23 waitress is on the bill."

24 A Okay.

25 Q I'm curious why you seem to have an

1 aversion to following up anything that has to do  
2 with hard records. Maybe you could explain that  
3 to us?

4 A Not an aversion, I just didn't think  
5 of it at the time.

6 Q Well, see, I can understand that a man  
7 can make a mistake. I can understand finding a  
8 needle in a haystack. But when a skilled elite  
9 investigator --

10 A Someone else's words, of course.

11 Q Yes. To describe the Professional  
12 Standards Unit -- is investigating the death of a  
13 human being, or at least an aspect of it --

14 A Um-hum.

15 Q -- that's serious stuff?

16 A Very.

17 Q I can't understand why mistake after  
18 mistake is made, all to do with hard records.  
19 Because to me, that's like walking past a haystack  
20 and having half a dozen needles jump out at you.  
21 So can you give us a reason why you made no  
22 efforts, not on one occasion, not on two, not on  
23 three, but on more than three?

24 A I was concerned with determining,  
25 trying to determine what Mr. Harvey-Zenk had to

1 drink that night. The waitress at Branigan's said  
2 in her opinion no one -- she wasn't concerned  
3 about anybody's ability to operate a vehicle or  
4 intoxication when they left. I asked the manager  
5 for the records. He said that he couldn't provide  
6 them to me. Should I have pursued it further?  
7 Yes, I agree with you.

8 Q Yes, and that wasn't the only --

9 A As far as explaining to you now why I  
10 didn't, I can't explain that to you now.

11 Q I can only think of two reasons and I  
12 don't believe one of them. One reason is that  
13 you're incompetent, and the other reason is that  
14 you didn't want to find out. I can't think of a  
15 third, sir.

16 THE COMMISSIONER: Don't answer that.

17 MR. ZAZELENCHUK: I apologize,  
18 Mr. Commissioner. That's all.

19 MR. McDONALD: I have no questions,  
20 Mr. Commissioner.

21 THE COMMISSIONER: Thank you.

22 THE WITNESS: Sir, may I ask a  
23 question?

24 THE COMMISSIONER: Excuse me. Yes.

25 THE WITNESS: Why is it that



1 Mr. Zazelenchuk is allowed to say something like  
2 that and then, you know, you made the comment you  
3 did but now, okay, so now it's forgotten? He's  
4 going to insult me and question my integrity? I  
5 just don't think that's fair. And I respect the  
6 fact that you're not going to allow it, or I don't  
7 recall your exact words, but I just think that  
8 that's ridiculous that he would be allowed to say  
9 that.

10 THE COMMISSIONER: Well, it's very --

11 THE WITNESS: And unprofessional.

12 THE COMMISSIONER: I understand. It's  
13 very difficult to stop somebody before they say  
14 it.

15 THE WITNESS: Yes.

16 THE COMMISSIONER: And it should not  
17 have been put to you, and I agree.

18 THE WITNESS: Thank you.

19 THE COMMISSIONER: Yes.

20 MR. LABOSSIERE: Thank you,  
21 Mr. Commissioner.

22 BY MR. LABOSSIERE:

23 Q Sergeant Girard, as I understand your  
24 evidence, sir, when you were with Professional  
25 Standards Unit at the time of this incident, you

1 were asked to assist East St. Paul with their  
2 criminal investigation; is that right?

3 A Yes.

4 Q And as I understand it, at least to  
5 your understanding, your investigation was limited  
6 to interviewing the police officers who were with  
7 Derek Harvey-Zenk the night of the incident, as  
8 well as the civilians who were working at  
9 Branigan's that night?

10 A Yeah. I don't believe that there is  
11 any direct, any direction to interview the  
12 civilians, but we just thought that that would be  
13 the next step to do --

14 Q That's what you did?

15 A -- for that inquiry. Yes, we did.

16 Q And when you concluded those  
17 interviews and reports, you provided those to both  
18 East St. Paul Police and to Martin Minuk; is that  
19 correct?

20 A Well, I provided them to, I submitted  
21 them to the reader in our office, and it was read  
22 by one Sergeant who didn't come back to me with  
23 anything that they thought should be looked at  
24 again, and it was read by Staff Sergeant Poole,  
25 and again nothing came back to me. And Staff

1 Sergeant Poole is then responsible for sending the  
2 report to whomever.

3 Q And neither your sergeants, your staff  
4 sergeant or ultimately, to your knowledge, neither  
5 East St. Paul or Martin Minuk asked you to follow  
6 up, did they, on any of the interviews conducted  
7 with the members?

8 A Once my report was submitted, I didn't  
9 hear another word about it.

10 Q You've given evidence before I assume,  
11 sir, in the course of your career as a police  
12 officer?

13 A Yes.

14 Q And you gave evidence Thursday and  
15 today for a number of hours. And I noted that you  
16 were very careful to be precise in your answers.  
17 Is that fair?

18 A Yes.

19 Q You didn't guess if you didn't know  
20 the answer. Is that also fair?

21 A Yes.

22 Q And I take it, sir, as a matter of  
23 practice, that's how you give evidence, whether  
24 it's here or otherwise?

25 A Yes, I'm here to tell the truth.

1 Q And if you can't answer something  
2 precisely, you'd agree with me that you wouldn't  
3 want to guess?

4 A No.

5 Q Now, on Thursday, sir, my learned  
6 friend asked you a series of questions in  
7 connection with Sergeants Anderson and Humniski  
8 and their approach to the service. Do you recall  
9 that?

10 A Yes.

11 Q My note, sir, is that you didn't know  
12 Anderson and Humniski personally but you knew them  
13 by reputation?

14 A Yes.

15 Q And, sir, you would agree with me that  
16 their reputation is one of officers with strong  
17 character; correct?

18 A Yes.

19 Q They are officers who are known to be  
20 men of integrity?

21 A Yes.

22 Q Correct. And they are respected by  
23 both junior and senior officers, would you agree  
24 with that?

25 A They are respected by me, yeah. I

1 think generally speaking they are respected, yes.

2 Q And you expected them to tell the  
3 truth when they came to see you?

4 A Yes.

5 Q And in part, you base that expectation  
6 on their reputation; correct?

7 A Yes.

8 Q And as I understand your evidence,  
9 sir, it wasn't only Anderson and Humniski that you  
10 expected to tell the truth, but it was all the  
11 police officers who you spoke to in the course of  
12 this investigation; correct?

13 A Yes.

14 Q Again, you base that on your  
15 experience in Professional Standards Unit,  
16 correct?

17 A Yes.

18 Q You have been there a number of years  
19 and you have investigated a lot of different  
20 matters involving police officers; correct?

21 A Yes.

22 Q And you had no reason to suspect that  
23 the officers who you interviewed were being  
24 anything less than honest and truthful; correct?

25 A At the time, I had no reason to

1 believe that.

2 Q And in this case, sir, you would agree  
3 that there was no suggestion made to you and no  
4 evidence that you uncovered that these police  
5 officers who you interviewed were in any way  
6 coordinating their evidence together; correct?

7 A No.

8 Q There was no suggestion or evidence  
9 that they were withholding evidence from  
10 Professional Standards Unit; correct?

11 A At the -- the one thing that I found  
12 in my experience is that it's a balance on how  
13 hard you press officers in interviews. Because  
14 typically, if you press too hard, you get to a  
15 certain point, and what happens is one of three  
16 things; they either sit back and cross their arms  
17 and look at you and don't say anything else, or  
18 they repeat the same answer over and over again,  
19 or they fall into the I don't know, I don't  
20 recall.

21 Q Sir, let me put it to you this way --

22 THE COMMISSIONER: Just a second. If  
23 you press them too hard they fall into one of  
24 those three categories?

25 THE WITNESS: Typically, yes, that had

1     been my experience.

2                   THE COMMISSIONER:  Then what would  
3     your reaction be to an officer who folded his  
4     arms, didn't say anything, or I can't remember  
5     what the third was?

6                   THE WITNESS:  I would probably  
7     continue to ask the question a few more times, and  
8     then if it got to the point when I realize nothing  
9     more would be forthcoming, the interview would be  
10    concluded.

11                  THE COMMISSIONER:  Would you then  
12    begin to suspect their evidence?

13                  THE WITNESS:  Yes, I would suspect  
14    their willingness to discuss it for sure,  
15    because -- how can I word this -- more often than  
16    not, it was my impression on a couple of files,  
17    different investigations, that it wasn't a matter  
18    of whether they were lying or not, but just not  
19    telling everything.

20                  THE COMMISSIONER:  Okay.  Go ahead.

21    BY MR. LABOSSIERE:

22                  Q     Sir, you'd agree with me that under  
23    the Winnipeg Police Service Regulations, officers  
24    have an obligation, when speaking with you, to  
25    disclose all matters in their knowledge to you;

1 correct?

2 A Yes.

3 Q They have to be fully forthcoming?

4 A Yes.

5 Q They are not entitled to withhold  
6 evidence?

7 A No.

8 Q And if they do, they are subject to  
9 discipline under the regulations; is that correct?

10 A Yes.

11 Q And I take it, sir, as an investigator  
12 in PSU, that if you thought an officer was  
13 withholding evidence, not being forthcoming with  
14 you, or shading the truth in any way, you would  
15 proceed against that officer under the  
16 regulations; correct?

17 A There would be some discussion with  
18 the Staff Sergeant but, ultimately, yes.

19 Q And that wasn't the case during this  
20 investigation; correct?

21 A At the time, no. I mean, let's be  
22 clear, we have to be able to prove it as well.

23 Q Now, sir, since this investigation  
24 occurred in 2005, I take it you have had a lot of  
25 time to review the entire file and consider your



1 investigation?

2 A Yes.

3 Q In preparation for this inquiry, you  
4 have had the ability to review your notes,  
5 correct?

6 A Yes.

7 Q You've had the chance to review your  
8 supplementary reports and look at the entire file?

9 A Yes.

10 Q And I take it, sir, you have also had  
11 the opportunity to reflect on the investigation  
12 that was done?

13 A Yes.

14 Q And with the benefit of that review  
15 and with the benefit of hindsight, as you've said  
16 already today, and period of reflection, you are  
17 acknowledging that there are some things that you  
18 could have done differently; correct?

19 A Yes.

20 Q And in fact, you've been very candid,  
21 you've said I think we could have done some things  
22 better?

23 A Yes.

24 Q But that's done and those answers are  
25 given, are they not, with the benefit of

1 hindsight, and the benefit of that careful review,  
2 and the benefit of that period of reflection;  
3 correct?

4 A Yes.

5 Q If you could conduct an investigation  
6 twice, I take it the second time would be much  
7 easier, is that fair to say?

8 A Yes. And it's also the fact that  
9 every time -- everyday that I go to work, I learn  
10 something new. Even now running a platoon, I  
11 learn things from my junior constables, things  
12 that I have either forgotten over the years or  
13 things that I had never quite thought of. I mean,  
14 that that's the whole purpose is continue to  
15 learn. We make mistakes and we learn from them  
16 hopefully.

17 Q I know, sir, reflecting back on some  
18 of the questions I have asked to various witnesses  
19 through this inquiry, with the benefit of  
20 hindsight and reflection, I wish I wouldn't have  
21 asked them, or perhaps I would have done them a  
22 different way.

23 THE COMMISSIONER: I wished you  
24 wouldn't have asked them either.

25

1 BY MR. LABOSSIERE:

2 Q And just as Mr. Commissioner is  
3 telling me that, you're now hearing from  
4 Commission Counsel and other lawyers that there  
5 are things you could have done better.

6 A Yes.

7 Q And I take it that if you had the  
8 opportunity to do this investigation twice or  
9 three times, and sit back and review it and  
10 reflect and get all the evidence, you'd have done  
11 it a different way?

12 A Yes.

13 Q But you weren't given that  
14 opportunity, were you, sir?

15 A No.

16 MR. LABOSSIERE: Those are my  
17 questions. Thank you, sir.

18 THE COMMISSIONER: Thank you. Thank  
19 you very much. You have Mr. Prober who is next,  
20 or Mr. Weinstein.

21 MR. WEINSTEIN: No.

22 THE COMMISSIONER: Sorry, Mr. Prober  
23 is next.

24 MR. PROBER: Good morning,  
25 Mr. Commissioner.

1 THE COMMISSIONER: Good morning.

2 BY MR. PROBER:

3 Q Sergeant Girard.

4 A Good morning, sir.

5 Q I have two areas of questions. One  
6 relates to the photo line-up --

7 A Yes.

8 Q -- and the photo line-up form. Was  
9 that signed by you?

10 A I believe so, yes.

11 Q Perhaps the witness could be shown it.  
12 I have alerted Madam Clerk to the exhibits I'll be  
13 referring to. It is Exhibit 207. We don't have  
14 copies of it yet.

15 A Yes, that is my signature.

16 Q Who attended on Chelsea O'Halloran  
17 with you? Anybody else, or you went yourself?

18 A I didn't go alone, no. I believe it  
19 was Sergeant Pearson. I'll just consult.

20 Q I think that's right.

21 A Yeah, it would have been Sergeant  
22 Pearson then that attended with me.

23 Q Thank you. Can you tell me how long  
24 you were there approximately?

25 A Well, we arrived at her residence at

1 1138 hours.

2 Q Right.

3 A We would have been there just long  
4 enough to go through the form and have her view  
5 the forms. I don't have the time we left though.

6 Q You mean view the photos?

7 A Yes. Our next appointment it looks  
8 like was at 1313, but I would say no more than  
9 maybe 20 minutes at the utmost.

10 Q How did you show her the photos?

11 A I showed her the same way I show every  
12 photo pack, the photos are cut into squares --

13 Q Right?

14 A -- with just the photo of the person,  
15 no identifiers or anything, and they are numbered  
16 one to 10, and I put them in that order behind  
17 each other.

18 Q Right?

19 A And then I ask her, following the  
20 directions there, to look at one and move onto the  
21 next.

22 Q So you showed them to her  
23 sequentially?

24 A Yes.

25 Q She seemed to recall that she was

1 shown them twice, once the way you described,  
2 sequentially, the other time on a sheet?

3 A No.

4 Q No?

5 A The sheet I would have had would have  
6 been a control copy that I would keep with the  
7 file, but she would not have seen that.

8 Q She wouldn't have seen that?

9 A No.

10 Q All right. And where is the original  
11 photo pack?

12 A It should be here because it was with  
13 the original line-up form.

14 Q We don't have it, I don't think. Do  
15 we, Mr. Paciocco?

16 A I attended to the PSU office last week  
17 and I found the original line-up form in an  
18 envelope with the photos in it.

19 Q Where are the photos then?

20 MR. PROBER: If I may have a moment?

21 THE COMMISSIONER: Yes.

22 MR. PROBER: Ms. Hanlin has advised me  
23 that, it may come as news to Commission Counsel,  
24 that she has the original photo pack. So thanks  
25 for that. I probably wouldn't have any questions

1 on that, I just wondered where it was.

2 THE WITNESS: Okay.

3 MR. PROBER: But now that we've found  
4 it, I take it, Ms. Hanlin, you will provide that  
5 to Commission?

6 MS. HANLIN: Yes, Mr. Commissioner,  
7 the photos are the same so I didn't disclose that.

8 MR. PROBER: Thank you.

9 BY MR. PROBER:

10 Q And do you recall, I think during your  
11 interview you didn't recall whether they were in  
12 black and white or colour, do you recall now?

13 A I believe they were in colour when I  
14 saw them last Wednesday, yes.

15 Q Fair enough.

16 A And that's just because sometimes we  
17 do photocopy them, depending on the colour  
18 variations from each photo to the next.

19 Q Right.

20 A If it's too drastic, then we will  
21 photocopy them so that they will appear more  
22 consistent.

23 Q I think you used Derek Harvey-Zenk's  
24 Winnipeg Police Service photo; right?

25 A Yes.

1 Q And that would have been a colour  
2 photo, or do you know?

3 A It was a colour photo and he wasn't in  
4 uniform.

5 Q Fair enough. The next, second area of  
6 questions has to do with your interview of  
7 Sergeant Paul Isaak?

8 A Okay.

9 Q And I have alerted Madam Clerk to  
10 that, it's Exhibit 204, and it's in book volume  
11 F-2, Mr. Commissioner. And it's at tab F-2.35.t,  
12 F-2.35.t. And in case you need to refresh your  
13 memory, I have placed that -- Madam Clerk placed  
14 that before you, and thanks for that.

15 At page 8 -- Constable Isaak, by the  
16 way, who is now sergeant, is a wellness officer;  
17 right?

18 A Yes.

19 Q And you knew that he had seen Derek  
20 Harvey-Zenk at the East St. Paul Police Station?

21 A Yes. And actually he was a Sergeant  
22 at the time.

23 Q Oh, he was a Sergeant, good. The  
24 transcript has him listed as constable. But in  
25 any event, Sergeant Isaak saw him at around 12:30.



1 And if you need confirmation of that, you'll find  
2 that at page 8?

3 A Yes.

4 Q Okay. You agree with that?

5 A Yes.

6 Q You saw him at 12:30 at East St. Paul.  
7 And the only other question is, at page 17 of his  
8 interview, starting at line 10, Mr. Commissioner,  
9 you ask Sergeant Isaak:

10 "Okay. And the only other direct  
11 question that I want to ask is, when  
12 you were with him, did he seem  
13 impaired?"

14 Sergeant Isaak answers, no.

15 "Sergeant Girard: By liquor or  
16 anything else?"

17 Sergeant Isaak: No. Again, what I  
18 saw was a distressed man, emotional  
19 and distressed, and everything that I  
20 saw I attributed to that reality for  
21 him."

22 Correct?

23 A Yes.

24 Q Pretty clear?

25 A Yes.

1 MR. PROBER: Thank you. Those are my  
2 questions.

3 THE COMMISSIONER: Thank you.

4 MR. GREEN: I have no questions,  
5 Mr. Commissioner.

6 THE COMMISSIONER: Thank you.

7 MR. McFETRIDGE: No questions.

8 BY MS. HANLIN:

9 Q Mr. Commissioner. Sergeant Girard,  
10 following the accident of February 25th, 2005, was  
11 Harvey-Zenk, Mr. Harvey-Zenk ever in your custody?

12 A No.

13 Q Did you ever have the opportunity  
14 following his arrest to search him or his vehicle?

15 A No.

16 Q Now, the interviews with the  
17 Branigan's staff, that is Mr. Gerardy, Bravo, and  
18 Ms. O'Halloran took place on March 11th, 2005; is  
19 that correct?

20 A Yes.

21 Q What was the purpose of those  
22 interviews?

23 A Well, I wanted to determine what  
24 Ms. O'Halloran could tell us about that evening,  
25 and specifically about what people had to drink.

1 And with the other gentlemen, it was to get his  
2 observations of that evening as well. And then  
3 ultimately with the both of them to see about any  
4 records that they might have.

5 Q And relative to the member interviews,  
6 was there anything that you were looking for, the  
7 interviews of --

8 A We were looking for their observations  
9 of Mr. Harvey-Zenk that evening, if they could  
10 tell us how much he had to drink.

11 Q And if Ms. O'Halloran had told you on  
12 March 11th what she later told Commission Counsel,  
13 that members were intoxicated, slurring their  
14 words, standing on chairs, things of that nature,  
15 what would you have done?

16 A I would have arranged for every  
17 officer that I had interviewed prior to that to  
18 come back in for another interview and pose that  
19 to them.

20 Q So would it be fair to say that in  
21 interviewing the Branigan's staff that you were  
22 looking for inconsistencies?

23 A Yeah. I mean, typically I found that  
24 in my time in Professional Standards, civilian  
25 witnesses quite often were the -- I want to use

1 the phrase the "fork in the road," but quite often  
2 their testimony would either corroborate or not  
3 what the officers were telling us. So it was  
4 usually very important information and quite often  
5 had a direct impact on which way our investigation  
6 would go.

7 Q Okay. Now, your notes at Exhibit 171,  
8 that's page 26 of your notes, page 2897 of volume  
9 Q-1.

10 THE COMMISSIONER: Page please?

11 MS. HANLIN: 2897, Mr. Commissioner.

12 THE COMMISSIONER: 2897, thank you.

13 BY MS. HANLIN:

14 Q Now, you have -- are you there,  
15 Sergeant Girard?

16 A Yes.

17 Q Now this is March 16th, 2005, the  
18 notes at this page; is that correct?

19 A Yes.

20 Q And you have a notation, you then  
21 updated Sergeant Carter as to our findings thus  
22 far re interviews?

23 A Yes.

24 Q Given that this is March 16th, would  
25 that have included the Branigan's interviews?

1           A     Yes.

2           Q     Did you hear any complaint from  
3     Sergeant Carter that that should not have been  
4     done?

5           A     No, nothing.

6           Q     Now, the photo pack, you testified  
7     that you viewed over 700 photographs; is that  
8     correct?

9           A     I viewed 700 photographs, yes.

10          Q     How long did that take you?

11          A     Hours.

12          Q     Hours?

13          A     Yeah.

14          Q     Would you care to give an estimate?

15          A     Oh, boy, I don't recall, but it was a  
16     lengthy period of time.

17          Q     What was your purpose in viewing so  
18     many photographs?

19          A     I wanted to put together the best  
20     gallery pack that I could, something that would be  
21     fair, so that a witness looking at it, there  
22     wouldn't be anything obvious that would jump out.  
23     So that if there was an identification, that it  
24     was a good identification.

25          Q     Now, your interview with

1 Ms. O'Halloran, initially she was accompanied by  
2 her uncle; is that correct?

3 A Yes.

4 Q And what took place regarding that,  
5 regarding the uncle accompanying her?

6 A She initially asked if her uncle could  
7 sit in, just for some support. And we said, sure,  
8 providing he sits off to the side and doesn't say  
9 anything. And then she changed her mind, and I  
10 addressed that in the interview.

11 Q Okay. And I believe it's stated that  
12 her uncle was just outside of the interview room?

13 A Yes.

14 Q Okay. And in her interview,  
15 Ms. O'Halloran, and this is in her statement, she  
16 also agreed with you that nothing was said to her  
17 by anyone that would influence her?

18 A Yes.

19 Q What was your impression of  
20 Ms. O'Halloran when you interviewed her?

21 A I thought she was being very honest.  
22 She appeared very relaxed. She was comfortable in  
23 our presence, so comfortable that she had changed  
24 her mind about having her uncle sit in with here.  
25 There was nothing that I detected in her

1     demeanour, or her words, or anything that would  
2     indicate to me that she wasn't telling me the  
3     truth.

4             Q     Now, it's also, I see in your notes,  
5     and that's page 51 of your notes, page 2865 of  
6     volume Q-1, you have a notation that you reviewed  
7     the report provided by Chief Bakema?

8             A     Yes.

9             Q     Would that have been the police  
10    report, Sergeant Girard?

11            A     Yeah, or the portion of it that they  
12    had completed up to that time.

13            Q     Okay. And that would have been prior  
14    to any interviews that you would have conducted?

15            A     Yes.

16            Q     During the interviews with the members  
17    and with the Branigan's staff, what information  
18    were you seeking?

19            A     I was looking for information as to  
20    how much and what Mr. Harvey-Zenk would have  
21    consumed that evening. I mean, initially it was  
22    going to be where was he that evening prior to the  
23    accident in the early morning hours, and what did  
24    he consume?

25            Q     Okay. And what is your understanding

1 of the time that the accident occurred?

2 A I believe it was around 7:00 a.m.,  
3 maybe shortly before, if my recollection is  
4 correct.

5 Q And what is your understanding of what  
6 time the members left Branigan's, roughly?

7 A Oh, Branigan's?

8 Q Um-hum?

9 A I believe it was about 2:30, at  
10 closing time anyway.

11 Q So would it be fair to say that  
12 evidence you were seeking of alcohol consumption,  
13 what would be at Sean Black's would be more  
14 important than what is at Branigan's in terms of  
15 time?

16 A Potentially, yes, and considering what  
17 we were told by Ms. O'Halloran, definitely so.

18 Q In your supplementary report at page  
19 184 -- and that's volume Q-2, page 3010,  
20 Mr. Commissioner.

21 THE COMMISSIONER: Ms. Hanlin, if you  
22 want me to be looking at those documents, you're  
23 going to have to be a little more helpful. You  
24 run through them as if they are at my fingertips.  
25 Well, they aren't. And then you ask a question,



1 you jump to another one. If you want me to look  
2 at them, then take your time. If you don't want,  
3 simply say, Commissioner, you don't have to look  
4 at them, I'll just put the question to the  
5 witness, okay.

6 MS. HANLIN: I apologize,  
7 Mr. Commissioner. It's Exhibit 184, volume Q-2.

8 THE COMMISSIONER: Q.

9 MS. HANLIN: Two.

10 THE COMMISSIONER: Q-2, thank you.

11 Page?

12 MS. HANLIN: 3010.

13 THE COMMISSIONER: Page 3070?

14 MS. HANLIN: 3010.

15 THE COMMISSIONER: 3010, thank you.

16 MS. HANLIN: And it's actually page  
17 3012 that I'm referring to, 3012.

18 BY MS. HANLIN:

19 Q Sergeant Girard, that's page 3 of your  
20 report?

21 A I don't have a copy of it with me.

22 THE CLERK: Sorry, what exhibit number  
23 was it?

24 MS. HANLIN: 184.

25 THE WITNESS: Sorry, what page again?

1 BY MS. HANLIN:

2 Q Page 3 of your exhibit.

3 A Okay.

4 Q And it's the third paragraph, and it's  
5 regarding the interview with Sergeant Humniski.  
6 You have noted there -- sorry?

