

INQUIRY INTO THE INVESTIGATION AND
PROSECUTION OF DEREK HARVEY-ZENK

The Honourable Roger Salhany, Q.C., Commissioner

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

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Tuesday, August 12, 2008

Volume 27

INQUIRY PROCEEDINGS

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APPEARANCES

Mr. G. Zazelenchuk and
Mr. S. Schmidt For Robert Taman and Family
Mr. M. Green and
Ms. K. Dixon For Mr. Marty Minuk
Mr. J. Prober and
Mr. B. King For Derek Harvey-Zenk
Mr. R. McDonald and
Ms. B. Bowley For R.M. of East St. Paul
Mr. H. Weinstein and
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1 Tuesday, August 12, 2008

2 Upon commencing at 9:00 a.m.

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

5 THE COMMISSIONER: Good morning.

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

8 THE COMMISSIONER: You're ready to
9 start off, are you?

10 MR. PACIOCCO: I am anxious to start
11 off, but it appears that there is an application
12 to reopen the evidence that will be brought by the
13 Government of Manitoba.

14 THE COMMISSIONER: Yes. Good morning.

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

17 Mr. Commissioner, this morning we are
18 just seeking your permission to file an additional
19 exhibit, which is a letter dated August 8th, 2008
20 signed on behalf of Mr. Slough.

21 THE COMMISSIONER: August 8th?

22 MR. McFETRIDGE: Of 2008.

23 THE COMMISSIONER: 2008, from who to
24 who?

25 MR. McFETRIDGE: From Mr. Slough to

1 Mr. Paciocco. I can indicate that Mr. Paciocco is
2 objecting to the filing of this letter. This
3 letter pertains to a passage in the prosecution's
4 laying and staying of charges policy guideline
5 dated April 2001. Now, that's been filed as
6 Exhibit 216. That's in volume G-46 of the
7 material. And the passage is at page 5 of that
8 policy under the heading "Procedure - staying
9 charges." And I'll just briefly read that into
10 the record. And this became an issue during the
11 examination of Mr. Minuk.

12 THE COMMISSIONER: Yes.

13 MR. PACIOCCO: My submission is simply
14 this, Mr. Commissioner. If my friend is going to
15 read in the evidence that I am objecting to having
16 come in at this point, then the evidence has been
17 made known unnecessarily. He can deal with the
18 application without reading in the entire document
19 and without, in the course of the motion,
20 basically presenting the evidence that he wants to
21 present.

22 The issue with respect to the
23 objection has to do with whether or not there was
24 due diligence in the filing of those documents.
25 Commission Counsel has taken the position that

1 documents could have been filed at the time
2 Mr. Slough was on the stand, and the questions
3 could have been put to him at the time. And to
4 reopen the evidence now would require everybody in
5 the room having an opportunity to look at it or
6 challenge it. And therefore, we took the position
7 as a matter of principle that in order for
8 evidence to come forward at this time, it has to
9 truly be fresh evidence, evidence that could not
10 have been discovered without due diligence.

11 Now, as a result of the motion, of
12 course, it's necessary to describe in broad
13 strokes the nature of the evidence, but it's not
14 necessary to get into the details of the evidence
15 in order to broach the issue of whether the
16 evidentiary foundation should be reopened at this
17 late stage.

18 MR. McFETRIDGE: And I can indicate,
19 Mr. Commissioner --

20 THE COMMISSIONER: Give me a minute.
21 Yes, okay.

22 MR. McFETRIDGE: I can indicate,
23 Mr. Commissioner, it was not my intention to read
24 in the letter or give what the evidence would be.
25 I anticipate my learned friend's objection, but

1 that was not my intention. I was just trying to
2 set the background for the purpose of why this
3 letter has been filed. And indeed, the passage I
4 was simply going to read in from the policy at
5 Exhibit 216 is already in evidence. And this was
6 an issue that came up between Mr. Minuk and
7 Mr. Paciocco during the course of his examination,
8 basically had to deal with whether or not that
9 particular passage, and this is the passage at
10 page 5 of that policy, Mr. Commissioner.

11 THE COMMISSIONER: Yes, under
12 "Procedures".

13 MR. McFETRIDGE: Under "Procedures -
14 Staying of Charges," where it says:

15 "Where the Crown Attorney decides not
16 to undertake or to stop a prosecution
17 by reason of a public interest factor,
18 a notation of this decision must be
19 placed in the file relating to the
20 case in question. For reasons of the
21 public interest and the administration
22 of justice do not demand otherwise and
23 the stay or withdrawal occurs in a
24 court of record, the reasons therefore
25 shall be stated by the Crown

1 Attorney."

2 That issue arose with respect to
3 Mr. Minuk as to whether or not that policy applied
4 to Mr. Minuk giving reasons to explain why he did
5 not stay particular -- or why he stayed particular
6 charges.

7 I just indicate, further on in the
8 transcript, there was a discussion between
9 Mr. Paciocco and Mr. Green as to whether or not he
10 should read in that full paragraph, he had only
11 read in a portion of it to Mr. Minuk, and
12 Mr. Paciocco had indicated that's more a matter of
13 argument as to interpretation of what that policy
14 means and whether or not it applies to all charges
15 or simply to charges that had been stayed based on
16 the public interest factor.

17 The letter we intend to file, or would
18 like to file with the Commission, is a letter from
19 Mr. Slough simply explaining, from the Province's
20 point of view, what the intent was behind this
21 particular paragraph and how it, in fact, is
22 applied in practice.

23 The objection of my learned friend is,
24 well, we could have done that while Mr. Slough was
25 on the stand. We agree, it should have been done

1 and could have been done, but it wasn't done.
2 Indeed, it wasn't done by Mr. Paciocco in any
3 questions they asked of them, it was not raised in
4 fact to any of the questions that were put to the
5 expert witnesses in this case. It's a matter that
6 simply came up between Mr. Paciocco and Mr. Minuk.

7 We feel that we would like to file
8 this letter, and it's a very short letter from
9 Mr. Slough explaining what the intent of this
10 policy was.

11 Certainly, at the end of the day it's
12 up to you, Mr. Commissioner, to decide whether or
13 not this policy is clear or not clear, whether it
14 should be revised in any way. We think it would
15 be important to the Commission to know what
16 Manitoba Justice's position is with respect to its
17 own policy.

18 It's not our intention to call
19 Mr. Slough. We don't think there is any issue on
20 this. We just want to present what our position
21 is with respect to this policy, and we invite the
22 Commissioner to allow that evidence in. Indeed,
23 Mr. Commissioner, you had indicated when we closed
24 you may be asking questions of parties after the
25 fact. We think this is an appropriate area where

1 this evidence should go in. We appreciate my
2 learned friend's comments, but we feel in the
3 circumstances it should be allowed in this case.

4 THE COMMISSIONER: Thank you. Can I
5 see the letter? Do you have any response?

6 MR. PACIOCCO: Only briefly,
7 Mr. Commissioner. The letter is not of earth
8 shattering significance. The point of the
9 objection was that there was a time to produce the
10 evidence and this could have been done at that
11 time. And Mr. Slough's letter could provoke
12 further questions. I understand that he's the
13 Assistant Deputy Attorney General, but what role
14 did he play in fashioning this policy, what is his
15 foundation for suggesting that that's not the
16 practice? There are many questions that should
17 have been posed to him if this had been presented
18 at the time that his evidence was put forward.

19 Ultimately, this is a question of
20 interpretation. I can indicate to you,
21 Mr. Commissioner, that not a great deal is going
22 to turn on this, and I have indicated that to my
23 friends. The position taken by Commission Counsel
24 is simply, if we get into this now and you admit
25 that, do other parties have an opportunity to

1 stand up and ask whether they want to present
2 evidence in response? Do they want to ask further
3 questions? Should Mr. Slough have been produced
4 for cross-examination? Simply, there comes a
5 point when the evidence has to close.

6 THE COMMISSIONER: Well, I'm going to
7 allow it. I'm going to allow the letter and, of
8 course, the parties will be entitled to make
9 comment on it. Anything further?

10 MR. McFETRIDGE: No, thank you.

11 THE COMMISSIONER: Thank you. We'll
12 make it the next exhibit.

13 THE CLERK: Exhibit 252,
14 Mr. Commissioner.

15 (EXHIBIT 252: Letter from Don Slough
16 to David Paciocco dated August 8,
17 2008)

18 THE COMMISSIONER: Mr. Weinstein, you
19 asked the other day whether Commission Counsel
20 should be allowed to respond. And my simple
21 answer to you is yes, this is not a trial where
22 the parties are entitled by reason of whether they
23 call witnesses or not to have a right of reply or
24 to be the last. If anything is raised during the
25 course of argument that needs some response, I'm

1 here to allow the Commission Counsel to make that
2 response. Thank you.

3 MR. WEINSTEIN: Thank you.

4 MR. PACIOCCO: Thank you,
5 Mr. Commissioner.

6 I want to begin my submissions and end
7 this proceeding where it began, by acknowledging
8 that, at bottom, this Commission was animated by
9 the loss of Crystal Taman. Certainly, your
10 mandate focuses on the investigation and the
11 prosecution, but it was an investigation and
12 prosecution arising out of the wasteful death of a
13 young woman who was loved and valued, and who died
14 through no fault of her own, simply trying to get
15 to work.

16 Keeping that in mind,
17 Mr. Commissioner, removes any abstraction from
18 what we are doing here. It puts into sharp relief
19 any findings you may ultimately make about botched
20 or frustrated investigations, or unfortunate or
21 ill-advised prosecutorial decisions. For those
22 failings are not just mundane examples of human
23 error or misjudgement, they effectively
24 dishonoured her memory.

25 When the noise of the crash spilled

1 into the surreal silence that was described by
2 Denise Bukowski, what remained to be done was to
3 seek and to find justice and closure for a family
4 and for a community.

5 This Inquiry has disclosed, through
6 the evidence you have heard, a failure of justice.
7 I am not suggesting that Mr. Harvey-Zenk needed to
8 be convicted of more offences or that he needed to
9 receive a higher penalty for justice to be done.
10 That, of course, is not the function of this
11 Commission. It falls outside the mandate of this
12 Commission to pass judgment on that. When I speak
13 of the failure of justice, I'm speaking about the
14 failure of the system to do the work that it
15 should, and as a result, it left questions
16 unanswered and trust betrayed. Instead of easing
17 the grief, the process added to the agony.

18 I know I speak for Mr. Clifford and
19 myself when I say it has been a privilege to have
20 served the people of Manitoba as Commission
21 Counsel in trying to find answers to the many
22 questions that have been raised and to assist you
23 in discharging your important mandate.

24 We have, from the outset, understood
25 the importance of our assignment, and today is no

1 different. We feel the weight of tremendous
2 responsibility coming before you to offer our
3 evaluation of what you have heard. Both
4 Mr. Clifford and I understand that as outsiders,
5 we should be humble and hesitant when making
6 submissions that could challenge the repute of the
7 institutions and the officers who serve the
8 province that is our host. More importantly, we
9 are aware of the need for deep reflection and
10 circumspection, given that our position has given
11 us the power to speak in ways that will cause
12 embarrassment, or anxiety, or even harm to the
13 reputations of some of those who have been brought
14 through the door of this hearing room. Still, we
15 made a solemn promise when we undertook this role
16 to follow the evidence where it leads and to have
17 the courage to be candid and frank, and we intend
18 to do so. It would betray the trust reposed in us
19 in performing our role in assisting you in
20 discharging that mandate to do otherwise.

21 Your mandate, of course, is set out in
22 the order of council of December 5th, 2007. Part
23 of that mandate is to inquire into the conduct of
24 the police investigations surrounding the death of
25 Crystal Taman, the correctness and adequacy of the

1 procedures and practices that were followed, and
2 the good faith objectiveness and professional
3 standards with which the procedures were applied
4 and decisions were made.

5 It falls to me, Mr. Commissioner, to
6 make submissions on behalf of Commission Counsel
7 with respect to the investigative issues.

8 Mr. Clifford will be making the submissions as
9 they relate to the other branches of your mandate,
10 including whether the prosecution of Mr. Derek
11 Harvey-Zenk, including the Crown's position on
12 sentence, were conducted in accordance with
13 professional and ethical standards expected of
14 lawyers for the Attorney General, and whether the
15 services provided to the family of Crystal Taman
16 were sufficient, having regard to the requirements
17 of the Victims' Bill of Rights Act.

18 I have compiled documents to assist in
19 the presentation of information because there is
20 so much to cover. Each party has been provided
21 with aids to argument which set out in bullet
22 points the structure of the points I am going to
23 be presenting. The parties have also been
24 provided, and you yourself have been provided with
25 compiled documents for submission.

1 In addition, there is a brief core
2 agendum that has been prepared because of some
3 errors that were introduced into the document
4 through no one's fault but my own. In the hurry
5 to get it done, it was simply not possible to
6 proofread it before it was produced. I am going
7 to pass up a copy of the incomplete core agendum.
8 I tried to get it done this morning, I didn't
9 quite succeed, but it covers most of the problems
10 that arise.

11 In addition, the parties have been
12 provided with the list of the recommendations that
13 Commission Counsel will be making. I will not be
14 making those recommendations during the course of
15 my submissions to you. They may be alluded to.
16 But after Mr. Clifford has made his submissions, I
17 will rise again and I will relay the
18 recommendations of Commission Counsel to you at
19 that time.

20 As indicated, Mr. Commissioner, my
21 task is to focus on the investigation. I take
22 absolutely no pleasure in standing before you and
23 before the people of this province, as your
24 counsel, and submitting that the investigation of
25 Derek Harvey-Zenk was a colossal failure of

1 justice. It was a colossal failure because the
2 justice system was never permitted to fulfill its
3 function. It was stymied. It was stymied by a
4 botched investigation and it was stymied by
5 uncooperative police witnesses, or to be more
6 precise, uncooperative witnesses who happen to be
7 police officers. The result has been a failure of
8 justice. And it is more than a casualty of
9 incompetence, although there was some of that. It
10 was nothing less than a betrayal of the rule of
11 law, the promise that those in positions of
12 authority will use their power to advance the law
13 in the public interest, and that they will abide
14 by the same laws and expectations they impose on
15 others.

16 I'm going to submit to you,
17 Mr. Commissioner, that the investigative file that
18 poor Mr. Minuk received was the progeny in part of
19 a calculated decision on the part of Mr. Harry
20 Bakema not to investigate Derek Harvey-Zenk at the
21 scene for impairment. It was the product of a
22 lack of courage on the part of Jason Woychuk in
23 not standing up to Harry Bakema and thereby
24 himself failing to conduct an investigation. The
25 investigation file that Mr. Minuk was receiving

1 was the product of suppressed information and
2 revisionist history, as notes were crafted not to
3 tell the story of what happened but to re-create
4 the story that would suit varied agendas, not only
5 of Harry Bakema, Ken Graham and Jason Woychuk, but
6 also of Norm Carter.

7 Things got a little better on the part
8 of the investigation when a branch of it was
9 entrusted to the Winnipeg Police Service
10 Professional Standards Unit. Regardless of the
11 vaunted reputation of that unit in the eyes of
12 insiders, and in spite of those who would defend
13 internal affairs policing, the investigation was a
14 little more than a product of a gullible chat with
15 trusted colleagues, when it should have been a
16 probing search for the truth. As a result, it was
17 far easier than it should have been for this part
18 of the investigation to become the casualty of
19 Winnipeg Police Officers, some of whom gave higher
20 regard to their loyalty to each other and to
21 self-preservation than to their solemn oaths to
22 uphold the law and their responsibility to honour
23 the memory of the victims and to support her
24 family and their community.

25 And to be clear, although it has been

1 suggested by others, Commission Counsel do not
2 accept that there was a widespread conspiracy to
3 suppress the truth between police agencies, nor do
4 Commission Counsel believe that executive members
5 of the Winnipeg Police Force were cleaning up
6 their end. The evidence was quite the converse.
7 It was the executive of the Winnipeg Police
8 Service who pressed for the investigation of the
9 activities of Derek Harvey-Zenk in the hours
10 leading up to the crash that killed Crystal Taman.

11 There are no elaborate conspiracy
12 theories to be offered by us, instead we will be
13 submitting that there was a collage of individual
14 self-interest, misguided loyalties and peer
15 pressures that coalesced into the mess described
16 to you in the evidence. The result was that
17 Mr. Minuk inherited a case that could not be fully
18 prosecuted. In the words of Richard Peck, "He was
19 left with a prosecutor's nightmare." It has
20 certainly been a long three and a half years for
21 Mr. Minuk, and many of the criticisms levelled at
22 him are unjustified.

23 Still, Mr. Clifford will be submitting
24 on behalf of both of us that Mr. Minuk ultimately
25 failed to conduct the kind of vigilant prosecution

1 the people of this province should expect, and he
2 failed to discharge fully his obligations under
3 the Victims' Bill of Rights. These are hard
4 positions for us to take and we have done so only
5 after great reflection.

6 I'm going to begin my submissions in
7 detail by looking at the East St. Paul Police
8 Service investigation. It was, with good reason,
9 described by Mr. Don Slough as a train wreck.
10 I'll begin with the first leg of your mandate
11 relating to investigations, namely, the
12 correctness and adequacy of the procedures and
13 practices that were followed. It would surprise
14 no one who listened to the evidence unfold in this
15 hearing room to find the conclusion being offered
16 to you that aspects of this investigation were at
17 best incompetent.

18 The errors began with the first phone
19 call at 7:10 and the failure of Constable Graham
20 to record who it was who placed the call. Now,
21 Constable Graham testified that the caller refused
22 to give his name and just said, get someone here
23 now, and then hung up. Mr. Graham came here
24 knowing that he was subject to criticism for not
25 securing the identity of the caller, and the

1 explanation he brought with him was simply not
2 credible. It's not credible in part because Ken
3 Graham is not a credible source of information.
4 His testimony was fraught with inconsistency and
5 contradictions, so much so that he cannot be
6 believed unless his testimony is confirmed by the
7 evidence of others or ring so true as a matter of
8 common sense and context that it cannot be
9 ignored. He is a man whose commitment to the
10 truth is so tenuous that during these proceedings
11 he ultimately chastised, if not threatened
12 Constable Maloney for being a traitor for coming
13 here to provide evidence, and then he approached
14 the bench in these proceedings and denied having
15 said so, only to give a feeble apology through his
16 lawyer the next day. More contextually, his
17 account of what happened during that call is not
18 credible because it is totally inconsistent with
19 the actions of Ken Ford, the caller, when he
20 himself came forward to the East St. Paul Police
21 on March 3rd and offered a statement.

22 Problems, of course, got much more
23 serious at the accident scene. Chief Bakema, the
24 ranking officer, failed to superintend and
25 organize the scene. It is beyond dispute that

1 there was no coherent organization in place.
2 Constable Graham and Constable Woychuk both
3 indicated that there came no point in time where
4 they were given dedicated assignments or where
5 there was any consultations about who was going to
6 do what. The best you received was a suggestion
7 that, as experienced police officers, they knew
8 what to do.

9 This accident scene required
10 organization. It was far too important to leave
11 to chance. Just by way of example, there was no
12 plan for identifying witnesses at the scene.
13 Chief Bakema said, "I didn't set up a plan for
14 that yet," when he testified before you. We know
15 that the failure to identify witnesses at the
16 scene resulted in the failure to identify Dale
17 Kasper, who was only later found as a result of
18 good fortune. There are possibly other witnesses
19 who were never found.

20 There was the testimony of Constable
21 Woychuk about sitting in his police vehicle
22 watching the traffic approach in his rear view
23 mirror. Chief Bakema conceded that Woychuk should
24 not have been doing that. There was the failure
25 to ensure that photos were taken and that the

1 person who took them recorded it. You have photos
2 in Exhibit 82, book B.a.a.4 that no one can
3 identify, no one can account for. But the most
4 serious concern of all is that there was no
5 on-scene investigation of whether Mr. Harvey-Zenk
6 was impaired. I'll be submitting to you shortly
7 that this was not just a matter of oversight and
8 disorganization, it was a conscious decision.

9 Now, you have heard evidence that
10 Harry Bakema kept two sets of notes. They have
11 been exhibited as Exhibit 87 and Exhibit 146. Now
12 that he had two separate places where he took down
13 information about the case is not in itself an act
14 of bad faith. Officers use jottings to record
15 matters of detail and organize the information
16 later. You saw that Norm Carter did so. There
17 are however two problems here. The first was the
18 content. Jottings normally consist of times and
19 details and matters that cannot be remembered. If
20 you examine Mr. Bakema's first set of notes, you
21 will see that they are a sloppily recorded series
22 of disconnected facts. Second, and of more
23 concern, those notes were never disclosed.

24 Now, if you look at them, you will
25 find there's nothing in there to be suppressed.

1 I'm not going to suggest to you that the failure
2 to disclose those notes was an attempt to hide
3 information. It may well have been an oversight,
4 but it was nonetheless a breach by Harry Bakema of
5 his obligation to disclose, and it is a breach
6 that is significant enough that it should be noted
7 by you, so that others who engage in
8 investigations will understand that the kind of
9 practices utilized here are unacceptable and can,
10 in fact, imperil prosecutions, often resulting in
11 long adjournments and at times even undermining
12 the credibility of the witnesses themselves.

13 Things, in my submission, got little
14 better at the police station. Sergeant Carter
15 failed to conduct an adequate investigation.
16 First, he failed to record or even collect
17 information about how the collision occurred while
18 he was processing Mr. Harvey-Zenk. This was
19 critically important for two reasons.

20 First, as you are aware, he ultimately
21 caused Mr. Harvey-Zenk to be released on a promise
22 to appear in connection with charges that allege
23 that he caused the death of Crystal Taman.
24 Without solid information about the role that
25 Mr. Harvey-Zenk's vehicle played in that

1 collision, he had no foundation whatsoever to
2 include those charges in the promise to appear or
3 ultimately to endorse the laying of those charges.
4 Moreover, he ultimately had to determine whether
5 he had reasonable grounds to believe that
6 Mr. Harvey-Zenk was impaired. When someone
7 operates a vehicle in a marked departure from the
8 standards that are normally expected, that in and
9 of itself, along with other circumstances observed
10 on the suspect, can contribute to a conclusion
11 that the individual was impaired. Learning about
12 the details of the accident was something that
13 would have certainly assisted him in coming to the
14 conclusion that he ultimately did.

15 His testimony was that he learned with
16 respect to details of the faculty that it was a
17 fatality. And at page 5 of the document that has
18 been handed to you, compiled submissions,
19 documents for submission, at tab 3, you will see
20 at line 9 the testimony relating to what it was he
21 learned about the accident. Page 2671, down in
22 the lower left-hand quadrant, line 9,

23 "Q At this point had Jason Woychuk
24 given you any details about the
25 accident?

1 A Other than it was a fatality.

2 Q Were there any details with
3 respect to the number of cars
4 involved, how it was that the
5 individual he had with him factored
6 into the accident?

7 A No, I didn't get those details at
8 that point in time."

9 His evidence continued that he did not receive the
10 details at any point in time before he ultimately
11 processed Mr. Harvey-Zenk. But by far, the most
12 egregious error committed by Sergeant Carter at
13 the scene was to record blood demand as opposed to
14 breath demand. Inexplicably, he did this on three
15 occasions, his rough notes, his final notes and
16 his incident narrative.

17 Commission Counsel is aware of his
18 testimony that he is 100 per cent certain that he
19 furnished a breath demand and that this was a mere
20 clerical error. It's likely that that testimony
21 is true, simply because of the fact that if you
22 look at the blood demand that is provided at page
23 7 of the document you have before you, you would
24 agree that it's almost inconceivable that someone
25 could read that without appreciating that they are

1 making an error, because it ends:

2 "Blood samples will only be taken by
3 or under the direction of a qualified
4 medical practitioner and if the
5 qualified medical practitioner is
6 satisfied that the taking of the
7 samples will not endanger your life or
8 health."

9 However, the repeated unexplained decision to
10 write blood demand seriously compromised the
11 charge and stands as a significant failing.

12 Mr. Gover was of the opinion that this
13 would "single-handedly" have destroyed the refuse
14 sample prosecution.

15 Problems at the station were not only
16 those of Mr. Carter. Jason Woychuk did not follow
17 proper procedures. First, he showed up at the
18 station with a suspect who had been in a serious
19 car accident and left him unattended and
20 unrestrained in the back of a police vehicle.

21 There is no appropriate explanation for that. It
22 makes sense only when understood in the context of
23 Sergeant Carter's evidence that Constable Woychuk
24 suspiciously pulled him into a side room and shut
25 the door before telling him he had a police

1 officer in the car. But looking at this from the
2 point of view of proper police procedure, this was
3 a significant failing.

4 As for the impairment systems, Jason
5 Woychuk claims to have observed that
6 Mr. Harvey-Zenk was unsteady on his feet, but he
7 failed to record that in his notes. It showed up
8 in his first incident report -- his final incident
9 report, rather, as "unsteady on his feet."

10 When asked about his observations on
11 subsequent occasions, he demonstrated an inability
12 to provide pointed and accurate evidence. He
13 described to the RCMP, "He was stumbling a little
14 bit." Although I won't take you there, you will
15 find that at page 10. He described to
16 Mr. Clifford during the interview, "He was
17 staggering." You'll note that at page 11 of the
18 material.

19 His very description of what he
20 observed and his failure to give details in his
21 notes would have made observations of
22 Mr. Harvey-Zenk being unsteady on his feet
23 vulnerable to significant attack by any competent
24 defence lawyer. His observations in the end would
25 have proved next to useless in a criminal trial.

1 Similarly, he checked off intoxicated
2 on the prisoner log sheet. Your Honour will
3 recall that, and you will find it, if need be, at
4 page 12 of the materials. Yet he records no
5 supporting information for that in his notes.

6 And there is also a possibility that
7 he failed to take Harvey Zenk's cell phone from
8 him when processing him, or at the very least
9 failed to record that he took Harvey-Zenk's cell
10 phone. Perhaps, the only useful piece of
11 information that Mr. Harvey-Zenk provided was that
12 he habitually carried the phone. He believes he
13 had it on that occasion. And one of those
14 vignettes he claims to have recalled was him
15 standing at the accident scene saying to his wife,
16 I can't talk now. There is no record of his cell
17 phone anywhere in any of the records secured by
18 the East St. Paul Police.

19 Glenda Pedersen did not follow proper
20 investigative practices at the station. Constable
21 Pedersen claims to have observed signs of
22 impairment of Mr. Harvey-Zenk when he was being
23 processed for release. She said that she made the
24 distinct observation of stale liquor on his
25 breath. She could see his eyes were somewhat

1 glassy and he was very deliberate and slow or
2 hesitant to answer. You will find her evidence to
3 that effect at page 13 of the materials you have.

4 This would have been a critically
5 important observation to make, yet its credibility
6 and utility is seriously damaged. It's damaged in
7 two ways. She testified that she told Sergeant
8 Carter about this probably that day. But in his
9 evidence, he indicated that it was probably when
10 the Commission of Inquiry was called that he
11 learned this from Glenda Pedersen. And although
12 it's not included in the material, the reference
13 to that passage is at page 3027 volume 12, page
14 3027, volume 12.

15 His own credibility or reliability on
16 this point is a bit suspect, because we know that
17 the interview with the RCMP included Glenda
18 Pedersen describing this. Sergeant Carter was at
19 that point unquestionably the investigator in
20 connection with the case. It's really unthinkable
21 that he would not have noticed this when reviewing
22 the RCMP material, or equally unthinkable that he
23 would not have bothered to review the RCMP
24 material. But the fact is, between the two of
25 them, there is no record of this observation,

1 which brings me to the second problem. She did
2 not make any note of her observations.

3 Her explanations for not having
4 recorded it are as troubling as the fact that it
5 was not recorded. You'll find them at page 14 of
6 the materials that were handed to you. On page
7 1828 in the lower left-hand quadrant, at line 11:

8 "On hindsight, I believe I should have
9 done that, but I was not the
10 investigating officer at the time and,
11 in my mind, I thought the accused had
12 actually been released."

13 Of what relevance is the fact that the accused may
14 have been released to the importance of the
15 observations she made? Over on page 1829 at line
16 9:

17 "Yes, normally a person would come
18 back for fingerprinting in several
19 days. So if I had been the officer
20 fingerprinting several days later,
21 that would not have been a notation in
22 my book either at that time. It would
23 only be noted that I fingerprinted the
24 person."

25 It was not followed up with, but that leaves the

1 curious question of whether there was some belief
2 that said she wouldn't have found it if he hadn't
3 agreed to provide the fingerprints and the
4 photographs at the time, that perhaps it's unfair
5 to record this observation? I don't know what
6 relevance that point has. But as I indicate, it
7 demonstrates a significant lack of understanding
8 of the importance of recording investigative
9 observations, regardless of the circumstances in
10 which they are observed.

11 The investigation that followed was
12 steered like a rudderless ship. In 2005, the East
13 St. Paul Police Service was clearly a
14 dysfunctional institution. There was an obvious
15 tension, if not enmity between Sergeant Carter and
16 Chief Bakema. Sergeant Carter had been the Acting
17 Chief of Police, and he lost that position as a
18 result of the appointment of Chief Bakema. And
19 certainly in Chief Bakema's mind, that caused some
20 animosity. Chief Bakema testified about how he
21 was hired as a figurehead, because Carter wanted
22 his job and Carter wanted his job badly. You will
23 find that reference at page 15, tab 6.

24 Now, Chief Carter, for his part, told
25 us that there were problems at the time but he did

1 not go into what those problems were. Perhaps it
2 was this that resulted in the fact that this file
3 was never assigned. Sergeant Carter testified
4 that no one had been assigned the file, and he had
5 not discussed the assignment of the file with
6 Chief Bakema. You'll find that reference at page
7 16.

8 "There was, without question, a
9 breakdown of communication in the
10 leadership of this police force. The
11 atmosphere likely created confusion
12 over who was assigned the
13 investigation."

