

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

\* \* \* \* \*

Thursday, July 31, 2008

Volume 24

INQUIRY PROCEEDINGS

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Mr. J. Prober and  
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1 THURSDAY, JULY 31, 2008

2 UPON COMMENCING AT 8:59 A.M.

3 THE CLERK: All rise, please. This  
4 Commission of Inquiry is now open. Please be  
5 seated.

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

8 THE COMMISSIONER: Good morning,  
9 Mr. Jack.

10 BY MR. JACK:

11 Q Mr. Minuk, I have just a few questions  
12 for you. I will certainly endeavour not to be  
13 covering ground that has already been covered with  
14 you, and I think a fair bit already has.

15 I want to start by taking you back to  
16 some of the discussion you had with some of the  
17 other counsel about the involvement of the  
18 Professional Standards Unit of the Winnipeg Police  
19 Service, the PSU?

20 A Yes, sir.

21 Q And you've already confirmed numerous  
22 times that you were aware at the beginning of  
23 March 2005 that the PSU was becoming involved in  
24 assisting in the investigation?

25 A Yes.

1           Q     And you were asked by Mr. Weinstein  
2     whether or not you had any qualms about that, and  
3     we have your response on that. I would take it  
4     even further. Apart from not having any qualms,  
5     would it be fair to suggest that at that point, in  
6     early March 2005, you actually viewed it as a  
7     positive thing that the PSU was getting involved?

8           A     Well, I'm glad that somebody was  
9     getting onto it, yes. I didn't have any problems  
10    with PSU, so...

11          Q     So, generally positive reaction from  
12    your perspective?

13          A     Yes.

14          Q     And certainly nothing ever stated by  
15    you to the contrary?

16          A     No, no, no.

17          Q     Okay. At any point throughout the  
18    investigation?

19          A     No, no.

20          Q     And we also learned that on March 7,  
21    2005, and I believe Mr. Zazelenchuk was putting  
22    some of the specific dates to you from Sergeant  
23    Poole's notes, it appears that you had a  
24    conversation with Sergeant Poole wherein he  
25    advised you that the Branigan's aspect was going

1 to be starting --

2 A Right.

3 Q -- on March 17, 2005? And again, you  
4 had no concern with PSU interviewing the civilian  
5 witnesses?

6 A No.

7 Q And in fact, given the investigation  
8 that needed to occur again, you would have viewed  
9 that aspect of their involvement as a positive  
10 thing?

11 A Yes. Anything being done by  
12 investigators on the investigation would be good.  
13 It's to get on with it and do the job.

14 Q Thank you. And so, again, it follows  
15 that at no point did you express concern or  
16 disapproval?

17 A No, I never expressed any concern  
18 regarding Professional Standards.

19 Q Thank you. Now, I just want to turn  
20 again to an area that was canvassed by several  
21 counsel, I think last by Mr. Labossiere. And this  
22 is with respect to some apparent contradictions  
23 from your perspective in some of the evidence.  
24 And by that I mean, firstly, referring to the  
25 evidence of Sean Black?

1           A     Yes, sir. I am familiar with the  
2     issue, yes.

3           Q     Yes, I don't need to cover that  
4     territory. And also referring to the apparent  
5     contradiction, from your perspective, with respect  
6     to the evidence of Humniski and Anderson?

7           A     Right.

8           Q     Okay. And you were asked by  
9     Mr. Labossiere whether or not you disclosed any of  
10    that to the defence, this apparent contradiction,  
11    from your perspective?

12          A     If I could what?

13          Q     If you had disclosed any of that, if  
14    you had contacted Mr. Wolson to disclose it?

15          A     I think I indicated that I hadn't,  
16    because our conversations had to take a turn to  
17    the issue of settlement. And had we gone back to  
18    the issue of the hearing, I would have met with  
19    each of the officers beforehand and heard what  
20    they had to say, and wouldn't have told Mr. Wolson  
21    anything different than I would have, of course,  
22    been reminded of that I might have otherwise  
23    overlooked.

24          Q     So apart even from the issue of  
25    disclosure or defence, I'm wondering whether it



1 entered your mind whether any further  
2 investigation needed to occur. So apart from  
3 disclosing to Mr. Wolson, I'm wondering whether or  
4 not you had made any contact to the PSU?

5 A I didn't make any contact because the  
6 timing was such, sir, that these officers were  
7 interviewed in the days leading up to the  
8 Preliminary, as I recall it. And then I know that  
9 there was an abrupt change of direction.

10 Q Okay. And so you would confirm  
11 therefore that you didn't --

12 A No.

13 Q -- contact PSU requesting further  
14 investigation?

15 A No.

16 Q Okay.

17 A I don't think PSU became involved at  
18 all, ever, after they submitted their report on  
19 anything, sir.

20 Q Okay. Not that you had requested them  
21 to?

22 A Pardon me?

23 Q Not that you had requested them to  
24 either?

25 A No.

1 Q Okay. And specifically with the  
2 evidence of Humniski and Anderson, and again I  
3 believe it was canvassed in great detail. There  
4 was just one comment you made in your evidence in  
5 chief when asked by Mr. Paciocco, and I have made  
6 note of it, that when you were referring to this  
7 second version, if you will, wherein you reported  
8 in your September 20 --

9 A Right.

10 Q -- September 20, 2007 report that they  
11 indicated some level of impairment and that was  
12 affecting their memory. I noted in your testimony  
13 that you used the phrase that that was the  
14 impression you got. At one point you used that  
15 phrase. And so I just wanted to explore that with  
16 you because, again, to my mind when one uses that  
17 phrase --

18 A Yes. That was what I understood them  
19 to be telling, that if I used that phrase, I don't  
20 think that I was telling you an impression, that's  
21 what I understood them to be telling me, okay.

22 Q And I understand that. But just to be  
23 entirely clear, there is no specific recollection  
24 of them saying that?

25 A I didn't make note of it, and had I

1 made a note of it, I would have been able to  
2 produce it for you.

3 Q That's what you took from the  
4 comments?

5 A Right.

6 MR. JACK: Thank you, Mr. Minuk. I  
7 have no further questions. Thank you,  
8 Mr. Commissioner.

9 THE WITNESS: Thank you, Mr. Jack.

10 MR. NOZICK: Good morning,  
11 Mr. Commissioner, Mr. Minuk.

12 THE WITNESS: Good morning, Mr.  
13 Nozick.

14 THE COMMISSIONER: You're not bringing  
15 all those files over, are you?

16 MR. NOZICK: I hope not.

17 THE COMMISSIONER: We don't have many  
18 days.

19 MR. NOZICK: We don't have enough time  
20 for that.

21 THE COMMISSIONER: Yes.

22 BY MR. NOZICK:

23 Q Stan Nozick, just to refresh your  
24 memory again, appearing as co-counsel for the  
25 Government of Manitoba. If I may get on with it.

1                   Mr. Minuk, I want to -- by the way,  
2   Mr. Commissioner, I'm going to be referring to  
3   several volumes that you may have handy, R-1, R-2,  
4   R-4 and volumes G and K?

5                   THE COMMISSIONER: What's the last  
6   one?

7                   MR. NOZICK: R-1, R-2, R-4, G and K.  
8   The K, I think, was the RCMP investigation.

9                   THE COMMISSIONER: Okay. Go ahead.

10   BY MR. NOZICK:

11                  Q   Referring you -- firstly, Mr. Minuk,  
12   do you have those volumes there?

13                  A   I don't have the volumes, I have  
14   individual exhibits that have been filed.

15                  Q   I'm going to refer you first again to  
16   Exhibit 55 and Exhibit 54, which appear in volume  
17   G-43.a and 43.b?

18                  A   Fifty-five I don't have, sir; 54, I do  
19   have, 54 was the retainer.

20                  Q   These are the two retainer letters.

21                  A   Oh, well, I have one dated March 3rd  
22   and then another dated August 26th, '04, and they  
23   are both attached to the one Exhibit 54.

24                  Q   Okay. Well, you've got the right  
25   documents in any event, and I may have the wrong

1 numbers.

2 A All right.

3 Q I'm referring firstly,  
4 Mr. Commissioner, to the letter of August 26,  
5 2004, which appears at G-43.a, and this was the  
6 original retainer letter that you received back in  
7 2004 from the Department of Justice. Is that  
8 correct?

9 A Yes, sir.

10 Q And I am noting in the last sentence  
11 of paragraph number 1, it says,

12 "Any file referred to you within this  
13 time frame but not completed by March  
14 31, 2005, will be included in this  
15 retainer unless agreement is reached  
16 otherwise with Brian Kaplan."

17 A Yes, sir.

18 Q And Brian Kaplan was the Director of  
19 Prosecutions and he's the person that has been  
20 referred to in these proceedings; is that correct?

21 A Director of Regional Prosecutions and  
22 Legal Education.

23 Q In my day we only called them the  
24 directors, but thank you.

25 In any event, they then indicate in

1 the next sentence that your client is the  
2 Department of Justice and any further instructions  
3 should be sought from Brian Kaplan and/or Rob  
4 Finlayson. Rob Finlayson was the ADM at the time  
5 and is now a Provincial Judge?

6 A Correct.

7 Q I take it his position has been filled  
8 by Mr. Slough?

9 A As I understand it, yes.

10 Q And then looking at the letter of  
11 March 3rd, 2005, this was a specific retainer  
12 letter in relation to this particular  
13 investigation, the Harvey-Zenk matter; is that  
14 correct?

15 A Yes, sir.

16 Q There's a little different name at the  
17 top, but it's the same matter we're talking about?

18 A Right.

19 Q And in that letter, Mr. Kaplan wrote  
20 to you confirming the retainer, and says in his  
21 letter:

22 "In addition, for the purpose of  
23 keeping our office apprised as to the  
24 status of this matter, would you  
25 kindly contact Colleen Ireton,

1 945-1864, and advise of all court  
2 dates if necessary."

3 And then he says:

4 "Please do not hesitate to contact the  
5 writer should you have any questions  
6 or concerns respecting this matter."

7 Correct?

8 A Yes, sir.

9 Q You see that? It's a lead-up  
10 question.

11 A The phone number though is 1854.

12 Q Sorry?

13 A The phone number is 1854, not 64.

14 Q Your eyes are much better than mine.

15 In any event, the point is, you had  
16 been a special prosecutor for quite some time at  
17 this point; is that correct?

18 A Yes, sir.

19 Q And you were aware of how the  
20 independent prosecutor yourself would interact  
21 with members of the Department of Justice; is that  
22 correct?

23 A Yes, sir.

24 Q So it would not come as any surprise  
25 to you to see the last line in the letter where

1 Mr. Kaplan says:

2 "Please do not hesitate to contact the  
3 writer should you have any questions  
4 or concerns respecting this matter."

5 A No.

6 Q That's standard practice that you  
7 would communicate with him, either to inform him  
8 with respect to matters, correct?

9 A Meet in person or talk by phone.

10 Q On various cases?

11 A All of them.

12 Q That was the practice at the time; is  
13 that correct?

14 A Yes.

15 Q Now, there was also a policy with  
16 respect to appointing independent counsel. And  
17 that is found at G-44, Mr. Commissioner, and I  
18 understand that to be Exhibit 215. Do you have  
19 that, Mr. Minuk?

20 A Yes, sir, I do have it.

21 Q I could stand to be corrected on any  
22 of these Exhibits.

23 A Yes, sir. I have it, sir.

24 Q And I'm referring you to -- are your  
25 pages numbered at the bottom or is this a blank?



1           A     They are numbered at the bottom,  
2     chronologically, and they are numbered according  
3     to the organizational system developed by  
4     Mr. Paciocco.

5           Q     Okay. I'm going to refer you --

6           A     Or perhaps his assistant, colleague.

7           Q     I'm going to refer you to the bottom  
8     number at page 1384?

9           A     1384, sir, yes.

10          Q     And I'm going to refer to you  
11     paragraph number C on that page. And that  
12     paragraph says:

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

21     Do you see that?

22          A     Yes, sir.

23          Q     And you had been given a copy of this  
24     and were familiar with that, I take it?

25          A     Yes, I'm aware of this policy, I have

1 read it, but it's not a policy that on a  
2 day-to-day basis I would be concerning myself  
3 with, because I don't make these appointments.

4 Q No. This would be something that you  
5 got probably when you started acting as a special  
6 prosecutor, fair enough?

7 A Well, I can tell you that I gave a  
8 talk about it at the Crown Defence Conference  
9 recently, I believe last year or within the last  
10 year, so I would have been particularly familiar  
11 with it.

12 Q All right. You've read it, and you  
13 don't read it everyday, but you know it?

14 A Absolutely.

15 Q So you know that the advice and  
16 decisions in the case, in this particular case,  
17 are final and binding on the Department of Justice  
18 for the Province of Manitoba?

19 A Yes.

20 Q So you have the sole authority,  
21 subject to following policy, to make these  
22 decisions that you, in fact, did make; correct?

23 A Yes.

24 Q And they also in paragraph D, and this  
25 is the policy as it was at that time, and I

1 understand it's been amended, and we'll get into  
2 that with other witnesses, Mr. Commissioner. But  
3 at that time the independent counsel had full  
4 access to all employees within, and all documents  
5 and information held by the Department of Justice  
6 for the Province of Manitoba?

7 A Yes.

8 Q Correct. And that would include  
9 Mr. Kaplan and Mr. Slough as being employees of  
10 the Department of Justice, right?

11 A Yes, sir.

12 Q So the policy allows for you to have  
13 direct access to people like Mr. Kaplan and  
14 Mr. Slough, correct?

15 A Yes.

16 Q And the only caveat to your advice and  
17 decision being final and binding on the Department  
18 of Justice comes in paragraph E which says:

19 "Independent counsel is to be guided  
20 by the prosecution policies issued on  
21 behalf of the Attorney General of  
22 Manitoba which apply to all provincial  
23 prosecutions throughout the province."

24 And then they give examples; is that correct?

25 A Yes, sir.

1           Q     So the bottom line is that you have  
2     the authority to make decisions binding the Crown  
3     and the prosecution, as long as you follow the  
4     prosecution policies; is that correct?

5           A     Yes.

6           Q     And I take it in a sensitive case such  
7     as the Harvey-Zenk -- this Harvey-Zenk matter was  
8     obviously a high profile case?

9           A     Yes.

10          Q     A very sensitive case to various  
11     parties?

12          A     Certainly.

13          Q     From the family's point of view, they  
14     lost a daughter, they lost a wife, and  
15     obviously --

16          A     Yes.

17          Q     -- no one can replace her at this  
18     point in time?

19          A     Yes, sir.

20          Q     And they are obviously emotionally  
21     involved in the case?

22          A     Yes, sir.

23          Q     And from the public point of view, you  
24     have an off-duty police officer being charged with  
25     some very serious criminal offences?

1           A     Yes, sir.

2           Q     So it's very high profile and very,  
3     very sensitive, correct?

4           A     Yes.

5           Q     And even though you are making  
6     decisions as the case is ongoing, you would want  
7     to run these opinions that you had by senior  
8     members of the department for various reasons,  
9     correct?

10          A     Well, I did, yes.

11          Q     No question. But one of those reasons  
12     would be to make sure that whatever decisions you  
13     were making were in accordance with the policies  
14     as set out in the policy, is that fair, one of the  
15     reasons?

16          A     Certainly, that's one of the reasons,  
17     for sure, that I would have to be -- I need to be  
18     in touch with them.

19          Q     Right. You're making decisions, and  
20     they are aware of the policy probably better than  
21     you are, because they are career civil servants,  
22     career Crown Attorneys?

23          A     Well, yes, they deal with these on a  
24     day-to-day basis. I would only deal with it on a  
25     case-by-case basis. So they would have much more

1 familiarity.

2 Q All right. In any event, you maintain  
3 contact with primarily, I take it, Brian Kaplan?

4 A Yes. He's the individual, the direct  
5 line would be to him.

6 Q Would you agree with me that that  
7 would be in accordance with the terms of both your  
8 retainer and the policy?

9 A Yes, sir.

10 Q Now, I want to take you to your time  
11 sheet that's Exhibit 218. I call it a time sheet.  
12 It's been called a docket.

13 A All right.

14 Q I'm not sure what the right  
15 terminology it is?

16 THE COMMISSIONER: Which one is that?

17 THE WITNESS: 218.

18 MR. NOZICK: Some would call it an  
19 invoice.

20 THE COMMISSIONER: Yes, thank you.

21 BY MR. NOZICK:

22 Q I'm not going to refer you to every  
23 entry and contact that you had with members of the  
24 Department of Justice, but I want to highlight  
25 some of them and try and ascertain what the

1 context of these contacts were, if you can bear  
2 with me. First of all, it was March 1st, 2005,  
3 and on your notation you have, among other things,  
4 a telephone call to and from Brian Kaplan. Is  
5 that correct?

6 A Yes.

7 Q All right. Now, March 1st, 2005, I  
8 understand, after referring to Exhibit 120, which  
9 is also I believe G-40, Mr. Commissioner, the date  
10 on which the East St. Paul Police Department  
11 forwarded their file to Mr. Kaplan?

12 A Okay.

13 Q All right. So I am assuming that you  
14 were contacted by Mr. Kaplan's office and told  
15 that the report is here, and the report presumably  
16 was forwarded on to you on that date?

17 A Presumably. It's hard for me to  
18 remember today, sir, what the purpose of each one  
19 of these calls was.

20 Q Right. I'm just trying to, and I  
21 wasn't there, I don't know what was in the call,  
22 but it seems to me to be reasonable that when the  
23 report is sent to Mr. Kaplan, that there would be  
24 some communication between you and him advising  
25 you in some way that the report had been received,

1 and is either being sent or is on its way to you?

2 A Reasonable.

3 Q Does that sound reasonable? And your  
4 time sheet indicates .40. I guess that's 4/10 of  
5 an hour. Is that what it is?

6 A Yeah.

7 Q And you have a number of other calls  
8 as well with other people, particularly Mr. Poole?

9 A Right.

10 Q And other things that you were doing.  
11 So it wasn't a lengthy conversation at that point  
12 in time with Mr. Kaplan?

13 A No.

14 Q Is that fair?

15 A Clearly.

16 Q Now, the next entry I highlighted  
17 here, and nobody has mentioned this, but I  
18 highlighted the May 26th, '05 entry?

19 A May 26th, '05.

20 Q Where you have a call to Z. Tessler,  
21 that would be Zane Tessler, and he is a Crown  
22 Attorney with the Department of Justice?

23 A Right.

24 Q And it's regarding getting a -- "re  
25 case list on drunk driving cases." So I am



1 assuming from that 10 minute call, or six minute  
2 call, that either you or he phoned each other and  
3 one or the other asked if you had a list of cases  
4 on drunk driving. Is that fair?

5 A Yes, it would be some professional  
6 conversation that we had about our own desk  
7 binders of law.

8 Q Okay. Now, do you recall who made the  
9 call, who requested the list?

10 A I believe that Mr. Tessler and I had  
11 been speaking about it outside of court somewhere,  
12 and that the purpose of my call was to remind him  
13 that this recent list of cases, I believe, that  
14 had been circulated in the department, or one that  
15 he had been collecting, he would send over to me.

16 Q Now, this is a common practice, as I  
17 understand it, between lawyers, where you have a  
18 case and you're thinking about some issues, you  
19 may talk to another lawyer, whether it's another  
20 defence lawyer or whether it's a Crown Attorney  
21 that you know and have a rapport with, in order to  
22 exchange ideas and see if they have the latest  
23 cases. Is that fair?

24 A Sure, before you moved to Vancouver,  
25 you and I did that.

1           Q     I'm going to get into the Vancouver  
2     system later on.  But the bottom line is, we have  
3     a very close knit criminal bar in Manitoba,  
4     correct?

5           A     Yes.

6           Q     And nobody is trying to hide what the  
7     law is, and if you know a case that's on point, on  
8     a point that another lawyer has --

9           A     Yes.

10          Q     -- you would provide that very  
11     willingly; correct?

12          A     Yes, we share our knowledge or  
13     research with each other.

14          Q     It's a sharing of information?

15          A     Yes.

16          Q     And that's because you told us that in  
17     your situation, you're with a major large firm, I  
18     can't count the lawyers, but you are basically the  
19     only person that does criminal law in your firm?

20          A     Right -- I wouldn't be the only one.

21          Q     You're the most senior person?

22          A     Right.

23          Q     And essentially you really don't have  
24     anybody to discuss your issues or cases with in  
25     your firm?

1 A Correct.

2 Q So you have to use some outside  
3 source, whatever that source may be?

4 A Right.

5 Q And similarly, there are a lot of  
6 small boutique firms that single sole  
7 practitioners, one or two partners, that also  
8 don't have the resources to discuss it in-house;  
9 correct?

10 A I would think so. They may have their  
11 own issues. I don't know what they might be  
12 but --

13 Q And you told us that one of the  
14 reasons that you would contact, particularly  
15 Mr. Kaplan, was if you had an issue with respect  
16 to one of your cases, or this particular case,  
17 that you might run it by him, if I can use that  
18 term?

19 A Yes.

20 Q Some might use the term vet, but I  
21 prefer run it by him.

22 A Right. Run it by, yes, talk about it.

23 Q Yes, whatever.

24 A Right.

25 Q Now, turning now to September 21st,

1 2005, on your time sheet -- I'm sorry, September  
2 21st was a fax that's found in R-1.91.94, R-2, I  
3 believe it should be.

4 THE COMMISSIONER: R-2?

5 MR. NOZICK: I'm sorry, I don't have  
6 the actual --

7 THE COMMISSIONER: What is it?

8 MR. NOZICK: This is a fax, this is  
9 the fax where Brian Kaplan sent you a copy of a  
10 letter that Sveinsons had sent to the Attorney  
11 General, and asked you to, I think the terminology  
12 is, draft a reply for signature with respect to  
13 the justice issues.

14 THE WITNESS: The cover sheet came  
15 from Ms. Ireton, and she was actually writing the  
16 text of the letter, I believe, on behalf of  
17 Mr. Kaplan, as I recall it.

18 BY MR. NOZICK:

19 Q All right. But the point is, you told  
20 Commission Counsel that you didn't think that you  
21 should be the person to respond to that particular  
22 letter?

23 A Well, I didn't respond to it, and I  
24 discussed that with Mr. Kaplan.

25 Q And there were several issues, and I'm

1 not going to get into all of the issues in that  
2 particular letter, but there were issues relating  
3 to the case, correct?

4 A Well, yes.

5 Q To the best of your recollection?

6 A Yes.

7 Q We don't need to read the whole  
8 letter.

9 A Right.

10 Q There were issues relating to the  
11 administration of justice in Manitoba; correct?

12 A Yes.

13 Q Issues relating to the court system;  
14 correct?

15 A Yes.

16 Q Issues relating to the Manitoba Public  
17 Insurance Corporation?

18 A Yes.

19 Q All kinds of issues, right?

20 A Yes.

21 Q And it probably, in retrospect -- do  
22 you understand how government works? A person  
23 writes a letter to the Attorney General, and as I  
24 understand it, generally the Attorney General  
25 doesn't respond by himself, at least right away.

1 Do you understand --

2 A I don't think I'll ever understand how  
3 government works.

4 Q Well, if I suggest to you that it's my  
5 understanding and I always --

6 THE COMMISSIONER: If he doesn't  
7 understand, there's no use suggesting to him. Go  
8 ahead.

9 BY MR. NOZICK:

10 Q All right. Another suggestion that he  
11 may understand. I'm going to suggest to you that  
12 probably the better phraseology that Mr. Kaplan  
13 should have used was ask you for a memo with  
14 respect to your contact with the Sveinsons and  
15 your knowledge of the case, as opposed to asking  
16 you to write the letter. Is that fair?

17 A I don't know what the proper protocol  
18 is. I can't -- if you're telling me that's what  
19 it is, then that's what it is. I just don't know  
20 what the protocol is.

21 Q I don't want to give evidence.

22 A I've never been -- I just don't know  
23 what the protocol is.

24 Q That's fair. But at this point in  
25 time, you were the prosecutor in charge of the

1 Harvey-Zenk matter, correct?

2 A Right.

3 Q The Sveinsons were the parents of the  
4 deceased, correct?

5 A Pardon me?

6 Q The Sveinsons were the parents of the  
7 deceased?

8 A Yes.

9 Q Yes. And you had had contact with  
10 them, I take it, on an ongoing basis or periodic  
11 basis?

12 A Well, periodic contacts with them,  
13 yes.

14 Q But it was your responsibility, as a  
15 prosecutor in charge of the case, to maintain the  
16 contact with them; is that correct?

17 A Well, it's a difficult -- yes, I did  
18 maintain contact, I did have periodic contact with  
19 the Sveinsons, even though it was the Tamans who  
20 were the victims, and I tried to balance out that.

21 Q Now, I don't want to use  
22 Mr. Weinstein's language, and I don't want to be  
23 critical and I'm not being critical. In that  
24 context, it was you that contacted the Sveinsons  
25 because you were in charge of prosecution,

1 correct?

2 A Well, yes. I don't really know what  
3 the order was. I knew that they needed to, they  
4 wanted to speak to somebody.

5 Q And you had a meeting with them, and  
6 that would have been on September 28th, if I'm not  
7 mistaken?

8 A September 28th -- that would have been  
9 October 3rd, sir.

10 Q So October 3rd?

11 A Yes.

12 Q So, had you spoke to Mr. Sveinson to  
13 set up the appointment?

14 A Pardon me?

15 Q Had you spoke to Mr. Sveinson to set  
16 up the appointment?

17 A If I didn't speak to them personally,  
18 maybe my assistant spoke with them to set it up,  
19 but it got set up.

20 Q You have on September 28, '05, call  
21 from the deceased family?

22 A Right. That may mean simply that they  
23 called my office and that I listened to the voice  
24 mail, and I may have -- like I can't tell you if I  
25 actually spoke with them.



1 Q Okay. And this -- and then you have a  
2 call to Mr. Kaplan?

3 A Yes.

4 Q So the way I'm interpreting this, and  
5 you tell me if I'm right or wrong in my  
6 interpretation, is that you get a call from them  
7 or you speak to them, and you call Kaplan to  
8 inform him that you had spoken to them and  
9 arranged a meeting. Is that fair?

10 A It would appear that that's the  
11 rational, reasonable conclusion from this.

12 Q And you meet with them on October 3rd,  
13 2005?

14 A Right.

15 Q Correct. And this is well before you  
16 are aware of any problems with Bakema and Woychuk;  
17 correct?

18 A Oh, yeah. Oh, yes, long before that.

19 Q Pardon me?

20 A Long before that.

21 Q Right. And even at this early point  
22 in time, based on your knowledge of the case law  
23 and your experience, that you feel that the likely  
24 disposition in this particular case will be a  
25 conditional sentence. Is that fair?

1           A     Well, I just know that, I can tell  
2     you, Mr. Nozick, that I would have known by that  
3     time in '05, that there are some cases, a handful  
4     of cases dealing with impaired driving causing  
5     death, there are a handful of cases involving  
6     dangerous driving causing death, various levels of  
7     courts in Manitoba where there has been a  
8     conditional sentence. And I would have informed  
9     these people what these cases stood for, what they  
10    were about. I think there may be four or five on  
11    the impaired by 2005, and maybe eight or nine on  
12    dangerous driving. I don't really have the  
13    numbers.

14           Q     Will you agree with me that as you  
15    gain experience, as either defence counsel or even  
16    a Crown Attorney, you get a feel for where the  
17    case is going at the early stages when you get a  
18    file?

19           A     Well, the more experienced you are,  
20    you read it over, you have a feeling for the file,  
21    yes. Someone, I would think that I would get a  
22    much better feeling for a file than someone who  
23    was a first or second year practitioner.

24           Q     Right. And your gut reaction, if you  
25    will, your educated opinion on this file is it was

1 going to end up with a conditional sentence of  
2 some sort. Is that fair? Your initial reaction?

3 A Well, my assessment would be that,  
4 based on the law in Manitoba, that it was a very  
5 likely resolution, or likely outcome of the case,  
6 whether there was a guilty plea or whether there  
7 was a trial, based on the case law.

8 Q And that's eventually what happened,  
9 correct, in this case?

10 A What do you mean eventually?

11 Q Well, eventually he received --

12 A Well, at the end of the day, Mr. Zenk  
13 received a two year less a day Provincial term of  
14 incarceration. Judge ordered that to be served  
15 conditionally, on conditions, yes, that was the  
16 end of the day.

17 Q Which was bang on with your original  
18 assessment of the file, right?

19 A Well --

20 THE COMMISSIONER: It was bang on  
21 because he agreed to it.

22 THE WITNESS: Yeah. Yes, that's what  
23 happened.

24 THE COMMISSIONER: Not as a result of  
25 what the judge decided. Go ahead.

1 BY MR. NOZICK:

2 Q All right. In any event, when you  
3 were talking to the Sveinsons on October 3rd, and  
4 you expressed this feeling to them, you hadn't  
5 discussed this with either Mr. Kaplan or  
6 Mr. Slough at that particular time --

7 A No.

8 Q -- or before that meeting? So when  
9 you expressed that in your opinion that this is  
10 likely to end up as a conditional sentence, it was  
11 your own opinion based on your own expertise?

12 A Yes.

13 Q Now, we go to April 21st, 2006, where  
14 we have got the Carter revelation?

15 A Yes.

16 Q And on that date, after you spoke to  
17 Mr. Carter, you then called Mr. Kaplan?

18 A Yes. That was April 21, page 3401.35,  
19 met with Mr. Carter, and then contacted  
20 Mr. Kaplan. That's 3401.35, Mr. Commissioner.

21 Q At this point in time, was there a lot  
22 of publicity about this case in the Winnipeg  
23 papers?

24 A At that time?

25 Q Yeah, at that time. I assume there

1 was some publicity around the time of the offence  
2 back in February 2005?

3 A I don't know, Mr. Nozick. I would  
4 imagine not, but, honestly, I don't know.

5 Q Now, the Carter revelation is  
6 obviously a major problem that you're going to  
7 have with your case; correct?

8 A Yes, in my mind.

9 Q And you've got basically one officer  
10 saying another officer told him to do things and  
11 making very serious allegations?

12 A Right.

13 Q And if that came to light, obviously  
14 this is something that the opposition party is  
15 going to get a hold of, it's going to be raised in  
16 the house, that type of thing?

17 A Well --

18 THE COMMISSIONER: Is this something  
19 that should concern him, what's going on in the  
20 political arena?

21 MR. NOZICK: I won't pursue that.

22 THE COMMISSIONER: Yes.

23 BY MR. NOZICK:

24 Q In any event, you call Mr. Kaplan at  
25 that time to inform him of the revelation; is that

1 fair?

2 A Yes.

3 Q And you had asked Mr. Carter for a  
4 written report?

5 A Which -- yes, yes, yes, yes, yes, yes,  
6 yes.

7 Q Right. And he provided that to you,  
8 his report is April 25th, and you've got it on  
9 April 26th?

10 A Yes.

11 Q And then on April 27th, you again  
12 phone Mr. Kaplan, and I'm going to suggest to you  
13 that it makes sense that you told him that you  
14 received the report from Mr. Carter?

15 A Yes.

16 Q All right. So you're keeping him  
17 up-to-date with respect to what's happening with  
18 the revelations at this point?

19 A Yes.

20 Q And I take it that the issue was  
21 important enough that you thought that you should  
22 meet with Mr. Kaplan; is that fair?

23 A Yes.

24 Q And the meeting was set up on May 2nd?

25 A Yes.

1 Q And you met with him?

2 A Yes.

3 Q And I'm assuming you discussed the  
4 Carter report and the possible ramifications to  
5 the Crown's case?

6 A Yes.

7 Q I mean, that makes sense. You just  
8 got the report, you tell him, I got the report,  
9 you have a meeting. I would assume that you talk  
10 about what the revelations were?

11 A Yes.

12 Q And as a result of what you told  
13 Mr. Kaplan, was it Mr. Kaplan that suggested that  
14 this is a serious allegation being made against  
15 Mr. Bakema, and we should get an independent  
16 police force to investigate it, i.e. the RCMP?

17 A Yes.

18 Q And Mr. Kaplan would be the liaison  
19 between -- I understand there's a fellow named  
20 Mike Horn that's employed by the Department of  
21 Justice, and he is the liaison from the Department  
22 of Justice to the RCMP?

23 A I learned that. I had never met  
24 Mr. Horn before this incident arose, so...

25 Q But were you advised that when you met

1 him, is that who he was?

2 A Yes.

3 Q Mr. Kaplan told you that?

4 A Yes, I might have even been introduced  
5 to Mr. Horn, I probably was introduced to  
6 Mr. Horn, and he told me that as well.

7 Q Yeah. So the protocol would be, you  
8 talk to Mr. Kaplan, Mr. Kaplan talks to Mr. Horn,  
9 Mr. Horn talks to the RCMP?

10 A That's how I understood.

11 Q Appears to be the protocol, all right.  
12 In any event, Mr. Horn eventually gets a hold of  
13 the RCMP; correct?

14 A Yes.

15 Q And by the way, before I leave this  
16 meeting, the intent was once the RCMP did an  
17 investigation, that that RCMP report will be  
18 referred to a different independent counsel for  
19 his opinion with respect to whether there should  
20 be a charge against Mr. Bakema?

21 A That's how it materialized once the  
22 report was completed. I had no idea of how things  
23 would unfold at the outset, because I wasn't,  
24 didn't participate in that.