7 A Go ahead.

8 Q You have noted there, this is  
9 regarding Sergeant Humniski, that he may have seen  
10 him with a glass in his hand. And that would be  
11 in regards to Constable Harvey-Zenk?

12 A Yes, at Constable Black's residence.

13 Q And if we can turn to page 7? And  
14 that would be 3016, Mr. Commissioner. And this is  
15 under the statement Synopsis of Constable  
16 Michalik, and it's the third paragraph in that  
17 statement, synopsis.

18 A Yes.

19 Q And you have noted there that  
20 Constable Michalik stated that Constable  
21 Harvey-Zenk had a beer in front of him?

22 A Yes.

23 Q And if we can turn to page 9, and  
24 that's page 3018, Mr. Commissioner. And it's  
25 under Constable Nolet's synopsis, and it's the

1 third paragraph within that synopsis at the last  
2 sentence. Constable Nolet related that they sat  
3 around talking about how they wanted to work on  
4 some projects this summer?

5 A Yes.

6 Q And he is referring to himself,  
7 Harvey-Zenk, Officer Azaransky and Black?

8 A I'm assuming so, yes.

9 Q Okay. And then the last paragraph on  
10 that page, regarding Constable Harvey-Zenk, Nolet  
11 stated that although he was consuming alcohol, he  
12 observed no signs of intoxication on him?

13 A Yes.

14 Q Page 10 of your supplemental, and  
15 that's page 30 --

16 THE COMMISSIONER: What are you doing?  
17 You're going through his synopsis, but we have a  
18 document here of interviews that set out what each  
19 witness who was interviewed responded about the  
20 amount of alcohol. What are you attempting to do,  
21 say that in a report he made these admissions? We  
22 have it on -- that were given to these officers  
23 when they were interviewed. Do you think this is  
24 of any help to me?

25 MS. HANLIN: Only the fact,

1 Mr. Commissioner, that this witness put this  
2 information in his report, that he would have  
3 written.

4 THE COMMISSIONER: And how is that  
5 going to help me, when we already have the  
6 interviews that were conducted of the various  
7 officers and the responses they made?

8 MS. HANLIN: Well, Sergeant Girard's  
9 supplemental report is based on the interviews,  
10 but we can move on.

11 THE COMMISSIONER: Yes, thank you.

12 BY MS. HANLIN:

13 Q Sergeant Girard, what is your view as  
14 to whether or not you sufficiently challenged the  
15 witnesses?

16 A At the time -- in hindsight, I didn't  
17 sufficiently challenge them. At the time, my  
18 partner and I would have occasional discussions  
19 about this, I wasn't working in a vacuum on this  
20 file. And at the time we felt that, based on what  
21 we had, and as well with other interviews,  
22 particularly Ms. O'Halloran's, that at the time we  
23 were satisfied. In hindsight, though, I believe  
24 it's clear that more should have been done.

25 Q Okay. Now, when you are working in

1 Professional Standards Unit and you receive  
2 information about particular members who might  
3 have information that's helpful to you in an  
4 investigation, you are able to determine when the  
5 members in question are working?

6 A Yes.

7 Q You are able to determine where they  
8 are at work?

9 A Like which division?

10 Q Um-hum?

11 A Yes.

12 Q And you have access to their home  
13 addresses and phone numbers?

14 A Yes.

15 Q And you can arrange for them to attend  
16 Professional Standards Unit through their  
17 supervisors?

18 A Typically, we do that by way of a  
19 memorandum, yes.

20 Q And did you do that in this case?

21 A We -- because of -- we didn't follow  
22 the normal procedure as far as the time line goes,  
23 but we did follow the procedures as far as  
24 preparing the letters and delivering them to their  
25 divisional commander, so that they can be given to

1     them sort of en masse so that they were aware of  
2     what was going on.

3             Q     Do you recall when that was done?  
4     It's in your notes at page 54.

5             A     Okay. Yeah, initially we left him  
6     one, Inspector McCaskill one copy of our witness  
7     interview memo on his desk for him, and that he --  
8     and I requested that he advise the officers of  
9     that, and particularly the middle section  
10    pertaining to their ability to, you know, if they  
11    should speak to someone from the association,  
12    whether they have that option prior to coming in.  
13    I don't believe it was until a little bit later  
14    that we actually drew up all the letters and  
15    delivered them.

16            Q     Okay. And in terms of importance to  
17    Professional Standards Unit, where was this  
18    investigation accorded in terms of priority?

19            A     Well, at the time we were carrying a  
20    number of files, my partner and I both. I would  
21    estimate somewhere in the area of 10 to 12  
22    investigations. When we initially got it, we  
23    wanted to get on it right away, though, we wanted  
24    to get it done as quickly as we can. And as I  
25    said before, that's why we got the officers in

1 much quicker than we normally would.

2 MS. HANLIN: Thank you. Those are my  
3 questions.

4 THE COMMISSIONER: Thank you.  
5 Re-examination?

6 MR. PACIOCCO: Very briefly,  
7 Mr. Commissioner.

8 BY MR. PACIOCCO:

9 Q Sergeant, you were referred to the  
10 interview with Detective Sergeant Isaak --

11 A Yes.

12 Q -- which I understand you should have  
13 in front of you. I would ask you to turn to page  
14 1176, relevant to the questions you were asked by  
15 Mr. Prober about the observations of Sergeant  
16 Isaak, shown as constable here in the transcript?

17 A Yes.

18 Q I draw your attention, please, to line  
19 11 where Sergeant Girard has just been asked, or  
20 Sergeant Girard asks:

21 "Okay. Now when you were with him,  
22 did you smell any liquor on him?"

23 Constable Isaak responds -- this is at page 1176,  
24 Mr. Commissioner.

25 THE COMMISSIONER: Thank you.

1 BY MR. PACIOCCO:

2 Q "Okay. Now when you were with him,  
3 did you smell any liquor on him?  
4 Constable Isaak: I certainly never.  
5 I didn't get close enough to really  
6 smell his breath or anything like  
7 that. No, I didn't."

8 Right?

9 A Yes.

10 Q Do you recall how long Sergeant Isaak  
11 was with Mr. Harvey-Zenk that afternoon?

12 A Off the top of my head, no.

13 Q Did you ask him that question, sir?

14 A I would have to review this to give  
15 you a positive answer. I don't recall at this  
16 moment whether I did or not, but --

17 Q I understand he arrived there at  
18 approximately 12:30?

19 A Um-hum.

20 Q And you received information that he  
21 continued to be with Mr. Harvey-Zenk into the  
22 afternoon?

23 A I believe he details that in his  
24 narrative report.

25 Q Okay.



1           A       But like I say, off the top of my  
2 head, I don't recall the details of that. But I  
3 understand he did spend time with him that day,  
4 yes.

5                   MR. PACIOCCO: Thank you, Sergeant.  
6 Those are the questions I have for you, and I do  
7 want to thank you for the evidence you furnished  
8 the Commission. I think the Commissioner should  
9 be aware that you sacrificed departure on a family  
10 holiday today to finish your evidence and we are  
11 sorry that we couldn't have inconvenienced you more.

12                   THE COMMISSIONER: Before you step  
13 down.

14                   THE WITNESS: Yes, sir.

15                   THE COMMISSIONER: Mr. Zazelenchuk, I  
16 appreciate the zeal with which you are  
17 representing the Taman family, but I would be  
18 grateful if you would not put allegations to this  
19 witness. The purpose of this Commission and the  
20 purpose of all counsel in any proceeding is to ask  
21 questions and not to make the kind of statements  
22 that you made. I appreciate -- I can't stop you  
23 until I hear the question, but I'd be grateful if  
24 you wouldn't do it again. Thank you very much.

25                   THE WITNESS: Thank you. May I just

1 say one more thing, please?

2 THE COMMISSIONER: If it's of  
3 relevance to these proceedings, yes.

4 THE WITNESS: Yes. I think, I'd like  
5 to think I made it pretty clear here that, with  
6 the benefit of hindsight, that things could have  
7 been done better. And I just want to say that I  
8 really wish that it had gone better because I  
9 think the Taman family deserves that. So I wish I  
10 had done a better job at the time.

11 THE COMMISSIONER: Thank you very  
12 much.

13 THE WITNESS: Thank you.

14 THE COMMISSIONER: Thank you for  
15 taking out time from your holidays.

16 THE WITNESS: No problem, sir.

17 MR. PACIOCCO: With the completion of  
18 the evidence of Sergeant Girard, that completes  
19 our examination of the investigation that was done  
20 by the Winnipeg Police Service and the testimony  
21 of Winnipeg Police Service Officers. We're now at  
22 the stage where we're going to move to the next  
23 phase, which is an examination of the prosecution  
24 of Derek Harvey-Zenk.

25 MR. CLIFFORD: Mr. Commissioner, the

1 next witness is Richard Wolson.

2 THE COMMISSIONER: Yes, thank you.

3 MS. EDWARDH: Mr. Commissioner, if I  
4 might, could I introduce myself for the record?

5 THE COMMISSIONER: Yes.

6 MS. EDWARDH: My name is Marlys  
7 Edwardh. I appear here pursuant to your rules and  
8 with, I understand, your permission as counsel to  
9 Mr. Wolson. I understand my colleague,  
10 Mr. Clifford, will adduce his evidence and after  
11 the other parties have had an opportunity to  
12 cross-examine, I would be permitted to ask a few  
13 questions if that's necessary.

14 THE COMMISSIONER: Yes.

15 MS. EDWARDH: And with that, thank you  
16 very much.

17 RICHARD WOLSON, having been first duly  
18 affirmed, testified as follows:

19 THE COMMISSIONER: Good morning, sir.

20 THE WITNESS: Good morning.

21 MR. CLIFFORD: Mr. Commissioner, there  
22 are a number of documents that I will refer to in  
23 the examination of Mr. Wolson. And for your  
24 benefit and the benefit of counsel, I can indicate  
25 what they are. I had provided the list to Madam

1 Clerk earlier this morning. We will be addressing  
2 Mr. Wolson's Curriculum Vitae. Copies have been  
3 distributed, and there are two copies with the  
4 Commission. We will be referring to volume J,  
5 which are the court transcripts of the various  
6 proceedings. We will refer to volume S,  
7 specifically tab 95, 99 and 100. And I will also  
8 refer to volume R-2.91.59 at page 3522. And what  
9 I'll do, Mr. Commissioner, is when those documents  
10 arise in the examination, I'll ensure that you  
11 have them. But those are the documents I  
12 anticipate at this point.

13

14 BY MR. CLIFFORD:

15 Q And with that, Mr. Wolson, perhaps I  
16 could start your examination by referring to your  
17 experience. And I see that is set out in your  
18 Curriculum Vitae. And if I could, sir, refer you  
19 to your CV and ask you, sir, just generally if you  
20 could tell the Commission about your legal  
21 education and when you started to study law?

22 A Sure. Mr. Commissioner, I graduated  
23 from the University of Manitoba Faculty of Law in  
24 1972 and was admitted to the bar in Manitoba in  
25 1973. And I have practised from that time till

1 the present continuously in the area, for the most  
2 part, of criminal law.

3 Q Mr. Wolson, could you also provide  
4 some evidence, please, with respect to your  
5 employment, sir? I see in your Curriculum Vitae  
6 that you are now a partner in your own law firm?

7 A Yes.

8 Q And --

9 A I can tell you that I started, I  
10 articulated in '72 and then stayed for a year in a  
11 criminal law boutique, Mr. Commissioner. And in  
12 1974, I had the opportunity to go to a firm called  
13 Walsh Micay and work with a great criminal lawyer  
14 by the name of Harry Walsh, who was my mentor. I  
15 had intended to spend a year there and that was  
16 going to be my masters degree, so to speak, in  
17 criminal law. And I ended up spending 21 years  
18 and practised with him and was mentored by him  
19 over that period of time.

20 He still practises today, I might say,  
21 but I left in 1995 and established my own firm  
22 with my present partners Jeff Gindin and Saul  
23 Simmonds. We are 10, actually 11 lawyers and one  
24 articling student, and our practice is, for the  
25 most part, related to the practice of criminal

1 law, although I do some administrative law, and I  
2 have been involved in some commission work.

3 Q Mr. Wolson, I know you're here today  
4 having the privilege of being a witness, but I see  
5 from your CV, sir, that in 1998, you were counsel  
6 to one of the parties at the Monin Inquiry?

7 A I was, sir.

8 Q And sir, further in 2001, you were in  
9 fact Commission Counsel at the Sophanow Inquiry?

10 A I was Commission Counsel to  
11 Commissioner Peter Cory.

12 Q As well, sir, you were counsel to one  
13 of the parties at the Driskell Inquiry?

14 A I was, sir.

15 Q And, sir, we understand that you also  
16 have been appointed Commission Counsel into the  
17 Schreiber Inquiry?

18 A I have been given that honour  
19 recently, sir.

20 Q Congratulations, sir.

21 A Thank you.

22 Q Now, I wanted to ask you as well,  
23 Mr. Wolson, with respect to your attendance at law  
24 schools for guest lecturing, et cetera, you've got  
25 reference to that in your resume. I understand,

1 sir, that you are a guest lecturer here at the  
2 Faculty of Law at the University of Manitoba?

3 A I have been over the years.

4 Q As well, with respect to the  
5 University of Winnipeg, their criminology  
6 department?

7 A That is so.

8 Q You also act as a guest lecturer for  
9 the bar admissions program here in Manitoba?

10 A I have in the past.

11 Q Mr. Wolson, to complete your relevant  
12 experience to assist the Commissioner, I  
13 understand as well, through speaking with your  
14 counsel, that an approximation with respect to the  
15 number of impaired and over 80 cases that you've  
16 done, either generic or cases involving bodily  
17 harm and unfortunately death, would be  
18 approximately one thousand or so cases?

19 A My estimate is about 30 to 35 cases a  
20 year, and I started that in about 1974. Some  
21 years I have done as many as 50, but on average  
22 about 30, maybe a little more, cases that are  
23 actually litigated.

24 Q And, sir, I understand that since 1987  
25 to 2004, you have authored numerous articles that

1 were presented at either faculties for continuing  
2 education, or otherwise to academic groups, with  
3 respect to the issue of drinking and driving. For  
4 instance, in 1987, you authored a paper "Drinking  
5 and Driving and the Charter of Rights and  
6 Freedoms," which was presented at a national law  
7 program?

8 A Yes, I was for, Mr. Commissioner, from  
9 1985 until 2005, I was a member of the Faculty of  
10 the Federation of Law Societies National Criminal  
11 Law Program. And as part of being a member of the  
12 faculty, we were required to prepare papers which  
13 were either delivered or were discussed at the  
14 annual meetings on various panels and in various  
15 seminars. And I have been involved in writing a  
16 number of papers on the subject of the charter,  
17 drinking and driving cases, over .08, refusal,  
18 blood tests, and a number of other discussions  
19 that we have had. I have probably been on about,  
20 of the 20 years I was with the Federation,  
21 probably in seven or eight of those years I was  
22 involved in panels on the subject of  
23 alcohol-related offences.

24 Q Now, Mr. Wolson, I see in your CV that  
25 you published a paper for the Federation in 1990



1 dealing with alcohol-related offences and  
2 constitutional issues?

3 A That is so.

4 Q You further published in '94 dealing  
5 with certificate evidence and over 80 cases?

6 A Yes.

7 Q You, again in 1995, authored a paper  
8 dealing with blood samples?

9 A Yes, sir.

10 Q And in 1999, you also followed up with  
11 a further paper in this field entitled "Impaired  
12 Driving, Public Policy versus Private Rights,  
13 Shortcuts to Proof for the Prosecution."

14 A Yes, sir.

15 Q And more recently in 2004, you  
16 authored the paper "Impaired Care and Control"  
17 which was also presented at the National Law  
18 Program in Halifax?

19 A That is so.

20 Q And I understand, sir, that your most  
21 recent publication, although not dealing with  
22 impaired driving, was in the Drake Law Review and  
23 it dealt with the Sophanow Inquiry as an example  
24 of the Canadian experience?

25 A I did write that, sir.

1           Q     Now, sir, if we could move forward  
2     then to February of 2005, the Commission has  
3     learned, through a number of sources, sir, about  
4     the fact that you became involved in the case very  
5     early in the process. And I should indicate at  
6     this point, Mr. Commissioner, and get it on record  
7     that Mr. Wolson is here today having acted for  
8     Derek Harvey-Zenk. And through discussions with  
9     counsel, Mr. Prober, and also through discussions  
10    with Ms. Edwardh, I should indicate on the record  
11    there is no waiver of solicitor/client privilege  
12    between Mr. Wolson and Derek Harvey-Zenk, and  
13    that's been affirmed by Mr. Prober. There has,  
14    however, been a waiver of settlement or litigation  
15    privilege. And indeed a number of documents have  
16    been furnished to the Commission and to Commission  
17    Counsel and have been disclosed to all parties  
18    with standing.

19                 The court transcripts also make  
20    reference to certain communications that occurred  
21    during the sentencing hearing, and we will refer  
22    to those. But I am mindful of the fact that there  
23    has not been a waiver of solicitor/client  
24    privilege, and I understand that other counsel are  
25    mindful of that fact as well.

1 THE COMMISSIONER: Thank you.

2 BY MR. CLIFFORD:

3 Q I think it would be most helpful,  
4 Mr. Wolson, if we started off and perhaps worked  
5 through the case chronologically. And I will not  
6 ask you about the initial appearances and your  
7 initial involvement. We know how, generally  
8 speaking, the disclosure process unfolded. But we  
9 have learned in this Commission, sir, the matter  
10 was originally scheduled for Preliminary Hearing  
11 in 2006, and it was brought to your attention that  
12 an adjournment request was being made. And I  
13 wonder if you could provide some evidence on that  
14 point, sir?

15 A Sure. I received notification from  
16 Mr. Minuk, who had conduct of the case for the  
17 prosecution, that he was going to seek an  
18 adjournment and he wanted to know whether or not I  
19 was willing to agree to the adjournment. He  
20 indicated to me that the purpose of the  
21 adjournment was for further investigation, but I  
22 didn't know at that time the nature of the further  
23 investigation. So the issue was, would I agree to  
24 an adjournment and get those kinds of instructions  
25 from my client or would I oppose it? And if I

1 were to oppose it and I was successful, then I  
2 wouldn't have had the benefit of whatever new  
3 evidence was coming if, in fact, new evidence were  
4 to come. Under the circumstances, we agreed to  
5 the adjournment, from our perspective, and the  
6 matter was put over.

7 Q Mr. Wolson, are you able to elaborate  
8 any further on the reason that was presented to  
9 you at first when the issue was brought up?

10 A My recollection is that Mr. Minuk said  
11 that he needed to have further investigations  
12 done, but I again didn't know the nature of the  
13 investigation. I later found out, of course, and  
14 it was pretty dramatic reinvestigation.

15 THE COMMISSIONER: Excuse me, I keep  
16 forgetting to speak into this. Do you recall when  
17 that first request for your consent to an  
18 adjournment was made by Mr. Minuk?

19 THE WITNESS: I think there is a  
20 letter. I don't have the letter with me. You  
21 should have it in your materials. I'm pretty sure  
22 a letter came to me and probably followed up by a  
23 phone call.

24 BY MR. CLIFFORD:

25 Q Yes. And if we could, Madam Clerk,

1 provide the witness with S-99, please?

2 A Thank you.

3 Q Mr. Wolson, you referred to  
4 correspondence, and if you wanted to take a look  
5 at the fourth paragraph down?

6 A What page are we looking at now?

7 Q Oh, I apologize, Mr. Wolson.

8 A I have a bundle here.

9 Q You have a bundle there, and if you  
10 look at the lower right-hand corner?

11 A What date?

12 Q I can probably do better than that for  
13 you, the lower right-hand corner, page 3488.

14 A Thank you. May 18, 2006 is this  
15 letter that I obviously received. Yes, the letter  
16 indicates in the second paragraph that I had been  
17 made aware of the need for some additional  
18 investigation to be performed in advance of the  
19 hearing.

20 "At this point, I do not think the  
21 investigation can be completed prior  
22 to the start."

23 And he's writing to ask me for my consent. So in  
24 answer to your question, Mr. Commissioner, it  
25 would have been in and around the 18th of May of

1 '06.

2 THE COMMISSIONER: Thank you.

3 BY MR. CLIFFORD:

4 Q And on the issue of the definition, or  
5 your understanding of the need for some additional  
6 investigation, Mr. Wolson, did you delve any  
7 further into that issue and make inquiries of  
8 Mr. Minuk as to what it was that required some  
9 additional investigation?

10 A I don't think I did.

11 Q You had come to the conclusion that, I  
12 take it, whatever it was, it would be more  
13 beneficial for you in the long run to take  
14 advantage of whatever new information might exist  
15 prior to this Preliminary?

16 A Well, I thought this, that if there  
17 was new information, I should have the advantage  
18 of having it, of perhaps cross-examining on it,  
19 and that's the essence of my thinking on the  
20 matter.

21 Q Mr. Wolson, one of the documents that  
22 we have obtained as well, and this is found in  
23 materials that were provided to us through  
24 Mr. Prober, was that on May 30th, sir, that you  
25 left a message for Mr. Minuk confirming the fact

1 that you were agreeable to the adjournment. And  
2 does that accord with your recollection, sir, that  
3 it would have been by the end of the month?

4 A The letter that he wrote came to me.  
5 It was dated the 18th, so I would have received it  
6 within a few days of that. And I would have  
7 responded. So the timing sounds right.

8 Q So, from your perspective, the '06  
9 adjournment really involved very little. You were  
10 not provided with a great deal of information?

11 A I wasn't.

12 Q And for the reasons stated, you were  
13 amenable to the adjournment. But I understand  
14 that as a result of scheduling, it would require a  
15 lengthier adjournment. In fact, we know that it  
16 was adjourned until July of 2007?

17 A I had told Mr. Minuk that my schedule  
18 was such that if this hearing were adjourned, that  
19 I wouldn't be available probably for many months.  
20 And the many months resolved into a new date set  
21 for a Preliminary off in '07.

22 Q When you indicated, sir, that it would  
23 result in an adjournment of many months, it in  
24 fact resulted in an adjournment of approximately  
25 13 months. Did you express that to Mr. Minuk at

1 the time, that this wasn't a situation where it  
2 was two or three or four months?

3 A Yes.

4 Q That it would be -- and can you  
5 indicate, sir, with some precision, did you  
6 indicate that it would be in fact about a year  
7 long adjournment?

8 A I'm quite certain I said that. I  
9 can't recall today what it was I had in the  
10 interim, but I have a pretty busy practice, and  
11 there were some matters that were going to cause  
12 me to be otherwise occupied. So I did tell him  
13 that it would be, if I didn't say a year, I would  
14 have said something close to that. I think I said  
15 a year.

16 Q Moving forward then, sir, in time to  
17 July, June, July I should say of 2007, when the  
18 Preliminary Hearing was once again scheduled to  
19 commence, are you able to indicate, Mr. Wolson,  
20 when any resolution discussions first took place,  
21 or when the topic of a potential resolution first  
22 arose?

23 A In my mind, we may have exchanged some  
24 conversation in the time preceding the July date.  
25 But I expected, quite frankly, the Preliminary



1 Hearing was going to go on. I was getting letters  
2 from Mr. Minuk, I think I got a letter as late as  
3 the 12th of July, giving me information about the  
4 Preliminary Inquiry, and I had expected that the  
5 Preliminary Hearing would go on as scheduled. Are  
6 you looking for that letter?

7 Q Yes, I am, Mr. Wolson. And I think  
8 you will find that letter, or series of  
9 correspondence, I am referring again,  
10 Mr. Commissioner, to S-99.

11 A I see those, yes. I received the  
12 letter dated July 3, giving me notes of the  
13 witnesses Bakema and Krawchuk. And then I  
14 received the letter, July 12, advising me that,  
15 providing me with a copy of a CD and a report and  
16 CV of Blandford. And so, obviously, I think as  
17 between the two of us, we had assumed we were  
18 going to Preliminary Inquiry.

19 Q And if I could touch upon that and  
20 give the Commissioner a little more assistance,  
21 perhaps, what I'll do, Mr. Wolson, is just touch  
22 briefly on the correspondence exchanged --

23 A Sure.

24 Q -- that suggests that that was in fact  
25 the case, that it was, for all intents and

1 purposes, headed towards a Preliminary in July.

2 And if I could refer you to S-99, page 3491, there  
3 is correspondence of May 8th, 2007?

4 A I see that.

5 Q What we see here is you are being  
6 provided with an additional disclosure list. And  
7 then following that, at page 3492, there is  
8 correspondence of June 22nd, 2007. Mr. Minuk is  
9 corresponding with you again, telling you of his  
10 intention to establish that your client was a  
11 registered owner of a motor vehicle, and he's also  
12 discussing other aspects of the case?

13 A I see that.

14 Q Again, at page 3494, the June 13th  
15 correspondence, Mr. Minuk is referring to two  
16 expert witnesses, the pathologist and the forensic  
17 traffic collision reconstructionist, and he's  
18 asking you, sir, whether there's going to be a  
19 voir dire required on the issue of expertise?

20 A Yes.

21 Q July 3rd letter that you mentioned at  
22 3496, and then there's the July 12th, 2007  
23 correspondence at page 3497. And there again are  
24 specific references in here to issues at the  
25 Preliminary Hearing?