14 And as if it was an ultimate admission that this
15 investigation was badly handled, both Harry Bakema
16 and Norm Carter were each intent on claiming that
17 in the earlier days of this investigation, the
18 other one was in charge.

19 Harry Bakema tried to distance himself
20 from this investigation. His efforts, however,
21 were not credible. He suggested in the page of
22 transcript found at page 17 of the materials you
23 have that he didn't have access to the narrative
24 reports of others. Yet we know from the evidence
25 that Chief Bakema had executive authority to

1 access whatever he wanted under the computer
2 program. He was the Chief of Police, and
3 circumstances suggest that he did have access to
4 those reports. There's one example. He
5 incorporated reference to Constable Woychuk's
6 narrative report in the incident report that he
7 himself had prepared. And you will find that at
8 page 19 of the materials.

9 Harry Bakema said that Chief Carter
10 controlled the investigation and would not let him
11 near it. I'll take you to page 22 of the
12 materials. You'll see in the passage quoted from
13 the interview with Mr. Clifford at page 3439 at
14 line 6:

15 "And through the days following and
16 weeks following February 25th of 2005,
17 did you access any of the other
18 officer's narrative reports for the
19 purpose of reviewing them?

20 I did not. Sergeant Carter likes to
21 be in control of everything. He makes
22 sure all of the packages go together
23 and if there's any problems, he comes
24 to me.

25 Do you remember that answer?

1 That's correct."

2 His position that Sergeant Carter controlled

3 everything, that he did not access or review the

4 materials in connection with this investigation,

5 and the narrative reports in particular, is belied

6 by the fact that he, and not Sergeant Carter, was

7 the Chief of Police. But more significantly, it's

8 belied by the fact that Harry Bakema had extensive

9 involvement in this file, including by directing

10 investigation. Indeed, in spite of his protest to

11 the contrary and his belated acknowledgment under

12 cross-examination that he was in a conflict of

13 interest because of his personal knowledge of

14 Derek Harvey-Zenk, it appears that in the early

15 days Harry Bakema took charge of this file. That

16 is supported both by documentary evidence and by

17 circumstantial evidence of his involvement.

18 Now, this is a point of some

19 importance. There is a difference between an

20 incident report and an incident narrative. And

21 you will find those differences described at page

22 22, this time at page 3436 in the upper left-hand

23 quadrant, question at line 16:

24 "Q I take it, Mr. Bakema, that you

25 agree with the testimony of Sergeant

1 Carter, now Chief Carter, that there
2 is a difference between an incident
3 report and a narrative report;

4 A An incident and a narrative?

5 Q Report?

6 A I believe so, yes.

7 Q Sir, the incident report is for
8 the overall investigation and the
9 narrative report is the particular
10 officer's summary of their own
11 activities. Is that correct, sir?

12 A That's correct."

13 You'll notice at page 23 that what Harry Bakema
14 prepared and ultimately filed was an incident
15 report. It is the kind of document that is used
16 by the investigator to compile the observations of
17 all officers.

18 Second, the incident report
19 development log, made Exhibit 94 in these
20 proceedings and found at tab P-1.83, shows that
21 Harry Bakema took charge of this investigation in
22 the early days. Starting with page 2428, this
23 page is one of the extracts from that log. It
24 shows Norm Carter entering information about the
25 accident at 5:02 p.m. on the 25th of February.

1 Page 2425 shows that at 10:15 p.m. Harry Bakema
2 enters that same file. He removes the old value
3 of Sergeant Carter, as the member taking the
4 report, and supplants himself, Chief of Police
5 Bakema.

6 Page 2389 shows that -- that's the
7 wrong page reference. It appears to have been
8 omitted from the package, but the document found
9 in the logs shows Chief Bakema replacing Norm
10 Carter as the member reviewing. And Your Honour
11 will recall having canvassed that at the time.

12 Page 2415 contains the first incident report
13 completed by Mr. Bakema. And again, that is the
14 overall incident report and not a narrative
15 report.

16 It isn't until March 1st at 1:58 p.m.
17 that Norm Carter takes over as the member
18 reviewing. You will find that document at page
19 2389, page 27 of the materials.

20 Mr. Bakema's explanation for all this
21 is simply not credible. You will find it at page
22 29 of the materials that have been furnished to
23 you. And I'll read to you, starting from line 10
24 on page 3450, which you will find at page 29.

25 "I did not change, I don't know, I

1 don't change Carter away from what he
2 is allowed to do. Carter is the
3 reader, he is the one that's
4 controlling all the reports coming in.
5 I was trying to get into the system
6 and it's a weird system to write a
7 report on what I had in the vehicles.
8 And that's the information you will
9 see that I put there."

10 And then I continue with the questioning, and he
11 says at line 5 of page 3451:

12 "No, sir, I recall trying to get into
13 the computer system and having
14 problems getting into it to write my
15 report."

16 Basically, his testimony is that this obvious
17 change from Norm Carter as the investigator on the
18 file, to himself, and Norm Carter as the reviewer,
19 was somehow the result of his lack of familiarity
20 with the computer system. These were,
21 Mr. Commissioner, deliberate and considered
22 changes. They were not accidental key strokes.

23 The circumstantial evidence also
24 demonstrates that certainly in the early days,
25 Chief Bakema was the one who was acting on this

1 investigation. It's evidenced by his heavy
2 involvement in the decisions surrounding the
3 investigation.

4 At page 31 you'll find Constable
5 Woychuk's testimony, that you may recall, that he
6 went to interview Garth Shaw that evening at the
7 direction, he believes, of Harry Bakema. You see
8 that that same evening Harry Bakema sets out to
9 interview Kathy Beattie, and he receives the
10 traffic accident report from her. You'll find
11 those at page 32 and 33.

12 You heard evidence that between the
13 28th of February and the 1st of March, he was
14 determining whether the Professional Standards
15 Unit of the Winnipeg Police should conduct the
16 investigation of the activities of Derek
17 Harvey-Zenk. And while certainly it was
18 appropriate to contact him as the Chief of Police,
19 there is no evidence in the file of any
20 consultation with Norm Carter over whether that
21 should be done.

22 Apart from the advertising for
23 witnesses, this is the only work apparently done
24 on this file in the first week, and it was all
25 done by or under the direction of Harry Bakema.

1 Sergeant Carter testified that there
2 was never a discussion about who would be assigned
3 the file, but he made a decision to take it over
4 on the 1st of March because, in his assessment,
5 nothing was being done. On that date, you find
6 that the file is sent off to Mr. Kaplan at the
7 prosecutor's office by Harry Carter. Even after
8 the 1st of March -- not Harry Carter but Norm
9 Carter -- even after the 1st of March, Bakema
10 continues to be involved. He interviewed the
11 Bukowski's on March 7th. And you'll find that
12 interview on page 34 of the materials. Tellingly,
13 at page 37 of the materials, you will find the
14 draft witness list. And I take you to that
15 document. This was the draft witness list on the
16 cover of the file created in Harry Bakema's hand,
17 as the evidence has demonstrated. We know that
18 this list could not have been compiled until after
19 March 8th, because the name Vernon Stevens appears
20 up near the top of the list of witnesses and
21 Vernon Stevens did not come forward until
22 March 8th.

23 Circumstantially, we can also possibly
24 conclude that this was made before the 14th of
25 March because on that date, Mr. Dan Fotti,

1 F-O-T-T-I, was interviewed. And this list simply
2 refers to Winnipeg ambulance attendant and does
3 not identify Mr. Fotti by name. It is very clear
4 that Harry Bakema is taking some type of overall
5 role in the organization of that investigation, at
6 least to the extent of compiling a witness list.

7 We heard evidence from Mr. Woychuk
8 that he interviewed Mr. Fotti on March 14th at the
9 direction of Harry Bakema. Now, Harry Bakema
10 appears to have been fielding the requests from
11 the Professional Standards Unit for interviews
12 with the paramedics. I will deal in more detail
13 later with the significance of the way that the
14 interview of the Selkirk paramedics was handled.
15 He ultimately goes out himself and he interviews
16 Ted Rosser, and he does this on the 24th of March,
17 2005. That interview is recorded at page 39.

18 As a symptom of the state of this
19 investigation and the lack of communication
20 between Mr. Bakema and Mr. Carter, you can have
21 regard to the notes of Inspector Poole that were
22 filed as Exhibit 137 in this case. They can be
23 found at page 42. And while they are not
24 tremendously legible, you will see that at the
25 bottom of the page, Sergeant Carter is approached

1 with respect to the emergency service records.

2 And he advised that he has not conducted any
3 interviews with the emergency service. And if it
4 has been done, he does not know about it.

5 Regardless of who was nominally in
6 charge, this is clearly a dysfunctional and
7 disorganized investigation. And it's not one that
8 Harry Bakema can distance himself from. His name
9 is writ large all over this file.

10 The investigation that was done was
11 woefully inadequate. It was woefully inadequate
12 both in content, in the lack of organization, and
13 in the lack of urgency with which things were
14 done.

15 The interview by Harry Bakema of
16 Mr. Shaw at the scene was not completely recorded.
17 I'm going to take you to volume E-1.22.b. Because
18 through inadvertence, the most important page of
19 the notes of Harry Bakema were not included in the
20 passages that I had reproduced for your
21 convenience.

22 THE COMMISSIONER: E-1.

23 MR. PACIOCCO: E-1.22.b, which was
24 Exhibit 146 of these proceedings, and those are
25 the first set of notes created by Harry Bakema.

1 Now, you will recall that he had some
2 conversation with Mr. Shaw in the form of an
3 informal interview, certainly with the intent to
4 have him interviewed later. But I think you will
5 understand, Mr. Commissioner, the importance of
6 recording accurately and completely the
7 information that a witness is giving. His notes
8 start with the 7:10 departure time.

9 "Call received, call motor vehicle
10 Perimeter and Henderson."

11 And then the next entry in the notes, but no time,
12 is Garth Shaw, his personal information. And then
13 there is some summary of what Mr. Shaw said.
14 There is no indication of whether these are quotes
15 or a synopsis of Mr. Shaw's account. At page 396,
16 you will see that the questioning of Mr. Shaw
17 appears to end, and details of the motor vehicles
18 are taken on that page and on page 396. And we
19 heard Mr. Bakema's evidence that he walked around
20 and took that information at some later point.

21 If you go to page 397, you will see
22 the entry:

23 "Truck going full speed, 80 for sure.
24 Hit vehicle two pushing into vehicle
25 one."

1 Now, we know from the interview with Mr. Shaw that
2 "truck going full speed 80 for sure" is attributed
3 to him. It's not put in quotes and it is remote
4 in terms of its connection to the other entries
5 for Mr. Shaw. That record of the interview with
6 Mr. Shaw was wholly inadequate for any police
7 investigation, let alone a police investigation of
8 this magnitude.

9 Then there was the dealing with Kathy
10 Beattie. What you have from Kathy Beattie is a
11 traffic accident report. And it's reproduced at
12 page 45. The relevant page being 46 where she
13 provides her narrative of events. Now, Harry
14 Bakema took this report and he took it on the
15 evening of the collision. And you will notice
16 that Kathy Beattie includes observations about
17 Mr. Harry Zenk. You'll find them in the second
18 box of the traffic accident report.

19 "Then a man walked over to see from
20 the truck that was parked in the ditch
21 further ahead. I asked him who hit
22 him and what happened. He just looked
23 at me and didn't say anything and then
24 he walked back to his truck."

25 There's no indication of any follow-up, no

1 indication of any questions asked or any
2 information sought about observations about this
3 gentleman's condition.

4 Now, Kathy Beattie testified that when
5 Mr. Bakema was at her place, it was never
6 disclosed to her that this was a criminal
7 investigation. She was simply completing a
8 traffic accident report. She was, as events
9 transpired, never interviewed. And I'll come back
10 to this in a moment when I move on to Norm
11 Carter's involvement in the investigation.

12 Chief Bakema also took an interview
13 statement from the Bukowski's, who came into the
14 East St. Paul Police Station as a result of the
15 advertisement, and their sense that this was
16 something important to do. Their interview is
17 found at page 56, where it is reduced into typed
18 format. And we see a similar pattern here.
19 Denise Bukowski observes in the middle of that
20 typed report:

21 "Then this man came out from behind
22 the vehicle and I asked him if he was
23 okay and if he had anyone with him and
24 didn't say anything."

25 No indication of any follow-up questions, no

1 indication of any investigation of impairment or
2 the condition of Mr. Harvey-Zenk. It was
3 certainly an inadequate attempt to investigate a
4 very serious crime.

5 To make matters worse, both of the
6 Bukowski's were at the accident scene. While it
7 proved to be so that Mr. Bukowski had very little
8 to offer, there was no attempt to interview him,
9 and the two were brought together into the
10 interview room at the same time. Any experienced
11 officer understands that you do not interview
12 separate witnesses together.

13 And then there is the Rosser
14 interview, the ambulance attendant, that took
15 place on the 24th of March. Harry Bakema showed
16 no enthusiasm for doing that interview. It should
17 have been the first order of business. This
18 Selkirk ambulance attendant was in the vehicle
19 with Mr. Derek Harvey-Zenk. Anyone with the
20 slightest familiarity with the function and role
21 of a paramedic understands that he would be
22 reviewing the condition of the driver of the
23 vehicle. Interviewing him should have been the
24 first order of business, yet it wasn't done.

25 Now, when it happened, it was as a

1 result of the pressure or persistent requests
2 brought by the Professional Standards Unit. They
3 wanted this information for the much less
4 significant purpose of determining what to do at
5 the suspension hearing of Derek Harvey-Zenk, yet
6 they felt it was important enough that they
7 requested it on a number of occasions. When Harry
8 Bakema was first approached, he said it's being
9 done as we speak. But it wasn't done, and it
10 wasn't done, and it wasn't done until the
11 Professional Standards Unit had to resolve the
12 suspension hearing issue without that information.
13 And it wasn't done until March 24th, after
14 Mr. Rosser had sat on the information that he was
15 able to offer for a month. And when it was done,
16 there was no attempt to secure ambulance records,
17 and the interview, which you can examine at your
18 leisure, was cursory and inadequate.

19 It was not only the portion of the
20 investigation done by Harry Bakema that was
21 problematic. No one interviewed paramedic Rolland
22 Fontaine. He dropped off a half-page statement to
23 the attention of Norm Carter. You will find it at
24 page 57. No one took the time to sit him down and
25 question him. In spite of the evident importance

1 of his observations, no one attempted to get
2 supporting records.

3 With respect to Ms. Beattie, page 51,
4 you will find a passage from her testimony -- page
5 52 rather -- where she testified about the
6 injuries in the aftermath of the accident. She
7 describes how she still suffers from back
8 problems, still sees a chiropractor, still is
9 unable to do many of the things that she did prior
10 to the collision.

11 At page 51, if you flip back a page,
12 you will find the testimony of Sergeant Carter,
13 now Chief Carter, about his state of mind and
14 intention when he was speaking to Mr. Minuk.

15 At page 2706 in the upper left-hand
16 quadrant, starting with line 18:

17 "That it was a three-car collision and
18 that there was a fatality, that I
19 formed the opinion that
20 Mr. Harvey-Zenk was impaired. And I
21 informed Mr. Minuk that, you know, he
22 had been advised of his rights, given
23 an opportunity to contact his lawyer,
24 and that I would monitor to see if
25 other people who may have been

1 involved in the accident. I had not
2 received that information yet. You
3 know, there may be charges in relation
4 to that such as impaired causing
5 bodily harm."

6 That was never done. You will later see a letter
7 addressed by Mr. Minuk to Chief Carter in 2006,
8 asking where is the witness interview with Kathy
9 Beattie. And even after that, it was never done.
10 It's quite conceivable that, had there been a
11 follow-up with this witness, another charge would
12 have been appropriately laid against
13 Mr. Harvey-Zenk. And the fact that the problems
14 in the investigation would have undermined the
15 ability to prosecute that charge doesn't change
16 the fact that this was not done, even though there
17 was an early recognition by Sergeant Carter of the
18 importance of doing it.

19 Perhaps the most distressing position
20 taken by Sergeant Carter during the investigation
21 had to do with the Branigan's records. Sergeant
22 Carter, as he then was, was asked on four
23 occasions by Mr. Minuk to secure those records. I
24 take you please to page 58, December 20th, 2005.
25 I misspoke a moment ago when I suggested it was in

1 2006 that the request for a witness statement for
2 Kathy Beattie was made. It was made in this
3 letter of December 20th, 2005.

4 In that letter from Mr. Minuk to then
5 Sergeant Carter, in the paragraph in the middle of
6 the page, he says:

7 "In addition, I do not know whether or
8 not a warrant to seize the records of
9 Branigan's Restaurant for February 25,
10 2005 was ever obtained for the purpose
11 of determining whether or not Mr. Zenk
12 did use his credit card for purchases
13 at this restaurant."

14 And he goes on in the next paragraph to explain
15 why this is important and why this would be the
16 most efficient way to resolve the issue of
17 Mr. Harvey-Zenk's alcohol consumption.

18 On April 10th, four months later,
19 Mr. Minuk finds himself writing a follow-up
20 letter, and he references an earlier discussion
21 that he had with Mr. Carter about the warrant. We
22 know from the dockets that that earlier discussion
23 would have taken place on February 24th. So you
24 have the original request in December of 2005, an
25 oral discussion on February 24th, and now a

1 follow-up letter on April 10th.

2 "Secondly, when we last met, we
3 discussed the service of a search
4 warrant on Branigan's Restaurant to
5 determine whether or not there would
6 be any evidence relating to the method
7 of payment by the accused for any
8 alcoholic beverages he may have
9 purchased. Since that discussion, I
10 have not had any information from your
11 office."

12 Now, I would ask you, Mr. Commissioner, to note
13 that reference in there to the fact that this
14 matter was discussed between them, and bear that
15 in mind when I get to Sergeant Carter's
16 explanation in a moment.

17 The fourth request, on April 20th, is
18 found on page 60 of the materials.

19 "In particular, we need to discuss the
20 proposed witness list and the warrant
21 on Branigan's Restaurant."

22 Now, unfortunately, as one of the many casualties
23 of my hurried attempt to be more efficient, I
24 failed to copy the relevant passages from Sergeant
25 Carter's testimony, or Chief Carter's testimony.

1 I'd ask you to turn, if you would, to his
2 testimony. It's found in volume 11 of the
3 transcripts which I understand, Mr. Commissioner,
4 you do have access to. I'm going to be looking at
5 page 2829, page 2829.

6 THE COMMISSIONER: I don't have those
7 transcripts with me, but go ahead, I'll make a
8 note of them.

9 MR. PACIOCCO: At page 2829, he is
10 asked if there's any reason why he didn't do that
11 or didn't tell the Crown that he didn't do it.
12 And he says:

13 "I didn't do it because I didn't have
14 the grounds to get a search warrant."

15 Further questioning of him established that he
16 never told Mr. Minuk why he didn't do it, he
17 simply failed to fulfill the request. And in
18 light of the clear references in the letters to
19 conversations about the warrant, it is highly
20 suspect that if he had reservations about the
21 legality of securing a warrant, that it would not
22 have been mentioned to Mr. Minuk.

23 It's always with great reluctance that
24 a submission is made that a witness has come up
25 with an explanation for an embarrassing

1 circumstance. But in my respectful submission,
2 the indications are that Sergeant Carter came up
3 with an explanation that he thought would explain
4 why he didn't go and get those records. Whether
5 it was an oversight, whether it was indolence, or
6 whether it was the arrogance to think that he
7 knows more about what the law of search warrants
8 is than a Crown prosecutor, part of whose function
9 is to give legal advice to investigators, this was
10 a significant and important violation of his
11 obligations as an investigator.

12 So, Mr. Commissioner, on the first
13 question relating to the investigation and East
14 St. Paul Police and the order-in-council, namely,
15 the correctness and adequacy of the procedures and
16 practices that were followed, you should in your
17 report join those witnesses who have testified
18 before you that this investigation was botched.
19 This investigation was done without organization,
20 without commitment, and without a coherent
21 strategy, and it contained a number of errors that
22 would have compromised the ability of any
23 prosecutor to try the impaired driving charge, and
24 certainly would have taxed the ability of the best
25 prosecutors to prosecute the refusal charge.

1 The second question relating to the
2 investigation that you are asked to consider is
3 the good faith objectiveness and professional
4 standards with which the procedures and practices
5 were applied and decisions made. Again, it's not
6 a finding that I'm happy to report, or a
7 submission that I'm happy to make, but in the case
8 of the East St. Paul Police, there were a number
9 of bad faith transgressions. It is no
10 professorial theory to suggest to you that the
11 evidence paints a complex but clear picture.
12 First, Harry Bakema decided not to assist in the
13 investigation on scene of Derek Harvey-Zenk.
14 Indeed, the evidence suggests that Harry Bakema
15 suppressed information of his own observations at
16 the scene. He failed to record those observations
17 or to acknowledge them.

18 The evidence will show that he did not
19 want to do so because Derek Harvey-Zenk was a
20 police officer known to him. The outstanding
21 issue is whether he did this because he didn't
22 want to be involved in ruining Derek Harvey-Zenk,
23 or whether he was actually trying to protect him.

24 There is troubling evidence to suggest
25 that he did it to protect Derek Harvey-Zenk from

1 prosecution. That is a serious finding, should
2 you choose to make it, and you should be aware
3 that there is other evidence that casts doubt on
4 that proposition.

5 In the end, whether it was done for
6 the purpose of not personally wanting to be
7 involved in ruining Derek Harvey-Zenk, or whether
8 it was done to try to protect him, this was a
9 serious breach of trust on the part of Harry
10 Bakema.

11 In the end it meant that he
12 effectively passed off to Jason Woychuk, Mr. Derek
13 Harvey-Zenk. And he gave him instructions, the
14 evidence will show, that lead to a massive charter
15 breach under Jason Woychuk's watch. No grounds
16 for the detention and an evident violation of
17 section 9 of the charter and the right not to be
18 arbitrarily detained. No right to counsel
19 afforded, contrary to section 10(b) of the
20 charter.

21 Harry Bakema then ensured that his
22 notes and Ken Graham's notes would interface. And
23 in the result, Harry Bakema produced a false set
24 of notes, and then came before this Commission to
25 deny that he had either collaborated with or even

1 used the information from Ken Graham's notes, when
2 that is a false denial and easily demonstrated to
3 be such.

4 Subsequently, Harry Bakema and Jason
5 Woychuk had a discussion. Harry Bakema wanted to
6 ensure that Jason Woychuk's notes would not betray
7 Harry Bakema's breach of duty, wanted to ensure
8 that their notes would intersect. And I will show
9 you, Mr. Commissioner, that they do.

10 Meanwhile, Jason Woychuk was disturbed
11 because he was the one left holding the bag on the
12 charter breaches, because of the instructions he
13 received from Harry Bakema. He was going to be
14 the fall guy. According to his evidence, he
15 discussed this with Harry Bakema and so the notes
16 were cooked.

17 On the evidence, Harry Bakema advised
18 Woychuk not to mention what Harry Bakema had said
19 to him about Harry Zenk's condition. And then he
20 helped Jason Woychuk attempt to overcome the
21 charter breach by giving him a non detention
22 function for transporting Derek Harvey-Zenk to the
23 station, the innocent assistance of bringing him
24 there so that he can complete a traffic accident
25 report. And he advised him not to make any

1 mention of alcohol that should have provoked an
2 earlier arrest. Because had Jason Woychuk had the
3 grounds at the scene, then the attempt to get over
4 the embarrassing charter breach that had occurred
5 would fail.

6 Now, ultimately Jason Woychuk does
7 make reference to alcohol in both his incident
8 report and his notes, but the way in which that
9 occurs confirms the directions and instructions he
10 was given.

11 Bakema, Woychuk and Graham were not
12 the only ones to cook their notes to fit their
13 agenda. Sergeant Carter changed his own narrative
14 report. He changed it in a way that would mesh
15 with Woychuk's evidence. He changed it in a way
16 that would overcome the charter breach.

17 In the end, all of them falsified
18 their notes and tailored them to meet their
19 various agendas and needs, rather than to reflect
20 what really happened. That is why I suggest to
21 you that there has, in this case, been a massive
22 breach of trust.

23 Now, with respect to Harry Bakema, he
24 failed to conduct an investigation to determine
25 whether Derek Harvey-Zenk had committed an alcohol

1 related offence. That is evident. That failure
2 did not rest on incompetence or oversight. He
3 would like, through his testimony, to trade on the
4 fact that Norm Carter had more experience than he
5 did, and that he hadn't done any impaired driving
6 cases since he got to the East St. Paul Police
7 Force. The fact is, Mr. Commissioner, that Harry
8 Bakema was a police officer of 32 years
9 experience. He had the evident acumen and ability
10 to rise to the rank of Platoon Sergeant with the
11 Winnipeg Police Service. Although he sought to
12 minimize it, as something that happened many years
13 before and was a qualification he never really
14 used, he was a trained breathalyzer technician.
15 And certainly his certificate would have expired,
16 but it is doubtful that the common sense
17 instructions he would have received would have
18 evaporated with that formal qualification. He
19 certainly would have known the basics of
20 investigating alcohol consumption in connection
21 with any accident.

22 And the failings of Harry Bakema are
23 of the most basic variety. Indeed, I'm submitting
24 to you that he failed to investigate is an act of
25 bad faith, a breach of duty that interfered

1 materially with the ability of Mr. Minuk to
2 prosecute the charges that had been laid. Indeed,
3 as I have suggested to you already, he not only
4 failed to conduct an integral investigation, he
5 suppressed evidence of his own observations.

6 On his own admission, when Harry
7 Bakema approached the truck of Derek Harvey-Zenk,
8 he knew of the need for a criminal investigation
9 into the cause of the accident. And he knew that
10 the truck caused the collision. Anyone would have
11 known that. The Beattie vehicle had damage to its
12 rear. It was obvious that Crystal Taman's vehicle
13 had been rear-ended. It wasn't the Beattie
14 vehicle that did it. Another vehicle down the
15 road, sitting in the snow at the side of the
16 ditch, was clearly the vehicle that had caused the
17 collision. And under examination, he acknowledged
18 that he would have to consider the importance of
19 examining a man to see if alcohol played a role.
20 He did not want to characterize it as an
21 investigation of impaired driving, but he
22 ultimately acknowledged that that's one of the
23 things he would have had to look for. Any
24 competent investigator coming upon an accident
25 scene on a straight road, with no apparent

1 explanation, is going to have to investigate the
2 possibility of alcohol. It is a far too common
3 scourge on our highways for that not to have
4 entered the head of someone conducting an
5 investigation.

6 On his own description of what took
7 place, as relayed to this Commission, he failed to
8 employ basic techniques for determining whether
9 Mr. Harvey-Zenk was impaired, techniques that are
10 catalogued in the East St. Paul policy that was
11 made evidence in this case, a policy he disclaimed
12 knowledge of. I have never seen that document
13 before. The Chief of Police of a small police
14 force.

15 He knew that this man was the driver
16 on his own evidence. He asked him and the man
17 nodded to him that he was. Yet he never asked the
18 man whether he had anything to drink. And the
19 explanation he gave for it is, with respect,
20 ridiculous. You'll find it in his testimony at
21 page 65, page 3355, page 65 of the materials
22 provided at line 21.

23 "Why didn't you ask him if he had been
24 drinking when he told you he was
25 driving the vehicle?"

1 This is at page 65, page 3355 in the upper
2 right-hand quadrant, line 21.

3 "Why didn't you ask him if he had been
4 drinking when he told you he was
5 driving that vehicle?

6 I didn't smell anything on him, that's
7 why I didn't ask him.

8 Sir, if you had smelled something, you
9 wouldn't have to ask him, would you?"

10 He claims that he never engaged the man in
11 conversation, even though that would have enabled
12 him to determine whether the man was slurring his
13 words or was otherwise affected. An investigator
14 of experience would have known to do that. And he
15 certainly had his entree, I'm a cop, according to
16 his evidence. Derek, his testimony before you was
17 he wasn't speaking, but his evidence was they
18 didn't try to get him speaking. Even if that
19 account is a credible one, which I will submit to
20 you it is not, he is acknowledging that he failed
21 to use a basic evidentiary and investigative tool
22 that he certainly should have.

23 He testified, and you'll find this at
24 page 68 of the document, that he never attempted
25 to observe Harvey-Zenk's balance or how he was

1 walking. He walked with the man, by his account,
2 some 50 yards. And I know his evidence was that
3 the man was distraught and he had his arm around
4 him and he was helping him along. But this was a
5 fatality and it was an evident fatality. He had
6 ample opportunity to see the capacity of Mr. Derek
7 Harvey-Zenk to walk. And on his own evidence, he
8 never took it.

9 Of course, Harry Bakema denies that he
10 failed to investigate the possibility that Derek
11 Harvey-Zenk was impaired or had committed an
12 alcohol related offence. He gave a careful
13 narrative that would explain why he made no
14 relevant observations, even though others may
15 have. He claims he tried to smell for alcohol but
16 couldn't get anything because of the cold. He
17 claims that he put Derek Harvey-Zenk in the back
18 of the cruiser with Woychuk and assigned Woychuk
19 the task of smelling for alcohol. None of that
20 evidence, in my respectful submission, is
21 credible. His careful narrative of what happened
22 was a false account fashioned to create the false
23 impression that he had a limited opportunity to
24 observe Derek Harvey-Zenk.

25 First, in my respectful submission, he

1 falsified the amount of time he spent with Derek
2 Harvey-Zenk. He did that in order to minimize any
3 suggestion that he should have made observations
4 of the man. If you look at page 118, and I have
5 to pull you that far forward, because once again I
6 failed to arrange for the photocopying of a
7 relevant page, but we capture it again at page
8 118, beginning over at page 117. You'll note that
9 he creates the time of 7:40, where he attended to
10 vehicle number 3 and noticed the male standing
11 beside the vehicle, and he makes his observations
12 about their interaction. And then he records at
13 the bottom of the page that he escorted him to RM2
14 due to the cold weather and his state of mind. He
15 at this time stated he was a cop. And then he
16 records the time of 7:42 on the next page, page
17 392, of the original materials.