25 Q Okay. Now, on May 12th of 2006, you



1 sent an e-mail, R-1.91.16, asking for a meeting.

2 Do you remember that?

3 A It may well be, yes. If I sent the  
4 e-mail, Mr. Nozick, I accept that. I don't really  
5 need to --

6 Q In any event, there was a meeting  
7 held. First there was a meeting between yourself  
8 and Assistant Commissioner Robinson of the RCMP;  
9 is that correct? Do you remember that meeting?  
10 That was on May 15th.

11 A I thought there was only one meeting  
12 with the RCMP, but maybe there were more.

13 THE COMMISSIONER: Is the  
14 investigation by the RCMP of any relevance to my  
15 mandate?

16 MR. NOZICK: Only as background  
17 information, I would think.

18 THE COMMISSIONER: We don't need a lot  
19 of background, we need a lot of substance. Let's  
20 get to the issues, please.

21 BY MR. NOZICK:

22 Q In any event, I'm suggesting you did  
23 have a meeting with Mr. Robinson on May 15th, and  
24 then you met with Mr. Kaplan on May 18th, 2006?

25 A All right.

1 Q And by the way, your meeting with the  
2 RCMP is referred to on your time sheet?

3 A Pardon me?

4 Q Your meeting with the RCMP is referred  
5 to on your time sheet?

6 A Oh, yes. I know I met with him, I'm  
7 just saying that --

8 Q All right. On May 18th, you meet with  
9 Mr. Kaplan?

10 A Right.

11 Q And at this point in time, I guess the  
12 Carter revelation again was revisited about what  
13 was happening?

14 A Right.

15 Q And was discussed that the RCMP were  
16 investigating it?

17 A Yes, sir.

18 Q And I would imagine that at this point  
19 in time, you realized that you couldn't proceed  
20 with the Preliminary Hearing in June of 2006, with  
21 this investigation up in the air?

22 A That would seem, that was my  
23 assessment at that time.

24 Q The point is, one of your chief  
25 witnesses was being investigated for obstructing

1 or attempting to obstruct justice?

2 A Yes. It seemed reasonable to me to  
3 follow this through.

4 Q It would be folly to proceed with a  
5 Preliminary Hearing with that up in the air?

6 A Right.

7 Q And you probably discussed that with  
8 Mr. Kaplan as well?

9 A Yes.

10 Q And when a police officer is being  
11 investigated for that type of an offence, a very  
12 serious offence, it's obviously a very sensitive  
13 matter as well; is that fair to say?

14 A Well, yes.

15 Q And you wouldn't want to reveal too  
16 much to defence counsel as to the nature of the  
17 investigation, is that fair, at that point in  
18 time?

19 A I wouldn't reveal anything, because my  
20 understanding of the policy was that when these  
21 matters are being investigated, we're not to be  
22 speaking about them except within the department  
23 on an as-needed basis.

24 Q All right.

25 A So I wouldn't be discussing this with

1 Mr. Wolson, or anyone else for that matter, other  
2 than -- the only person I was speaking to about it  
3 was Mr. Kaplan. And ultimately, on an issue with  
4 respect to correspondence, I believe that  
5 Mr. Lawlor was invited, just for the limited  
6 purpose of drafting a letter, but that's it. No  
7 one else was in this.

8 Q And I want to deal with why we needed  
9 Mr. Lawlor to draft a letter, because you  
10 obviously are experienced and you know how to  
11 write letters?

12 A I don't know why Mr. Lawlor was  
13 brought in, that was Mr. Kaplan's suggestion. So  
14 I just met him when he got there.

15 Q I'm going to suggest to you that  
16 because of the sensitive nature of the  
17 investigation, that you wanted to be very careful  
18 as to exactly how you phrased the letter to  
19 Mr. Wolson, and you wanted some guidance in  
20 respect to that; is that fair?

21 A Not necessarily guidance. I wanted to  
22 talk about it because there was a sensitive issue  
23 of the investigation, there was an issue that  
24 might arise by reason of delay, and all of these  
25 issues prompted me to have a discussion, like a

1 round-table discussion about how to craft the  
2 correspondence to Mr. Wolson.

3 Q You raised the issue about delay.  
4 Obviously, by requesting the adjournment brings  
5 into the effect the Askov case?

6 A Right.

7 Q And the delay would obviously be  
8 attributed to the Crown, correct?

9 A Right. It was just another issue  
10 added already to the already mounting issues.

11 Q Exactly. In any event, the letter is  
12 drafted and goes out. Mr. Wolson, on May 24th,  
13 agrees to the adjournment?

14 A Yes, Mr. Wolson does agree at some  
15 point in the month of May to the adjournment.

16 Q Okay. Well, it says May 24th. Can we  
17 take my word for that?

18 A Yes, sir.

19 Q And the point that I'm making is, as  
20 soon as he agrees to the adjournment, again you  
21 make a call to Kaplan, presumably, advising him  
22 that Wolson has agreed to the adjournment?

23 A All right.

24 Q Is that fair?

25 A Yes. I thought that I had written to

1 Mr. Wolson a couple of times in the month of May.  
2 He didn't respond to the letters right away, and  
3 then ultimately he contacted me by telephone to  
4 let me know that he was in agreement. I think  
5 that's how it unfolded.

6 Q I stand to be corrected, but my  
7 understanding was it was on May 24th. I don't  
8 know how much is going to stand or fall on that.

9 A I don't think --

10 Q It makes sense if that happened on  
11 May 24th, the phone call with Mr. Kaplan would  
12 have been about that topic; fair?

13 A Well, I don't think at that point --

14 THE COMMISSIONER: Mr. Minuk, you  
15 arrange an adjournment, you don't tell him why.

16 THE WITNESS: Right.

17 THE COMMISSIONER: And the reason why  
18 you don't tell him is because there's a sensitive  
19 investigation going on of Bakema; is that it?

20 THE WITNESS: Correct.

21 THE COMMISSIONER: Okay. Let's move  
22 on.

23 BY MR. NOZICK:

24 Q Moving on to May 31st, there's  
25 reference on your time sheet to a number of phone

1 calls. You talked to Chief Carter on that day.  
2 You call, you get a call from Bev Charko. Now, I  
3 don't think it's been explained who Bev Charko is?

4 A She is, or was then the provincial  
5 court trial coordinator, and I was likely  
6 contacting for some purpose with respect to  
7 scheduling matters related to this Preliminary.

8 Q Well, given the fact that Wolson had  
9 agreed to a new date, Bev Charko would be the  
10 liaison with the Provincial Court to try and  
11 determine a date for the next date for the  
12 Preliminary Hearing. Is that fair, that's who she  
13 was?

14 A Two things. One to bring it forward  
15 to the court, and secondly to confirm or to  
16 canvass dates.

17 Q And then you call Kaplan right after  
18 that, I'm assuming, and you tell him we've got  
19 dates from Bev Charko; correct?

20 A Or that the matter has been brought  
21 forward. It will be cancelled and Charko is  
22 looking for dates, one or the other.

23 Q The point is, you call Kaplan to  
24 inform him that you had the call with Charko and  
25 whatever she said?

1 A Right.

2 Q And then on June 14th, there was an  
3 e-mail from Mr. Kaplan's secretary telling you  
4 that Doug Abra had been appointed as independent  
5 counsel with respect to the Bakema investigations?

6 A Okay.

7 Q Do you recall that?

8 A Yeah.

9 Q And on June 27th, your time sheet  
10 shows that you called Mr. Abra, correct?

11 A Yes.

12 THE COMMISSIONER: Why are we spending  
13 so much time on this RCMP investigation? Maybe we  
14 could focus on the issues. This sounds like an  
15 assessment of his account, and that's not my  
16 function. I want to deal with this particular  
17 case. We can spend the whole morning, maybe the  
18 whole day and tomorrow. Let's move on, Mr.  
19 Nozick.

20 BY MR. NOZICK:

21 Q One of the issues in this Inquiry, as  
22 I understand it, there had been some suggestion,  
23 because you had represented police in the past,  
24 that you might be coloured with respect to  
25 prosecuting police officers?



1 THE COMMISSIONER: Well, that has  
2 already been put to bed by other witnesses. Let's  
3 move on.

4 BY MR. NOZICK:

5 Q All I'm going to say to you is this,  
6 is that the opinion of Mr. Abra was that there was  
7 not sufficient evidence to warrant a charge  
8 against Mr. Bakema, but you disagreed with that  
9 opinion; is that fair?

10 A Yes, I did, sir.

11 Q To the extent that you sent an e-mail  
12 to both Mr. Kaplan and Mr. Abra containing the  
13 Beaudry case?

14 A Yes, sir.

15 Q Indicating that you thought the charge  
16 should be brought?

17 A Yes, sir.

18 Q And now we turn to the week of  
19 July 12th, the so-called resolution?

20 A Pardon me?

21 Q The week of July 12, 2007?

22 A All right. Now, okay, I have that in  
23 front of me.

24 Q Well, I'm just going to give you --  
25 you have your time sheet, but I'm not going to

1 even refer to the time sheet, we don't really need  
2 that. The point is, at this point in time you are  
3 preparing for a Preliminary Hearing?

4 A Yes, sir.

5 Q And is it your experience that when  
6 members of the Winnipeg Police Service are  
7 charged, that rarely do they change their plea to  
8 a plea of guilty? Is that your experience or --

9 A There is a common thought, generally,  
10 that they fight their cases, yes. Generally, the  
11 approach would not be to assume that a police  
12 officer would be pleading guilty to a charge.

13 Q And that's because, in addition to  
14 whatever the court may impose on a particular  
15 accused, there is some other serious ramifications  
16 to police officers when they are convicted of a  
17 criminal offence, fair?

18 A There would be many reasons, Mr.  
19 Nozick, for why they choose to fight their cases.  
20 I couldn't begin to identify them all and wouldn't  
21 want to go there.

22 Q So I'm going to suggest to you that it  
23 came as a bit of a surprise when Mr. Wolson raised  
24 the possibility of a plea bargain, or entering a  
25 plea to the dangerous driving causing death?

1           A     Yes, for two reasons. One, the  
2     prosecution case or the strength of it, which he  
3     would be able to lead and understand, had its  
4     problems. And secondly, of course, that the  
5     fellow is a police officer, and in light of what I  
6     thought the weaknesses of the case were, given  
7     that the fellow was a police officer and  
8     traditionally they fight their cases, I was  
9     surprised.

10           Q     And so you start these negotiations  
11     with Wolson, and basically by July 12, 2007, you  
12     have a tentative, if I can call it, deal in place  
13     subject to Wolson confirming it with his client  
14     and subject to your running it by Mr. Kaplan; is  
15     that fair?

16           A     I don't know the date, sir, but I can  
17     just tell you again, as I told Mr. Paciocco, as I  
18     know the week unfolded, I knew that Mr. Wolson was  
19     meeting with his client on the Thursday, that he  
20     had raised this issue with me. He had asked me to  
21     consider it overnight. That would have been the  
22     Friday. On the Friday, I believe I spoke to  
23     Mr. Kaplan about it. Would have spoken to  
24     Mr. Wolson again, because I knew that from  
25     information provided to me by Mr. Wolson, that on

1 the weekend, which was the Saturday, Mr. Zenk and  
2 his family, and those he thought would be  
3 necessary to be close to him, would all be meeting  
4 at Mr. Wolson's office to discuss this issue. And  
5 that at some point on the weekend, after the  
6 client, along with his family had a chance to  
7 consider the matter, I would hear again from  
8 Mr. Wolson. And that's how it unfolded.

9 Q All right. But by the evening of  
10 July 12th of 2007, you had a tentative  
11 arrangement. Is that fair? Not written in stone  
12 but a tentative, Wolson was going to recommend  
13 this to his client?

14 A Well, if the 12th is the Thursday,  
15 yes, I just don't know -- you'll have to forgive  
16 me, I'm doing it only by days of the week and I  
17 cannot do it by calendar days in the absence of  
18 the calendar in front of me.

19 Q The 12th was Thursday, 13th was  
20 Friday, 15th was Sunday, 16th is Monday, the first  
21 court appearance.

22 A All right.

23 Q So on the Thursday, July 12th, there  
24 was a tentative arrangement; is that fair?

25 A At some point that night I believe, or

1 later that afternoon, I would have heard from  
2 Mr. Wolson. So I don't know if there was a  
3 tentative arrangement at that point. Mr. Wolson  
4 was sending out the feelers, if we would call it  
5 that, and testing me out and sort of saying  
6 whether or not that might be a potential  
7 resolution. There was nothing firm at that point.  
8 It was Mr. Wolson raising the issue and asking me  
9 to consider it.

10 Q And did you indicate to him that you  
11 thought that it was a pretty good plea bargain  
12 arrangement?

13 A I don't know whether I indicated that  
14 to Mr. Wolson. I cannot recall today, but I  
15 certainly would have indicated to him that I would  
16 think about it and that I would be getting back to  
17 him.

18 Q And all of this, all of your mind-set  
19 took place without any consultation with either  
20 Mr. Kaplan, Mr. Slough, or anybody from the  
21 Department of Justice; is that correct, as of the  
22 Thursday?

23 A By the time Mr. Wolson and I have  
24 had -- Mr. Wolson and I had our discussions before  
25 I had any discussions with anyone from Manitoba

1 Justice, yes.

2 Q And you were clearly of the view that  
3 this was a very good deal for the Crown, fair?

4 A Well, I thought that it was a good  
5 resolution on a case that had a number of  
6 problems.

7 Q And you have outlined the problems,  
8 and we don't have to go there.

9 A And also that Mr. Wolson, I believe,  
10 was recognizing what the law was on sentencing, as  
11 we understood it to be, and I thought that even  
12 his response was a reasonable one.

13 Q So you were ad idem with Mr. Wolson,  
14 correct?

15 A Well, conceptually ad idem on at least  
16 thinking that dangerous driving causing death was  
17 a reasonable resolution, and that a conditional  
18 sentence was what the law was. We didn't discuss  
19 what the range would be or what the conditions  
20 would be, but conceptually on the topics, yes, we  
21 were.

22 Q Did you at that point, or at any other  
23 point, discuss with him the facts on which the  
24 plea would be based?

25 A No, we didn't discuss that at that

1 particular time, because we weren't at that point.

2 Q Did you at any point in time discuss  
3 with him the factual underpinnings for the plea of  
4 dangerous driving causing death?

5 A At any time?

6 Q At any time, yes?

7 A Yes, we did, but not at that time,  
8 because at that time we weren't even close to a  
9 resolution.

10 Q When, to the best of your  
11 recollection, would you have had those types of  
12 discussions?

13 A We would have had those only after the  
14 family meeting when there was some circumstantial  
15 guarantee, if I can use that language, even though  
16 I don't think that's appropriate, that his client  
17 was of the mind to enter a guilty plea. There  
18 would be no reason to discuss that beforehand.

19 THE COMMISSIONER: Excuse me a second.  
20 Help me with something. As I understand from  
21 Mr. Wolson, when an accused pleads guilty, the  
22 facts are not read in, in support of the plea --

23 THE WITNESS: Only --

24 THE COMMISSIONER: -- at the time.

25 THE WITNESS: Only if the sentencing

1 doesn't occur at the time.

2 THE COMMISSIONER: So getting back to  
3 what I have said, the facts upon which the Crown  
4 relies are not read into the record, or before the  
5 judge, and the accused counsel or the accused  
6 himself or herself does not agree to those facts  
7 at the time that the plea is entered?

8 THE WITNESS: Right.

9 THE COMMISSIONER: Then the matter is  
10 adjourned. And at the sentencing hearing, the  
11 Crown gets up and indicates the facts upon which  
12 the Crown relies. Is that the practice?

13 THE WITNESS: Well, they should be  
14 communicated to the defence beforehand, but that's  
15 how it happens, yes, we talk beforehand and then  
16 we read them in.

17 THE COMMISSIONER: I say that because  
18 it's an unusual practice that I have never heard  
19 of. But, in any event, that's the practice that's  
20 carried on in Manitoba.

21 In this particular case, did you, with  
22 Mr. Wolson, agree upon the facts that you would  
23 eventually read into the record before the plea  
24 was entered or after the plea was entered?

25 THE WITNESS: Mr. Commissioner, we



1 discussed them beforehand. And I know that we --  
2 when I showed him again, like what it was that I  
3 intended to say about it in writing, even though  
4 we had spoken about it, he saw again in writing  
5 what it is that I had indicated to him.

6 THE COMMISSIONER: Before the plea?

7 THE WITNESS: Oh, yes.

8 THE COMMISSIONER: In other words, you  
9 told him before the plea what you were going to  
10 say in support of the plea, and upon which the  
11 judge had to make a finding, that the facts that  
12 you would read into the record supported the plea?

13 THE WITNESS: Yes.

14 THE COMMISSIONER: In other words, if  
15 you read facts that didn't support the plea, the  
16 judge has an obligation to reject them?

17 THE WITNESS: Yes.

18 THE COMMISSIONER: All right. Let me  
19 go a little further here. So you told Mr. Wolson  
20 in advance what you were going to read in once the  
21 plea was entered and on the sentencing day?

22 THE WITNESS: Yes.

23 THE COMMISSIONER: All right. So he  
24 understood that?

25 THE WITNESS: Yes.

1 THE COMMISSIONER: Okay. Now, when  
2 the matter came up for the sentencing, I  
3 understand there was again a discussion with him  
4 and he said something to the effect, if I recall  
5 his evidence, that the two of you spoke about it  
6 over the phone and there was some discussion, and  
7 you came to some resolution. And you then, on the  
8 day of sentencing, read into the record the facts  
9 upon which you relied, which were essentially, you  
10 say, the same as what you originally told him?

11 THE WITNESS: Yes.

12 THE COMMISSIONER: All right. I am  
13 just trying to understand this practice, because  
14 I'm wondering whether there was any dispute with  
15 Mr. Wolson about the facts that you read in on the  
16 day of the sentencing?

17 THE WITNESS: He didn't --

18 THE COMMISSIONER: Whether they were  
19 different than the ones that you told him before.

20 THE WITNESS: No. And as I said  
21 yesterday or the day before, had Mr. Wolson  
22 disagreed with anything that I said, I would have  
23 expected him to stand up and say, no, this isn't  
24 what we spoke about. And he didn't.

25 THE COMMISSIONER: Well, he didn't at

1 the time. And then he said later he thought about  
2 it, and that's when the matter came up after, I  
3 believe the judge wrote a letter saying he wasn't  
4 prepared to accept the plea bargain, which was not  
5 for him to decide, the plea bargain was different  
6 from the sentencing. And that's when he got up,  
7 and there was some sort of discussion in court  
8 about the facts that you were relying upon.

9 THE WITNESS: That's how it unfolded.

10 THE COMMISSIONER: That is how it  
11 unfolded, okay. Thank you. Go ahead.

12 BY MR. NOZICK:

13 Q I take it in retrospect, in hindsight,  
14 that it probably would have been better to reduce  
15 the facts upon which the plea was to be entered  
16 into an agreed set of facts. With the benefit of  
17 hindsight now, we know --

18 A Yes, I think that there's good sense,  
19 Mr. Nozick, in doing that, in simple criminal  
20 matters of summary offences, it's probably likely  
21 that it need not be. But the more complicated the  
22 matter, I do agree that the better way to approach  
23 these matters today is by having a statement of  
24 agreed fact. And this way there's no disputes.  
25 Because each of the parties will sign off on it,

1 and the statement of agreed fact could be filed as  
2 an exhibit before the Provincial Court Judge or  
3 the Court of Queen's Bench Judge, and the facts  
4 are settled.

5 THE COMMISSIONER: Excuse me. Whether  
6 it's done by an agreed statement in writing or  
7 done at the proceeding, the judge should not  
8 accept the plea until he's satisfied that the  
9 facts presented by the Crown in support of the  
10 plea justify the finding of guilt.

11 THE WITNESS: Yes.

12 THE COMMISSIONER: All right. Go  
13 ahead.

14 BY MR. NOZICK:

15 Q But in reality, that's the way it's  
16 worked in Manitoba for eons, I guess. The judges  
17 have accepted the plea, and if the matter is put  
18 over to sentencing, the facts aren't read until  
19 the sentencing date?

20 A That's the way, that's the local  
21 practice.

22 Q It may be wrong, but that's the way it  
23 is.

24 THE COMMISSIONER: Well, there's no  
25 right or wrong, always.

1 MR. NOZICK: There's always room for  
2 improvement, Mr. Commissioner.

3 THE COMMISSIONER: Okay. Go ahead.

4 MR. NOZICK: And that may well be an  
5 area.

6 BY MR. NOZICK:

7 Q Now, as well, and I take it that it  
8 goes to this limited defence, there is only a  
9 dozen, maybe 15 lawyers practicing criminal law on  
10 a regular basis. Is that a fair estimate or has  
11 it gone up?

12 A There's a lot of lawyers these days  
13 practicing criminal law.

14 Q Okay. I've been away.

15 A In Winnipeg, there are a lot.

16 Q But it is a fairly small bar, you have  
17 a close relationship with many members of the  
18 criminal bar; right?

19 A Let me put it to you this way, Mr.  
20 Nozick, the criminal bar has a lot of lawyers.  
21 There is only a select group of that lawyers who  
22 are in the top echelon who take on the better and  
23 more complicated cases.

24 Q And over the years, you develop a  
25 rapport with the other lawyers; right?

1 A Yes.

2 Q And you develop an element of trust,  
3 I'm assuming?

4 A With some.

5 Q Well, with Mr. Wolson in particular --

6 A Yes.

7 Q -- there is no way you would doubt  
8 anything he says to you.

9 A Yes.

10 Q And he would not doubt your word at  
11 all, correct?

12 A Correct.

13 Q And so you get into the habit, if I  
14 can put it that way, of having these informal  
15 discussions regarding pleas, what pleas are you  
16 going to take, what's your position on sentence,  
17 what facts are you going to rely on? They are  
18 held on an informal basis, is that fair, in some  
19 cases?

20 A Well, every prosecutor and defence  
21 lawyer, each one is feeling each other out as we  
22 move along. I don't think that it's unique to be  
23 done by experienced lawyers. Even the junior  
24 lawyers try it and learn how to do it.

25 Q You try and work the other side?

1           A     Right, you're always --

2           Q     Always working.  But, let me put it  
3     this way.  At some point in time, you come to an  
4     agreement, there's going to be a plea here.  And  
5     here's the facts that we're going to rely on in  
6     support of the plea.  So now you've gone more than  
7     feeling each other out and working each other,  
8     fair?

9           A     Yes.

10          Q     And these type of conversations, once  
11     you've got the pleas arranged, the sentence  
12     arranged, and you're talking about what facts are  
13     going to be read in, in support of the charge, are  
14     also done on an informal basis, fair?

15          A     The whole of the discussion is,  
16     whether it's informal or not, it all happens  
17     leading up to getting to the court, because what I  
18     don't want, or what no lawyer should want to  
19     happen is that there's some dispute in the court  
20     about what the facts are, or that there is no  
21     basis for the charge at all.  That's -- we're  
22     trying to get to the point where the judge will be  
23     satisfied.

24          Q     But I guess the problem with doing it  
25     in the informal method, that has been the practice

1 in Manitoba for many years, is that it does lend  
2 itself for misunderstandings between counsel. One  
3 counsel understands one thing, the other counsel  
4 understands it a different way?

5 A Well, it's always going to happen,  
6 sir.

7 Q Yeah, because it's not in writing and  
8 it's not formalized?

9 A Hence the suggestion of something  
10 either in writing or something that could be read  
11 in by agreement, would solve that problem.

12 Q I'm not criticizing you, Mr. Minuk,  
13 because I fully understand what happened. I think  
14 I do. But that's the reality of it. There was  
15 informal discussions and a misunderstanding  
16 occurred, correct? Would you agree with that?

17 A Sure.

18 Q Mr. Wolson's understanding, according  
19 to what he says, and I don't think we have any  
20 reason to doubt his understanding, is that there  
21 would be no reference to any consumption of  
22 alcohol at all. That was his understanding. You  
23 heard him say that?

24 A That was what he said.

25 Q Your understanding was different?



1 A Correct.

2 Q Your understanding that, is you were  
3 entitled to refer to what you call this term  
4 anecdotal history --

5 A Right. What I wanted to talk about  
6 were the narrative, the background of how it was  
7 that this man got to the point that he was at.

8 Q Okay. So you had a fundamental  
9 misunderstanding, because it wasn't reduced to  
10 writing; is that a fair assessment?

11 A Perhaps we misunderstood what each of  
12 us were speaking about and could have been better  
13 done had it been in writing.

14 Q And it was continued on when you met  
15 with Judge Wyant in his chambers. I don't know if  
16 you recall this, but Mr. Wolson testified that you  
17 also said to Judge Wyant that there was anecdotal  
18 historical evidence of drinking, in your chambers  
19 meeting. Do you remember that or not? You don't  
20 remember?

21 A I don't remember today.

22 Q But you don't doubt Mr. Wolson?

23 A No, I don't doubt Mr. Wolson. And I  
24 know if he did challenge me, I recall telling  
25 him -- well, I know the purpose for which I wanted

1 that.

2 Q But it would appear that he didn't  
3 challenge you in the chambers at least?

4 A No, he didn't challenge me even in the  
5 courtroom on it.

6 Q And again, yes, on August 22nd, when  
7 you went to court the first time, you use the same  
8 phraseology that you had used before Judge Wyant;  
9 correct?

10 A Right.

11 Q And Wolson let it go at that point in  
12 time. And the only comment he made is it was  
13 nothing to do with the issue of impairment, as  
14 opposed to referring to the consumption of  
15 alcohol?

16 A Whatever reason, I don't know what was  
17 going on in Mr. Wolson's mind, we did not have a  
18 discussion about it in court, outside, before,  
19 after, or during before the judge.

20 Q In any event, I'm going to suggest to  
21 you that the reason this wasn't a major issue in  
22 either your mind or Mr. Wolson's mind was because  
23 of your understanding of what Judge Wyant would  
24 likely do with respect to the either joint  
25 recommendation or plea bargain, call it what you

1 will?

2           A     Well, I don't know what's in  
3 Mr. Wolson's mind. I just sort of know what's in  
4 mine. And there was no issue as I -- I didn't  
5 see -- had I expected an issue, Mr. Wolson is  
6 experienced counsel, he would have made an issue  
7 of it.

8           Q     All right. And I'm going to suggest  
9 to you what happened in the chambers is these  
10 things are very informal -- was it a pre-trial  
11 meeting, or a resolution meeting, or was it I  
12 guess just a meeting that the judge was going to  
13 be seized, that type of meeting, is that what it  
14 was?

15           A     Well, it was an informal meeting with  
16 Judge Wyant who was ultimately going to hear the  
17 matter.

18           Q     I'm just trying to get a picture of  
19 this in my mind. So you set up the plea before  
20 Judge Wyant on July 17th, which was the Tuesday.  
21 And normally that starts at 10:00 o'clock?

22           A     Right.

23           Q     And I'll get into that later. And  
24 before court, presumably around 9:00 o'clock, you  
25 go into his chambers, invites you in, hello Marty,

1 hello Richard, that type of meeting?

2 A Well --

3 Q Have a seat in my office?

4 A Your Honour, hello, good morning.

5 Q A nice cordial meeting, I think it was  
6 described?

7 A Yes.

8 Q And you are there, presumably he  
9 doesn't know anything about the case at this point  
10 in time, I would imagine?

11 A Well, he knew that, if he knew that I  
12 was there from Manitoba Justice and Mr. Wolson was  
13 there, that there was some outside counsel matter,  
14 he would know that. And I don't know what their  
15 alert system is within the court, but they do  
16 follow the outside counsel cases because they need  
17 to bring in judges periodically.

18 THE COMMISSIONER: Well, you don't  
19 know what was in his mind.

20 THE WITNESS: No.

21 THE COMMISSIONER: Let's go on.

22 BY MR. NOZICK:

23 Q He would know it's a serious matter  
24 that is going to be dealt with, talked about?

25 A Well, yes.

1           Q     So you go in there and you fill him in  
2     on, here's an off-duty police officer who had been  
3     at a gathering, I assume you said to him words to  
4     this effect, earlier in the evening, 7:00 o'clock  
5     in the morning he's on his way, he rear ends  
6     somebody, kills a young lady on her way to work?

7           A     More or less, yes.

8           Q     And Richard says, my client is an  
9     off-duty police officer, he's been suspended or  
10    may be suspended, there's all kinds of  
11    ramifications to him. We have assessed the case.  
12    We're both of the view that the proper plea to the  
13    charge is dangerous driving causing death,  
14    something along those lines?

15          A     Yes.

16          Q     Okay.

17          A     Similar to that.

18          Q     And then would you presumably give him  
19    some recitation of the background of the case, the  
20    gathering the night before, the unexplained  
21    accident, driving at the speed limit, missing the  
22    yellow lights, a brief resume of those facts?

23          A     He would have gotten some brief  
24    overview, yes. I don't know which facts I would  
25    have told him, but he would have gotten a brief

1 overview.

2 Q So he certainly was aware that the  
3 accused was an off-duty police officer?

4 A Well, Mr. Wolson reminded us the other  
5 day that he told him that.

6 Q Yeah. So that would make him aware of  
7 it. All right. So here is the position we're  
8 taking on sentencing, we have a joint  
9 recommendation, right? It's going to be a  
10 conditional sentence, with various conditions,  
11 right? That would have been said to him?

12 A Yes, yes, yes.

13 Q All right. And you told him that you  
14 had problems with your case, according to  
15 Mr. Wolson?

16 A Right.

17 Q Right. And by problems, I think that  
18 you could have also have used the word  
19 "exigencies" with the case?

20 A Right, one or the other.

21 Q And I don't know whether you wanted to  
22 get into a lot of details with respect to what the  
23 exigencies or problems were. Did you discuss any  
24 of those problems with him?

25 A We didn't, as I recall.

1           Q     So he would have, based on the  
2     conversation, Judge Wyant would have been aware  
3     that it was an off-duty police officer involved in  
4     a fatality, and that the Crown had problems with  
5     his case, and a plea bargain or joint  
6     recommendation was going to be made?

7           A     Yes.

8           Q     And then it was said that he  
9     volunteered the fact that he had a manslaughter  
10    case, and he was going to give a conditional  
11    sentence to the accused in that particular case  
12    later on that morning?

13          A     Yes, sir.

14          Q     And what did you -- what was your view  
15    when he said that? What did that mean to you, in  
16    light of the discussions that you had?

17          A     Well, Judge Wyant, of course, said  
18    that he would not tell us what it was that he  
19    would do with respect to the matter we were  
20    speaking to him about. He wasn't going to tell us  
21    his decision or anything of that sort but, as you  
22    said, communicated -- he first said that, then he  
23    told us about this manslaughter, and we had to go  
24    on our way because he had to deal with that. And  
25    after, when I heard that, I thought that he may

1 likely go along with this, but I couldn't predict  
2 that. It gives you a feeling that maybe, yes, the  
3 judge thinks this is not bad. But I know at the  
4 end of the day that I could be -- I can't take  
5 that sort of telling me that he's doing this case  
6 and doing that as what's going to happen. But  
7 certainly it makes you think that maybe the judge  
8 doesn't think you're off base.

9 Q The reason you would go to a judge in  
10 advance is, one, alert him as to the sensitivities  
11 of the case, I take it?

12 A Well --

13 Q Or not?

14 THE COMMISSIONER: Let's not deal with  
15 the reason why you normally do it. Let's deal  
16 with the facts of this case. Let's get on with  
17 it.

18 BY MR. NOZICK:

19 Q I'm going to suggest to you that,  
20 based on what happened here, that there was some  
21 sense that Judge Wyant was going to go along with  
22 the arrangement?

23 A Well, that's how I personally thought  
24 how it might unfold. Mr. Wolson told you that's  
25 how he thought it might unfold. But I think both



1 of us are experienced enough to know that you  
2 can't get a full final read, so to speak, out of  
3 that type of meeting and comment.

4 Q Nobody is asking you for a full read,  
5 or that Judge Wyant bound himself in any way. But  
6 I understand, according to Wolson's evidence, that  
7 you and he discussed it on the way out of the  
8 office and by the elevators, and you both came to  
9 the consensus that this judge is going to go along  
10 with the --

11 A Like, why would he -- I guess we would  
12 say, why would he tell us he was doing this if he  
13 found what we were talking about to be  
14 unfavorable?

15 Q Exactly. And all I'm saying, what he  
16 was going to do in his mind is his business, but  
17 in your mind --

18 A Right.

19 Q I'm going to suggest to you, Wolson  
20 said he was shocked when the case evolved the way  
21 it did, he was shocked because he thought the  
22 judge knew enough facts to, and was going to go  
23 along with it, and he was totally surprised. Was  
24 that your feeling as well?

25 A Well, I was definitely surprised, yes.

1           Q     All right. Now, if you are of the  
2 view that the judge was likely -- let me put it  
3 another way. Had you had to do the sentencing and  
4 the proceedings over again, I take it you would  
5 take a whole different approach. Is that fair?

6           A     Well, yes.

7           Q     I mean, in hindsight, we now know what  
8 evolved. You probably would have made a  
9 distinction between a joint recommendation and a  
10 "true plea bargain based on exigent  
11 circumstances." You probably would have  
12 explained?

13          A     The language would have been different  
14 and clearer, yes.

15          Q     I mean, that's what the Sinclair case  
16 says, the Lamirande case says, I don't know if it  
17 is the law anywhere else than Manitoba, but it is  
18 certainly the law in Manitoba?