1           A     I see that.

2           Q     Now, I take it, sir, we can conclude  
3 safely from these various pieces of correspondence  
4 that, again, in your mind, this matter was  
5 proceeding on to a Preliminary Inquiry on the day  
6 that it was to be scheduled?

7           A     That was my understanding. I was  
8 preparing as if we were going to have a  
9 Preliminary Inquiry.

10          Q     And during that time frame, sir, that  
11 we have just covered, from June of 2007 up to  
12 July 12th, had the issue of a potential resolution  
13 come up? Had it been raised by either you or  
14 Mr. Minuk?

15          A     I don't recall it being raised. Quite  
16 frankly, I was working towards the Preliminary  
17 Inquiry, and I had taken some time the week before  
18 the inquiry was to start, and I started again to  
19 go over, I had done it before, but I started to go  
20 over again the Crown disclosure, and started to  
21 prepare myself for this Preliminary Inquiry.

22          Q     Are you able to comment, Mr. Wolson,  
23 on when you actually engaged in resolution  
24 discussions?

25          A     My best recollection is resolution

1 discussions of any moment would have been probably  
2 the Thursday or the Friday before the inquiry,  
3 Preliminary Inquiry was to start on the Monday.  
4 So, that's my best estimate of time. And I have  
5 got, or I have a few memorandum to my file that I  
6 have looked at, and I would say around the  
7 Thursday prior to the Monday of the inquiry to  
8 start. And what I did, I -- if you'd like my  
9 thought process on how I broached the subject of  
10 potential resolution -- Mr. Commissioner, in  
11 reviewing the materials, and there were binders of  
12 materials, not as many binders as you have here,  
13 but binders of materials. And I quickly, as I had  
14 known for many months, realized again that there  
15 were a whole lot of difficult areas for the  
16 prosecution along the lines of the alcohol-related  
17 offences, along the lines of consumption, and  
18 certainly along the lines of impairment. There  
19 were all kinds of obstacles, in my view, that the  
20 Crown would face, legal obstacles, factual  
21 obstacles. And keep in mind that I am relying on  
22 paper disclosure that I have. And that's all, I'm  
23 assessing what I had been given on paper. And I  
24 came to the conclusion very quickly that Mr. Minuk  
25 had a lot of difficulty with his case.

1                   And then I came to this exercise. I  
2    said to myself, if I take all of the potential  
3    evidence of alcohol and put it aside, because I  
4    thought I could challenge that and challenge it  
5    successfully, if I put it aside and look only at  
6    the driving, the question in my mind was, did this  
7    driving in itself amount to dangerous driving?  
8    And I went through an exercise where I resolved,  
9    based on the case law in this province, and  
10   there's two cases in particular, a decision of the  
11   Court of Appeal called Manty, and a decision that  
12   followed Manty, and they are both fairly recent,  
13   they were both fairly recent cases. The other  
14   case is called Slobodia. And the Court of Appeal  
15   came to different resolutions on similar facts.  
16   And I thought that I might be able to argue, the  
17   facts on Slobodia would be fairly close to the  
18   facts here, and I may have an argument on  
19   dangerous driving. I thought -- and I put it this  
20   way to myself, I thought I'd have a 10 or 12 per  
21   cent chance on the dangerous driving, based on the  
22   case law. And then I add to that,  
23   Mr. Commissioner, my view of the investigation,  
24   which I believed was quite flawed. And I thought,  
25   quite frankly, at least on paper, the evidence of

1 Woychuk, Constable Woychuk would compromise the  
2 Crown in a major way and may cause a trier of fact  
3 to conclude that that trier may not have  
4 confidence in the evidence at all. And I thought  
5 there may be a 10 or 12 per cent chance there.

6 So at the end of the day, in my own  
7 mind, I resolved that I might have, on behalf of  
8 my client, a 20 to 25 per cent chance to  
9 successfully fight the dangerous driving charge.

10 Now, Mr. Commissioner, if you were  
11 laying in a hospital bed and somebody said, you  
12 have a one in four chance of surviving, those  
13 would not be good odds. But in a criminal case, I  
14 don't mind fighting a case with a 20 or 25 per  
15 cent chance and I've done it many times. But if  
16 you have a 20 or 25 per cent chance, there's a  
17 pretty large chance against your position. And  
18 based on discussions I had with my client, I then  
19 approached the Crown and had a discussion with  
20 him.

21 Q And that was going to be my next  
22 question, Mr. Wolson. You have indicated that  
23 your recollection is that it would have been  
24 Thursday the 12th or Friday the 13th --

25 A Yes.

1           Q     -- was the date for the commencement  
2 of resolution discussions. And my question to you  
3 was how, in fact, did they take place? Who  
4 approached who? And you have alluded to that,  
5 that you did approach the Crown?

6           A     I phoned Mr. Minuk. I said to him, I  
7 said I think you have got a lot of difficulties in  
8 your case, particularly around the area of  
9 alcohol. And his response was, I know. And you  
10 know, quite frankly, anybody who does any criminal  
11 law would know that you have in this case a whole  
12 variety of legal problems.

13                     And I said to Minuk, that being said,  
14 that you have these problems, would you be  
15 prepared to accept a plea from my client on  
16 dangerous driving causing, and would you then stay  
17 the other charges -- in this province we don't  
18 withdraw, we stay -- would you stay the other  
19 three charges, and would you jointly recommend a  
20 non incarceratorial sentence, at least house  
21 arrest as opposed to an arrest, or as opposed to  
22 an incarceration -- incarceration in either  
23 provincial or federal jail. And that was the plea  
24 bargain that I was suggesting in the  
25 circumstances.

1           Q     Mr. Wolson, if I could interrupt you  
2     there.  You have indicated that you pursued two  
3     lines of inquiry with Mr. Minuk.  One is whether  
4     he would be prepared to stay charges?

5           A     Yes.

6           Q     And the second was to join you on a  
7     joint recommendation for a conditional sentence?

8           A     Yes.

9           Q     And we're going to come back to that.

10           THE COMMISSIONER:  I think he said  
11     plea bargain.

12     BY MR. CLIFFORD:

13           Q     A plea bargain, yes, a plea bargain  
14     which would be presented as a joint  
15     recommendation?

16           A     That is so.  And there was an  
17     additional factor.  I also wanted him to agree to  
18     no driving prohibition, because a driving  
19     prohibition is at the discretion of the judge on  
20     dangerous driving.  And I indicated that I would  
21     want as well some liberal terms in the conditional  
22     sentence order.

23           Q     Do I understand correctly that on the  
24     issue of the no driving prohibition, that that did  
25     not ultimately become part of the plea bargain?



1           A     No, it became part of the plea  
2     bargain.

3           Q     Was that open on sentence, or was it  
4     your expectation that both parties would encourage  
5     the judge to do that?

6           A     We both did.

7           Q     Now, I had interrupted you, sir, and  
8     the reason for that was because you had begun to  
9     explain the discussion about the plea bargain,  
10    what your expectations and requests were. But I  
11    want to go back to your testimony where you  
12    indicated that you spoke with Mr. Minuk. You  
13    indicated, look, there are a lot of flaws in this  
14    case, and he said I know.

15                   Now for some time, that was the sole  
16    topic of conversation here, for many days. And  
17    I'm not going to ask you to go into detail on it,  
18    but what else can you tell me about the  
19    conversation you had with Mr. Minuk with respect  
20    to the difficulties he perceived in the case?

21           A     Well, I didn't articulate what the  
22    issues were, and I didn't do that for a reason.  
23    If our discussions fell flat, I wasn't going to  
24    tell him what I thought the problems in the case  
25    were. I would have exploited them, quite frankly,

1 at a Preliminary Hearing or at a trial, but I  
2 didn't tell him what I thought that they were.  
3 But I think, quite frankly, in this case, it  
4 doesn't take a legal scholar to appreciate that  
5 you had a lot of issues. And I can articulate  
6 some of those, if you would like, but there were a  
7 lot of issues here.

8 Q Perhaps you could take one or two  
9 minutes, Mr. Wolson --

10 A Sure.

11 Q -- and highlight, without going into  
12 the detail --

13 A Sure, I can.

14 Q -- the areas where you would, you  
15 clearly were able to discern there were  
16 difficulties, and your reasonable expectation  
17 would have been that Mr. Minuk would have as well?

18 A Well, I observed, first of all --  
19 again, these are all on paper because that's all  
20 that I have -- I observed in Officer Bakema's  
21 evidence that he took control of Mr. Zenk, that he  
22 walked him from one point to another and put him  
23 in the back of a police vehicle driven by Woychuk.  
24 In his notes, he had no symptoms of impairment.  
25 He was, I was told, a breath technician, or at

1 least had a lot of experience on the Police  
2 Service. No evidence of the usual indices of  
3 impairment that you would think a policeman would  
4 observe if they were present. He then places the  
5 accused in the police vehicle, in my view, in a  
6 form of detention. There are no rights given to  
7 the accused upon his detention. In that police  
8 vehicle of Woychuk's, Woychuk, in his notes,  
9 doesn't articulate any evidence of any symptom of  
10 impairment except there's a note in his notes at  
11 8:08, I think he had had him in his custody from  
12 7:40 approximately, so almost a half an hour later  
13 Woychuk said there was a slight, and I think  
14 slight was in brackets, odour of liquor.

15           So what I could see, quite frankly,  
16 was no charter rights, no demand made for a  
17 sample. According to Woychuk, there was no basis  
18 to make a demand. And as well, while a demand is  
19 made later by Carter, the demand then is for  
20 blood, not breath. And in my view, the demand,  
21 whatever it was, would not have been as soon as  
22 practicable as the code would mandate.

23           So I thought, aside from other factual  
24 issues that existed in this case, from the  
25 Professional Standards investigation, from -- then

1 there was a witness at the scene who, I think his  
2 name was Stevens, Vernon Stevens, who gave a  
3 statement, and in that statement, he noted that he  
4 didn't see any evidence of any impairment, and he  
5 himself was a party, used to be a fellow that was  
6 acquainted with alcohol himself and had friends  
7 who were also acquainted.

8 So I could see a lot of areas of  
9 difficulty. And I thought, quite frankly, that I  
10 would have some success if this matter went ahead.

11 Q And, sir, in this initial dialogue  
12 that occurred between you and Mr. Minuk, did he  
13 raise issues that he thought --

14 A No.

15 Q -- would be fundamental to his  
16 approach in the prosecution?

17 A No. It was my approach to him and my  
18 telling him what I thought of his case.

19 Q If we could then, sir, progress. You  
20 had embarked upon resolution discussions on the  
21 Thursday, Friday. If you could, Mr. Wolson, tell  
22 the Commission when was it that you would say that  
23 you actually came to the point where you  
24 established a plea bargain?

25 A Well, in that conversation that I had

1 with Mr. Minuk, I had said to him, is that -- is  
2 my suggestion that he would consider? And I think  
3 he said to me, will you put that to your client?  
4 And I said, I want you first to go to the people  
5 who you have to go to and to think about this  
6 arrangement and get back to me. And I'm quite  
7 sure he got to me, I was working on that Saturday,  
8 or maybe the Sunday, and he got to me over the  
9 weekend. He told me that he would accept those  
10 conditions, that type of plea bargain. And on  
11 that basis, we went forward. I had further  
12 discussions with my client. And I have a memo  
13 that you would have and --

14 Q And it's my intention, Mr. Wolson, to  
15 get that into evidence. But if I could perhaps  
16 just follow up with one brief question. And  
17 Mr. Commissioner, it would be appropriate  
18 afterwards to break for lunch, I'd be happy to do  
19 so. So with your permission, Mr. Commissioner  
20 I'll just follow up on this one area.

21 You mentioned just a moment ago in  
22 your testimony, sir, that you were encouraged by  
23 Mr. Minuk to speak to your client about it, in  
24 terms of your initial approach on your side. And  
25 if I understood your testimony, you said to

1 Mr. Minuk, no, I think that you should go to the  
2 people that you have to deal with prior to me  
3 speaking to my client. Have I got that right?

4 A Yes. I wouldn't go to my client and  
5 say first, this is -- I wouldn't want to go to my  
6 client before I had an offer from the Crown.

7 Q I can understand that from a defence  
8 perspective.

9 A Yes.

10 Q That you're not going to go to the  
11 client with something unless it's at least  
12 reasonably firm. But what I wanted to know, sir,  
13 was, when you suggested to Mr. Minuk, you go to  
14 the people you have to deal with, who were you  
15 referring to?

16 A Well, I can tell you, in looking at my  
17 material and preparing to testify, I looked at a  
18 memo, Mr. Commissioner, that I made to my file.  
19 The memo is dated the 18th of July of '07, but it  
20 was obviously dictated a couple of days before  
21 that. Because in the opening paragraph I say,  
22 "I talked with Derek over the  
23 weekend..."  
24 Derek is my client, Mr. Commissioner,  
25 "...on several occasions and met with

1                   him this morning, July 16."

2       So, obviously, I'm dictating this memo. And I'll  
3       wait for you, Mr. Clifford, to...

4                   MR. CLIFFORD: All right. So what  
5       I'll do then, very quickly before we break for  
6       lunch, is, Madam Clerk, if we could, I had been  
7       referring with Mr. Wolson to S-100 I believe. And  
8       that should be made an exhibit.

9                   THE CLERK: S-99.

10                  MR. CLIFFORD: I had been referring to  
11       S-99 and that should be made an exhibit.

12                  MR. CLIFFORD: And Mr. Wolson has just  
13       referred me to S-100 and we'll make that an  
14       exhibit, and we'll come back to it after lunch.

15       BY MR. CLIFFORD:

16                  Q       So Mr. Wolson, you are referring to a  
17       memorandum dated July 18, 2007, which is found at  
18       volume S tab 100 page 3501. That's just what you  
19       referred to?

20                  A       I have referred to, I'm sure there's  
21       only one July 18th memo, and I'm referring to the  
22       fact that while it says July 18, it --

23                  Q       Referring to in fact --

24                  A       -- refers to my -- refers to the  
25       morning of the 16th. So I obviously dictated it

1 at that time.

2 MR. CLIFFORD: If that could be made  
3 the next exhibit?

4 THE CLERK: S-100 is already Exhibit  
5 18. S-99 would be 210.

6 (EXHIBIT 210: S-99, Correspondence)

7 MR. CLIFFORD: 210 would be the next  
8 exhibit, and that would be the memorandum,  
9 Mr. Wolson, that you are referring to. And with  
10 that, Mr. Commissioner, with your permission we'll  
11 break for lunch until 2:00 o'clock.

12 THE COMMISSIONER: Yes. An hour and  
13 15 minutes, counsel, sufficient? We'll come back  
14 at let's say 1:50.

15 THE CLERK: All rise. This Commission  
16 of Inquiry is adjourned.

17 (Proceedings adjourned at 12:33 p.m.  
18 and reconvened at 1:50 p.m.)

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

21 MR. CLIFFORD: Mr. Commissioner, prior  
22 to carrying on with the examination, I should at  
23 this point ask that the curriculum vitae for  
24 Mr. Wolson be filed as a formal exhibit.

25 THE CLERK: Exhibit 211.



1 (EXHIBIT 211: Curriculum Vitae

2 Richard Wolson Q.C.)

3 BY MR. CLIFFORD:

4 Q Mr. Wolson, just prior to the lunch  
5 break we were both referring to what is now known  
6 as exhibit 18, which is found in volume S at tab  
7 S-100, page 3501. And that is, as you've  
8 described, a two-page memorandum dated July 18th,  
9 but obviously having been dictated on July 16th of  
10 2007. And that memorandum was raised in  
11 connection with the question I put to you,  
12 Mr. Wolson, as to who was it that you were  
13 referring to when you suggested to Mr. Minuk that  
14 he discuss this or go to the people that he has to  
15 talk to about it?

16 A Well, refreshing my memory with this  
17 document, and it was a fairly contemporaneous  
18 document, I have at page 2 that he vetted it,  
19 meaning our plea bargain discussions. And just to  
20 back up, Mr. Commissioner, what I say at the  
21 bottom of the page of exhibit 18 is, I say this:

22 "Marty is going to send me..."

23 Marty being Marty Minuk,

24 "...a letter outlining our discussions  
25 and confirming our plea bargain. He

1           has vetted it with his superiors,  
2           Kaplan and Slough, and we will do the  
3           sentencing when I have obtained some  
4           letters of reference and a report."

5   And Kaplan and Slough are both senior members of  
6   the Justice Department. I think Slough heads the  
7   department and Kaplan has a senior position with  
8   them, Brian Kaplan.

9           Q     Mr. Wolson, you indicate in the  
10    memorandum as follows at page 2:

11                "He has vetted it with his superiors  
12                Kaplan and Slough and we will do the  
13                sentencing when I have obtained some  
14                letters of reference and a report."

15   You have presented it in the past tense as though  
16   this has occurred. Do I understand from your  
17   testimony this is what was indicated to you by  
18   Mr. Minuk?

19           A     Yes. I would have had no other source  
20    to know that it was vetted by them.

21           Q     I wanted to ask you another question,  
22    sir, about the sentence preceding that which reads  
23    as follows:

24                "Marty is going to send me a letter  
25                outlining our discussions and

1                   confirming our plea bargain."

2                   First, you are referring to a  
3 confirmation of a plea bargain. And I take it  
4 that as of July 16th, 2007, that's how you were  
5 characterizing this, in your own mind and in your  
6 internal memorandum?

7                   A       Well, there is no question but this  
8 was a plea bargain in this sense,  
9 Mr. Commissioner: There were four charges, the  
10 accused was pleading guilty to one. So there was  
11 a plea bargain vis a vis the charges. And  
12 secondly, there was a plea bargain vis a vis a  
13 joint submission of counsel that we were going to  
14 jointly recommended what I'd indicated this  
15 morning, a conditional sentence and the terms of  
16 the conditional sentence.

17                  Q       Mr. Wolson, I'm going to come back to  
18 that point a little bit later in your examination.  
19 In this sentence that I've referred to, you also  
20 make reference to Marty sending you a letter  
21 outlining the discussions and confirming our plea  
22 bargain. Was, in fact, this letter ever forwarded  
23 to you?

24                  A       No. But you would also understand  
25 that while I didn't get a letter, I've dealt with

1 Mr. Minuk in the past, and I was content with our  
2 discussions. I had no reason at all to ever think  
3 that either one of us would vary from our plea  
4 bargain.

5 Q I appreciate that, Mr. Wolson. And in  
6 fact, I will ask you later in the examination  
7 about your prior dealings --

8 A Sure.

9 Q -- with Mr. Minuk, and your view on  
10 issues such as that that you've just raised. I  
11 wanted to ask you one further question about the  
12 information that is being provided to you and you  
13 are documenting on July 16th, and that is as  
14 follows, the second last sentence in the  
15 memorandum, and it would be the last paragraph:

16 "There is a militant father and mother  
17 of the deceased. The husband and the  
18 children are on side, but having said  
19 all that, we will meet with Judge  
20 Wyant and discuss these issues with  
21 him."

22 First, the notation here in your  
23 memorandum that the husband and the children are  
24 on side, could you provide evidence, Mr. Wolson,  
25 as to how that was presented to you?

1           A     Well, it was presented by Mr. Minuk.  
2     I've never talked to the Taman family, I have  
3     never talked to the Sveinson family, so all of my  
4     information would have come from Mr. Minuk. That  
5     was my only source. And it would be important for  
6     me to know that, and I would be interested, I  
7     always am, on the position of the family. And I'm  
8     assuming that I asked him what the position of the  
9     family was, and this is what he reported to me.  
10    And it came up again when we met with the judge.

11           Q     Mr. Wolson, do you say that you are  
12    interested in what the position of the family  
13    would be in so far as you might have an  
14    expectation that this would be seen as a factor  
15    that might ameliorate some of the judge's  
16    concerns, and it would be beneficial for you if  
17    the Crown were indicating that, yes, the family is  
18    aware of this and on side?

19           A     The judge would want to know that. In  
20    fact, he asked when we met him.

21           Q     So with respect to the degree of  
22    confidence on the accuracy of what is recorded  
23    here in the memorandum, I take it you don't have  
24    any difficulty with that fact being expressed to  
25    you by Mr. Minuk?

1           A     I may, when I use the word "militant,"  
2     have used my own word.  And I may have used the  
3     word "on side," or the words "on side," but the  
4     meaning was expressed to me, I have every  
5     confidence in that.  I would have no other way of  
6     knowing.

7           Q     Moving further then, Mr. Wolson, to  
8     the following day.  You've referenced this in your  
9     memorandum saying that:

10                     "We will meet with Judge Wyant and  
11                     discuss these issues with him."  
12     That's the final sentence that we have in the  
13     version that's been disclosed.  There is an  
14     editing, and I understand that that may be  
15     something that is not relevant to the Commission?

16           A     It is not relevant.

17           Q     The final thing that you are  
18     indicating here is that:

19                     "We will meet with Judge Wyant and  
20                     discuss these issues with him."

21     I want to ask you about that.  But, sir, before we  
22     go into chambers, so to speak, with the judge, how  
23     was this arranged?  Was this something that you  
24     wanted to do with Judge Wyant?  Was it something  
25     that the Crown wanted to do?

1           A     I had said to Minuk that I wanted to  
2     see the judge in chambers and he would he agree to  
3     that, and that's how we go to see the judge. He  
4     arranged it, and we go to see the judge the  
5     morning of the plea being entered.

6           Q     And can you tell me, sir, why did you  
7     want to see the judge in chambers?

8           A     If I can see a judge in chambers on a  
9     plea bargain like this, I always want to do that.  
10    I want to -- I'm not so concerned because it  
11    doesn't happen that often that a judge will say to  
12    us, yes, I will agree to your plea bargain. I  
13    want to know if the judge has some problems, if he  
14    sees some issues, and I want, in effect, some  
15    advance notice of that so that I'm prepared. And  
16    that's really -- I mean, it is very nice when a  
17    judge says, yes, I'm going to accept this  
18    recommendation, but I also am concerned whether or  
19    not he highlights any difficulties that he may  
20    have.

21          Q     This memorandum was obviously prepared  
22    subsequent to your court appearance on July 16th  
23    of 2007, I take it? It goes without saying?

24          A     The memorandum I think was prepared on  
25    the 16th, that is the memorandum that you've

1 referred me to, exhibit 18. Because I say in  
2 here:

3 "I then talked with Derek over the  
4 weekend on several occasions..."

5 at the first of that document,

6 "...and met with him this morning, the  
7 16th."

8 So I am assuming that I wrote it on the 16th --  
9 that I dictated it on the 16th. I don't use a  
10 computer, I'm embarrassed to say, I'm not computer  
11 literate, and I dictate, and I also make hand  
12 scribbles because I'm not, unfortunately, very  
13 fluent in this world of technology.

14 Q Mr. Wolson, in the memorandum which is  
15 exhibit 18, you do indicate as recently as this  
16 morning, July 16, 2007, we appeared in court. So  
17 you are dating it by the substantive content. Now  
18 you had already been in court earlier that day.  
19 And I --

20 A Not to see the judge, though, we were  
21 in court on the 16th, which was the Monday, and it  
22 was put over one day.

23 Q That's right. You were before Judge  
24 Stewart, as I recall?

25 A Yes.



1           Q     And I wanted to ask you a question  
2     about that, if I could.  And the transcript from  
3     July 16th is found at Exhibit 6.

4           A     I have it.

5           Q     We see on July 16th, from exhibit 6,  
6     the transcript of the proceedings, that there is a  
7     very brief exchange, and what is taking place  
8     primarily is that Mr. Minuk is telling the court  
9     that the matter was to begin today for the  
10    remainder of the week, he is telling the court  
11    that in preparation for the matter, meeting with  
12    witnesses and speaking to you, where they are at  
13    the moment is a 32 witness list with agreements  
14    and whatnot, and it is being pared down to 12  
15    people.  And he simply asked that the matter go  
16    over to the following day, the 17th, before Judge  
17    Wyant.

18                   I wanted to ask you, Mr. Wolson, can  
19    you shed any light why it wasn't dealt with before  
20    Judge Stewart on the 16th, or whose request it was  
21    to go over to Judge Wyant on the following day, or  
22    how that came about?

23           A     I don't know how it came about.  Minuk  
24    had indicated to me that we will appear the next  
25    morning before the chief judge, and I was content

1 with that. I would have been equally content, for  
2 sure, to appear before Judge Stewart, who is a  
3 very fine and fair-minded judge, and I would have  
4 been happy to do that. But those arrangements had  
5 been made. And I'm not even sure on the morning  
6 before Judge Stewart -- our courts are now, they  
7 have changed in their complexion, and I'm not sure  
8 whether we would have had time that morning, that  
9 is whether the court could give us time that  
10 morning. I don't know what the reason was.

11 Q I anticipate we will hear further  
12 evidence from this on Mr. Minuk, but we have heard  
13 some evidence, perhaps not directly on this, but  
14 it has been referred to as a scheduling court,  
15 something of that nature, would that accord with  
16 your --

17 A It may well have. I'm not quite  
18 up-to-date on -- there is an overhaul of the court  
19 system, and now courts are called different --  
20 they have different names to them but -- and for  
21 me the big concern was, did we have time that  
22 morning, would the court have given us time? But  
23 I didn't make those inquiries. I was told it was  
24 going to go over a day. I was fine with that.

25 Q And moving to the next day, July 17th,

1 sir, we understand that both you and Mr. Minuk  
2 went in to see Chief Judge Wyant prior to the  
3 commencement of court to have an in-chambers  
4 discussion?

5 A We did.

6 Q And could I ask you, Mr. Wolson, in as  
7 much detail as you can, to describe what was  
8 discussed in the chambers meeting?