18 "I then placed him in the rear of RM2
19 with Constable Woychuk in the front
20 seat."

21 You see, what he's done is he's described two
22 minutes, two minutes of interaction with Mr. Derek
23 Harvey-Zenk, two minutes. Two minutes is an
24 inherently preposterous time given that he had to
25 get to the vehicle, even with the brief

1 interchange he describes, and get back to the
2 police vehicle. But you don't have to rely on
3 common sense to conclude that the times he
4 recorded are inaccurate. There is no way it took
5 until 7:40 in the morning for Harry Bakema to get
6 over to that truck.

7 Now, he arrived at the accident scene,
8 and Your Honour will recall the controversy about
9 whether it really was 7:16, because the emergency
10 service vehicles were already there according to
11 his evidence, and they didn't get there until
12 about 7:18. But certainly 7:20, in that area it
13 starts to make sense. Constable Woychuk arrives
14 at 7:22 and he's already there. He'd want to get
15 to the driver of the third vehicle. On his own
16 account, the other two drivers were being attended
17 to by emergency service personnel. And he made
18 what can only be described fleeting visits to
19 their vehicles.

20 Now, any police officer understands
21 the importance of checking on the occupants of a
22 vehicle. And on his evidence, that's what he did
23 when he arrived. He went over to Beattie vehicle,
24 she was being attended to. He went over to the
25 Taman vehicle, she was being attended to. And

1 depending on what version you listen to, he either
2 went back to the Beattie vehicle briefly, or not,
3 noticed the truck and went directly there.

4 There's no way that took 20 minutes.

5 We secured a grudging admission from
6 him in cross-examination, which you'll find at
7 page 74 -- excuse me, page 70, at page 3251 at
8 line 5, page 3251, line 5.

9 "Let's go back to 7:40, sir. If your
10 arrival time is fairly accurate, based
11 on your description of what took
12 place, this time of 7:40 is pretty
13 inaccurate. Would you not agree with
14 that, sir?

15 Yes I do."

16 Page 3251 at line 5.

17 So his time to start the two minute
18 window is wrong, yet it's recorded in his book
19 with absolute clarity. 7:42, the end of his two
20 minute window. There's no way it was 7:42 when he
21 placed Harvey-Zenk in Mr. Woychuk's vehicle.
22 Selkirk Ambulance attendants, with the assistance
23 of their dispatch system, arrived at 7:38. You
24 heard the testimony of both Mr. Rosser and
25 Mr. Fontaine that they went directly to the

1 vehicle, having learned that that was the only
2 occupant of the motor vehicles who had yet to be
3 attended to. They estimated it would have taken
4 at most a minute to get there. 7:39, three
5 minutes before Mr. Bakema claims that he ever put
6 Mr. Harvey-Zenk in the vehicle. In fact, before
7 Mr. Bakema even claims he went over to see
8 Mr. Harvey-Zenk.

9 Now, Ken Graham claimed that Harry
10 Bakema was already over there dealing with
11 Harvey-Zenk when he had his conversation with
12 Chief Riddolls which he records at 7:23 in the
13 morning. We know that that time is not entirely
14 accurate because Riddolls didn't even arrive until
15 7:24. But given the narrative of events in the
16 early part of this situation, it's very likely
17 that it was 7:23, 7:24, in around that area, when
18 Harry Bakema is over there with Mr. Harvey-Zenk.
19 Although I wouldn't rely on Mr. Graham for much,
20 this narration comports with common sense and
21 context.

22 So Harry Bakema crafted a two-minute
23 window in his notes. And you have to ask
24 yourself, why would he do that? Why would he do
25 that? Then there was his attempt, in my

1 respectful submission, to minimize the length and
2 nature of the conversation that he had with Derek
3 Harvey-Zenk. He said that his interchange or
4 exchange with Mr. Derek Harvey-Zenk consisted of
5 but two clipped exchanges. You'll find them
6 referred to at page 71 of the materials. He asked
7 if Derek Harvey-Zenk was the driver. Derek
8 Harvey-Zenk nods his head. He asked Harvey-Zenk
9 if he was okay. Harvey-Zenk said yes. That is
10 the sum total of the conversation that Harry
11 Bakema reports, and he was adamant that that was
12 all that took place.

13 This description of the interaction
14 between the two men is fundamentally inconsistent
15 with the accounts of Kathy Beattie and Garth Shaw.
16 Kathy Beattie described how she was placed first
17 in one ambulance, and then removed from it and
18 transported in another. And she described how she
19 spent what she considered to be a long time
20 sitting in the front of the first ambulance. She
21 described how it was facing the truck and how she
22 watched. And she says at page 72 of the materials
23 handed to you this morning, at page 1329, line 12:

24 "It looked like they were standing,
25 talking or just by him. I couldn't

1 really -- I couldn't hear what they
2 were saying. It looked like a
3 conversation was happening."

4 Down at line 18 at page 1330.

5 "How close to him were they?

6 A I would be guessing. I would say
7 not too far away. They were in
8 conversation, this distance.
9 You are using your arms, Ms. Beattie,
10 in the witness box. Could I use the
11 old expression arm's length?

12 A Probably, yes."

13 Over on page 1332, she provides an estimate at
14 line 9.

15 "I would say 15 to 20 minutes maybe in
16 my mind right now. It's a long time
17 ago so it's really hard to tell."

18 Whether it was 15 to 20 minutes or some period
19 less extensive than that, she is describing a
20 significant exchange. And I'm fully aware that
21 her evidence was that there was more than one
22 person over there with Derek Harvey-Zenk, and that
23 is her memory of events, but it is clear that she
24 observed a conversation that went on for some
25 time.

1 Now, we know that she was not in that
2 ambulance when Harry Bakema arrived, because he
3 talked about her being attended to and he went
4 over there. She was not sitting in the front seat
5 of an ambulance waiting. And we know that on
6 Harry Bakema's evidence, he went over to
7 Harvey-Zenk's truck after attending to her. Now,
8 there is no possibility that a bunch of Winnipeg
9 Fire Service first responders clustered around
10 Derek Harvey-Zenk and just left him there. Her
11 observation of more than one person is unexplained
12 on the evidence you heard.

13 You will hear me submit later that Ken
14 Graham's description of his activities at the
15 scene is not a credible one, and there is every
16 possibility that he accompanied Harry Bakema over
17 to check on Mr. Harvey-Zenk.

18 Garth Shaw also confirms a
19 conversation of some length between the men. And
20 while he has one man, he allowed for the
21 possibility that it could be more than one. But
22 certainly his best evidence, his best recollection
23 was that it was one man with Derek Harvey-Zenk.
24 You'll find his evidence at page 73, line 13 at
25 page 1431.

1 "Q Sir, what happens when he gets out
2 of the truck?

3 A Again, they seem to be conversing
4 in, in a conversation.

5 Q When you say they, who are you
6 referring to?

7 A The driver of the truck and the
8 officer.

9 Q Okay. Can you tell us where they
10 were relative to the truck?

11 A He was still leaning up against
12 the truck, so that's where they were
13 having the conversation.

14 Q So I take it from your earlier
15 answers, that would be on the
16 passenger side?

17 A That's correct.

18 Q Sir, did you notice anything about
19 the conversation that you can share
20 with us? How long was the
21 conversation?

22 A About five minutes."

23 On the next page you will notice that in
24 re-examination I tried to deal with his evidence
25 that it could have been shorter, it could have

1 been longer. He says, it's a medium to lengthy
2 conversation. So Bakema's account of his exchange
3 with Harvey-Zenk is contradicted by independent
4 witnesses.

5 We don't know how long the
6 conversation was, nor do you have clear evidence
7 on how many people were engaged in that
8 conversation. Kathy Beattie didn't imagine
9 sitting in that truck watching a conversation. It
10 took place, and it was not the clipped, brief
11 exchange that Harry Bakema tried to present.

12 Harry Bakema also tried, in my
13 respectful submission, to diminish his opportunity
14 to observe by describing the posture of Derek
15 Harvey-Zenk in a way that would make it hard for
16 him to see the man's face, a man he knew, or to
17 make observations about his condition. He
18 presented this as a central feature of his
19 evidence. You'll notice at page 76 he is
20 presented with his response to Mr. Clifford at
21 line 21 of page 3245. This is what he told
22 Commission Counsel.

23 "So I walked up to him, and at that
24 time he was just walking around
25 shaking his head, and he had his head

1 down."

2 And the RCMP statement, or the statement that was
3 prepared, Your Honour will recall, and it's at
4 page 77, this statement was prepared but never
5 furnished to the RCMP as a result of the advice of
6 counsel, but it was a statement prepared in the
7 throes of an investigation of Harry Bakema into
8 the possibility of charges of obstruct justice.
9 In the middle of the page, the middle paragraph,
10 and at the last lines of the paragraph.

11 "I asked him if he was the driver of
12 the truck and he indicated he was.

13 This male was looking down."

14 During his testimony in the pages that I have
15 produced that follow, he describes how he had to
16 bend down to notice the blood on Mr. Harvey-Zenk's
17 face. He noticed that the man was bent over when
18 they were walking together. He describes how he
19 had to bend down when the man said "I am a cop" to
20 see his face. He says I tipped myself forward to
21 look at him.

22 The first observation I would want to
23 make, Mr. Commissioner, is that this description
24 is inconsistent with the evidence of Mr. Shaw
25 about the physical posture of the individuals as

1 the conversation was occurring. You will recall
2 that he had Mr. Derek Harvey-Zenk leaning up
3 against the truck.

4 At page 79 you will see Mr. Shaw's
5 description of how the gentlemen walked back
6 together, and it was not the bent over posture
7 described by Chief Bakema.

8 At page 1435, line 8.

9 "Q Now, you have used the word
10 escort. What do you mean by that?

11 A They were walking together.

12 Q Are you able to tell us in any
13 more detail how they were walking
14 together?

15 A The driver was slightly in front
16 of the police officer.

17 Q Did you notice any contact between
18 them?

19 A No, I did not.

20 Q Are you able to describe the
21 posture of the driver while he was
22 walking? Was he standing as he
23 walked? Was he bent over as he
24 walked? Was there anything?

25 A Standing, normal."

1 So the independent witness's account is
2 inconsistent with this hunched over gentleman with
3 an inaccessible face.

4 Chief Bakema's early notes before the
5 investigation of him began are inconsistent with
6 his description. Page 80, the time is 7:40 again,
7 and a passage we have already visited.

8 "Noticed male standing on driver's
9 side of pick-up."

10 From his narratives of the events that were
11 furnished both to Commission Counsel and to the
12 statement to his lawyer in connection with the
13 investigation, he featured the posture of Harry
14 Bakema in a way that would make him inaccessible.
15 There is no mention of that in his notes. The
16 only mention of the man's posture is that he was
17 standing.

18 Without question, Harry Bakema
19 doctored the narration of events in order to
20 minimize his opportunity to observe him. Why
21 would someone do that? Why would they describe a
22 two-minute window, a clipped conversation and an
23 inaccessible subject? He wanted to create a
24 picture of a limited opportunity to observe the
25 very things that I will submit later that he

1 observed, caused him to conclude that the man was
2 impaired, or possibly impaired, or maybe even
3 pissed. He provided this narrative to explain why
4 he would not have smelled alcohol on the man's
5 breath, when virtually every other person who
6 dealt with Derek Harvey-Zenk after him did, with
7 one exception.

8 That one exception is Paul Isaak, the
9 wellness officer. At page 81, you will see that
10 Paul Isaak does not say he did not smell alcohol
11 on Mr. Harvey-Zenk's breath. What he says at page
12 81 of the materials assembled for you at line 11.

13 "I can see the distinction there,
14 yeah.

15 Okay. Now, when you were with him,
16 did you smell any liquor on him?"

17 Answer by Constable Isaak:

18 "I certainly never, I didn't get close
19 enough to really smell his breath or
20 anything like that, no, I didn't."

21 Every other witness, Woychuk, Carter, Rosser,
22 Fontaine, even Pedersen smelled alcohol on this
23 man's breath, and Bakema's account was carefully
24 crafted to explain why he would not.

25 I think it's an appropriate time to

1 take a break, Mr. Commissioner.

2 THE COMMISSIONER: I think so. 15
3 minutes.

4 THE CLERK: All rise. This Commission
5 is in recess.

6 (Proceedings recessed at 10:46 a.m.
7 and reconvened at 11:02 a.m.)

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

10 THE COMMISSIONER: Mr. Jack and
11 Ms. Hanlin left us, Mr. Green is on his way.

12 MR. PACIOCCO: I won't be getting to
13 the Winnipeg Police Service for some time.

14 Continuing with Chief Bakema, he
15 claimed that he tried to smell alcohol, and he
16 tried to find this on the man's breath, and you'll
17 find the relevant passages at page 84 of the
18 materials I gave you.

19 In my respectful submission, that
20 claim is simply not credible. His notes record
21 nothing about putting Jason Woychuk, or putting
22 him in the car for the purposes of smelling the
23 breath of Mr. Harvey-Zenk, a point I'll come to
24 shortly, but they certainly say nothing about him
25 trying and failing to smell alcohol. If a police

1 officer attempts to smell alcohol on the breath of
2 a subject and doesn't, it certainly should be in
3 the notes, but it's not there.

4 And it appears, in my respectful
5 submission, that Mr. Bakema hoisted himself on his
6 own petard in terms of trying to limit his access
7 to the face of Derek Harvey-Zenk, he had himself
8 leaning over and bending over and walking with his
9 arm around the man. His description of events
10 makes it very unlikely that he would not have
11 observed the odour of alcohol that others did,
12 notwithstanding the cold temperature,
13 notwithstanding that it was a windy day. But most
14 importantly, his claim that he smelled alcohol, or
15 attempt to smell alcohol on Derek Harvey-Zenk's
16 breath is part of the narrative that he gave in
17 describing his communication with Jason Woychuk.

18 And it is a narrative, in my respectful
19 submission, it simply does not hold up. Quite
20 simply, it didn't happen. It's part of the claim
21 that he asked Jason Woychuk to see what he could
22 detect in the warmth of the police vehicle.

23 It's unlikely that, if Chief Bakema
24 really was investigating Derek Harvey-Zenk for
25 alcohol consumption, that he would have simply

1 passed him off to another officer like this,
2 especially an inexperienced officer like Jason
3 Woychuk. It was interesting to see the
4 progression in Chief Bakema's description of Jason
5 Woychuk's capabilities. At page 82, at the bottom
6 of the page, page 3350 of the transcript, it was
7 put to Harry Bakema.

8 "He was a green kid.

9 A Mr. Woychuk was a very eager
10 policeman and Mr. Woychuk, he had more
11 impaired driving arrests than probably
12 any policeman in that division."

13 And you'll recall Jason Woychuk's testimony about
14 his experience with impaired drivers, he had had
15 some indirect experience with Dakota before coming
16 over, and very few that he could describe.

17 "How many impaired driving arrests do
18 you think he had, sir?

19 Prior to this or after? Prior to this
20 he had some, I believe he had some
21 prior."

22 You contrast that with the response he gave when
23 he had to give an account for getting Sergeant
24 Carter out, over on page 83, the bottom of page
25 3385.

1 "Why would you want him to come to the
2 station when Carter comes in, sir?

3 A Well, he's got a gentleman in his
4 back seat of his car. As you
5 indicated earlier, he was a very young
6 officer, and I wanted to have somebody
7 a little more senior there that could
8 help him."

9 So at one point, Jason Woychuk is capable of doing
10 this, and at the other point he wants Mr. Carter
11 there to help Jason Woychuk, but that's an
12 incidental point. What is important,
13 Mr. Commissioner, is that this account of having
14 attempted to detect alcohol and putting him in the
15 car of Jason Woychuk to have Jason conduct that
16 investigation surfaced for the first time when
17 Harry Bakema was under investigation for
18 obstruction of justice. It has a self-serving
19 quality to it.

20 It's not just that it's not in his
21 notes. His account in his notes and his incident
22 report are inconsistent with this version of
23 events. And I take you to page 86 and then page
24 87 of the material I handed to you.

25 Now, clearly, if you're putting

1 somebody in a police car to have another officer
2 investigate their impairment, that's part of the
3 investigation, it's part of what you include in
4 your notes. Page 86 at the bottom of the page:

5 "Then escorted him to RM2 due to the
6 cold weather and his state of mind."

7 "Due to" describes why you did something. He
8 brings him over there, he says in his notes, due
9 to the cold weather and his state of mind.

10 There's no mention of this being done to assist in
11 the investigation of whether the man has alcohol
12 on his breath.

13 Then the next document that you have
14 in the package is the incident report that he
15 prepared. And you look over at page 89 of that
16 incident report, page 89 of the package you have,
17 it would be page 3 of the incident report, about
18 five lines from the top.

19 "Writer then escorted this male to RM2
20 where Constable Woychuk remained with
21 the male as he appeared quite
22 disturbed over the incident."

23 So there about five lines from the top of the page
24 you have another explanation as to why he brought
25 the man over. He appeared quite disturbed over

1 the incident is the explanation here.

2 So in his notes, and in his incident
3 report, not only do they not mention putting him
4 in Woychuk's car so Woychuk can smell his breath,
5 they give explanations that are fundamentally
6 inconsistent with that as being the reason.

7 And then you have Jason Woychuk's flat
8 denial, he didn't give very clear answers to much,
9 it was a lot of I don't remembers or I would have
10 done this. When he was asked whether he was told
11 by Harry Bakema to smell for alcohol, he said, no,
12 I didn't. He testified to a different version of
13 events. He testified consistently with the
14 disclosure he made to Carter that, in fact,
15 Mr. Bakema brought Derek Harvey-Zenk over and told
16 him not to do anything.

17 Bottom of page 91, right-hand side,
18 very bottom of page 2242 in the lower right-hand
19 quadrant:

20 "I believe first, when he first
21 brought him, he mentioned not to do
22 anything because Sergeant Carter at
23 the time was coming to the scene."

24 Bottom of page 92, right-hand quadrant:

25 "I guess at that point not to do

1 anything and wait for Sergeant Carter,
2 or Constable Carter at the time, to
3 come to the scene.

4 Page 93, another passage, this time up in page
5 2397, at line ten, upper right-hand quadrant, line
6 ten.

7 "What was being dumped on you?
8 The fact that Harry made an
9 observation and a comment to me and
10 advised me not to do anything and wait
11 for Sergeant Carter, and then at a
12 later point to deliver him to Sergeant
13 Carter."

14 So he was told not to do anything, according to
15 his evidence. Indeed, he testified that Harry
16 Bakema had in fact made observations that were
17 suppressed, and find no reference in any of Harry
18 Bakema's statements or notes or incident reports.
19 Jason Woychuk testified that when he was placed --
20 when Harry Zenk was placed in his car, Harry
21 Bakema said he was impaired or could be impaired.
22 And you find that at page 94, page 2229 of the
23 transcript at line 19.

24 "He made a comment to me that he could
25 be impaired or was impaired, I'm not

1 certain on which it was."

2 According to Carter, Woychuk told him at the time
3 of the disclosure of February 24th, 2006, that
4 Harvey-Zenk was pissed. And that there was
5 another conversation with Jason Woychuk where he
6 again used that term. And you will notice over on
7 page 97, and then back at page 96, the two notes
8 that had taken place. First at page 96, four
9 lines into it, it says:

10 "Said 47 told him Harvey-Morden-Zenk
11 pissed."

12 And over on the next page, 97:

13 "Again said 47 told him Morden-Zenk
14 pissed."

15 This time it's April 10th that we have Carter
16 recording that in notes that he took.

17 Well, Jason Woychuk said he didn't
18 remember the use of that word. He allows for the
19 possibility that he did, over on page 95 of his
20 testimony, page 2232, line nine.

21 "Sir, are you able to say whether
22 Chief Bakema used the term pissed when
23 speaking to you?

24 A No, I'm not."

25 Whether that answer is indeed on a fair reading an

1 allowance that that might have happened, or Jason
2 Woychuk's way of saying it didn't happen, I'm
3 asking you to find that it happened, that in fact
4 this comment was made, or at the very least
5 comments about impairment were made.

6 Now, I understand that Jason Woychuk
7 is a witness with his own significant credibility
8 problems. He gave inconsistent accounts of the
9 event. He revealed little independent recall of
10 events. He falsified his own notes. To be sure,
11 no one would want to build a case on the evidence
12 of Jason Woychuk as it related to this event. But
13 there are three things I would ask you to bear in
14 mind in assessing the credibility of this account.
15 First, when Jason Woychuk gave this account for
16 the first time, it was not a self-serving story.
17 It was part of an acknowledgment by him that he
18 had participated in falsifying his notes. He was
19 putting himself in great peril when he told this
20 story. It is a classic statement against his
21 interest. And while that doesn't guarantee its
22 truth, it's certainly an indication of
23 truthfulness. I'm not asking you to believe this
24 just because Jason Woychuk said it, I'm asking you
25 to believe it because of the circumstances in

1 which he said it.

2 Second, his subsequent conduct was
3 entirely consistent with the direction to do
4 nothing. That's what he did. He did nothing. He
5 didn't make any attempt to smell for alcohol. He
6 didn't even respond when a paramedic signaled to
7 him that this man, Harvey-Zenk, had been drinking.
8 He continued to do nothing.

9 Now, why would someone, a police
10 officer, not conduct an investigation when they
11 get that kind of heads up? Because he was told
12 not to do anything, not that he was told to smell
13 for alcohol. Instead he waited for Carter, until
14 his instructions changed. And then look at his
15 conduct when he gets to the station. He took the
16 man without handcuffs to the station in the back
17 of his cruiser. He left him in the car
18 unattended. And then according to Sergeant
19 Carter, he took Carter into a room and shut the
20 door before telling him he had a police officer in
21 his car. Those are not the acts of a man who has
22 been tasked with investigation. They are the acts
23 of a man who was tasked to do nothing.

24 Finally, there is circumstantial
25 support for his evidence. There is the relatively

1 minor observation that on Bakema's version, Carter
2 was called to the station. Woychuk said, no, he
3 was initially called out to the scene, and that's
4 what in fact the evidence shows. But of more
5 significance and far more significance is the
6 testimony of Cecil Sveinson. His evidence is
7 reproduced in relevant part at page 100 of the
8 material. In fact, I should have included the
9 next page, page 1606 as well, so I'm going to look
10 at volume seven of the transcript and refer you to
11 that, because it contains other information beyond
12 what is contained in your volume. The passage you
13 have is found at the bottom of page 1605. He
14 describes how he was shocked, speechless to be
15 told that the driver of the other vehicle was a
16 Winnipeg Police Service Officer. And then at line
17 18 he says:

18 "Yeah, we were quiet for a while. I
19 was crying. And then he let me, he
20 just let me do that, he didn't say
21 anything. And then I asked him, I
22 said was he? And I didn't even get it
23 out. And Chief Bakema said, pissed,
24 oh, yeah, we had to get him out of
25 here right away."

1 The next page, which you don't have in front of
2 you and you do have my apologies,
3 Mr. Commissioner, is page 1606. He was asked
4 whether those were the exact words. His answer
5 was, those are the words he used. And then he
6 repeats:

7 "Pissed, oh, yeah, we had to get him
8 out of here right away."

9 And he's asked, did you ask him any further
10 questions? And he says, no, I wish I did, I wish
11 I knew what he meant by we had to get him out of
12 here right away. I wish I knew what he meant by
13 we had to get him out of here right away. And the
14 significance of that evidence can't be lost. It's
15 certainly consistent with Bakema having made
16 observations about Mr. Harvey-Zenk, consistent
17 with what Woychuk claims.

18 And you can believe Cecil Sveinson.
19 Unlike the naked narrative so often heard in
20 courts, his testimony was imbued with emotion,
21 context, that give it the stamp of a truthful
22 account. This isn't an issue of misunderstanding.
23 Either he's telling you the truth or he has
24 fabricated his story. This is a truthful account.
25 One of the signs it's truthful is, if somebody is

1 going to make up an account, they are not going to
2 include a reference that they don't understand.
3 We had to get him out of there right away. He's
4 wondering, why did he say that? And he regrets
5 not having asked him that. That's not consistent
6 with a man fabricating a story and coming forward.

7 More importantly, Cecil Sveinson,
8 while certainly no doubt interested in pleasing
9 his family, was putting himself in a very
10 difficult and awkward position in coming forward
11 and giving the evidence he did. He's a Winnipeg
12 Police Service Officer who came in here and gave
13 testimony that was hostile to the testimony that
14 had been given, or was about to be given, by many
15 of his colleagues at the Winnipeg Police Service.
16 The significance of his evidence is obvious. It
17 confirms Harry Bakema's observations. It provides
18 support for the use of the term "pissed" as
19 recorded by Carter and attributed to Jason
20 Woychuk.

21 And there is another intersection
22 between their evidence that should not go
23 unnoticed. At page 112 -- no, 102 of the
24 materials prepared for you, Mr. Commissioner, you
25 have the initial version of Jason Woychuk's

1 incident report in which he explains why
2 Harvey-Zenk was transported, at page 102, in the
3 fourth paragraph:

4 "At 8:08 hours writer transported
5 Harvey-Zenk to the East St. Paul
6 Police office to get him away from the
7 scene."

8 Exactly the message communicated by Cecil
9 Sveinson.

10 Now, I'm aware that there were
11 questions posed to say, well, look, isn't it the
12 problem he was left at the scene for too long, not
13 that he was ushered away from the scene? He was
14 left at the scene until the ambulance attendants
15 came out of the vehicle, having inspected this
16 man, and signaling that he was, in fact had
17 consumed alcohol. At that point, he was removed
18 right away without question.

19 Harry Bakema not only failed to
20 conduct an investigation on this scene, he
21 suppressed his observations. Now, why would he do
22 that? You are aware from the evidence here, and
23 its a notorious world experience that the status
24 of the subject as a police officer can affect how
25 some police officers behave as witnesses or

1 investigators. You have that fairly eloquently
2 confirmed in the testimony of Chief McCaskill at
3 page 103, starting at page 4057, line 11:

4 "Would you agree with me..."

5 This is page 4057, bottom left-hand quadrant:

6 "Would you agree with me or disagree
7 with me if I was to suggest that
8 police officers tend to develop a very
9 strong bond of loyalty to one another?

10 A I would agree with that.

11 Q And it's very important that they
12 do, given the nature of work that gets
13 undertaken?

14 A That's true.

15 Q There has to be deep trust between
16 the officers in order to engage in the
17 very dangerous undertakings that
18 officers have to engage in?

19 A I would agree with that too.

20 Q And these were young officers as
21 you have described?

22 A Many of them were.

23 Q And just so I understand your
24 evidence, did it not go through your
25 mind that there might be a reluctance

1 on the part of some of these officers
2 to be truthful, the way that any
3 witness is meant to be when talking to
4 investigators, and that you wanted to
5 make it clear that it is your
6 position, as their supervisor, that
7 their first loyalty is to the truth
8 and not to the uniform?

9 A I felt that there might be some
10 reluctance to tell all the facts. I
11 was only doing that based on my belief
12 that they perhaps felt they wouldn't
13 be supported, and coupled with that my
14 expectation is that officers would
15 tell the truth and I wanted to get
16 that across. It was so vitally
17 important."

18 I understand those comments were made
19 in the context of the officers who were going to
20 have to testify perhaps about their own activities
21 on the night in question. It's confirmation of
22 the loyalty. And you saw it in the evidence that
23 was presented to you in many ways. You saw
24 Constable Graham's suggestion that Woychuk told
25 him that he didn't want to be responsible for

1 ruining another officer's life. He didn't want to
2 have what was referred to as a bad reputation.
3 You'll find those passages at page 104, a bad
4 reputation. The mere fact that an officer can
5 consider that testifying about another officer or
6 implicating another officer can give you a bad
7 reputation shows that there's something to this
8 concern. And then you have the event that
9 occurred when Constable Maloney was waiting to
10 testify, or where Constable Graham approached him:

11 "Maloney, Maloney, you guys are
12 nothing but a bunch of fucking
13 traitors."

14 Sergeant Carter related the concern to this
15 specific file when you asked him,
16 Mr. Commissioner:

17 "Was it the kind of file nobody wanted
18 to touch?

19 This one, this one was.

20 Was that because Harvey-Zenk was a
21 police officer?

22 That's possible, yes, sir."

23 The stature of Harvey-Zenk as a police officer
24 featured large in this event. Bakema told Woychuk
25 he was a cop. Harvey-Zenk was not handcuffed when

1 he was transported. Woychuk took Carter into a
2 room and shut the door. Bakema communicated with
3 the Winnipeg Police Service. Carter, in the PSU,
4 is calling -- a wellness officer comes down, he is
5 allowed in the cell. The man was permitted to
6 call his mother. Harvey-Zenk's status as a police
7 officer was the wallpaper that hung in the room
8 where relevant events occurred.

9 The instant question, of course, is
10 what impact did this have on Chief Bakema? What
11 impact did Harvey-Zenk's stature and his personal
12 familiarity to Chief Bakema have? There are three
13 reasons why you should conclude that it influenced
14 his conduct on that day.

15 First, you have evidence that Harry
16 Bakema was deeply troubled by the situation
17 Mr. Harvey-Zenk was in. You will recall the
18 testimony of Constable Pedersen. I have
19 reproduced it at page 107 for your assistance.
20 She testified that Chief Bakema seemed to dwell on
21 the terrible consequences of the accident for the
22 accused and how it would ruin the life of a police
23 officer. You will recall the evidence of Sergeant
24 Poole, again made available to you at page 108,
25 that Harry Bakema was upset with the fact that the

1 status of the accused as a police officer was
2 released, even though his name was not. And
3 Sergeant Poole went on to explain how some police
4 officers feel that their status as police officers
5 is not a relevant consideration. So you have
6 evidence before you that Bakema is troubled by
7 this.

8 At one point during his
9 cross-examination, Mr. Bakema agreed, he said, and
10 you have the passage at page 109:

11 "I guess dealing with the policeman, I
12 would have little concern that I would
13 rather not deal with a policeman."