19          A     Mr. Nozick --

20          Q     So you would have done that, I'm going  
21 to suggest to you?

22          A     -- when I look back at what happened,  
23 and if there was confusion or misunderstanding on  
24 my part with the judge, the judge not  
25 understanding me, and some issues with Mr. Wolson,

1 I would do whatever I could now to make sure that  
2 those misunderstandings don't occur, and try to  
3 put as much, in my mind, as much in writing as  
4 possible by agreement so we don't have these  
5 problems.

6 Q Okay. You would have crossed the T's  
7 and dotted the I's more carefully, in your  
8 submission, particularly on August 22nd?

9 A No, I would put the facts in front of  
10 the judge more clearly. I would set out, in a way  
11 which could never be misunderstood, in writing as  
12 well for the judge, the agreement of counsel. So  
13 that there would be no misunderstanding. I think  
14 that is a better way that we would have both  
15 signed off on it, and that would have been the end  
16 of it.

17 Q Do you think that the reason that you  
18 didn't do it that way, and you did it the way that  
19 you did, was because you basically felt quite  
20 strongly that the judge would be going along with  
21 the joint recommendation made by two senior  
22 counsel?

23 A No, not at all. Because at the end of  
24 the day, even though recommendations are made by  
25 senior counsel, even where in the language of

1 Madam Justice Steele, I believe in Lamirande,  
2 where we talk about the quid pro quo, that the  
3 judge at the end of the day has the final say, and  
4 not counsel, and I don't think that I would do  
5 anything just to cavalierly sort of go about it  
6 thinking that the judge is going to do this so I  
7 don't have to do something else. I just think I  
8 would do it with the thought always in the back of  
9 my mind, which I tried to do here and will always  
10 do, that the judge has the final say, but I'll do  
11 what I think is appropriate, what needs to get  
12 done.

13 Q Let's move on a bit now. One of the  
14 issues that came up is, the term that you use is,  
15 and I guess that's a term that you would use,  
16 anecdotal historical evidence.

17 A Right.

18 Q It's not one that's in my vocabulary.  
19 But in any event, you use that term, and then the  
20 issue came up as to whether or not you were -- you  
21 were asked whether you were prepared to prove the  
22 evidence of consumption of alcohol as opposed to  
23 evidence of impairment. Do you remember all that  
24 issue?

25 A I know that whole interchange, yes.

1           Q     Right.  And Wolson told us that after  
2     August 22nd, when you raised that term in court,  
3     he thought he should have dealt with it a little  
4     bit differently as well, he thought he should have  
5     addressed it directly at that time with the judge  
6     and said, no, I'm not agreeing to that, rather  
7     than phrasing it in the term of impairment.  And  
8     obviously, on reflection, he would have dealt with  
9     it differently.  But he said the way he dealt with  
10    it is he called you after August 22nd, or after  
11    August 31st, sometime between the two sentencing  
12    dates, August 22nd and September 12th, and he  
13    raised that concern with you.  Do you remember him  
14    telling you that?

15           A     I remember him saying that.

16           Q     Okay.  You remember that happening?

17           A     Well, today, after being here for two  
18    and a half days, I'm not sure, but I'm not going  
19    to disagree with Mr. Wolson.

20           Q     So if Mr. Wolson says that he  
21    raised --

22                   THE COMMISSIONER:  He said he doesn't  
23    disagree, so can we just move on?

24    BY MR. NOZICK:

25           Q     I am moving on.  If you don't disagree

1 with Mr. Wolson, what he says is that you agreed  
2 not to call evidence with respect to the  
3 consumption of alcohol before September 12th, the  
4 second sentencing date.

5 A Well, I don't know if that was the  
6 discussion, but I want -- Mr. Wolson and I thought  
7 we had a clear understanding, and that is why I  
8 didn't think he was objecting, which was that I  
9 was trying to explain, and I thought he understood  
10 totally after why I used that phrase, which was I  
11 was trying to tell the judge what had happened  
12 from the time this man had stopped work and gone  
13 through the evening, and that evidence of alcohol  
14 was not something that we were relying on in the  
15 case. And that's why I don't -- Mr. Wolson said  
16 that when he heard me give the explanation in  
17 court that he didn't raise the objection to it,  
18 and that's all I can tell you, Mr. Nozick.

19 Q Let me put it another way. On  
20 September 12th, when the issue came up in court,  
21 there was a recess and you went and phoned  
22 Mr. Kaplan and Mr. Slough and had a discussion  
23 with them?

24 A Right.

25 Q Okay. If Mr. Wolson is accurate,

1    which you concede that he was, he says that you  
2    would have already made an undertaking to him not  
3    to call the evidence with respect to alcohol  
4    consumption, before the court proceedings on  
5    September 12th, and that your conversation, or  
6    your call to Slough and Kaplan would be  
7    superfluous because you had already made your  
8    undertaking?

9           A     Well, yes, but it was an issue that I  
10    didn't anticipate arising. I didn't know  
11    Mr. Wolson was even going to go there, because it  
12    didn't seem like we were going there. When the  
13    issue arose, I took a break. I thought that it  
14    was clear between Mr. Wolson and I that I was not  
15    going to be calling evidence. I called the two  
16    fellows at Justice, told them what was going on,  
17    because clearly they were watching this closely,  
18    and told them this is the issue which has now  
19    arisen. My understanding of the dialogue is the  
20    judge is now asking me whether or not I'm going to  
21    be calling evidence on whether or not alcohol was  
22    a factor in the marked departure. If I  
23    misunderstood the judge, I misunderstood the  
24    judge, but that's what I clearly thought he was  
25    asking me, because that's what Mr. Wolson was

1 saying, and told them that it was not going to  
2 happen.

3 Q But if you had given your undertaking  
4 to Mr. Wolson before court on September 12th, not  
5 to call evidence regarding the alcohol  
6 consumption, you would have felt bound by that  
7 undertaking; is that fair?

8 A Well, yes, I made an undertaking to  
9 Mr. Wolson but -- that I would have to be bound  
10 by.

11 Q So when the judge asks you whether you  
12 are calling evidence with respect to alcohol  
13 consumption, in court on September 12th, you  
14 didn't immediately answer, no, in accordance with  
15 your undertaking to Mr. Wolson, did you?

16 A No, I didn't. I first asked for a  
17 break.

18 Q You went and you phoned Mr. Kaplan and  
19 Mr. Slough. Was that the purpose of telling them,  
20 this issue has come up in court?

21 A Right.

22 Q And this is the way I'm going to  
23 handle it?

24 A Well, that's how I told him I was  
25 going to handle it.



1 Q All right. And that was your decision  
2 to make?

3 A Well, ultimately they are all my  
4 decisions, I know that.

5 Q But you had made the decision and the  
6 undertaking to Mr. Wolson not to call the evidence  
7 with respect to alcohol consumption?

8 A Well, yes. But in my conversations  
9 with them, I don't feel that they understood that  
10 I had any obligation otherwise.

11 Q You let Mr. Kaplan and Mr. Slough  
12 know?

13 A Right.

14 Q Right. But the point is, when you  
15 made your decision before September 12th not to  
16 call the evidence, that was your decision?

17 A Oh, yes, I didn't talk to Kaplan or  
18 Slough at all about this matter until it arose in  
19 the courtroom, if that's where you're going, Mr.  
20 Nozick. I didn't talk to them at all about it.

21 Q And you accept responsibility for  
22 that, I take it, that decision?

23 A I don't know if it's accepting  
24 responsibility. That's the decision I made.

25 Q All right. I want to go back to

1 July 13th on your time sheet. Now, we got  
2 sidetracked a little bit.

3 A I guess if we were at September, we  
4 wouldn't go back to July, but I guess we are going  
5 back to July.

6 Q We have to deal with the meeting with  
7 Mr. Kaplan on July 13th, 2007. Okay. Now, that's  
8 a Friday, and that's after you have the tentative  
9 arrangement made, but before Wolson meets on the  
10 weekend with the family?

11 A Right.

12 Q And various terms have been used to  
13 describe the purpose of the meeting. One term was  
14 vetted that is used, another term is consulted.  
15 But I take it that the meaning of those terms, in  
16 your mind, was you want to run by them the  
17 proposed deal; is that correct?

18 A Run by?

19 Q Run by Mr. Kaplan --

20 A Yes.

21 Q -- the proposed deal. And you want to  
22 make sure that the deal that is being proposed is  
23 in accordance with all of the policies. Is that  
24 correct?

25 A Yes.

1 Q And these policies you told us, there  
2 is a couple of policies that come into play here.  
3 One, a policy regarding staying charges. You are  
4 aware of that policy?

5 A Yes.

6 Q And there's another policy with  
7 respect to recommending conditional sentences?

8 A Right.

9 Q And those are the two policies that  
10 would have to be complied with in order for the  
11 deal to go through; correct?

12 A Yes.

13 Q And as long as those policies are  
14 being complied with, then according to the  
15 independent counsel policy, as we discussed  
16 earlier, your decision is final and binding;  
17 correct? Right?

18 A Yes, I would assume so.

19 Q Yeah. I mean, the only way that  
20 Kaplan or anybody else can veto it is if it's not  
21 in accordance with Crown policy?

22 A Or was -- I would like to think that  
23 also, if for some particular reason they knew  
24 about the case they had, and independent counsel  
25 was so off base that they might interfere. I

1 don't think it would be responsible of either of  
2 them to not interfere at that point.

3 Q Okay. So if it's totally off the  
4 wall, then you might think they might say  
5 something to you. But as long as you have an  
6 opinion --

7 A Well, let me --

8 Q -- and you can justify the basis of  
9 your opinion to them, they are bound to go along  
10 with your opinion?

11 A Yes, or if the opinion was wrong and  
12 they were aware of recent authority which reversed  
13 the thinking that counsel was relying on, I would  
14 think they would be obliged to point that out as  
15 well. I can think of circumstances where they  
16 would be obliged to interfere.

17 Q But short of that, they have -- by  
18 virtue of the policy, they have to accept your  
19 opinion?

20 A That's what the policy says, yes, sir.

21 Q All right. Now, let's look at the  
22 policy. First of all, the policy regarding stay  
23 of proceedings, G-46, Exhibit 216, if you have it  
24 there.

25 A 216, yes, sir.

1 Q It's found in G-46.

2 A What page are you on, sir?

3 Q Page 1389 --

4 A 1389, yes, sir.

5 Q -- in G. Everybody with me here? I'm  
6 just looking at the policy statement and it says:

7 "The twofold test for prosecutorial  
8 discretion to proceed with or to  
9 instruct that charges be instituted  
10 is: First of all, whether or not  
11 there exists a reasonable likelihood  
12 of conviction."

13 Do you see that?

14 A Yes, I see that.

15 Q And it was your opinion from the early  
16 point in time, back in October 3rd, 2005, that  
17 there was not a reasonable likelihood of  
18 conviction with respect to the drinking or  
19 alcohol-related charges, the impaired driving  
20 causing death, refusal, and the criminal  
21 negligence causing death?

22 A There was not, or was?

23 Q That there was not a reasonable  
24 likelihood of conviction?

25 A No, I think that there was a

1 reasonable likelihood of conviction on the charges  
2 that were laid. Whether or not they could be  
3 proven beyond a reasonable doubt is another issue,  
4 because the standard for laying the charge, as I  
5 understand it, is a reasonable likelihood of  
6 conviction. It's a different standard for the  
7 laying of the charge as opposed to proof of the  
8 charge, as I understand that policy.

9 Q I thought I understood you to say that  
10 you didn't think you had a case on the impaired  
11 driving and the criminal negligence or the  
12 refusal, and you gave a number of reasons.

13 A I told you, Mr. Nozick, those were the  
14 problems with the case. That doesn't mean that  
15 the charter issue, for example, on the refusal  
16 would be resolved against the Crown. I can't rule  
17 out that the -- I can't rule out that a judge may  
18 find that the charter violations do not call for a  
19 remedy that would favour the accused. I would  
20 think on balance that there is reasonable  
21 likelihood of conviction for the laying of the  
22 charges. And as I said to Judge Wyant, with  
23 respect to the prosecution, I was of the view that  
24 some of the charges, there was a reasonable  
25 likelihood of conviction, which is the basis upon

1    which the Crown could proceed.  However, that we  
2    were not satisfied on some of these charges that  
3    there was proof beyond a reasonable doubt for a  
4    conviction.  There are two different standards, in  
5    my mind.

6           Q     Let me ask you this question.  We know  
7    weaknesses or problems that the Crown had with the  
8    case from the investigation point of view.  How  
9    would the, let's call it the Bakema/Woychuk  
10   escapade, play out in your mind with respect to  
11   reasonably obtaining, the reasonable likelihood of  
12   obtaining a conviction?

13           THE COMMISSIONER:  He's not talking  
14   about conviction at the trial level, he's talking  
15   about institution of the proceedings.

16   BY MR. NOZICK:

17           Q     I'm not disputing the institution.  
18   I'm talking -- the charges, the test for whether  
19   to proceed with the charges is whether there's --  
20   the issue of whether there continues to be a  
21   reasonable likelihood of conviction is an ongoing  
22   criteria, correct?

23           A     Yes, sir.

24           Q     Right.  And if at some point in time,  
25   maybe initially you get a report from the police

1 saying -- that leads you to believe that there's a  
2 reasonable possibility of conviction at the  
3 outset, right? I mean, that's why you --

4 A Mr. Nozick, at the end of the day,  
5 what you're suggesting to me are matters relating  
6 to issues of credibility, certainly the judge may  
7 find that one or two of these officers are not  
8 believable. But at the end of the day, a judge  
9 could make a finding of guilt, or a jury could  
10 make a finding of guilt depending on how the  
11 evidence goes in and what gets excluded or not.

12 Q But the point --

13 A I don't know if we're speaking the  
14 same language here.

15 Q I'll try and be a little more clear.  
16 When you authorized the charges, you obviously  
17 thought that there was a reasonable possibility  
18 for a conviction at that time?

19 A I believe there was a reasonable  
20 likelihood of conviction, yes. I maintained that  
21 throughout.

22 Q And in some cases then, at some point  
23 in time, because of the development in the case,  
24 that opinion can change where there's no longer a  
25 reasonable likelihood for a conviction?



1           A     That can change, yes.

2           Q     And if that happens, then your duty is  
3 to stay the charge; correct?

4           A     Yes.

5           Q     All right. Now, in this particular  
6 case, we had all of the problems that we have  
7 outlined. And then you have the additional  
8 problem that comes to your attention in the Carter  
9 disclosure?

10          A     Yes, sir.

11          Q     You have a senior officer at least  
12 being suspected of obstructing justice; correct?

13          A     Well --

14          Q     That was a suspicion?

15          A     There has been opinion on that that  
16 had been rendered, which was an unfavorable  
17 opinion, in my view, to that issue. And to the  
18 extent that there was no obstruct justice before  
19 the court to consider, it was not on the table for  
20 me to consider.

21          Q     It's not for you to consider, but you  
22 would have -- you'd be duty bound to make  
23 disclosure to Richard Wolson the RCMP  
24 investigation, right?

25          A     Yes.

1           Q     And Mr. Richard Wolson would come to a  
2     trial, perhaps in front of a jury, armed with this  
3     police report; right?

4           A     Yes.

5           Q     Armed with the allegations that  
6     Woychuk was making; right?

7           A     Yes.

8           Q     Now, how in your mind would that play  
9     out in front of a trier of fact? I'm going to  
10    suggest to you that that would affect the  
11    continuing reasonable likelihood of conviction on  
12    anything?

13          A     Well, I can look at these, sir,  
14    independently. I can see that the dangerous  
15    driving stands independent of the matter  
16    concerning Mr. Bakema and Mr. Woychuk. The issue  
17    of whether or not Mr. Zenk refused or did not  
18    refuse the breathalyzer can stand independently of  
19    that activity. And so too can the issue of  
20    whether he was impaired at the time stand apart  
21    from that. Those two fellows have their own  
22    problems, but there are other people at the scene,  
23    there are other witnesses. And just because they  
24    are not believed and their evidence is discarded,  
25    I can't be certain that -- I know there are

1 weaknesses, I know there are problems, I'm not  
2 sure there is going to be a conviction, but I  
3 can't rule that out. There's other evidence,  
4 other than just those two people.

5 Now, it may well be that on the whole,  
6 the case is fatal and I believe that there will be  
7 some problems that the resolution is fine, but I  
8 did not think that I should be staying these  
9 charges, just independently, before the  
10 Preliminary Inquiry. If that's a suggestion you  
11 are making to me, I would have not stayed these  
12 charges before a Preliminary Inquiry, if that's  
13 where we were going.

14 Q Okay. Do you agree with me that in  
15 presenting a case to a trier of fact, whether it's  
16 a judge or a jury, that what you're trying to  
17 persuade the trier of fact is you have a credible  
18 case that they can rely on. Isn't that one of the  
19 things you have to look to do?

20 A Because I have some problems, Mr.  
21 Nozick, I cannot predict to you today that they  
22 are fatal. If you're suggesting to me that I  
23 ought to have stayed -- I don't understand what  
24 the suggestion is?

25 Q I haven't made any suggestion, I am

1 just trying to --

2 A I am just telling you -- we're not  
3 communicating.

4 THE COMMISSIONER: Let's communicate  
5 and get on with this, otherwise we'll be here all  
6 day, if you're going to talk one way and you are  
7 going to respond the other way. Put your question  
8 again, please.

9 BY MR. NOZICK:

10 Q Let me put it another way.

11 THE COMMISSIONER: Good. Put it  
12 clearly.

13 BY MR. NOZICK:

14 Q Why did you stay the charges that you  
15 stayed, the drinking and driving?

16 THE COMMISSIONER: At trial, not  
17 initially.

18 BY MR. NOZICK:

19 Q Before the preliminary hearing.

20 A Why did I stay them? Because  
21 Mr. Wolson and I entered into an arrangement and a  
22 plea bargain that he, his client was going to be  
23 pleading guilty to dangerous driving and I was  
24 going to stay these charges. That's why it  
25 happened.

1 Q Okay. And what was the basis of your  
2 thinking in accepting the plea bargain? Was it  
3 exigent circumstances? Was it a fact that you  
4 thought that you might not prove the case? What  
5 was your thinking?

6 A My thinking was all of those things,  
7 Mr. Nozick. That the case on the other charges  
8 was not good, there was credibility problems,  
9 there was some charter problems, that there is  
10 potentially even some problems with the dangerous  
11 driving.

12 THE COMMISSIONER: In short, you  
13 didn't have a reasonable likelihood of conviction.  
14 Is that what you're saying?

15 THE WITNESS: No, I thought I -- I  
16 didn't think that there would be -- at the end of  
17 the day, I would think proof issues, proof beyond  
18 a reasonable doubt issues.

19 THE COMMISSIONER: Okay. You see, you  
20 are both talking about the same thing but you're  
21 talking about it differently. Move on, please.

22 BY MR. NOZICK:

23 Q I'm going to move on to the  
24 conditional sentence policy, G-45,  
25 Mr. Commissioner, Exhibit 217, page 1385.

1           A     Exhibit 217, yes.

2           Q     Now, the term plea bargain, the  
3     Commissioner has used it a certain way. I don't  
4     want to differ with the Commissioner, but he has  
5     used it, a plea bargain is in relation to the  
6     charge, and then there's some type of arrangement  
7     with respect to sentence. But I take it that  
8     really when you use the term plea bargain in the  
9     context that we're using, it was a global plea  
10    bargain for both the charges and the sentence?

11          A     Yes.

12          Q     It's not -- you can't dissect it and  
13    say the plea bargain terminology only applied to  
14    the charges, because it applied also to the  
15    sentence?

16          A     Yes.

17          Q     So, in other words, Wolson agrees to  
18    plead guilty to the dangerous driving in  
19    consideration of a joint recommendation for a  
20    conditional sentence; right?

21          A     Yes.

22          Q     And had you not agreed to the joint  
23    recommendation for the conditional sentence, then  
24    likely the deal would have fell through?

25          A     Correct.

1 Q And in Exhibit number 217, the --

2 A 207?

3 Q 217?

4 A Yes, sir, I've got it right in front  
5 of me.

6 Q In paragraph four?

7 A Which page, sir?

8 Q Page 1385.

9 A Yes, sir.

10 Q Now, this refers to a case conference,  
11 which doesn't apply in your case because you are  
12 an independent counsel, but what it says:

13 "In those exceptional cases where it  
14 has been agreed at a case conference  
15 that a Crown Attorney will recommend a  
16 conditional sentence. In one of the  
17 above situations, the Assistant Deputy  
18 Attorney General must be given advance  
19 notice of the sentencing date."

20 Correct?

21 A Okay.

22 Q I take it you can read into that if  
23 you're going to, that if there's an exceptional  
24 case, and I take it this may be an exceptional  
25 case, or argued to be an exceptional case, then

1 you have to give the Department of Justice notice  
2 of what you're doing, at least in your case?

3 A That's fair, yes.

4 Q Right. And that's part of the reason  
5 for communicating with Mr. Kaplan and Mr. Slough?

6 A Yes.

7 Q Now, while a conditional sentence  
8 recommendation is exceptional, at page 1386:

9 "However, a case may involve  
10 exceptional circumstances that would  
11 justify a recommendation about  
12 conditional sentence. Exceptional  
13 circumstances is difficult to define  
14 as they will be unusual and  
15 unforeseeable situations that will  
16 arise."

17 And then they set out some of the factors that  
18 might be included. Do you see that?

19 A Yes, sir.

20 Q And if you go to the second last  
21 bullet, it talks about the exigencies of the case,  
22 i.e. difficulties with proof. That's what you had  
23 here, correct?

24 A Yes.

25 Q "...may permit a Crown Attorney to



1            recommend a conditional sentence in  
2            order to obtain a conviction, even  
3            though a conditional sentence would  
4            not normally be appropriate."

5            Do you agree with that?

6            A        I am reading it, yes. That's what it  
7            says.

8            Q        And do you agree with that, though,  
9            that's correct?

10          A        Well, I think that it has to be read  
11          in the context of the sentence below because --

12          Q        I'm going to get that. I am going to  
13          get to that in a minute.

14          A        All right. That's what it says.

15          Q        And it says it's a difficult judgment  
16          call and a case conference will often be of  
17          assistance in determining whether this course is  
18          justified; correct?

19          A        Yes.

20          Q        Now in your case you don't have the  
21          availability of a case conference in the way that  
22          it's used in the policy; correct?

23          A        There was no availability for that.

24          Q        Right. But you do have the ability to  
25          consult or run by the case with senior members of

1 the department?

2 A Yes, I said that on a number of  
3 occasions.

4 Q So that would be a substitute for the  
5 case conference?

6 A That's how I understand the  
7 relationship to be.

8 Q Okay. The next bullet:

9 "A Crown Attorney is not required to  
10 argue that a conditional sentence is  
11 inappropriate in the face of clear  
12 authority to the contrary."

13 And I take it, in your case, you have made it  
14 clear that there was all kinds of clear authority  
15 in Manitoba that that was the proper disposition?

16 A That's my research and I stand by it,  
17 certainly to the date of the sentencing of that  
18 particular case -- the law in Manitoba, that is.

19 Q Now, after your meeting with Kaplan on  
20 July 13th, that was a Friday, on the Sunday you  
21 wrote an e-mail to I guess Brian Kaplan and his  
22 secretary Colleen. That's found at -- it's  
23 Exhibit 227, Mr. Commissioner, found at R-1, I'm  
24 sorry R-2.91.49.

25 A This is the briefing them about the

1 case and there was going to be a conditional  
2 sentence, yes.

3 Q Do you have that in front of you?

4 A I don't have it in front of me.

5 Q Exhibit 227?

6 A I know what you're speaking about.

7 Yes, I have it here, sir.

8 Q So to put this in context, on Thursday  
9 you talked to Wolson, on the Friday you talked to  
10 Kaplan, and then Wolson talks to the family on the  
11 weekend and gets back to you. And you write  
12 Kaplan on the Sunday, July 15th, '07, writing an  
13 update on the matter?

14 A Yes, sir, I see that about 10:12.

15 Q You are aware that Mr. Kaplan is  
16 actually away from the office but you're sending  
17 him a copy anyways. I take it Mr. Kaplan went on  
18 holidays?

19 A I don't know why he was away from his  
20 office, I just knew he was away.

21 Q Okay. And then in the third paragraph  
22 you give a brief summary of the witnesses that  
23 were available, the Winnipeg Police Services, the  
24 witnesses from the scene, the ambulance, the East  
25 St. Paul Police, the RCMP --

1           A     Yes.

2           Q     -- traffic reconstruction expert,  
3     correct?

4           A     Yes.

5           Q     And then you venture your opinion.  
6                 "My opinion is that resolving this  
7                 matter by taking the plea as offered  
8                 is a very good resolution."

9           A     Okay, yes.

10          Q     "The evidence in support of the  
11                 charge of both the drive impaired and  
12                 refusal of breathalyzer is very, very  
13                 weak."

14     Correct?

15          A     Yes.

16          Q     So that was your opinion at the time?

17          A     Yes.

18          Q     And then you refer:  
19                 "By reason of the shoddy work of the  
20                 East St. Paul Police, the charge of  
21                 refuse breathalyzer is bound to fail."

22          A     That was my opinion.

23          Q     Yes. So, again, no reasonable  
24     possibility of conviction, correct, when you use  
25     that terminology?

1           A     All right. We will adopt your  
2 language.

3           Q     Thank you. And then:  
4                 "The WPS members do not describe Zenk  
5 as being impaired, and in speaking to  
6 the RCMP expert, his assessment is  
7 that the plea may in fact be more than  
8 what might happen had the matter gone  
9 to trial."

10          A     Yes.

11          Q     What did you mean by that?

12          A     Well, he was telling me that there is  
13 a good chance, based on his review of the file,  
14 the man could be acquitted, so that the resolution  
15 was good.

16          Q     Okay. So what was left:  
17                 "What is left factually is speed  
18 within the posted speed limit, no  
19 evidence of impairment, no evidence of  
20 erratic driving before the collision."

21 Correct?

22          A     Right, reading my memo.

23          Q     So this appears, if you read your  
24 memo, that you are of the view that this was a  
25 very good deal for the Crown?

1 A Yes.

2 Q Right. You salvaged a guilty plea,  
3 without having to go through a Preliminary  
4 Hearing, without having to go through a trial, on  
5 a case that you may very well have lost?

6 A Yes.

7 Q And then you point out that the main  
8 issue will be the sentencing, and you point out,  
9 because the public perception of this case and the  
10 family's perception is different than what the law  
11 is, as you understood it; correct?

12 A Right.

13 Q Just a couple of quick matters that  
14 were canvassed by counsel and not pursued.

15 THE COMMISSIONER: Can you do them in  
16 three minutes so we can have our break?

17 MR. NOZICK: I'll do my best.

18 THE COMMISSIONER: Good.

19 BY MR. NOZICK:

20 Q Courtroom 404, there was some  
21 discussion that it takes a long time, that the  
22 family sat there for a long time waiting for the  
23 very short matter to be dealt with on July 17th.  
24 Do you remember that?

25 A Yes.

1 Q It was brought up?

2 A Yes, sir.

3 Q Court starts at 10:00 o'clock?

4 A Yes, sir.

5 Q Generally people who are interested in  
6 a case like this would come early. Were you there  
7 early at 9:00 o'clock?

8 A Well, that's my -- I try to get there  
9 early.

10 Q People generally come early, and then  
11 the 404 court is an assignment room where all the  
12 matters scheduled for that day go into that  
13 docket, and then they are shipped out to courts,  
14 to be tried in other courts?

15 A Right.

16 Q And in this case, your plea was  
17 entered?

18 A Right.

19 Q So if there was a delay, and the  
20 family is saying it, it may well have been that  
21 they were waiting for court to start?

22 A I don't know what they were speaking  
23 about and don't want to --

24 Q That's how the court works?

25 A -- think about it. Well, I don't want

1 to think about it. I don't mean it that way, I  
2 just cannot tell you what they were thinking  
3 about.

4 Q The issue on the release on the  
5 promise to appear, you remember saying you agreed  
6 to release Mr. Harvey-Zenk on a promise to appear?

7 A Yes.

8 Q You didn't consult with either  
9 Mr. Kaplan or Mr. Slough beforehand?

10 A No. Mr. Kaplan wasn't around, and I  
11 did not consult with Mr. Slough. And I did not  
12 consult with Mr. Ridd, who contacted me about the  
13 matter.

14 Q As the independent counsel, that was  
15 your decision and your responsibility.

16 A Yes.

17 Q The report from Judge Meyers, Exhibit  
18 223 dated December, I think it's 19th, 2005, that  
19 was referred to by counsel, and there was a check  
20 mark off there where, something along there were  
21 no real issues. This was what they call a  
22 pre-trial meeting that was held many months before  
23 the time was scheduled for the Preliminary  
24 Hearing?

25 A Yes.



1 Q It was held in December, the  
2 Preliminary in June of '06. And as I understand  
3 what happens at these trial conferences, the judge  
4 has a little check list, asks a bunch of  
5 questions, checks off the checks, and that's it;  
6 correct?

7 A Generally speaking.

8 Q And often counsel haven't really spent  
9 a great deal of time addressing their minds to the  
10 issues?

11 A Oftentimes that does occur.

12 Q And in any event, this was way before  
13 the Carter disclosure; right?

14 A Correct.

15 Q Way before the RCMP report, right?

16 MR. NOZICK: I have a couple more  
17 questions, it may take more than three minutes.

18 THE COMMISSIONER: All right. 15  
19 minutes.

20 THE CLERK: All rise. This Commission  
21 of Inquiry is now in recess.

22 (Proceedings recessed at 10:45 and  
23 reconvened at 11:00 a.m.)

24 THE CLERK: All rise, please. This  
25 Commission of Inquiry is now reopened. Please be

1 seated.

2 THE COMMISSIONER: Are you planning to  
3 be much longer?

4 MR. NOZICK: Hopefully not. I would  
5 estimate five, seven minutes.

6 THE COMMISSIONER: Remember Yogi Berra  
7 said it was deja vu all over again. That's the  
8 impression I'm getting here.

9 MR. NOZICK: I hear you.

10 THE COMMISSIONER: Okay.

11 BY MR. NOZICK:

12 Q Referring to 91.72?

13 A What exhibit is that?

14 Q Exhibit 233, and it looks like 142,  
15 which is 91.73 and 91.74 in volume R-2?

16 A Okay. I have that.

17 Q First of all, Exhibit 233 is an e-mail  
18 from Don Slough to yourself requesting some  
19 information for a briefing note for the Premier?

20 A Yes.

21 Q Right. And at that point, he sets out  
22 a whole number of questions there that he asks you  
23 to answer?

24 A Yes.

25 Q Basically, what the case is about,

1 what's going on, that type of thing?

2 A Yes.

3 Q And you answer him, first of all you  
4 send a draft and then you send a revised copy?

5 A Yes.

6 Q And in paragraph seven, and this has  
7 been referred to, we note that there was  
8 additional comments made on number seven --

9 A Yes.

10 Q -- in the final copy vis-a-vis the  
11 previous copy?

12 A Yes.

13 Q I take it Mr. Slough did not ask you  
14 to add anything to your revised copy; fair?

15 A Mr. Nozick, today, I cannot remember  
16 what the discussion was. If there was some  
17 additional material, clearly in my mind, it could  
18 only have resulted as a consequence of our  
19 discussions.

20 MR. NOZICK: Okay. Now, keeping in  
21 mind the Yogi Berra caveat, I'll ask no further  
22 questions.

23 MR. PROBER: I have to wait until Yogi  
24 leaves.

25

1 BY MR. PROBER:

2 Q Good morning, Mr. Commissioner and  
3 Mr. Minuk.

4 A Good morning, Mr. Prober.

5 Q I do not expect to be lengthy. First  
6 of all, you, Mr. Minuk, draw a distinction, and  
7 rightly so, between a reasonable likelihood of  
8 conviction and proof beyond a reasonable doubt?

9 A I do, sir.

10 Q That's all you were saying before when  
11 Mr. Nozick was questioning you?

12 A Right.

13 Q And in order to proceed with the  
14 charges, proceed with them, never mind lay them,  
15 but to proceed with them, as a Crown Attorney you  
16 have to be satisfied that there's a reasonable  
17 likelihood of conviction?

18 A Correct.

19 Q And while you were satisfied that  
20 there was a reasonable likelihood of conviction,  
21 you were not satisfied that you could prove the  
22 alcohol-related charges beyond a reasonable doubt?

23 A Correct.

24 Q Now, in terms of the plea discussions  
25 with Richard Wolson, you didn't say to him, I

1 don't have a reasonable likelihood of conviction  
2 therefore I'm staying the charges, before the plea  
3 discussions, right?

4 A I wouldn't speak like that to  
5 Mr. Wolson, ever.

6 Q No. And nor did you tell him before  
7 the plea discussions that you were not satisfied  
8 that you could prove the charges beyond a  
9 reasonable doubt?

10 A Simply put, Mr. Nozick -- Mr. Prober,  
11 until Mr. Wolson called me to discuss resolution,  
12 we did not -- I have not contacted him at all.