9 A Sure. We went in to see Judge Wyant.  
10 Now, Judge Wyant is a congenial fellow, we sat  
11 around his table, we had a discussion. My  
12 recollection of it is it wasn't that long, but we  
13 talked I'm sure for 15, 20 minutes at least, I  
14 didn't time it, I didn't make notes of it. And in  
15 essence what it was, I had told Judge Wyant that  
16 my client was going to be pleading guilty that  
17 morning to dangerous driving cause, that the Crown  
18 was going to stay charges, and that there was  
19 going to be a joint recommendation to this plea  
20 bargain. And I had said to Judge Wyant that my  
21 client is a police officer, and although suspended  
22 from the services without pay, and as a result of  
23 this plea will either be forced to retire or he  
24 will be fired, let go, and made that very clear to  
25 him, because I wanted the judge to know this. I

1 wanted him to have some information from which he  
2 would then be able to have an idea of what this  
3 case is about.

4           Mr. Minuk related the facts to him, a  
5 brief recitation of the facts, and that was, in  
6 effect, a brief outline of the allegations.  
7 Mr. Minuk indicated to him, I believe, that he had  
8 some difficulties with his case, although I don't  
9 recall that he articulated what those were. And I  
10 then said to Judge Wyant, and I think also  
11 Mr. Minuk in that -- because it caused me some  
12 concern, he said he reviewed in brief form the  
13 evidence of the traffic reconstructionist, and  
14 indicated that that was basically the evidence  
15 that he had. And then indicated that there was  
16 some evidence of, historical anecdotal evidence of  
17 drink. And that caused me some concern,  
18 because -- and I will tell you what I did about  
19 that at a later time. I then turned to Judge  
20 Wyant and I said, will you accept this  
21 arrangement? And his response to me was what I  
22 expected, he said, I will hear you in court.  
23           Oh, by the way, he also asked whether  
24 or not, what the position of the family was. And  
25 I think Mr. Minuk had indicated that the husband

1 is on side, or is in agreement, something along  
2 those words, but the parents are not.

3           And I then posed the question to Judge  
4 Wyant, will you go along with this plea  
5 arrangement? And his response was that he will  
6 hear us in court. And that's more or less what I  
7 expected. He then said to me, but you know that I  
8 do give consideration to submissions of senior  
9 counsel. And then said something to me, which in  
10 my view was critical in my belief that he would  
11 accept this joint recommendation. He said that  
12 that very morning he was going to give a  
13 conditional sentence on a manslaughter.

14           Now, as you know, manslaughter is, at  
15 least by the Criminal Code, a more serious offence  
16 than dangerous driving cause. It carries with it  
17 a higher maximum penalty. And basically in this  
18 jurisdiction, there aren't a lot of conditional  
19 sentences on manslaughter cases. Manslaughters  
20 usually will range from low federal time to way up  
21 there, depending on the nature of the allegation.

22           And I thought to myself, why is he  
23 telling us that he is going to give a conditional  
24 sentence on a manslaughter? What could this mean?  
25 I didn't care, quite frankly about the

1 manslaughter, I am there for my case. I, for a  
2 number of reasons, left that interview, left that  
3 meeting with quite a satisfaction that this judge  
4 would accept this plea bargain. I was quite  
5 convinced of that.

6 Q So despite the fact that he indicated  
7 to you that he wouldn't necessarily accede to it,  
8 the impression you formed as a result of all of  
9 the communication was that you didn't have a  
10 concern about proceeding with that particular  
11 judge?

12 A No. And I will tell you what my  
13 thinking was. First of all, Judge Wyant is a --  
14 he is no shrinking violet. If he has a problem,  
15 he is going to tell you that he has a problem.  
16 And he didn't. That to me was a very positive  
17 sign. He didn't say, look, gentlemen, your  
18 client, Wolson, is a police officer, and perhaps  
19 there is a higher standard of care. He didn't say  
20 that to us. He didn't say anything negative along  
21 those lines.

22 Secondly, I thought he is asking about  
23 the position of the family because that would be  
24 something he would want to know about if he were  
25 inclined to agree with us.

1                   And third, he had indicated that he  
2 would give consideration to, and does give  
3 consideration to submissions of senior counsel.  
4 Minuk and I have been around a long time.

5                   And then lastly, this comment about  
6 the conditional sentence on a manslaughter to me  
7 was just overwhelming that, while he wasn't coming  
8 out and saying that he was going to agree to it, I  
9 could read it no other way. To the point,  
10 Mr. Clifford, when we went into court that  
11 morning, and counsel was there on the  
12 manslaughter, I had said to that counsel, Marty  
13 Glazer, I said will you call me when your  
14 sentencing is finished? And he did, and he told  
15 me that there had been a conditional sentence. So  
16 I was quite -- I was quite satisfied.

17                   THE COMMISSIONER: I have a couple of  
18 questions. Is it a common practice, and I'm  
19 talking about the Provincial Court in Manitoba,  
20 for Crown and Defence to present a, you call a  
21 plea bargain or a joint submission, to the judge  
22 in chambers and ask whether he would go along with  
23 it?

24                   THE WITNESS: It is less common than  
25 it used to be. There was a time in Manitoba where

1 you would do it quite frequently. Some judges  
2 will meet with you, some won't. Some Crowns will  
3 go into chambers, some won't. My experience is,  
4 if I can get there, I would like to get there, but  
5 I need the consent of the Crown and the judge. We  
6 have in Manitoba a resolution conference in  
7 Provincial Court, and that's intended to have  
8 these types of discussions, frank discussions, and  
9 they are even more frank in the Queen's Bench than  
10 they are in Provincial Court.

11 THE COMMISSIONER: What would happen  
12 if the judge would give a clear indication to you  
13 that he would not go along with the plea and the  
14 proposed sentence, would you then walk out and get  
15 another judge?

16 THE WITNESS: It has never happened,  
17 but I think I would be -- I would be before that  
18 judge and I would deal with it, try to convince  
19 him on the record.

20 What I was looking for more was, is  
21 there an area that he has a problem with.

22 I know, and we know from the  
23 transcript, Mr. Commissioner, that ultimately he  
24 had a problem with the fact that Mr. Zenk was a  
25 police officer. I would have expected, and that's



1 my experience in going in these meetings, a judge  
2 wouldn't come out and say, look it, I'm never  
3 going to give this to you. A judge would say, I  
4 have a concern here, you may want to address it,  
5 and if that concern -- and that's normally what  
6 will happen. And I've been doing this for many  
7 years. Again, some judges will invite you to have  
8 this kind of discussion, others want no part of  
9 it.

10 BY MR. CLIFFORD:

11 Q Mr. Wolson you referred to Mr. Minuk  
12 having a brief recital of the facts and referring  
13 to consumption of alcohol within the chambers  
14 meeting. And can you elaborate a little further  
15 on what sort of detail was brought out with  
16 respect to the facts?

17 A I think the facts was just basically  
18 that he had been on a highway where the accident  
19 occurred, there was no evidence of braking, no  
20 evidence that he attempted to avoid the accident,  
21 those kinds of facts. I don't recall if there was  
22 anything else in that regard. And he did mention,  
23 I'm quite certain of it now that I think about it,  
24 this anecdotal historical evidence, because that  
25 bothered me and it caused me to speak to him

1 subsequently, not as soon as we walked out.  
2 Because when we walked out of that meeting, we  
3 talked as we walked to the elevator that, in  
4 effect, this judge was going to accept that  
5 recommendation. That was certainly my view, and  
6 his, as we discussed it.

7 Q Had you heard or discussed this phrase  
8 prior to the chambers meeting, and by phrase I  
9 mean "anecdotal historical evidence"?

10 A No. My understanding of this plea, my  
11 understanding was always that it was to be based  
12 on driving. And that's why, when I discussed this  
13 morning that exercise that at least I went  
14 through, the exercise being we were pleading based  
15 on the driving, and I could justify the plea based  
16 on speed. We thought there was evidence that he  
17 was going about twice as fast as a witness who was  
18 going 40; so he was going 80. That there was a  
19 warning light that should have told Mr. Zenk that  
20 there was a traffic -- set the traffic lights  
21 ahead. There was no braking, no attempt to avoid  
22 the accident. And my understanding of the law,  
23 save for a Sloboda type argument, which I didn't  
24 peg in the highest way, that is I didn't think it  
25 was going to be the greatest defence, my

1 understanding of the law was that that factual  
2 underpinning would equal dangerous driving.

3 Q Mr. Wolson, now with respect to the  
4 17th of July, and if you could refer to exhibit 7,  
5 which is the transcript from the 17th?

6 A I have it.

7 Q I think this brief series of questions  
8 might fall more into the category of criminal  
9 procedure than anything else, but I wanted to ask  
10 you about what I understand to be, and I see from  
11 the transcript to be the local practice. And you  
12 can tell me if I've got this right, Mr. Wolson,  
13 but your client was never formally arraigned. The  
14 arraignment was waived and there was an indication  
15 that he would be entering a plea of guilty. And  
16 that he is, in fact, asked if that is the case.  
17 And Mr. Harvey-Zenk says to the court, "yes, Your  
18 Honour, that is the case." Is that the standard  
19 practice with respect to going through the process  
20 of entering a plea?

21 A It is the standard practice in  
22 Provincial Court for sure. Now, I do, in my  
23 practice, travel to places outside of Manitoba,  
24 not as often now, but at one point in my career I  
25 was going to Kenora, Dryden, Rainy River, Sioux

1 Lookout and Thunder Bay. And I understand the  
2 process is different in Ontario than it is in  
3 Manitoba. But we have taken this route, and it is  
4 a fairly common route where counsel will indicate  
5 that there is going to be a plea, we will waive  
6 the reading of the information and we will go  
7 through, at least I did, I do quite often go  
8 through -- a judge will have to go through a plea  
9 comprehension, whether the accused understands  
10 what he is doing and is he doing it voluntarily.  
11 And I will often do that plea comprehension myself  
12 on behalf of the client.

13 Q Now, the court asked Mr. Harvey-Zenk  
14 at page 2, line 24, a direct question:

15 "All right. You have seen the police  
16 report or seen the allegations?"

17 And he responded:

18 "Yes, I have."

19 And he is further questioned:

20 "You have had an opportunity to speak  
21 to counsel, to Mr. Wolson extensively  
22 I assume?"

23 And he says:

24 "I have."

25 And we are not getting into that, it is covered by

1 solicitor/client privilege. But the court asks:  
2 "Do you make the plea voluntarily or  
3 do you feel at all coerced or  
4 pressured?"

5 And there is an inaudible there, but we take it  
6 that he did understand that to be the case and  
7 those are the circumstances. And he further  
8 confirms that he understands that ultimately the  
9 sentence to be imposed is up to the court.

10 What I'm interested in, Mr. Wolson, is  
11 in the context of entering a plea and having some  
12 exchange like this to confirm the understanding  
13 that the plea is entered free and voluntarily, and  
14 a reference to the facts, in sentencing hearings  
15 such as this in this jurisdiction, are there not  
16 occasionally times when an agreed statement of  
17 fact would be read out at the time of the plea  
18 being entered?

19 A You know, I can probably count on one  
20 hand, on a sentencing in Provincial Court, where  
21 there has been an agreed statement of fact. We  
22 just don't do it. There are many times -- I never  
23 used these courts, but there were courts set up  
24 specifically just to hear guilty pleas. And  
25 sometimes counsel would come with 20 cases and

1 plead 20 clients guilty in one sitting. Matters  
2 on sentencing are generally done fairly  
3 expeditiously. Again, I don't recall the last  
4 case I've had where there has been a joint written  
5 document which we've presented to a judge,  
6 especially in Provincial Court. Sometimes Federal  
7 Department of Justice prosecutors do it, not too  
8 often.

9 Q What about an oral presentation of the  
10 facts relied upon by Crown counsel?

11 A It doesn't happen here. I know you do  
12 that in Ontario because I have been part of that.  
13 We don't do that here. Once the accused enters a  
14 guilty plea, even through counsel saying my client  
15 is pleading guilty, we will waive the reading of  
16 the charge and we will waive the election section,  
17 that's it.

18 Q Because as I understand it, Judge  
19 Wyant had not made a finding of guilt even  
20 necessarily on the 17th, the next court date was  
21 the 22nd?

22 A Well, the finding of guilt is taken  
23 from a guilty plea, and this is a -- this is  
24 representative of a guilty plea in Provincial  
25 court.

1 THE COMMISSIONER: I'm having some  
2 difficulty with that. A judge accepts a plea of  
3 guilty, and no facts are submitted, or at least no  
4 statement is read in support of the plea, and the  
5 judge makes a finding of guilt?

6 THE WITNESS: Well, the judge accepts  
7 the plea. And once the judge accepts the plea,  
8 then we engage usually in the sentencing process.  
9 That's how we do it here, sir.

10 THE COMMISSIONER: But isn't there an  
11 obligation upon a judge to be satisfied that the  
12 facts in support of the plea justify that finding  
13 of guilt?

14 THE WITNESS: Sometimes what will  
15 happen, and it has happened, is that this will  
16 occur, this same process, an accused will go off  
17 and speak to say a probation officer, and say  
18 things to the probation officer which defy a  
19 guilty plea. And the judge will call counsel back  
20 and he will say, I can't accept this guilty plea  
21 because of the comments of the accused in the  
22 pre-sentence report. But other than that, this is  
23 the state of affairs in our Provincial Court. It  
24 happens every day.

25

1 BY MR. CLIFFORD:

2 Q Mr. Wolson, moving forward then to  
3 August 22nd, 2007, and the transcript reference is  
4 our exhibit 8.

5 A I'm going to use my own transcript  
6 that I received, and I have some tabs on this,  
7 Mr. Commissioner, for ease of reference. But my  
8 pages are off. And Mr. Clifford and I, when he  
9 interviewed me, when I gave a statement to him, we  
10 ran across this. My pages are out sometimes by a  
11 page, but I will try to focus in on the issues  
12 that I'm asked.

13 Q Before we get into any of the  
14 specifics on August 22nd, 2007, Mr. Wolson, what  
15 we do see at the commencement of that day's  
16 proceedings is, in fact, a reference to some of  
17 the factual underpinning behind the plea. And was  
18 it your understanding that Mr. Minuk would be  
19 presenting the facts in the manner that he did?

20 A My understanding of the facts of this  
21 case is that Mr. Minuk and I would present to the  
22 court a factual underpinning of the driving being  
23 the basis for the guilty plea. And I thought  
24 that's where we were going. And perhaps this is  
25 an appropriate time to tell you what I did after



1 the meeting with the judge in chambers, when  
2 Mr. Minuk raised the phrase "historical anecdotal  
3 evidence."

4 Q Please do?

5 A At some point closer to this  
6 sentencing of August 22, I had called Mr. Minuk  
7 and I had said, and I still hadn't received that  
8 letter confirming the basis of the plea bargain.  
9 I called Mr. Minuk and I said, you know, Marty, I  
10 don't think you should refer to historical  
11 anecdotal evidence, I don't think you should raise  
12 that at all, because that's not where we should be  
13 going here based on our understanding. And he  
14 wouldn't -- he just wouldn't move on that. And I  
15 said, well, what do you plan to say about this --  
16 because I had my concerns. And he referred me to  
17 a part in the transcript, which appears in the  
18 transcript, as to what he was going to say. And  
19 perhaps I can find that for you. It is at page 6  
20 of your transcript, and it starts at the top of --  
21 our transcripts are now the same for some reason,  
22 which is nice. This wasn't the transcript that  
23 you had, I don't think, when we met. But at page  
24 6, line 6, he said, and he read this to me, so I'm  
25 assuming he had a submission prepared. He said:

1 "Much like any night out with friends  
2 and colleagues, no one paid attention  
3 to who ate what, who drank alcohol and  
4 who did not. The accused remained at  
5 the after work meeting place with the  
6 group, and at some point near closing  
7 time he departed with others to the  
8 home of another work mate in East St.  
9 Paul area."

10 Then this, to me, sort of put this issue to bed,  
11 because he said this, when questioned about these  
12 activities of the accused, that questioning was  
13 conducted by the Winnipeg Police Service  
14 Professional Standards Unit:

15 "No one recalled much of his  
16 activities that evening and expressed  
17 opinions that he likely would have had  
18 some alcohol, but what and how much  
19 they did not appear to know. At no  
20 time did he appear to be affected by  
21 the alcohol that evening."

22 Well, once he said that to me, in my view that  
23 ended the issue, because if he is not affected by  
24 it, it is not a factor in dangerous driving. He  
25 now, for some reason felt that he had to say that,

1 he had to talk about anecdotal evidence, he was  
2 fairly stubborn on that. But when he read this to  
3 me, it allayed my concerns because, again, if it  
4 didn't have an effect on him, if that's the  
5 evidence that he had, he didn't have any evidence  
6 that was relevant to this plea.

7 Q Despite the concern you raised and the  
8 comfort level that you gained from having this  
9 recited to you by Mr. Minuk, we see further in the  
10 transcript at page 8 that Mr. Minuk does go on and  
11 indicate to the court, however, and this will be  
12 the true test, Mr. Wolson, if we have got the same  
13 transcript.

14 A I think we are now leaving it.

15 Q Line 34 in exhibit 8?

16 A Yes.

17 Q And it starts:

18 "Through that investigation anecdotal  
19 historical evidence of alcohol  
20 consumption by the accused, some time  
21 prior to the collision, was  
22 identified. The investigation,  
23 however, did not permit the  
24 conclusions to be drawn from this  
25 history. Proof of impairment, by

1                   reason of the investigation, would be  
2                   difficult to prove at best."

3       So he is, in fact, bringing this up on  
4       August 22nd. Did that come as a surprise to you?

5           A       It did.

6           THE COMMISSIONER: What page again, I  
7       have your 8?

8           MR. CLIFFORD: I was at --

9           THE WITNESS: Page 8, line 34.

10          THE COMMISSIONER: All right. Go  
11       ahead.

12          THE WITNESS: And it goes over to page  
13       9 at the top.

14          THE COMMISSIONER: Thank you.

15          THE WITNESS: I must say that what  
16       really caused me a lot of anxiety was the  
17       questioning that the judge engaged in with him at  
18       some point, and I'm sure we will get to that.

19          THE COMMISSIONER: Do I understand you  
20       correctly, at no time did you know he was going to  
21       use the terminology "anecdotal evidence of alcohol  
22       consumption" until you spoke to him and he read  
23       that part?

24          THE WITNESS: Well, he had used it in  
25       the pre-trial meeting with the judge, and that's

1 what caused me my anxiety.

2 THE COMMISSIONER: I see. But he  
3 didn't use it in a court proceeding?

4 THE WITNESS: He hadn't used it in a  
5 court proceeding. He was just starting this  
6 submission on the 22nd, and I did call him before  
7 the 22nd and had that conversation with him when  
8 he told me what he was going to say.

9 BY MR. CLIFFORD:

10 Q Mr. Wolson, you testified that you had  
11 a concern that developed as a result of the  
12 questions that the judge put to Mr. Minuk on that  
13 point?

14 A Yes.

15 Q And I think we will get to that issue  
16 now, and we will try to deal with this specific  
17 concern in reference to anecdotal historical  
18 evidence. And I think I may be correct here, sir,  
19 that the line of questioning that you are  
20 referring to starts at page 17 and develops  
21 through page 18. And if I can refer you to page  
22 18, line 29.

23 So, Your Honour, I am at page 18 of  
24 the court transcript of August 22nd. The court  
25 says:

1 "So it is fair to say, in essence, the  
2 factual circumstances surrounding the  
3 Crown's acceptance of the plea to  
4 dangerous operation of a motor vehicle  
5 causing the death of Mrs. Taman was a  
6 combination between the evidence of  
7 consumption of some alcohol, along  
8 with an accident that appears to be  
9 unexplained where speed was -- there  
10 doesn't appear to be any evidence of  
11 excessive speed but a..."

12 And Mr. Minuk says:

13 "Well, that and --

14 THE COURT: But an accident where that  
15 occurred without braking at a red  
16 light?

17 MR. MINUK: Absolutely, yes, there was  
18 an accumulation of what would be  
19 otherwise highway traffic violations  
20 which would set this apart from --

21 THE COURT: And that's the marked  
22 departure, the combination of those  
23 factors is the marked departure?"

24 And Mr. Minuk says:

25 "Correct, yes. That -- this is not

1           just a pure accident. Having been  
2           involved in similar prosecutions where  
3           people are blinded, if I might call it  
4           that, by a frame of a vehicle and dart  
5           out into an intersection where they  
6           shouldn't have, even though they have  
7           taken steps to stop and do checks,  
8           this is not that type of case."

9           I wanted to complete the passage for completeness  
10          sake. But have I got it right, Mr. Wolson, that  
11          pages 17 and 18 leading in to that exchange  
12          between the Court and Mr. Minuk would be the  
13          questions and the exchange that caused you  
14          concern?

15                 A       Quite frankly, I never expected that.  
16          This wasn't our plea arrangement, in my opinion.  
17          I can tell you it is inconsistent with the page 6  
18          that we read. If it had no effect, then it can't  
19          be a contributing factor, and that did cause me  
20          concern. And -- it did.

21                 Q       The judge refers to a combination of  
22          things, the consumption of alcohol and the  
23          unexplained accident, and Mr. Minuk commented on  
24          that. At that point, Mr. Wolson, did you see this  
25          as a paradigm that was setting up where the judge

1 was of the view that there were two factors here  
2 contributing to the marked departure?

3 A I thought you could say that, yes.  
4 And you know, I was bothered by that, because that  
5 wasn't the basis of our discussions, and it was  
6 inconsistent with the statement that he had made  
7 earlier. You know, the point being, quite  
8 frankly, is I'm not going to admit any evidence  
9 that can't be proven. And I didn't think this  
10 evidence could be proven and I would never admit  
11 it.

12 Q I understand, Mr. Wolson, from your  
13 interview with me, that looking at the situation  
14 in retrospect, you are of the view that perhaps  
15 what you should have done is make it very clear,  
16 perhaps at that point, that you didn't accept the  
17 consumption of alcohol. And just on that point,  
18 sir, and your explanation to me, I wonder if you  
19 could expand on that for the Commissioner?

20 A Sure. I realized what was happening.  
21 My intent on plea was to be quite brief. I think  
22 I was about 13 pages in my submission, until  
23 questions started coming from the judge. I was  
24 going to be quite brief. I dealt with the issue  
25 on two -- in two areas, the issue that had come



1 up. And I dealt with it, I think first at page  
2 56, where I'm reviewing the cases, page 56, line  
3 26, Mr. Commissioner.

4 THE COMMISSIONER: Thank you.

5 THE WITNESS: At page 56 I'm reviewing  
6 the cases and I say:

7 "Every other case before you where  
8 there is either alcohol involved, to  
9 an extent of readings over 08, or to  
10 where no alcohol was involved, to  
11 where, like in this case there is  
12 mention of it by the Crown, but no  
13 proof of it..."

14 BY MR. CLIFFORD:

15 Q If I could just interrupt you, and I  
16 apologize for doing so. We have that at page 55,  
17 line 26?

18 A All right. So we were together for a  
19 while but now we have departed.

20 Q We have parted ways. So for the  
21 benefit of counsel, what the witness is referring  
22 to now is exhibit 8, the transcript of proceedings  
23 August 22, 2007, page 55 line 26. If you want to  
24 continue, Mr. Wolson?

25 A Then I deal with it again at my page

1 60, which is your --

2 Q Page 59, line 4, I believe.

3 A Thank you, sir. I deal with it again  
4 when I say to the judge -- the judge had asked  
5 some questions about whether or not there is a  
6 higher standard for a policeman, off duty or  
7 otherwise. And I say, I'm trying to reason with  
8 him and submit to him that this is not a case of  
9 impairment. And I say this, I say:

10 "...in this case, the nature of the  
11 accident itself is not one that was  
12 brought on by an impairment, because  
13 that isn't the position articulated by  
14 the Crown, that Derek was impaired,  
15 but through inadvertence, which in my  
16 view falls into the area of dangerous  
17 driving -- but it would be hard and  
18 wrong to penalize somebody for  
19 inadvertence because they happen to be  
20 a judge, lawyer or police officer..."

21 With the benefit of hindsight, and I must tell you  
22 the setting in the courtroom was a very, very  
23 tense one. The emotions were, you could cut the  
24 emotional atmosphere in that courtroom with a  
25 knife. The complainant, or the victims had just

1 finished pouring their hearts out in a most  
2 compelling way, and it was a difficult setting.  
3 And quite frankly, I should have been more  
4 specific. I should have said not "impairment" but  
5 "consumption," because that's the position that I  
6 always took.

7 I cleared that up when we go back on  
8 September the 12th, but I'm not clear on it in the  
9 August 22. I'm still of the view, Mr. Clifford,  
10 that this judge is going to accept the joint  
11 recommendation. I'm still of that view at that  
12 time. And I thought, rather than to create a side  
13 bar and start challenging Mr. Minuk, that this was  
14 going to resolve itself and that I had dealt with  
15 it. But, again, I didn't deal with it the way I  
16 should have and the way I could have. And it  
17 bothered me, quite frankly, afterwards. And when  
18 we get the letter from the judge, I deal with it  
19 right away.

20 Q And I will address that with you,  
21 Mr. Wolson. And you've mentioned getting a letter  
22 from the judge, and this of course is what brings  
23 you back to court on September 12th, 2007, and I  
24 would like to ask you some questions about  
25 September 12th, 2007. But prior to that I will

1 put the letter that you've referred to in to  
2 evidence, and that is found at R-2.91.59. So  
3 again volume R-2.91.59, at page 3252, and that  
4 should be marked as the next exhibit.