14 Now, you have Harry Bakema's actions
15 which I submit to you are suspicious. His records
16 do not record that he knows Harvey-Zenk. His
17 notes made at or around the time of the event
18 don't make any reference to the fact that
19 Harvey-Zenk is a police officer. There is no
20 record in his notes of the seizure of a police
21 uniform, nor is there any record in the notes of
22 Constable Graham. That appears only subsequently
23 in the incident narrative that is made after they
24 are back at the station and it's pretty clear that
25 it's all going to come out. The man has been

1 arrested, he's going to be charged. But also of
2 significance to you, Mr. Commissioner, is that
3 Mr. Bakema sought to minimize the fact that he
4 knew Derek Harvey-Zenk. If you look at page 110,
5 his answer at page 3290 of the transcript, line
6 two:

7 "I didn't really know Derek."
8 I didn't really know Derek. Now, if Derek had
9 done something to make him famous, I'm sure that's
10 not the way he would have expressed it. I know
11 Derek is what you would have heard. These are men
12 who worked in a small physical space on shifts
13 that would collide when being changed, and there
14 are overlap days. He's a ranking officer in the
15 platoon. And you will remember Cecil Sveinson's
16 evidence that you get to know the people you work
17 with, even if they are on another platoon,
18 especially the people who are in positions of
19 authority, ranking officers. You have Chief
20 Bakema telling you, I only knew his name was Derek
21 because he has a strange name. When asked if he
22 would recognize him, he said I don't recall seeing
23 him for a long time before I left. He talks about
24 having 20 guys in the platoon, as though that's a
25 an impediment to being able to recognize someone.

1 These gentlemen worked out of the same small
2 office for over a year, at least 14 months
3 according to testimony of Harvey-Zenk.

4 Now, why would he try to minimize his
5 familiarity with Derek Harvey-Zenk? Why would he
6 try to minimize his involvement with Derek
7 Harvey-Zenk? Why would he put him in a police car
8 and say to a junior officer, do nothing. He
9 failed to act and he suppressed his own
10 observations because Derek Harvey-Zenk was a
11 police officer known to him.

12 And as I indicated when I began
13 looking at this, the question remains whether this
14 is a case of Harry Bakema having attempted to
15 assist Harvey-Zenk, or whether it's just an
16 attempt on the part of Harvey Bakema to ensure
17 that he would have to be no part of what was about
18 to happen. Regardless of which of the two it is,
19 they are not flattering and they both involve bad
20 faith and a lack of objectivity. But I will say
21 this, there are grounds to be highly suspicious
22 that Mr. Bakema was attempting in the early
23 moments of this investigation to help Derek
24 Harvey-Zenk, including first his direction to
25 Woychuk to do nothing. Secondly, his comments to

1 Cecil Sveinson that seem consistent only with an
2 attempt to protect the man. Third, and perhaps
3 most troubling was his subsequent conduct. If he
4 was simply intent on staying out of this, there
5 would have been a clear assignment of the file to
6 Sergeant Carter, instead of a failure to assign
7 the file. He would not have entered himself as
8 the investigator and reviewer. He would not have
9 directed Woychuk to do interviews, he would have
10 stayed out of it.

11 The on-scene failure to investigate
12 and the suppression of the observations that lead
13 him to say that the man was impaired, or possibly
14 impaired, or perhaps even pissed, are arguably
15 more consistent with Harry Bakema initially
16 attempting to protect Harvey-Zenk, and then after
17 realizing that that's not possible because charges
18 had been laid, participating in maintaining some
19 continued control over the investigation. But
20 there is one thing that should cause you pause,
21 Mr. Commissioner, before making that conclusion.
22 He and Sergeant Carter were not friends, and from
23 the get-go, the evidence you have shows that Harry
24 Bakema was going to involve Carter. Now, would he
25 do that if he was really trying to protect

1 Harvey-Zenk?

2 Regardless of the conclusion you come
3 to, the decision to refrain from investigating the
4 alcohol offence and to suppress his own
5 observations was done in bad faith, was clear
6 misconduct on his part.

7 This lead to the falsification of his
8 notes. The larger problem isn't that he had two
9 set of notes, it's the final set of notes. His
10 testimony about making these notes, the cold pens
11 not writing and the vacillation about where they
12 were is risible. I'm not going to belabour the
13 point about where he made the notes. The bottom
14 line is, they were clearly crafted in a way that
15 would minimize his opportunity to observe
16 Harvey-Zenk and to avoid any reference to
17 Harvey-Zenk's alcohol consumption or his status as
18 a police officer.

19 We have already looked at the 7:40 to
20 7:42 window, note the failure to record
21 Harvey-Zenk as a police officer, the failure to
22 record the seizure of the uniform, the failure to
23 record the smell of alcohol in the vehicle, the
24 failure to record any observations that would have
25 lead him to tell Woychuk the man was possibly

1 impaired or impaired. Those notes were clearly
2 crafted in collaboration with Ken Graham.

3 When asked about this, you will recall
4 that Harry Bakema denied it. Page 112, I have
5 included that passage from the transcript.

6 "Sir, I am suggesting that you worked
7 on your notes with Graham, or
8 alternatively, you took Graham's notes
9 to make your own?

10 No, I did not."

11 One need only look at exhibits 148 and 149 to see
12 that this testimony was inaccurate. Exhibit 148
13 is found at page 113, and that is the document
14 that I prepared, and the original exhibit has the
15 colouring which makes it more evident of details
16 found in the final notes, not found in the
17 original on-scene notes. Mr. Bakema's notes
18 contain a plethora of precise information, licence
19 numbers, exact times, makes and models of
20 vehicles, it's not found in his original notes.
21 He got that information somewhere and it certainly
22 wasn't lodged in his memory.

23 Exhibit 149 found at page 121 shows
24 where those notes' details came from. That
25 excerpt which was prepared, sir, was coincidental

1 details found in Graham's on-scene notes and not
2 found in Bakema's on-scene notes, and the overlap
3 is staggering, not only in terms of content, but
4 they record the same errors, the same times. The
5 7:16 arrival time, highly unlikely given their
6 evidence, they both arrive at it. One says he got
7 it off the dashboard clock, the other off his
8 watch. Yet it's wrong. We know it's wrong from
9 the records of the responders. They both make the
10 same mistake. 7:23 arrival of the East St. Paul
11 Fire and First Responders, their dispatch records
12 show they arrived at 7:24, but both of these
13 officers have it at 7:23. They both record the
14 departure of the ambulance at 7:39, but the
15 dispatch records show it happened at 7:43. Then
16 you have the misspelling of Blandford as Landford
17 in both of their notes. These notes were done in
18 concert.

19 As for Ken Graham, in his notes, he
20 either collaborated with Bakema or Bakema took his
21 notes to make his own, but there was likely
22 collaboration at the scene. There was ample
23 opportunity to do so, in spite of the protests
24 that how busy these gentlemen were. Somebody was
25 making phone calls to a car dealer.

1 Constable Maloney came before you and
2 testified, volume ten at page 2593, and he tells
3 you that he had observed these men collaborating
4 on making their notes in the past. There is no
5 evidence about this particular occasion, but
6 certainly there's no aversion, based on the
7 evidence of Maloney, to that having happened
8 between these gentlemen.

9 Ken Graham, of course, was not a
10 witness who was forthright with you. He distanced
11 himself from Harvey-Zenk claiming no dealings with
12 him. Yet you will recall that when Harry Bakema
13 was testifying, he put Graham at Woychuk's
14 vehicle, when Bakema walked Harvey-Zenk over.
15 Now, Bakema's account was that Graham took off at
16 that point because the kids had arrived. But the
17 testimony of Tara Taman is clear that Harvey-Zenk
18 was still at the vehicle when they were sitting in
19 a police car. So it didn't happen that way.
20 Constable Graham had much more to do with these
21 circumstances than his evidence allowed. And that
22 might explain why Kathy Beattie had more than one
23 officer with Harvey-Zenk at the truck. It seems
24 unnatural in the circumstances that Graham, who
25 was not directing traffic, would not have walked

1 over and joined Harry Bakema at the truck when he
2 was there for that prolonged period of time
3 dealing with Harvey-Zenk.

4 What we do know is Graham's notes were
5 suspicious. They don't record the discovery of
6 the uniform. He never records a smell of alcohol
7 on his vehicle, the same omissions that occur in
8 Bakema's notes. Those details only end up in the
9 incident report later, after, as I say, the cat's
10 out of the bag.

11 What about Woychuk's notes? The
12 evidence shows that his notes and his incident
13 report have also been falsified. And the evidence
14 and his testimony support a finding that they were
15 falsified under the influence of Harry Bakema.
16 Woychuk variously attributes specific influences
17 to Bakema, and he had testified that the changes
18 were made for two reasons. I'm going to take you
19 to page 129 of the material that was assembled for
20 you. At tab 14, starting at page 2330 in the
21 bottom right-hand quadrant at line three:

22 "Woychuk: Well, I guess my impression
23 would be that probably to align what
24 they wrote, or what Harry wrote in his
25 notes."

1 That's what he tells the RCMP of the direction
2 he's given, to align the notes. And then you'll
3 notice up on line 21 on page 2329, also found at
4 page 129:

5 "What impression were you getting
6 about the directions relating to your
7 notes? What would the purpose have
8 been for those discussions and
9 recommendations or directions,
10 whatever they were?

11 A To make up for the time delay and
12 for the reason for transporting."

13 So you've got two objectives; one to
14 align the notes, and second to make up for the
15 time delay and the transporting. He testified
16 that he was told specifically that he was to admit
17 from his notes what Harry said at the vehicle
18 about Harvey-Zenk's impairment. You'll find that
19 at page 130, again, in his interview with the RCMP
20 at the bottom of page 2324, starting at line 20:

21 "So, like I don't recall if anyone
22 told me, if Harry would have told me
23 to put that or not. Like the things I
24 recall, or what the ambulance driver
25 said, and then obviously not putting

1 anything in there about what Harry
2 said about he could be impaired."
3 Now, before you he disclaimed any memory of that,
4 but his evidence was to the RCMP pretty obvious to
5 him that that's what he had been told.

6 In addition, he was told, as you'll
7 see at page 2323 in the upper left-hand quadrant
8 of that same page, page 130. He was told not to
9 mention Ted Rosser, the Selkirk ambulance
10 attendant.

11 "Okay. So the comments about alcohol
12 smell, whether he gave you a sign or a
13 motion?

14 Yes, sir.

15 And what discussion ensued as a result
16 of you mentioning that?

17 I was told that I didn't need to put
18 that in my notes."

19 Over on page 131, in the upper
20 left-hand corner of page 131, line two:

21 "All right. And what happened?

22 I was told that I was transporting him
23 to complete a traffic accident
24 report."

25 And again, in the context, that's a

1 claim that Harry Bakema told him to put that he
2 was transporting him for a traffic accident
3 report.

4 Now, these claims are verified by the
5 progression of his notes and the narrative report.

6 First the notes, Jason Woychuk's notes
7 omit any reference about Harvey-Zenk's status as a
8 police officer, just as Harry Bakema's and Ken
9 Graham's do. They omit all reference to alcohol,
10 at least in their original incarnation, and I will
11 show you that in a moment. There is no reference
12 to what Harry said about Harvey-Zenk's impairment.
13 No reference to the ambulance attendant telling
14 Woychuk about the smell of alcohol. No reference
15 in his notes about even the unsteadiness seen at
16 the station. The only reference of alcohol in
17 Woychuk's notes is found at page 605 of E-2.25.b.
18 You'll find the reference at page 132 in the
19 materials I have assembled for you. If you take a
20 look at his notes at page 808, and you see written
21 in there "odour liquor slight." It is,
22 Mr. Commissioner, evident that that was added
23 later and was not in his notes when he originally
24 prepared them.

25 If you go through his notes, including

1 the pages that are not before you now, you will
2 notice that between each change of observation and
3 each time, and each theme, there is a space. The
4 only place that pattern is broken is between 8:08
5 and 8:12, where you see no space and the space is
6 filled "odour liquor slight."

7 If you turn the page to 133, you will
8 see a passage from the protocol used by East St.
9 Paul Police with respect to notetaking. And at
10 point number 3:

11 "Do not leave unnecessary blank
12 spaces. For neatness, a line or two
13 should be left between different
14 entries, especially those made on
15 different dates."

16 If you look at Woychuk's notes, that's what he's
17 doing, he's doing as he is taught. He leaves
18 those spaces, until he has to fill something in.
19 And what he puts in is "odour, liquor slight."
20 And it is significant where he puts it in. He's
21 10:17 to the East St. Paul office, he's en route
22 when he puts that in.

23 In my respectful submission, it's not
24 tenable or credible that Woychuk smelled alcohol
25 for the first time en route to the station while

1 driving. He was in and out of the police car with
2 Harvey-Zenk. He had received information from an
3 ambulance attendant about the smell of alcohol.
4 He had taken documents from him. It is highly
5 unlikely that the first odour of alcohol comes,
6 cold or no cold, sucking Halls or not sucking
7 Halls, comes as he's en route.

8 The significance of that,
9 Mr. Commissioner, is if he smells it en route,
10 then it's not a charter problem, because he
11 couldn't be expected to pull over and deal with
12 the man until he got to the station. If he smells
13 it on scene, it's a charter problem.

14 The subsequent assertion of alcohol
15 after he leaves the scene is not the only
16 falsification of his notes. He records the same
17 verifiably false time as Bakema's notes do for
18 putting Harvey-Zenk in his cruiser, 7:42. It is
19 inconceivable that two men can by coincidence
20 happen to make the same manifestly false error as
21 to the precise time. That time, 7:42, is as if
22 Harry Bakema signed his notebook because that was
23 the tail end of Harry Bakema's false two-minute
24 window for making observations of Derek
25 Harvey-Zenk. The only overlapping time or event,

1 according to the notes prepared by this man,
2 wherein Harry Bakema interacted with Jason Woychuk
3 was when he put Harvey-Zenk in the vehicle. It's
4 the only place where their notes had to intersect.
5 And they intersect with an error, 7:42.

6 The incident narrative also assists in
7 betraying the truth of Bakema's influence. At
8 page 134 and 135, you will see the progression of
9 those incident reports. You'll notice the
10 February 26th version, there is no indication of
11 alcohol, none. And the reason for transport is to
12 get the man away from the scene.

13 Now, if you'll look over at page 135,
14 at 8:08 hours:

15 "Writer transported Harvey-Zenk to the
16 East St. Paul Police Office to process
17 an accident report."

18 There is your TAR.

19 You also see on February 27th at page
20 136, the interjection, the very careful
21 interjection of alcohol observations for the first
22 time. And I say careful because it says, at 8:08
23 in the new addition:

24 "En route to the ESP office writer
25 detected a slight odour of alcohol

1 coming from Harvey-Zenk."

2 Again, it's en route. It's at a time when it's
3 not going to cause charter problems. And you will
4 remember that one of the motivations described by
5 Woychuk for Harry Bakema's advice was to help him
6 get over the delay problem he had. At 8:12:

7 "Writer also advised Sergeant Carter
8 that slight odour of liquor was
9 detected from him."

10 We're going to see later that in Carter's first
11 narrative report that's not what he records as
12 being told. He records being told that the man
13 had been drinking and he was intoxicated.

14 And then you have walking into the
15 office, he appeared to be unsteady on his feet.
16 Again, a sign of impairment but observed at a time
17 when you get over the delay difficulties. His
18 notes are entirely consistent and the progress of
19 his incident report is entirely consistent with
20 the advice he was given by Bakema.

21 And then there is Norm Carter's
22 accident report, narrative report. It's evident
23 that Norm Carter ultimately changed his own
24 incident narrative. If you take a look at page
25 137 at tab 15, 8:12, that's the time Woychuk

1 arrives back at the station.

2 "8:12 hours Constable Woychuk attended
3 to the station and advised that he had
4 male subject in the rear of RM2 who
5 was involved in the accident that has
6 resulted in one fatality of a female.
7 Information received from Constable
8 Woychuk was that this subject had been
9 drinking and was believed impaired,
10 and that he had refused medical
11 attention."

12 This timely note, in my respectful submission, is
13 likely what Carter was told. The problem with
14 that version, though, is that it discloses a
15 charter breach. It discloses that Woychuk would
16 have had reason to arrest Harvey-Zenk at the
17 scene. There were observations about drinking and
18 conclusions about impairment. He would have had
19 to have given Harvey-Zenk the right to counsel on
20 the version that had been recorded by Carter.

21 Turn over please to page 138? This is
22 a version done on March 1st by Carter, where he
23 removes all that information, and this is what he
24 writes:

25 "8:12 hours, Constable Woychuk

1 attended at the station and advised
2 that he had male subject in the rear
3 of RM2 who was involved in an accident
4 that has resulted in one fatality of a
5 female. The subject had declined
6 medical attention at the scene and was
7 being transported back to complete a
8 TAR. Information received from
9 Constable Woychuk was that he detected
10 a slight odour of alcohol from this
11 subject en route to the station."

12 So voila, presto, you have a charter-proof version
13 of events recorded on March 1st to replace the
14 charter problematic version of events that was
15 recorded on the day that Mr. Harvey-Zenk was
16 brought in.

17 Now, you have to remember,
18 Mr. Commissioner, that these historical records of
19 the incident reports are not disclosed to the
20 Crown. They are not disclosed to defence counsel.
21 They were secured as a result of the persistence
22 of Mr. Clifford in trying to see whether there
23 could be prior versions.

24 Commission Counsel has considered
25 carefully whether perhaps Sergeant Carter was

1 simply trying to just record Woychuk's version.
2 But two things present serious problems to this
3 conclusion. First, this is an incident narrative,
4 not an incident report. And you will notice that
5 at the heading on page 139, it is an incident
6 narrative. And over on page 140, you'll see
7 Carter explaining the significance, the difference
8 between an incident narrative and a narrative
9 report, or an incident report rather and a
10 narrative report. Now, he's very clear that a
11 narrative report records your own observations,
12 the incident narrative, where the incident report
13 generates the investigative document.

14 Now, you read it through, read his
15 incident report through, I didn't produce the
16 whole -- incident narrative rather through. I
17 didn't produce the whole thing at page 189, but
18 you'll notice almost every observation he makes,
19 writer informed, writer advised, writer attended,
20 writer read, writer noted, writer had requested,
21 everything in there is his own observations. He's
22 not purporting to record Woychuk's observations.

23 Second, the event that changed was a
24 conversation he was a party to, he was a witness
25 to. He had firsthand knowledge of what took place

1 when Woychuk brought this man in. The fact that
2 Woychuk now changed his version doesn't leave any
3 room for the suggestion that Carter is going to
4 say, oh, well, maybe I was mistaken about what I
5 heard you say. You will recall that he was firm
6 in what he knew. When he noticed that Woychuk
7 claimed to have delivered Harvey-Zenk to a place
8 in the station different from the one that Carter
9 knew to have been a proper location, he approached
10 Woychuk about that. And as a result, Woychuk
11 accepted that he was wrong. This is not a case of
12 Carter saying, well, maybe I was wrong about what
13 I witnessed and therefore I'll change my report.
14 He falsely altered his incident report, and he did
15 it to help pave away a charter breach.

16 And we are aware that he caused the
17 investigation by Mr. Tramley to be done at the
18 East St. Paul Police. And that may be a reason to
19 give you pause to whether he did this on purpose.
20 Why would he bring in somebody to it do an audit
21 that might uncover his own wrongdoing? But bear
22 in mind that the information that would reveal
23 Carter's actions was buried in the computer file,
24 not in the investigative file.

25 With respect, you have bad faith, non

1 objective misconduct by four members of the East
2 St. Paul Police. This is not just a badly
3 conducted investigation. When you answer the
4 question of whether this investigation on the part
5 of East St. Paul was conducted objectively and
6 with good faith, it's our submission to you that
7 the answer has to be an unequivocal no.

8 I'm going to move on now to the
9 Winnipeg Police Service Professional Standards
10 Unit investigation. Now, there was much
11 questioning about whether it was an appropriate
12 decision to make to bring the Professional
13 Standards Unit in. It is the conclusion of
14 Commission Counsel that all of those who
15 participated in the decision to involve the
16 Winnipeg Police Professional Standards Unit acted
17 reasonably in bringing them in. Given the ethic
18 and the habits and the role of the Professional
19 Standards Unit of investigating police officers
20 within the Winnipeg Police Service in connection
21 with criminal events, it is a custom or a
22 practice, and it is not surprising that it was one
23 that did not cause any alarm on the part of those
24 familiar with it.

25 Having said that, in our view from the

1 perspective of the appearance of justice and
2 impartiality, it is highly regrettable that the
3 investigation of Mr. Harvey-Zenk's activities
4 leading up to the accident was done by the PSU.
5 This in part has permitted unsubstantiated
6 conspiracy theories to be launched in which the
7 claim was made that the ESP and PSU collaborated
8 to hide evidence of Harvey-Zenk's criminality.
9 Now, there's no basis for that. But this was an
10 internal investigation and it's a measure of the
11 perils in terms of appearances when this kind of
12 thing happens. And although there was no
13 malefices or bad faith in connection with the PSU
14 investigation, the manner in which it was
15 conducted opened the door a crack for that kind of
16 unsubstantiated speculation.

17 At the best of times, an internal
18 policing system is weighed down by divided
19 loyalties and conflicts of focus. The police
20 associations have secured for their members
21 procedural protocols that are not accorded to
22 other witnesses. You heard that police officers
23 are given at least 24 hours notice so they can
24 consult with their union representatives.

25 You will recall Sergeant Girard

1 testifying, and it's reproduced at page 142, that
2 he felt it was a good thing to "let things soak
3 in." He had difficulty explaining why he would
4 have put those words there, but lay witnesses are
5 not given time to let things soak in. And the
6 soak-in period in this case gave enough time for a
7 shift briefing at which Sergeants Anderson and
8 Humniski most inappropriately shared what they
9 expected the questions to be with the assembled
10 platoon. You will remember the testimony of
11 Constable Michalik to that event, and it is
12 recorded at page 143 and 144 of your materials.

13 No investigator would telegraph in
14 advance the questions that will be asked of
15 witnesses. And regardless of the motivation for
16 which it was done, or how evident it was that
17 those officers could have figured out for
18 themselves what they were going to be asked, it
19 was profoundly inappropriate for these sergeants
20 to take that initiative in connection with an
21 investigation, and it was only because it was an
22 internal investigation that that happened.

23 In terms of special treatment, police
24 officers are interviewed on the job. And as in
25 the case of Constable Bauer here, their holiday

1 schedules are accommodated. Now, while
2 investigators may well accommodate lay witnesses
3 and try and not to inconvenience people too much,
4 we're talking about a systemic practice here that
5 creates unhealthy expectations. We heard
6 questions about the obvious urgency of securing
7 information as soon as reasonably possible. This
8 is not a healthy paradigm in criminal cases.

9 Third, we have police officers being
10 cautioned about the potential use of their
11 evidence. Civilian witnesses are not cautioned
12 unless they are suspects, and then only because
13 they have legal rights not to answer. Why caution
14 officers? The truth is the truth.

15 Commission Counsel is fully aware that
16 police officers are duty bound to answer questions
17 and civilian witnesses are not. Yet don't put too
18 much into that. These officers have a duty, a
19 moral duty, simply by virtue of their oath to
20 assist in the administration of justice. Fully
21 aware that the careers of police officers can be
22 affected by the answers they give, only when it
23 affects their own conduct. The same remains true
24 of many individuals subpoenaed into courts on a
25 daily basis, who are made to answer questions

1 about their conduct.

2 If you want to indulge those interests
3 in a purely administrative investigation, fine,
4 that's understandable. It's an investigation
5 about the conduct of the person relevant to their
6 job. But when criminal investigations are at
7 stake, priorities change. Union and professional
8 sensitivities have nothing to do with it, only the
9 public interest and effective administration
10 should animate the protocol that is utilized.

11 So the way in which the investigation
12 is done is troubling just from an appearance point
13 of view. And then there's the reality that in
14 internal investigations, there is bound to be
15 divided objectives and loyalties. Sergeant Girard
16 was frank and candid when he said this, and you'll
17 find it at page 145, at page 5397 at the top right
18 of page 145:

19 "In professional standards it has to
20 be a balance, because one of the
21 things that I was told was that we are
22 not -- let me just think about the
23 right way to word this. In order we
24 basically had four stakeholders that
25 we were serving in the sense of our

1 duties, that being the citizens of
2 Winnipeg, the city, the Service and
3 our members. So we had to make sure
4 that there was a balance and we did
5 things the right way to maintain
6 credibility of all those groups. It
7 was difficult to do the work if you
8 don't have any credibility."

9 Well, I'm not impugning bad faith to anyone when I
10 point out that this is a criminal investigation.
11 The paramount duty is to solve the case and not
12 worry about the Service, the members, and how they
13 might react to what you're doing. It was about
14 finding the truth and using the most effective
15 investigative techniques possible. Now, that
16 answer unfolds the reality of internal
17 investigations.

18 Now, Sergeant Girard testified that
19 the search for credibility had two concrete
20 implications in this investigation. Page 146, you
21 will see where it played into the decision to give
22 these officers 24 hours notice. At page 5331,
23 immediately after having been asked on page 5330:
24 "So you were following now the
25 internal procedures that are normally

1 in place or the protocol that's
2 normally in place for PSU
3 investigations even though you were
4 assisting East St. Paul in their
5 criminal investigation?

6 Yes. It is important that we remain
7 consistent in how we deal with the
8 officers."

9 Over on page 147, the second implication, Staff
10 Sergeant Girard, or Sergeant Girard rather, was
11 confronted with an answer he gave to Commission
12 Counsel at page 5395.

13 "Now, line 16 at page 43 you say, and
14 one of my concerns thinking back on
15 this now is that they were witnesses
16 so I wasn't going to push it too hard.
17 Yes. So he made the decision because
18 the people you were interviewing were
19 not subject or suspect officers, you
20 weren't going to push them, you were
21 just going to get them to narrate
22 their information and you weren't
23 going to probe it in any aggressive
24 way, sir?

25 A I was going to treat them the

1 same as I would any other witnesses
2 coming in. One of the things that
3 over my time in Professional Standards
4 that I was told when I got, and I
5 learned it subsequently in the three
6 years that I was there, that it's very
7 important to maintain consistency in
8 order to maintain the credibility. I
9 mean, we don't want to be treating,
10 like if someone is coming in as a
11 subject officer, we try to treat them
12 all in the same manner. And if
13 someone is coming in as a witness
14 officer, we try to keep it consistent
15 as well."

16 The way that these officers were interviewed was
17 based on concerns about consistency rather than
18 concerns about context and the importance of
19 getting the information and making sure that it
20 was true and accurate.

21 Having police officers investigate
22 other police officers creates endemic conflicts.
23 I have already read to you the passage of Chief
24 McCaskill where he was concerned that some of
25 these officers might need to be told to tell the

1 truth. PSU reports to the Chief. Everyone
2 involved in the police force has a legitimate
3 interest in the morale of the members. A crime
4 committed an by an officer damages reputation and
5 the morale of the force. If an investigation
6 uncovers criminal wrongdoing, it's embarrassing
7 and disturbing for all concerned. If it clears
8 the officer, it reduces the damage.

9 Now, I want to be clear here. I am
10 not saying that the PSU officers in this case or
11 in any other case have worked to clear an officer
12 to avoid embarrassment, or that they did it in
13 order to clear Harvey-Zenk. Indeed, Mr. Clifford
14 and I want to distance ourself expressly and
15 unequivocally from the suggestion that Sergeant
16 Girard was in any way trying to help Derek
17 Harvey-Zenk. He presented himself as a man of
18 honour and gave candid and credible evidence. Had
19 all other Winnipeg Police Service witnesses
20 followed his lead, they would not be taking the
21 battering in the press that they have been
22 receiving. Still, human beings have a remarkable
23 capacity to believe what they want to believe, and
24 will accept more readily what they want to hear.

25 Speaking generally, being an insider

1 with divided loyalties is an unhealthy
2 investigative posture. You need look no further
3 than the conduct of Sergeants Humniski and
4 Anderson. They never would have given a list of
5 questions to witnesses in connection with an
6 investigation that they were conducting. Yet they
7 thought nothing of sharing those questions with
8 their colleagues. The unhealthy posture was
9 evident in this case and it helps explain why this
10 investigation was an unequivocal failure.

11 Sergeant Girard had this to say, and
12 I'm going to have to take to you the volume
13 because, again, it's not properly reproduced in
14 the material. It's volume 20 at page 5289.

15 THE COMMISSIONER: I'm sorry, page?

16 MR. PACIOCCO: From the transcript, I
17 didn't successfully get it in there.

18 THE COMMISSIONER: Okay.

19 BY MR. PACIOCCO:

20 Q At line seven from page 5289:

21 "Q You would want to take into
22 account any motivations or pressures
23 that might be on witnesses that could
24 cause them to provide incomplete
25 information, or perhaps even false

1 information.

2 A Yeah, more so with civilian
3 witnesses. With the police witnesses,
4 my assumption is that they are coming
5 in and they are going to tell the
6 truth."

7 This investigation was not launched with a healthy
8 scepticism, and even when there were grounds for
9 healthy scepticism, they were not picked up on.

10 The PSU unit that conducted this
11 investigation was credulous, even though witnesses
12 were eager to come forward, the whole platoon they
13 were told was eager to come forward. And as
14 Sergeant Girard testified, this was not usual. It
15 should have twigged that the platoon had a strong
16 interest in coming forward. And I know that ab
17 initio you can't say that their interest isn't in
18 getting rid of falsehoods and the rumours, but you
19 have to understand when somebody is anxious to
20 come forward that they have a personal interest in
21 the ultimate product of the investigation, and you
22 have to approach that investigation in that
23 spirit.