13 Q Right. Well, that's the worst insult  
14 I've had today, by the way.

15 A Pardon me?

16 Q You mixed me up with Mr. Nozick.  
17 That's about the worst insult I have had today.

18 A Sorry.

19 Q But it's early. In any event, Mr.  
20 Nozick and I are friends.

21 All right. So you didn't tell him  
22 either of those things, in terms of your case and  
23 what your beliefs were with respect to your case  
24 before plea discussions were conducted?

25 A I didn't follow you with that.

1 Q You didn't give him what you believed  
2 the strength of your case was?

3 A Oh, no, no, no.

4 Q No. And the opening salvo, in fact,  
5 comes from Wolson; right?

6 A Correct.

7 Q In terms of plea discussions?

8 A Yes.

9 Q And as a result of that, the alcohol  
10 related charges were stayed as part of the plea  
11 bargain?

12 A Right.

13 Q Right. And the fact that you told the  
14 court that you were not satisfied that you could  
15 prove the charges beyond a reasonable doubt, you  
16 didn't have legal proof. And you drew the  
17 distinction before, when you were in front of  
18 Judge Wyant, between the reasonable likelihood of  
19 conviction and proof beyond a reasonable doubt.  
20 You will recall that?

21 A I do recall that.

22 Q Right. And that fact is not -- I  
23 mean, the fact that the charges were stayed as  
24 part of the plea bargain, and the fact that you  
25 didn't have proof beyond a reasonable doubt, are

1 not mutually exclusive. You don't have proof  
2 beyond a reasonable doubt, so you stay the charges  
3 as part of the plea bargain; right?

4 A Well, that was my concern.

5 Q Right. Okay. Do you think you could  
6 have gotten a plea, a sure conviction, a guilty  
7 plea that is to dangerous driving causing death,  
8 without staying the alcohol-related charges?

9 A I think that --

10 Q I'm not talking about at trial now,  
11 I'm talking about in the plea discussions?

12 A No. No, no, no, I don't think that I  
13 could have successfully -- well, I knew that  
14 Mr. Wolson was just not going to go there.

15 Q Right. Thank you.

16 The only other area of questioning I  
17 have is on the issue of head trauma which was  
18 raised with you yesterday. Now, my colleague,  
19 Mr. King, printed out yesterday's transcript of  
20 evidence. And I just want to make -- when  
21 Mr. Paciocco put to you this issue of the head  
22 trauma or concussion, it was not made clear, and I  
23 want to make it clear with you as to when it was  
24 first brought to the attention of you and Judge  
25 Wyant. And that was on the August 22nd

1 proceedings. Now, if you want to confirm that, go  
2 to volume J, please?

3 A I have.

4 Q Do you have that?

5 A Exhibit 8, that's the August 22nd  
6 volume, I have that here.

7 Q You have the August 22nd volume. Now  
8 do you have page numbers at the bottom and the  
9 top?

10 A Yes, sir.

11 Q Okay. So 1663 at the bottom, the top  
12 is 46.

13 Now, I have it, hopefully they will be  
14 the same line numbers, line 29, the bottom.

15 "Never once, never once has Derek ever  
16 offered to me any concern for  
17 himself."

18 And then it goes on to refer to a concussion. Do  
19 you have that?

20 A Yes.

21 Q So that's raised at the August 22nd  
22 court proceedings; right?

23 A Well, it looks like he raised it.

24 Q Sorry?

25 A He raised it, but what they



1 believed --

2 Q Yes. That was quoted to you yesterday  
3 by Mr. Paciocco?

4 A Right.

5 Q But it wasn't put on the record that  
6 it was the August 22nd proceedings.

7 A Okay. I don't remember that.

8 Q No, no. Mr. Paciocco didn't put it on  
9 the record and I want to clear that up.

10 A Oh, okay, it's not a question.

11 Q That's all. So you see it on the  
12 August 22nd proceedings?

13 A I'm reading it, yes.

14 Q No, no. Fair enough. But I just want  
15 to confirm the date. And then there's another  
16 reference at page 1678 that Mr. Paciocco puts to  
17 you, and again it's August 22nd. That's at page  
18 61 at the top, 1678 at the bottom, line 15.

19 "I think, quite frankly, that may well  
20 have happened, but I don't know that  
21 and Derek doesn't know that because of  
22 the head trauma that he suffered."

23 But that again is August 22nd, correct, Mr. Minuk?

24 A I see where you're reading from the  
25 transcript.

1 Q Do you have it?

2 A I see where you're reading from.

3 Q Okay. That's fine. You obviously had  
4 nothing that you were aware of that contradicted  
5 that statement?

6 A Well, no.

7 Q No?

8 A Nothing there at all.

9 Q Right. Now, you were satisfied that  
10 there were elements of dangerous driving  
11 sufficient to ground a plea?

12 A Yes.

13 Q And if necessary, perhaps get a  
14 conviction at trial; correct?

15 A Yes.

16 Q And they included the marked departure  
17 from the norm, no attempt to stop, no attention  
18 paid to the warning lights, no attempt to avoid  
19 the collision, plowed into the rear of a vehicle  
20 at a high speed, and that caused a death, all of  
21 those factors; right?

22 A Right.

23 Q And I put that to you because I want  
24 to confirm with you that the issue of the head  
25 trauma, the concussion, the loss of memory had no

1 bearing on your taking a plea to dangerous  
2 driving?

3 A No.

4 Q No.

5 A Not a part of the driving at all.

6 Q No. Nor was it a factor in agreeing  
7 to make a joint recommendation --

8 A No, not at all.

9 Q -- in terms of the sentence?

10 A It wasn't at all.

11 Q No. Because all of that was done  
12 before it was ever brought to your attention on  
13 August 22nd; right?

14 A Correct.

15 MR. PROBER: Right. Thank you. Those  
16 are my questions.

17 THE WITNESS: Thank you.

18 BY MR. GREEN:

19 Q Mr. Minuk, you have given evidence  
20 about the investigation that you had instigated of  
21 Chief Bakema. And you have told us that you felt  
22 that you were constrained in certain ways of  
23 revealing the fact that an investigation was going  
24 on. Is that correct?

25 A Yes.

1 Q And that was constraint pursuant to an  
2 actual policy of the Department of Justice. Is  
3 that correct?

4 A Yes, sir.

5 Q And Mr. Commissioner, I'd refer to  
6 volume Y-2, which has been marked as I understand  
7 it as Exhibit 266 in these proceedings. And if  
8 madam clerk can put that -- she's already done so,  
9 put it before the witness.

10 And if you look at page 153 at the  
11 bottom, sir?

12 THE COMMISSIONER: Is that the opinion  
13 of Mr. Gover?

14 MR. GREEN: No, I'm very sorry. I  
15 have got the wrong reference, sorry, it's volume  
16 G.

17 THE COMMISSIONER: G, okay, thank you.  
18 I have that.

19 MR. GREEN: Yes, it's 216.

20 THE COMMISSIONER: 216.

21 MR. GREEN: I'm sorry, volume G-46.

22 THE COMMISSIONER: Ah, okay. Thank  
23 you.

24 THE WITNESS: I have Exhibit 216 in  
25 front of me, Mr. Green.

1 THE COMMISSIONER: You're looking at  
2 the policy statement?

3 MR. GREEN: Yes.

4 THE COMMISSIONER: Thank you.

5 BY MR. GREEN:

6 Q And at the bottom of my copy, it's  
7 about six pages in, we have the number 153 --

8 THE COMMISSIONER: You don't have  
9 any --

10 MR. GREEN: It's under "procedure,  
11 laying charges," it's pages four of five at the  
12 top.

13 THE COMMISSIONER: Thank you.

14 BY MR. GREEN:

15 Q Do you have it?

16 A Yes, I do, sir.

17 Q All right. I'm looking at procedure  
18 laying of charges, item number 6, which states:

19 "No Crown Attorney shall disclose the  
20 fact of a police investigation other  
21 on a need to know basis within the  
22 prosecution service so as to maintain  
23 confidentiality and secrecy respecting  
24 the identity of a person who is the  
25 subject of a police investigation."

1 Is that the policy and the particular passage --

2 A Yes, sir.

3 Q -- that you had in mind --

4 A Yes, sir.

5 Q -- when you gave that evidence, sir?

6 A Yes, sir.

7 Q Sir, Mr. Zazelenchuk raised some  
8 matters with you that I'd just like to refer you  
9 to briefly. In particular, he referred you to  
10 your statements of account. We have heard those  
11 referred to as docketts and what have you. And he  
12 pointed out that someone with the initials E.E.M.  
13 had recorded time on this particular file?

14 A Yes.

15 Q And you told us who E.E.M. was?

16 A Right.

17 Q And who is it?

18 A Erin McNicol.

19 Q Right. And she is employed at your  
20 firm --

21 A Yes.

22 Q -- at the Aikins firm. And she was  
23 present at some of the meetings with the Tamans;  
24 is that correct?

25 A Yes.

1           Q     And you told us, or told Mr. Paciocco  
2     that her purpose in, or Mr. Zazelenchuk, her  
3     purpose in being at those meetings wasn't to take  
4     notes; is that correct?

5           A     Right, she wasn't taking notes.

6           Q     What was her purpose in being at those  
7     meetings?

8           A     Only because I was just concerned  
9     about the atmosphere between, and the  
10    relationship, and I use that in a sort of  
11    quotation sense, between myself and the families.  
12    And it was just difficult and I just wanted  
13    someone there with me.

14          Q     Okay. And have you, since this  
15    inquiry was called, spoken to Ms. McNicol and  
16    asked her whether she has any recollection of what  
17    went on at those meetings?

18          A     Yes, I did. When the matter came to  
19    light, I spoke with her. I asked her if she  
20    recorded any notes, if she kept any notes. She  
21    checked.

22          Q     Does she have any recollection?

23          A     Nothing, sir, no. She didn't even  
24    remember that she had sat in on the meetings.

25          Q     Mr. Zazelenchuk also asked you about

1 meeting with Constable Woychuk. And I think you  
2 told him that, in fact, a meeting had been  
3 scheduled for the 15th of July. That was a  
4 Sunday?

5 A Yes, sir.

6 Q Correct. And we know that that  
7 meeting was missed by you, is that correct?

8 A Yes, sir.

9 Q And you have now satisfied yourself,  
10 as I understand it, that you simply slept in and  
11 that was the reason that you missed the meeting?

12 A I'm not sure I would call it slept in,  
13 but I suspect it was a time when I was sleeping,  
14 because I wasn't sleeping at all during the  
15 evenings during that period of time. I wasn't  
16 able to lie down. I could only sit upright. So  
17 my sleeping was on and off during that period of  
18 time.

19 Q All right. And Mr. Zazelenchuk  
20 described Constable Woychuk as being a potentially  
21 weak witness. Would you agree with me that he was  
22 more than a weak witness, he was -- he had  
23 significant and abiding credibility problems.  
24 Would you agree with that?

25 A Yes.



1           Q     Now, I don't want to rehash evidence,  
2     but to put it in context, sir, am I correct in my  
3     understanding that from fairly early on after your  
4     having received this file, you were of the view  
5     that Mr. Harvey-Zenk was facing jail time, but  
6     jail time to be served within the community?

7           A     Well, yes, and I think I indicated  
8     that to both of the families in my early meetings  
9     with them that I thought the law in Manitoba was,  
10    for these types of offences, either dangerous  
11    driving causing death and impaired driving causing  
12    death.

13          Q     So a conviction on either, you were of  
14    the view that it was likely that there would be a  
15    conditional sentence?

16          A     Yes.

17          Q     Is that fair?

18          A     Yes.

19          Q     And what circumstances did you take  
20    into account when you arrived at that opinion,  
21    sir?

22          A     Primarily, well, first of all, many of  
23    the accidents that were described in the case  
24    law --

25          Q     Yes?

1           A     -- and the circumstances of the  
2     accident, whether it was rear end accident, people  
3     going through red lights, people moving from one  
4     lane to the other, but the factual circumstances  
5     of the accident. Of course, some with alcohol,  
6     some without alcohol.

7           Q     And what about the circumstance of  
8     Mr. Zenk?

9           A     And the circumstances of the offender,  
10    which is always front and centre in the  
11    conditional sentence cases.

12          Q     And what particular circumstances in  
13    relation to Harvey-Zenk would you consider?

14          A     Well, first of all, Mr. Zenk was a  
15    City of Winnipeg Police Officer, so from that I  
16    knew that he was employed, what the nature of his  
17    employment was, that he had no record. I knew  
18    that from the disclosure provided, no previous  
19    police contact, so to speak. That he was an  
20    individual with roots in the community, that he  
21    would likely meet all of the criteria, so able to  
22    follow court orders, abide by conditions.

23          Q     Had a young family?

24          A     Yes, not likely to reoffend. All of  
25    the things that I would need to consider in

1 determining whether or not he was a candidate for  
2 a conditional sentence.

3 Q Okay. Now, Mr. Paciocco cited you the  
4 evidence of the Tamans that you, according to  
5 them, you told them that dangerous driving causing  
6 death was the most serious of the charges that  
7 Harvey-Zenk was facing. You recall Mr. Paciocco  
8 bringing that to your attention?

9 A Yes, I do.

10 Q And I believe your evidence was that  
11 you wouldn't have told them that, there must be  
12 some confusion. Do I have your evidence  
13 correctly?

14 A Yes. And it's not the most serious at  
15 all, on the scale upward or downward it would be  
16 above the refusal.

17 Q Yeah. And that was going to be my  
18 point, sir, that if there was any comparison to be  
19 made as to it being more serious or most serious,  
20 that would have to be in connection with the  
21 refuse breathalyzer charge; is that correct?

22 A Yes, more serious than refusing the  
23 breathalyzer.

24 Q And the Tamans seem to be particularly  
25 interested, I won't say fixated, but there was a

1 lot of discussion about the refuse breathalyzer  
2 offence; is that fair?

3 A Yes. Because of the fact of the  
4 refusal, and the inferences that people might  
5 think can be drawn, and its use and things like  
6 that. So the refusal always presents itself as a,  
7 presented itself as sort of a topic of discussion.

8 Q Okay. Now, we have heard about your  
9 meeting with the Tamans on July 13, 2007, and we  
10 know that that was a Friday, correct?

11 A Yes, sir.

12 Q And the Preliminary was to start the  
13 following Monday, the 16th?

14 A Yes, sir.

15 Q And the evidence seems to be that  
16 pretty significant or serious settlement  
17 negotiations with Mr. Wolson had occurred by that  
18 time, that is by the Friday. And I think you and  
19 Mr. Wolson are of the same mind that those  
20 settlement negotiations started either on the  
21 Wednesday or the Thursday. Is that correct?

22 A Yes, the serious settlement  
23 discussions, yes.

24 Q And they had advanced to the point  
25 that you had contacted Mr. Kaplan about them on

1 the Thursday?

2 A Yes.

3 Q And from the memo that has been filed,  
4 his memo of a telephone conversation, you called  
5 him at home in the evening of that Thursday?

6 A Sure. I believe that, if it says  
7 that.

8 Q All right. And then you met with  
9 Mr. Kaplan first thing on the Friday morning,  
10 immediately before you met with the Tamans; is  
11 that correct?

12 A Yes.

13 Q And actually the Tamans have said that  
14 you were somewhat late for the meeting with them  
15 on that Friday morning. And putting two and two  
16 together, I gather that that may have been because  
17 you had met with Mr. Kaplan right before; is that  
18 fair?

19 A If I was late, it would be because I  
20 was coming from Mr. Kaplan's, the meeting with  
21 Mr. Kaplan.

22 Q Okay. Mr. Paciocco also referred you  
23 to the Tamans' allegations that you told them that  
24 you intended to stay the charges of criminal  
25 negligence, impaired driving and refusal, and

1 proceed only on the question of dangerous driving  
2 to the Preliminary. You will recall --

3 A I heard that.

4 Q -- Mr. Paciocco pressing you fairly  
5 vigorously on that in his questioning?

6 A Yes.

7 Q And you denied that allegation  
8 completely. That is if the settlement  
9 negotiations broke down, that you would stay the  
10 charges, stay the three charges and proceed only  
11 on the dangerous driving, you denied that  
12 vigorously?

13 A I would have gone ahead.

14 Q Now, for the sake of argument  
15 Mr. Minuk, I want you to assume that in fact that  
16 was your intention, okay. In other words, if the  
17 settlement negotiations break down, it was your  
18 intention to stay the three charges, the crim neg,  
19 the impaired, and the refusal, and only proceed to  
20 the Preliminary on the question of the dangerous.  
21 Make that assumption?

22 A Yes.

23 Q If that were the case, is that  
24 something that you would have run by Mr. Kaplan  
25 and Mr. Slough?

1           A     If I was just going to stay these  
2 charges outright and just go to a Preliminary on  
3 dangerous driving, I would have told them that,  
4 absolutely, for sure. I wouldn't have gone ahead  
5 on something like that without alerting them to  
6 that type of activity.

7           Q     Sure. And Mr. Paciocco showed you  
8 Mr. Kaplan's memo of the Thursday night telephone  
9 conversation, and there's nothing in there about  
10 staying the charges and proceeding only to the  
11 Preliminary on the question of dangerous driving,  
12 is there?

13          A     I don't recall any. We didn't even  
14 talk about that.

15          Q     No. And you have read the Commission  
16 Counsel's transcript of their interviews with  
17 Mr. Kaplan and Mr. Slough, have you?

18          A     Yes.

19          Q     And there's nothing there that was put  
20 by Commission Counsel about staying those three  
21 charges and proceeding to the preliminary only on  
22 the question of the dangerous driving; correct?

23          A     No, I would be surprised to read it.  
24 We didn't talk about it. It wasn't a matter of  
25 discussion, ever.

1           Q     Mr. Paciocco also referred you, I  
2     think, to Jordan Taman's evidence, that at the  
3     meeting with him and his father on July 13, he  
4     asked you point blank whether there was a plea  
5     bargain, and you said no. Do you recall  
6     Mr. Paciocco referring that to you?

7           A     Yes.

8           Q     Mr. Minuk, if you look at the sentence  
9     that you and Mr. Wolson jointly recommended,  
10    sentence of two years less a day to be served in  
11    the community, and you look only at that, in your  
12    view, were you giving anything up as regards to  
13    the sentence itself?

14          A     Well, I don't know if I was giving  
15    anything up, but I'd say that I didn't think I was  
16    because the sentence which I wanted, which I  
17    thought was appropriate, was the high end of the  
18    Provincial -- it was the end of the allowable  
19    period for conditional sentence, two years less a  
20    day, which some of the cases were in the teens,  
21    some lower, I thought that this was extreme end.

22          Q     So, as far as the sentence is  
23    concerned, you weren't bargaining anything away in  
24    your mind; is that fair?

25          A     Based on the law that I understood it



1 to be, and the duration of the sentence, I didn't  
2 think I bargained anything away there.

3 Q All right. Now, Mr. Paciocco also  
4 asked you yesterday, I believe it was yesterday,  
5 about the government, the Department of Justice  
6 policy concerning the staying of charges. Do you  
7 recall that?

8 A I'm sure he did. It's already  
9 beginning to lose --

10 Q In particular, where charges are  
11 stayed, the policy that you have to explain that  
12 to the court in certain circumstances.

13 A Right. Yes, yes, yes, yes.

14 Q And he suggested to you that nowhere  
15 in the transcript, at none of the court  
16 appearances, did you fulfill that obligation of  
17 explaining the reason for the staying of those  
18 charges. Do you recall him making that suggestion  
19 to you?

20 A I do recall that now.

21 Q If you refer to the transcript of the  
22 appearance on September 12, 2007?

23 A That's exhibit 9?

24 Q I believe so.

25 A What page, Mr. Green, do you want me

1 to look at?

2 Q Page 1702.

3 A Yes, sir.

4 Q And starting at line 13, sir, would  
5 you read that into the record, please?

6 A Line 13?

7 Q Yes?

8 A "In short, no evidence capable of  
9 meeting the required standards..."

10 Q Read it slowly and out loud, please?

11 A Okay. This is line 13:

12 "In short, no evidence capable of  
13 meeting the required standard for  
14 prosecutions, a reasonable likelihood  
15 of conviction, and all the more so, no  
16 evidence resisting a Gardiner  
17 challenge was available to the Crown  
18 in respect to the offence of impaired  
19 driving and refuse breathalyzer. If  
20 such evidence may have been available,  
21 none was demanded or obtained at the  
22 scene in compliance with the  
23 requirements set out by the Supreme  
24 Court of Canada in R v. Woods 2005  
25 Supreme Court of Canada Reports, page

1                   42, and recently applied in the  
2                   Manitoba Court of Appeal by Justice  
3                   Clearwater the case of R v. Bowler."

4           Q     As a result of that, do you agree or  
5     disagree with the suggestion that you didn't give  
6     an explanation for the staying of the charges to  
7     the court?

8           A     Well, I was giving an explanation  
9     there, what I thought was an explanation.

10          Q     So the court was aware of why the --

11          A     Yes.

12          Q     The reason for the charges being  
13     stayed?

14          A     That is what I was intending to do,  
15     was give that explanation.

16          Q     Now, Mr. Paciocco questioned you at  
17     length about the transcripts of your various court  
18     appearances. And in particular, he asked you  
19     about the appearances of August 22nd,  
20     September 12th, of last year. And one of the  
21     areas that he referred you to and questioned you  
22     vigorously about was Judge Wyant's question of  
23     whether you would be calling evidence of the  
24     consumption of alcohol?

25          A     I recall that. It was near the end of

1 the proceeding on September 22nd.

2 Q I just wanted to refer to that  
3 transcript, sir, and I think it's found at page  
4 1738.7. And I'm interested in the remark at the  
5 bottom of page -- of the page at line 29. Do you  
6 have that?

7 A Line 29.

8 Q Line 29 on page 1738.7.

9 A I have that.

10 Q Okay. And this is a comment by you.  
11 All right. We can start at 26, I guess. And you  
12 had been asked the question of whether you were  
13 going to be calling evidence of alcohol and you  
14 said the following:

15 "What I'd like to do before I answer  
16 the question is ask you for five  
17 minutes.

18 The Court: Absolutely.

19 Mr. Minuk: Then I'll come back and  
20 answer the question. I could answer  
21 the question now, but I think it might  
22 take too long and I'd prefer to have  
23 the five minutes beforehand."

24 When you say, I could answer the  
25 question now, you are telling the judge that you'd

1 like five minutes but you could answer the  
2 question right there and then; is that correct?

3 A Yes.

4 Q And what would your answer have been?

5 A Pardon me?

6 Q What would your answer have been --

7 A No.

8 Q -- had you given it then. It would  
9 have been no?

10 A The same answer I gave him.

11 Q Now, I want you to listen to this  
12 question very carefully. Did you at any time  
13 understand Judge Wyant to be asking you whether  
14 you intended to call evidence of consumption of  
15 alcohol as a potential aggravating factor on  
16 sentence?

17 A Well, no, he never asked me that  
18 question, either on August 22nd or September --  
19 for sure not then. And my understanding, sir, is  
20 in the course of that dialogue which you just  
21 referred me to, the questions that were -- the  
22 dialogue that was going on between Mr. Wolson and  
23 the judge, I understood them to be talking about  
24 those factors which made up the marked departure  
25 which formed the basis of the plea. I did not at

1 any time understand that discussion, nor did I  
2 ever have the impression that that discussion,  
3 based on the dialogue between Mr. Wolson and the  
4 judge, had anything to do at that point with  
5 sentencing. Because it struck me that they were  
6 talking about the whole issue of the basis of the  
7 plea, and what the factors were going into that,  
8 because that's what Mr. Wolson was talking about.  
9 And that's what the judge was speaking to him  
10 about.

11 Q So --

12 A And then when he turned to me, I  
13 believe that we were still speaking about the same  
14 thing, and not about factors taking into account  
15 at sentencing, that we were right back to the  
16 whole fundamental issue, which is what is it that  
17 you gentlemen are saying is the basis for the  
18 marked departure, basis of the plea and,  
19 Mr. Minuk, are you going to be calling evidence on  
20 that issue? That's how I understood that.

21 Q All right. So you never understood  
22 him to be questioning that of consumption of  
23 alcohol vis-a-vis aggravating factor in  
24 sentencing?

25 A No. And I read that over and over

1 again. And because, I just, that's how I  
2 understood it. I look at it to see whether or not  
3 I may have misunderstood it now that I step back  
4 from it. But in the context of the discussion,  
5 sir, it still today is to me not a discussion any  
6 longer about sentencing, but we spent a lot of  
7 time in court, and now we're right back to the  
8 beginning again.

9 Q All right. Now, sir, you told us  
10 yesterday that quite a while ago you stopped  
11 reading media reports on the Taman matter; is that  
12 correct?

13 A After the -- it would be shortly after  
14 the August 22nd court appearance, I guess.

15 Q But you know that there have been many  
16 media reports in both of the daily newspapers in  
17 Winnipeg that had been critical of some of the  
18 decisions you made and some of the steps you took?

19 A I may not read it, but it's  
20 unavoidable in me hearing about it, yes.

21 Q And you are aware of that the Tamans  
22 and the Sveinsons have been mightily critical of  
23 you in this inquiry?

24 A Yes. Yes, sir.

25 Q Sir, do you feel that criticism is

1 justified?

2 A I think in the circumstances that,  
3 from the available evidence that I had to me --

4 Q Yes.

5 A -- what was presented to me, that I  
6 conducted myself in the proper manner in this  
7 case, in a professional manner, considered the  
8 pros and cons of this case and achieved a result,  
9 first of all, obtained a conviction in a case  
10 where some may say that getting a conviction might  
11 be difficult, others may disagree with that, but  
12 certainly the certainty of a conviction, I believe  
13 that based on the case law in Manitoba at the time  
14 of the sentencing hearing, that there would be no  
15 cases to support -- well, that there may be some  
16 cases, I wouldn't go that far, but certainly the  
17 overwhelming majority of cases in Manitoba to the  
18 year 2005, when this matter occurred, in cases of  
19 impaired driving causing death and all the more so  
20 dangerous driving cases causing death, even where  
21 other charges of impaired driving cause death  
22 might have been laid, but all the research that I  
23 came across from 1999, up until the time of the  
24 sentencing in 2007, supported the view that in  
25 Manitoba, unlike some other provinces, but in



1 Manitoba, the Court of Appeal has indicated that  
2 the two year, or the conditional sentence is  
3 appropriate. I believe that in getting the high  
4 end of that period, as opposed to the teens or the  
5 twenties in the months, secured the most serious  
6 penalty based on the law as I understood it and in  
7 the result, did a good job in this matter. And I  
8 see that some people may choose to disagree, but I  
9 think that objectively, taking a look at this,  
10 that some of the criticism may be -- I don't  
11 really want to go there.

12 Q I take it this criticism, we won't go  
13 there, but this has exacted a tremendous toil on  
14 you, all of this process, sir, is that --

15 A Absolutely. Oh, yes.

16 Q Now, if Judge Wyant --

17 A I wanted to say one thing, sir, which  
18 is that if I didn't think it was the right thing  
19 to do, I wouldn't have done it.

20 Q All right. Sir, if Judge Wyant had  
21 rejected the joint recommendation and imposed some  
22 other sentence, in the larger scheme of things,  
23 would that really have mattered to you?

24 A No, not at all. I go into every case  
25 knowing that, no matter whether I'm acting on

1    behalf of my own clients, or whether or not I'm  
2    doing counsel work for the Government of Manitoba,  
3    every time I go to court with a joint  
4    recommendation, plea bargain, whether it's a quid  
5    pro quo or otherwise, that it's always open to the  
6    judge to make up his or her mind to follow or not  
7    to follow, and always, always warn my clients of  
8    that, notwithstanding the fact that they will get  
9    some warning of that by the judge. I tell them  
10   that. They know that. I know that. And all I  
11   can do is the best job that I am able to do. And  
12   at the end of the day, wait for the decision. And  
13   if I think it's wrong, there's an appeal court.  
14   If it's, I think it's --

15           Q     But you don't have any vested  
16   interest --

17           A     None whatsoever.

18           Q     -- in the judge accepting the  
19   recommendation?

20           A     None whatsoever.

21           Q     Those are all the questions that I  
22   have, Mr. Minuk. Is there anything that you'd  
23   like to add?

24           A     No, I think we've covered it. I've  
25   been here a long time, and Mr. Commissioner has

1 reminded me of the comments of Mr. Berra, and I  
2 too enjoy that sport, and I know that he has other  
3 witnesses to deal with, and a lot of work ahead of  
4 him. And after two and a half days, maybe he's  
5 seen enough of me.

6 MR. GREEN: Thank you.

7 BY MR. PACIOCCO:

8 Q After two and a half days, Mr. Minuk,  
9 you will be relieved to know that I'm going to  
10 exhibit uncharacteristic restraint. I don't have  
11 many questions for you.

12 The one I want to deal with very, very  
13 briefly is, when you had your Manitoba provincial  
14 insurance discussions with the Sveinsons --

15 A Manitoba Provincial Insurance?

16 Q The insurance discussions --

17 A Yes.

18 Q -- they talked about their  
19 dissatisfaction with it?

20 A Yes.

21 Q Do you recall them indicating to you  
22 that their concern was not that they would not get  
23 adequate money for themselves, but their concern  
24 was for the inadequacy for the payment that their  
25 grandchildren would be eligible to?

1           A     It may well be that. I actually, sir,  
2 really wanted to find somebody at MPI to call them  
3 or give them the name to speak with. That was --  
4 really my focus was to try to help them.

5           Q     Thank you. The last issue I want to  
6 deal with is the question about whether sufficient  
7 information was given to the court about the  
8 reasons for staying the charge. And they were  
9 stayed, of course, way back in the July  
10 appearances. Mr. Green took you to the  
11 September 12th document. And you'd agree with me  
12 that you didn't even anticipate that there would  
13 be a September 12th appearance, that you really  
14 said what you had to say on the sentencing on  
15 August 22nd?

16          A     I think I told you that yesterday. If  
17 it wasn't yesterday, I can't remember, or the day  
18 before.

19          Q     Yes. The point is that, absent some  
20 exceptional situation where you're called back in,  
21 you would have walked away from this case on the  
22 22nd and you would never have made any reference  
23 to the staying of the charges?

24          A     If it's not -- I will have to take you  
25 at your word, sir, but if isn't in the

1 August 22nd, then you're right.

2 Q The only other point -- actually there  
3 are two. One of the points I want to make very  
4 briefly, sir, is that when you do talk about the  
5 fact that you did not have evidence for this  
6 particular -- I'm just trying to find the page so  
7 I'm precise, sir, bear with me. 1702, I believe.

8 A 1702, yes, that's where it is.

9 Q Yeah. You say:  
10 "In short, no evidence capable of  
11 meeting the required standards for  
12 prosecutions or reasonable likelihood  
13 of conviction, and all the more so, no  
14 evidence resisting a Gardiner  
15 challenge was available to the Crown  
16 in respect to the offences of impaired  
17 driving and refusing the  
18 breathalyzer."

19 What I had put to you, sir, was that you had not  
20 provided a foundation for the criminal negligence  
21 charge and the refusal charge. Now, you'd agree  
22 with me that you don't mention --

23 A I agree, yes.

24 Q And the only other point, sir, is you  
25 have given bald assertion that you had no

1 reasonable likelihood of conviction on those  
2 charges, but you'd agree with me that there was  
3 evidence of a demand being made --

4 A Oh, yes.

5 Q -- a process going through, an officer  
6 believing he had reasonable and probable grounds.  
7 You would agree with me that you don't explain  
8 what the problems were with the evidence, but you  
9 just kind of leave it hanging as a general  
10 conclusion?

11 A I didn't, yes.

12 Q Do you think, given the nature of the  
13 policy, and I think you would agree its underlying  
14 purpose in allowing the public to understand, it  
15 wouldn't be much, much better to explain in brief  
16 terms what the problems were so that people could  
17 walk away and feel satisfied?

18 A I think if I -- I would have tried to  
19 find a balance between not looking as if I was  
20 telling them the facts of the case, and not  
21 looking as if I was on some full scale attack on  
22 the Police Service, some balance between them.

23 Q Do you really think the best place to  
24 draw that balance is by just giving the conclusion  
25 with no detail, sir? Do you not think it would

1 have been more in keeping with the purpose of the  
2 policy to give some more explanation than you did?

3 A More detail can never hurt.

4 MR. PACIOCCO: All right, sir. And  
5 thank you for your evidence and your endurance.

6 THE WITNESS: I didn't know I would  
7 have such endurance, sir.

8 THE COMMISSIONER: Thank you. Please  
9 step down.

10 THE WITNESS: Thank you, sir.

11 MR. CLIFFORD: Mr. Commissioner, the  
12 next witness is Richard Peck.

13 THE COMMISSIONER: Good morning.

14 THE WITNESS: Good morning, sir.

15 THE COMMISSIONER: You're going to be  
16 sworn.

17 RICHARD PECK, having been first duly  
18 sworn, testified as follows:

19 THE COMMISSIONER: Where is the  
20 opinion, which volume is it?

21 MR. CLIFFORD: Y-1, Your Honour, and  
22 it is filed as Exhibit 228.

23 THE COMMISSIONER: Thank you.

24 BY MR. CLIFFORD:

25 Q Good morning, Mr. Peck.

1           A     Good morning.

2           Q     Mr. Commissioner, prior to the  
3 examination-in-chief, what I would propose to do  
4 is indicate to you and counsel present the  
5 materials that would be relevant to this witness.  
6 Most have been filed as an exhibit, and what I  
7 will do is refer to them, and also enter one  
8 further document up front prior to the  
9 examination.