5 THE CLERK: Exhibit 212.

6 (EXHIBIT 212: R-2.91.59, Letter from  
7 Chief Judge Wyant to Mr. Minuk and Mr.  
8 Wolson, August 31, 2007)

9 BY MR. CLIFFORD:

10 Q You will have that document and you  
11 can comment on it.

12 A I have my original, I'm sure it is the  
13 same.

14 You know, when we go back on the 12th,  
15 and we eventually get into a discussion with the  
16 judge, and the judge takes up with Mr. Minuk, is  
17 this a plea bargain? And he takes it up with me,  
18 he tells me, he gives me his view of what a plea  
19 bargain is. And it is interesting to note this  
20 letter starts off by saying:

21 "I'm contemplating rejecting the plea  
22 bargain..."

23 To me, anybody knowledgeable with the criminal  
24 justice system would know, first of all, when  
25 charges are stayed and you plead to one, when

1 there is a joint recommendation, the judge was  
2 told in chambers, although not on the record on  
3 August 22, that the Crown had difficulties. I  
4 think anybody in the criminal justice system would  
5 twig to the fact that it is a plea bargain. But I  
6 think it is quite clear that this judge was of  
7 that view, despite his questions of us on  
8 September 12th, and he refers to it as a plea  
9 bargain.

10 Q Mr. Wolson, I will follow up with you  
11 on that issue because I understand that you have  
12 something to say with respect to the Manitoba  
13 jurisprudence on that point. But I will come back  
14 to that.

15 A Thank you.

16 Q But this letter, which has now been  
17 filed as an exhibit, is what brings both you and  
18 your colleague, Mr. Minuk, back to court on  
19 September 12th for further argument. And what we  
20 can see here quite clearly is that pursuant to the  
21 jurisprudence that exists in Manitoba, he ought to  
22 notify counsel of his intention and give you a  
23 full opportunity to be heard on the concern that  
24 he has. And he articulates this concern as being  
25 the fact that the offence was committed by a

1 police officer and that a higher standard of  
2 conduct is expected of a person in this position.  
3 So that's the only area of concern that's being  
4 raised to you, to give you the heads up, so to  
5 speak, when you come back on September 12th, is  
6 that right?

7 A It is. But I take the view that you  
8 are entitled, when you go back, to raise other  
9 issues. And I have to tell you, Mr. Commissioner,  
10 I can't recall, and I have gone back in my mind, I  
11 can't recall when a judge has rejected a plea  
12 bargain in one of my cases. I don't have that  
13 experience. I know that it can happen.

14 THE COMMISSIONER: But how can the  
15 judge reject the plea bargain? He doesn't  
16 bargain, you and the Crown can bargain. What he  
17 can reject is the proposed sentence.

18 THE WITNESS: Of course.

19 THE COMMISSIONER: He didn't reject  
20 the plea bargain. I think you must have  
21 misunderstood that here, because in my view,  
22 rightly or wrongly, you don't reject a plea  
23 bargain. What he should have said is I don't  
24 agree with the joint submissions and to call you  
25 back.

1                   THE WITNESS: And I accept that,  
2 because the plea bargain is mine and Minuk's. But  
3 I take the position, and I haven't had this  
4 experience, but when we do go back, I take the  
5 position that I'm free to raise issues, to clarify  
6 issues, to convince him as to the fact that he  
7 should consider our recommendation seriously. And  
8 what I did, so that you know, because the issue --  
9 I realized, and I wasn't happy that I didn't deal  
10 with the issue of consumption well. It is oral  
11 advocacy and I just wasn't happy with how I dealt  
12 with it.

13                   So we go back on the 12th and before  
14 that time I phoned Minuk and I say to Mr. Minuk,  
15 I'm going to raise this issue. I think that we've  
16 gone away from what we had resolved and I'm going  
17 to raise that consumption is not a basis or an  
18 underpinning of this plea, that there is no proof  
19 of it. Historical anecdotal evidence is not  
20 proof, and I'm going to raise that with the judge.  
21 And I said to him, I'm assuming you don't have an  
22 issue with that, because that's our agreement.  
23 And I said, I don't want to be in a position where  
24 you do take issue with that, contrary to our  
25 agreement, and attempt to call evidence, for

1 instance. I said that would, in my view, be not  
2 consistent with the agreement that he and I had.

3 BY MR. CLIFFORD:

4 Q So I understand then, Mr. Wolson, that  
5 you got in touch with him after the letter of  
6 notification of the judge's concern, but prior to  
7 going into the courtroom to deal with it, and you  
8 advised Mr. Minuk that you were going to put on  
9 record that the guilty plea and the facts  
10 surrounding the guilty plea were the driving, and  
11 not the alcohol consumption?

12 A I would never go back and put that on  
13 the record without talking to him first. Because  
14 that was -- I mean, that would be an improper  
15 thing to do. So I talked to him, and not only did  
16 I talk to him about that, I put that conversation  
17 on the record.

18 Q Did you ask him if he would take issue  
19 with it in court?

20 A I did.

21 Q And what was his response?

22 A He would not.

23 Q Okay. Before we go further,  
24 Mr. Wolson, and I apologize for this, I want to  
25 bring you back to the 17th?



1           A     The 17th?

2           Q     The 22nd, pardon me, there is one  
3 point I wanted to raise --

4           A     Sure.

5           Q     -- before we get a little bit further,  
6 and that simply deals with the practice to file a  
7 joint case book. And is this something that is  
8 typically done in serious cases such as this?

9           A     It happens, it happens more at an  
10 appellate level where you save some paper and some  
11 trees, and you will discuss the case book that's  
12 going to be filed. And if we are on the same  
13 page, it will be a joint case book. I don't have  
14 a problem with that, and had no issue with that.  
15 I think his -- one of his juniors researched the  
16 area, he told me the cases that he had. I think I  
17 asked him to include a couple of others, but I was  
18 content with it. I thought it was a fair  
19 representation.

20                     I had argued this issue of dangerous  
21 driving causing death about a year earlier in a  
22 case called Burfoot. And I had used in that case  
23 many of the cases that were in this case book that  
24 Mr. Minuk had prepared and that I signed off on.  
25 And the cases weren't new to me. They were, in my

1 view, a representation of Manitoba Court of Appeal  
2 decisions, I think there were three, Manitoba  
3 Court of Queen's Bench decisions and Manitoba  
4 Provincial Judges' decisions. So we had in that  
5 book a fair assessment of what courts had done in  
6 this province on this type of offence.

7 Q Thank you, Mr. Wolson. Now going back  
8 to September 12th, and you have been called back  
9 into court by the Chief Judge. And I'm going to  
10 put a proposition to you, Mr. Wolson, and ask you  
11 whether you agree with me, because there was a  
12 great deal said on September 12th, in court, but  
13 would you agree with the proposition, sir, that  
14 much of it could be distilled down to really two  
15 general themes that day that caused great concern  
16 to the judge. One centred around the factual  
17 underpinning of plea, the anecdotal historical  
18 evidence. And the other centred around the  
19 existence of what would be termed a quid pro quo  
20 plea bargain that supported the joint  
21 recommendation. And almost ironically, the one  
22 topic that probably got less air time was the  
23 concern that was articulated in the letter, that  
24 being the fact that the individual was a police  
25 officer.

1 Do you agree with that general  
2 synopsis?

3 A Sure, it is a fair read.

4 Q That's the read I take, and I don't  
5 know whether others do, but I appreciate the fact  
6 that you do, Mr. Wolson, and I want to ask you  
7 some questions about what took place on  
8 September 12th.

9 Now, you recognized, of course, that  
10 you were being called back, and I take it that you  
11 are prepared to deal with the issue that the judge  
12 has raised, the concern about the police officer?

13 A There was a case book filed regarding  
14 police officers on duty and off duty, that was  
15 filed, as well as some cases on joint submissions,  
16 joint recommendations and plea bargains. And I  
17 was absolutely prepared to deal with that, but I  
18 had intended to raise the issue and clear up my  
19 own point that I wanted to raise, that this plea  
20 was predicated on, from my perspective, on  
21 driving.

22 Q Okay. What I would like to do is,  
23 looking at the proceedings of the day, if we  
24 could, I think it would be most effective if we  
25 dealt with the two issues separately.

1                   Let me deal first, if I may, with the  
2   issue of the joint submission for sentence.  Would  
3   you agree, Mr. Wolson, that here in the Province  
4   of Manitoba there is jurisprudence to the effect  
5   that when a judge considers whether to go along  
6   with a joint recommendation for sentence, that  
7   greater weight or discretion would be given to a  
8   submission where the judge understands that it is  
9   based upon a quid pro quo exchange amongst  
10  counsel?

11                A       There is an appellate court decision  
12  on that, and that is the state of the law here in  
13  Manitoba.

14                Q       And this issue is raised by Chief  
15  Justice Wyant, and he spent some considerable time  
16  asking Mr. Minuk about this and making comments to  
17  Mr. Minuk about that issue.  And he expressed both  
18  surprise and concern with respect to the fact that  
19  it was being presented to him in that way on  
20  September 12th, 2007.  And Mr. Minuk, and we will  
21  hear from him, indicated to the judge, well, look,  
22  that is the case, this is what you are dealing  
23  with, a quid pro quo plea bargain which is the  
24  foundation for my joint recommendation for a  
25  conditional sentence.

1                   Was that always your understanding,  
2 Mr. Wolson, that that is indeed what the joint  
3 recommendation was based upon?

4           A       It was. And you know, you would know  
5 better than anybody, everyone in this room, that  
6 this case is riddled with problems. It has, the  
7 investigation was horribly flawed. There are  
8 legal issues. So, in effect, what the accused is  
9 doing in this plea bargain is he is giving up the  
10 right to try those triable issues. And on that  
11 basis we've, as between Mr. Minuk and myself,  
12 we've come to this agreement. But it is not just  
13 an agreement that, in my view, speaks to the  
14 weaknesses or flaws of the Crown's case, it is  
15 still an agreement which is clearly, in my  
16 respectful view, within the range of penalty to be  
17 imposed for these types of offences. We are  
18 clearly in that range of our Court of Appeal, our  
19 Queen's Bench and our Provincial Judge's Court.

20                   THE COMMISSIONER: What were the  
21 triable issues that he was giving up on the  
22 dangerous driving causing death? What do you say  
23 they were?

24                   THE WITNESS: Well, I think an  
25 argument could be made, as I mentioned this

1 morning, there is case law in Manitoba, the  
2 Sloboda decision of our Court of Appeal, where  
3 driving not too dissimilar from his was not viewed  
4 as a marked departure from the norm. So, I think  
5 he had, not a case that was horribly strong on  
6 that, but a case that I think, if there had been  
7 no plea arrangement, I would have been happy to  
8 proceed and argue Sloboda as being a factor. And  
9 you know, although it wasn't relevant at that  
10 time, within a few months of Sloboda, which would  
11 have been prior to the trial of this matter, the  
12 Supreme Court in Beattie came down, and Beattie  
13 supports on a dangerous driving that these facts  
14 may not be dangerous driving. That is -- I'm only  
15 making -- I'm only saying to you that I think  
16 there is an argument to be made there. It is not  
17 pie in the sky, it is an argument to be made,  
18 coupled with the fact that I think this  
19 investigation, where on paper a policeman is told  
20 what to put in his notes and what not to put in  
21 his notes, I think would cause potentially a trier  
22 of fact to have a difficulty here.

23 THE COMMISSIONER: Do you think the  
24 three different decisions in Beattie can be  
25 reconciled into one general principle in support

1 of what you've just said?

2 THE WITNESS: I think you can argue  
3 from Beattie in the Supreme Court. Obviously, the  
4 Court of Appeal decision on Beattie, which was  
5 reversed by the Supreme Court, and that's what we  
6 had in Manitoba at the time, was not favorable to  
7 my position. But if you take a read of Sloboda, I  
8 think there is an argument to be made. I don't  
9 think that it is an overwhelming argument, but I  
10 think it is an argument I was prepared to try.

11 BY MR. CLIFFORD:

12 Q Mr. Wolson, you've expressed your view  
13 that the joint recommendation for the conditional  
14 sentence was truly reflective of a quid pro quo  
15 plea bargain. Do I take it that you didn't have  
16 any difficulty sensing from Judge Wyant, through  
17 the proceedings on September 12th, that he was  
18 having some difficulty, at least initially with  
19 that concept?

20 A I think the difficulty he was having  
21 wasn't raised in August.

22 Q And if I could refer you to page 29 in  
23 the August -- pardon me, in the September 12, 2007  
24 transcript. So we are now dealing with exhibit 9.

25 A We may be on different pages. Do you

1 mind telling me what the words are and I will try  
2 and find it?

3 Q I'm looking at page 29, line 7, and  
4 there is a comment made by the Court:

5 "But I didn't hear you at any time in  
6 the previous submissions, nor even  
7 here, say this was really a plea  
8 bargain."

9 A Yes, I have that.

10 Q Okay. So I will continue.

11 "But I didn't hear you at any time in  
12 the previous submissions, nor even  
13 here, say that this was really a plea  
14 bargain until you said exigencies on  
15 plea bargain, but that quotes the  
16 Manitoba Court of Appeal, all right,  
17 and quotes it properly. But I still  
18 don't see how this is a plea bargain  
19 and exigencies other than you telling  
20 me that it is. Because the factual  
21 basis..."

22 and I am putting emphasis on here, Mr. Wolson,

23 "...you guys presented to me doesn't  
24 seem to justify that. Do you see my  
25 problem?"



1 The reason I raise that and put that emphasis is  
2 he is harkening back to the factual basis. Do you  
3 understand him to be, and I'm not asking to you  
4 read his mind, but as counsel, did you understand  
5 it to be a situation where he was still operating  
6 under the notion of having the combined factors of  
7 alcohol consumption?

8 A He may well be, because at that time I  
9 hadn't spoken to the issue. I obviously don't  
10 speak to the issue until I'm called on to speak.

11 Q And when you are called upon to speak,  
12 if I could refer you to page 39, line 13, you will  
13 see yourself being referenced there, Mr. Wolson?

14 A Yes.

15 Q So does the preceding passage prompt  
16 you to indicate at page 39, line 13, as follows:

17 "That alcohol does not play a part in  
18 the plea of the accused. I had  
19 indicated to you that I thought this  
20 was the case of in effect not keeping  
21 a proper lookout, that there was a  
22 departure from the norm, I say to you,  
23 by inference that you would have  
24 accepted that by accepting the guilty  
25 plea."

1           A     Well, I had intended to, when we came  
2 back on the 12th, I had intended to put that  
3 position clearly to him. What he had said to  
4 Mr. Minuk earlier had no effect on that, I was  
5 going to make this statement to him because, in  
6 fact, that was in my view the basis of our plea  
7 arrangement.

8           Q     And you are very firm with the court,  
9 further down the page at line 25 where you  
10 indicate:

11                     "I thought that I made it very clear  
12 to the Court that I don't accept that.  
13 I don't accept the consumption of  
14 alcohol being any part of this plea.  
15 I said that to you in terms at page 59  
16 when I responded to you and I say it  
17 to you again today."

18           A     I actually thought, when we started  
19 this process, coming back on the 12th, I thought  
20 that Mr. Minuk was sort of laying the ground work  
21 for the fact that I was going to make the  
22 submission, because when we came back he started  
23 with Gardiner. I think at page 12 and earlier he  
24 was quoting Gardiner. And Gardiner, I don't know  
25 if we are still on the same page, but Gardiner, at

1 least in my report at page 12 says the following:

2 "Gardiner stands for the proposition  
3 that all of the facts, in particular  
4 any aggravating facts upon which the  
5 Crown relies at a sentencing hearing,  
6 are facts that the Crown must be able  
7 to prove beyond a reasonable doubt.  
8 Accordingly, if the facts put forward  
9 by the Crown at a sentencing hearing  
10 are disputed by the accused who admits  
11 the essential ingredients of the  
12 offence, the Crown will be called upon  
13 and required to adduce evidence to  
14 prove the disputed facts."

15 So I thought what he was doing by referring to  
16 Gardiner was, because I had -- he and I had  
17 discussed the issue about consumption, that he was  
18 in effect laying the ground work in his own way.  
19 And then I, of course, made my submission when I  
20 address the court.

21 And you know, on that note, Mr. Minuk  
22 dealing -- which was my position all along,  
23 dealing -- I'm not sure we are on the same page,  
24 but page 33 of the September 12th transcript.

25 Q Yes?

1           A     I think we are. Mr. Minuk addresses  
2 the issue of anecdotal historical evidence in the  
3 Gardiner sense, he knows I'm going to take issue  
4 with that. And what he says is, page 33 line 5:

5                     "That we had some historical anecdotal  
6 evidence and to the extent that it is  
7 historical and anecdotal may not even  
8 be admissible at trial.

9           And if Your Honour is of the view that  
10 by saying historical anecdotal  
11 evidence would be a comment Your  
12 Honour that the Crown was of the view  
13 that that evidence was admissible. I  
14 would think that that is not -- that  
15 type of language does not convey the  
16 evidence to be admissible."

17 So, in effect, it doesn't pass the Gardiner test,  
18 it doesn't pass. I would never have agreed to it,  
19 and that's, even in his own language, evidence  
20 that, in my view, should not have been considered  
21 by the judge in this two-pronged approach that the  
22 judge had.

23           Q     But, of course, you harken back, I  
24 take it, to August 22nd, where the judge was  
25 expressing to Crown counsel, look, do I understand

1 that the marked departure is predicated upon a  
2 combination of alcohol consumption and the  
3 unexplained accident?

4 A And that was to me a departure from  
5 our understanding, his and mine, Mr. Minuk's and  
6 mine.

7 Q In any event, you are quite clear on  
8 September 12th, with the judge, look, this is not  
9 something that you are agreeing to, it ought not  
10 to form the basis of a factual underpinning to the  
11 plea. And then there is an exchange between the  
12 court again and Crown counsel. And you've  
13 discussed the atmosphere in the courtroom on the  
14 prior occasion, on the 22nd. What is the  
15 atmosphere in the courtroom on September 12th,  
16 when these exchanges are taking place?

17 A It is tense.

18 Q Mr. Minuk is put to a question, for  
19 all intents and purposes, as to whether he is  
20 going to prove alcohol consumption?

21 A Yes.

22 Q And putting aside for a moment the  
23 value of doing so, or not doing so, it was  
24 something that, I take it, you recognized as  
25 experienced counsel, for whatever it was worth,

1 the court was interested in, whether there would  
2 be proof on that point or not?

3 A Well, he asks Mr. Minuk if he is going  
4 to try to prove that.

5 Q And I take it, based on your  
6 communications with Mr. Minuk, your only  
7 expectation was that he would not try to prove it,  
8 based on your agreement with him?

9 A Without question.

10 Q And when there was a request made for  
11 an adjournment, did you speak to Mr. Minuk about  
12 what he was going to do, what happened during the  
13 adjournment, whether his position was evolving,  
14 changing or departing from your agreement?

15 A You know, I think he attended to  
16 whatever it was he was doing, and he told me  
17 afterwards, I think he had phoned either Slough or  
18 Kaplan and run this position by them. But, I  
19 mean, from my perspective, I couldn't have  
20 imagined that he was going to do something  
21 contrary to what he had told me already, that he  
22 wasn't going to do that. And I should tell you  
23 that I had put on the record on the September 12th  
24 hearing, I put on the record in two separate  
25 places that I had told Mr. Minuk that I was going

1 to raise this issue about alcohol consumption not  
2 being part of this plea. And I put it on the  
3 record at page 40, of September the 12th.

4 Q Let's make sure, Mr. Wolson, that we  
5 are --

6 A We are on the same page -- let me see.

7 Q Could you read part of that in,  
8 please?

9 A Yes, we are on the same page, page 40.  
10 I start at line 10, and I again say to the judge:

11 "I should have said alcohol isn't an  
12 issue in this case."

13 And then as we go down to line 23, page 40, I say:

14 "That's the position I take and I've  
15 taken that position, I believe it is  
16 pretty clear that I was pretty clear  
17 on that, and I want to be clear on  
18 that today, so I told Mr. Minuk that I  
19 would be articulating this prior to  
20 today and I want that to be clear on  
21 the record."

22 Then I do it again at page 60, and this is where  
23 the judge, you've just mentioned it, Mr. Clifford,  
24 where the judge is putting to Mr. Minuk, are you  
25 going to prove, attempt to call evidence on this

1 historical anecdotal area. And Minuk, at page 60,  
2 asks for a couple of minutes. And then, again, I  
3 put it on the record, page 60, line 4, I say the  
4 following:

5 "I can tell you, as I said earlier,  
6 I've raised this point prior to  
7 articulating it today, I have raised  
8 it with my friend in advance of today  
9 and the answer that I received was one  
10 that I expected in the circumstances."

11 And Judge Wyant says at line 10:

12 "I would have expected that you  
13 would."

14 I'm never going to come into this  
15 court and make -- take a position that I hadn't  
16 raised with counsel. And I did it in what I  
17 thought was the most gentlemanlike way that I  
18 could do it, by telling him that I was going to do  
19 this and ensuring that he was of the same view as  
20 me, that that was our arrangement.

21 Q And, in fact, do I understand that he  
22 confirmed with you that he wouldn't take issue  
23 with you putting it on the record?

24 A Yes, of course not.

25 Q Now, before we move further ahead in



1 time, during that hearing, you referred in your  
2 testimony, Mr. Wolson, to the fact that when there  
3 was an adjournment that Mr. Minuk contacted either  
4 Slough or Kaplan?

5 A I think he told me that.

6 Q And that's what I want to learn from  
7 you, sir. And could you provide as detailed as  
8 possible evidence on that exchange?

9 A It would have been in passing. He  
10 just, I think he retired, he had his cell phone  
11 with him. I think he came back and said that he  
12 talked to one of them, I'm not sure who, or maybe  
13 both of them, and came back and indicated that he  
14 wasn't going to call any evidence, which is quite  
15 frankly what I had anticipated before we started  
16 the 12th.

17 Q So you understood that he made a  
18 telephone call on his cell to one or both of those  
19 individuals?

20 A That's what I was told.

21 Q And from that point on in the  
22 sentencing, we see that Chief Judge Wyant wants to  
23 satisfy himself that the Crown is aware, of  
24 course, that the plea is now grounded in the  
25 unexplained accident, that those are essentially

1 the facts surrounding the plea to dangerous  
2 driving?

3 A Yes.

4 Q And you got to, I take it, where you  
5 wanted to be on that point, on September 12th?

6 A I put the position that I believed was  
7 the correct position, the one that we had agreed  
8 to from the beginning.

9 Q Mr. Wolson, there were other issues  
10 that were raised. They didn't have the  
11 prominence, of course, that the issue of the joint  
12 submission and the factual underpinning, but one  
13 of the issues that the court raised with you a  
14 number of times, in fairness to you, and in fact  
15 pressed you to a certain extent was your client's  
16 ability to recall and, of course, your ability to  
17 relay certain facts to the court. And you on a  
18 number of occasions made reference to a head  
19 injury and how that affected his ability to  
20 recall. And of course, bearing in mind, sir, that  
21 there is still the issue of solicitor/client  
22 privilege, I want you to expand on that, sir. And  
23 I asked you during our interview, where did you  
24 get this information, sir, that he had suffered  
25 head trauma and resultant memory loss?

1           A     I got it from, A, a family member, and  
2     I got it in a way that would now -- I'm in this  
3     position of privilege, my statements on the record  
4     are quite clear, and I will rely on those if you  
5     are content with that.

6           Q     I understand that to be your position.

7           THE COMMISSIONER:   Can you take me to  
8     that part?

9           THE WITNESS:   I think it is at page 63  
10    of September 12th.

11   BY MR. CLIFFORD:

12          Q     Mr. Commissioner, what I could do for  
13    the benefit of yourself, sir, and other counsel,  
14    and certainly the witness, in order to be  
15    complete, is I am confident that I have covered  
16    every time, during all of the proceedings, where  
17    this would have been raised.  Somebody might find  
18    another one, so if we wanted to refer to  
19    August 22nd, page 46, line 22, so exhibit 8.

20          THE COMMISSIONER:   Let me get that  
21    again, August 22nd.

22          MR. CLIFFORD:   Page 46, line 32.

23   BY MR. CLIFFORD:

24          Q     And because we have such a wonderfully  
25    organized disclosure method here, I will give you

1 all of the details, volume J, tab J.62, page 46 in  
2 the transcript, 1663 in the overall disclosure in  
3 exhibit 8.

4 Mr. Wolson, at that point there is  
5 reference to as follows:

6 "He has never tried to make excuses,  
7 he has been forthright in what he can  
8 remember. He received what they  
9 believe is a concussion at the time of  
10 this incident but he has always  
11 thought only of the family of Crystal  
12 Taman."

13 A That's in August, August 22?

14 Q That's right?

15 A Yes.

16 Q Then further at page 61, line 16, or  
17 15:

18 "I think, quite frankly, that that may  
19 well have happened, but I don't know  
20 that and Derek doesn't know that  
21 because of the head trauma that he  
22 suffered. So I can't tell you that  
23 but I think that may have happened."