24 In his testimony, Girard indicated
25 that it didn't occur to him that Humniski and

1 Anderson could have a personal stake in the
2 investigation. These were platoon leaders. They
3 were at the two locations that lead ultimately to
4 the allegations of the events surrounding
5 Harvey-Zenk. If the investigation was to show
6 that they behaved irresponsibly, without question,
7 it reflects badly on them and could even have
8 employment implications for them. Instead, he
9 said, I expected they were going to come in and
10 tell the truth. He relied on their reputations
11 instead of trying to sit back and critically
12 analyze what he was being told. When challenged
13 that witnesses could be affected by their own
14 civil liability or the liability of their
15 associates who they work with and care about, he
16 said, and you have this at page 150:

17 "My position has always been that I
18 will interview the officers assuming
19 that they are going to tell me the
20 truth. And if contradictions or
21 things of that nature come up, then I
22 will address those, but I am not going
23 to assume the worst at the beginning."
24 Even the fact that Black and Azaransky cancelled
25 their meeting with him at the last minute, and

1 that it took him a number of tries to get them
2 together because of concerns relating to civil
3 liability and regulatory implications, this did
4 not trigger any concern on his part.

5 On his evidence, it didn't trigger any
6 concern when Black asked him at the end of the
7 interview, am I a witness or a police witness?
8 Now, curiously, his faith in the truthfulness of
9 police officers was contradicted by his own
10 evidence. And I don't mean to cast a slur on
11 police officers generally, but just to focus on
12 how intent his expectation that his colleagues
13 would cooperate is. If you look at page 152, he
14 says at page 5315:

15 "Well, with the staff at Branigan's,
16 for example..."

17 I'm reading from line one,

18 "Well, with the staff at Branigan's,
19 for example, I know at the house party
20 that would have been a more difficult
21 test, but with the civilian, any time
22 in my time in Professional Standards
23 Unit, any time that we had access to
24 an independent civilian witness, that
25 was usually the turning point of the

1 investigation."

2 The civilian witnesses, who he would be more
3 skeptical of than the police officers, are usually
4 the turning point in the investigation in his
5 experience.

6 If you take a look at page 153, he's
7 being asked why he's not pushing harder with these
8 witnesses. Line 11 he says, at page 5463 in the
9 upper quadrant.

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

22 Those experiences of his are hardly a platform for
23 starting from the assumption that police officers
24 are going to be truthful. And in fairness to
25 Sergeant Girard, his position was that he becomes

1 skeptical if contradictions occur. And you asked
2 him, Mr. Commissioner:

3 "Don't you think that's doing it
4 backwards? It is backwards. How do
5 you find contradictions if you're not
6 looking for them? Do you have the
7 kind of healthy scepticism that allows
8 for probing investigations if you
9 start from the assumption that
10 everybody who is coming in is just
11 going to narrate the truth to you?"

12 And he did miss key contradictions. You will
13 recall that he never confronted the witnesses with
14 Gerardy's evidence, important evidence, evidence
15 that clashed dramatically with the atmosphere
16 created by the evidence of the officers. Gerardy
17 having to actually intercede because of concerns
18 that a few of the officers were so impaired that
19 they should have been cut off and had no business
20 driving vehicles.

21 Now, I know that came late in his
22 investigation, but that is a significant point of
23 departure from the accounts he received from those
24 officers. He doesn't put it to the officers who
25 come after and he doesn't call back the officers

1 who testified before. He never grew concerned
2 that Chelsea O'Halloran said that a couple of the
3 officers had eight beer. He just seized on it,
4 the fact that she said everyone was fit to drive.
5 He never secured receipts, even when referred to
6 those receipts by witnesses, and neither did Epp,
7 who was conducting the other interviews. Mikawoz
8 and Toews specifically initiated reference to
9 their receipts. They were not asked for or
10 sought. Girard sought and accepted -- or accepted
11 Bravo's excuse rather for the Branigan's records,
12 that they wouldn't prove useful. Even though you
13 will remember Chelsea O'Halloran being asked
14 whether she viewed the records, and she said, no,
15 I haven't, my manager is going to give them to
16 you. He didn't seek them, did not even ask to
17 look at them, just accepted that they are not
18 going to be useful because Mr. Bravo said so.

19 Now, this investigation, with the
20 greatest of respect, was a disaster. It consisted
21 of patty-cake interviews that lasted an average of
22 15 minutes, some of them under ten minutes.

23 Girard's 14 interviews took less than
24 four hours. I'm not suggesting that this is the
25 model to use, but certainly even the East St. Paul

1 Police Force with its skeleton crew could have
2 done that. That's four hours even allowing for
3 the three-page cautions and introductions that
4 began every one of those interviews. Comments
5 made during those investigation interviews betray
6 the collegial atmosphere with which they were
7 conducted. I am going to take you to page 167.
8 You have Sergeant Pearson questioning Constable
9 Black. You will see it referred to at page 5389.

10 "Speaking of Harvey-Zenk?
11 Yeah, did he look like he was
12 fatigued? I understand there was a
13 lot of over time.
14 Uh-huh."

15 Now, there's no foundation for suggesting that
16 constable -- that Pearson was intentionally trying
17 to steer this investigation away from the truth.
18 That wouldn't be fair. But what is apparent is
19 that this invitation is not the kind of thing you
20 hear in a regular police interview. In fact, the
21 records they had showed there wasn't a lot of
22 overtime. One-half hour in the week is all that
23 was produced. And here this suggestion is being
24 put to a witness by Pearson.

25 Volume 21 of the transcript at page

1 5400, again, I didn't successfully get this one in
2 there. Sergeant Pearson indicating to Azaransky
3 at the end of his interview, line seven at page
4 5400.

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

14 When do you see that kind of comment in a police
15 investigation?

16 Page 168, this time it's Sergeant Epp
17 asking Mikawoz about what observations were made
18 with respect to Harvey Zenk's alcohol consumption,
19 line three on page 5404.

20 "Can you tell us what he was drinking
21 that evening?

22 Constable Mikawoz: No idea actually.
23 I believe it was beer, but I don't
24 know.

25 Sergeant Epp: Okay. And you know

1 what, as everyone gets talking and
2 stuff and we get busy with our own
3 conversations, would you have been in
4 a position to say how many beverages
5 he had that evening?"

6 If a lawyer was to ask a question like that in
7 examination-in-chief, every lawyer within
8 200 yards would be on their feet. These recorded
9 interviews are more like collegial chats than
10 serious inquiries. Then we have the misplaced
11 photo line-up, document containing precise words
12 of the witness.

13 Sergeant Girard's commendable
14 admission that this investigation could have been
15 done more thoroughly is an understatement. It
16 fell short of what should have occurred. It was
17 compromised by the guileless attitude of the
18 Professional Standards Unit about the credibility
19 and the honour of their colleagues. And
20 tragically, Mr. Commissioner, this enabled the
21 Winnipeg Police Service Officers collectively to
22 tell an incredible tale.

23 Commission Counsel is fully aware that
24 individuals tend not to count the drinks their
25 friends consume, even at the same table. The only

1 time you see this is in evidence to the contrary
2 cases where friends come in and give a precise
3 inventory of what the others had to consume. But
4 two things, in my respectful submission, put the
5 lie to this as an explanation for the kind of
6 information that was presented to the Winnipeg
7 Police Service Professional Standards Unit, and
8 that was served up here by witness after witness.
9 First, while friends are unlikely to be able to
10 give a precise count of ounces, or even a drink
11 count, they would know whether their associates
12 are drinking a particular kind of alcohol, and
13 they would be able to say whether their associates
14 were drinking lightly, moderately or heavily. We
15 certainly never would have expected 24 officers to
16 come in with that information because they are
17 scattered all over the room, not all of them would
18 have observed. But certainly those who interact
19 and sit at the same table, particularly in
20 confined spaces like Sean Black's kitchen, would
21 in the natural order of things be able to tell you
22 whether a man was consuming alcohol, and whether
23 he was consuming it lightly or heavily.

24 And secondly and more importantly,
25 this is not an ordinary case. A few hours after

1 the breakup of the get-together, it became known
2 that Derek Harvey-Zenk had been involved in a
3 collision that had taken the life of a woman.
4 This is not the kind of information that takes
5 time to spread. Constable Fudge, who didn't even
6 work at that division, talked about how this kept
7 coming up at her division. Any suggestion that
8 people didn't learn for long periods of time just
9 doesn't ring true.

10 And there was information that he was
11 being held at the East St. Paul Police Station.
12 There was some suggestion by some that, well, he's
13 a driver in a fatality and he'd just be there, but
14 others told you they knew he was in custody, and
15 it didn't take long before information would break
16 that he was being investigated in connection with
17 alcohol related charges. Even if nothing had
18 registered at the time they were there, any
19 reasonable person would have stopped to try to
20 figure out what happened. They would have cast
21 their mind back, they would have used their own
22 drinking as a reference, their time with the
23 individual. It is only natural. And it is
24 thoroughly unnatural for witnesses to come forward
25 and claim three and a half years as an explanation

1 for not remembering. It wasn't three and a half
2 years before they were asked the questions, and it
3 certainly wasn't three and a half years before
4 these police officers knew the importance of their
5 observations. Yet look at what you get. Page 170
6 to 173 is the alcohol consumption chart for
7 Harvey-Zenk. Left-hand column is Branigan's. No
8 idea, no idea, no clue, I have no idea, all the
9 way through, with a few exceptions. Now,
10 certainly some of those witnesses are telling the
11 truth. No one can suggest otherwise. However,
12 the prospect of all of those witnesses having that
13 kind of a response is thorough untenable. Even
14 the witnesses sitting near Harvey-Zenk, according
15 to the evidence we were able to produce, provide
16 less detail or no detail than would reasonably be
17 expected. Veldman, no, I don't. Haddad, no clue.
18 Schneider, a glass and probably a drink in there.
19 Buors, a beer in front of him. Unless Harvey-Zenk
20 had an existential evening, as Mr. Clifford put it
21 to one of the witnesses, he had contact with few
22 people.

23 If you believe the accounts you were
24 given, he was treated as a leper, sitting off by
25 himself, nobody paying any attention to him.

1 Sergeant Girard, when shown the chart,
2 I would agree that's strange, that's what he said.
3 But the event at Constable Black's, now Sergeant
4 Black's, is the clincher. Ten officers in the
5 kitchen and here is what you get. I wasn't aware,
6 I wasn't paying attention, I didn't know, I wasn't
7 paying attention, I didn't notice, I really didn't
8 even notice him, I didn't see him, I don't know,
9 not that I noticed, I honestly couldn't tell you.
10 That's what you get.

11 The one witness, and it was not
12 included in the chart by oversight of Commission
13 Counsel, was the observation by Nolet in his RCMP
14 interview, reproduced that at page 174. Constable
15 Nolet at line 17:

16 "Yeah, I didn't see anything that
17 would suggest to me that, yeah, you
18 know, he was consuming alcohol there.
19 He was consuming alcohol there too,
20 but, again, I don't, he wasn't showing
21 signs to me of someone who was
22 impaired."

23 I am not clear whether he's telling us, I didn't
24 notice any signs that he was consuming alcohol
25 there, or whether he is saying:

1 "I didn't see anything to suggest to
2 me that, you know..."

3 And then he pauses:

4 "He was consuming alcohol there too,
5 but, again, I don't..."

6 That's the closest you come to a statement of the
7 consumption of alcohol, in the small confines of
8 that kitchen that I had Constable Black draw out
9 for us. Now, to be sure, it's a pretty impressive
10 kitchen, but it is not an amphitheater, it's a
11 closed confine, and everybody is in there
12 socializing together. The totality of the picture
13 defies common sense and human experience. You
14 can, Mr. Commissioner, conclude without any
15 hesitation that the investigators failed to
16 observe the obvious, and that they were not
17 getting the whole story. And that the Winnipeg
18 Police Officers, or at least some of them, were
19 not forthcoming.

20 We know this from the evidence of
21 Branigan's witnesses supported by the records. We
22 know this from common sense, and we know this from
23 the troubling accounts given by officers both to
24 the PSU and before this tribunal.

25 You can believe Chelsea O'Halloran,

1 Mr. Commissioner. You can believe the generality
2 of her testimony about the nature of the evening
3 and some of the specific observations that she was
4 able to make. And you can believe her in spite of
5 the fact that she changed her story.

6 Now, certainly changing your story is
7 one of the hallmarks of an incredible witness, but
8 you have to look at how that story changed. She
9 came forward and admitted to effectively
10 obstructing justice, to giving false information
11 to a police officer in connection with a police
12 investigation. Her statement again, her revisited
13 description of the events at Branigan's was again
14 a classic statement against interest. Why would
15 somebody do that? Why would somebody come forward
16 and make up information that is so thoroughly
17 damaging and risky for them? It happened because
18 she had a conscience. And she furnished a
19 credible reason for this, the pressure from her
20 boss, Rodrigo Bravo. Rodrigo Bravo, who was not
21 truthful with Girard about the records and what
22 they were capable of showing. Rodrigo Bravo, who
23 was concerned about his own civil liability.
24 Rodrigo Bravo, who is a close friend of Sean
25 Black's.

1 The stamp of credibility on her
2 evidence is also shown by the stamp of
3 incredibility of her PSU interview. You will see
4 at page 177 to 180 what I mean. Line 22 of page
5 17:

6 "Now, do you recall if any one person
7 or people there had an excessive
8 amount to drink?

9 Ms. O'Halloran: Probably about, I
10 wouldn't say excessive, but a couple
11 of them had more than others.

12 Okay. Do you remember how many, like
13 the people that had more, how many
14 would they have had?

15 Ms. O'Halloran: Probably about eight.

16 Sergeant Girard: Beers?"

17 And she goes on and she's asked whether she
18 thought anybody there shouldn't be driving? She
19 says no. She's asked about the total bill over on
20 page 180. She's telling Sergeant Girard that beer
21 is \$2.75 a pint, 35 cents for wings, so she
22 computes roughly 25 to \$30 each bill. There's
23 already been a description by the number of wings
24 served by other witnesses, 10, 20. She says, I
25 don't know how much the full bill was because I

1 billed them individually, so approximately 25 to
2 \$30 each. At 25 to \$30 each, there's a heck of a
3 lot of beer being purchased at \$2.75.

4 Her conclusions expressed do not match
5 the description she gives. So when she comes
6 forward and corrects those descriptions, you're
7 getting an accurate account, and it is supported
8 by the records, and it is supported by Darcey
9 Gerardy's observations about officers who he had
10 concerns about. And you can believe him. He had
11 no reason to come forward and fabricate that
12 evidence.

13 What can you conclude? You can be
14 sure that the Winnipeg Police Service witnesses
15 sought inaccurately to cast the shift party at
16 Branigan's as a sedate and quiet affair, and that
17 this defies common sense. Mr. Commissioner, that
18 bar stayed open. It normally closes at midnight,
19 but it stayed open until it could sell no more
20 liquor. And most of these officers were still
21 there.

22 Your best evidence is that there were
23 only police officers there, which makes sense
24 given the customary closing time. This was kept
25 open especially for them. It was a beer and wings

1 night and the place was hopping busy. Chelsea
2 O'Halloran testified that she hardly had time for
3 a break. As soon as she brought something, she
4 was called for more. It was a time and a place to
5 unwind. These officers had just finished their
6 shift and they were together, almost a whole
7 platoon. It defies common sense to suggest that
8 this was a sedate affair. It's contrary to her
9 evidence. She talked about how it got louder and
10 louder the more the officers drank. It culminated
11 in rude comments being directed at her. It
12 culminated in her observation of an officer
13 standing on a chair clapping. This was not a
14 lounge atmosphere in the classic sense, this was a
15 party.

16 You can be sure that these witnesses
17 have sought inaccurately to understate the alcohol
18 consumption that went on. I'm aware of the
19 shortcomings with the records in volume W, because
20 they do not link drinks to individuals. And
21 Chelsea O'Halloran did issue 39 cheques and there
22 were only 24 police officers. So are we going to
23 be able to compute exactly how much beer was
24 consumed by the officers and how much alcohol was
25 consumed? No. But know this, Mr. Commissioner,

1 68 pints, not bottles, but pints of beer at \$2.75
2 were available only to the police officers.

3 In three witnesses, we found ten
4 additional beers that are not the \$2.75 pints.
5 Chelsea O'Halloran testified to two people
6 drinking rye, and Michalik confirmed that the
7 trays contained drinks other than beer. There are
8 19 complimentary drinks shown on the Branigan's
9 records. The number that is close to the number
10 of officers on the scene, and if those drinks were
11 served late in the evening, perhaps exactly the
12 number of officers remaining. We don't know for
13 sure, but what we do know is if we check the
14 records from the night before, there were only two
15 complimentary drinks. These are the special
16 customers of Branigan's. Mr. Bravo went out and
17 cultivated this group. That's where those
18 complimentary drinks went in all probability.

19 Chelsea sold more than three-quarters
20 of the 130 beer sold that day. And she says most
21 of it was sold to the police officers. Chelsea
22 O'Halloran and Constable Fudge remember pitchers
23 of beer, notwithstanding that they are not shown
24 on the invoice. A couple of the officers in their
25 interviews spoke of getting beer from a male, the

1 bartender.

2 We will never know exactly how much
3 beer was consumed or alcohol was consumed, but we
4 will know with absolute certainty that it is more
5 than it being owned up to in the statements that
6 you have been furnished.

7 And then you have Chelsea's evidence,
8 describing a large number of individuals she would
9 have described as impaired, including Black,
10 Azaransky, Harding. You can be sure that the
11 witnesses sought inaccurately to cast the
12 get-together at Black's at quiet-ish. It was a
13 continuation of a party, the bar was closed, and
14 10 of them kept going. And only two people left
15 before the Anderson foursome at 5:00 o'clock in
16 the morning. Four more remained until after 6:00.
17 I'm not saying this in any derogatory way, but arm
18 wrestling, teasing, Constable Fudge describing
19 Harding as being obnoxious, this wasn't a sit
20 around the kitchen table and discuss business
21 get-together. You can be sure that the alcohol
22 consumed at Black's is understated.

23 Even if we were to take one bottle of
24 Rye as the measure, the one that Black admitted to
25 putting out, when you go through Exhibit 208 at

1 page 1916 of the materials I have assembled for
2 you, you will count 10 drinks accounted for. And
3 there are a number of expressions in the
4 information gathered during the investigation that
5 circumstantially arguably support the conclusion
6 that drinking was understated. Page 194 in
7 Black's interview to the RCMP -- excuse me -- to
8 the PSU, at the bottom of page 194, starting with
9 the last two words:

10 "I do recall the girls leaving and
11 being concerned about people driving."

12 People -- now, he suggested that that's just
13 semantics. It's not semantics, Mr. Commissioner.

14 Over on the next page, in his
15 statement to his insurance adjuster right in the
16 very middle of the page:

17 "The female officers, Tracy Fudge and
18 Kelly McLure also offered to volunteer
19 as designated drivers if need be."

20 When do you start talking about designated
21 drivers? You do that when people are drinking.

22 The comments made by Anderson and
23 Humniski when they met with McCaskill and
24 Stannard, at page 2992, about two-thirds of the
25 way down:

1 "There were plans in place."

2 Page 2939 in the middle of the page:

3 "There were precautions in place."

4 Page 2994,

5 "There were safety measures in place."

6 When do you need plans, precautions

7 and safety measures in place? When

8 people are drinking.

9 The statement by Black to the

10 insurance adjuster that he and Azaransky suggested

11 that Harvey-Zenk stay over, you'll find that over

12 on page 200, at the bottom of page 4276. Again,

13 semantics to Mr. Black. The statement by Harding

14 to the PSU, the bottom of page 202, line 24:

15 "No, because to be honest, I was

16 probably the most intoxicated there."

17 You know, when you ask enough questions and you

18 say enough, sometimes information comes out. He

19 doesn't say I was the only one intoxicated. He's

20 speaking in relative terms, I was probably the

21 most intoxicated there.

22 And then you have over on page 3297 at

23 the bottom of the page, this is Mr. Minuk's report

24 to Mr. Slough about the events that lead him to

25 make the decisions he did.

1 THE COMMISSIONER: Page?

2 MR. PACIOCCO: This is page 203 at the
3 bottom, you'll see point number 3.

4 "Some officers themselves reported
5 that their impairment was such that
6 they did not remember much of the
7 evening."

8 Now, Mr. Minuk felt that this could be Anderson or
9 Humniski, he's not sure who told him this. But
10 you will remember Sergeant Humniski contacting him
11 to try to discourage him from calling officers who
12 might not be necessary to the case. Maybe it's
13 not a fair inference, but where does that come
14 from? Minuk was clear that he received that
15 information from someone.

16 I want to be clear here. You do not
17 have a basis for concluding that all of the police
18 officers who were interviewed by the PSU provided
19 misleading information. It's entirely possible
20 that some of them were forthright and it's likely
21 that that is so. And it is most unfortunate if
22 they all get tainted in the process. But much of
23 what you have heard is simply not credible. You
24 were treated to a chorus yourself, when these
25 witnesses were under oath, of I don't remembers

1 and I don't recalls, even on matters that they
2 should remember. The high water mark was hit by
3 T.J. Spruyt, he disclaimed even the ability to
4 testify to having seen alcohol being served at
5 Branigan's, and you have that at page 205. He
6 didn't even recall who was on the other end of his
7 arm wrestling with him when he was arm wrestling.
8 But page 207 is, in my respectful submission, very
9 telling, line six of page 5038:

10 "Can you give the Commission any
11 evidence, sir, on any statement,
12 anything that was to you that night at
13 all?

14 It wasn't directed at me specifically,
15 but when I was walking in I overheard
16 Sergeant Black saying that anybody who
17 wanted to spend the night, they were
18 more than welcome to.

19 Q Okay. That's the only comment
20 that you attribute to anybody through
21 the whole night?

22 A That's correct.

23 Q And you wanted the Professional
24 Standards unit to know about that,
25 didn't you?

1 A Not so much that I wanted them to
2 know, but I thought when I was going
3 to my interview with them, I thought
4 it was obviously something that was
5 very relevant given the situation and
6 what happened.

7 Q You wanted them to know that, sir,
8 and you told them why you wanted them
9 to know it?

10 A Right. And that's why, like I
11 said, I thought it was relevant given
12 the situation.

13 Q And the one comment, the only
14 thing that you can attribute to any
15 person that night, it was important
16 for you to get to the Professional
17 Standards Unit. What was the reason
18 you wanted them to have that
19 information?

20 A Just to show that Sergeant Black
21 was being responsible."

22 The one thing he remembers is servicing Sergeant
23 Black's need to appear to be responsible.

24 Some of the testimony you received
25 clashed with other testimony that you should find

1 credible. Contrary to the independence of Darcey
2 Gerardy, for example, only one person is
3 identified as problematic at Branigan's, and
4 that's Dave Harding. And even some didn't notice
5 anything with Dave Harding. No one came forward
6 and acknowledged hearing or being party to
7 Gerardy's conversation when he's trying to ensure
8 that no one leaves drunk.

9 You heard Chelsea O'Halloran's
10 embarrassing revelation that Officers Azaransky
11 and Harding were being rude, commenting on her
12 behind, and encouraging the other young officers
13 to look at it. It is denied of course by both
14 Harding and Azaransky. Why would she come in here
15 and say that?

16 And you have Michalik's testimony that
17 Constable Harding was talking to Derek
18 Harvey-Zenk. Constable Harding's evidence was
19 that he never spoke to him that night. Michalik's
20 testimony was that Constable Nolet was talking to
21 Derek Harvey-Zenk. Constable Nolet denies that
22 that happened. He has no memory of that.

23 You've got constable Harding
24 describing the events when they got back to
25 Branigan's and how he got into Anderson's car, yet

1 he forgets about the tussle with Constable Fudge.
2 You've got evidence that doesn't comport with
3 common sense.

4 You've got Ken Azaransky claiming that
5 he never discussed civil liability with Black,
6 even though you know that they postponed a meeting
7 to go over to Professional Standards Unit because
8 of concerns attributed to both of them about civil
9 liability.

10 Mr. Commissioner, I have very little
11 left to do, but I see that it's approaching 12:45
12 and I think this is an opportune time to break.

13 THE COMMISSIONER: Everybody seems to
14 be in agreement? We'll start at 2:00 o'clock.

15 THE CLERK: All rise. We are in
16 recess until 2:00.

17 (Proceedings recessed at 12:43 p.m.
18 and reconvened at 2:00 p.m.)

19 THE CLERK: Order. All rise. This
20 Commission of Inquiry is now reopened. Please
21 have a seat.

22 MR. PACIOCCO: Thank you,
23 Mr. Commissioner. I won't be much longer. As you
24 will have noticed, my voice is fading for one
25 thing, and I'm just about at the end of this.

1 I was examining the Winnipeg Police
2 Service witnesses and suggesting to you that at
3 least some of them were not forthright and
4 complete in the evidence that was given, either to
5 the PSU, or before you, sir.

6 Sean Black's evidence stands out for
7 dedicated treatment. His interview with the PSU
8 and his testimony before you was not, I
9 respectfully submit, forthright. Without
10 question, Sergeant Black had clear motivation to
11 be guarded about his testimony relating to the
12 events. He was deeply concerned about himself and
13 his civil liability. He was concerned enough to
14 cancel his interview with the PSU and attend with
15 an insurance adjuster, laying the foundation for a
16 possible claim that might be made against him.
17 Yet he was resistant at the suggestion that he was
18 concerned about civil liability, never really
19 acknowledging that that was a concern, talking
20 about he was worried about his family.

21 He denied speaking to Rodrigo Bravo,
22 even though Rodrigo Bravo was also concerned about
23 civil liability. Their evidence that they never
24 discussed the matter, given that Harvey-Zenk had
25 been at their respective locations before the

1 fatal crash, defies common sense. It is telling,
2 in my respectful submission, that this is what
3 Mr. Black said about his friendship with Rodrigo
4 Bravo, at page 219 of the materials that have been
5 assembled, at line 22:

6 "He's a friend who I would consider to
7 be close, but it is -- we don't speak
8 all that often, it is not like we
9 speak daily, weekly."

10 If you flip over the page you will see Rodrigo
11 Bravo, approximately the same location, on page
12 220:

13 "Yeah. And you also, I suggest to
14 you, sir, talked to Sean Black.
15 We talk daily, we used to talk daily."

16 It is evident that Sean Black in his evidence
17 tried to minimize his friendship with Bravo, even
18 though his friendship with Bravo was clearly close
19 at the time of these events. And it does defy
20 common sense to think that these gentlemen who had
21 so much in common over this incident would not
22 have discussed it.

23 He claimed not to recall how often he
24 went to Branigan's, suggesting it was once or
25 twice since he changed to District 13, even though

1 Chelsea O'Halloran, who started at Branigan's
2 around the same time that Sergeant Black moved to
3 District 13, knew him as a regular, a member of
4 the core group, she called it, and he was close
5 friends with Rodrigo Bravo.

6 He provided suspect explanations for
7 his lack of observations, both at Branigan's and
8 at his place of residence. You will recall the
9 exchange about the relative height of the tables
10 which was offered to the PSU, and again to you, as
11 an explanation for the impossibility or
12 impracticability of him observing what Derek
13 Harvey-Zenk was doing. At his place it was a
14 fixation with a popcorn machine that prevented him
15 from making observations about who was pouring the
16 alcohol that he had just set out.

17 He gave inconsistent accounts of how
18 much alcohol was available at his place. He told
19 the PSU in a document found at page 228 that he
20 put a bottle of rye and some Bailey's out. On the
21 same day, he had given a statement to the
22 insurance adjuster, page 229, when asked about how
23 much alcohol was consumed, he spoke of two bottles
24 of rye being consumed and a part of Bailey's. He
25 tried to deal with that in his interview with

1 Commission Counsel by suggesting that one of those
2 bottles was a heel, as he described it, only a few
3 ounces left in it. He had difficulty suggesting
4 that when he consumes a heel, then he could say he
5 consumed a bottle. The discussion of that
6 cross-examination takes up several pages.

7 Earlier when confronted with the
8 insurance statement, he began to say he glanced at
9 it when he was asked if he read it, but quickly
10 thought the better of that and acknowledged that
11 he read it. He said that he consumed -- that when
12 there was consumption of the two bottles, he meant
13 consumed one bottle and the heel of another, which
14 in my respectful submission is not credible. He
15 suggested the answers conflict because there is a
16 difference between put out and took out. He said
17 he didn't think it was important to mention the
18 other bottle to the Winnipeg Police Service
19 because it was for his own consumption, even
20 though they were inquiring into the consumption of
21 alcohol, including his own. He said he wasn't
22 worried about the insurance statement saying two
23 bottles because he could clarify that orally.
24 With respect, Mr. Commissioner, his evidence was
25 not credible.

1 He testified that he could put a drink
2 in no one's hand at his home, even though he was
3 the host, even though he put out the alcohol. He
4 said he was worried about people leaving because
5 of fatigue and not alcohol. This, after his
6 guests had been at a bar for several hours before
7 arriving at his place, this even though drinking
8 continued at his place until he put the bottles
9 away at 6:00 in the morning, this even though he
10 claims not to have known who consumed what,
11 fatigue was his explanation for precautions that
12 were taken.

13 Even though he claims he doesn't know
14 who drank what, his statement to the insurance
15 adjuster records that no one was drinking at a
16 heavy rate. His account of how Derek Harvey-Zenk
17 unexpectedly left, even though confirmed by
18 Mr. Azaransky, is a suspect and convenient
19 description of events.

20 And then there is Mr. Minuk's
21 testimony that Mr. Black told him that he retired
22 around 4:00 o'clock in the morning, and that some
23 of his colleagues remained and he doesn't know who
24 or why or for how long. Constable Black testified
25 here that that was misinformation. Mr. Minuk

1 testified, "I remember that," when the question
2 was put to him. And I'm going to ask you,
3 Mr. Commissioner, to find expressly in your report
4 that Sean Black did not provide credible evidence
5 in his testimony before you.