10                         So for the benefit of you and my  
11 colleagues, relevant documentation would be  
12 Exhibit 228, which is the Taman Inquiry volume  
13 Y-1. It's broken into four sections, A through D,  
14 and that contains the opinion of Mr. Peck. We  
15 will also refer to Exhibit 226, which is Y-2 in  
16 the Taman disclosure material. And that includes  
17 Mr. Gover's opinion and tab A through C.

18                         I am also going to refer to Y-3. And  
19 if we could at this time enter that as an exhibit?  
20 Y-3 in the Taman disclosure material contains at  
21 tab A the letter dated February 22nd, 2008 to  
22 Mr. Peck, our witness. It's from -- the  
23 correspondence is from Mr. Paciocco. And at tab B  
24 in Y-3 is the correspondence of March 4, 2008 to  
25 Brian Gover.



1 THE CLERK: Exhibit 235.

2 (EXHIBIT 235: Y-3.A, Letter dated  
3 February 22, 2008 to Richard Peck,  
4 Y-3.b, Letter dated March 4, 2008 to  
5 Brian Gover)

6 MR. CLIFFORD: So that will be Exhibit  
7 235.

8 I expect our witness will also make  
9 disclosure, perhaps collaterally to volume J,  
10 which would be the transcripts. This witness will  
11 also refer to Exhibit 231, which is Crown policy  
12 directives, or Manitoba Minister of Justice policy  
13 directives, et cetera. This is found at volumes  
14 X-1.1 through X-2.10. And finally, another  
15 document that our witness will make reference to  
16 is found at Exhibit 217, the disclosure reference  
17 is G-45, and this is the Manitoba Department of  
18 Justice Prosecutions Policy Directive on the  
19 subject of conditional sentencing.

20 Mr. Commissioner, as you are aware and  
21 as counsel are aware, Mr. Peck has kindly agreed  
22 to provide the Commission with some assistance,  
23 and we will be asking him to provide some expert  
24 opinion in a number of areas dealing with the role  
25 of the Crown, the Crown's discretion, and relevant

1 ethical and professional standards from the Crown  
2 perspective. So those are the three areas that we  
3 expect to hear an opinion from Mr. Peck on. And  
4 he will also provide specific opinions with  
5 respect to various facts that were presented to  
6 him by Mr. Paciocco in his correspondence.

7 BY MR. CLIFFORD:

8 Q Mr. Peck, if I could, sir, draw your  
9 attention to your Curriculum Vitae, which is found  
10 at our material Y-1, so Exhibit 228. And, sir,  
11 I'd like to start first with your education. I  
12 understand, sir, that you completed your studies  
13 in law at the University of British Columbia in  
14 1974?

15 A That's correct.

16 Q And with respect to your employment  
17 history in the legal profession, sir, I understand  
18 that you have been practicing since 1974, and I  
19 wonder if you could take a moment, sir, and bring  
20 the Commission briefly through your employment  
21 history to date?

22 A The first six years of my practice,  
23 and as well as my articling year, were spent at  
24 the offices of Rankin & Company in Vancouver,  
25 practicing initially, primarily in the area of

1 criminal law, but also doing some civil litigation  
2 and some family litigation. I left there at the  
3 beginning of 1982 and set up a firm with one of my  
4 partners at Rankin & Company and we practiced  
5 together until 1990, when the two of us joined a  
6 law firm in Vancouver known as Harper Grey Easton.  
7 I stayed there for just under two years, and then  
8 set up my own company, my own law firm in 1992,  
9 and have been practicing at that law firm since.

10 Q Mr. Peck, I understand that your  
11 membership in professional societies and  
12 organizations includes being a member of the Law  
13 Society of British Columbia. You were also a  
14 member of the Society for the Reform of Criminal  
15 Law. You are a member of the B.C. Trial Lawyers  
16 Association, the Medical Legal Society of British  
17 Columbia. You are a fellow of the American  
18 College of Trial Lawyers, and a fellow of the  
19 International Society of Barristers?

20 A Yes.

21 Q And your current appointments and  
22 positions, sir, include the fact that you are a  
23 director of the International Society for the  
24 Reform of Criminal Law?

25 A Yes.

1 Q You are a member of the management  
2 committee for the same society, sir?

3 A Yes.

4 Q You are a life bencher, I understand,  
5 with the Law Society of British Columbia?

6 A Yes.

7 Q Appointed Queen's Counsel in 1987?

8 A (Witness nodding)

9 Q A co-chair as well of the Federation  
10 of Law Societies of Canada National Criminal Law  
11 Program.

12 A Yes.

13 Q A member of the Canadian Judicial  
14 Council National Committee on Jury Instructions.  
15 Sir, you are also an adjunct professor at the  
16 University of British Columbia Law School?

17 A Yes.

18 Q President of the Legal Historical  
19 Society of B.C.?

20 A Yes.

21 Q You are a chairperson on the regional  
22 committee for the British Columbia Supreme Court  
23 Advocacy Institute of Canada?

24 A Yes.

25 Q And you are a member of the Deans

1 Advisory Committee at the University of British  
2 Columbia Faculty of Law Innocence Project?

3 A Yes.

4 Q I will not, sir, recite or make  
5 reference to all of your articles, publications,  
6 and papers that are found at page 5 through 10 in  
7 your Curriculum Vitae, or I should say through  
8 page 12 in your Curriculum Vitae, but I do note,  
9 sir, that at this point you have some 95 articles,  
10 publications and papers listed?

11 A Yes.

12 Q I want to touch on some of the areas,  
13 sir, where you make reference to professional and  
14 educational participation in your Curriculum  
15 Vitae. You have indicated that you are a member  
16 of the faculty on the Federation of Law Societies  
17 National Criminal Law Program. For how long, sir,  
18 have you been a member on faculty?

19 A Since 1992.

20 Q You have listed many areas, sir, or  
21 programs, conferences, et cetera, where you act as  
22 a guest speaker. I understand that you act as a  
23 guest speaker at the Supreme Court Judges  
24 Conference in Victoria B.C. in 1986, and in many  
25 other conferences from '86 to the present day?

1           A     Yes.

2                   THE COMMISSIONER:  Excuse me, I didn't  
3 know you were the silver gloves boxing champion  
4 for Vancouver in 1971.

5                   THE WITNESS:  Days long past,  
6 Mr. Commissioner.

7                   MR. McDONALD:  We should be mindful of  
8 that when questioning him.

9                   THE COMMISSIONER:  I think we've run  
10 across each other over the years.

11 BY MR. CLIFFORD:

12           Q     Dealing, sir, with your appellate  
13 experience at page 20, you have listed in your  
14 Curriculum Vitae your experience as counsel in the  
15 Supreme Court of Canada.  And I will touch upon it  
16 again a little later in your qualifications as we  
17 complete them.  But I understand, sir, that in  
18 addition to the cases that you have listed there,  
19 from 1990 through 2006, that you have also acted  
20 and argued in the Supreme Court of Canada as  
21 counsel on an additional two cases this year, in  
22 both the months of May and June?

23           A     I think it was March and June but,  
24 yes, that's correct.

25           Q     You also have referenced, sir, in your

1 CV at page 20 through 22, the numerous decisions,  
2 reported decisions, sir, from cases that you have  
3 argued in the British Columbia Court of Appeal?

4 A Yes.

5 Q I understand that you have a long  
6 history of arguing cases both in the B.C. Court of  
7 Appeal and in the Supreme Court of Canada?

8 A Yes.

9 Q I was going to ask you about the  
10 golden gloves, but Mr. Commissioner has covered  
11 it. So now I'll turn to the area of your  
12 practice, sir.

13 In general terms, could you tell the  
14 Commission about your practice, the type of work  
15 that you are now engaged in, sir?

16 A My practice consists largely of  
17 practice in the area of the criminal law, some  
18 administrative regulatory practice, virtually all  
19 areas of criminal law, and not infrequently acting  
20 on behalf of the Crown, either as an ad hoc  
21 prosecutor or as a special prosecutor appointed  
22 pursuant to section 7 of the Crown Counsel Act of  
23 British Columbia. I do a fair amount of appellate  
24 work, trial work, and extradition work.

25 Q If I could ask you, Mr. Peck, are you

1 able to comment that in addition to your defence  
2 practice, the number of cases where you have acted  
3 on behalf of the Crown as an independent  
4 prosecutor?

5 A I have acted as Crown counsel in over  
6 a hundred cases for the Provincial Crown in  
7 British Columbia, some five cases for the  
8 Department of Justice. The Federal Crown in B.C.,  
9 I have acted for the Crown as a special prosecutor  
10 pursuant to section 7 of the Crown Counsel Act in  
11 excess of 15 times since that statute was enacted  
12 in 1991. I don't know what more I can add to  
13 that. I have acted twice for the Crown in the  
14 Supreme Court of Canada, and approximately 30  
15 times for the Crown in our Provincial Court of  
16 Appeal.

17 Q So, in addition to the approximately  
18 100 cases that you made reference to doing trial  
19 work, or prosecutorial work, you have also acted  
20 on behalf of the Crown in appellate work, both at  
21 the Supreme Court of Canada and at the appellate  
22 level in your province?

23 A Yes.

24 Q Now, sir, I also wanted to determine  
25 from you, sir, that in addition to court



1 appearances in handling the prosecution of cases,  
2 I understand that you are frequently as well  
3 called upon to provide written opinions to the  
4 Ministry or the Crown's office in British  
5 Columbia. And these issues include, sir, the  
6 laying of charges, the staying of charges,  
7 procedure, standards, ethics, et cetera?

8 A Those issues would be covered in a  
9 general sense, yes. Normally, those referrals  
10 deal with the question of whether or not a charge  
11 should be laid, and prosecuting the cases.  
12 Sometimes ethical issues arise, and there are  
13 occasions when I do write peer opinions for them.

14 Q As stated in Mr. Paciocco's  
15 correspondence to you at Y-3, tab A, one of the  
16 terms of the Commission Inquiry is to inquire into  
17 whether all aspects of the prosecution of Derek  
18 Harvey-Zenk, including the Crown's position on  
19 sentence, were conducted in accordance with the  
20 professional and ethical standards expected of  
21 lawyers and agents of the Attorney General.

22 You have commented, sir, with respect  
23 to your experience in the, with respect to  
24 prosecutorial experience and standards, et cetera.  
25 And I wonder if you could take a moment and

1 comment on your experience dealing with the issue  
2 of ethics? Do I understand that, for instance,  
3 you were a bencher?

4 A Yeah. As a bencher, for the decade  
5 approximately that I was a bencher of the Law  
6 Society, we frequently dealt with ethical matters.  
7 I have lectured on ethics, I have written on  
8 ethics, and I have helped out many, many members  
9 of the profession over the years who have brought  
10 to me their professional or ethical problems,  
11 which is not untypical of members of our  
12 profession when you get to a certain level, and  
13 particularly when you've been a bencher.

14 Q Now, sir, I understand that your  
15 writing in this area and teaching in this area  
16 includes the fact that you are responsible for  
17 teaching the advocacy course, or the advanced  
18 trial advocacy course at the University of British  
19 Columbia Law School, which has a sizeable ethical  
20 component to it?

21 A Yes, this was a course that was  
22 created by Allen McEachern, the former Chief  
23 Justice and I, for third year law students at the  
24 University of British Columbia. We felt it  
25 important that they have a course of that ilk, and

1 a component of that course is professionalism and  
2 ethics. I think in any advocacy course that is  
3 worthwhile, a significant component should consist  
4 of ethics and professionalism.

5 Q And one further point in this area,  
6 Mr. Peck. I understand that you are listed as a  
7 senior counsel within your province through the  
8 Law Society, as an individual that lawyers from  
9 all levels of experience could go to, to get  
10 advice on the issue of ethical dilemmas or  
11 questions?

12 A I don't even know if that list still  
13 exists, but that list was created about, I'm  
14 thinking 1985, 1986, both for the criminal bar and  
15 the civil bar. And that is accurate. Whether the  
16 list still exists, I don't know, but certainly the  
17 calls keep coming in.

18 Q And your writing in that area, sir,  
19 two examples, and not limited to two, but  
20 certainly starting at page 11 in your Curriculum  
21 Vitae, the paper entered as number 80 deals with  
22 the subject of Ethics and the Practice of Law.  
23 And as well, number 94 in your list of  
24 publications, the Commandments of Advocacy. These  
25 would be two examples, sir, of your writing in

1 this area?

2 A Yes. And particularly, the topics of  
3 professionalism and ethics as they relate to the  
4 practice of law in the courtroom.

5 MR. CLIFFORD: Mr. Commissioner,  
6 that's the extent of the background that I wanted  
7 to put before you.

8 THE COMMISSIONER: I think you've  
9 written more articles than Mr. Paciocco has.

10 THE WITNESS: I don't think so.

11 MR. CLIFFORD: With your permission,  
12 sir, I'm going to now embark on the examination  
13 and ask Mr. Peck to provide us all with some  
14 expert opinion on the role of the Crown, Crown  
15 discretion, and relevant ethical and professional  
16 standards.

17 THE COMMISSIONER: Yes.

18 BY MR. CLIFFORD:

19 Q Mr. Peck, I wanted to start, sir, by  
20 asking you to comment on what you understand to be  
21 generally the role of an independent prosecutor,  
22 focusing on why the concept exists, why we have  
23 independent prosecutors, the importance of it, and  
24 how the independence is maintained, and I'll have  
25 some follow-up questions for you.

1           A       Probably the simplest way to explain  
2 this would be to go back and give you an example.  
3 There was a case in British Columbia in the late  
4 1980s that involved allegations against a  
5 politician. A number of opinions were written,  
6 both inside the Ministry of the Attorney General  
7 and outside of the Ministry. Ultimately, a  
8 decision not to charge was made. The opposition  
9 party in government made allegations of  
10 interference. And that lead to a Commission of  
11 Inquiry headed up by Steven Owen. And it was  
12 entitled the -- his report ultimately became  
13 entitled "Discretion to Prosecute." His report  
14 was delivered, I think in late 1990, and it gave  
15 rise to the Crown Counsel Act of 1991.

16                   The purpose the Crown Counsel Act was  
17 to sever off from government, in effect, the  
18 Attorney General's function as the chief  
19 prosecutor in the province. And it did that by  
20 effectively putting the Assistant Deputy Attorney  
21 General of the province in charge of all  
22 prosecutions and all decisions with respect to  
23 prosecutions, and insulated the criminal justice  
24 branch under the Assistant Deputy Attorney General  
25 statutorily from any outside influence.

1                   Section six of that statute provides  
2   that the Attorney General can give the criminal  
3   justice branch specific directions as to a  
4   specific prosecution, so long as he does so in  
5   writing and it becomes gazetted in the house.

6                   He is also entitled, the Attorney  
7   General is, to give more general direction to say  
8   the branch under subsection 2 of section 6. And  
9   again, there are certain requirements that he must  
10   meet in order to do that. The whole idea being to  
11   separate the Crown prosecution's functions from  
12   any potential political interference.

13                  They also put in what I would call a  
14   fail safe or further measure in section 7. And  
15   that section permitted or allowed for the creation  
16   of the role of special prosecutor. The idea is to  
17   further insulate or separate the prosecutorial  
18   function from government or any seeming  
19   interference by government. And so that role  
20   exists to ensure that any conflict or appearance  
21   of conflict is avoided, any bias, any favouritism.  
22   And it most often comes into play where a person  
23   who is under investigation is a government  
24   official, perhaps a politician, perhaps a  
25   government member of bureaucracy the civil

1 service, a police officer, a prosecutor, and so  
2 on.

3                   And the special prosecutor, and I  
4 believe this is still the case, is chosen from a  
5 list. He's selected by the Assistant Deputy  
6 Attorney General. The list itself is created in  
7 consultation between the Assistant Deputy Attorney  
8 General and the treasurer or president of the Law  
9 Society, I believe. And it's a list of, it  
10 contains a number of names and the special  
11 prosecutor is selected from that list. The idea  
12 being that they are, by dint of being members of  
13 the private bar, separate from the Crown office  
14 and able to exercise and carry out a completely  
15 independent assessment of the prosecution, without  
16 influence from the government and/or from the  
17 criminal justice branch in British Columbia.

18               Q     It goes without saying, Mr. Peck, that  
19 the importance of maintaining the independence is  
20 one that is essential, but I understand, sir, that  
21 in your experience as an independent or special  
22 prosecutor that there are times where you will  
23 want to discuss or perhaps detail the progress of  
24 a case. And does that, from time to time, occur  
25 with your practice?

1           A     It does. But where I might advise or  
2     consult, I would not take direction. And that's  
3     where the independence exists at that point.

4           Q     And I understand, sir, that your  
5     authority to make decisions is one that is  
6     independent, is vested in you as an independent or  
7     special prosecutor by virtue of the fact you've  
8     been selected and have the experience to do that.  
9     And you would have the sole authority to make  
10    decisions as long as you followed the applicable  
11    provincial policy?

12          A     Yes, I think that's a fair statement.

13          Q     Now, sir, I'd like to turn to the  
14    factors that you have provided specific opinions  
15    on, and those are found in your opinion. And for  
16    the benefit of counsel, we would be dealing with  
17    Exhibit 228 at tab D, and for the benefit of you  
18    as well, Mr. Commissioner.

19                 Now, prior, sir, to getting into the  
20    specifics of your opinion, I wanted to confirm  
21    with you, sir, that the basis of the following  
22    opinions that you will be provided are detailed  
23    very clearly in Mr. Paciocco's material, which is  
24    now Exhibit 235. Your opinion in these areas as  
25    they relate to the conduct of the prosecution,



1 Mr. Peck, are based, as I understand it, and  
2 include hypothetical facts that have been  
3 presented to you. Is that true, sir?

4 A Yes. And I set this out in paragraph  
5 1.4 of my opinion, that's accurate.

6 Q You have also considered, sir, the  
7 prosecutorial standards and ethics material that I  
8 have referred to earlier?

9 A Yes.

10 Q Exhibit 311?

11 A And for my purposes, they came in two  
12 binders, tab binders.

13 Q And I understand as well, sir, that  
14 you have also taken into consideration the  
15 Manitoba Department of Justice Prosecution Policy  
16 Directives Guideline 4 CON:1, the subject being  
17 conditional sentences?

18 A Yes. And Mr. Commissioner, this  
19 document was not included in the materials I  
20 received some months ago and relied upon for the  
21 basis of my opinion, it was provided to me last  
22 night.

23 Q And I understand, sir, that having had  
24 the opportunity to review that guideline in its  
25 entirety, that it does not change your opinion,

1 sir, or opinions?

2 A No.

3 Q You have also been furnished with and  
4 considered, Mr. Peck, the opinion of Brian Gover,  
5 who will also be providing expert opinion evidence  
6 to the Commission?

7 A Yes.

8 Q And you will see, sir, that although  
9 you and he concur for the most part, there are  
10 certain areas where there is a divergence of  
11 opinion?

12 A Yes.

13 Q Now, sir, if I could ask you to direct  
14 your attention to your observations on the  
15 investigation and the provable facts, as they  
16 existed in this case.

17 Sir, having had the opportunity to  
18 review all of the materials that I have just  
19 referred to, can you comment, sir, on whether the  
20 investigation in this case was adequate or  
21 inadequate?

22 A My comment is that the investigation  
23 was inadequate. In my view, there was a failure  
24 to gather meaningful evidence with respect to this  
25 matter. That includes the failure of the

1 attending police to apparently do any initial  
2 assessment as to the condition of Mr. Harvey-Zenk  
3 in any meaningful way.

4           There is some suggestion in the  
5 material that I reviewed to rely upon my opinion  
6 that there were significant irregularities in the  
7 course of the investigation and in the course of  
8 putting together police notes and reports and that  
9 type of thing. It was, I think it would be a soft  
10 statement to say that this investigation was  
11 inadequate. And there were also certain mistakes  
12 made in the course of the police dealing with  
13 Mr. Zenk that incapacitated the prosecutor from  
14 proceeding with certain of the charges.

15           Q     And, sir, I understand that your  
16 opinion in this factor is set out at page 6,  
17 paragraphs 3.1 through 3.3?

18           A     Yes, and in very brief compass.

19           Q     Could I ask you, sir, whether you  
20 could provide further comment on your opinion,  
21 sir, on the amount or paucity of evidence there  
22 was with respect to impairment?

23           A     The word that you used is paucity, I  
24 use the same word, a lack of, small amount of  
25 evidence of impairment. That was coupled with the

1 failure to do an on-scene assessment as to the  
2 condition of the accused. Observations made over  
3 the course of the ensuing hours tended to negate  
4 an allegation of impairment. Subsequent  
5 investigation of police officers who had been with  
6 Mr. Harvey-Zenk prior to the accident tended to  
7 negate an assertion of impairment. The case was  
8 bereft of cogent evidence to substantiate a charge  
9 of impaired driving or impaired driving causing  
10 death.

11 Q I understand as well, Mr. Peck, that  
12 in those areas where there were observations or  
13 claims to have been observations of signs of  
14 impairment that you have recognized, in your  
15 expert opinion, that there would be difficulties  
16 with respect to proof. You make reference to one  
17 of those areas, for instance, the evidence of  
18 Constable Pedersen, who had processed  
19 Mr. Harvey-Zenk for his photographs and  
20 fingerprints under the Identification of Criminals  
21 Act, for instance?

22 A Yes. And this was not untypical of  
23 the state of the record that Crown counsel had  
24 before him when he proceeded to deal with this  
25 matter. We have this assertion that Constable

1 Pedersen, in the course of dealing with this man,  
2 Harvey-Zenk, under the Identification of Criminals  
3 Act, claimed to have observed signs of impairment  
4 at that time. But there is no record of this in  
5 her notes, whether contemporaneous or made shortly  
6 after the matter. And simultaneous with this, you  
7 have the evidence of, or apparent evidence of a  
8 person known as a wellness officer who attends  
9 contemporaneously with Mr. Harvey-Zenk and says  
10 that he showed no signs of impairment. So one, in  
11 effect, negates the other. And I say more than  
12 negates because the absence of a contemporaneous  
13 note is somewhat telling.

14 Q And, sir, what conclusion does that  
15 bring you to with respect to the difficulties that  
16 this case presented for the prosecutor?

17 A This case was a prosecutor's  
18 nightmare, in my view. There were four counts  
19 that had been laid. Three of them, in my view,  
20 had virtually no hope of being the subject matter  
21 of a successful prosecution. Matters of proof  
22 were at best equivocal in those areas. It was an  
23 extremely troubling case for a prosecutor to be  
24 presented with, any prosecutor to be presented  
25 with.

1           Q     Mr. Gover, at this point I'd like to  
2 bring you to --

3           A     Gover's coming next week.

4           MR. CLIFFORD: I apologize, and I've  
5 been doing that over the last few days.

6 BY MR. CLIFFORD:

7           Q     Mr. Peck, if I could bring your  
8 attention to page 8, please? And I'd like to  
9 review with you the opinions that you've rendered  
10 on the questions that were put to you by  
11 Commission Counsel. And if we could deal with 4.1  
12 and 4.2 in your opinion at page 8, and I'll state  
13 the question, sir, and then what I'll do is ask  
14 you to provide your opinion on these areas.

15                     4.2.A, whether it is a conflict of  
16 interest or it is otherwise  
17 inappropriate to act as a prosecutor  
18 where a police officer is the accused  
19 after acting in the past for police  
20 officers;  
21 and B, whether there is a conflict of  
22 interest or it is otherwise  
23 inappropriate to act as a prosecutor  
24 in a case where a defence lawyer has,  
25 in the past, acted for a co-accused in

1 a joint trial where you were counsel  
2 for another person."

3 A I give the opinion that the fact that  
4 a member of the private bar retained to prosecute  
5 a police officer has, in the past, acted in the  
6 defence of police officers is effectively  
7 irrelevant to the consideration. I see that, in  
8 my view, no -- I say that in my view, no conflict  
9 of interest arises from class or occupation.  
10 There are situations here where a conflict could  
11 arise, and I cite them as being the following:  
12 Firstly, where the lawyer has previously  
13 represented the very person he is now being called  
14 upon to prosecute, and that seems to me to be  
15 patently obvious. Secondly, where the lawyer had  
16 previously worked closely with the very police  
17 officer he is now being called upon to prosecute.  
18 And thirdly, in those rare situations where the  
19 private practitioner's practice depends almost  
20 solely upon representing police officers and thus  
21 deriving his income from that business. And  
22 subject to those areas, I don't see any conflict  
23 in the way this question is posed.

24 On the second issue, you are talking  
25 about whether there's a conflict merely because

1 two lawyers in opposition on this particular case  
2 had in the past worked jointly on a case. And  
3 again, to me, there is no conflict there. This  
4 happens from time to time. It happens in the  
5 criminal bar, it happens at the civil bar. You  
6 know, we do take an oath when we're called to the  
7 bar. We're supposed to adhere to the tenets and  
8 strictures of that oath, as a starting point. But  
9 in these scenarios presented, these questions  
10 posed, I do not see a conflict.

11 Q Sir, have you had the opportunity to  
12 review Mr. Gover's view with respect to  
13 representing of police officers? And he has  
14 expressed an opinion that the recency of your last  
15 representation of a police officer may factor into  
16 his opinion. Do you share that view, sir?

17 A No.

18 Q Could you comment on it further?

19 A I don't see how it is relevant, the  
20 fact that I may have acted for a police officer  
21 yesterday, and today I'm prosecuting another  
22 police officer. I see no relationship between the  
23 two that gives rise to a conflict.

24 Q Mr. Peck, I'd like to refer now to the  
25 issue of whether it was appropriate or within



1 acceptable prosecutorial standards to either  
2 recommend or express agreement with the release on  
3 a promise to appear without conditions of a person  
4 accused of criminal negligence causing death,  
5 impaired driving causing death, dangerous driving  
6 causing death, and refusal to provide a breath  
7 sample. And that's set out at 4.3, subsection C,  
8 at page 9 in your opinion, sir.

9           What is your view, sir, on whether  
10 this is an acceptable prosecutorial -- whether the  
11 accepted prosecutorial standards were met by  
12 releasing the individual on a promise to appear?

13           A     On the facts of this case?

14           Q     Yes.

15           A     I don't see it being a problem in the  
16 sense that this is a common practice. I can't  
17 speak to this jurisdiction, I can speak to British  
18 Columbia. When I came to reviewing this question,  
19 I spoke to at least one very senior Crown. I am  
20 lead to understand that this is a common practice.  
21 That persons in these circumstances are released  
22 without the necessity of going through a show  
23 cause hearing pursuant to the Criminal Code.

24                     There are circumstances where they are  
25 released with conditions. It's case specific.

1 And there are cases where a person in these  
2 circumstances will not be released by the consent  
3 or at the will of the Crown or the police on a  
4 promise to appear of this type, and there will be  
5 a show cause, and usually those are cases where  
6 the person has some criminal history, usually a  
7 driving related history, or the particular  
8 circumstances of the case are grossly aggravated,  
9 a high speed chase, for instance, in a stolen car  
10 that leads to the death of someone by running a  
11 stop sign, that type of thing. So this is not, in  
12 my experience, to my understanding, an unusual  
13 circumstance.

14 Q Now, Mr. Peck, a couple of points.  
15 First, on the hypothetical facts that you were  
16 presented, your opinion relates, or seems to be  
17 confined to the issue of pursuing the concept of a  
18 detention order or simply releasing on a promise  
19 to appear without conditions. Had you considered  
20 the further option, sir, of releasing on  
21 conditions to a peace officer, pursuant to section  
22 503(2) of the Criminal Code?

23 A Only indirectly, and I addressed that  
24 in a limited extent toward the bottom of the  
25 response to the question, where I talk about

1 consent release by Crown counsel under 515,  
2 section 515(2)(d) of the Criminal Code, a release  
3 with conditions. And I think there is merit in  
4 some of these cases with a peace officer, a police  
5 officer imposing conditions after consultation  
6 with the Crown. It seems to me that these would  
7 likely be in circumstance -- the person is going  
8 to lose their licence in any event, in this  
9 circumstance, for a certain set period of time. I  
10 think it's usually 90 days, certainly in British  
11 Columbia and I think in this province. So then  
12 the condition would be a question of abstention  
13 from alcohol. If there was some indication that  
14 the person had a history of that in the fact  
15 pattern, that would, in my view, probably be an  
16 appropriate condition.

17 Q Now, sir, you see in the opinion of  
18 Mr. Gover that you and he are not in agreement,  
19 that he has indicated quite clearly that in his  
20 view a more restrictive form of release was  
21 required. And I understand, sir, you obviously  
22 take issue with his opinion in this regard?

23 A That may be driven by Mr. Gover's  
24 experience in his jurisdiction, as a prosecutor.  
25 What I've given you is what my understanding is of

1 my jurisdiction.

2 MR. CLIFFORD: Mr. Commissioner, it's  
3 12:32, and we are making pretty steady progress  
4 here. Did you want me to continue or --

5 THE COMMISSIONER: Let's go to 12:45.

6 MR. CLIFFORD: Indeed.

7 THE COMMISSIONER: One of my roles in  
8 this Commission is to ensure that counsel stick to  
9 the times, and they had been very good at it.  
10 Except I'm required to break at 3:15 because the  
11 coffee bar, quite close by, closes at 3:30. So  
12 senior counsel at the end of the room actually  
13 stands at 3:15 to remind me.

14 We're carrying on. Go ahead.

15 MR. CLIFFORD: Thank you.

16 BY MR. CLIFFORD:

17 Q Mr. Peck, dealing with issues D and E,  
18 being whether it is within acceptable  
19 prosecutorial standards to stay or withdraw a  
20 charge of refusing to provide a sample on the  
21 hypothetical facts set out in Mr. Paciocco's  
22 letter, and also whether it is consistent with the  
23 Manitoba Crown policy directives to stay or  
24 withdraw a charge of refusing to provide a sample,  
25 on the hypothetical facts set out in

1 Mr. Paciocco's letter, sir, could we have your  
2 opinion on those questions?

3 A This power to stay a charge lies at  
4 the core of the exercise of prosecutorial  
5 discretion. Very often, decisions made to  
6 exercise the discretion in this way are difficult.  
7 Sometimes it's a lot easier for a prosecutor not  
8 to exercise discretion to stay a charge and simply  
9 let the court decide.

10 In the circumstances of this case,  
11 based on the evidentiary record available to this  
12 prosecutor, as of the time the matter was coming  
13 to court, which I note is about two and a half  
14 years after the accident, a woefully long delay,  
15 but in any event. This evidence, in my view, was  
16 so inadequate, so fraught with difficulty, so  
17 subject to challenge in a number of different  
18 areas, including charter challenges, that by the  
19 time Crown counsel was dealing with this matter,  
20 certainly July of 2007, the case had become one  
21 where there was, in my opinion, no longer a  
22 reasonable likelihood of conviction. And I think  
23 it was apt to stay that charge.

24 THE COMMISSIONER: Is it the practice  
25 in British Columbia to stay a charge where the

1 Crown is not intending to proceed on that specific  
2 charge? Or is it the practice, as it is in  
3 Ontario, and I have been off the bench now for 10  
4 years, to simply, in the Provincial Court,  
5 withdraw the charge, or in the Superior Court to  
6 indicate that no evidence will be offered and the  
7 charge is, in fact, dismissed?

8 THE WITNESS: The practice, and I  
9 understand the question and the import of it, and  
10 I had actually had some debate with Michael Code,  
11 for instance, about this. The practice in British  
12 Columbia has been, at least during the course of  
13 my professional career, to stay the charge. It is  
14 not a common practice in British Columbia to  
15 formally withdraw the charge. And the stay occurs  
16 in one of two ways. It is sometimes done in open  
17 court by Crown counsel rising and directing the  
18 clerk of the court to enter a stay of proceedings,  
19 and not infrequently simply attending at the  
20 registry and noting the stay on the information or  
21 the indictment.

22 BY MR. CLIFFORD:

23 Q Mr. Peck, you referred to some of the  
24 difficulty or the problems in proving the case.  
25 With respect to the refusal charge, you listed as

1 some of those problems the form of the demand, the  
2 blood versus the breath. In your opinion, you  
3 have referred to existence of reasonable and  
4 probable grounds, the right to counsel issue. One  
5 of the other areas that you refer to, sir, is  
6 section 254(3) of the Criminal Code, and that  
7 being that the demand was made as soon as  
8 practicable. And you indicate in your opinion,  
9 sir, that there was no demand until almost 40  
10 minutes after Mr. Harvey-Zenk was first dealt with  
11 by the police. If the evidence were to show, sir,  
12 that when the arresting officer, Sergeant Carter,  
13 indicated that he formed his reasonable and  
14 probable grounds, that soon thereafter he made the  
15 demand. Would that change your view with respect  
16 to the potential frailties or the potential for an  
17 argument under 254(3)?

18 A On that particular point, yes, but  
19 that does not in any way cleanse this case  
20 sufficiently that one would be inclined to proceed  
21 with the prosecution because of a host of other  
22 problems here, some of which you have mentioned  
23 and I have mentioned.

24 Q So, in your view, sir, on both of  
25 those issues with respect to the staying of the

1 refusal, it is within acceptable prosecutorial  
2 standards, and also consistent with the Manitoba  
3 Crown policy directives?