24 I won't recite the balance of the paragraph. You  
25 are referring to case law.

1 A Yes.

2 Q Then, Mr. Commissioner, if we go to  
3 the next exhibit, exhibit 9, and that's at volume  
4 J, tab J.63?

5 THE COMMISSIONER: Excuse me, I'm just  
6 making a note here. Go ahead. Give me that  
7 again.

8 MR. CLIFFORD: J63.

9 THE COMMISSIONER: Yes.

10 MR. CLIFFORD: Page 43, line 15.

11 BY MR. CLIFFORD:

12 Q Mr. Wolson, at this passage there is  
13 further reference as follows:

14 "Yes, I was indicating that I was  
15 responding to some questions you had  
16 for me last time, I indicated to you  
17 that Harvey-Zenk had gone from work  
18 and gone to a friend's place and left  
19 to go home. He doesn't -- there was a  
20 head injury, I can't relate to you the  
21 circumstances of how the accident  
22 occurred. It is unexplained. I would  
23 expect that perhaps he did fall  
24 asleep, I don't know. But I can tell  
25 you, as I said last time, that's the

1 position of the accused, this is not  
2 an offence of anecdotal evidence which  
3 should play a part in your reasoning  
4 for sentence."

5 There is a further reference at page 61, at line  
6 10. It would be better to start at line 4. And I  
7 indicated, when I put the question to you,  
8 generally, that the court was pressing you, and  
9 this is one of the instances where I see this. So  
10 page 61, line 4.

11 "THE COURT: All right. Let me just  
12 then -- I will move on for a moment, I  
13 will come back to that. The head  
14 injury, this is, I take it, gentlemen,  
15 a documented head injury as a result  
16 of the accident that has caused lack  
17 of memory?

18 MR. WOLSON: That's the position I  
19 advance to you. I don't know  
20 whether -- I didn't seek a medical  
21 report on that issue, I can only tell  
22 you that's the position that was  
23 advanced to me from the beginning, and  
24 that's what I advance to you."

25 At page 64, again, the court brings up at line 8

1 as follows, Mr. Commissioner, it is page 64, line  
2 8:

3 "The next point then is because of the  
4 nature of the head injury of which --  
5 do I -- and I'm not trying to put you  
6 on the spot, Mr. Wolson, I understand  
7 that obviously there is certain  
8 presumptions that still apply, but  
9 there is no other information that you  
10 can present to me, medical reports or  
11 otherwise?

12 MR. WOLSON: I was advised that the  
13 air bag deployed, that he hit quite  
14 firmly. I can tell you that an  
15 additional fact, although it is not  
16 quite on point but you may wish to  
17 know this. I indicated to you last  
18 time that Dr. Davis had suggested that  
19 he seek further help, and he sought  
20 out and has two meetings with a doctor  
21 in Brandon, Dr. Richard..."

22 last name unclear on the transcript.

23 The final reference that I see is at  
24 page 65 -- actually, it would be at page 64, line  
25 29, ending on page 65, line 4. You have indicated

1     here, sir:

2                     "You know, I've asked him that on some

3                     occasions and he doesn't have a firm

4                     recollection of what preceded the

5                     accident in the hours before, and we

6                     have had a discussion about that. I

7                     can tell you that one of the officers

8                     at the scene thought he was in a state

9                     of shock when they dealt with him. I

10                    can only tell you what I'm advised. I

11                    don't normally seek out medical

12                    evidence like that, that isn't

13                    something that I would ordinarily do.

14                    I'm advancing a position that I've

15                    been told and that's what I tell you."

16     Subject to somebody else finding further

17     references, Mr. Wolson, those seem to be the

18     passages where you address on many occasions the

19     head injury or the trauma and corresponding memory

20     loss. And I understand it, sir, that your

21     position, bearing in mind the privilege that

22     exists, is that that's what you had to say about

23     it. If I put the same questions to you today it

24     would be a similar position and you stand by that?

25                    A     Yes, thank you.



1 Q Do you recall who the family member  
2 was that you spoke to?

3 A I think it was the mother.

4 Q All right. Mr. Wolson, I'm going to  
5 raise a question with you here that might provide  
6 some assistance to evidence that we heard in the  
7 first phase of the Commission, and that deals with  
8 the victims' issues.

9 At the end of the September 12th, '07  
10 sentencing hearing, and I may be wrong on the  
11 date, but I think I've got it right, was there a  
12 security concern that was raised and had to be  
13 addressed on that day?

14 A There was a security concern that was  
15 raised by me shortly after August the 22.

16 Q The Commission has heard evidence with  
17 respect to Mr. Harvey-Zenk being in a courtroom,  
18 and then there being some concern about whether he  
19 was going to exit the courtroom and whether he  
20 might have gotten treatment to go out a side door  
21 or another exit door.

22 Do I understand, sir, that you, and I  
23 believe I speak for counsel here when I indicate  
24 that the Commission is not interested in the  
25 minutia of detail on what caused this, but you

1 received what could be characterized as a serious  
2 threat, it was either directed to, it was  
3 ambiguous, but either to Derek Harvey-Zenk's  
4 family or perhaps even your own?

5 A Yes.

6 Q Which caused you to notify the  
7 authorities in major crime here in Winnipeg?

8 A I did.

9 Q And also court security?

10 A I didn't do court security. The judge  
11 was made aware of the situation.

12 Q That's what I was referring to?

13 A The police were and the judge was.

14 Q And do I understand that as a result  
15 of that, steps were taken on September 12th, with  
16 respect to the exiting of the courtroom?

17 A I can't tell you what security did,  
18 that is the security that were there. I'm quite  
19 sure there were more sheriff officers there after  
20 this, because the concern I had was that it could  
21 have come from inside the courtroom, that is from  
22 somebody who was inside the courtroom. And I had  
23 indicated to one of the security officers,  
24 sheriff's officers, I had notified him as well  
25 just as we were in the courtroom, I said, would

1 you mind keeping sort of a look at the people in  
2 the courtroom and see whether you think there is  
3 anything that we should know about.

4 Q And in terms of the assessment of the  
5 threat, in terms of whether it was a bona fide  
6 concern, am I correct that the threat was left by  
7 way of a voice mail on your telephone?

8 A It was, yes. And I had given police  
9 service major crimes access to that voice mail so  
10 they could listen to it and they could do what  
11 they thought they should do under the  
12 circumstance. It was without question a bona fide  
13 issue.

14 Q Moving forward now, Mr. Wolson, to the  
15 October sentencing, October 29th, 2007. We have  
16 the exhibit of the judge's final ruling, but there  
17 were some intervening occurrences and I wanted to  
18 ask you about those, sir.

19 Could the witness be provided with  
20 volume S-99, please?

21 MR. CLIFFORD: Mr. Commissioner, would  
22 this be an appropriate time for the afternoon  
23 recess?

24 THE COMMISSIONER: How much longer do  
25 you think?

1 MR. CLIFFORD: I am not going to be  
2 much longer, this is in fact the final --

3 THE COMMISSIONER: Let's finish it and  
4 then we will adjourn. While you are at it, carry  
5 on.

6 MR. CLIFFORD: All right.

7 THE COMMISSIONER: Volume S?

8 MR. CLIFFORD: Tab 99, page 3499.

9 THE WITNESS: Is this the letter from  
10 the judge?

11 MR. CLIFFORD: Yes, it is. And does  
12 the witness have that, Madam Clerk?

13 THE WITNESS: I have a copy, my own  
14 copy.

15 MR. CLIFFORD: Exhibit 210.

16 THE WITNESS: This is the October 19,  
17 2007 letter?

18 BY MR. CLIFFORD:

19 Q Indeed it is, Mr. Wolson, October 19,  
20 2007. You are moving towards your sentencing  
21 hearing, and I understand that you were furnished,  
22 along with your colleague, Mr. Minuk, with this  
23 correspondence from Judge Wyant?

24 A I was.

25 Q What was your reaction to this,

1 Mr. Wolson?

2 A I was shocked.

3 Q And could you elaborate on that?

4 A I had never heard of a judge giving a  
5 sentencing live on the radio. It is not something  
6 that's happened in this jurisdiction. I'm not  
7 aware that it has ever happened. But I'm even  
8 more shocked that the judge seemed to make up his  
9 mind without consulting with counsel, because he  
10 says:

11 "Please be advised that the court has  
12 been approached by CJOB."

13 First of all, I'm a little taken aback that there  
14 would be some communication between CJOB, which  
15 is, Mr. Commissioner, a local radio here in  
16 Winnipeg. I'm surprised there would have been  
17 that communication while a judgment is on reserve.  
18 But he says:

19 "Please be advised that the court has  
20 been approached by CJOB with a request  
21 to broadcast my decision with respect  
22 to the above-noted case on October 29,  
23 2007 by live feed. Upon careful  
24 consideration of the request, I have  
25 approved it, subject to stringent

1 conditions."

2 And he goes on to say, I don't need to read it  
3 all, it is there for you. He says in the last  
4 paragraph, he said:

5 "It can reasonably be anticipated that  
6 other media outlets will become aware  
7 of CJOB's plan to broadcast this live  
8 feed and may make similar requests.  
9 It is the view of the Court that  
10 notification ought to be given to  
11 other media of this granted controlled  
12 access."

13 So I'm absolutely taken aback by it.

14 Q Sir, at page 3500 at tab S-99, you  
15 should see a copy of your correspondence that very  
16 day?

17 A Yes, I write -- I think this came in  
18 by -- I have my own documents, is it here? I will  
19 just go --

20 Q I just want to make sure, Mr. Wolson,  
21 and I'm fairly confident that this is the case,  
22 that your correspondence comprises part of the  
23 exhibit as well?

24 A Well, this is what I say. I say:  
25 "I've received your fax..."

1 because it came in by fax from the judge,  
2 "...October 19 at 3:34 p.m. regarding  
3 the above captioned individual. I was  
4 unaware that the court had been  
5 approached by CJOB wishing to  
6 broadcast your decision on October 29,  
7 2007 by live feed. I was also unaware  
8 you would approve the request of this  
9 media agency."

10 And then, of course, I ask for -- to be allowed to  
11 make submissions as to the appropriateness of this  
12 process. And that's faxed to the judge and hand  
13 delivered to the judge that afternoon.

14 Q I understand, sir, that you became  
15 aware of the fact shortly thereafter that the  
16 judge had changed his position on allowing the  
17 live media feed into the courtroom for the  
18 sentencing?

19 A I think I got a fax back indicating  
20 that we don't need to set a date for arguing the  
21 appropriateness of it because he has withdrawn his  
22 consent of that.

23 You know, I had heard about this, or  
24 at least Mr. Minuk had called me, I believe, and  
25 he told me that he had heard this rumour that this

1 was going to happen. And I said to him, it can  
2 never happen, it just couldn't be. And then I got  
3 this document and it was happening.

4 Q There is one other piece of  
5 correspondence I wanted to ask you about in  
6 connection with this issue, and that is found at  
7 volume R-2.91.79.

8 A Is this Mr. Minuk's email to me?

9 MR. CLIFFORD: Yes, it is, and we will  
10 get it entered as the next exhibit.

11 THE CLERK: Exhibit 213.

12 (EXHIBIT 213: R-2.91.79, Email from  
13 Martin Minuk to Richard Wolson sent  
14 10/19/07 at 4:54 p.m.)

15 MR. CLIFFORD: I'm going to give the  
16 full reference again, volume R-2.91.79, page 3307.

17 BY MR. CLIFFORD:

18 Q It is quite evident here that word  
19 gets around pretty fast. Mr. Minuk is in Bangkok  
20 and he is emailing you at --

21 A 5:00 in the morning.

22 Q Apparently. And he is referring to  
23 the fact that there is going to be a media issue,  
24 and he makes reference, in fact, to the  
25 conversation that you just told the Commission



1 about, that contrary to your thoughts or belief  
2 that it would never happen, he learned otherwise  
3 as well. But what he makes reference to here, and  
4 I wanted to ask you about, is he states, or asks:

5 "If you are planning any challenges or  
6 motions for bias and recusal, please  
7 let me know as soon as you can."

8 And I wanted to ask you, Mr. Wolson, was there  
9 anything in the conversation you had with  
10 Mr. Minuk that would form the basis of him asking  
11 you that question or raising that issue?

12 A I've never made such a motion. What I  
13 would have done, quite frankly, in these  
14 circumstances, is I would have gone back before  
15 the judge and tried to convince him that what he  
16 had agreed that he was going to do was  
17 inappropriate. I would have challenged him on  
18 that. I actually thought at this point the matter  
19 was going to be going to the Court of Appeal. I  
20 thought that -- that was my mindset at the time.

21 Q And so do I understand from your  
22 response that, no, Mr. Minuk hadn't said anything  
23 to you that would form the basis of this --

24 A Not that I recall at all.

25 Q -- communication?

1           A     No.

2           Q     And I wanted to follow up with you on  
3     the issue of your expectation that you were going  
4     to the Court of Appeal. Do I understand that you  
5     were ready to do so in the event that the judge  
6     didn't accede to the joint recommendation for  
7     sentencing?

8           A     In a heart beat.

9           MR. CLIFFORD: Mr. Commissioner, it is  
10    3:30, could we take our afternoon recess?

11          THE COMMISSIONER: Thank you.

12          (Proceedings recessed at 3:30 p.m.  
13          and reconvened at 3:45 p.m.)

14          THE CLERK: Order. All rise. This  
15    Commission of Inquiry is now reopened. Please be  
16    seated.

17          MR. ZAZELENCHUK: Mr. Clifford  
18    informed me, Mr. Commissioner, that he is through  
19    with his direct evidence.

20          THE COMMISSIONER: Yes, I assumed he  
21    was.

22          MR. ZAZELENCHUK: Madam clerk, I  
23    wonder if you could give Mr. Wolson exhibit 176.

24    BY MR. ZAZELENCHUK:

25          Q     Sir, that's a photocopy. Can you

1 confirm for me if that's in your hand?

2 A It is.

3 Q And it appears to be a numbered  
4 witness list for the preliminary inquiry that  
5 didn't take place?

6 A That's right.

7 Q And am I correct in assuming that this  
8 would have been given to you by Mr. Minuk as a  
9 courtesy, as Crowns often do to defence counsel,  
10 telling them when the witnesses can be expected to  
11 be called?

12 A It is. I don't recall today when I  
13 got this. But, of course, I was writing down as  
14 he was telling me, because as you know, there is a  
15 lot of disclosure here and you would like to focus  
16 in on certain witnesses at certain times.

17 Q Absolutely. And I figured that out,  
18 but I just wanted you to confirm that for me.  
19 Thank you, sir.

20 A I will leave all of these exhibits  
21 over here.

22 Q Now I want to ask you a few questions  
23 about the threat that you received. I accept your  
24 evidence that you received it, but I want to get  
25 some details on what happened afterwards. You say

1 it was on your voice mail?

2 A It was at my office.

3 Q I see.

4 A I will tell you exactly, it was  
5 August 22nd, it was the evening of August 22nd. I  
6 had left Winnipeg to go to Grand Forks, North  
7 Dakota. Mr. Commissioner, that's about 150 miles  
8 south of Winnipeg. Our firm was having a meeting,  
9 a firm meeting there, a bonding weekend so to  
10 speak, so that we would talk about issues in the  
11 office and things of that nature. While I  
12 normally check my voice mail fairly often, I  
13 didn't, and I checked it that evening, and a  
14 message was there that caused me a lot of concern.  
15 I raised it actually with the other people in my  
16 firm, because we were all there, and I said this  
17 is the message, what do you think I should do?  
18 And I ended up calling the police service,  
19 advising them.

20 Q That's what I was getting to, sir. So  
21 you called the police service. Did anybody from  
22 the police service interview you or come down and  
23 listen to the voice mail?

24 A I think I gave them my access code, so  
25 that is how to access my voice mail. And they did

1 so on the understanding they wouldn't listen to  
2 any other messages, as you can imagine, but only  
3 this one. And I trusted them. And they listened  
4 to the message and took whatever action they  
5 thought, including relating it to Derek  
6 Harvey-Zenk.

7 Q Did you have any further contact with  
8 the police service with respect to this threat  
9 after that?

10 A I think they came to my office to  
11 see -- they wanted to -- I was away, but I invited  
12 them there on the Monday. No one was there I  
13 don't think on the weekend. So I invited them to  
14 come in, and sometimes on my voice mail you can  
15 check a time or even a phone number, if one were  
16 foolish enough to use a phone with a phone number.

17 Q Okay. So you spoke to them and they  
18 went so far as to come to your office. Okay,  
19 thank you sir. One last point: You mentioned  
20 that you received extensive disclosure and we can  
21 go to it, if necessary, but as I went through the  
22 material I think the disclosure came in four  
23 parts, there were at least four different  
24 disclosures.

25 A I had them put in binders in my office

1 and they occupied two binders and then a file, an  
2 accordion type file.

3 Q One of the items of disclosure that  
4 you received was the traffic accident report  
5 filled out by Mrs. Beattie and by your client,  
6 correct?

7 A Yes.

8 Q And you also received a CD with 26  
9 interviews on it?

10 A Which interviews were those?

11 Q Those were with the Winnipeg Police  
12 officers?

13 A What I had in my disclosure and what I  
14 used was a summary of each of the interviews that  
15 came in to the disclosure. Did I open the CD? I  
16 couldn't. Someone in my office may have, but when  
17 I say I couldn't, I'm not handy in that regard.

18 Q I'm exactly like you, to me a computer  
19 and anchor are exact similars. But I'm curious  
20 about you did receive the CD, but you say you  
21 worked from summaries of it?

22 A I worked from summaries. Obviously,  
23 if the matter had gone to preliminary, I may have  
24 had more available to me. I had a junior working  
25 with me.

1           Q     And the reason I raise that, sir, is  
2     because I'm trying to be fair, and there is  
3     something that I want to draw your attention to  
4     and now you are telling me that you may not know  
5     about it, but if we could go firstly to the  
6     traffic accident report -- I'm just looking for  
7     the exhibit number, Mr. Commissioner. It is  
8     exhibit 70, and for those of us with the book it  
9     is E1.23.n. And on the fifth page of that  
10    document, we have the statement of Derek  
11    Harvey-Zenk. You see that, sir?

12           A     I do.

13                     And it says, it is very brief,  
14                     "On February 25th, 2005 at  
15                     approximately 7:00 a.m. I became  
16                     involved in a collision on  
17                     Lagimodiere. I was wearing my seat  
18                     belt at the time. My air bag  
19                     deployed. As a result of the  
20                     collision I sustained a bloody nose  
21                     and a cut to the inside of my lip."  
22                     And there is no indication here of any  
23    kind of a head trauma, you see that, sir?

24           A     I do.

25           Q     The other document that I'd like to

1 draw your attention to is exhibit 204 and that can  
2 be found at F-2.35.t.

3 A I hadn't read this, I hadn't seen it  
4 before.

5 Q And I can appreciate that, sir, and in  
6 fact that corresponds with what you told me a few  
7 minutes ago that you didn't get into the disk,  
8 that that would have been something for later.  
9 But this is a statement of -- he is referred to as  
10 constable, but I understand he was a sergeant --  
11 of Sergeant Isaac?

12 A I know Paul Isaac.

13 Q And he is the wellness officer?

14 A He is.

15 Q And if we could go to page 17 at the  
16 top, and at the bottom the number is 1177. And if  
17 we could go to line 21, we have Sergeant Pearson,  
18 the interviewer, saying:

19 "Do you know if and when he received  
20 any medical treatment?"

21 And Sergeant Isaac replies:

22 "I attended to the Concordia Hospital  
23 with him later on in the evening and I  
24 remained with him until he was seen by  
25 the attending physician. And at that



1 point all of the information that was  
2 really provided to the attending  
3 physician was this was an individual  
4 who had been up for a number of hours,  
5 partly as a result of work, and then  
6 in the morning he was involved in a  
7 motor vehicle accident and someone had  
8 died as a result of that. And it has  
9 been very distressing for him,  
10 upsetting, and what he needs is some  
11 prescription that would assist him in  
12 getting to sleep because that's an  
13 important piece. And they were fully  
14 supportive of that just from the  
15 conversations that we had."

16 Q Okay. So that was the reason for  
17 taking him to Concordia, it wasn't  
18 medical or anything?

19 A That was the only reason. The  
20 prescription was written out and he  
21 returned home, and that was the sole  
22 purpose if it."

23 This is happening in the late evening  
24 of the 25th from the context, and I believe you  
25 told us, and I accept your word without question,

1 that you weren't aware of this?

2 A Right.

3 Q You will agree with me that receiving  
4 sleeping medication is really not consistent with  
5 having a concussion?

6 MR. PROBER: I object to that  
7 question. How would this witness know? He is not  
8 a medical doctor. It is inappropriate. I take it  
9 you heard me, Mr. Commissioner?

10 THE COMMISSIONER: I have. Mr.  
11 Prober, one always hears you.

12 MR. ZAZELENCHUK: I think Mr. Wolson  
13 has cross-examined pathologists --

14 THE COMMISSIONER: I don't think that  
15 he can answer the question.

16 MR. ZAZELENCHUK: If that's the  
17 ruling, Mr. Commissioner, I will withdraw.

18 THE WITNESS: My understanding, I can  
19 tell you, was that it was the Victoria Hospital  
20 not the Concordia and when I flip the page here I  
21 see --

22 BY MR. ZAZELENCHUK:

23 Q He does in fact say that.

24 A Something about the Victoria hospital.

25 Q He does in fact say -- Officer Isaac

1 does say later on, I was going to get to that,  
2 Officer Isaac does say later on he meant Victoria  
3 when he says Concordia. You are correct on that,  
4 sir. Those are my questions, sir, thank you.

5 THE WITNESS: Thank you, sir.

6 MR. McDONALD: I have none.

7 THE COMMISSIONER: Thank you.

8 MR. LABOSSIERE: No questions,  
9 Mr. Commissioner.

10 THE COMMISSIONER: Thank you.

11 MR. WEINSTEIN: No questions.

12 MR. PROBER: No questions.

13 THE COMMISSIONER: We will get to you,  
14 sir.

15 MR. JACK: Thank you,  
16 Mr. Commissioner.

17 BY MR. JACK:

18 Q Mr. Wolson, I have just a few  
19 questions on one specific narrow detail. I would  
20 like to turn your attention to that, to give you a  
21 heads up where I'm going.

22 THE COMMISSIONER: Before you get  
23 there, I understand it is Mr. Nozick?

24 MR. NOZICK: Correct.

25 THE COMMISSIONER: I don't think Mr.

1 McFetridge ever introduced you. I'm glad that  
2 someone else did, Mr. Giasson did.

3 MR. NOZICK: I think Commission  
4 Counsel did on July 2nd.

5 THE COMMISSIONER: Did they? I didn't  
6 make a note of it, Mr. McDonald. Thank you.

7 BY MR. JACK:

8 Q Thank you, Mr. Commissioner. Mr.  
9 Wolson, if I could turn your attention to exhibit  
10 8 in these proceedings, volume J62, in particular  
11 I'm looking at page 1623. I hope that accords  
12 with the copy that you are reviewing there.

13 A I don't -- what document is this?

14 Q This is the transcript of proceedings  
15 in front of Judge Wyant on August 22, 2007?

16 A I was using my own, but that's fine.  
17 Yes, sir.

18 Q If you could, please, direct your  
19 attention on page 1623, to line 20?

20 A What page is that?

21 Q It is in the upper right hand corner,  
22 it would be page 6 of the transcript.

23 A But I'm using my own here. 1623 did  
24 you say?

25 THE COMMISSIONER: The transcript of

1 August 22nd, at page 6, yes.

2 THE WITNESS: Yes, sir.

3 BY MR. JACK:

4 Q You have got it there, Mr. Wolson?

5 A I do.

6 Q I would like to read in beginning at  
7 line 20 because it is one specific detail that was  
8 read in by Mr. Minuk on that date, with which I  
9 would like to have a discussion with you. I will  
10 read as follows, beginning at line 20:

11 "All of the people with whom the  
12 accused was with that evening were  
13 interviewed by Professional Standards.  
14 The homeowner related that the  
15 gathering came to an end at his  
16 residence when he began to clean up  
17 and retire for the evening or early  
18 morning near to or just after  
19 4:00 a.m. on February 25. He told  
20 investigators that some of his  
21 colleagues remained at his home, and  
22 when he woke around 6:30 a.m. those  
23 who had remained were ready to leave.  
24 One of those persons was the accused."  
25 Now, you've already explained the

1 process that was employed to arrive at the  
2 submissions that were made on August 22, 2007.  
3 I'm wondering if you recall having heard that  
4 specific detail submitted by Mr. Minuk on that  
5 date?

6 A Prior to that date?

7 Q First of all, do you recall that  
8 comment being made in court on August 22, 2007?

9 A It is there, and I was there, so I  
10 have to assume that I heard it.

11 Q Did it cause you any particular  
12 concern? Did you make any note of it when it was  
13 read in at that time?

14 A I didn't.

15 Q Looking at that the comment, and in  
16 particular the notion that the homeowner retired  
17 around 4:00 a.m. and awoke again at 6:30 a.m., was  
18 that consistent with your understanding of the  
19 evidence? And the homeowner they are referring to  
20 would have been Sean Black, as we've heard.

21 A You know, I haven't read his statement  
22 for a while. And what I read was the summary that  
23 was contained in the materials, because as I said,  
24 I didn't crack open that CD. So I don't know what  
25 his statement says. I had the summaries of each

1 of the individuals, and I'm sure you have that  
2 too, and I was relying on that.