6 And Sergeants Anderson and Humniski
7 also require specific address. Sergeant Anderson
8 and Humniski made a concerted effort to support
9 their platoon and Constable Black by approaching
10 the executive to set the record straight. It is
11 clear that they went forward, not as witnesses,
12 but as advocates for their platoon, and that their
13 target of information was the executive. The
14 interview with the PSU was an afterthought
15 suggested to them by Inspector Stannard. Although
16 denied in their evidence, their earlier version of
17 why they came forward demonstrates that their
18 focus was on their executive.

19 You can take a look at page 245, over
20 at page 4851, in a statement to the PSU beginning
21 at page 4851, line 2:

22 "I know that the reason Jim and I came
23 out here is we wanted to get away from
24 this interpretation of that this is a
25 big shift party. It wasn't."

1 It was because of a concern about rumours that
2 Anderson came forward.

3 McCaskill recorded, as indicated up at
4 page 4852, on the same page, page 245:

5 "Both wanted the executive to know the
6 truth."

7 Sergeant Humniski told Mr. Clifford, and it is
8 reproduced at page 247, page 4855:

9 "Over the weekend..."

10 This begins at line eight on page 4855:

11 "Over the weekend, you know, hearing
12 different things, yes, I was concerned
13 because there was all these rumours
14 out there, and I was aware of where
15 they were at that point in time, at
16 the time prior to this happening. As
17 far as like my statement stated, I had
18 been at both places, and I felt that I
19 was obligated as a police officer to
20 come forward and supplied, you know,
21 the Service with an explanation as to
22 what happened."

23 I'm not going to suggest that it is
24 inappropriate for police officers to have concern
25 for explaining themselves to the Service, but

1 without question, it was ill-advised for two
2 witnesses, two experienced police officers, two
3 investigators, to make a joint approach in which
4 they advocate for a particular conclusion relating
5 to a matter that was of criminal interest.

6 Without question, they would have discussed what
7 they were going to say between themselves.

8 Sergeant Anderson largely denied any
9 meaningful discussion, but Sergeant Humniski
10 allowed that he learned from someone that
11 Azaransky had slept over, and that he and Anderson
12 talked about it, that he learned from Anderson,
13 who left later than him, about the conditions of
14 leaving and about the arrangements that had been
15 made for Constable Harding. And that essentially
16 what was off limits, as far as Humniski was
17 concerned, was discussing Derek Harvey-Zenk's
18 alcohol consumption. But Anderson gave quite a
19 more clipped description of the conversation that
20 they had. In either event, it was not appropriate
21 for them as witnesses to do as they did. And it
22 is quite clear that they were intent, whether with
23 good intentions or not, of presenting this as a
24 subdued get-together.

25 In his interview with the PSU,

1 Humniski said that no one was having difficulties
2 with overconsumption. He did not describe
3 Constable Harding as intoxicated, he described him
4 as not feeling very good. And when asked directly
5 by Detective Girard:

6 "So, from the sounds of it, correct me
7 if I'm wrong, but it sounded like
8 nothing was really out of control and
9 you didn't have any concern about
10 anybody when you left?

11 A No. No, I didn't."

12 The presentation of the atmosphere by
13 these officers is not in keeping with the evidence
14 you have heard from other witnesses, the
15 Branigan's witnesses in particular.

16 Anderson and Humniski then, as I have
17 suggested already, inappropriately shared the
18 questions that would be asked with their platoon,
19 again, demonstrating their concern with the
20 well-being of their officers rather than with the
21 integrity of the investigation.

22 Finally, Sergeant Anderson should --
23 Sergeant Humniski rather, should not have called
24 Mr. Minuk to discuss witnesses. He was a witness
25 himself. And if you look at the bottom of page

1 4664, which is in the last page of the book, page
2 255, you will see the tail end of the questioning
3 on his call to Mr. Minuk, line 14:

4 "General terms, all I asked him was,
5 is it possible to keep the numbers
6 down to avoid the negative
7 perception?"

8 This is at line 14 on page 4684.

9 "Is it possible to keep the numbers
10 down to avoid the negative perception?"

11 Q Of?

12 A And the false perception of it
13 being a wild party and/or a giant
14 conspiracy, because neither of these
15 insinuations are even close to
16 factual."

17 Here you have an experienced police officer. He
18 is calling the prosecutor in a case where the
19 police witnesses are going to be advancing a case
20 that is inconsistent with the prosecutor's theory.
21 He is calling the prosecutor, even though he is a
22 witness, and he is essentially concerned about the
23 appearances, what would happen if you called all
24 of these officers? His focus was not on the
25 pursuit of the truth, his focus was on loyalty to

1 his officers. And at one level, that's
2 commendable, but certainly much more restraint
3 should have been exercised. And the dealings of
4 Anderson and Humniski in connection with this case
5 were inappropriate.

6 Finally, Mr. Commissioner, I need to
7 say a few words about Derek Harvey-Zenk. It has
8 been said many times that this is not an inquiry
9 conducted for the purpose of retrying him. He
10 was, however, a witness to the investigation. He
11 was on the accident scene when the East St. Paul
12 Police arrived. He was at the East St. Paul
13 Police Station. He was at Branigan's. He was at
14 Black's. And he was in a position to know whether
15 he consumed enough alcohol to give rise to the
16 kind of motivation that has been presented before
17 you, for some of these officers to understate what
18 took place and/or Mr. Bakema, in particular, to
19 refrain from investigating him. Derek Harvey-Zenk
20 had relevant evidence to give. Sadly, he was of
21 no assistance to the Commission. Instead, he came
22 before you and stated that he remembered almost
23 nothing.

24 It has been the experience in the
25 criminal justice system that such claims are often

1 the refuge of those who wish to shy away from the
2 truth, to leave their stories untold, when they
3 know that the truth will not flatter them. It is
4 not surprising that his evidence was presented as
5 inherently suspect. It is truly unfortunate that
6 Derek Harvey-Zenk came before the Commission,
7 before the people of Manitoba, before the family,
8 and made the claim without offering any
9 evidentiary support other than his word.

10 It is truly unfortunately that he
11 sought to support his claim solely by relying in
12 part on a conversation he had with his mother
13 about a possible concussion, and by relaying
14 second hand that his psychologist told him that
15 his claim of memory loss was consistent with
16 post-traumatic stress disorder. All of this is
17 unfortunate, because presenting his evidence this
18 way was a recipe for skepticism and left his
19 claims without credibility.

20 The concussion he offered by way of
21 explanation is a concussion that on the evidence
22 never happened. More than once on the day of the
23 accident he said he was fine when asked. He was
24 asked whether he was hurt by the ambulance
25 attendant; his complaint was about his leg. The

1 ambulance attendant, Rosser, examined him looking
2 for symptoms of a concussion and found none.
3 Throughout the hours following the collision,
4 Harvey-Zenk was lucid, not addled. He was not
5 confused. He made complex decisions. Even when
6 he described his injuries in his traffic accident
7 report, he listed a sore leg and a bloody nose,
8 but nowhere does he mention even a hint about a
9 head injury.

10 As for the post-traumatic stress
11 disorder, there is no question that this event was
12 traumatic for him, and in my submission we all
13 have to understand that. Still, as a result of
14 the tactical decision made not to seek expert
15 evidence to support his claim, the Commission is
16 left only with his bald assertion that he was
17 unable to respond to every hard question that he
18 was asked.

19 Most disturbingly, Mr. Commissioner,
20 his claim stands in stark contrast to the words
21 from a report of W.L. Davis, a psychologist, that
22 he himself submitted to the sentencing judge,
23 through his counsel, as a reliable document to
24 assist in the disposition of his sentencing.
25 Dr. Davis' report not only does not support the

1 memory loss, it blankly contradicts the memory
2 loss. You will find the relevant portions at page
3 243, about six lines from the bottom.

4 "There was no evidence of cognitive
5 impairment, memory loss or psycho
6 motor retardation or agitation."

7 This, under the mental status examination, this in
8 a passage in which he talks about how the man
9 became upset every time the topic focused on the
10 accident and its aftermath. The accident and its
11 aftermath were discussed.

12 Now, I'm cognizant of the fact that
13 this report was penned in 2007, but its meaning is
14 unmistakable. This memory loss was not something
15 that was gone by the time the report was penned.
16 If it was gone by the time the report was penned,
17 we would have had testimony from Mr. Harvey-Zenk.

18 This unfortunate state of affairs has
19 produced two results. The first result is that in
20 narrating your findings, you should find Mr. Derek
21 Harvey-Zenk's claimed memory loss not to be
22 credible.

23 The second unfortunate result is that
24 you will have to discharge your mandate without
25 the assistance of Derek Harvey-Zenk. Not because

1 he didn't have information to give in assisting
2 you, but because he did not wish to assist you.

3 Those are my submissions,
4 Mr. Commissioner. Mr. Clifford will be addressing
5 the prosecution issues and the victims' issues.
6 If I could just have the indulgence of a few
7 minutes to clean up the books.

8 MR. CLIFFORD: Good afternoon,
9 Mr. Commissioner. Part of the second phase
10 focused on the prosecution of Mr. Harvey-Zenk. In
11 your mandate, you are required to look at all
12 aspects of the prosecution to see whether they
13 were conducted in accordance with professional and
14 ethical standards expected of lawyers and agents
15 of the Attorney General.

16 As you are aware, some, including the
17 Taman family, hold a very highly critical
18 perception of the job Marty Minuk did. And that
19 perception no doubt contributed to the decision to
20 include the prosecution in this inquiry. That
21 perception was ultimately coloured, no doubt, by
22 the result, including a decision to drop three of
23 the four charges, including both of the alcohol
24 related charges, a decision to enter into a joint
25 submission for a conditional sentence on the

1 remaining charge, the dangerous driving, and the
2 decision not to seek to prove that Mr. Harvey-Zenk
3 had alcohol in his body at the time of the
4 collision. Something that the presiding Chief
5 Judge made clear that he would have considered as
6 an aggravating circumstance in the sentencing.

7 Chief Justice Wyant remarked that
8 Mr. Minuk cannot be blamed if his deck was short
9 of cards. You, Mr. Commissioner, have had what we
10 hope was a full opportunity to see the deck that
11 Mr. Minuk had in his hand. And I will say at the
12 outset, when one looks at the cards he held, he
13 can not be blamed for staying the charges that he
14 did, and that he did act ethically in all aspects
15 of the prosecution. However, Commission Counsel
16 cannot endorse all of his conduct, nor all of the
17 decisions he made.

18 On the issue of whether he made an
19 appropriate decision to stay the three charges, he
20 did. We have the expert testimony and written
21 reports from Mr. Peck, exhibit 228, and Mr. Gover,
22 exhibit 226. Without reviewing their evidence in
23 detail, they agreed that the staying of the
24 charges of impaired, refusal and dangerous was
25 within prosecutorial standards and consistent with

1 the Manitoba Department of Justice policy
2 directives.

3 Indeed, likely no one could have
4 salvaged the impaired charge. The criminal
5 negligence charge was destined to fail and ought
6 to have never been laid. As hard as it can be to
7 try and understand, and differentiate in law the
8 concepts of dangerous driving versus criminal
9 negligence, this was never a criminal negligence
10 causing death case.

11 The refusal was open to challenge on a
12 factual and constitutional front. It was deeply
13 problematic, and failure would have been the
14 likely result of running that charge.

15 On the issue of whether he entered
16 into an appropriate and improvident resolution by
17 agreeing to a conditional sentence on a dangerous
18 driving plea, we submit that the Crown's
19 participation in the joint submission was
20 ill-advised. As with Mr. Gover, in his
21 transcript, and testimony at page 6746 at line 12,
22 we submit that this was the most problematic area
23 of the case. The joint submission was
24 ill-advised, and agreeing not to ask for a driving
25 prohibition was ill-advised as well.

1 Why was it ill advised? For a number
2 of reasons, Mr. Commissioner. First, Derek
3 Harvey-Zenk was a police officer and held to a
4 higher standard. Mr. Minuk could have relied on
5 cases regarding alcohol consumption being an
6 aggravating factor. This he was entitled to do.
7 The case law was clearly in his favour on this
8 point. And we are aware of Mr. Peck's opinion and
9 the cases he cites from British Columbia.
10 However, in our view, the case law has established
11 that the consumption of alcohol is a factor and
12 that argument ought to have been made in this
13 case. Several recent cases establish a clear
14 trend in favour of holding that mere consumption
15 of alcohol in such cases is considered as an
16 aggravating factor. And when I refer to those
17 cases, I refer to Manitoba cases as well.

18 Even if it was appropriate to stay the
19 refusal charge, to stay the impaired charge and
20 the criminal negligence, there was no mileage in
21 agreeing to a conditional sentence for the
22 dangerous. He had a strong case in dangerous
23 driving, he had a clear case. The suggestion that
24 the accident reconstructionist indicated that the
25 dangerous driving case was shaky is without merit,

1 in my submission. There was no need to agree to
2 that sentence.

3 In the event that a joint submission
4 could not have been, or a submission could not
5 have been arrived at on the dangerous, for
6 instance, that there was no agreement that the
7 case could simply be resolved on a plea to the
8 dangerous, one, in fact, bearing in mind the
9 Urbanski decision, had made the choice to run the
10 dangerous driving charge along with the refusal
11 charge, and made arguments that the blood versus
12 breath distinction was subject to scrutiny, and
13 that in light of Harvey-Zenk's position, that he
14 would not have been adversely affected because it
15 was a merely technical oversight. Harvey-Zenk
16 would have known that. The Crown could have then
17 addressed potential charter breaches by arguing
18 for non exclusion, based on the fact that
19 Harvey-Zenk did get to speak to counsel and that
20 he would have understood the charter issues. And
21 the court could have been asked to consider the
22 timing constraints in the fact that Harvey-Zenk
23 was indeed asking about the time. All of this, in
24 our submission, could have militated in favour of
25 admission rather than exclusion of evidence.

1 The sentence agreed upon was not in
2 accordance with the conditional sentence policy,
3 as there were no exigent circumstances to justify
4 it. The mere fact that things can go either way
5 at trial is not sufficient. If it were, no case
6 would fail to meet the exigent circumstance
7 threshold.

8 The conditional sentence policy was
9 placed before you, Mr. Commissioner, as Exhibit
10 217. Mr. Minuk even acknowledges that the
11 sentence was not in accordance with the policy. I
12 refer you to page 5910 in his transcript of
13 evidence, but he understood it to be an
14 appropriate legal sentence based on jurisprudence.
15 The difficulty with this position, however,
16 Mr. Commissioner, is that he is taking the facts
17 down by agreeing to avoid proof of alcohol
18 consumption.

19 The policy directive reflects the
20 Department of Justice's goal to discourage a form
21 of sentencing that the Department of Justice feels
22 does not reflect the requisite denunciatory and
23 deterrent impact of sentencing in the cases where
24 someone has died. It is an attempt to get
25 prosecutors on the same page. The fact that there

1 may be existing precedent for conditional
2 sentences in dangerous driving cases is not an
3 invitation to continue to advocate for such a
4 sentence. It does not tie the Crown's hands.
5 Each case is different, as are the precedents. At
6 page 6753 in the transcript of evidence, Mr. Gover
7 indicates that the sentence recommendation was not
8 in accordance with the policy and the case law,
9 and he states this despite Mr. Kaplan's testimony.
10 And it is important to bear in mind here that
11 Mr. Kaplan justifies his position on the basis of
12 the position that alcohol consumption was not an
13 aggravating factor.

14 Mr. Commissioner, I would like to deal
15 next with the issue of whether it was appropriate
16 for Mr. Minuk not to have elected to try to prove
17 that Mr. Harvey-Zenk had alcohol in his body at
18 the time of the collision. We know that he did
19 not attempt to do so. It is the position of
20 Commission Counsel that he erred in failing to do
21 so. I say this in acknowledgment of the fact that
22 there is a divergence in the opinion in the expert
23 evidence on this point. Mr. Gover indicated that
24 if alcohol consumption was of a sufficient
25 importance to warrant inclusion in the facts, the

1 prosecutor should have been willing and able to
2 prove it. He also indicates that the decision not
3 to prove alcohol consumption was as follows, and
4 this is at page 6760 in his evidence:

5 "So my conclusion here is that when we
6 look at the policy on plea bargaining,
7 that this was tantamount to taking
8 away a fact that the sentencing court
9 was entitled to know. And as I have
10 said, the case law treats it as an
11 aggravating circumstance for the
12 purpose of sentencing. So my view is
13 that the sentence not to prove, the
14 decision not to prove consumption of
15 alcohol was tantamount to an agreement
16 not to place a material fact before
17 the court."

18 Mr. Peck stated firmly in his
19 testimony in what he described as a debate with
20 me, and further at page 24 of his written opinion,
21 that he does not see the mere fact of the
22 consumption of some alcohol as a relevant factor
23 in the sentencing process. And, in his view,
24 Mr. Minuk, in not proving it, was acting within
25 acceptable prosecutorial standards.

1 We, however, agree with Mr. Gover and
2 submit to you that the decision not to prove
3 alcohol consumption, whether by virtue of an
4 undertaking or a last minute decision, was not in
5 accordance with professional standards for the
6 following reasons. The preponderance of the case
7 law supported it as an aggravating factor. In
8 this case there was ample evidence to prove
9 alcohol consumption. You had the evidence of
10 Officer Woychuk, with the odour of alcohol on his
11 breath. You have the evidence of the paramedics,
12 distinct from the police and the issues linked to
13 that. You have the evidence of Officer Graham of
14 the odour in the vehicle, and Officer Carter who
15 detected an odour and as well signs of impairment.

16 Putting aside the concerns that are
17 raised by the evidence of the police officers,
18 consider the evidence of the paramedics. Over 30
19 years combined experience on the roads, streets,
20 homes and communities in Manitoba, this evidence,
21 their experience in my submission was untouchable
22 and it would have clearly met the Gardiner
23 standard.

24 The only people that dealt with
25 Harvey-Zenk that didn't smell alcohol on him when

1 they were with him were Bakema and Officer Isaak.
2 Mr. Bakema says that he was outside, it was too
3 cold and it was too windy and he didn't detect an
4 odour. Officer Isaak, in the cell block,
5 indicated that when he dealt with Harvey-Zenk that
6 morning, he just simply didn't get close enough.

7 With the case law in his favour, and
8 with that proof, he had the ability, Mr. Minuk had
9 the ability to place an aggravating factor before
10 the court, and he chose not to.

11 And we must ask why not? Why wouldn't
12 he have done so? In my view there are two
13 possibilities. One, he made a deal with
14 Mr. Wolson not to, as Mr. Wolson said he did. And
15 if that's the case, he should not have done so.
16 The other is in consultation with senior justice
17 officials on September 11th, over the telephone,
18 he decided not to. And if that's the case, he
19 clearly should not have done so.

20 The decision not to call evidence with
21 respect to alcohol consumption begs the question
22 of why there would be clear agreement with the
23 Judge's declaration on August 22nd, 2007, at page
24 18 and 19 of the transcript, which are pages 1635
25 and 1636 of the main disclosure, that he

1 understood the consumption of alcohol, combined
2 with the unexplained accident, to have formed the
3 basis of the marked departure, to form the
4 dangerous driving. And I will address that later
5 in my submissions, Mr. Commissioner.

6 As I have stated, we can not stand
7 before you today and endorse the decision not to
8 prove alcohol consumption on the part of
9 Mr. Harvey-Zenk. We say this in view of numerous
10 factors that I haven't related to you. I ask you
11 to consider the Judge's comments. I would ask you
12 to consider as well the policy designed to
13 discourage conditional sentences in cases
14 involving death on the grounds of the perception
15 that they are not sufficiently denunciatory. I
16 ask you to consider the facts that he had before
17 him.

18 We can not endorse this decision to
19 agree or decide not to call this evidence. He was
20 the Crown, he should have advanced an argument
21 that could have easily been made in the
22 circumstances. The decision not to do so did not
23 fall within appropriate prosecutorial standards.

24 On this issue there is also evidence
25 before you, which on occasion is extremely

1 confusing, and perhaps demonstrates Mr. Minuk's
2 lack of clarity and appreciation for the
3 predicament he was in regarding the court's
4 reliance of alcohol consumption as an aggravating
5 factor. I ask you, Mr. Commissioner, to contrast
6 the fact that on August 22nd there is clear
7 language that counsel, in particular the Crown, is
8 agreeing that alcohol combined with unexplained
9 driving constituted the marked departure, with his
10 testimony at the Commission before you at page
11 6080, line 16 in evidence, where he stated as
12 follows:

13 "I did not believe that there was any
14 suggestion before the Judge that the
15 Crown was identifying, for the purpose
16 of marked departure, alcohol. I
17 didn't think we had. I don't believe
18 I conveyed that to him."

19 I ask you to compare and contrast that evidence
20 with the court record of August 22nd, 2007. The
21 contrast, in my submission, is remarkable and
22 speaks for itself.

23 He clearly states that he did not
24 prove alcohol consumption by proving the presence
25 of alcohol in his body because, and I quote

1 Mr. Minuk again in his evidence before the
2 Commission at page 6085:
3 "My view was that the alcohol was not
4 causative of anything, it could not be
5 linked to anything at all to the
6 manner of driving and, therefore, my
7 opinion was that it would not be
8 helpful to the prosecution to prove a
9 factor in the marked departure."
10 This is where he clearly indicated
11 that he was not prepared to rely on the
12 jurisprudence in his favour and argue that alcohol
13 consumption, period, was an aggravating factor.
14 Mr. Minuk testified that he felt that the Judge
15 was putting him to the proof that alcohol
16 consumption was contributory to the marked
17 departure. And I submit to you, Mr. Commissioner,
18 that this explanation is without merit, as it was
19 already established that the accident was
20 unexplained. And furthermore, the Judge indicated
21 that he knew there was no evidence that
22 Harvey-Zenk was impaired by alcohol. It would
23 have been evident to anyone listening to the
24 Judge's comments that he considered the
25 consumption of alcohol to be an aggravating

1 factor. And I would direct your attention to the
2 opinion of Mr. Gover, who testified at page 6817
3 in our transcript of proceedings, that this was a
4 very safe assumption.

5 Mr. Commissioner, I would like to move
6 on to another area of concern. Even if this case
7 was too weak to parlay into a conviction on all of
8 the charges, we must examine whether Mr. Minuk
9 took adequate steps to advise investigating
10 officers on how to address those weaknesses,
11 whether he conducted due diligence before making
12 the decisions he did. Did he, or should he, for
13 instance, have interviewed witnesses? Was he
14 suitably critical, if he could have been at all,
15 of the information that was placed before him?
16 Did he consider his options as a prosecutor fully?
17 Did he obtain all of the material he could have?
18 Did he consider it to the full extent? Did he
19 make decisions in the absence of information? Did
20 he embark on resolution discussions without first
21 assessing the weaknesses, the strengths, and areas
22 where additional work may have assisted or pointed
23 to further avenues of questioning or
24 investigation? Were there things done that are
25 inexplicable on the evidence before us? In these

1 areas, and in addressing these questions, there
2 were shortcomings.

3 At exhibit 222 you will see an
4 assessment of the case, a status of the case
5 document that Mr. Paciocco prepared, and it was
6 filed. And at page 5756, Mr. Minuk agreed in
7 testimony that it was a fair view or overview of
8 the charges.

9 In looking at the case, we have to
10 bear in mind that there was a failure to ensure
11 that Sergeant Carter complied with the request or
12 direction to obtain records from Branigan's. This
13 is inexcusable, and our position is that
14 Mr. Minuk's explanation for not following up on it
15 is unacceptable. These records would have been
16 valuable as well in the investigation and in
17 gaining a true sense of how much alcohol was
18 consumed. The extent he went to get them, the
19 three letters that he wrote, signifies the
20 importance of them. He should not have given up
21 on the pursuit of these records. The fact that
22 the records may not have revealed all that he
23 hoped cannot be used as an ex post facto
24 justification for not getting the records. And
25 moreover, the records may have spurred additional

1 investigation, as there is clearly alcohol
2 unaccounted for on the evidence of the officers.

3 In respect to lay witness preparation
4 and the contact, or lack thereof, of these
5 witnesses, I would ask you to direct your
6 attention to the evidence of Denise Bukowski, at
7 page 1578 in our evidence at line 11, where she
8 stated:

9 "Given the seriousness of what
10 actually happened, I was surprised
11 right from the onset of it that I
12 wasn't contacted. Even for someone to
13 tell me that, you know, what I saw or
14 what I did, et cetera, had some value
15 or didn't. But I didn't find that I
16 had a lot of clear direction as to
17 what to expect, and I felt that I just
18 had to take the initiative to find out
19 where I stood and where I needed to
20 be. Yeah."

21 Kathleen Beattie testified before you,
22 her evidence is at page 1368 at line 13, where she
23 stated:

24 "Now that I'm involved with it, I'm
25 surprised that I didn't have a meeting

1 with Mr. Minuk."

2 The evidence of Garth Shaw is found at page 1447,
3 line 12 in our transcript. He told you,
4 Mr. Commissioner, that he had no contact with the
5 prosecutor before attending court. He was told on
6 day one that there might be some plea bargaining,
7 so they won't know anything until the next
8 morning, so he was told to come back. The next
9 day he was told that they had plea bargained.
10 Mr. Minuk advised him that Mr. Harvey-Zenk would
11 likely get some sort of house arrest. And
12 Mr. Shaw described what he noted as a lack of
13 caring. He described Mr. Minuk's dealings with
14 him as though Mr. Minuk had put down another deal
15 on the books.

16 In our submission, there was a failure
17 to fully comprehend the full extent of the
18 accident reconstruction evidence, and to reject
19 outright any suggestion of falling asleep or a
20 momentary lapse of attention as the cause of the
21 accident. We say that for the following reasons.
22 The best it gets is there is 15 seconds of warning
23 on these advance lights. He is approaching
24 flashing yellows and a red at the intersection.
25 Cars are stopped in the intersection. The roadway

1 is a straight as a ribbon. The vehicle traveling
2 along this path is in control, it is in motion
3 going in a straight line. There is no variation
4 in direction, there is no variation in speed.
5 Consider that with the evidence of his reaction
6 and the ability to keep the truck on the roadway
7 instantly after the accident. This, we submit, is
8 inconsistent with being awoken from the state of
9 subconsciousness. We submit that driving this
10 vehicle for that period of time in that manner,
11 straight down a straight road, that this accident
12 cannot be accounted for on the suggestion that
13 there was a momentary lapse of attention.

14 Some of the facts that Mr. Minuk read
15 in to court are completely unsupported by the
16 disclosure. Now, we know that he had interviews
17 with officers, but some of the facts were
18 unsupported by the disclosure, and that should
19 have lead somewhere. For instance, on August 22nd
20 there is a submission at page 4 in the transcript
21 of that day, and that is page 1623 in our
22 disclosure, that Officer Black went to sleep at
23 4:00 a.m., and when he woke up, the remaining
24 guests at his home were leaving. He indicated
25 that officers were drinking so much that some were

1 unable to report on the consumption of others.
2 When he testified before you at page 5918, he
3 referred to the memorandum of September 19th, 2007
4 to Mr. Slough, where he referred to officers
5 Anderson and Humniski as sources of that
6 information. This was at page 5921 of his
7 testimony. He indicated as follows:

8 "One of them, at least Anderson said
9 that he -- that their impairment was
10 such that they did not remember much."

11 We want to point out to you,
12 Mr. Commissioner, that this is not clear evidence
13 that it was Officer Anderson or Humniski who were
14 saying that they themselves were in a state of
15 impairment that they did not remember much, but
16 they are clearly indicating to Mr. Minuk that some
17 of the officers were drinking so much that they
18 were unable to report on the consumption of
19 others. And you know this is completely
20 contradicted by the evidence of the police
21 officers.

22 Further submission on August 22nd, at
23 page 18 in the transcript of that day, which is
24 page 1635 in our disclosure, stated as follows:

25 "They weren't watching or didn't pay

1 attention and, in fact, some of them
2 even went so far as to say that
3 because of his rank, not to be
4 disrespectful of anyone who is a
5 member of the Police Service, but
6 because of his rank, many of these
7 were senior officers, they barely paid
8 attention to him because he was simply
9 on a shift but wasn't truly friendly,
10 so to speak, with these other
11 officers."

12 There is no basis whatsoever in the disclosure for
13 this. Mr. Minuk explained it as referring to an
14 understanding that when he received this
15 information, it was a reference to badge number
16 being the equivalent of rank. But even that
17 doesn't make sense, I submit to you, because there
18 are officers there with similar and less
19 experience than Mr. Harvey-Zenk. The testimony
20 before the Commission indicated that there was no
21 difference or dichotomy between senior and junior
22 officers. Most of the officers there were not
23 senior officers. Most held the rank of constable.

24 He states he learned these things in
25 speaking with the officers, yet he did not follow

1 up adequately on these issues, as they should have
2 been. They ought to have been challenged, if
3 Mr. Minuk was taking a healthy skeptical approach
4 to the officers' evidence. Indeed, we know as a
5 result of what he told me at page 5780 and 5781 of
6 his testimony, that he took no notes of the
7 conversations with the officers despite the fact
8 that what they were saying represented a profound
9 departure from the statements that he had been
10 furnished with.

11 Mr. Minuk did not interview
12 Mr. Rosser, Mr. Fontaine, Mr. Woychuk, or any of
13 the Branigan's civilians before solidifying the
14 plea arrangement. The suggestion that had the
15 plea discussions failed, that he would meet with
16 the witnesses at night, as per his testimony, was
17 insufficient. Witnesses need to be interviewed
18 and prepared well in advance for the Crown's
19 benefit and for the witnesses' benefit as well.

20 Also, as I mentioned, there are areas
21 where the evidence is irreconcilable. If he
22 agreed not to call evidence of alcohol
23 consumption, why is he in a telephone conversation
24 with Mr. Kaplan and Mr. Slough, on September 12th
25 during the recess of court, for the purpose of

1 determining whether he would do precisely that. I
2 refer you to the testimony of Mr. Slough on this
3 point, at page 6896 of our evidence, at line 6,
4 where he agreed that it was hard to reconcile any
5 agreement with Wolson not to call evidence and
6 thereafter participate in a conference call to
7 determine if he would do just that.