4 A Yes, that's my opinion.

5 Q Now, sir, I'd like to get your opinion  
6 on whether it was within acceptable general  
7 prosecutorial standards to stay or withdraw the  
8 charges of impaired driving causing death on the  
9 hypothetical facts that were presented to you, and  
10 also whether it was consistent with the Manitoba  
11 Crown policy directives to stay the charge of  
12 impaired driving causing death on the hypothetical  
13 facts that you were provided?

14 A Well, as you know, my conclusion is  
15 that it was appropriate and within the policy to  
16 stay this particular offence. To repeat what I  
17 have said here in the report would be to be  
18 reiterating what I have already said about the  
19 problems with proof that the prosecution faced in  
20 this case, and there were many. There were also  
21 problems in the context, from the Crown's  
22 perspective, of there being a number of other  
23 witnesses available to the defence who would  
24 counter or contradict any suggestion of impairment  
25 at the time of driving. At best, it was an



1 extremely marginal case by the time it came to  
2 fruition here in July of 2007, had a host of  
3 difficulties of proof and, in my opinion, was an  
4 appropriate exercise of prosecutorial discretion to  
5 have stayed this particular offence.

6 Q Mr. Peck, I note at page 12 in your  
7 report at paragraph 1, on those issues, you refer  
8 to five officers who attended on the scene, set  
9 out to determine whether Mr. Harvey-Zenk had  
10 consumed alcohol or was impaired. The Commission  
11 has heard evidence that there were essentially two  
12 officers who dealt primarily with Mr. Harvey-Zenk,  
13 and there were civilians on scene as well. They  
14 too did not note signs of impairment. The fact  
15 that you've got two officers dealing with him, as  
16 opposed to five, does that in any material way  
17 change your opinion?

18 A No. And in fact, if you want to  
19 change it to two, go ahead, because it doesn't  
20 make a whit of difference to my opinion. When  
21 these police attended the scene, it seems to me  
22 they had three primary immediate responsibilities:  
23 First of all, to see to the injured; secondly, to  
24 secure the scene for safety and investigational  
25 purposes, safeties of the other members of the

1 travelling public, and investigational purposes,  
2 particularly in terms of accident reconstruction;  
3 and thirdly, to carry out an immediate  
4 investigation as to how and why this occurred, who  
5 caused the accident, and what was that person's  
6 condition. And that was not done. And this goes  
7 back to what we started with, completely  
8 inadequate investigation.

9 Q Sir, dealing with the questions of  
10 whether it was within acceptable general  
11 prosecutorial standards to stay a charge of  
12 criminal negligence causing death on the  
13 hypothetical facts, and whether it was consistent  
14 with the Manitoba policy directives to do the same  
15 thing, I understand, sir, in your opinion you make  
16 some reference and explain to a certain extent the  
17 difference between those two charges. I'd ask you  
18 to do that, sir. Explain briefly the difference  
19 between the charge of crim neg causing death with  
20 respect to the dangerous, and give us your opinion  
21 on the appropriateness of the criminal negligence  
22 charge being stayed?

23 A Mr. Commissioner, this will take more  
24 than the remaining few minutes that we have. And  
25 for continuity purposes, you might wish to --

1 THE COMMISSIONER: Well, I think it's  
2 a good time because senior counsel at the end is  
3 getting a little edgy, and I think it may be an  
4 appropriate time for us to take our break. Are we  
5 doing well, Mr. Paciocco? How are we moving?

6 MR. PACIOCCO: We're moving well  
7 enough that I anticipate being on my airplane this  
8 evening, but not well enough that we couldn't  
9 squeeze in another witness if we have a short  
10 lunch, so I'm going to leave it to you.

11 THE COMMISSIONER: Well, counsel have  
12 been working very hard.

13 MR. PACIOCCO: They have indeed and I  
14 would suggest 2:00 o'clock.

15 THE COMMISSIONER: Let's break until,  
16 and I'll try to remember, 2:00 o'clock today.

17 THE CLERK: All rise. This Commission  
18 of Inquiry is adjourned until 2:00 o'clock.

19 (Proceedings recessed at 12:44 p.m.  
20 and reconvened at 2:00 p.m.)

21 THE CLERK: All rise. This Commission  
22 of Inquiry is now reopened, please be seated.

23 MR. CLIFFORD: Good afternoon,  
24 Mr. Commissioner. Good afternoon, Mr. Peck.

25

1 BY MR. CLIFFORD:

2 Q Prior to the lunch break, I put the  
3 question to you whether it was within acceptable  
4 general prosecutorial standards and Manitoba policy  
5 directives to stay the charge of criminal  
6 negligence on the hypothetical facts presented to  
7 you. And, sir, you were going to give your  
8 opinion on that question and make reference to the  
9 charge of criminal negligence and dangerous  
10 driving, and I would invite you to do so at this  
11 time.

12 A My response, in the simplest terms, is  
13 that it was within general prosecutorial standards  
14 to stay this charge of criminal negligence causing  
15 death, and certainly it is not inconsistent with  
16 Manitoba policy directives. To understand how one  
17 reaches that conclusion, it is necessary to  
18 understand the distinction between dangerous  
19 driving and criminal negligence causing death.

20 The fault element -- first of all,  
21 both of these offences in the Criminal Code are  
22 what we refer to as conduct based offences. In  
23 other words, you derive the fault element, which  
24 is a modern term for what we used to call the mens  
25 rea, or mental element, from the conduct. You

1 look at the conduct in order to assess the state  
2 of the case and whether it meets dangerous driving  
3 or whether it supersedes that and is a case of  
4 criminal negligence causing death. So the fault  
5 element for dangerous driving is what we refer to  
6 as a marked departure from the norm. The fault  
7 element for criminal negligence causing bodily  
8 harm or causing death is a marked and substantial  
9 departure from the norm, the norm being the  
10 reasonable driver in the circumstances.

11 For the conduct part of this, the  
12 conduct that you look at for dangerous driving,  
13 the issue is dangerousness to the public in the  
14 circumstances of the road at the time. For  
15 criminal negligence, it is a much more elevated  
16 standard, and that is a standard of wanton or  
17 reckless disregard for the lives and safety of  
18 others. So you have these two departures as  
19 between a fault element for dangerous driving  
20 versus crim neg and the conduct element, the act  
21 itself. Probably a simple way of analyzing this  
22 is by thinking of it as existing on a continuum.  
23 At the low end of the continuum you would have  
24 pure accident, motor vehicle case that is a pure  
25 accident. You can't attribute any level of fault

1 or degree of fault to anyone. Those cases are  
2 extraordinarily rare, they do exist but they are  
3 very rare.

4 As you move along the continuum you  
5 have conduct that's impugnable but not greatly  
6 impugnable. So you would have conduct that  
7 offended say the provisions of the Provincial  
8 Motor Vehicle Act, you have an indication of  
9 careless driving, what we call careless driving,  
10 driving without the due care and attention, that  
11 type of thing.

12 Further along the continuum you start  
13 getting into the Criminal Code offences, and you  
14 now meet dangerous driving. So that conduct is  
15 exacerbated, it is more aggravated conduct than  
16 mere careless driving under the Motor Vehicle Act.

17 And then at the extreme end of the  
18 continuum, you have criminal negligence causing  
19 death. So it really becomes a matter, there is no  
20 science to this, it is an art form. You are  
21 looking at the nature of the conduct that gave  
22 rise to the accident and you are trying to put it  
23 somewhere on that continuum.

24 Then it becomes a matter of trying to  
25 assess, what are the factors that we can look at

1 that help us know where we fall on the continuum.  
2 And the case law is somewhat helpful because you  
3 can look at similar cases that have been found to  
4 meet the standard of dangerous driving, and  
5 similar cases of elevated or exaggerated conduct  
6 that meet the standard of criminal negligence.  
7 And it is a matter of degree and, in fact, that's  
8 language taken right out of the cases.

9           One court, the Ontario Court of  
10 Appeal, has referred in a case to this problem in  
11 these terms, whether specific conduct should be  
12 categorized as criminal negligence is one of the  
13 most difficult and uncertain areas of the law. So  
14 it is a matter of feel to some extent, and as I  
15 say, you look to the case law for some guidance to  
16 assist you.

17           The types of things that you would  
18 find that would justify not only charging, but  
19 convicting someone for criminal negligence causing  
20 death, would be indications of a grossly reckless  
21 driving pattern that had preceded the accident for  
22 some time and distance, significant evidence of  
23 alcohol consumption, perhaps ignoring warnings,  
24 perhaps assuming risks in a heedless manner that  
25 ought not to be assumed.

1                   And when one looks at all of these  
2 different factors and measures the conduct here, a  
3 conduct that has been presented to me on the  
4 assumed facts, the case is clearly a case of  
5 dangerous driving. It is a strong case, in my  
6 view, of dangerous driving. But in my view it is  
7 not anything near a strong case of criminal  
8 negligence.

9                   So when I take all of these factors  
10 together, I come to a conclusion that the  
11 likelihood or the prospect of achieving a  
12 conviction for criminal negligence causing death  
13 is very low and, to my mind, would not satisfy the  
14 charge approval standard in this province,  
15 certainly not in British Columbia, of a reasonable  
16 likelihood of conviction. Whereas, at the same  
17 time, one can safely conclude that a charge of  
18 dangerous driving causing death clearly meets that  
19 standard, would certainly meet the British  
20 Columbia standard for charge approval as well,  
21 which is a higher standard, we cast our charge  
22 approval at a substantial likelihood of conviction  
23 as opposed to a reasonable likelihood of  
24 conviction, but either standard would be met.  
25 Ultimately, the difference in terms of consequence



1 is one that is somewhat difficult to measure,  
2 because dangerous driving causing death carries a  
3 maximum term of imprisonment of 14 years.  
4 Criminal negligence causing death carries a  
5 maximum term of imprisonment of life. One should  
6 remember that these maximums are reserved for  
7 comparatively rare cases involving what the courts  
8 have described as the worst offender on the worst  
9 occasion.

10 Q Mr. Peck, in your explanation on  
11 criminal negligence causing death in the realm of  
12 driving offences, you made reference to ignoring  
13 repeated warnings. And I wanted to confirm, sir,  
14 that in the hypothetical facts presented to you,  
15 you have taken into consideration the fact that  
16 there were warning lights in place?

17 A I have taken that fact into account  
18 and it is set out in my opinion.

19 Q And with respect to a gross pattern of  
20 driving and ignoring repeated warnings, would you  
21 elaborate further on what you would mean by that?

22 A Evidence that the driver had for some  
23 period of time been weaving markedly in and out of  
24 a driving lane, perhaps had struck other vehicles,  
25 parked cars perhaps along the route, had shot

1 through lights on a number of occasions, that type  
2 of thing.

3 Q So the presence of an overhead  
4 lighting system could be taken into consideration,  
5 but yet would not place the offence necessarily in  
6 the category of criminal negligence, more securely  
7 perhaps in the area, as I understand your opinion,  
8 in that of dangerous driving?

9 A Yes, not to my thinking. And again,  
10 understand clearly that we are not dealing with an  
11 exact science here, we are dealing with something  
12 that falls on a continuum depending on the factors  
13 that you have, and an assessment, an experiential  
14 assessment that most of us are required to make as  
15 to whether or not there is going to be a likely  
16 conviction if a charge is laid.

17 Q Now, Mr. Peck, I would like you to  
18 provide testimony, please, on the issue of whether  
19 it is within acceptable general prosecutorial  
20 standards to agree on the hypothetical facts set  
21 out in Mr. Paciocco's correspondence to a plea  
22 bargain arrangement that would result in staying  
23 of charges of the criminal negligence causing  
24 death, the impaired causing death, and the  
25 refusing to provide a sample, in exchange for a

1 guilty plea to the dangerous driving causing  
2 death, and agreeing to a joint submission for a  
3 conditional sentence of two years, so whether that  
4 would be within acceptable general prosecutorial  
5 standards and consistent with the Manitoba Crown  
6 policy directives?

7           A       The short answer is that I think it  
8 was acceptable and consistent in those two  
9 questions. The way I approached this, based on my  
10 conclusion that the facts available give rise to a  
11 clear case of dangerous driving causing death, a  
12 marked departure from the standard of care of a  
13 reasonable person, it was acceptable to accept a  
14 plea to that offence. You have to understand that  
15 on the one hand a Crown can accept a plea, or  
16 agree to a plea to an offence where the evidence  
17 supports that. They can't where the evidence  
18 doesn't support it. So the evidence here clearly  
19 supported the offence of dangerous driving causing  
20 death. But the question, the real question here  
21 is whether the joint position for a conditional  
22 sentence of two years was within acceptable  
23 prosecutorial standards and within the guidelines.

24                       So what do we do when we try to answer  
25 that question? What we have to do is we have to

1 look at what are the sentencing patterns in the  
2 jurisdiction where this offence occurred that tell  
3 us whether or not a two year conditional sentence  
4 is acceptable or not. The starting point for me  
5 was to look at the authorities that had been  
6 presented to the Chief Judge in this case,  
7 authorities from this jurisdiction. There were I  
8 think 11 in total, one of which was an Ontario  
9 decision, the rest were Manitoba decisions.

10 Q Could I confirm with you, Mr. Peck,  
11 that you, in your review of the applicable  
12 jurisprudence, reviewed as one component the case  
13 book that was filed before the judge, and in  
14 addition, conducted your own independent  
15 research --

16 A I was just going to come to that.

17 Q -- on a broader scale?

18 A Yeah, I was just coming to that.

19 Q All right.

20 A So the starting point was to look at  
21 their cases, the cases that the judge had before  
22 him that the counsel for the Crown and the counsel  
23 for the defence had fastened on and presented.  
24 And certainly those cases clearly support the  
25 propriety or appropriateness of a two-year

1 conditional sentence for dangerous driving causing  
2 death in these circumstances. But we didn't stop  
3 there and we went beyond that, and I thought it  
4 would be useful to have research done to see  
5 whether or not there were other cases in the same,  
6 in around the same time, going back to about 1999.

7 Q And prior to giving your opinion on  
8 that, Mr. Peck, can you comment on whether you  
9 felt the compendium of cases that was put before  
10 the trial judge was comprehensive?

11 A Yeah, I was just going to say after we  
12 did our own research, we concluded it was  
13 comprehensive and, in fact, the relevant case law  
14 had been placed before the Chief Judge. And there  
15 being no other single factor, in my mind, that in  
16 any way meaningfully removed this from the  
17 mainstream of cases, it seemed to me that to agree  
18 to this resolution and sentence was not  
19 inconsistent with other general principles or  
20 specific Crown policies. And there was, to my  
21 mind, no policy that I had been presented with, in  
22 these materials, that would in any way detract  
23 from that conclusion.

24 I think it is important to know that,  
25 one thing we know in the criminal justice system

1 in this country is that it tends to be somewhat  
2 province specific, depending on the nature of the  
3 offence. It is probably a fairly notorious fact  
4 that for certain types of drug offences, you are  
5 better off being sentenced in British Columbia  
6 than you are in the Prairie Provinces. A drug  
7 offence in British Columbia that would normally  
8 draw a conditional sentence or something less in  
9 Manitoba or Saskatchewan might well draw a four  
10 year sentence of straight prison.

11 So what I found when I was looking at  
12 this is that Manitoba, in its own area and looking  
13 at dangerous driving causing death, there tends to  
14 be a convention, perhaps a tradition of  
15 jurisprudence that supports a non-prison sentence  
16 for dangerous driving causing death. This  
17 province, our research and obviously the research  
18 of the people involved in this case, indicated  
19 that that was the case.

20 Q One area I wanted to clarify with you,  
21 Mr. Peck, in your opinion thus far and in your  
22 testimony you've referred to the case of dangerous  
23 driving as a clear case of dangerous driving. And  
24 in our Commission evidence, we've heard in  
25 evidence terms such as a strong case, a weak case,

1 et cetera. What do you mean when you say a clear  
2 case of dangerous driving? Can you give some  
3 comment with respect to the relative strength or  
4 weakness of the case?

5 A A case where if I was the prosecutor  
6 handling this matter, I would have no doubt going  
7 in that I would obtain a conviction for dangerous  
8 driving causing death.

9 Now, I think we need to refer to this  
10 document that I saw for the first time last night,  
11 because that had not been a part of my  
12 consideration. And this document,  
13 Mr. Commissioner, that I'm referring to, is a  
14 Manitoba Department of Justice policy directive  
15 guideline. And I'm not sure of the exhibit  
16 number.

17 Q The exhibit number is 217, and the  
18 disclosure reference is G-45. It is the Manitoba  
19 Department of Justice Prosecutions Policy  
20 Directive on the subject of conditional  
21 sentencing.

22 A And I don't quite know why this wasn't  
23 included in the materials, but I will preface my  
24 remarks by saying it doesn't really change my  
25 opinion, but I do want to make some comments about

1 it. This is a policy directive which would be  
2 aimed at all Crown counsel in this province  
3 handling certain classes of cases under the  
4 Criminal Code. And this policy directive is dated  
5 April 2005, so it postdates the accident and the  
6 case at bar, or the case under review by some two  
7 months. And the effect of this directive is to  
8 instruct Crown counsel that as a general rule  
9 there should not be a recommendation for a  
10 conditional sentence in cases involving death or  
11 serious bodily harm. If a prosecutor handling  
12 such a case, after this directive came down,  
13 wished to recommend a sentence that was a  
14 conditional sentence, in circumstances where death  
15 or serious bodily harm was concerned, that  
16 prosecutor was required to engage in what is  
17 referred to as a case conference involving more  
18 senior members of the Crown prosecution service,  
19 or Department of Justice in Manitoba, in effect,  
20 to obtain their imprimatur or okay to recommend  
21 such a sentence. This directive says that there  
22 may be exceptional circumstances in a given case  
23 that justify a recommendation of a conditional  
24 sentence. The directive says exceptional  
25 circumstances is difficult to define as there will



1 be unusual and unforeseeable situations that will  
2 arise. It further says that a Crown Attorney is  
3 not required to argue that a conditional sentence  
4 is inappropriate in the face of clear authority to  
5 the contrary. And it concludes under the heading  
6 "rationale" on page 4, that it is important that  
7 the position taken by the Crown with respect to  
8 sentence be thoroughly considered and approved by  
9 way of a case conference. It doesn't say you  
10 can't have a conditional sentence, you can't  
11 recommend it, you can't go along with it. What it  
12 says is you have got to have a case conference  
13 and/or be involved in a case that is highly  
14 exceptional.

15           What does this mean to the independent  
16 or special prosecutor who is assigned the carriage  
17 of this prosecution? Certainly, that person  
18 cannot be subject to a requirement of obtaining  
19 approval because that person is in the role of an  
20 independent prosecutor. So the independent  
21 prosecutor looking at this is going to take this  
22 as advisory only, but he or she is the very  
23 approver, they are the person that has to make the  
24 decision, and they do not go to seek approval from  
25 senior members of the Crown counsel office because

1 they are independent. As I prefaced my remarks,  
2 nothing in here changes my opinion.

3 Q Do you see any difficulty at all with  
4 an independent or special prosecutor coming to a  
5 conclusion on a conditional sentence, and then  
6 advising, for instance, individuals that he or she  
7 may be required to report to of the decision?

8 A I don't think there is anything wrong  
9 with advising. There may be circumstances where  
10 you would want to run it by someone else. But if  
11 that's your conclusion, nobody has the power under  
12 the policy directive appointing independent  
13 prosecutors, or special prosecutors, to overrule  
14 you or override you on that. You are the person  
15 that makes that decision. They want you as an  
16 independent prosecutor and you are independent.

17 Q Now, Mr. Peck, your opinion that the  
18 agreement to the plea bargain and the plea itself  
19 was within the Crown discretion and consistent  
20 with the policy directives, you recognize of  
21 course that you and Mr. Gover are in disagreement  
22 rather significantly on this point. And I wonder  
23 if you could comment on his position that entering  
24 into the joint position for the imposition of a  
25 conditional sentence in this case would have

1 tended to bring the administration of justice into  
2 disrepute?

3           A     I don't agree with that opinion of  
4 Mr. Gover. This sentence was consonant with  
5 sentences in this jurisdiction for similar conduct  
6 that preceded this offence and post-dated this  
7 offence. Some of these cases appear to be more  
8 egregious or aggravated in their facts. There was  
9 a case in 2003 called Duchominsky, two counts of  
10 dangerous driving causing death and three counts  
11 of dangerous driving causing bodily harm, 24 month  
12 conditional sentence. There is a case from 2001  
13 called Higgins -- Duchominsky by the way is  
14 reported, a reported case from the Manitoba Court  
15 of Appeal. Higgins again is a Manitoba Court of  
16 Appeal case from 2001, dangerous driving causing  
17 death, facts involved, impairment by alcohol, 18  
18 month conditional sentence. There is a case of  
19 Perron, 2007, from the Manitoba Court of Appeal,  
20 of dangerous driving causing death, again with a  
21 two-year conditional sentence.

22                         So if the courts in this province see  
23 fit to mete out sentences that are of a  
24 conditional nature for this offence before, both  
25 before and after this offence, I do not see how

1 one can claim that to agree to such a sentence  
2 brings the administration, or tends to bring the  
3 administration of justice into disrepute.

4 Q Mr. Peck, I would like to turn your  
5 attention, sir, to the issue as to whether it was  
6 within acceptable general prosecutorial standards  
7 to agree or decide not to prove that the accused  
8 had consumed alcohol after that allegation fell  
9 into issue on the hypothetical facts that you were  
10 presented?

11 A Mr. Commissioner, this analysis  
12 commences at page 22 of the opinion. The  
13 evidentiary record in this case was extremely  
14 problematic on this issue. There was some  
15 evidence that the accused had consumed some  
16 alcohol some time before the accident. This, to  
17 some extent, turns on the importance of that  
18 factor in the sentencing process. And the law is  
19 in a state of some uncertainty on this point.  
20 Logically, the proof of consumption of alcohol  
21 would be considered an aggravating factor on  
22 sentencing in a case of this nature if it could  
23 somehow be linked to the accident. There is  
24 disagreement in the courts on this point. Some  
25 cases tend to indicate that the mere fact that

1 someone had consumed some alcohol should be always  
2 considered an aggravating factor, even if it  
3 doesn't appear to have factored into the accident  
4 itself.

5 Other cases seem to indicate that we  
6 are looking for situations where, in fact, the  
7 consumption had been at least in part a cause of  
8 the accident. And the case law in this  
9 jurisdiction, to my way of thinking, is not  
10 certain on this point, it is not set. And I  
11 analyzed that looking at some of these cases.  
12 There is a case called Manty the Court of Appeal  
13 in this province from 2006. That case refers to  
14 the absence of the aggravating factors, including  
15 no evidence of alcohol having been consumed.  
16 There is the case of Tremblay from 2008, that  
17 post-dates this case, similar to Manty in its  
18 conclusion. And then there is a case that I  
19 referred to earlier in 2003, from the Manitoba  
20 Court of Appeal of Duchominsky which says that the  
21 presence of alcohol, that is the mere fact of the  
22 consumption of alcohol, as I read the case, could  
23 be considered as an aggravating factor. There is  
24 a 2006 case from the British Columbia Court of  
25 Appeal that is to like effect.

1                   So the question, I think the starting  
2 point is, is it going to make a difference if I  
3 can prove as a prosecutor that this man,  
4 Harvey-Zenk, had consumed a beer at 11:00 o'clock,  
5 or whatever it was, because the proof of that was  
6 very problematic. It wasn't going to make a  
7 difference given the case law. My conclusion  
8 would be, unless I can link it some way to the  
9 accident, probably not. And then it becomes a  
10 question of a cost benefit analysis, how much, how  
11 likely is it that I'm going to be able to prove  
12 it, and even if I do prove it, is it going to make  
13 any difference?

14                   So my conclusion was that the mere  
15 fact of the consumption of some alcohol, I didn't  
16 see that as being a particularly relevant factor  
17 in the sentencing process. The evidence was just  
18 so scant on this point.

19                   Q     Mr. Peck, there is, obviously, we can  
20 see in your opinion and based on your testimony  
21 somewhat of an ongoing and healthy debate on that  
22 point in the jurisprudence. I understand as well  
23 that you would have taken into consideration the  
24 Proulx decision from the Manitoba Court of Appeal,  
25 which we know was reviewed in the Supreme Court of

1 Canada, but with no mention being made of the  
2 alcohol?

3 A And I make that point in my opinion.

4 Q Indeed. In light of the jurisprudence  
5 tending one way or the other, if there was an  
6 indication, for instance, as there was in this  
7 case, perhaps from the transcripts, that this was  
8 a factor that the trial judge was interested in,  
9 or the sentencing judge was interested in, in  
10 other words, that it seemed as though he might  
11 have wanted to ride that horse, would that be  
12 something that would influence your opinion?

13 A Not necessarily. I mean, that's why  
14 we have an adversarial system with three  
15 independent actors, an independent and private  
16 defence bar, an independent prosecution service,  
17 and an independent and impartial judge. Judge's  
18 wishes are always something that you consider, but  
19 you have to make your own decision when you are  
20 presenting a case, and that decision depends on  
21 relevance and proof. But I will say this, that if  
22 the law were settled and the mere fact that  
23 consumption of any alcohol was to be considered as  
24 an aggravating factor, if that were the state of  
25 the law, and if proof were available on a standard

1 of proof beyond a reasonable doubt, Regina v.  
2 Gardiner standard, then in my view it would be  
3 Crown counsel's duty to attempt to prove that  
4 fact. I think what has to be understood, by any  
5 who don't know this, is that if at a sentencing  
6 proceeding the defence contests a fact, and the  
7 Crown wishes the court to rely upon that fact in  
8 sentencing, as an aggravating factor usually, it  
9 is incumbent and it is the law that the Crown is  
10 required to prove that fact beyond a reasonable  
11 doubt. And that's what I mean by reference to the  
12 Gardiner case. In those circumstances, if the law  
13 were settled, if the evidence was there, then I  
14 think it would be Crown counsel's duty to proceed  
15 to prove that fact.

16 Q And based on the hypothetical facts  
17 presented to you, Mr. Peck, you concluded that  
18 Crown counsel was acting within the acceptable  
19 prosecutorial standards and within the Crown policy  
20 directives. But on this point, we see as well a  
21 dramatic divergence of opinion between you and  
22 Mr. Gover. I take it you are aware of his view  
23 that if alcohol consumption was of sufficient  
24 importance to warrant inclusion in the facts, the  
25 prosecutor should have been able to prove it. And



1 he goes further and indicates that the decision  
2 not to attempt to prove consumption of alcohol was  
3 tantamount to an agreement not to place the facts  
4 before the court.

5 A I adamantly disagree with that last  
6 phrase, tantamount to an agreement. This was a  
7 prosecutorial decision, as I see it. I come and  
8 deal with this a little further on in the opinion  
9 at page 34, if you want to wait until then, or we  
10 can jump to that, but I think logically perhaps we  
11 should stay where we are.

12 Q All right. That's what we will do.

13 I take it, based on Mr. Gover's  
14 opinion and your disagreement with it, that  
15 obviously the logical conclusion one might draw is  
16 that you and he don't take a similar view of the  
17 case law and what the mere consumption of alcohol  
18 suggests?

19 A And I think given the state of the  
20 law, Mr. Commissioner, at this time, reasonable  
21 people can disagree on this point.

22 THE COMMISSIONER: The Supreme Court  
23 of Canada proves that every day.

24 THE WITNESS: I'm merely a humble  
25 lawyer so I can't respond to that,

1 Mr. Commissioner.

2 BY MR. CLIFFORD:

3 Q On the issue, Mr. Peck, of the debate  
4 and what the cases may stand for, your reliance on  
5 the Manitoba cases, the Manitoba jurisprudence  
6 supports your opinion on the conditional sentence  
7 imposition and the appropriateness of that  
8 sentence. The Manitoba jurisprudence also seems  
9 to lean very heavily in favour of taking the mere  
10 consumption of alcohol into consideration as an  
11 aggravating factor?

12 A I'm not so sure that I would say leans  
13 heavily, and I think I referred you to the  
14 Duchominsky case where the Court of Appeal in  
15 Manitoba in 2003, referring to the aggravating  
16 factor of the presence of alcohol in a dangerous  
17 driving case, said it could be considered, that's  
18 the language that I fastened on, not that it must  
19 be considered. So whichever way you want to cut  
20 this deck, it is still going to end up that there  
21 is a reasonable debate out there on this point.

22 Q I take it, sir, you considered as well  
23 the recent Court of Appeal decision from Manitoba,  
24 the Tremblay decision, the court had concluded  
25 there that in that case the accused had consumed

1 alcohol, that the court indicated that they  
2 thought they had to take that into account to some  
3 degree, even though they noted from Crown  
4 counsel's submission that is an ambulance  
5 attendant at the time found the accused,  
6 Mr. Tremblay, to be alert and normal.

7           A     I took that not to be a Court of  
8 Appeal decision, but rather a Queen's Bench  
9 decision.

10           Q     And you were correct perhaps in doing  
11 so. Let me confirm. That's right. I flipped to  
12 the wrong title page. But there are, in addition  
13 to the Manitoba decisions, many cases in the  
14 British Columbia jurisprudence as well that  
15 suggests much the same thing, that the mere  
16 consumption of alcohol could allow the sentencing  
17 judge to consider it as an aggravating factor in a  
18 dangerous driving case.

19           A     All right. If we are going to debate  
20 this, let's look at -- and I did refer you to  
21 Prasad from the Court of Appeal of British  
22 Columbia in 2006, where it is stated that the  
23 consumption, the mere fact of consumption can be  
24 considered, can be, as an aggravating factor. I  
25 do cite from the English Court of Criminal Appeal,

1 some years ago on this very point, at page 23 of  
2 my opinion. The B.C. Court of Appeal in 1973 case  
3 refers with approval to the case of McBride in the  
4 English Court of Criminal Appeal and says this:

5 "In order to render evidence as to the  
6 drink taken by the driver admissible,  
7 such evidence must tend to show that  
8 the amount of drink taken was such as  
9 would adversely affect a driver or  
10 alternatively that the driver was in  
11 fact adversely affected."

12 If we look at sentencing in a principled manner  
13 and we want to consider aggravating factors, it  
14 seems to me that we need to look at aggravating  
15 factors that have some relationship to the matter  
16 being sentenced. So it seems to me that if  
17 someone consumes one glass of beer at noon, and is  
18 driving along Portage and Main, in this city, at  
19 1:00 o'clock, or 1:30, and then starts reaching or  
20 fiddling with a CD player or something and rear  
21 ends someone, it is hard to imagine how the  
22 consumption of one glass of beer becomes an  
23 aggravating factor in those circumstances.  
24 Logically, I have difficulty with the mere  
25 expression or proposition that the mere

1 consumption of any alcohol prior to a motor  
2 vehicle accident should be an aggravating factor  
3 on sentencing. It doesn't logically connect for  
4 me. Unless either Parliament or perhaps the  
5 Supreme Court of Canada, in its jurisprudential  
6 role over the Common Law decides as a matter of  
7 policy that that should be the case. We are not  
8 really talking now so much about logic, but we are  
9 talking about a policy driven issue. And the  
10 courts remain undecided. So, to my mind, it is  
11 not at this point certain that it is the case by  
12 any means that the mere consumption is and always  
13 will be an aggravating factor.

14 Q I appreciate that, Mr. Peck, and I  
15 take your opinion. But I think you would agree  
16 that certainly the debate is a healthy one and  
17 certainly the argument is there to be made to the  
18 contrary?

19 A Absolutely. I'm not sure how healthy  
20 the debate is, but the argument is there to be  
21 made to the contrary.

22 Q In the sense that it is an issue that  
23 we see in many levels of court throughout many  
24 jurisdictions.

25 A Yes.

1           Q     And there is a diversion of opinion  
2 amongst many levels of courts and jurisdictions.

3           A     Yes.

4           Q     Now, sir, moving on, and this I think  
5 this will allow you to give an opportunity to  
6 expand further on that issue, as you mentioned  
7 earlier. Dealing with the questions, sir, whether  
8 it is within acceptable prosecutorial standards  
9 and/or ethical principles to present a joint  
10 submission or position to a judge, without making  
11 it clear to the judge that the joint position was  
12 arrived at as a result of a plea bargain; and the  
13 second issue, which is slightly different, is  
14 whether judging from the transcripts that you were  
15 provided, whether sufficient efforts had been made  
16 or taken by the prosecutor in the context of all  
17 the submissions made to alert the presiding judge  
18 to the fact that the joint position was arrived at  
19 as a result of the plea bargain.

20                     Could I have your opinion on those  
21 issues, sir?

22           A     And, Mr. Commissioner, this commences  
23 at page 24.

24                     THE COMMISSIONER: Yes.

25                     THE WITNESS: My conclusion on this

1 point is that in this province there is clear  
2 authority emanating from the Manitoba Court of  
3 Appeal that it is incumbent upon counsel to make  
4 it apparent, to make it manifest to the court,  
5 when a joint submission is in the nature of a true  
6 plea bargain. The case that I cite is Regina v.  
7 Sinclair from 2004. The case clearly stands for  
8 the proposition that the clearer the quid pro quo  
9 or the plea bargain, the more weight should be  
10 given an appropriate joint submission by the  
11 sentencing judge. And this, of course, is what  
12 happened in this case, it wasn't made clear when  
13 the facts were first explicated to the court, on  
14 August 22nd, that this was, that what was being  
15 presented to this judge was in the nature of a  
16 true or pure plea bargain.