3 Q Thank you. If I were to suggest to  
4 you that in the summaries or in the statements  
5 which you've indicated you didn't crack open and  
6 listen to, that in fact that was not the version  
7 offered by Officer Black and, in fact, not the  
8 version offered by any of the officers who might  
9 have also been in a position to comment on that,  
10 would that surprise you?

11 A It doesn't affect me one way or the  
12 other. I don't recall their evidence  
13 particularly. You know, I did prepare as best I  
14 could for today, but I don't recall -- if you ask  
15 me what is in those statements, I just have an  
16 overview.

17 Q Certainly. Would it be fair to say  
18 that, again, given the context in which you've  
19 just indicated, you didn't have any recollection  
20 prior to August 22, 2007, that the homeowner would  
21 have gone to sleep at 4:00 a.m., that wasn't a  
22 detail in your mind?

23 A That statement didn't cause me any  
24 thought, quite frankly. We are there on a joint  
25 recommendation. We are there having made this

1 plea bargain. I'm looking at the overall picture,  
2 is this plea bargain going to be accepted by the  
3 judge. I'm focused on that. And as to the detail  
4 of that statement, did I dissect it, did I listen  
5 to it and put stars beside it? I can't say that I  
6 did.

7 Q And that's understandable. It would  
8 be fair to say then that detail, whether you had  
9 heard it before August 22, 2007 or not, just  
10 simply wasn't sticking in your mind, especially on  
11 that date?

12 A It didn't move me one way or the  
13 other.

14 MR. JACK: Thank you, Mr.  
15 Commissioner, I have no further questions.

16 THE COMMISSIONER: Before you, Mr.  
17 Nozick, I think Mr. Green --

18 MR. GREEN: I have a few questions,  
19 Mr. Commissioner, but my friend Mr. Nozick and I  
20 have spoken, and I will go after him.

21 THE COMMISSIONER: Good, all right.

22 MR. NOZICK: Just to introduce myself,  
23 Stan Nozick, appearing as co-counsel for the  
24 government. If I might have a moment. They  
25 ushered me right out in to the back room, they



1 don't let me across this line.

2 THE COMMISSIONER: Glad to hear that.

3 BY MR. NOZICK:

4 Q Good afternoon, Mr. Wolson.

5 A Hello, Mr. Nozick.

6 Q How are you?

7 A I'm very well, how are you?

8 Q I am fine. Now that we have gone  
9 through that I have a couple of questions for you.

10 MR. PROBER: Mr. Nozick, could you  
11 lower the mic, please? You are not that tall.  
12 Thanks.

13 MR. NOZICK: I will figure this out.  
14 I always like the ones that attach to your lapel.

15 THE COMMISSIONER: That's a little  
16 higher than Mr. Prober has it.

17 BY MR. NOZICK:

18 Q In any event, Mr. Wolson, I just want  
19 to get to this area of when you decided to try and  
20 resolve this matter.

21 A Sure.

22 Q And that, I take it, was in the week  
23 before the matter was set for preliminary hearing  
24 in July; is that correct?

25 A My recollection, Mr. Nozick, it was

1 probably the Thursday, Friday before the Monday.

2 Maybe even the Wednesday.

3 Q As I understand it, having come late  
4 to these proceedings, the preliminary was  
5 scheduled to start on Monday, July the 16th?

6 A That is so.

7 Q And the Friday then would have been  
8 the 13th of July, and Thursday the 12th of July?

9 A Yes.

10 Q And it is at that point, I take it, is  
11 that when you contacted Mr. Minuk?

12 A It would have been around the  
13 Wednesday, Thursday, or Friday. Probably the  
14 Thursday or Friday is my best estimate of time.

15 Q And just while I think of it, you had  
16 no contact with either Mr. Don Slough or Brian  
17 Kaplan with the Department of Justice?

18 A On this matter?

19 Q Regarding this matter?

20 A Not a word.

21 Q Your dealings were strictly with Mr.  
22 Minuk?

23 A That is so.

24 Q And you were under the impression that  
25 Mr. Minuk had been appointed as an independent

1 prosecutor in order to alleviate any perception of  
2 bias or prejudice with respect to the  
3 investigation; is that fair?

4 A Yes. You know, Mr. Nozick, I do a  
5 fair bit of work with independent counsel. There  
6 was Mr. Minuk, there was Mr. Abra before he became  
7 a Queen's Bench judge, there is Mr. Tapper, there  
8 is -- there are a couple of others. And my  
9 understanding of it is, is that they give the  
10 courtesy of Mr. Kaplan -- are you leaving me?

11 Q Just getting my original notes made at  
12 the time or shortly thereafter.

13 A I see. They give the courtesy, I have  
14 been advised, of keeping Justice informed as to  
15 what is happening. So that's what I have been  
16 told in the past and I had no reason to believe  
17 that it was different here.

18 Q I was going to get to that in a  
19 moment. But in your memo to your file dated  
20 July 18, the one that was dictated on July the  
21 16th, that's exhibit 18 in these proceedings, and  
22 it is also found, Mr. Commissioner, at volume S at  
23 page 3501 and the tab would be S100.

24 A I have got that.

25 THE COMMISSIONER: I had it a few

1 minutes ago.

2 MR. NOZICK: Here it is, got it.

3 BY MR. NOZICK:

4 Q So you had these discussions with Mr.  
5 Minuk on the 12th or 13th of July, you had the  
6 court proceeding on July 16 in which the matter  
7 was adjourned until the next day, July 17th,  
8 correct?

9 A That's so.

10 Q And after court it looks like you went  
11 back to your office and dictated this memo to  
12 file, correct?

13 A I did some time on that day, so --

14 Q Well, you refer, "we appeared in court  
15 this morning, adjourned the matter for one day,"  
16 so obviously you went back and would have done  
17 this memo?

18 A Sure.

19 Q And in the memo you say there is going  
20 to be a guilty plea tomorrow before Judge Wyant  
21 and he will be seized; correct?

22 A That's what I say.

23 Q Okay. We can follow along the  
24 bouncing ball here. Then you indicate that the  
25 intention was to talk to Judge Wyant in advance,

1 correct?

2 A Yes, it is, it was my intention.

3 Q I will get back to that in a moment.

4 And then Marty, Mr. Minuk, is going to send me a  
5 letter outlining our discussions and confirming  
6 our plea bargain. And then you say he has vetted  
7 it with his superiors. Do you see that?

8 A Yes.

9 Q I have taken a long time to come to  
10 this point, but what did you mean -- that's your  
11 word "vetted", I take it, correct?

12 A It is. Of course, it is my word, it  
13 is my memo, it is my word.

14 Q Mr. Minuk didn't say to you "I'm going  
15 to vet it with my superiors?"

16 A I don't know what words he used. The  
17 impression that I got was that he was going to --  
18 I had said to him, you take this discussion of  
19 mine and you deal with it with the people who you  
20 have to deal with it. And obviously he must have  
21 told me Slough and Kaplan, because I put it in my  
22 memo. I just wouldn't put it in there otherwise.  
23 But whether the word "vetted" was used or whether  
24 the word "discuss", I can't tell you. This is my  
25 memo on my file. It is all that I can tell you.

1           Q     Now, you've had extensive experience  
2     in dealing with independent counsel in many other  
3     cases?

4           A     I have.

5           Q     In fact, have you been independent  
6     counsel for the Government of Manitoba yourself?

7           A     No. I have never prosecuted.

8           Q     In any event, what has your experience  
9     been in dealing with other independent counsel  
10    with respect to their consulting or not with  
11    members of the Department of Justice?

12          A     My experience is that they do consult,  
13    and I have been told that. I was told that by Mr.  
14    Abra. As a matter of fact, we had a case some  
15    months prior to his being appointed a Queen's  
16    Bench judge and I asked him about it as we were  
17    together, and he said to me, I look at it this  
18    way: They are my client in effect, I'm giving  
19    them the courtesy of a discussion, telling them  
20    what I'm planning to do. I'm independent, but I  
21    owe it to them, the courtesy of discussing it with  
22    them.

23          Q     And in this particular case, is it  
24    your assessment that the responsibility for making  
25    the decisions that were made in this case would

1 fall to the independent prosecutor, Mr. Minuk?

2 A No doubt about that in my mind.

3 That's why they have independent counsel.

4 Q Exactly. Now, I wanted to talk a bit  
5 about this plea bargain. Now, I take it, as I  
6 understand it, a plea bargain encompassed many  
7 things; is that fair?

8 A Sure.

9 Q And in this case it was a two-prong  
10 plea bargain, correct?

11 A It was charge and sentence.

12 Q So, the first part of the plea bargain  
13 was what charges is the accused prepared to enter  
14 pleas of guilty to and what charges are the Crown  
15 prepared to enter stays of proceedings?

16 A Correct. There was only one charge  
17 that he was prepared to enter guilty to, at least  
18 that I articulated to Mr. Minuk.

19 Q And he eventually plead guilty to the  
20 one charge of dangerous driving causing death?

21 A Yes.

22 Q And the Crown entered stays of  
23 proceedings to the other three charges, the  
24 refusal, the impaired driving and criminal  
25 negligence causing death?

1           A     You are correct, sir.

2           Q     And that part of the plea bargain is  
3 not reviewable by a court, is that fair? That is  
4 a judge -- the Crown has the sole discretion as to  
5 what charges they are going to proceed on?

6           A     A charge that's stayed is a charge  
7 that's stayed. It should not be a factor on any  
8 sentence.

9           Q     So the judge does not have any  
10 jurisdiction to interfere with a charge that is  
11 stayed by a Crown Attorney; do you agree with  
12 that?

13          A     I accept that.

14          Q     And it was your assessment on the  
15 evidence of this particular case, that the staying  
16 of these charges was more than reasonable, I take  
17 it; is that fair?

18          A     I thought that it was a reasonable  
19 thing to do. I thought the whole plea bargaining  
20 was reasonable.

21          Q     And so do I. And we will get to that  
22 part --

23                   THE COMMISSIONER: I am sorry?

24                   MR. NOZICK: I said so do I and we  
25 will get to that part.



1 THE COMMISSIONER: I don't think you  
2 should express your opinion. I think you should  
3 ask questions.

4 MR. NOZICK: I apologize.

5 BY MR. NOZICK:

6 Q In any event, the second part of the  
7 plea bargain is with respect to what sentence  
8 would be proper under the circumstances, keeping  
9 in mind the facts of the case, and the case law in  
10 respect thereto; is that fair?

11 A It is.

12 Q And it was your assessment after  
13 reviewing the facts and the case law that the  
14 joint recommendation with respect to a conditional  
15 sentence was a reasonable disposition; is that  
16 fair?

17 A Absolutely fair. I thought that it  
18 was well within the range of accepted cases in  
19 Manitoba by all courts in this province, that is  
20 by all levels in this province.

21 Q And what you wanted to do, as a  
22 responsible counsel, you wanted to make sure that  
23 whomever the judge was going to be, if possible,  
24 would meet with you and the Crown Attorney and  
25 give you an indication with respect to whether

1 they were prepared to accept the joint  
2 recommendation or whether they had any other  
3 problems in respect thereto; is that fair?

4 A Well, it is to a point. My experience  
5 is, particularly in the later years, judges don't  
6 necessarily say, yes, I will agree. But if they  
7 have problems, they will give you and tell what  
8 you what their problems are and give you a chance  
9 to, when you come to court, deal with those  
10 problems. So I never really -- I mean it would  
11 have been nice if Judge Wyant had said in bold  
12 black letters, I agree, but I never really  
13 expected that. I just wanted to see if he had  
14 issues. And at the end of the day, Mr. Nozick, I  
15 took from our conversation with him, while he  
16 didn't articulate the words to me, I had no  
17 difficulty in my experience concluding that he was  
18 going to accept this joint submission of ours.

19 Q And at the meeting with Judge Wyant  
20 you advised him that your client was a police  
21 officer that was then under suspension; correct?

22 A You heard me say that, yes, that's  
23 absolutely correct.

24 Q And did you advise Judge Wyant that by  
25 virtue of his guilty plea that he would be losing

1 his employment?

2 A I said he would either volunteer  
3 retirement, retire, or he would be terminated.

4 Q So in addition to whatever disposition  
5 the court may make, there were some other  
6 ramifications that were coming to your client by  
7 virtue of a plea of guilty to the charges; is that  
8 fair?

9 A Well, there was his job and there was  
10 also, while the plea bargain was that there was  
11 not going to be a court ordered prohibition, I  
12 know from my dealing with these matters, that the  
13 motor vehicle branch will automatically suspend on  
14 charges of this kind, so I knew that he was facing  
15 ramifications. I knew he was facing a lot of  
16 ramifications. A conditional sentence is a real,  
17 it is a real sentence. It carries with it -- it  
18 is in effect a jail term in the community.

19 THE COMMISSIONER: Is it an automatic  
20 suspension under your Highway Traffic Act?

21 THE WITNESS: It is, sir.

22 THE COMMISSIONER: How long?

23 THE WITNESS: It would be five years.

24 I think it is a category B listing, and that would  
25 list dangerous causing death, impaired causing

1 death and a variety of the more serious matters.  
2 And the difference being that if it were a  
3 prohibition, you can't appeal to the motor vehicle  
4 branch. If it is a suspension, you can appeal to  
5 the Licence Suspension Appeal Board and argue, if  
6 they are satisfied that it is not contrary to the  
7 public interest and there is need, that there may  
8 be some kind of conditional licence imposed.

9 BY MR. NOZICK:

10 Q And at the same time Mr. Minuk, you  
11 say, briefly recited some of the facts to Judge  
12 Wyant; is that correct?

13 A He did.

14 Q And part of those facts were the  
15 manner of driving, I take it?

16 A I would expect that. I can't  
17 articulate them today. He gave him sort of a  
18 precis of the evidence.

19 Q Something similar to what he presented  
20 to the court on August 22nd?

21 A No, it was much less.

22 Q But a summary of what he said on  
23 August 22nd?

24 A I'm sure it would have been included  
25 in that. I have never looked at it that closely.

1 But I would think that he would have told him the  
2 nature of the allegation. This is a common place  
3 thing when you meet a judge in these  
4 circumstances.

5 Q I mean, that's the purpose of going to  
6 the meeting is to basically inform the judge the  
7 basis of what is going to happen, or you think is  
8 going to happen?

9 A I agree with that.

10 Q And these things are fairly informal,  
11 as I understand it?

12 A It was a very congenial meeting. It  
13 was informal. We were around -- not his desk, but  
14 he has a table in the office. We sat around that.  
15 People don't take notes. I certainly don't take  
16 notes. I'm in pre-trials, as you know now, Mr.  
17 Nozick, pre-trials are mandatory in Provincial  
18 court in any matter that is over a day, so we have  
19 these pre-trials all of the time.

20 Q On a regular basis?

21 A It is.

22 Q And that pre-trial as opposed to a  
23 resolution hearing, I take it, is there a  
24 difference or --

25 A Well, the resolution hearing, the

1 judge tries to see if you can resolve the case. A  
2 pre-trial is to talk about issues of timing and  
3 what issues are going to be the issues of the  
4 case, are there charter issues, are there issues  
5 that would cause a court to have to prepare in  
6 advance. This is different than both of those in  
7 some respects because we are meeting the judge  
8 informally prior to entering our plea. And, you  
9 know, I have done that not just here in Manitoba,  
10 I have done it in Ontario, I have done it in the  
11 Northwest Territories, at least in those  
12 jurisdictions, maybe in some others that I don't  
13 remember.

14 Q And you were aware, of course, that  
15 the Crown would have some grave difficulties in  
16 proving its case, at least with respect to the  
17 drinking and driving part of the case?

18 A I thought that they had a huge burden  
19 ahead of them.

20 Q Even with respect to the dangerous  
21 driving, is that correct?

22 A With the dangerous driving, I went  
23 through my exercise in my own mind, I thought they  
24 would have some issues. I pegged it at what I had  
25 said earlier, I thought if I fought the case I

1 would probably have a 15 to 30 per cent chance  
2 when you combine the case law and when you combine  
3 what I thought was a trier of fact may have a  
4 total lack of confidence in this investigation  
5 where there are issues that, at least on paper,  
6 that a policeman said and did things which you  
7 wouldn't expect a policeman to do.

8 Q By that you are referring to Constable  
9 Woychuk alleging that Chief Bakema had asked him  
10 to leave things out of his notes. Are you aware  
11 of that?

12 A Of course I'm aware of that.

13 Q And there was a suggestion that there  
14 was a coverup. Was that part of the information  
15 that you had at that time?

16 A Well, I certainly had enough  
17 information that I could have exploited that had  
18 the matter gone to court, and with the purpose of  
19 having the trial judge or jury not have confidence  
20 in this evidence and raise a reasonable doubt. I  
21 pegged it at about 10, 12 per cent on the law, and  
22 10, 12 per cent on the other issues. So about a  
23 one in four chance.

24 Q And that's akin to section 24(2) of  
25 the Charter where the evidence may bring the

1 administration of justice into disrepute; is that  
2 fair?

3 A Well --

4 Q Same type of argument?

5 A Well, I think I would argue to a jury  
6 at the end of the case that they couldn't have  
7 confidence in this evidence.

8 Q What was your election, by the way?

9 A The election I think was Queen's Bench  
10 judge alone. But as you know, what I do generally  
11 is I hear the evidence at the preliminary hearing  
12 and I will either re-elect at that time, or I will  
13 leave it as that election. I hadn't gotten that  
14 far in my mind because I didn't know how this  
15 evidence would play out.

16 The difference is, Mr. Commissioner,  
17 you have evidence on paper, sometimes in a  
18 courtroom things happen differently and that's  
19 sort of what any trial lawyer knows, that  
20 sometimes things don't play out the way you would  
21 expect them to for either the better or the worse.

22 Q You mentioned that you would have  
23 relied on the Sloboda case, 2007, MJ-163, the  
24 decision of the Manitoba Court of Appeal, had you  
25 taken the matter to trial, correct?



1           A     I would have argued some parallel to  
2     Sloboda.  It just so happens, but I didn't know it  
3     at the time, that Beattie would have been resolved  
4     by this time if we went to trial.  But, you know,  
5     cases are always distinguishable, as you know, Mr.  
6     Nozick, you are a veteran of the courts, and it  
7     depends on the ability of the lawyer to convince a  
8     trier of fact.  So I would have tried for sure.

9           Q     And the facts in Sloboda are  
10    remarkably similar to the facts in this particular  
11    case?

12          A     There are differences but there are  
13    similarities, so you do what every trial lawyer  
14    would do in the circumstances.

15          Q     Now getting to what happened in court  
16    with respect to this quid pro quo that has been  
17    discussed by the Manitoba Court of Appeal and it  
18    is also called a true plea bargain based on  
19    exigent circumstances; is that correct?

20          A     I can tell you, Mr. Commissioner, that  
21    when you go to court these days and you are  
22    sitting there waiting for your case to be heard,  
23    you hear those phrases now all of the time.  I  
24    didn't hear them as much prior to this matter, but  
25    I hear them all of the time, exigencies, it has

1     become the buzz word.

2           Q     That's because of the Sinclair case  
3     and the Lamarand cases, and that line of cases  
4     that are referred to in the transcript; is that  
5     correct?

6           A     That's correct.

7           Q     Were these exigencies or problems with  
8     the Crown's case pointed out to Judge Wyant in  
9     chambers?

10          A     All that Mr. Minuk said, to my recall,  
11     is that I have some problems with my case. I  
12     don't recall that he articulated what they were.  
13     But he indicated that he had problems.

14          Q     But Judge Wyant is a judge with  
15     tremendous experience?

16          A     Judge Wyant was a defence lawyer, then  
17     he became a Crown lawyer, then he went to the  
18     bench and then he became Chief Judge.

19          Q     He has lots of experience, correct?

20          A     Of course he does.

21          Q     Was it your assessment that based on  
22     what was said to him in the chambers, that he at  
23     least ought to have been aware that there were  
24     exigent circumstances in the Crown's case?

25          A     If the Crown had difficulties with its

1 case, he heard that, so it was articulated by Mr.  
2 Minuk.

3 Q Did it come as a surprise to you  
4 during the course of these proceedings that Judge  
5 Wyant took issue with the way the case had  
6 initially been presented to him by Mr. Minuk vis a  
7 vis a joint recommendation, vis a vis exigent  
8 circumstances or true plea bargain, did that come  
9 as surprise to you at all based on what had  
10 happened in chambers?

11 A Well, I didn't -- I didn't expect what  
12 happened on the 12th of September to play out the  
13 way it did. There was quite a challenge and there  
14 was a to and fro between the judge and counsel.

15 Q I appreciate that, and I've read the  
16 transcript. But I'm asking you whether it came as  
17 a bit of a surprise to you that Judge Wyant was  
18 taking that position on September 12th, given what  
19 was said to him in chambers beforehand?

20 A Well, what was said in chambers was in  
21 July. We were there in September. Was I  
22 surprised by it? Well, as I said, it was  
23 unexpected. I didn't expect that kind of volley  
24 to happen.

25 Q You told us that after the meeting in

1 chambers on July the 17th that it wasn't -- Judge  
2 Wyant didn't guarantee or say I'm going to do A, B  
3 or C, but based on what was said, in particular to  
4 the reference to the manslaughter case that you  
5 articulated, it was your full expectation that he  
6 would probably follow the joint recommendation or  
7 the plea bargain; is that fair?

8 A I go beyond that. I thought he was  
9 simply going to accede to the recommendation.

10 THE COMMISSIONER: He didn't tell you  
11 that, though, did he?

12 THE WITNESS: Absolutely not.

13 THE COMMISSIONER: And if he had, it  
14 wouldn't have been proper for a judge to tell you  
15 that I am going to go along with it.

16 THE WITNESS: He should keep his  
17 judicious independence, and he did.

18 THE COMMISSIONER: Yes. Go ahead.

19 BY MR. NOZICK:

20 Q But based on your extensive  
21 experience, it was your view at the time?

22 A It was my view. As a matter of fact,  
23 on that point, Mr. Commissioner, I produce a memo  
24 where I say that Judge Wyant didn't confirm as one  
25 would expect. In other words, I'm reminding

1 myself that he has this judicial independence.

2 Q What did you take from the reference  
3 to what he was going to do in the manslaughter  
4 case, that is impose a conditional sentence, that  
5 morning?

6 A I took that as message to us, that if  
7 he was going to give a conditional sentence on a  
8 manslaughter -- I don't know why he mentioned it  
9 to us. It had no bearing on our discussion,  
10 unless he was telling us that that's what he would  
11 do in our case. That's how I read it. You know,  
12 lawyers are always trying to read judges and  
13 that's my read of the situation.

14 Q And were you given a false sense of  
15 security with respect to that, do you think, in  
16 retrospect?

17 THE COMMISSIONER: I don't think  
18 that's a fair question. He is not here -- do you  
19 expect to have called Judge Wyant?

20 MR. NOZICK: No.

21 THE COMMISSIONER: All right.

22 MR. NOZICK: I won't pursue that,  
23 Mr. Commissioner, I appreciate that.

24 THE COMMISSIONER: That would be  
25 better.

1 MR. NOZICK: I have no problem with  
2 that.

3 BY MR. NOZICK:

4 Q Now it was your view at all times, I  
5 take it, that the consumption of alcohol really  
6 ought not to play part in the factual underpinning  
7 of the charge of causing death by dangerous  
8 driving?

9 A You have my position on that, yes.

10 Q You have told us several times. And  
11 you discussed that with, Mr. Minuk, I take it  
12 beforehand?

13 A I did, of course.

14 Q And Mr. Minuk made the comment in  
15 chambers initially that there was anecdotal  
16 historical evidence of drinking?

17 A Yes.

18 Q Did you say anything at that time?

19 A No, I wouldn't say it at that time in  
20 chambers, but I did speak to him after that, not  
21 that day. I will tell you what happened, we went  
22 to do the plea and then I was distracted with  
23 something else. I had another matter that I was  
24 attending to. In other words, we went, we entered  
25 the plea, what I believe was the entering the

1 plea, Mr. Commissioner, and we departed.

2 Q On July 17th?

3 A Yes.

4 Q And you subsequently had a discussion  
5 with him with respect to whether he should refer  
6 to any evidence of drinking; is that correct?

7 A I did.

8 Q And do you recall when that discussion  
9 took place?

10 A It would have been when he prepared  
11 his remarks. He had his remarks prepared and he  
12 read me what he was going to say. So, whenever --  
13 I can't put a date to it, but it was certainly  
14 well in advance of August the 22nd.

15 Q And during the course of his  
16 submission, he again used the same phraseology?

17 A He did. But he prefaced it with what  
18 he said at page 6, August 22.

19 Q And at that time you didn't want to  
20 make a mountain out of a mole hill, I take it, and  
21 you made the comments that you did, believing at  
22 that point in time that Judge Wyant was still  
23 going to go along with the recommendation; is that  
24 fair?

25 A I dealt with it and I told you what I

1 thought of how I dealt with it. And I did, I  
2 thought that Judge Wyant would still accede to the  
3 recommendation.

4 Q Right. In retrospect if you had to do  
5 it all over again, you might have done it a little  
6 bit differently; is that fair?

7 A Of course, with the benefit of  
8 hindsight and looking at the transcript as I did,  
9 I think I'm better than that.

10 Q You are very good. Sorry. I don't  
11 want to take issue with your qualifications. We  
12 can all learn from the benefit of hindsight, and  
13 it seems that at this point in time I'm going to  
14 suggest to you that if you had to do the whole  
15 case over again, that you might have dealt with  
16 the consumption of alcohol as opposed to whether  
17 or not impairment was at issue?