8 Another area where Mr. Minuk did not
9 ensure that the court received reliable
10 information was in his silence on the explanation
11 being offered by Mr. Wolson for Harvey-Zenk's
12 failure to assist the court in understanding what
13 happened in the accident. I want to refer you
14 specifically to what Mr. Wolson stated in this
15 regard. This is at August 22nd, page 46 in the
16 transcript from that day:

17 "Never once, never once has Derek ever
18 offered to me any concern for himself.
19 He has never tried to make excuses.
20 He has been forthright in what he can
21 remember. He received what they
22 believe is a concussion at the time of
23 this incident, but he has always
24 thought only of the family of Crystal
25 Taman."

1 As with the suggestion that there may
2 have been a momentary lapse of attention or
3 falling asleep, this assertion should have been
4 vigorously challenged. Indeed, the only exhibit
5 filed at the sentencing hearing on memory stated
6 there was not any memory loss issues. That is
7 exhibit 250, I.54, page 1557.

8 The existence of this report and that
9 assertion to Chief Justice Wyant should have, at a
10 bare minimum, prompted a question or motivated an
11 effort to get some clarification on that issue.
12 This was important because the fact of the memory
13 loss was being floated as a reason for how
14 Harvey-Zenk could be characterized as being
15 forthright, despite any explanation for the
16 accident. That's the one thing the family would
17 have wanted. And the court instead was given a
18 reason for why it was not proffered, and that
19 reason should have been seriously challenged by
20 the Crown, in view of the case and the material
21 that he had before him.

22 The suggestion of memory loss was also
23 inconsistent with the submission that he would
24 have told his mother that he sees Crystal Taman
25 dying. Mr. Minuk should have picked up on that

1 fact as well.

2 Mr. Commissioner, I want to move to
3 another area, and I'm going to ask you to consider
4 whether on August 22nd, the first real day of the
5 sentencing hearing, whether Mr. Minuk made
6 appropriate disclosure to Chief Justice Wyant
7 about his reasons for the resolution. In other
8 words, whether he gave adequate guidance to the
9 court on whether the joint position was a quid pro
10 quo plea bargain or a simple coincidental joint
11 resolution. Our experts address this issue in
12 questions M and N in their respective reports.

13 On this issue the expert evidence is
14 consistent. A mistake was made. On the first
15 day, August 22nd, the Crown failed to take
16 sufficient steps, and the precise nature of the
17 joint submission was not made manifest to the
18 Judge. This, however, was corrected on
19 September 12th, and it has been characterized as a
20 mistake, but one of inadvertence. It is important
21 to bear in mind, however, that but for the letter
22 of Judge Wyant calling counsel into court again,
23 this mistake might never have been clarified.

24 Mr. Minuk explained this mistake at
25 page 5802 in his transcript of evidence. He

1 states that it was not his best advocacy and he
2 did not convey what he intended. What he stated
3 was:

4 "Those charges were stayed when the
5 guilty plea was entered. They were
6 stayed not because the accused pleaded
7 guilty to dangerous driving, but
8 because of the Crown's obligations
9 that I described to you in my
10 introductory remarks. That obligation
11 is to have and be able to present to
12 the court legal proof."

13 We know further on August 22nd he
14 clearly stated to the Judge that he did not stay
15 the charges as a result of the plea bargain.
16 Mr. Minuk fairly conceded that this was not his
17 best advocacy. This concession, however, is in
18 the face of him being asked by the Judge, if that
19 was the case, why are these charges being stayed?
20 If that was the case, that the charges were being
21 stayed as a result of weaknesses and not a plea
22 bargain, and he affirmed that that was the
23 position. And I refer you to the transcript of
24 September 12th, page 23, which is page 1709 in our
25 disclosure, and also page 1714 in our disclosure,

1 line 5, further evidence of September 12th, where
2 he clearly indicated that the charges were not
3 stayed as a result of a plea bargain.

4 When referred to those passages before
5 you, he acknowledged that he was not expressing
6 himself clearly, and that is at page 6057 in our
7 evidence. He does, however, succeed to a certain
8 extent in informing the Judge that the joint
9 submission is a product of a quid pro quo plea
10 bargain. And this comes on September 12th. But
11 at this point, it seems on a fair reading of the
12 transcript, that the Judge is confused by the
13 submission to the contrary. One would suggest, or
14 could suggest that the clarification of his
15 position seems Johnny-come-lately to Judge Wyant,
16 and perhaps all too convenient as far as he is
17 concerned. The Judge appears to be skeptical
18 about that submission. And he may well be
19 suspicious that this characterization is an
20 attempt to armour plate the joint recommendation
21 using Manitoba jurisprudence on joint submissions.
22 I think we all recognize that much of this
23 confusion and turmoil could have easily been
24 avoided by getting the message out clearly on
25 August 22nd, in the form of an agreed statement of

1 fact.

2 It is difficult to reconcile the
3 suggestion that when put to the question of plea
4 bargain, Mr. Minuk would have indicated at page
5 23, and page 1709 on September 12th as follows --
6 this is the judge, and then Mr. Minuk comments on
7 what is being said. Judge Wyant says as follows:

8 "As I heard you say, and I may have to
9 review the transcript, you indicated
10 and clearly stated and, of course, I
11 clearly accept this, that charges were
12 not stayed because the accused plead
13 guilty, they were stayed because the
14 Crown was satisfied that it did not
15 have legal proof, correct?"

16 And Mr. Minuk responded:

17 "Correct."

18 At page 1714, that would be page 28 in the
19 transcript of September 12th, 2007, the court
20 stated:

21 "And there is no question. But there
22 is, there is a significant difference.
23 Your comment was, if I have it right,
24 the other charges were stayed not
25 because the accused plead guilty to

1 dangerous driving causing death,
2 that's what you said, but because the
3 Crown had the legal proof of dangerous
4 driving causing death, and that's what
5 I heard you say before and that's what
6 I heard you say today."

7 And Mr. Minuk responded,

8 "Well, that's my opinion."

9 It is easy to see on this evidence,
10 Mr. Commissioner, why the experts would agree that
11 a mistake was made on that day, and it is easy to
12 see why Mr. Minuk would fairly concede that that
13 was the case. And that concession is appreciated,
14 and you will hear strong recommendations with
15 respect to a potential remedy for this, and that
16 would be by way of conducting the plea a little
17 bit differently, and in cases such as these,
18 committing to a written agreed statement of fact.

19 Mr. Commissioner, another area that we
20 must consider is whether adequate information was
21 furnished by the prosecutor to satisfy the ethical
22 and professional obligations of a prosecutor
23 presenting the factual underpinnings of the plea.
24 Here we also see a divergence of the opinion of
25 the experts, but, again, neither is prepared to

1 endorse the manner in which he handled this issue.

2 Mr. Gover maintains that the public
3 interest required the evidence of alcohol
4 consumption to be brought to the attention of the
5 sentencing court and proven as necessary. In
6 failing to prove this fact, the prosecutor in this
7 case failed to meet his professional obligations.

8 Mr. Peck, on the other hand, quite
9 obviously in light of his interpretation of the
10 law regarding alcohol consumption, maintains that
11 Mr. Minuk was overreaching in the first place to
12 have even brought up alcohol consumption.

13 And again, it is of note that both
14 experts made the same recommendation as a result
15 of this specific question, and that was, get
16 things in writing in cases such as these.

17 I would like to address another issue
18 with you now, Mr. Commissioner, that being whether
19 Mr. Minuk acted as an independent prosecutor. On
20 this issue, you will want to carefully consider
21 the evidence we heard of the many interactions he
22 had with the officials from Manitoba Justice
23 throughout the prosecution.

24 I refer you to exhibit 218, and that
25 is the docket, and you see the blue highlighting

1 which indicates the numerous contacts. Now, I
2 want to quickly point out that we do not suggest
3 that he was influenced improperly, but in our view
4 he worked too closely with Manitoba Justice to
5 maintain the appearance of independence.

6 In assessing this issue, you will need
7 to bear in mind the applicable policy, and you
8 will find that at exhibit 215, that is the
9 Manitoba Justice Policy Directive on the
10 appointment of independent counsel.

11 On this issue you should also refer to
12 a number of exhibits. Exhibit 217, the Manitoba
13 Policy Directing Conditional Sentencing. I have
14 already referred you to 218, that is Mr. Minuk's
15 docket with the blue highlighting of interaction.
16 Exhibit 219 is relevant, that's the fax from
17 Mr. Kaplan to Marty Minuk of September 21st,
18 asking for a response to the Sveinson's letter of
19 August 31st, to Gord Mackintosh, the Minister.
20 Exhibit 220, where Mr. Minuk asks for an extension
21 to respond to Mr. Kaplan's request. We see at
22 exhibit 211, queries from Mr. Slough after the
23 fact. We see at exhibit 227, a July 15th, 2007
24 email about the possible resolution between senior
25 justice officials. At exhibit 225 there is

1 reference to the May 12th meeting with the RCMP
2 and other justice officials. Exhibit 230 is an
3 actual copy of Mr. Minuk's submissions that were
4 forwarded for review. And exhibit 48 is
5 Mr. Kaplan's memo to Mr. Slough detailing his
6 understanding and involvement.

7 Without going again through details on
8 these exhibits, what we see here is the dynamic of
9 interaction and seeking approval emerges as early
10 as getting the letter prepared to send to
11 Mr. Wolson as a result of the Woychuk/Carter
12 disclosure. It continues into discussions
13 regarding plea and joint submission. We enter
14 into an ad hoc case conference. You have evidence
15 before you of sending submissions to be vetted not
16 only for August 22nd, but September 12th. You
17 have the telephone conference of September 12th.

18 Now, we understand that the policy
19 directive on the role of independent prosecutors,
20 which is exhibit 215, and the newer version which
21 you will see in exhibit 44, disclosure reference
22 X.1.3 and on, it may encourage consultation, but
23 the frequency and substantive nature of the
24 contact in this case was beyond that which was
25 envisioned by the policy, despite the fact that

1 the policy is designed to make such contact
2 transparent. In this case it was akin to a
3 vetting process where Mr. Minuk was seeking
4 approval.

5 I would suggest to you,
6 Mr. Commissioner, that on a reading of Mr. Minuk's
7 interview with Commission Counsel and his
8 testimony on that point before you, that no other
9 conclusion can be drawn. And I want to refer you
10 to four brief passages that were covered in the
11 evidence. Mr. Minuk was asked about these
12 statements and questions and answers, this is his
13 interview on May 2nd, 2008 with Commission
14 Counsel, at page 63. What is being addressed
15 leading up to page 63 and this question is the
16 fact that there is a discussion about a potential
17 resolution, and there has been some discussion
18 with Robert Taman and his son, which occurred on
19 Friday the 13th, 2007. I asked Mr. Minuk:

20 "Q Now, would you have vetted this
21 resolution with Mr. Kaplan or
22 Mr. Slough?

23 A Absolutely.

24 Q Prior to speaking to the family
25 about it?

1 A Absolutely.

2 Q And what was their reaction to
3 your proposed resolution?

4 A Like, they, they were fine with
5 it. I didn't, I didn't hear any
6 negativity.

7 Q Were there any questions put to
8 you about the factual underpinnings
9 would be to support the plea of
10 dangerous driving causing death by
11 Mr. Kaplan or Mr. Slough?

12 A I will say all along, with
13 certainty, the three of us believed
14 that the alcohol evidence was weak,
15 very weak, and that the case, had it
16 proceeded to prosecution, would run
17 the risk of losing, or not being
18 successful rather, on matters of
19 alcohol."

20 He then went on, and you will find the reference
21 at page 64, line 11:

22 "I will tell you, sir, these issues
23 were discussed, and that had been
24 discussed with Mr. Slough and
25 Mr. Kaplan for many, many months

1 leading up to this."

2 I refer you to page 89 of transcript
3 T.7.b, the Commission Counsel interview, and this
4 was addressed when Mr. Minuk testified and these
5 questions and answers were put to him. And also
6 Mr. Slough had to deal with these questions and
7 answers when he testified. Page 89, line five:

8 "Q Now, when the matter is remanded
9 over to the 22nd day of August, this
10 is the day, Mr. Minuk, that you put on
11 record the facts that are actually
12 going, that are actually grounding the
13 plea?

14 A Right. My recollection, sir, is
15 that I would have prepared a written
16 submission. That written submission
17 would have been forwarded over to
18 Mr. Kaplan and Mr. Slough. They would
19 have had an opportunity to read it,
20 and once having read it, then received
21 what I considered to be some extent of
22 an approval, then I would have gone
23 forward with it and I would have made
24 any amendments or changes that they
25 would have asked or suggested that I

1 make.

2 Q So your submissions would have
3 been vetted by --

4 A I don't know, I guess that's the
5 word, vetted, but I gave it to them in
6 advance.

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

8 A Yes."

9 At page 98, when Mr. Minuk was
10 interviewed by Commission Counsel at line 14, and
11 this was put to him when he testified:

12 "And you start your submissions, and
13 we are talking about September 12th
14 here, and you open your submissions
15 with a reference to the Gardiner
16 decision being the duty of the Crown?

17 A Um-hum.

18 Q Now, I understand, sir, that those
19 submissions were in fact vetted or
20 approved by Mr. Kaplan and Mr. Slough?

21 A Yes, they were, that's correct."

22 At page 111 at line 21 in his
23 interview, which was put to him when he testified,
24 this is line 23:

25 "Q Now, Mr. Wolson indicated to the

1 court that he doesn't agree that
2 alcohol plays any part in the case and
3 he clearly said that to the court.
4 I should have indicated that alcohol
5 isn't a factor because he didn't
6 believe that it was.
7 And then, of course, Judge Wyant put
8 you to the test, or put you to the
9 question, look, the defence doesn't
10 agree to this --
11 A Yes, I know that.
12 Q -- factor. And then you were
13 asked whether you were going to prove
14 it, whether you would prove that fact?
15 A Right.
16 Q And did you bring this up with
17 anyone?
18 A I spoke with Mr. Slough and
19 Mr. Kaplan about it.
20 Q And could you tell me about that
21 conversation?
22 A The conversation was to -- I
23 reported to them what the Judge said,
24 so to see there was some effort on my
25 part to at least secure an

1 adjournment, put that to them,
2 indicated to them what the situation
3 was, and the response that I gave to
4 the Judge was as a result of that
5 conversation."

6 What we see here, Mr. Commissioner, is
7 a lack of independence, or the perception I should
8 say of the lack of independence, and there is a
9 failure, I think, to recognize that. The lack of
10 independence is further evidenced by Mr. Kaplan's
11 claim that in consideration of Marty Minuk's
12 proposed resolution, that he would like to "sleep
13 on it," as per his memorandum of July 13th to
14 Mr. Slough, which is exhibit 48. Mr. Kaplan's
15 assertion that the old cliché "sleep on it" should
16 not be given its age old interpretation of
17 deciding something over night is curious,
18 particularly in the light of the evidence of the
19 repeated nature of the contact and requests for
20 vetting. Despite the fact that Mr. Kaplan and
21 Mr. Slough might not have known about Marty
22 Minuk's undertaking not to prove alcohol, they
23 both participated in the telephone conference of
24 September 12th during the court recess. And they
25 were in agreement in principle with the approach

1 of not calling alcohol consumption evidence. We
2 submit that this was an error. They too should
3 have recognized and been aware of Manitoba and
4 other jurisprudence that could have been furnished
5 to the Judge to address that point and deal
6 effectively with what evidence there was. I guess
7 in short what I'm saying, if you are going to
8 engage in a consultative process, you should
9 strive to get it right. And having three heads
10 together on this point didn't necessarily assist
11 Mr. Minuk, in our submission. And we recognize
12 that there is a difference of opinion on this.

13 In explaining his contacts, numerous
14 contacts as evidenced by the exhibits, et cetera,
15 Mr. Minuk stated in his testimony at page 5832
16 that he is mindful of the fact that the Department
17 of Justice is his client. He considers that they
18 are a client and, therefore, he is keeping them
19 informed. And he draws a private practice
20 analogy. And in our view, this is not sound. It
21 is not even an applicable -- it is not a tight
22 analogy. Because in private practice we don't
23 send our submissions to our clients to get vetted.
24 We are supposed to know what to do and what to
25 say. We get approval, from time to time, because

1 of the nature of the work we do. But the
2 suggestion that you would be sending your
3 submissions over to get vetted on the basis of
4 treating somebody as though they were a client, in
5 our submission, is a weak suggestion.

6 The wording also of Mr. Kaplan's
7 memorandum does not suggest independence. And I
8 refer you again to exhibit 48 where he stated:

9 "The Friday meeting allowed a better
10 understanding of outside counsel's
11 position and his recommendation."

12 Even Marty Minuk suggested, when he testified,
13 that if he did not get a form of approval, that he
14 could potentially be off the case. I refer you to
15 his testimony at page 5936, it is actually 5935
16 and 5936, the bottom and the top.

17 "Kaplan was determining whether or not
18 I should be let alone, so to speak, to
19 carry on with the matter, or if I was
20 so off base that others -- I should be
21 removed from it. That's what I
22 suspect would happen."

23 Consider also on this point, Mr. Commissioner, the
24 evidence of Ms. McCorrister, the Victims' Rights
25 worker, who was present during the meetings with

1 Robert Taman and Jordan Taman, and also had some
2 exchanges, email exchanges with the Tamans, and
3 was at one point trying to get a meeting set up.
4 And there was some concern after court on the
5 22nd, and then there was a desire perhaps for
6 Mr. Taman to meet. And without going into the
7 details of that specific issue, one of the things
8 that she records at exhibit 11, page 1925, is that
9 Mr. Minuk is getting direction from Justice as to
10 what he could reveal.

11 Now, Mr. Minuk gave an explanation for
12 what he was referring to there. But that is not
13 consistent with what Ms. McCorrister has indicated
14 the subject matter of the conversation was and the
15 memorandum that she had prepared.

16 Mr. Wolson even refers to Mr. Minuk's
17 concept of vetting in his own notes. This is
18 S100, page 3501 in the disclosure. You recall his
19 testimony that Mr. Minuk would go to his people
20 before he would deal with his client.

21 On another issue, Mr. Commissioner,
22 there have been allegations made that Mr. Minuk
23 was in a conflict of interest, given his dealings
24 as a defence lawyer and in his work with
25 Mr. Wolson. On this issue it is clear, it is our

1 view that he was clearly not in conflict as per
2 his evidence and the evidence of the prosecution
3 experts.

4 Sir, on the issue of Mr. Minuk's
5 approval of the Winnipeg Professional Standards
6 Unit investigating a Winnipeg Police Officer,
7 while it is not unreasonable perhaps for the
8 Winnipeg Professional Standards Unit to have done
9 this, according to the local practice and views,
10 we are cognizant of the perception that this
11 practice can create.

12 Mr. Minuk commented on this issue at
13 page 5772 in the transcript, on getting the
14 Winnipeg Professional Standards Unit involved, as
15 opposed to the RCMP, he had this to say:

16 "Maybe there is merit, maybe there is
17 merit, period, in the establishment of
18 some group other than the Professional
19 Standards to investigate police
20 officers who are involved in criminal
21 offences, and Professional Standards
22 perhaps should focus itself on
23 internal disciplinary matters. So I
24 can't disagree with that."

25 Mr. Commissioner, on the separate

1 issue of whether there was compliance with the
2 Ministerial policy on the laying and staying of
3 charges, that's exhibit 216, volume G-46, page
4 1393 in the disclosure. We urge that this policy
5 is at best ambiguous and should be clarified. We
6 submit that the policy should apply to stays that
7 arise out of plea bargains, given that the law of
8 Manitoba requires such disclosure. Marty Minuk's
9 failure to explain the reasons for staying of
10 charges is regrettable, even if it does not
11 contravene the policy.

12 In summary, Mr. Commissioner, on the
13 prosecution, it is the position of Commission
14 Counsel that this prosecution was not done with
15 the preparation, the analysis, the vigor,
16 conviction and commitment to denouncing and
17 deterring significant criminal misconduct that the
18 people of Manitoba should be entitled to expect.

19 Now, Mr. Commissioner, I note the time
20 and what I was going to suggest --

21 THE COMMISSIONER: Can I say
22 something? You haven't commented on it yet,
23 and -- excuse me, you haven't commented on it yet,
24 and I presume you would as part of your submission
25 with respect to the treatment of the Tamans. The

1 question that I wanted to put to you, and we will
2 take a break now, and hope that you will comment
3 on it, is the issue of whether it was appropriate
4 for Mr. Minuk to give Mr. Wolson a false story
5 about why he sought an adjournment, and to --
6 again, when it came to the Tamans, he was
7 conducting, or had asked the RCMP to conduct an
8 investigation. I don't know whether much turns on
9 what your submissions are going to be, but it is
10 something that I think I should comment on.

11 MR. CLIFFORD: Mr. Commissioner, I do
12 deal with that issue when I deal with the Victims'
13 Bill of Rights issues.

14 THE COMMISSIONER: I thought you
15 might, but since you are going to turn to that, we
16 will rise now for 15 minutes.

17 THE CLERK: Order, all rise. This
18 Commission is in recess.

19 (Proceedings recessed at 3:19 p.m.
20 and reconvened at 3:35 p.m.)

21 THE CLERK: Order. All rise. This
22 Commission of Inquiry is now reopened. Please be
23 seated.

24 MR. CLIFFORD: Mr. Commissioner, I
25 would like now to deal with the Victims' Bill of

1 Rights issues. As a starting point I think one
2 should look at the intention of the Victims' Bill
3 of Rights.

4 For many judges, Mr. Commissioner, the
5 touchtone of interpretation is the intention of
6 the legislature. The legislature may reveal its
7 intentions, as the Legislative Assembly of
8 Manitoba did with the Victims' Bill of Rights, by
9 explaining them in the preamble. I think it is
10 therefore fitting that we should start with the
11 preamble to paint a full picture of what the
12 objectives of the Victims' Bill of Rights are, and
13 what it strives to achieve for victims, and to
14 assist us in answering the question whether the
15 services provided to the Taman family met the
16 requirements of the Victims' Bill of Rights.

17 In answering that question we need to
18 be mindful of the specific intention of the Act
19 and its provisions. The evidence we heard from
20 those on the receiving end of the Victims' Bill of
21 Rights enlightened us and increased our
22 understanding of what victims need and expect. We
23 should contrast that evidence with what the Act
24 sets out to provide to victims.

25 Before dealing with specific issues,

1 Mr. Commissioner, I would like to make some
2 opening remarks on the intent of the Victims' Bill
3 of Rights. The Act, through its various
4 provisions, requires that there be recognition of
5 the following: That victims of crime have needs,
6 concerns and interests that deserve consideration,
7 in addition to those of society as a whole.
8 Needs, concerns and interests; this must be
9 recognized, and the fact that their needs and
10 concerns and interests go beyond those of the
11 ordinary public. They have a need for many
12 things, but primarily for information. The needs
13 and concerns and interests of the victims have to
14 be recognized by all persons from victims's rights
15 workers to Crown counsel. The Act states that
16 victims should be treated with courtesy,
17 compassion and respect. Here there is reference
18 to all victims.

19 One must ask what do these concepts
20 stand for? How are they achieved? We need to
21 look at the concept of compassion. What does it
22 mean to be compassionate? It is not a legal term.
23 In its general sense, it is simply the humane
24 quality of understanding of suffering of others
25 and wanting to do something about it. This calls

1 for an understanding. It calls for us to step
2 outside our own paradigm, whether that paradigm is
3 shaped by looking at the world through the prism
4 of a lawyer, a victims' rights worker, a police
5 officer, and to force ourselves to walk in
6 another's shoes. And as hard as that might be to
7 try to only imagine, knowing that you could never
8 truly understand the grief, the pain, the
9 suffering, the agony, the anger, the disbelief,
10 the endless loneliness of losing your wife, your
11 mother, your daughter, and the thought of starting
12 each day with the abiding sad thought, I miss my
13 wife, I miss my mom, I miss my daughter, and
14 knowing that you will never see that person again.

15 In order to treat someone with true
16 compassion, one must not only embrace these
17 thoughts, but they must understand how a victim is
18 affected by those thoughts, and more importantly,
19 how a victim can be weakened by those thoughts.

20 The Victims' Bill of Rights indicates,
21 Mr. Commissioner, that victims should have access
22 to appropriate protection and assistance, and they
23 should be given information regarding the
24 investigation, prosecution and disposition of
25 crimes.

1 Now, when we deal with the concept of
2 information, there must be an understanding of how
3 critically important that concept is. We have to
4 ask ourselves, if we were faced with the loss of a
5 loved one, what would we want to know more than
6 anything? Probably why is this person no longer
7 with me, what happened, and there would be an
8 abiding need, and I say need as referred to in the
9 preamble, to know what occurred. And if it was
10 the result of a crime, to know what will happen as
11 the state handles the prosecution. We would want
12 to know what will happen at each stage of the
13 case, and have an understanding of why it is
14 happening.

15 As Robert Taman testified on June 2nd
16 at page 63 in the transcript, he exemplified this
17 need to know when he stated as follows:

18 "That the evidence would come out and
19 show the wrongdoing. That it would
20 show the alcohol related to the
21 incident, and that it would put all of
22 the pieces together so that in the end
23 that full picture would come out for
24 everyone to see who took Crystal's
25 life and how it was done."

1 We also know from volume L of the
2 victims' materials that he sought information
3 throughout the entire process and he always wanted
4 to know what was happening. The flow of
5 information to victims is critical,
6 Mr. Commissioner. There are two ends of the
7 spectrum; those delivering the information and the
8 victims, who by virtue of their suffering and loss
9 and unfamiliarity with the system, a hostile
10 system, are apt to hang on every word that is said
11 to them. Victims are apt to place great weight
12 and reliance on what they are being told because
13 the information is being provided by
14 professionals. A victim would therefore be
15 justified in concluding that the words spoken are
16 the result of careful analysis and consideration.
17 Victims, we must recognize, may also want the
18 words they hear to reflect their desires, their
19 objectives and their motives. This is why the
20 information being provided to them should not by
21 design be cryptic. The message should not be
22 marred by legalese. The message should not be
23 sugarcoated or inconsistent or twisted in order to
24 address awkward and unpleasant exchanges or
25 circumstances.

1 The information provided to victims,
2 even when delivered in a compassionate manner,
3 will often not be what they want to hear or easy
4 to understand, but nevertheless must be clear,
5 concise and delivered directly. It must reflect
6 the truth, as hard and difficult to accept as that
7 truth may be.

8 During the course of our inquiry we
9 learned about the practice, we learned about who
10 gives information to victims, for instance the
11 front line workers told us about the PRISM system,
12 how letters were forwarded about upcoming court
13 dates, how calls were made and recorded, how
14 meetings were set up and recorded. We heard about
15 the dissemination of information regarding victim
16 impact statements, and we also learned about how
17 discussions or information in certain areas of the
18 case was to be dealt with by a Crown. In other
19 words, areas such as whether the case would be
20 subject to a plea bargain and what the possible
21 outcomes could be.

22 The PRISM system allows for better
23 communication between all parties involved in the
24 justice system and those working with the Victims'
25 Bill of Rights. We are going to suggest to you,

1 and recommend that it be extended to independent
2 Crowns, when Mr. Paciocco makes his
3 recommendations. There shouldn't be in this day
4 and age, with all of the things we can do in this
5 world, be a problem to get the PRISM system into
6 the offices of independent Crown counsels. We
7 thank Mr. Minuk for the suggestion that this take
8 place, and acknowledge what he had to say about it
9 and how beneficial it could be.

10 We are going to ask you to consider
11 Robert Taman's difficulty in getting a meeting set
12 with the Crown, and even Lesley McCorrister's
13 misunderstanding that he had in fact had a meeting
14 with the Crown. If you look at volume L of
15 victims materials, at page 1860 you see that
16 Robert articulated a concern about plea
17 bargaining. Further at page 1862 in volume L he
18 also raised with Ms. McCorrister other general
19 concerns about the case and his desire to meet
20 with the Crown. At 1863 in volume L we see there
21 was an erroneous belief from Ms. McCorrister that
22 Mr. Minuk had in fact met with Mr. Taman, and that
23 was not the case. All of these things,
24 Mr. Commissioner, wouldn't have happened if the
25 PRISM system was being piped into the independent

1 Crown counsel's office.

2 Another objective of the Act -- moving
3 to another point -- is the fact that it is in the
4 public interest to give guidance and direction to
5 persons employed in the justice system about the
6 manner in which victims should be treated. Those
7 in the justice system, particularly lawyers
8 involved in criminal cases, need to be aware of
9 the full import of the issues that victims are
10 faced with.

11 In attempting to comply with the
12 roles, the duties and the guarantees that are
13 afforded to the key players in our justice system,
14 and by that I mean the accused, the Crown and the
15 trier of fact, the rights afforded to victims
16 under the Bill of Rights can get overshadowed and
17 can even fall into a blind spot. I hasten to
18 point out that I am not saying that victims'
19 issues should steer prosecutions. Victims need to
20 be informed. People in the system need to be
21 aware of this, and they need to know how to do it.

22 When we deal with something as
23 sensitive as victims' rights, we can't forget that
24 the Act, the Bill is only a collection of words,
25 the mere framework, it requires people, guidance

1 and understanding to make it work. Therefore, it
2 is in our interest to give guidance and direction
3 to persons employed in the justice system about
4 the manner in which victims should be treated.

5 The examination of this tragic case
6 from the important perspective of victims' rights
7 came at a high cost, and I refer to the emotional,
8 physical and psychological burden that the Tamans
9 and Sveinsons have had during each day of this
10 inquiry. We are going to recommend to you, and
11 Mr. Paciocco will make a full recommendation, that
12 independent Crowns attend for training on the
13 issue of the Victims' Bill of Rights, and they
14 attend for informational sessions on those issues
15 within the Crown's office.