17 The Manitoba Court of Appeal in the  
18 Sinclair case seems to be fairly explicit on the  
19 obligations of counsel in this regard. And in  
20 fact, they say if the joint submission is as a  
21 result of, for example, an evidentiary gap in the  
22 Crown's case, or the absence of an essential  
23 witness, this is information that should be  
24 provided to the court by counsel, and particularly  
25 Crown counsel. And I derive from that Sinclair

1 case a number of conclusions. I stated them  
2 simply as this. The essence of the plea bargain  
3 should be placed on the record in open court, and  
4 there is a particular duty on Crown counsel to  
5 ensure that this information is clearly placed  
6 before the court.

7           Why does the Sinclair case say this?  
8 Because it equally says that the more toward the  
9 end of the spectrum you are in a true plea  
10 bargain, where the accused has given up essential  
11 rights to achieve this joint submission, the more  
12 incumbent it is upon the sentencing judge to pay  
13 heed to those submissions. And the judge needs to  
14 know this in terms of assessing the priority of  
15 the plea bargain, what has been given up, and how  
16 he or she should approach the issue that's been  
17 presented to him. And we know that in the case at  
18 bar under review, the Chief Judge was very  
19 critical of counsel for not having made it clear  
20 at the first instance on August 22nd, 2007, that  
21 the case before him was in the nature of a true  
22 plea bargain.

23           This, of course, became the subject of  
24 further discussion when counsel reappeared on  
25 September 12th, 2007. At that time counsel



1 clearly moved to correct this state of affairs and  
2 to satisfy the Chief Judge that this was in fact a  
3 true plea bargain. And I have cited a great deal  
4 of the transcript to this effect at pages 28 and  
5 following. Although it took some time, given the  
6 way this was articulated, to finally get the  
7 message across, but it certainly was done on  
8 September 12th. And if one has regard to the  
9 transcript, you can see comments at pages 17 and  
10 21 to this effect. And comments, in fact, by  
11 defence counsel that support the notion that this  
12 was in fact a joint submission in the nature of a  
13 true plea bargain, and his comments are at page 41  
14 of that same transcript.

15 BY MR. CLIFFORD:

16 Q Mr. Peck, a couple of follow-up  
17 questions flowing from that. One of the things  
18 you mentioned was that Chief Judge Wyant was  
19 critical of counsel, and particularly critical of  
20 Crown counsel for not having made it clear during  
21 the August 22nd sentencing proceedings that the  
22 case before him was more in the nature of a true  
23 plea bargain than a joint submission. And you've  
24 rendered your opinion, sir, that you felt that the  
25 emphasis was also particularly on Crown counsel to

1 achieve that. Why do you feel that it is more on  
2 Crown counsel, for instance, than equally shared  
3 amongst the parties?

4 A Because that's what the Manitoba Court  
5 of Appeal said precisely in the Sinclair case.  
6 They used the phrase "particularly on Crown  
7 counsel," the onus, Crown counsel is presenting  
8 the matter to the court, here is where the onus  
9 lies.

10 THE COMMISSIONER: One of the problems  
11 in a plea bargain is that it is important for  
12 Crown counsel to relate to the judge in open court  
13 the reasons for the bargain, so that there is no  
14 public perception that a deal has been made that  
15 is unreasonable.

16 In other words, if Crown counsel is  
17 going to indicate, first of all, that there is a  
18 bargain and he should make it, the facts  
19 surrounding the bargain. In this case Crown  
20 counsel was somewhat concerned with revealing the  
21 circumstances surrounding the bargain and, in  
22 fact, indicating the weakness in his case because  
23 he wanted to strike a proper balance, and I will  
24 have to look at my notes, I don't know if I got  
25 them all down correctly, in not embarrassing the

1 police because of the nature of the investigation.

2 How far do you think Crown counsel  
3 should go in revealing the bargain and the facts  
4 surrounding the bargain?

5 THE WITNESS: I wasn't aware that  
6 Crown counsel was concerned about not embarrassing  
7 the police, but to me that would be a completely  
8 irrelevant consideration. The police made their  
9 own bed in this investigation and have to sleep in  
10 it. If the plea bargain is driven by the  
11 inadequacy of the investigation, the problems with  
12 proof and that type of thing, then it seems to me  
13 that needs to be put before the judge so he  
14 understands.

15 THE COMMISSIONER: Let's take another  
16 situation of a bargain; let us assume that the  
17 Crown comes in and says, I have an undercover  
18 officer here, I don't wish to reveal in open court  
19 the fact that we are withdrawing this charge or we  
20 are -- here in this province they stay them -- we  
21 are not proceeding on a particular charge because  
22 I don't want that fact to be made known in public.  
23 How does the Crown counsel deal with that?

24 THE WITNESS: Well, he would have to  
25 be guarded in the language he used, because he is

1 dealing with issues of investigational and perhaps  
2 informal privilege in those circumstances. It is  
3 often in those cases, a wink is as good as a nod.

4 THE COMMISSIONER: Sir, you can't wink  
5 and nod to the public.

6 THE WITNESS: No, you can't wink and  
7 nod to the public, but you can get your message  
8 across to the court, and you can say that there  
9 are serious investigational interests at risk here  
10 that motivate this resolution, My Lord. That is  
11 kind of the way -- I would have to think it  
12 through more, you are posing the question to me  
13 like that, but that's the way I think I would  
14 approach it.

15 THE COMMISSIONER: But your opinion is  
16 that there is a duty and a responsibility on the  
17 Crown to advise the court of the weaknesses in his  
18 case?

19 THE WITNESS: As it relates to this  
20 true plea bargain.

21 THE COMMISSIONER: One of the  
22 problems, of course, in Manitoba is that the  
23 practice is a little unusual, maybe not for  
24 Manitoba, but for the province from which I come,  
25 in that the accused is arraigned, the plea is

1 taken, and then the matter is adjourned for  
2 sentence, at which time the Crown will then set  
3 out what facts he or she relies upon. In other  
4 words, at the time that the judge makes a finding  
5 of guilt, he or she is not given a factual basis  
6 in support of the plea, which I have difficulty  
7 with, but that then comes on the date of  
8 sentencing.

9                   How would that affect the disclosure  
10 by the Crown? Because there is a concern, a  
11 genuine concern that the moment the Crown at that  
12 stage gets up and says, I have got weakness in  
13 this case for these reasons, the defence may stand  
14 up and say, I'm not pleading guilty, I am asking  
15 that my plea be withdrawn.

16                   THE WITNESS: In fact, in the case at  
17 bar, it seems to me that not only was the plea  
18 taken but the other three counts stayed, and then  
19 it was adjourned.

20                   THE COMMISSIONER: Yes.

21                   THE WITNESS: One way that this -- and  
22 you may know at the end of my report I make  
23 reference to this -- this problem might have been  
24 alleviated, although I wasn't directing my mind to  
25 your question in writing this, was by the

1 production and presentation to the court as an  
2 exhibit an agreed statement of facts.

3 THE COMMISSIONER: That's what we were  
4 talking about.

5 THE WITNESS: That would have brought  
6 clarity and certainty to this proceeding.

7 THE COMMISSIONER: All right. Thank  
8 you.

9 BY MR. CLIFFORD:

10 Q Mr. Peck, I take it from your  
11 testimony and opinion, sir, that you felt as  
12 though the proceedings, on August 22nd, left the  
13 court with the absence of a proper foundation to  
14 conclude that it was a true bargain. And with  
15 respect to this omission, sir, do I conclude that  
16 you felt as though this was one of the errors that  
17 the Crown had committed?

18 A Yes, I find it was an error. I noted  
19 the Chief Judge's comment, particularly I think on  
20 October 29th, when the actual judgment was  
21 rendered, that he referred to this as an  
22 inadvertent omission. And I think that that is a  
23 proper -- I agree with that.

24 Q That was the question I was going to  
25 put to you, sir, and have you give your opinion on

1 that. I take it you have expressed that, that you  
2 are in agreement with Judge Wyant's findings on  
3 that point, although it was a mistake, it was  
4 committed through inadvertence?

5 A Yes. And I don't find the failure to  
6 draw the plea bargain, the nature of the plea  
7 bargain to the attention of the court on the first  
8 occasion, August 22nd, to be a mistake or a  
9 conduct that gives rise, in my mind, to any notion  
10 of professional or unethical misconduct. To my  
11 mind, it is an inadvertent omission.

12 I think that, you know, one of the  
13 things that we have to be cognizant of is the  
14 nature of the case. This is a highly emotive  
15 case. Cases of this nature put extreme pressure  
16 on counsel, the court, the parties, people  
17 involved, everyone involved. The media focus is  
18 intense. The facts are tragic. The emotional  
19 atmosphere of courtrooms in cases of this nature  
20 can sometimes verge on being overwhelming, even to  
21 the most hardened lawyer, hardened counsel. And  
22 this is the very crucible, I think,  
23 Mr. Commissioner in which mistakes happen from  
24 time to time.

25 You know, one can say or argue, well,

1 isn't it really in these cases that counsel should  
2 be hypervigilant, as it were? But we are dealing  
3 with an intensely human system. The courtroom is  
4 a place where the foibles and frailties of the  
5 human condition are often manifest, and often  
6 prodded and poked. And it can be a very difficult  
7 atmosphere. So I think we have to recognize the  
8 context in which mistakes of this nature not only  
9 can occur, but do occur. There is no such thing  
10 as a counsel of perfection and we all make  
11 mistakes in the course of our careers. None of us  
12 can cast the first stone.

13 Q Mr. Peck, your comments with respect  
14 to the media focus being intense, emotive  
15 atmosphere, verging on the point of being  
16 overwhelming, these are things, I take it, you  
17 were able to glean from the transcript simply by  
18 reviewing the exchanges that took place between  
19 the counsel and court?

20 A Absolutely, and indeed I took it from  
21 many of the comments of the learned trial judge,  
22 both in the course of dealing with counsel on the  
23 sentencing and in his reasons for judgment on  
24 sentence.

25 Q You've provided the Commission with



1 testimony about the potential for an agreed  
2 statement of fact, and how that might improve the  
3 situation. You have also provided testimony with  
4 respect to giving as much detail and clarity to  
5 the judge as possible, and communicating as much  
6 as possible with the judge, the court. Can you  
7 provide some further comment, Mr. Peck, with  
8 respect to communication with other individuals  
9 that are involved in the process? For instance,  
10 as an independent prosecutor, I take it that you  
11 do have to deal quite frequently with family  
12 members who have been affected by tragedies,  
13 crimes?

14           A     And this doesn't just apply to  
15 prosecutors, this applies to all of us who deal in  
16 the criminal justice system, whether defending or  
17 prosecuting. If you are defending, you are very  
18 often dealing with clients, many of whom are very  
19 ordinary people who have made a mistake, sometimes  
20 a tragic mistake. You are dealing with the  
21 families of your clients. You intend, or desire  
22 to take steps in the course of the defence that  
23 they may not understand, agree with, like.  
24 Communication is imperative. It is part of what  
25 we do for a living. You get the clients, you get

1 the family in, you explain the problems with the  
2 case, what is likely to happen or not happen,  
3 where you think you can go with the defence or  
4 can't go, what the sentencing range is, how we are  
5 going to deal with it, what we can and can't  
6 accomplish. You explain the law to these people.  
7 Because the average person doesn't understand  
8 these things.

9                   And the same obligation, it seems to  
10 me, rests with the prosecutor. If I'm a special  
11 prosecutor in circumstances like this where there  
12 are -- you have got an absolute tragedy you are  
13 dealing with. You have got people who are in  
14 grief, in bereavement, and you are going to  
15 make -- and I have no idea what happened in this  
16 particular case, but if I'm handling it, I want to  
17 get those people in, I want to get the family in,  
18 I want to say to them, here are the problems,  
19 whatever it is. Here is what I think I can do,  
20 here is what I can't do, here is the way we have  
21 got to deal with this. Communicate to them,  
22 explain to them the problems, let them know.  
23 Communication is -- I think we are supposed to  
24 pride ourselves in our ability to be  
25 communicators, but sometimes I think we don't

1 perhaps express ourselves as we should, or as  
2 often as we should, or as meaningfully as we  
3 should. It takes a little bit of extra time and a  
4 little bit of extra work, but it seems to me in  
5 most cases it is well worth it.

6 Q On the issue of -- I appreciate what  
7 you have said on that point, and just tying this  
8 back to the submissions in court, providing the  
9 judge with clarity and detail on the fact that we  
10 were dealing with a true plea bargain, do you  
11 think that an experienced judge or lawyer would  
12 have recognized that that is simply what they are  
13 dealing with, just on the facts of what was  
14 presented to them on August 22nd?

15 A They might well do. I mean, you know,  
16 but you don't take these things for granted. If  
17 you have got an obligation to do something, you do  
18 it. You don't just assume that the judge is going  
19 to know that this is a true plea bargain. And  
20 clearly here there was a problem in this  
21 communication, so he didn't apparently pick up on  
22 that, judging by what he said on September 12th  
23 and later on October 29th. You can't simply shunt  
24 your obligations on an assumption of what somebody  
25 else is going to believe or think. You have a

1 positive obligation to advise the court of  
2 something, you do it. Is that responsive to the  
3 question?

4 Q Yes, I think it is. And if it isn't,  
5 I'm sure other counsel will attempt to clarify it.

6 I would like to refer you now to page  
7 34 in your written opinion, and ask for your  
8 evidence, sir, and your opinion on the issue of  
9 whether on the transcripts in this case, and in  
10 light of the hypothetical facts set out in  
11 Mr. Paciocco's correspondence, adequate  
12 information was furnished by the prosecutor to  
13 satisfy the ethical and professional obligations  
14 of a prosecutor presenting the factual  
15 underpinnings of the guilty plea?

16 A And, Mr. Commissioner, this question  
17 is what lead me ultimately to think that this case  
18 ought to have been dealt with by an agreed  
19 statement of facts, because that forces counsel to  
20 focus on the matter and to present to the court a  
21 document that brings clarity, concision to the  
22 court. And my conclusion -- and what this  
23 question really revolves around is when the Crown  
24 counsel in this case made reference in his  
25 explication of the facts to what he referred to as

1 anecdotal historical evidence respecting the  
2 consumption of alcohol. My view of this is that  
3 had counsel analyzed the case in the context of  
4 drafting an agreed statement of facts, this phrase  
5 would likely have been omitted. This expression  
6 would not have gone before the court. Once he  
7 analyzed this and saw that either it was going to  
8 be extremely difficult to prove, and he couldn't  
9 meet the Gardiner standard on this issue, or that  
10 the cost benefit analysis did not invite  
11 proceeding to try to prove it, then you would omit  
12 that from the recitation of the factual context  
13 for the plea and the sentence.

14 I mean, what happens when he raises  
15 this and he is challenged on it by the court, and  
16 indeed he is challenged on it by defence counsel,  
17 and defence counsel says that is no part of this  
18 plea, this reference to anecdotal historical  
19 evidence. Defence counsel says quite properly,  
20 anecdotal evidence is not evidence. Of course it  
21 isn't. By definition an anecdote is a story, it  
22 is pure hearsay. If you can't prove it, you don't  
23 say it.

24 So I think that that -- it was use of  
25 that expression that caused this particular

1 problem. And when he is challenged on it after a  
2 recess, Crown counsel comes back and simply says  
3 that he would not be seeking to call evidence on  
4 this point. So if that was his conclusion, he  
5 shouldn't have mentioned it in the first place.

6 I also think that, in retrospect, in  
7 reviewing my opinion, Mr. Commissioner, that  
8 probably, having mentioned it, and now having  
9 decided that he is not going to attempt to prove  
10 it, he should have followed that up with some  
11 explanation. And the Martin report makes some  
12 reference to that. I pointed that out in my  
13 discussions with counsel last night, the Martin  
14 report at volume 2, page 314. And had I thought  
15 of that before, I would have included it in my  
16 opinion. But having advised the court that he  
17 would not be seeking to call evidence on a point  
18 that he raised, he probably should have given an  
19 explanation to the court. I think that his use of  
20 that language was an act that I described as  
21 really overreaching. He was reaching too far in  
22 terms of what was capable of proof in his case,  
23 and it didn't really add a great deal to what was  
24 going to be happening in the case. So I think  
25 that was a mistake that he made.

1                   Again, I do not see this as being an  
2    ethical problem or a question of professional  
3    misconduct, it was overreaching, it was a mistake.  
4    And it certainly was not, in my view, an effort to  
5    sanitize facts before the court. He simply had a  
6    situation where he overstated his case and had to  
7    back off it.

8                   Q     Mr. Peck, would I be correct in  
9    suggesting to you that your conclusion that the  
10   mistake was not in deciding not to call evidence  
11   on the alcohol consumption, but in making  
12   reference to it in the first place, that your  
13   opinion on that is predicated heavily on the fact  
14   that -- you've expressed your opinion that had he  
15   decided to prove alcohol, there would be the issue  
16   as well, to what end? In other words, that it is  
17   based --

18                  A     Yes.

19                  Q     -- very heavily on your opinion as to  
20   what the net effect, or proof would be of actually  
21   calling the fact that there had been some  
22   consumption?

23                  A     Yes.

24                  Q     Because I take it you agree that the  
25   was evidence there to be called that there had

1 been some consumption. You are aware of the odour  
2 of alcohol of the paramedics, et cetera?

3 A Yes. And I'm aware of the fact that  
4 apparent observation was not recorded in any  
5 police notes, notwithstanding that there was some  
6 suggestion that these paramedics had told the  
7 police officer about it. I'm aware of the other  
8 contradictions in the evidence and the notes. Why  
9 all of that occurred, I don't really know, because  
10 I haven't been here to listen to this Commission  
11 of Inquiry and the various witnesses. But, yes.

12 Q All right. Now, I wanted to, before  
13 dealing with your final conclusions when you look  
14 at everything comprehensively, go back, if we  
15 could, to the issue of the stay of the refusal.  
16 There were other factors, sir, that I wanted to  
17 address with you, and this of course dealt with  
18 the D and E in your opinion, whether the stay of  
19 the refusal was in line with acceptable  
20 prosecutorial standards and consistent with the  
21 policy directives. And you have given your  
22 opinion, sir, that in your view it was consistent  
23 and within accepted prosecutorial standards. But I  
24 wanted to put to you, sir, that there were other  
25 factors at play here. The Commission has heard



1 evidence with respect to the fact that the issue  
2 of the blood versus breathalyzer demand, if you  
3 were to consider, for instance, that the  
4 prosecutor might have had information where he  
5 could have presented to the court that this was a  
6 clerical error which had been pointed out to the  
7 Crown, and there had been indications of the fact  
8 that the breathalyzer demand was read as opposed  
9 to a blood demand, but it was recorded  
10 inaccurately.

11 A Well, that would simply be a matter of  
12 proof, wouldn't it? A matter of contest between  
13 counsel if the matter proceeded to trial.  
14 Presumably, defence counsel is going to say to the  
15 officer who made the demand, but, sir, isn't the  
16 best evidence your contemporaneous recording of  
17 the demand? Yes, normally it would be. And  
18 didn't you record this as a blood demand? I mean,  
19 that's the kind of thing, I can see the potential  
20 for the accused taking the witness stand and  
21 saying, I was given a blood demand, and then I  
22 immediately invoked my right to counsel, phoned a  
23 lawyer and said, I am at the police station, they  
24 have given me a blood demand. And the lawyer  
25 says, well, are you incapacitated, incapable of

1 giving a breath sample? No. Well, then refuse.  
2 So that notion of a clerical error -- and I'm not  
3 so certain, if I'm the prosecutor in this case,  
4 seeing the number of difficulties and problems in  
5 this case, I'm not going to be so ready to accept  
6 someone's assertion that that was just a clerical  
7 error in these circumstances. I mean, was the  
8 direction to Woychuk to make notes in a certain  
9 fashion a clerical error? There is a lot of  
10 undercurrents to this case that cause problems.  
11 Even if you accept that it is a clerical error,  
12 there are a host of other problems embedded in  
13 this notion that one can prove the refusal, to a  
14 standard beyond a reasonable doubt. I just don't  
15 buy it.

16 Q What if there was information provided  
17 to the prosecutor on the issue of the clerical  
18 error, that the factual circumstances surrounding  
19 the timing of the demand were consistent with it  
20 being a breathalyzer demand, in other words, in  
21 close proximity to a breathalyzer room, and also  
22 you would have additional evidence of Officer  
23 Woychuk, that he was present when it was a  
24 breathalyzer demand that was read, would that  
25 impact or change your view?

1           A     Let me just give you two responses to  
2     that.

3           Q     And I can imagine what they are going  
4     to be.

5           A     Firstly, there are a host of other  
6     problems with this charge in terms of proof, in  
7     terms of available defences.  Secondly, I'm not so  
8     certain that I'm going to just readily accept  
9     Constable Woychuk's word on that, or anything, by  
10    the time I'm getting to this prosecution.

11          Q     Those are the factors, sir, that I  
12    wanted to cover, A through O.  If I could in  
13    conclusion, in your examination-in-chief, sir, at  
14    this time, ask you to refer to your conclusion  
15    section in your written opinion and provide it to  
16    the Commission, please?

17          A     It is succinctly stated,  
18    Mr. Commissioner, page 37, under the heading  
19    conclusion in three short paragraphs.

20                 Firstly, my conclusion is that Crown  
21    counsel handling this case erred in two areas.  
22    Firstly, he failed to adequately set out the basis  
23    for the joint submission to the sentencing judge  
24    on August 22nd.  Like the Chief Judge, on my  
25    review of this, my conclusion is that this error

1 is attributable to inadvertence and not any  
2 malefices. And I note that Crown moved to correct  
3 this error at the next court appearance on  
4 September 12th.

5           Secondly, I think Crown counsel was in  
6 error in this whole area of using this phrase of  
7 anecdotal historical evidence, because the phrase  
8 is really, in terms of the law, somewhat  
9 meaningless. It was an act, I find, of  
10 overreaching, but I do not find that either of  
11 these errors amount to unethical conduct on the  
12 part of counsel handling, as I've said, a tragic,  
13 highly emotive, very difficult case in terms of  
14 proof and the atmosphere of the courtroom.

15           Q     Thank you, Mr. Peck.  
16     Mr. Commissioner, prior to taking our next --

17           THE COMMISSIONER: You have six  
18 seconds.

19           MR. CLIFFORD: Good. I will try to be  
20 useful here.

21           THE COMMISSIONER: Mr. Weinstein is on  
22 his feet.

23           MR. CLIFFORD: I wonder at this point  
24 if we could canvass amongst counsel whether there  
25 will be questions for Mr. Peck, so we can try to

1 adequately gauge what we should do for the rest of  
2 the afternoon, because there is the potential of  
3 getting Mr. Kaplan on.

4 THE COMMISSIONER: Yes. You will do  
5 that in the break. Thank you. We will now rise.

6 THE CLERK: All rise. This Commission  
7 of Inquiry is in recess.

8 (Proceedings recessed at 3:15 p.m. and  
9 reconvened at 3:30 p.m.)

10 THE CLERK: All rise, please. This  
11 Commission of Inquiry is now reopened. Please be  
12 seated.

13 BY MR. ZAZELENCHUK:

14 Q Sir, I have never been a prosecutor,  
15 independent or otherwise, so you will forgive me  
16 if my questions are a bit basic.

17 We heard evidence earlier in these  
18 proceedings that before a charge is laid,  
19 generally speaking, it is the police who are in  
20 charge of the investigation, they may go to a  
21 prosecutor for advice, but generally speaking the  
22 ball is in their court. Is that your  
23 understanding as well?

24 A Yes. And I think that's a traditional  
25 understanding in jurisdictions all across Canada,

1 the police investigate, the Crown prosecute.

2 There are occasions when a prosecutor may be  
3 consulted for advice.

4 Q Sure, it blurs sometimes, but  
5 generally. We also heard evidence to the effect  
6 that once a charge is laid and a prosecutor is  
7 assigned to the case, be it a line prosecutor in  
8 the department or a special prosecutor,  
9 independent like yourself, it is perfectly fair  
10 game for the prosecutor to direct certain other  
11 areas of investigation. Is that your  
12 understanding as well?

13 A Yes.

14 Q And I guess that when you are an  
15 independent prosecutor, you are a bit like Harry  
16 Truman, the buck is going to stop on your desk?

17 A Yes.

18 Q And so it is perfectly fair game for  
19 you to say to the investigator that you are  
20 dealing with, look, I want you to interview that  
21 witness, or I want you to try and look for this  
22 document, or things like that?

23 A Yes.

24 Q And is that something that you've done  
25 from time to time?

1           A     Yes.

2           Q     Okay. Now, at some point after the  
3 charge is laid and you have been appointed the  
4 independent prosecutor, you get some materials  
5 from the police; correct?

6           A     Yes, that would be the case in this  
7 jurisdiction. Let me clarify something for you.  
8 In British Columbia and in two other Canadian  
9 jurisdictions, I believe, New Brunswick and  
10 Quebec, it may be Nova Scotia, Quebec, there is  
11 what is called the charge approval system whereby  
12 the charge is not laid by the police, it is laid  
13 only after the Crown has approved the charge and  
14 directed the police to lay it. In Manitoba and  
15 all of the other provinces, the police lay the  
16 charge and then the report comes to the Crown.

17          Q     I see. So in your jurisdiction you  
18 would get the material before the charge is laid,  
19 if you have been appointed the independent  
20 prosecutor?

21          A     Yes.

22          Q     I see.

23          A     And I would make the decision about  
24 laying the charge and what charge, if I'm in a  
25 position of a special prosecutor, or even if I'm

1 in the position of an ad hoc prosecutor, the  
2 prosecution service makes the decision as to the  
3 charge or charges.

4 Q In your particular case, have you ever  
5 been brought in after the charge has been laid?

6 A Yes.

7 Q And --

8 A Not as a special prosecutor, simply as  
9 what we call an ad hoc prosecutor.

10 Q Okay. And I'm not sure, I'm not even  
11 going to ask you the difference because I'm not  
12 sure it is relevant to where I want to go.

13 In those cases where you were brought  
14 in as an ad hoc prosecutor, after the charge had  
15 been laid, at some point after you accepted the  
16 assignment to be an ad hoc prosecutor, you would  
17 have gotten a bundle of documents, witness  
18 statements, officer's notes, police reports,  
19 interviews, photographs, things like that;  
20 correct?

21 A Yes.

22 Q Okay. And am I correct in assuming  
23 that that would be something you would want to go  
24 through at a very early stage?

25 A Yes.



1           Q     And maybe not necessarily that day or  
2     that week, but as quickly as you could, and in any  
3     event you wouldn't let a period of months go by  
4     before you went through that material?

5           A     Not normally.

6           Q     And am I correct in assuming that the  
7     reason you would want to go through that material  
8     as quickly as you could is because you would want  
9     to see if you could identify any problems in the  
10    evidence, or the case, and if you could, you would  
11    want them fixed; correct?

12          A     That might not be my motivation. I  
13    think my motivation would be just to get a handle  
14    on what I was doing, get a handle on the case.  
15    And in the course of reading and reviewing that  
16    material, I might identify legal issues that I  
17    would want research done on by my members of my  
18    law firm, my associates. I might well identify  
19    areas that I thought were subject to problems of  
20    proof, and I might give a direction or request  
21    that further investigative steps be taken. I  
22    think generally the answer to your question is,  
23    yes, I would review the case fairly quickly upon  
24    receipt. Depend upon, to some extent how far down  
25    the line the case was likely to be coming to court

1 for the trial, in the trial.

2 Q Sure. I understand that. But my  
3 point is simply that, as a general practice, you  
4 would want to review the materials you got from  
5 the police sooner rather than later?

6 A Absolutely.

7 Q Thank you. Now, just following up,  
8 you indicated to me a few minutes ago that you  
9 have in some cases directed investigators to do a  
10 little bit further investigation in this area or  
11 that area. Has anybody ever not done it? Do you  
12 understand my question?

13 A Absolutely. Not for me, but I know  
14 that this has on occasion been a problem. There  
15 have been occasions where the follow-up has not  
16 been done, or not been done adequately, where the  
17 Crown has requested it be done.

18 Q And if you can't, you've told us it  
19 hasn't happened to you, so if you can't answer  
20 this question, I will understand it, but you are  
21 produced as an expert today. So what would you do  
22 if you directed a police officer, a police officer  
23 on a file that you've been given, either as an  
24 independent prosecutor or as an ad hoc prosecutor,  
25 to look for a particular document or interview a

1 particular witness, and he or she doesn't seem to  
2 be doing it?

3 A Probably communicate with the person,  
4 get them into the office or phone them up and say,  
5 look, you have got to understand, I just didn't  
6 idly make this request. I require this be done, I  
7 need this help. And if it persisted -- because  
8 the police, like everybody else, are busy, they  
9 have other obligations, I might go to a superior  
10 officer and say, I'm not getting the cooperation I  
11 need. It has never happened, but that's my  
12 hypothetical answer to your hypothetical facts.

13 Q No, and I appreciate that limitation  
14 on it, sir, but whether at the end of the day if  
15 Mr. Commissioner finds those questions helpful, or  
16 answers helpful or not, I thought he might, so  
17 that's why I asked them.

18 You talked about the need to  
19 communicate, in the last part of your evidence,  
20 the need to communicate with the family, be it  
21 when you are a defence counsel, and I think you  
22 seemed to apply that was equally important when  
23 you were a prosecutor, is that correct?

24 A Absolutely.

25 Q And as a prosecutor in a case

1 involving the loss of a human life, particularly a  
2 younger person, which is always more tragic than,  
3 you know, somebody who has lived a full and long  
4 life, although they are both tragic, we will  
5 agree.

6 THE COMMISSIONER: Speak for yourself.  
7 We elderly people have to be protected.

8 MR. ZAZELENCHUK: My 87 year old  
9 mother would agree with you 100 per cent,  
10 Mr. Commissioner.

11 BY MR. ZAZELENCHUK:

12 Q But in a case involving a sudden  
13 tragic death of a human life, that you were given  
14 the brief to prosecute, do I understand correctly  
15 that you would want to try and meet with the  
16 family, the victims, at an early stage of the  
17 proceeding, within a month or two or something  
18 like that?

19 A I would certainly meet with the family  
20 any time that I was going to take a step that was  
21 of significance in the course of the conduct of  
22 the brief. Whether I would meet with them  
23 immediately or later, I really can't say. I would  
24 have to have much more --

25 Q I understand that.

1           A     I can tell you this: That very often  
2 people in the position of a bereaving, a grieving  
3 family will want to meet with you. And it is  
4 extraordinarily important to take the time to do  
5 that and to communicate with people. They are  
6 human beings and they are suffering and they are  
7 entitled to your input and your advice and  
8 information, so they understand.

9           Q     You will get no argument from me on  
10 that point, sir.

11                     Just to follow that up a little bit.  
12 You say that the family may want to meet with you.  
13 If you are appointed a prosecutor in a case  
14 involving a death, will you send a letter to the  
15 next of kin or something saying I have been  
16 appointed the prosecutor, this is my business  
17 card, if you want to talk to me, call my secretary  
18 for an appointment, or something to that effect?

19           A     They will know that I have been  
20 appointed, and in fact, many of these files will  
21 carry the phone number of a Victim Service worker  
22 so that you can communicate with the family. Does  
23 that help?

24           Q     Yes, that helps very much, sir. You  
25 agree with me that the credibility of witnesses,

1 particularly civilian witnesses, and witnesses who  
2 aren't what I call professional witnesses, such as  
3 experts, senior police officers, is something  
4 that's better determined through an interview than  
5 through a statement on a piece of paper? I mean  
6 that's -- chicken soup?

7 A Common sense.

8 Q Common sense, yes. As a special  
9 prosecutor, do you interview civilian witnesses  
10 before the Preliminary Inquiry, at some period,  
11 two, three, four weeks, or do you leave it as it  
12 comes?

13 A You have to do your preparation. Of  
14 course, you interview the witnesses.

15 Q And at what stage do you think it is  
16 desirable to interview, particularly civilian  
17 witnesses who may never have been in a courtroom?

18 A Well, I mean, well in advance of the  
19 proceeding. I really, again, can't give you any  
20 definitive. But, you know, I mean, you have to  
21 sit down with your witnesses, particularly the  
22 important -- we are talking about the important  
23 witness in a case. You have to go through their  
24 evidence, you have to assess their evidence. And  
25 one of the things that happens when you do this

1 with witnesses is that they will sometimes give  
2 something different from what is contained in the  
3 statement, and that triggers a disclosure  
4 obligation on you to advise the defence of this  
5 change, or omission, or whatever it is.

6 Q I can appreciate that.

7 A There are all kinds of reasons why you  
8 interview witnesses.

9 Q And something extra can also either  
10 make your case stronger or weaker?

11 A Yes.

12 Q And that's another reason for doing it  
13 sooner rather than later, correct?

14 A Yes.

15 Q Okay. Just a couple more points, sir.  
16 When you were asked about the desirability or not  
17 desirability of calling evidence with respect to  
18 alcohol consumption as opposed to alcohol  
19 impairment -- you recall when Mr. Clifford asked  
20 you that question?

21 A Um-hum.

22 Q And you gave us an answer saying, if  
23 the law was settled and if -- do you recall that?

24 A Yes.

25 Q Okay. My question to you, sir, about

1 that answer that you gave is one of the things you  
2 said is you would engage in a cost benefit  
3 analysis. What did you mean by that, sir?

4 A Whether the effort was worth the  
5 result that was likely to ensue is what I meant by  
6 that. That wasn't in the context of if the law  
7 was settled, it was in the context of the law as I  
8 see it now, and it is unsettled.