18 A If I had it to do over again with what  
19 I know now, I would have had written undertakings.  
20 I would have had -- perhaps, I guess that would  
21 have done it. If I had had a letter, the letter  
22 that I expected from Mr. Minuk that I put in my  
23 memo, sure. Obviously, who would want an issue?  
24 And if this is an issue, I wouldn't want it.

25 THE COMMISSIONER: How about an agreed



1 statement of fact?

2 THE WITNESS: Well, if I had a letter  
3 it would suffice. An agreed statement of fact  
4 would have been helpful too, obviously. In  
5 hindsight, even though that's not how I ordinarily  
6 practice, I ordinarily take counsel at their word,  
7 I ordinarily don't expect a problem, and I think  
8 Marty Minuk is an honourable guy. I don't think  
9 he was trying to be sharp with me at all.

10 BY MR. NOZICK:

11 Q It was just a misunderstanding that  
12 was clarified in the end; is that fair?

13 A I think you can say that.

14 Q Now, with respect to the importance of  
15 whether or not -- the importance of the  
16 consumption of alcohol, I take it that you will  
17 agree with me that the consumption of alcohol per  
18 se or by itself doesn't prove impairment?

19 A Of course not.

20 Q And do you agree -- there was no road  
21 side screening test taken in this case?

22 A That's all Woychuk could have done,  
23 because all he said was "I smelt a slight odour."  
24 The law is if you reasonably suspect alcohol in a  
25 suspect's system, you could ask for a road side

1 alert. That's all he could have done. He didn't  
2 do that. There was no road side alert.

3 Q There was some other evidence, as I  
4 understand it, there was an ambulance driver or  
5 two who smelled some alcohol while Mr. Harvey-Zenk  
6 was in the back seat --

7 A I offset that by Bakema spending time  
8 with the accused, seeing no symptoms. And I  
9 offset that by Woychuk who was in the car with him  
10 for a considerable period of time, where in  
11 Woychuk's statement said I couldn't observe any  
12 symptoms.

13 Q Now. There is no question that had  
14 you taken this case to trial you would have argued  
15 these very real defences?

16 A Whether I take them to trial or I  
17 don't, I'm not going to agree to something that I  
18 don't think the Crown can prove.

19 Q The issue is there may have been some  
20 basis for the officers, based on the smell that  
21 the ambulance drivers smelt, based on Graham  
22 saying he smelled alcohol in the vehicle, based on  
23 Woychuk noticing a slight smell of alcohol an  
24 hour, half an hour after he comes in contact with  
25 Mr. Harvey-Zenk, to reasonably suspect that there

1 may be some alcohol in the body at that particular  
2 time?

3 A To make a road side demand?

4 Q Make a road side demand?

5 A Sure, he can do it on a slight smell.

6 Q And they didn't do that in this case?

7 A You are right.

8 Q So essentially one of the other  
9 arguments may be that there were no reasonable and  
10 probably grounds to make the breathalyzer demand  
11 later on?

12 A There was certainly no reasonable and  
13 probable grounds at the beginning, and if there  
14 weren't at the beginning, I don't know how there  
15 could have been at any time. I would have  
16 questioned Carter, how he made his findings.  
17 There were a lot of questions that one would ask  
18 if this were litigated.

19 Q Would you agree with me that in the  
20 absence of the road side screening test done  
21 shortly after the investigation commenced, that  
22 the smell of alcohol really has no probative value  
23 in this case?

24 A I'm not sure I would go that far, but  
25 you could argue that.

1           Q     Now, you received the letter of  
2 August 31st, which is R2.91.59.

3           A     Who is the author of that letter?

4           Q     It was the letter that Judge Wyant  
5 sent to counsel contemplating rejecting the plea.  
6 It is also exhibit 212, Mr. Commissioner.

7           THE COMMISSIONER: R2 what?

8           MR. NOZICK: It is R2, page 3252.

9 BY MR. NOZICK:

10          Q     So on -- I will just wait for  
11 Mr. Commissioner to find the page.

12          THE COMMISSIONER: Go ahead.

13 BY MR. NOZICK:

14          Q     He says in the first paragraph, and I  
15 think you alluded to this, "I'm contemplating  
16 rejecting the plea bargain in the above-noted  
17 matter." He uses the word "plea bargain?"

18          A     The words, yes.

19          Q     His words. Did you attach any  
20 significance to that word when it later came into  
21 issue, whether or not it was a true plea bargain  
22 or whether it was a joint recommendation?

23          A     You know, I don't really make a huge  
24 distinction as the judge did in this case.  
25 Whenever an accused gives up his right to have a

1 trial, there in effect is a quid pro quo because  
2 he is giving up his right to a trial and he is  
3 pleading guilty. So I don't take as finite a  
4 definition as the judge did. I guess the only  
5 point I make is that -- and the Commissioner made  
6 a comment on it -- he uses the words plea bargain,  
7 I would have thought he would have known this was  
8 a plea bargain. I think it is plain for anybody  
9 in the criminal justice system that when you plead  
10 to one and they stay three and you have a joint  
11 recommendation, in my opinion you are into that  
12 territory of plea bargain. What else could you  
13 bargain here?

14 Q And the plea bargain could be based on  
15 the evidence, evidence supports one charge or  
16 another, correct?

17 A Sure.

18 Q Could be based on the fact that the  
19 Crown had problems or exigencies in its case?

20 A Well, we know that the Crown had a lot  
21 of problems with its case. That's not a stretch.

22 Q No. Now, you had also discussed with  
23 Mr. Minuk, whether or not he would be calling any  
24 evidence regarding the consumption of alcohol  
25 prior to September 12th?

1           A     Whether he challenged my statement?

2           Q     Yes?

3           A     Yes, I did.

4           Q     And do you recall when that was?

5           A     It would have been sometime prior to  
6     September the 12th. I don't have the date. It  
7     would have obviously been sometime after we got  
8     this letter on August 31 and September the 12th.  
9     So that's an 11 day period, it would have been  
10    somewhere in that time.

11          Q     And at that -- tell me how this took  
12    place? Did you phone him up, did you meet with  
13    him?

14          A     Called him up.

15          Q     So you spoke to him on the phone. You  
16    said, Marty, I guess you called him, I got a  
17    problem with the anecdotal historical evidence  
18    that you referred to on August 22nd; right?

19          A     No, I said I have got a problem with  
20    this two-pronged issue, that the issue regarding  
21    driving and anecdotal historical evidence, the  
22    combination of the two. And could I have seen him  
23    in person about it? I don't know. It seems to me  
24    I called him on the phone, and it seems to me his  
25    response to me was what I had anticipated. I told

1 him I was going to raise it, and I did raise it.

2 Q All right. So he recognized that, I  
3 take it, after you spoke to him, that alcohol was  
4 not a part of the factual underpinning for the  
5 plea; is that fair?

6 A That's how I took it.

7 Q And did he immediately say, look, I  
8 agree with you, I'm not going to call any evidence  
9 to demonstrate any alcohol being consumed?

10 A I raised it. I think I said to him,  
11 my understanding or agreement was that we are  
12 dealing with driving, and that's the basis for the  
13 guilty plea. I said I'm going to put that on the  
14 record. I'm going to make my comments about  
15 consumption, and I said to him I'm assuming that  
16 you are going to agree with my position and not  
17 call any evidence, because I said we are going to  
18 get into a situation where I'm going to take  
19 strong issue with you.

20 Q And did he agree with that?

21 A I believe he did.

22 Q Did he say something to you along the  
23 lines "you are right, Richard, I'm not going to be  
24 calling evidence with respect to alcohol  
25 consumption?"

1 A Right.

2 Q And that was in the same phone call  
3 that you had with him that you are describing?

4 A It wasn't a lengthy call.

5 Q He didn't say, "I will call you back,  
6 I want to check with Mr. Slough or Mr. Kaplan?"

7 A No.

8 Q So that was his decision made at that  
9 particular time?

10 A I assume that to be the case.

11 Q When it came up in court on  
12 September 12th, you already told us that Mr. Minuk  
13 is a honourable person?

14 A Without question.

15 Q His integrity is beyond reproach;  
16 would you agree with that?

17 A I would.

18 Q When the issue came up in court on  
19 September 12th, you would have no difficulty with  
20 that, in view of his undertaking not to call that  
21 evidence, correct?

22 A I had no problem with it.

23 Q So the fact that they took an  
24 adjournment, and he told you later on that he  
25 phoned either Mr. Kaplan or Mr. Slough or both,



1 really the decision had already been made by him,  
2 correct?

3 A As far as I knew.

4 Q That's what he told you?

5 THE COMMISSIONER: He didn't tell you  
6 he was going to call Mr. Slough or Mr. Kaplan?

7 THE WITNESS: I think he told me  
8 afterwards that he had called Slough or Kaplan,  
9 and I don't remember who. But quite frankly, I  
10 thought it was surplusage that he would even do  
11 that, because I thought our understanding was such  
12 that that wasn't going to happen.

13 BY MR. NOZICK:

14 Q He was the independent prosecutor?

15 A That's right.

16 Q Who had the authority to make those  
17 kinds of decisions, correct?

18 A Of course.

19 Q Who had the responsibility to make  
20 those kinds of decisions, correct?

21 A I would think so.

22 Q And he made that decision?

23 A I would think that too.

24 Q I just want to go to these series of  
25 letters regarding the media being allowed into the

1 courtroom. I take it that you had some experience  
2 in the past with media applying to a judge to be  
3 allowed to be in the courtroom?

4 A I have.

5 Q I'm talking --

6 THE COMMISSIONER: Mr. Nozick, is this  
7 of any assistance to the Commission, on whether or  
8 not the judge wanted to allow the media in or not?

9 MR. NOZICK: I just wanted to know if  
10 Mr. Wolson had a read on why that occurred in that  
11 fashion. I will leave that to you.

12 THE WITNESS: I had no clue it was  
13 coming, and I was quite taken aback when I saw it.

14 BY MR. NOZICK:

15 Q Normal procedure would be to apply to  
16 the court beforehand and have an order one way or  
17 the other.

18 A It would be.

19 MR. NOZICK: I'm just about finished,  
20 Mr. Commissioner, you will be glad to know.

21 THE COMMISSIONER: I make no comment.

22 MR. NOZICK: Those are my questions.

23 THE COMMISSIONER: Thank you. Mr.  
24 Green.

25 MR. GREEN: I realize that it is late

1 in the day, Mr. Commissioner, but I'm assuming --

2 THE COMMISSIONER: Are you going to be  
3 some time?

4 MR. GREEN: No, I won't be long. I  
5 think we can finish things up today. I'm sure you  
6 would like to.

7 THE COMMISSIONER: I'm here whether  
8 counsel wish me to be here or not, I'm here. The  
9 only issue is whether we can finish Mr. Wolson  
10 today, I think he would like to get his evidence  
11 finished.

12 THE WITNESS: I would like to have my  
13 evidence finished.

14 THE COMMISSIONER: Let's press on.

15 BY MR. GREEN:

16 Q Mr. Wolson, of the four charges  
17 against your client, did I understand your  
18 evidence correctly that you were reasonably  
19 confident that three of them, you would gain  
20 acquittal for your client on?

21 A You know, you never know, but at least  
22 the other charges I thought were certainly, could  
23 be contested with a great deal of force, so I  
24 thought that there was a reasonable chance of  
25 success.

1 Q Right. And the refuse breathalyzer,  
2 your defence essentially would have been charter  
3 oriented; is that fair?

4 A Well, there was a demand made for  
5 blood. The circumstances, in my view, wouldn't  
6 permit a demand made for blood in this case.

7 Q Yes.

8 A And there were charter arguments, so I  
9 thought that there were multiple issues.

10 Q Okay. As far as the criminal  
11 negligence causing death is concerned, I take it  
12 you weren't overly worried about that charge in  
13 these circumstances? There didn't appear to be  
14 much evidence of reckless and wanton care?

15 A I'm always worried.

16 Q Yes, that perhaps was the wrong word.

17 A I'm always worried when there are  
18 charges before the court, always. You never know  
19 what is going to happen. But I thought, quite  
20 frankly, that the most appropriate charge here was  
21 the dangerous driving, for reasons that I had said  
22 before. I didn't think that the other charges  
23 would -- that the Crown would have an easy time  
24 with them.

25 Q All right. And you've said, as far as

1 the dangerous driving charge is concerned, that  
2 you assessed your likelihood or possibility of  
3 making out a successful defence in the 20 per cent  
4 to 30 per cent range; is that right?

5 A 20, 25 per cent is what I said. And  
6 quite frankly, that would go up or down depending  
7 on the evidence at a Preliminary Hearing.

8 Q Right. And you were aware that there  
9 was a traffic reconstruction expert who was going  
10 to be called by the Crown?

11 A Mr. Blandford.

12 Q Yes. You hadn't had an opportunity to  
13 ask him any questions, you didn't get discovery of  
14 him other than his report?

15 A I read his report. I never talked to  
16 him.

17 Q If you knew in advance, and I'm not  
18 suggesting that you should have, but if you knew  
19 in advance that you would have been able to bring  
20 out the fact that he couldn't discount the  
21 possibility of Mr. Harvey-Zenk having fallen  
22 asleep, that would be another factor in your  
23 favour, would you agree?

24 A If I could argue that this was  
25 inattentiveness as opposed to dangerous driving,

1 it would be a factor, of course, and I might have  
2 explored that with him, with Mr. Blandford.

3 Q Yes. You see, we have Mr. Minuk's  
4 memorandum, that you perhaps aren't familiar with,  
5 but he had actually canvassed that with Blandford,  
6 and Blandford had told him that he was not able to  
7 rule out the possibility of Mr. Harvey-Zenk having  
8 fallen asleep.

9 A All I can tell you is that I wouldn't  
10 have received that disclosure.

11 Q No, but assuming that evidence came  
12 out at the Preliminary, that you, through your  
13 cross-examination skills, were able to bring it  
14 out, that would enhance your chances, would you  
15 agree?

16 A I would argue that as a factor.

17 Q Now, you talked about your discussions  
18 with Mr. Minuk towards the end of August, about  
19 alcohol and calling evidence about that, and --

20 A It would have been after August 31st,  
21 after I received the letter from the judge.

22 Q Okay. All right. Prior to  
23 September 12th?

24 A That is so.

25 Q My information is that during those

1 discussions Mr. Minuk said to you words of this  
2 effect, that he agreed that he could not prove  
3 that the consumption of alcohol contributed to the  
4 manner of driving. In other words, he couldn't  
5 make the nexus between any alcohol and the  
6 accident itself. Does that accord with your  
7 recollection of what he told you?

8 A No. That's what he said at page 6 of  
9 August 22, that's what he told the judge. What I  
10 didn't understand was how he got from there to,  
11 and I'm not sure he ever did go there, quite  
12 frankly, but I'm not sure how the judge concluded  
13 that it was driving plus alcohol consumption.  
14 Because once Mr. Minuk makes a statement that he  
15 couldn't prove that the accused was affected, then  
16 there is no link between that, in my view, and  
17 dangerous driving.

18 Q Yes. And that's what Mr. Minuk told  
19 you in your discussions with him, that he couldn't  
20 make that link; is that not fair?

21 A All that I remember, quite frankly, of  
22 our discussion is this: I remember raising it  
23 with him. I remember Minuk telling me that he  
24 would not take any opposition to my putting my  
25 position on the record, and would not challenge

1 that by calling any evidence. What the words  
2 were, I don't know, but that was the effect of it  
3 and that's what I was looking for.

4 Q All right. And Mr. Minuk did tell you  
5 that he had no intention of calling evidence as  
6 respects alcohol?

7 A Without a doubt.

8 Q All right. Sir, the sentence here, as  
9 we all know, was two years less a day to be served  
10 in the community, with a number of restrictive  
11 conditions attached, plus some community service,  
12 et cetera. We've -- I think in your evidence you  
13 felt that that was well within the range of what  
14 could be expected in the circumstances of a case  
15 like this?

16 A I did.

17 Q We have received an expert report  
18 which suggests that that sentence was overly  
19 lenient, overly lenient to the point of bringing  
20 the administration of justice into disrepute?

21 A Who is the expert?

22 Q A gentleman by the name of Gover.

23 A Um-hum.

24 Q I take it that you wouldn't agree with  
25 that particular sentiment, Mr. Wolson?



1           A     That's not the law in Manitoba. We  
2     are sort of governed here by our Court of Appeal,  
3     by the Court of Queen's Bench, other decisions in  
4     the Provincial Court. I can tell you, Mr. Green,  
5     that I think three days before the judge in this  
6     case imposed the conditional sentence, I think  
7     it's judge, her name escapes me for a moment --  
8     Giesbrecht, I think Judge Giesbrecht imposed a  
9     sentence on an impaired causing death when the  
10    accused had a prior conviction for an impaired,  
11    albeit there were aboriginal issues, and you know  
12    the law in that respect, with certain inquiries  
13    that were made and reports, the Gladu report. But  
14    that I can tell you that as recently as a few days  
15    of that decision, there was a similar decision of  
16    a conditional sentence. They were at the time  
17    existent in all courts.

18           Q     Now, we also know, of course, that  
19    this accident occurred early on February 25, '05,  
20    that Mr. Harvey-Zenk was ultimately taken to the  
21    East St. Paul detachment, that he was charged and  
22    processed, and released on a promise to appear.  
23    And that there were no conditions attached to his  
24    promise to appear. Did that surprise you in any  
25    way?

1           A     Not at all.

2           Q     That wasn't unusual in your  
3 experience?

4           A     I have other cases of similar charge.  
5 I have one presently where the client was  
6 summonsed, he was hospitalized after the accident  
7 and appeared to have received a summons through  
8 the mail to appear in court. And I have another  
9 one where an accused is charged with causing  
10 bodily harm by dangerous driving, who was given an  
11 appearance notice. I don't think it is unusual,  
12 quite frankly.

13           THE COMMISSIONER:   Wouldn't it be  
14 unusual to release a man who, rightly or wrongly,  
15 was charged with impaired, considering that one of  
16 the factors that are taken into account is whether  
17 there is a likelihood that he is going to repeat  
18 the offence? And if you release him with the  
19 belief, based on the charges, that he is impaired  
20 or was impaired at the time, wouldn't that be in  
21 breach of that section?

22           THE WITNESS:   No. What happens in  
23 this province on impaired driving cases is that an  
24 accused is released to a sober person. And  
25 that's -- now, I wasn't here at the time of this

1 incident, but that's what I was advised occurred.  
2 So when you release an accused, obviously you are  
3 not going to release them on the street on his  
4 own. The police either drive that person home, is  
5 my experience, or they release them to a sober  
6 party.

7 THE COMMISSIONER: Yes. But they  
8 simply don't release him --

9 THE WITNESS: Oh, not at all.

10 THE COMMISSIONER: -- without ensuring  
11 that he is going to get home without getting into  
12 a car, walking out of the police station and  
13 getting into a car and driving again?

14 THE WITNESS: That would do violence  
15 to common sense.

16 THE COMMISSIONER: I agree with that.

17 BY MR. GREEN:

18 Q You are aware that Ms. Bueti was down  
19 at the police station?

20 A I was.

21 Q And that Mr. Harvey-Zenk accompanied  
22 her when he left the police station?

23 A I don't know if it was Ms. Bueti or it  
24 was the wellness officer.

25 Q Regardless, it was somebody who was in

1 a sober state?

2 A There is no question that no police  
3 service is going to release somebody on  
4 allegations to anyone but somebody they would have  
5 confidence in, as the Commissioner has said.

6 THE COMMISSIONER: But in this case,  
7 the evidence is by Sergeant Carter that he was  
8 instructed by Mr. Minuk to release him, and that's  
9 the point that Mr. Green was trying to make. Now,  
10 unless he was, unless there was some instruction  
11 that he be released into the custody, or driven  
12 home by someone who is capable of driving, you are  
13 not suggesting that he should be released without  
14 conditions?

15 THE WITNESS: No, the condition that I  
16 would -- that's absolutely the norm in this  
17 province is that you release somebody to a sober  
18 third party or you drive them home.

19 THE COMMISSIONER: And I think  
20 Sergeant Carter said that he assumed, or he  
21 believed that a member of your law firm --

22 THE WITNESS: Yes, Ms. Bueti.

23 THE COMMISSIONER: -- was going to  
24 drive him home.

25 THE WITNESS: Yes. And Marty Minuk

1 knows that, so he is not going to suggest to  
2 Carter, just throw him out on the street. I mean,  
3 that's never going to happen, in my opinion.

4 BY MR. GREEN:

5 Q Right. Before you commenced your  
6 remarks to the court on the September 12th  
7 appearance, Mr. Wolson, you took a couple of  
8 moments to allude to media reports?

9 A I did.

10 Q Can you tell the Commissioner why you  
11 did that?

12 A I thought they were unfair. I thought  
13 that the media reports that I'm thinking of, and I  
14 don't have the text of them before me, I thought  
15 they were an unfair characterization of Mr. Minuk,  
16 that he would be influenced by some friendship  
17 or -- I just thought it was wrong. And, you know,  
18 I am a senior member of the bar and if I see  
19 something like that, I feel it an obligation,  
20 whether it is Mr. Minuk or you or whoever it is, I  
21 feel it is my obligation to say something and I  
22 did.

23 Q And it would be fair to say that  
24 Mr. Minuk conducted himself in a professional  
25 manner throughout all of your dealings in this

1 case? Would that be fair?

2 A That's my belief. I wasn't happy with  
3 the point that he made --

4 Q Right.

5 A -- on the 22nd, but as far as I know,  
6 he is a gentleman and I've dealt with him in the  
7 past. You know, there are some people when you  
8 deal with them, you would immediately send a  
9 letter out and confirm everything. I don't have  
10 that concern with him. And for the most part, I  
11 don't have that concern with any Crown unless I  
12 have been burnt.

13 Q Right. This particular plea bargain  
14 was made in fairly quick time, is that fair to  
15 say?

16 A Yes.

17 Q And in fact, you had been preparing  
18 assiduously on the Wednesday or Thursday  
19 beforehand, and the next Tuesday you were in court  
20 making a plea bargain and starting to implement  
21 your plea bargain?

22 A You know, Mr. Green, in this practice,  
23 criminal law, many plea resolutions, plea bargains  
24 are made on the steps of the courthouse. Things  
25 happen in this business very quickly. And while I

1 never anticipated that they were going to happen,  
2 they developed rather quickly.

3 Q My point was, sir, that the letter  
4 that you alluded to or referred to in your memo  
5 from Mr. Minuk, in fact, the plea bargain that you  
6 had entered into was implemented before there was  
7 any -- the commencement of that plea bargain was  
8 implemented before any opportunity to send a  
9 confirming letter?

10 A Well, I just thought it might come in  
11 due course. But, you know, again, I don't -- and  
12 it is my practice, quite frankly, I don't always  
13 confirm by letter with the Crown when I make an  
14 arrangement. There is an element of trust. And I  
15 wasn't staying up nights wondering, boy, where is  
16 that letter. I didn't have that issue or concern.

17 MR. GREEN: Thank you very much,  
18 Mr. Wolson.

19 MS. EDWARDH: No questions.

20 MR. CLIFFORD: Mr. Commissioner, I  
21 would like to refer to volume S-95? We will mark  
22 that as the next exhibit.

23 THE CLERK: Exhibit 214.

24 (EXHIBIT 214: S-95 Remand memos)

25

1 BY MR. CLIFFORD:

2 Q Mr. Wolson, could I ask you to turn to  
3 page 3415, that would be in the lower right-hand  
4 corner of exhibit 214. This is one of your  
5 memorandums, sir, dated July 20, 2007. And in the  
6 second paragraph you've documented as follows:

7 "We referred Judge Wyant to the facts  
8 of the case and to the recommended  
9 disposition, but he would not commit  
10 himself, as one would understand."

11 You made reference in one of the responses in  
12 cross-examination to, in fact, creating such a  
13 memorandum, and I wanted to clarify with you that  
14 that was in fact the document that you were, I  
15 think, looking for?

16 A It is. That was the point that I made  
17 to the Commissioner, that I expect the judge to  
18 maintain his judicial independence. So it didn't  
19 come as a shock to me.

20 Q And the only other area of  
21 re-examination deals with exhibit 18, and that is  
22 your memorandum dated July 18th, which refers to  
23 the July 16th events.

24 A I have that.

25 Q Mr. Nozick asked you about the wording



1 that you chose, whether it was something that was  
2 stated to you by Mr. Minuk, whether it was his  
3 language. You responded that it was your  
4 language, of course, it is your memorandum. What  
5 I wanted to ask you, sir, is does your memo both  
6 capture and convey the meaning of the words that  
7 were used by Mr. Minuk?

8 A Yes.

9 MR. CLIFFORD: Thank you, that's all  
10 in re-direct. And I would like to thank you,  
11 Mr. Wolson, for attending today with counsel and  
12 assisting the Commission.

13 THE WITNESS: Thank you. Thank you  
14 very much.

15 THE COMMISSIONER: We will now rise.  
16 9:00 o'clock tomorrow morning. Is that all right,  
17 Mr. Weinstein, as senior member of the bar?

18 MR. WEINSTEIN: I would think that  
19 9:15 would be appropriate.

20 THE COMMISSIONER: Well, we wanted to  
21 accommodate Mr. Wolson today, and he has more  
22 important matters to attend to. Thank you very  
23 much.

24 THE WITNESS: Thank you, sir.

25 THE CLERK: All rise. This Commission

1 of Inquiry is adjourned until 9:00 tomorrow  
2 morning.

3 (Proceedings adjourned at 5:10 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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