9 Q I see. So I misunderstood you there.  
10 But when you said a cost benefit analysis, you  
11 weren't talking about money?

12 A Absolutely not.

13 Q And I just wanted to make that clear,  
14 I understood you not to be talking about money,  
15 but maybe some lay people in the audience didn't.

16 A No, no.

17 Q So, you are talking about the effort  
18 of getting the evidence out as opposed to the  
19 benefits that you as a prosecutor will get from  
20 getting the evidence out?

21 A Yes.

22 Q Okay. You indicated a couple of times  
23 in your direct evidence that what we are talking  
24 about here is an art and not an exact science.  
25 And later on you said, reasonable people can agree



1 to disagree on points. You recall those comments,  
2 sir?

3 A Yes.

4 Q And that's no different than saying,  
5 if a chap walks into my office and gives me a fact  
6 situation and asks me what his chances are as a  
7 plaintiff, and I say they are 60/40 in your  
8 favour, and he goes down the hall and sees my  
9 colleague down the hall and gives him the same  
10 fact situation, and my colleague says there, you  
11 know, 55/45 against you. Neither one of us is  
12 right or wrong. We are having a different  
13 assessment of facts, and at the end of the day,  
14 there is only one person, or 12 people if it is a  
15 jury, who is going to be able to give you a  
16 definitive answer, and even that can be appealed;  
17 correct?

18 A Yes.

19 Q Okay. One last point, sir. You  
20 indicated to us that on the hypothetical given to  
21 you, you referred to the dangerous driving cause  
22 death charge as a clear case. You recall that?

23 A Yes.

24 Q And Mr. Clifford asked you what a  
25 clear case was, and you said, by that I mean if I

1 was a prosecutor, I would expect to get a  
2 conviction, or words to that effect; correct?

3 A Yes.

4 Q How do you reconcile that, or maybe  
5 you don't have to reconcile that, but given that  
6 statement, what did the accused, Mr. Harvey-Zenk,  
7 give up by pleading guilty to dangerous driving  
8 cause death?

9 A He gave up his right to a trial, to  
10 challenge the case. Notwithstanding my view, I'm  
11 not necessarily right, that is my view and I stand  
12 by it, but there are always contingencies in  
13 litigation.

14 Q Is there anything else, other than his  
15 right to a trial, that you can see in that  
16 hypothetical?

17 A Not patently, but after some  
18 reflection I might have some.

19 Q Every litigator will tell you, I'm  
20 sure, that he won cases that he thought were  
21 losers and he lost cases that he thought were  
22 winners. I know I have. You would agree with me  
23 on that, wouldn't you, sir?

24 A Absolutely.

25 Q Getting back to the point, what the

1 accused, in your opinion, gave up by entering a  
2 plea to dangerous driving causing death was his  
3 right to have a trial, and you can't think of  
4 anything else?

5 A No, but that right should not be  
6 underestimated in terms of its importance.

7 Q I have never prosecuted, I have  
8 defended a lot, and I agree with you on that,  
9 sir. Thank you for your help.

10 MR. McDONALD: No questions,  
11 Mr. Commissioner.

12 THE COMMISSIONER: Thank you.

13 MR. HOEPPNER: We have no questions  
14 Mr. Commissioner.

15 THE COMMISSIONER: Thank you.

16 MR. WEINSTEIN: No questions.

17 MR. JACK: No questions,  
18 Mr. Commissioner.

19 MR. PROBER: No questions.

20 MR. NOZICK: No questions that aren't  
21 *deja vu*.

22 BY MS. DIXON:

23 Q I just have a few questions, sir.

24 Mr. Peck, my name is Dixon and I'm  
25 co-counsel for Mr. Minuk, the Crown prosecutor in

1 this case.

2 Sir, I think in answer to a question  
3 that Mr. Zazelenchuk just asked you, you said that  
4 you had given thought to a cost benefit analysis.  
5 And I believe that that was in the context of  
6 deciding whether there would be cogent evidence to  
7 substantiate an impaired case. Am I correct on  
8 that?

9 A No. Whether there would be evidence  
10 to prove consumption of -- mere consumption.

11 Q Right.

12 A That was the context in which the  
13 question was posed by Mr. Clifford.

14 Q All right. And as I understand the  
15 evidence that you gave, you would have come to the  
16 conclusion in this case that there wasn't  
17 sufficient benefit to call that sort of evidence,  
18 correct?

19 A Predicated upon my interpretation of  
20 the current state of the law --

21 Q Right.

22 A -- on sentencing in this area.

23 Q Right. And you were asked earlier by  
24 Mr. Clifford about the release of persons charged  
25 with the type of offence we have here?

1           A     Yes.

2           Q     And I believe your evidence was that  
3     the practice in B.C., as far as you are aware,  
4     would be consistent with the release of a person  
5     in these circumstances, in Mr. Zenk's  
6     circumstances, and facing these charges on a  
7     promise to appear; right?

8           A     I believe that to be the case.

9           Q     Right. And you alluded in your report  
10    to the fact that sometimes conditions can be  
11    attached, but I believe that the attachment of a  
12    condition relative to abstaining from alcohol was  
13    linked by you to the situation where there was  
14    some evidence that the person has a prior history  
15    of that fact pattern. Am I correct on that?

16          A     Yeah. And in a way you are exercising  
17    discretion. My view is that there should be some  
18    logical nexus between a condition, whether it be a  
19    condition of bail or a condition of supervised  
20    release or probation, whatever it is, there should  
21    be some logical link between the imposition of a  
22    condition and the person's conduct. I really  
23    don't see much merit in situations where trial  
24    judges, for instance, from time to time will  
25    impose a series of conditions every time they deal

1 with an offender in a certain area,  
2 notwithstanding the fact that the offender doesn't  
3 have a problem in the certain area. So to me  
4 there has to be some logical connection.

5 Q Right. And I think what I was asking  
6 about was the imposition of conditions on the  
7 release of an accused who has been charged, back  
8 at that stage. I don't know whether you know  
9 Mr. Richard Wolson, a local Manitoba lawyer?

10 A Yes.

11 Q He is a prominent member of our  
12 defence bar. And he has given evidence in this  
13 case that it is not unusual in Manitoba to release  
14 people in Mr. Harvey-Zenk's circumstances, with  
15 his background and facing the charges that he was  
16 facing, it is not uncommon to release them on a  
17 promise to appear without conditions?

18 A And I think I've said that, although  
19 mine is more a B.C. generated view.

20 Q You agree with that.

21 A Right.

22 Q You were asked a few questions by  
23 Mr. Clifford about Gover's opinion.

24 A Yes.

25 Q And in particular, you were asked

1 about Mr. Gover's opinion that the sentence in  
2 this case was overly lenient. Do you recall that  
3 exchange?

4 A Yes.

5 Q And you disagreed with that?

6 A Yes. I think the sentence in this  
7 case is consonant with sentences for the same  
8 offence in this jurisdiction.

9 Q Now, Mr. Gover, in his opinion, seems  
10 to cite a recent amendment to the Criminal Code in  
11 support of his opinion. That is an amendment that  
12 came into force after the sentencing in this case.  
13 In your view, is that an appropriate assessment?

14 THE COMMISSIONER: We are talking  
15 about now.

16 MS. DIXON: Is it --

17 THE COMMISSIONER: Not at the time.

18 MS. DIXON: I'm asking him if it would  
19 be appropriate.

20 THE WITNESS: I understand the  
21 question. I am just looking for a note on that I  
22 had, Mr. Commissioner.

23 I don't agree with that. What that  
24 does is it superimposes on counsel a factor that,  
25 in my view, should probably not be taken into

1 account. What he is saying is this: He is saying  
2 that in May, I think May the 1st, 2007, Parliament  
3 tabled legislation to come into force six months  
4 later, on December 1st, 2007. He is saying that  
5 that demonstrates Parliament's will. Parliament's  
6 will, in theory, is the will of the people. And  
7 therefore there is a sentiment out there, a belief  
8 that people charged and convicted of certain types  
9 of offences should not be subject to a conditional  
10 sentence order.

11           And the effect of that legislation, of  
12 course, which now has been proclaimed in effect,  
13 is to take away from certain offenders the ability  
14 to obtain a conditional sentence. I think it puts  
15 too fine an analysis, it imposes a standard really  
16 almost of correctness. We are dealing with an  
17 area of reasonableness. It also in a de facto  
18 kind of a way affronts section 11(i) of the  
19 charter, a notion that you are entitled to the  
20 lesser sentence that prevailed at the time that  
21 your offence was committed.

22           In saying that, I think it is  
23 imminently arguable that a conditional sentence is  
24 a lesser sentence than a standard jail term. So  
25 it -- I just don't understand how we should be



1 imposing this very fine analysis requirement on  
2 prosecutors to take a position that, because  
3 Parliament is going to do something, we should be  
4 responding to it in terms of our submissions. It  
5 doesn't jive with my thinking.

6 BY MS. DIXON:

7 Q And it just seemed to me unfair that  
8 you would cite something that came into effect  
9 subsequent to a sentencing hearing, and I just  
10 wanted your thoughts on that. Thank you.

11 Now, you gave evidence this morning, I  
12 think, that the charge of impaired, impaired cause  
13 death in this case was a very, very marginal case.  
14 The case for impaired cause death was very  
15 marginal and, therefore, it was very appropriate  
16 to stay that charge down the line?

17 A It wasn't inconsistent with accepted  
18 prosecutorial standards and Manitoba guidelines to  
19 do that.

20 Q Right.

21 A It was within the reasonable exercise  
22 of Crown counsel's discretion to do that.

23 Q And the charge of refusal was fraught  
24 with difficulties?

25 A That's my opinion.

1 Q Right. So, again, it was reasonable  
2 to stay that charge, correct?

3 A Yes.

4 Q And the criminal negligence charge was  
5 one that was unlikely to succeed at trial?

6 A I don't really see this as a case of  
7 criminal negligence causing death. I'm sure, as  
8 hard as some people in this room find it to accept  
9 that, it was a proper prosecution of a dangerous  
10 driving causing death, which has a maximum term of  
11 incarceration, as I have said, of 14 years.

12 Q So it was reasonable to stay that  
13 charge?

14 A Yes.

15 Q And you were directed to the question  
16 of the joint position on sentence, and you gave  
17 evidence that you reviewed the jurisprudence in  
18 Manitoba --

19 A Yes.

20 Q -- relevant to these types of  
21 offences, both the authorities that were put  
22 forward by counsel in this case and generally.  
23 And that you have found that the jurisprudence in  
24 Manitoba clearly supports the propriety of a  
25 two-year conditional sentence, as I have written

1 down your evidence?

2 A On the facts of this case --

3 Q Yes?

4 A -- as have been presented to me, yes.

5 Q And I believe you were asked if you  
6 were the prosecutor would you have thought you  
7 would obtain a conviction on the charge of  
8 dangerous driving cause death, and you said you  
9 would have thought you could obtain a conviction  
10 on that?

11 A Yes.

12 Q And so my question to you is, if you  
13 had been the prosecutor in this case, you wouldn't  
14 have had any hesitation accepting the plea bargain  
15 that was ultimately implemented in this case? I  
16 mean, given the evidence that you have given us as  
17 to the strength of the charges and the  
18 appropriateness of the disposition?

19 A I don't know that, to phrase it the  
20 way you have in the context of "not have any  
21 hesitation" is something that I would necessarily  
22 agree with. I mean -- you agonize over these  
23 cases, all right? You are going to spend a lot of  
24 time thinking about this, worrying about it. Am I  
25 doing the right thing? Am I right in taking this

1 position? Is it consistent with the law? Is  
2 there something I'm missing? Ultimately, on the  
3 facts before me, the answer is yes, but I would  
4 take out the "without hesitation" part.

5 MS. DIXON: All right. Thank you.  
6 Those are my questions.

7 THE COMMISSIONER: Thank you. Any  
8 re-examination?

9 MR. CLIFFORD: Mr. Commissioner, no  
10 re-examination.

11 Mr. Peck, on behalf of the Commission,  
12 I would like to thank you for attending and  
13 assisting us.

14 THE COMMISSIONER: Do you propose  
15 calling another witness?

16 MR. PACIOCCO: I would like to take  
17 advantage of the half hour that God gave us,  
18 Mr. Commissioner.

19 THE COMMISSIONER: Maybe we will give  
20 you 25 minutes, because I'm going to take a short  
21 adjournment. All right.

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

24 (Proceedings recessed at 4:00 p.m. and  
25 reconvened at 4:05 p.m.)

1                   THE CLERK: All rise, please. This  
2 Commission of Inquiry is now reopened. Please be  
3 seated.

4                   MR. McDONALD: Mr. Commissioner, with  
5 Mr. Paciocco's consent, I would like to clear up  
6 an evidentiary issue pending the start of the next  
7 witness.

8                   You will recall that exhibit 69 in  
9 these proceedings is the statement of facts  
10 pertinent to the Rural Municipal of East St. Paul  
11 agreed to by Commission Counsel and interested  
12 parties. And that was read into the record at the  
13 conclusion of the case, of the presentation of the  
14 case involving the East St. Paul witnesses. On  
15 page 5 of that exhibit, the first paragraph,  
16 reference is made to pages 21, 22 and 23 of a  
17 report prepared by Robert Tramley that appears in  
18 volume P-1.82 at pages 2182, 2183 and 2184. I  
19 neglected, sir, through oversight, to have those  
20 documents marked as an exhibit, and with Mr.  
21 Paciocco's concurrence, I will do that. It will  
22 be volume P-1, all of the documents at tab P-1.82,  
23 which is my letter to Mr. Paciocco dated  
24 February 28th, together with the reference pages  
25 of the Tramley report. So that can become the

1 next exhibit.

2 (EXHIBIT 236: P-1.82 Correspondence  
3 from Fillmore Riley to Commission  
4 Counsel, February 28, 2008, re Tramley  
5 report with attached relevant  
6 excerpts)

7 MR. McDONALD: Thank you.

8 THE COMMISSIONER: Tell me when you  
9 need to go, grab your plane.

10 MR. PACIOCCO: I will indeed. Thank  
11 you very much for that consideration,  
12 Mr. Commissioner.

13 Just before we have this witness sworn  
14 in, the expert witness, Paul Lobsinger from the  
15 Elmer Police College who was set to testify on  
16 behalf of the Commission Counsel, has -- we are  
17 going to be filing his report, or excerpts from  
18 his report in lieu of his oral testimony, through  
19 the consent of everyone gathered. And I wanted to  
20 express my thanks for that, it has made the  
21 process much more efficient. I am providing the  
22 clerk with two copies of the relevant pages from  
23 the report, including the CV of Sergeant  
24 Lobsinger, his opinion, as well as an addendum to  
25 his opinion dealing with a narrower question that

1 was solicited subsequently, that narrower question  
2 being internal investigations by police officers.  
3 With that document in, it would be marked as  
4 exhibit?

5 THE CLERK: 237.

6 (EXHIBIT 237: CV of Paul Lobsinger  
7 along with his opinion evidence  
8 relating to East St. Paul Police  
9 investigative file and his report  
10 addendum dated May 8, 2008)

11 MR. WEINSTEIN: I can advise,  
12 Mr. Commissioner, that Commission Counsel  
13 canvassed the issue of him not having to appear,  
14 and us consenting to the report going in as -- and  
15 we met, some of us met with Commission Counsel  
16 yesterday. We wanted to put on the record, and I  
17 know Mr. Paciocco agrees, that notwithstanding the  
18 fact that we are agreeing to it going in, we are  
19 not agreeing that it has weight to be attached to  
20 it. We are not agreeing to all of the contents of  
21 it, and I don't think that Mr. Paciocco either is  
22 agreeing to everything that's being said in that  
23 report.

24 THE COMMISSIONER: Thank you.

25 MR. PACIOCCO: Yes. I can clarify

1 that it was put in on the understanding that  
2 parties are free to contest the contents and are  
3 not to be taken to have accepted the contents, and  
4 that they will use it as it suits their case.

5 THE COMMISSIONER: Thank you. You  
6 will not be calling him.

7 MR. PACIOCCO: We will not be calling  
8 him.

9 THE COMMISSIONER: Thank you.

10 BRIAN RICHARD KAPLAN, having first  
11 been duly affirmed, testified as  
12 follows:

13 BY MR. PACIOCCO:

14 Q Good afternoon, Mr. Kaplan.

15 A Good afternoon, Mr. Paciocco.

16 Q You are the director of Regional  
17 Prosecution and Legal Education here in the  
18 Province of Manitoba for Manitoba Justice?

19 A Correct.

20 Q Sir, you are obviously a highly placed  
21 Crown prosecutor. I understand that there are  
22 four directors?

23 A Yes.

24 Q And the directors work under the  
25 direction of the Assistant Deputy Attorney



1 General?

2 A Correct.

3 Q And, sir, as part of your  
4 responsibility, I understand that you, of course,  
5 are responsible for legal education, as your title  
6 indicates, for prosecutors?

7 A Correct.

8 Q More importantly for our purposes,  
9 sir, I also have been given to understand that the  
10 attorney -- that the Assistant Deputy Attorney  
11 General's authority to appoint independent  
12 prosecutors has been delegated to your office?

13 A Correct.

14 Q Given your role in that regard, and  
15 our review of the file, it is apparent, sir, that  
16 you played some role in the ultimate appointment  
17 of Mr. Martin Minuk as the special prosecutor of  
18 Derek Harvey-Zenk?

19 A Correct.

20 Q I'm going to ask you to refer to a  
21 document that I will have shown to you now, it is  
22 exhibit 215 in these proceedings, found at volume  
23 G-44.

24 Sir, you should have in front of you  
25 the Manitoba Department of Justice Prosecution

1 Policy Directive for the Appointment of  
2 Independent Counsel dated in January of 2005?

3 A Correct.

4 Q The page numbers at the bottom are  
5 page numbers that we have utilized in organizing  
6 our materials, sir, and I will refer those to you  
7 to orient you in the document.

8 The first issue I wanted to clarify  
9 and point out through your good offices, sir, is  
10 that in this case the decision was ultimately  
11 made, appropriately with the policy, to appoint an  
12 independent prosecutor because Derek Harvey-Zenk  
13 was a police officer. And this protocol and the  
14 practice in this province is that whenever a  
15 criminal charge is laid against a person who is  
16 directly connected to the justice system, there  
17 may be a reasonable perception that the accused  
18 could receive some kind of differential treatment  
19 if prosecuted by a staff Crown Attorney. And that  
20 as a result of that policy, and in keeping with  
21 practice, that's how Mr. Minuk came to be involved  
22 in this case?

23 A Correct.

24 Q I also notice from the protocol, sir,  
25 at page 1382, the third page of the document, that

1     there are four levels of independence that are  
2     described as potential appointments in cases where  
3     this policy is invoked. Those level of  
4     independence of prosecutors, I suspect, work on  
5     gradation of least independent to most  
6     independent, and begin with the appointment of a  
7     Crown Attorney from within Manitoba but from  
8     another Crown office. The next step would be the  
9     appointment of a private prosecutor from Manitoba,  
10    and I understand that Mr. Minuk fits into that  
11    category, sir?

12             A     Correct.

13             Q     And the next rung up the ladder of  
14    independence would be to seek the assistance of a  
15    Crown Attorney from another province. And the  
16    ultimate level of independence would be the  
17    appointment of a private practitioner from another  
18    province.

19                     I will come back to this later, sir,  
20    but how are private practitioners such as  
21    Mr. Minuk designated for selection in cases  
22    involving independent counsel? If you are into  
23    the second level and you are getting a private  
24    practitioner from within Manitoba, how are they  
25    selected when it comes time to choose one for the

1 purposes of a prosecution?

2 A They are selected -- as long as I can  
3 recall, having done this, again, in gradation as  
4 far as our outside counsel. I think when you  
5 first interviewed me, I used a term perhaps that I  
6 shouldn't have in reflection, and that was our  
7 stable of outside counsel.

8 Q You are taking that term back, sir?  
9 Because I have grown very fond of it.

10 A Then leaving it with you, let it be  
11 stable. Out of the stable of our outside counsel,  
12 we would assign the more serious matters probably  
13 to the top three regular retained outside counsel.  
14 As far as police officers being involved, that  
15 would then fall to one of the top three that we  
16 use. In this case, Mr. Minuk certainly fell  
17 within that category of the top three of the four  
18 in the stable, if you will.

19 Q So there are four in the stable, and  
20 you had three who you would designate as top  
21 counsel who might receive a case like the  
22 Harvey-Zenk prosecution, and another who I take it  
23 does more, not mundane, but less contentious types  
24 of cases, or at least did at that time?

25 A I have to be careful what I say, but,

1 yes, you are correct.

2 Q Yes. This idea of having a group of  
3 identified individuals is supported, I understand,  
4 by one-year retainer agreements with each of them?

5 A Yes. When we first started -- to give  
6 you a minute's worth of history of the case --  
7 when we first started there was no type of annual  
8 retainer. And we were engaging outside counsel,  
9 similar to the policy you see here, but we noticed  
10 that if we possibly could shift it to annual  
11 retainers, being, or attempting to be fiscally  
12 responsible, it might assist us. And we found  
13 that, yes, it has assisted us in doing the annual  
14 retainers with those particular stable, if you  
15 will, of outside counsel.

16 Q Sir, if you could please try speaking  
17 into the mic, I think it might assist those in the  
18 audience to hear everything you say. But thank  
19 you for that answer.

20 The stable of prosecutors that you  
21 have, and I know you didn't come here prepared to  
22 provide us with precise statistics, but are you  
23 able to indicate how regularly each of those  
24 persons would be called upon to work as  
25 independent counsel? Are you able to give us an

1 indication of the number of cases or the  
2 percentage of their practice that they might  
3 expect to spend as independent prosecutors?

4 A Certainly had you -- certainly had you  
5 asked me to bring the material, my support person  
6 always has available that sort of statistic to  
7 give. If you are asking me to give a  
8 guesstimate --

9 Q I'm asking you for your best estimate,  
10 unless you would classify it as a shear guess,  
11 sir. But given that you appoint, I was wondering  
12 whether you are in a position to give us some  
13 indication of the frequency with which each of  
14 those individuals might expect to be called upon,  
15 and how much of their practice would actually be  
16 prosecuting?

17 A I will try and give you my best  
18 estimate, if you will. There are months that go  
19 by that we will use some of our retained counsel a  
20 lot, or a smaller amount. On average, I would  
21 have to say two or three, perhaps even four  
22 matters could come to them within a month period.  
23 Sometimes more, depending on the nature and  
24 complexity and issues involved with the cases that  
25 we get in that have conflicts.

1           Q     All right.  So they get a fairly  
2 regular part of their practice, I would take it,  
3 from the privilege of serving the province in this  
4 way?

5           A     They get a fair workload I would say.

6           Q     All right.  And I just ask the  
7 question because, as you know, the Commissioner is  
8 interested in potential systemic issues as well,  
9 including the process that is used in the  
10 practices relating to the appointment of  
11 independent counsel.  And I'm going to just put it  
12 to you for your response.  Is there any risk, in  
13 your view, that those independent prosecutors, who  
14 are used from such a small stable and who are used  
15 with such regularity, might not come to think of  
16 themselves or be thought of by the department as  
17 just another wing of the prosecution service?

18          A     I'm not sure I caught the last part,  
19 if you will forgive me, just to repeat it?

20          Q     There was a lot in the question, so I  
21 understand.  Basically, I'm wondering whether if  
22 those select number of individuals who act as  
23 independent prosecutors on an ongoing basis, with  
24 an annual retainer, might not come to think of  
25 themselves, given the regularity with which they

1 are called on to do this, to think of themselves  
2 as just another branch of the prosecution service,  
3 rather than people, outside people who are removed  
4 from the prosecution service. Are you in a  
5 position to give me any indication as to whether  
6 you think that might be a fair concern for anyone  
7 to have?

8 A I'm not prepared to say it might not  
9 be a fair concern, but I think the best people  
10 obviously to ask are the outside counsel and their  
11 view, how they feel doing these kind of things.  
12 In my past experience, I think that they are doing  
13 a job, and they are not quite connected to our  
14 offices, but yet obviously have access to  
15 information and ability to talk to any of the  
16 Crowns.

17 Q All right. So they are not quite  
18 connected to your office. And the term "quite"  
19 and I know that this is a term, it may be totally  
20 meaningless, but are they not kind of like quasi  
21 Crowns? They are regular people getting Crown  
22 work?

23 A Obviously they act as Crowns for us in  
24 that position.

25 Q And they may well identify themselves



1 as independent prosecutors by trade?

2 A Sure.

3 Q Sir, I understand that the policy that  
4 we've just examined has since been revised as a  
5 result of the Krindle report?

6 A Correct.

7 Q And it was changed in February of  
8 2008?

9 A Yes.

10 Q Exhibit 49 is the revised policy which  
11 has already been put into evidence. It can be  
12 found at book R-3, at tab 92.7, page 3364.

13 A Sorry, page?

14 Q Page 3364. There is a lot that's been  
15 put into that tab because of the way in which we  
16 received our disclosure, but you will find it at  
17 page 3364.

18 A Yes.

19 Q You will notice, sir, that there are a  
20 number of terms and conditions that are contained  
21 in the Crown policy that are notionally included  
22 within the retainer of your independent  
23 prosecutors, sir?

24 A Yes.

25 Q And those terms have been altered as a

1 result of the revision of this policy, from the  
2 one that we were just examining and the one that  
3 was in effect when Mr. Minuk was retained, sir.  
4 Could you please take a look at 3368, the fifth  
5 page of the document, at condition G?

6 If I'm correct, sir, and please  
7 correct me if I'm wrong, this is a new insertion  
8 into the independent prosecutor's policy. And  
9 what G says is:

10 "The independent counsel is bound by  
11 the same obligations as those imposed  
12 on departmental prosecutors with  
13 respect to the Victims' Bill of  
14 Rights. A copy of the prosecution  
15 policy regarding legislative  
16 obligations on departmental  
17 prosecutors under the Victims' Bill of  
18 Rights must also be provided to the  
19 independent counsel. Additional  
20 inquiries can be directed by  
21 independent counsel to the Director of  
22 Regional Prosecutions and Education,  
23 who can facilitate consultation with  
24 the Victims' Services branch."

25 Can you explain, sir, why this has

1    been added to the policy, if you are in a position  
2    to do so?

3           A     I would believe it was added as a  
4    result of Madam Justice, as she then was,  
5    Krindle's, comments and suggestions based on her  
6    report and review of the independent policy that  
7    we had.

8           Q     Okay. And were you privy to the  
9    rationale for that change?

10          A     That I really can't answer.

11          Q     Fair enough, sir. I won't call them  
12   up, but they are found in exhibit 55 of the  
13   Commission's materials, book G-43. If you do need  
14   to see them at any point, I will have them put in  
15   front of you, sir. But they do not include any  
16   reference to the Victims' Bill, there is no  
17   paragraph or term put into the retainer that makes  
18   any reference to the Victims' Bill. Nor at the  
19   time did the Independent Prosecutor Policy make  
20   any reference to the Victims' Bill.

21                    Are you able to indicate, based on  
22   your involvement with Mr. Minuk's retainers,  
23   whether he was provided with documentation  
24   relating to the Victims' Bill of Rights, whether  
25   it be the policies internal to Manitoba Justice,

1 or whether it be with a copy of the statute  
2 itself?

3 A I can only give you, I guess what  
4 could be termed hearsay coming from my support  
5 person. And that would be that she advised me  
6 that Mr. Minuk had been given a copy of the  
7 Victims' Bill of Rights. And she also added, if  
8 I'm recalling correctly, that any updates that  
9 come along occasionally would be provided to  
10 outside counsel. So I'm going to include, I  
11 believe, Mr. Minuk in that.

12 Q Okay. Because Mr. Minuk certainly had  
13 familiarity with the Victims' Bill through his  
14 many years of experience, but couldn't provide us  
15 with firm indications as to whether he had  
16 received the documents. But essentially, sir, I  
17 take it, you, of course, would rely on the  
18 information you've been given, but I take it you  
19 feel there are firm and dependable systems in  
20 place to ensure that Victims' Rights materials are  
21 properly disseminated to your independent counsel?

22 A I would like to say definitely yes on  
23 that point.

24 Q And I take it that you understand,  
25 through your position, the importance of ensuring

1 that all of your Crowns are familiar with those  
2 provisions and the practices of your office?

3 A Fair enough.

4 Q Mr. Minuk was formally appointed to  
5 prosecute Derek Harvey-Zenk on the 3rd of March,  
6 are you aware of that, 2005?

7 A Yes, I am aware of that now.

8 Q Yes. And he came to be involved,  
9 though, much earlier. On February 25th, in fact,  
10 a Mr. Russ Ridd, who I understand was a duty  
11 Crown, he is a full time Crown in your office but  
12 I understand was acting as duty Crown on that day,  
13 was contacted by Chief Carter as a result of this  
14 incident, sir. And he ultimately provided Chief  
15 Carter with Mr. Minuk's number. And Mr. Minuk was  
16 then called upon by Chief Carter to provide  
17 guidance on how to proceed, and received  
18 information relating to contact with your office  
19 for the filing of the brief, for example, terms  
20 and conditions of release, and discussion, and  
21 ultimate opinion on the appropriate charges to lay  
22 in the circumstances.

23 Is it common practice for your  
24 retained Crowns, independent Crowns, to be called  
25 upon prior to their formal appointment to give

1 this kind of advice, sir?

2 A In certain circumstances, what we try  
3 and do is appoint as early as possible outside  
4 counsel, because there is issues as far as -- I'm  
5 telling you -- as far as bail, et cetera, et  
6 cetera. In this particular case, for some unknown  
7 reason, and I've checked it since last we spoke as  
8 to where I was on that day, and now I can tell you  
9 definitely under oath, I'm not sure where I was.  
10 Russ Ridd is the supervising senior Crown at that  
11 time of the intake unit. And we had basically  
12 weekly dealings, because he would see matters  
13 coming in to our office, and could all of a sudden  
14 note to me that there is certain conflict cases,  
15 and he would bring it to my attention, so he knew  
16 how the system certainly worked.

17 To answer your question, basically  
18 Mr. Ridd would have then gotten in touch with one  
19 of the outside counsel, in this case Mr. Minuk,  
20 and that's how he became involved.

21 Q Okay, sir. And we also have, through  
22 Mr. Minuk's evidence and testimony of various  
23 officers from the Winnipeg Police Service  
24 Professional Standards Unit, learned that  
25 Mr. Minuk was also contacted on March 2nd, the day

1 before his formal appointment, to discuss the  
2 steps that should be taken in ensuring that an  
3 investigation be done of Mr. Harvey-Zenk's  
4 movements in the hours leading up to the accident,  
5 because East St. Paul Police had not undertaken  
6 that investigation, and indicated they had  
7 resource issues as to whether they could. And the  
8 Professional Standards Unit was looking for advice  
9 on whether they should become involved, and  
10 whether this was something that the prosecutors'  
11 office would be comfortable with. So at this  
12 point, Mr. Minuk is not formally appointed. Are  
13 you able to indicate whether there was any  
14 discussion with him having an ongoing role in  
15 connection with this file prior to the appointment  
16 of March 3rd?

17 A I believe there was, and I'm sure you  
18 will correct me if I'm wrong, there was a  
19 March 2nd email. I believe it was from myself to  
20 Mr. Minuk. I believe I was asking him for some  
21 information vis a vis charges, perhaps, that might  
22 have arisen. I stand to be corrected. I don't  
23 have the R-1 and R-2 binders, I think it was in  
24 one of them, that at least would show to me that I  
25 was in touch in some way with Mr. Minuk.

1           Q     I noticed that in exhibit 218,  
2     Mr. Minuk's dockets, there is an indication of  
3     mail to "B. Kaplan, re update." And our  
4     information, sir, is that that email came about as  
5     a result of the PSU conversation, unless I'm  
6     mistaken, sir. Do you recall whether you had a  
7     conversation with Mr. Minuk before this?  
8     Essentially, sir, what I'm probing is the  
9     dependability of the system in terms of having  
10    independent prosecutors take carriage of files at  
11    the early stages. Was this serendipity or is this  
12    how it is normally done; you earmark somebody and  
13    it takes a few days to get the formal appointment  
14    in place?

15           A     It takes perhaps a few days to get  
16    that formal letter. But what I have done in the  
17    past on many occasions is, because of my  
18    relationship with many of the outside counsel, is  
19    to at least give them, if I'm there, which  
20    obviously I wasn't there on this particular date,  
21    to give them a heads up perhaps by even a call  
22    saying, this fellow has come in, we would like it  
23    to be sent to you. And I always say, if there is  
24    any conflict, please get back to me as soon as  
25    possible so that we can rearrange who is to



1 receive the file.

2 Q Okay, sir. I think that's probably  
3 going to be the time we had today. I knew we  
4 would get a little past the introductions, but I'm  
5 glad we got a start on this, and we will ask you  
6 to -- ultimately, the Commissioner will no doubt  
7 ask you to re-attend on Tuesday. But those are  
8 the questions that I'm going to ask you today.

9 A I appreciate that.

10 THE COMMISSIONER: Yes, thank you.  
11 Tuesday, 9:00 o'clock.

12 THE CLERK: All rise. This Commission  
13 of Inquiry is adjourned until Tuesday at 9:00 a.m.

14 (Adjourned at 4:30 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

A				
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