16 The Victims' Bill of Rights,
17 Mr. Commissioner, also states that persons
18 employed in the justice system should consider the
19 rights and views of victims in a manner that does
20 not unreasonably delay or prejudice investigations
21 or prosecutions. That is consistent with the law
22 and the public interest, and that is reasonable in
23 the circumstances, that is reasonable in the
24 circumstances of each case.

25 Now the Bill calls for consideration

1 of rights and views of victims, and that's an area
2 that I will deal with later and address
3 specifically, Mr. Commissioner, when I deal with
4 the concept of consultation. But for now assuming
5 that we equate the concept of considering the
6 rights and views of victims with that of listening
7 and seriously considering what victims have to
8 say, we have to ask ourselves, are we able to say
9 that that occurred in this case? We have to ask
10 did the criminal justice system afford the Tamans
11 an opportunity to be heard and were their concerns
12 seriously considered? This does not mean that the
13 rights and views of the Tamans would steer the
14 case. It does, however, suggest that the Crown's
15 consideration of their views in a manner that's
16 consistent with the law, would require an
17 understanding of their perspective which could
18 only be achieved through meaningful, unambiguous
19 and timely dialogue.

20 Those, Mr. Commissioner, are my
21 opening remarks on the Victims' Bill of Rights and
22 I would like now to touch briefly on the sentiment
23 of our victims. Robert Taman, as we expected,
24 explained to us in vivid colour what victims
25 experience in the justice process. He reminded us

1 that as lawyers we often become so acculturated to
2 the process that we treat our files as cases and
3 numbers rather than human catastrophes. He also
4 reminded us on June 2nd, when he testified, that
5 this is something we ought not to do. In response
6 to the simple question in what way has the system
7 let you down, Mr. Taman gave the following answer.

8 "It is really difficult to explain.
9 When you are going through something
10 like this you don't have any input, so
11 you are following people that you are
12 assuming are going to lead you into
13 that promised land, so to speak. You
14 have your full trust in these people.
15 You have -- basically your lives are
16 in their hands. It is not like seeing
17 a doctor and being diagnosed with
18 something and you can say hold off,
19 I'm going to get a second opinion
20 here. With this system you are not
21 allowed a second opinion. You have to
22 go with what is being said to you and
23 you are being lead in that direction
24 whether you like it or not. And along
25 the way you are being told certain

1 things that maybe aren't entirely
2 accurate, or being said in a way that
3 maybe they could be twisted afterwards
4 to portray them as being accurate at
5 the time. Everything was very
6 confusing to go through this. And
7 just being regular people, who have
8 never stepped into a courthouse
9 before, you have to trust that person
10 is leading you the proper way. And in
11 the end when everything unfolded, it
12 was not only accurate, as -- it was
13 not only not accurate as to what we
14 were told, we felt the whole case and
15 our lives collapsed around it, and it
16 was a very difficult thing to deal
17 with. That's, you know, like I said,
18 nobody would really understand until
19 they have actually walked that path."
20 Mr. Taman's impassioned and moving
21 words remind us that in trying to walk that path
22 we should try to step into another's shoes and not
23 look at all aspects of the case through the
24 lawyer's lens.
25 Tara, Jordan and Kristin, all good

1 citizens, likeable adults, close knit with one
2 another, told us about how painful it was to have
3 lost their mother at such a young age, and
4 thereafter to have been thrown into the jaws of a
5 justice system that Lesley McCorrister described
6 as hostile and hard on victims.

7 Sveinn and Victoria Sveinson described
8 an incredibly painful odyssey that commenced in
9 Victoria, B.C., being awakened with the news of
10 their daughter's death over the telephone when
11 they were thousands of kilometres from the comfort
12 and privacy of their own home. Theirs is an
13 odyssey that obviously continues to today. Their
14 testimony and the evidence reveals that they are
15 spirited and vocal advocates for what they believe
16 the justice system should stand for. But perhaps
17 more than anything, under it all, their story and
18 their motivation is punctuated by the unrelenting
19 anguish that flows from the aberration and
20 unnaturalness of outliving your own child. The
21 sense of loss that emanated from their testimony
22 was palpable.

23 Mr. Commissioner, I would like to now
24 turn to the key issues on the delivery of services
25 as required under the Victims' Bill of Rights.

1 The first key area I would like to raise with you,
2 Mr. Commissioner, is that the definition of victim
3 in the Manitoba Victims' Bill of Rights did not
4 include Crystal's parents, Victoria and Sveinn.
5 Your specific mandate with the Victims' Bill of
6 Rights is to ask whether it was complied with in
7 this case. Technically you didn't even have to
8 hear any evidence to make that decision with
9 respect to the Sveinsons, because rather
10 unnaturally, no one was under any legal obligation
11 to provide them with anything. As we might
12 expect, however, given their status as parents,
13 and through a measure of compassion, they were
14 indeed provided with information. Now I'm not
15 attempting, nor am I, despite my delusions of
16 popularity, qualified to provide evidence on
17 societal norms, but I do think that we all, and I
18 mean everyone in this room, agree that this
19 structure does not reflect our collective view of
20 who a victim is. Clearly a parent is a victim and
21 should be recognized as such, whether there be a
22 spouse or partner or otherwise in the family.

23 I would like now, Mr. Commissioner, to
24 turn to a second key issue; in asking whether the
25 services provided to the Tamans were sufficient,

1 having regard to the requirement of the Victims'
2 Bill of Rights, we need to harken to the intention
3 of the Act and examine the concepts previously
4 mentioned: The needs, concerns and interests,
5 courtesy, compassion and respect, information
6 regarding the investigation and prosecution, and
7 consideration of the rights and views of victims.
8 We have to look at these concepts and ask the
9 tough question, were these areas complied with?
10 Were their failings on these issues? Yes. Where?
11 Primarily with the Crown and to a lesser extent
12 with the East St. Paul Police Service.
13 Unfortunately we have no choice but to submit that
14 Mr. Minuk did not comply with his obligations
15 under the Victims' Bill of Rights. In saying
16 that, we acknowledge, however, that we have to put
17 this submission into perspective. Mr. Minuk
18 attempted to do so and went further than most
19 prosecutors would have had in meeting with victims
20 and in meeting with the Sveinsons when not legally
21 required to do so. He, however, did not succeed
22 in fulfilling his informational requirements
23 because he failed to communicate effectively. We
24 are not saying that he intended to be anything
25 less than courteous, professional and respectful,

1 but he failed in his communications.

2 We appreciate that victims are often
3 emotional, and that they are lay persons in
4 matters of law, but the Crown has a duty to ensure
5 that they understand, or to attempt thoroughly
6 that they understand. There is no expectation
7 that they will accept everything that was said to
8 them. But there should be due diligence in trying
9 to get them to understand. It is here, we
10 maintain, with respect, that he failed.

11 As I stated, this is a hard position
12 to take, but we do so for the reasons that follow.
13 Concerns were raised in the victims' phase,
14 Mr. Commissioner, during the evidence that Mr.
15 Minuk was not forthright with the victims, more
16 specifically;

17 A, That he provided inaccurate or
18 inconsistent information about the
19 strength of the case.

20 B, That he was not forthright about
21 the existence of a plea bargain with
22 Mr. Wolson.

23 C, That he represented that the
24 dangerous driving charges were the
25 most serious of the charges laid.

1 D, That there may have been an
2 inaccurate description of the purpose
3 for the RCMP investigation and the
4 need to adjourn the preliminary
5 inquiry in 2006.

6 Mr. Commissioner, there was also
7 concern raised by the victims that Mr. Minuk
8 failed to consult with them adequately, contrary
9 to the policy guidelines for Manitoba Justice and
10 the Victims' Bill, and that he may have
11 misrepresented to the court and the defence
12 counsel that the Taman family was on side with the
13 position that he was taking on the joint
14 recommendation for sentence.

15 More generically, Mr. Commissioner,
16 claims were also made during the victims' phase
17 that he failed to treat the victims with dignity
18 and respect. Again, I say that the Crown did not
19 fully meet his obligations under the Victims' Bill
20 of Rights, despite the fact that Lesley
21 McCorrister stated he would have spent more time
22 with the Tamans than front line Crowns may have.
23 I say this in light of the fact that Lesley
24 McCorrister describes Marty Minuk as being polite,
25 respectful and courteous to the Tamans.

1 Mr. Minuk fell short in the
2 requirement under section 12 of the Victims' Bill
3 of Rights with respect to information about the
4 prosecution, particularly section 12(i),
5 information about resolution discussions and
6 12(k), the process for sentencing a person, and
7 section 13, which deals with right to information
8 about the status of the prosecution, particularly
9 section 13(f), which deals with the outcome, and
10 also section 14, the right to be consulted about
11 the prosecution, particularly 14 subsection (e),
12 any agreement relating to a disposition of the
13 charge. In these areas, the evidence has revealed
14 shortcomings and that there was not a meeting of
15 the minds. The informative component is where
16 there were difficulties. There was a lack of
17 understanding and there were surprises that the
18 Taman family experienced in court. They were
19 unanimous in their view that the sentence was not
20 the subject of a plea bargain. They were firm in
21 their belief that at least the issue of the
22 sentence would be decided by the judge. They were
23 affronted by the notion that somehow it could
24 said, with what they considered unmitigated
25 audacity, that alcohol did not play a role in the

1 dangerous driving in the death of Crystal.

2 Mr. Commissioner, I would like to
3 examine now the areas of concern that were raised
4 in the victims' phase, areas where there are
5 contradictions, down right differences of opinion
6 and miscommunications. On the issue of inaccurate
7 or inconsistent information regarding the strength
8 of the case, I refer you to the testimony of
9 Jordan Taman at page 403, line 20 in our evidence:

10 "I believe Marty told us that he was
11 -- he had entered a guilty plea there
12 outside the courts, and I don't
13 remember the exact words, but I do
14 remember him saying when we found out
15 he was entering the plea that he
16 doesn't understand why he would be
17 pleading guilty because he could have
18 gotten him off all of the charges."

19 The comment as heard by Tara was
20 described at page 327, line 3 in our evidence.

21 "And basically he told us that if it
22 was his client he would not have let
23 him plead guilty. He would have got
24 him off all of the charges. I'm
25 sorry, he was going to be pleading to

1 dangerous driving."

2 And it doesn't stop with the Taman
3 family. Denise Bukowski at page 1577 at line 5 in
4 the evidence indicated:

5 "And he did say that Mr. Zenk was
6 doing -- he said, you know, this
7 gentleman perhaps had a conscience and
8 that he was perhaps doing the right
9 thing, because of the holes in the
10 investigation he could very well, he
11 could very well have gone to trial and
12 he would have gotten off completely."

13 I ask you, Mr. Commissioner, to
14 contrast those expressions regarding the lack of
15 strength in this case with what he said before you
16 and others. Consider again exhibit 222, the
17 assessment of the case which was prepared by Mr.
18 Paciocco at page 5756. Mr. Minuk agreed in
19 testimony that this was a fair summary of his view
20 of the charges. The factors therein suggest that
21 this was a strong case of dangerous driving.
22 Indeed, Richard Wolson, who has great respect in
23 this community for his abilities as a defence
24 counsel, appeared before you and indicated that on
25 the dangerous driving charge alone he would have

1 calculated a mere 10 to 12 chance of acquittal.
2 Consider also the comments that I referred you to
3 earlier in the prosecutions' phase, when I
4 referred to the transcript of August 22nd, 2007
5 where Mr. Minuk repeatedly indicated to Chief
6 Justice Wyant that he had a case in dangerous
7 driving. Also consider his testimony before you
8 at page 5902 where he indicated:

9 "I knew there was some risk to the
10 dangerous driving but low."

11 The calculus of the dangerous driving
12 case as presented does not suggest that it was a
13 weak case that anyone could have easily beaten.

14 I ask you to consider whether Mr.
15 Minuk was forthright about the existence of a plea
16 bargain with Mr. Wolson. You will recall Robert
17 Taman testified and stated that the term plea
18 bargain was not used by Mr. Minuk in their first
19 meeting. And the first time he heard the word was
20 in court when Judge Wyant asked if there was a
21 plea bargain. Robert Taman told the Commission
22 that on August 22nd, which he describes as the
23 worst day he could ever imagine in court, that he
24 learned that day outside in the hallway that there
25 was going to be a joint recommendation for a

1 conditional sentence, and his reaction was that he
2 was "flabbergasted." He, "couldn't believe what
3 he was hearing". And I refer you to page 193 and
4 194 of the transcript of evidence. And he asked
5 Mr. Minuk, is there any where on there, referring
6 to the sheet with the conditions, that he could
7 write down, that Mr. Minuk could write down that
8 the family didn't agree.

9 As for the children, Jordan, at page
10 405 and 406 in the transcript indicated,

11 "I'm not 100 per cent sure but I might
12 have asked him if it was a plea
13 bargain or not because it was in the
14 papers. He never said to me that it
15 was."

16 On the issue of Sveinn Sveinson's
17 understanding of whether this was a plea bargain
18 or whether Mr. Minuk was forthright about the
19 existence of a plea bargain, I'm going to refer
20 you to an exchange in the evidence, part of the
21 transcript, Mr. Commissioner, at page 566 in our
22 evidence.

23 "Q Sir, you had had, by the time the
24 plea went in, you had had a number of
25 hours to reflect on the decision to

1 take a plea to one charge and drop the
2 others, sir. What were your feelings
3 about that?

4 A I couldn't understand why -- why
5 or even that they would consider
6 dropping a charge of refusing a
7 breathalyzer. I mean, I know they
8 couldn't prove that he was drunk
9 because he didn't take a breathalyzer,
10 but why they would charge -- drop the
11 charge of refusing a breathalyzer? It
12 didn't make sense.

13 Q Sir, what did you do after that
14 court hearing?

15 A I went out in the hallway and I
16 waited.

17 Q What did you wait for, sir?

18 A For Mr. Minuk.

19 Q And did he come out?

20 A Yes, he did.

21 Q And what happened when he came
22 out?

23 A Well, I approached him and I asked
24 him straight out, you have given away
25 three charges, there is only one left.

1 I said, are you going to plea bargain
2 for a sentence now? His comment was,
3 oh, no, that's the judge's job. He is
4 the one that decides the sentence.

5 Q Sir, was anyone else present when
6 you had that conversation with him?

7 A I don't think so.

8 Q And, sir, what was your reaction
9 to that?

10 A I was very pleased. If the judge
11 has this then -- it is not a plea
12 bargain. And what Minuk had been
13 talking before shouldn't have been
14 what the judge would be thinking."

15 Mr. Sveinson testified further at page
16 570 on this issue, using very strong language.

17 "Q And were you aware that that
18 joint submission was going to be made
19 on the 22nd of August?

20 A Absolutely not.

21 Q Sir, what was your reaction to
22 that?

23 A Lied to again.

24 Q And sir, what do you mean lied to?

25 A He told me it was in the hands of

1 the judge. Now he is going and he is
2 recommending it. And when -- and I
3 know a little bit about law and court
4 cases, and when the Crown prosecutor
5 recommends something and it is
6 accepted, that's it, there is no
7 appeal. It goes under the carpet
8 forever. And this is what was
9 happening."

10 Mr. Commissioner, even outside the
11 family, the impression was that the sentence
12 wasn't in his hands to decide, that it was up to
13 the courts. And I refer you to the testimony of
14 Denise Bukowski at page 1574 and 1575. She
15 indicated, when she asked Mr. Minuk about it, when
16 asked:

17 "Minuk stated that it wasn't in his
18 hands to decide, that it was up to the
19 courts now to decide."

20 On the issue, Mr. Commissioner, of
21 whether Mr. Minuk represented to the Taman family
22 and others that the dangerous driving charges were
23 the most serious of the charges laid, I refer you
24 to the following evidence of Robert Taman at page
25 182, line 15:

1 "He said that it is a good thing that
2 we were going to go with the dangerous
3 driving causing death because that's
4 the most serious of all of the
5 charges."

6 And Robert Taman indicated that he immediately
7 disagreed with Mr. Minuk. According to Tara
8 Taman, her dad came home and told them that Marty
9 explained to them, her dad and brother, that they
10 were holding the worst charge. And her evidence
11 in this regard is page 360, line 15. Jordan
12 testified and stated at page 393, line 5 of the
13 transcript:

14 "And then he said that he could prove
15 that he was dangerous driving and that
16 was the biggest of all of the charges.
17 He said there is a level of charges,
18 and used his hands to describe it. He
19 said this is dangerous driving and
20 this is the other charges."

21 Mr. Commissioner, on the issue of
22 whether there was an inaccurate description of the
23 purpose of the RCMP investigation and the need to
24 adjourn the Preliminary Inquiry of 2006, Mr. Minuk
25 failed to advise the family of the true reason for

1 the investigation, and the resultant adjournment.
2 And in fact, their reluctant acceptance of delay
3 was based on the fact that they felt it would make
4 the prosecution against Derek Harvey-Zenk
5 stronger.

6 Now, you asked me specifically about
7 this point, and I indicated that I would deal with
8 it in my submissions, and I'm about to do so. But
9 I do want to follow up with you, Mr. Commissioner,
10 on a point you raised in the question, and that
11 dealt with misleading perhaps Mr. Wolson as well.
12 And I didn't know whether you meant Mr. Taman or
13 Mr. Wolson or both.

14 THE COMMISSIONER: I knew you would
15 deal with it with the Tamans, but I was wondering
16 whether it is considered inappropriate to tell a
17 defence counsel -- and I appreciate what his
18 problem was, if he told Wolson, then at that stage
19 it might be harmful to the prosecution and I can
20 understand why he did it.

21 MR. CLIFFORD: What I will say is
22 this, Mr. Commissioner, I hope this will be of
23 some assistance to you. The exhibit reference to
24 help you on this point would be at 210, S-99 is
25 the disclosure reference. And it has been

1 provided to you in anticipation of this issue, and
2 it is at page 3488 in the overall disclosure.

3 And in the second paragraph what
4 Mr. Minuk says is:

5 "In preparation for the upcoming
6 Preliminary Inquiry, I have been made
7 aware of the need for some additional
8 investigation to be performed in
9 advance of the hearing. At this point
10 I do not think the investigation can
11 be completed prior to the start date
12 of the hearing. Accordingly, I am
13 writing to you to request your consent
14 to adjourn the Preliminary Inquiry..."
15 and he goes on.

16 Now, this is all he says to
17 Mr. Wolson, it is a very generic explanation, and
18 Commission Counsel has not made any submissions to
19 you, Mr. Commissioner, with respect to, or
20 suggestion to you that he mislead Mr. Wolson. He
21 indicated in his testimony that it was a generic
22 letter and he indicated the purpose for the letter
23 and why it might not have set out all of the
24 detail.

25 THE COMMISSIONER: Thank you.

1 MR. CLIFFORD: However, when we look
2 at the Taman family, it is another story
3 altogether. I would ask you to consider the
4 evidence of Jordan Taman at page 389, line 10 in
5 the evidence:

6 "Well, he said he wanted to get the
7 information so that everything was
8 clear when it came to trial. He
9 didn't want to go in with holes in the
10 case. So we were -- well, myself, I
11 guess I was a little bit upset because
12 it was going to take longer, but I
13 figured at least things were going to
14 get done properly."

15 On the issue of the adjournment,
16 Robert Taman told you when he testified at page
17 165:

18 "He advised us, I'm going to try to
19 remember the terminology as best I
20 can, he had applied for an adjournment
21 because he had found some problems
22 with the case that he had to fix up."

23 Robert further indicated at page 165
24 line 12 in his testimony:

25 "No. I asked him what the problems

1 were and he told me it was just
2 something to do with the
3 investigation, and he had to send out
4 some people to do another
5 investigation of what happened so
6 that, basically to close holes, he
7 said."

8 Robert's reaction to this news about a
9 potential one year delay was, according to both
10 him and Jordan, that he broke down in Mr. Minuk's
11 office. This is at page 157, line 15:

12 "I broke down in his office and I was
13 upset, my son was upset, and it was a
14 very emotional time."

15 THE COMMISSIONER: How do you suggest
16 that he should have dealt with it? There might
17 have been a concern that, if he was honest and
18 candid with them, they might have revealed this to
19 the detriment of his case.

20 MR. CLIFFORD: I'm happy to address
21 that, Mr. Commissioner. Even if you were to
22 maintain that you couldn't tell them, you cannot
23 mislead them with a reason that is not reflective
24 of the reality of what is happening. Sometimes
25 police officers, sometimes Crown attorneys and

1 high placed justice officials have to tell
2 somebody, look, we can't give you this
3 information. And moreover, Mr. Commissioner,
4 that's understood, that's built into the Victims'
5 Bill of Rights.

6 The kids, Mr. Commissioner, when
7 Robert got home from that meeting, also had a
8 similar reaction when they were told that there
9 was going to be a delay. Now, if one were faced
10 with the suggestion that, well, this is what the
11 Tamans took away from the meeting with Mr. Minuk,
12 that they misunderstood what he was explaining
13 about the investigation, you should consider the
14 memorandum of Lesley McCorrister on this specific
15 issue. It is not only the Tamans' impression that
16 this was the reason for the adjournment, it is
17 what Lesley McCorrister recorded. I refer you to
18 exhibit 11, page 1877 in our disclosure. You will
19 see reference to a PRISM entry.

20 "Marty met with Robert..."

21 it goes on,

22 "...he explains..."

23 she goes on,

24 "...had investigative officers doing
25 more interviews as he had some

1 questions that needed to be answered.

2 She goes on,

3 "Robert agreed..."

4 She goes on,

5 "...better to have a complete

6 investigation."

7 What she captures and records here, from a third
8 party objective perspective, is Robert Taman's
9 understanding for what is happening, the reason
10 for what is happening, and his reaction.

11 Sveinn and Victoria Sveinson are also
12 told that this is to plug a few holes and to get
13 more evidence. Jordan and Tara also refer to plug
14 holes. This was put to Mr. Minuk when he
15 testified, and he said he did not remember using
16 the term, does not remember saying this at page
17 5842.

18 Now, although Mr. Minuk stated that he
19 thought the investigation may serve two purposes,
20 it was clear, Mr. Commissioner, very soon after
21 this investigation was launched, on the
22 documentation generated in connection with the
23 RCMP investigation, that the focus was on an
24 allegation of obstruct, that the RCMP was focused
25 solely on Harry Bakema. And yet the family was

1 allowed to continue to be under the impression,
2 the erroneous impression that the investigation
3 was designed to strengthen the case of the
4 prosecution against Derek Harvey-Zenk.

5 In this regard, Mr. Commissioner,
6 being mindful of two exhibits, exhibit 14, which
7 is K.66 in our disclosure, the Manitoba Justice
8 request to the RCMP for investigation, and what
9 this refers to is the conduct of Harry Bakema. Be
10 mindful of exhibit 15, which is K.67 in our
11 disclosure material, this is the RCMP response to
12 the request where it is clearly articulated that
13 the focus of the investigation is on the actions
14 of Harry Bakema. No one could be under any
15 misapprehension that this investigation served a
16 dual purpose. This investigation was about Harry
17 Bakema. And Mr. Minuk did not attempt or have
18 anyone else attempt to have the RCMP investigate
19 or help to try to strengthen the case against
20 Harvey-Zenk.

21 And once he knew of the sole direction
22 of the investigation, he did not clarify it with
23 the family, he left them with the impression that
24 it was designed to strengthen the case. And that
25 impression continued and continued and survived

1 the case.

2 On the issues, Mr. Commissioner, of
3 misrepresenting that the Tamans were on side for
4 the position that he took on sentence, I would ask
5 you on this issue to consider what Mr. Minuk had
6 to say at page 5991 in his evidence.

7 "I was left with the distinct
8 impression that, although they were
9 unhappy with the state of the law and
10 had difficulty understanding the
11 issues relating to refusal, that they
12 understood the circumstances that I
13 was in and were fine with where we
14 left off."

15 He went on and said:

16 "After the first submissions in front
17 of Judge Wyant that my relationship
18 with them was no longer cordial, we
19 were no longer effectively
20 communicating."

21 He went on:

22 "I didn't have an understanding that
23 they did understand what I was
24 saying."

25 And then he went on.

1 Now, what I'm suggesting to you is
2 that his evidence signals that the Tamans clearly
3 did not understand what he was doing with respect
4 to the joint recommendation. And it was on
5 August 22nd that they found out. It was not a
6 surprise that they would not have been able to
7 express a view before that time. This is the
8 first day that the judge was presented with the
9 information in court. This is why the
10 relationship broke down, perhaps, because they
11 didn't know what to expect.

12 Mr. Minuk fairly conceded:

13 "I have a tendency to speak in
14 legalities."

15 He fairly conceded:

16 "I told them there are problems and I
17 believe I would have touched on them,
18 I can't remember today, but I may not
19 have given them the full extent that I
20 might have given to a lawyer."

21 These comments, in my submission,
22 demonstrate the lack of depth he went into with
23 them. Therein lied the problem. I acknowledge
24 that he would likely never have convinced them
25 that it was an appropriate sentence, but he should

1 have used due diligence, in the circumstances, so
2 as to be able to step back and say, yes, I, to the
3 very best of my ability, explained the approach I
4 took and the reasons why I was doing what I did.

5 The term "on side," this is clear in
6 my submission, or any expression conveying the
7 same meaning, on side or any form of it should
8 never have been used in this matter to explain how
9 the Taman family felt about this. Had he spent
10 more time with them, Mr. Minuk would have
11 benefited, and would not have conveyed any such
12 message to a defence lawyer or Chief Justice
13 Wyant.

14 Mr. Commissioner, even the concept of
15 resignation should not have been presented as
16 being anywhere near being on side to anyone in
17 this case. Indeed, there was evidence of the
18 Tamans that they asked Mr. Minuk to put, as I
19 mentioned to you earlier, on the list of
20 conditions that they were not in agreement. It
21 was quite evident that they were not and no one
22 should have ever been informed otherwise.

23 On the issue concerning the Tamans and
24 the Sveinsons being treated with courtesy,
25 compassion and respect, Mr. Taman testified that

1 Mr. Minuk did not treat him with courtesy,
2 compassion and respect, and this is at page 213,
3 line 4. Now, I understand that the dynamic here
4 is stressed and difficult. Jordan Taman testified
5 at page 420, line 12, that he did not feel that
6 Marty Minuk treated him and his family with
7 respect, courtesy and professionalism. On the
8 same issue, Tara testified at page 344, line 8,
9 and I quote her evidence because her testimony
10 says so much.

11 "Every time I would stand there and
12 Mr. Minuk was talking to us, every
13 single time I felt a little bit
14 stupider. He just, he always had this
15 way of making it like he knew
16 everything, don't worry about it, it
17 is taken care of."

18 On that same issue, Kristin testified on June 3rd,
19 page 480, line 15, that in her view, bearing in
20 mind that her experience with Mr. Minuk was
21 limited relative to the other members of the
22 family, that in her view he did not treat the
23 family with respect and courtesy.

24 On June 9th, when Sveinn Sveinson
25 appeared to testify before you, he told you that

1 he felt that Mr. Minuk was a little bit arrogant
2 and found his interaction with him as though he
3 was talking down to him and his wife. You see
4 that at page 543, line 4 and 18 in the transcript
5 of evidence.

6 The same day that Victoria Sveinson
7 testified, she described her communications with
8 Mr. Minuk and the meetings that she had, that were
9 set up to address the letters she wrote to Justice
10 officials, and she said as follows:

11 "Most of his reactions were almost to
12 ignore me or make it sound like I
13 didn't understand what he was doing or
14 why he was doing it."

15 She went on,

16 "I was under the impression that you
17 don't know what you are talking about,
18 so we are dealing with it."

19 This is at page 645, starting at line two.

20 And this is not just the Tamans and
21 the Sveinsons. I would refer you to the evidence
22 of Ms. Bukowski and Mr. Shaw. They describe
23 Mr. Minuk's dealings with them as well, and their
24 comments suggest that he was being insensitive to
25 the issues of the lay witnesses.

1 It goes without saying that Mr. Minuk
2 could never have won the hearts of the Tamans and
3 Sveinson families, given the deck that he held in
4 his hand. But it is telling that they describe
5 the same manner of being dealt with, not the fact
6 that they get information that they don't like,
7 but the manner or impression that they are left
8 with by their dealings with him.

9 I now want to make some general
10 comments about the communications, or
11 miscommunications that occurred between Mr. Minuk
12 and others. And on this issue of poor
13 communication, we cannot pass it all off as
14 victims being in a distressed state. We have the
15 evidence of Ms. McCorrister which objectively
16 records the reason for the adjournment of the
17 Preliminary Inquiry in 2006, and the reactions.
18 We have the evidence of Mr. Wolson, where he
19 records a notation of parents being described as
20 militant and the fact that the family was on side.
21 And we have the evidence of Ms. Bukowski, who
22 recalls his comments regarding the strength of the
23 case. It is not confined to simply the Tamans.
24 What others, beside the victims, hear
25 and more importantly understand, is not in

1 accordance with Mr. Minuk's version of what he
2 would have said or tried to say.

3 Now, I want to be very clear about
4 this point, Mr. Commissioner. I hasten to point
5 out here that in assessing this evidence, where
6 there are clear differences on issues between the
7 Tamans or others and Mr. Minuk on the issue of
8 what Mr. Minuk said, it may not be necessary to
9 make stark findings of credibility where there are
10 contradictions in order to find that the Victims'
11 Bill of Rights was not complied with. It may be a
12 question of ineffective communication as opposed
13 to lack of attempt, or deliberate misleading, that
14 caused Mr. Minuk to fall short of meeting the
15 informational requirements of the Victims' Bill of
16 Rights.

17 Mr. Minuk's unfortunate example may
18 profit other prosecutors who may be inclined to
19 adopt the same approach. His was a hard lesson
20 learned.

21 I want to comment further on just a
22 few other areas where there were difficulties in
23 communicating with the family and the dynamic that
24 existed. There was a failure to disclose the fact
25 that he agreed that alcohol wouldn't be a factor,

1 in my submission, to disclose it in a way that
2 they understood, or understood why. And this was
3 egregious as far as the family was concerned.
4 Their mother died in an accident that involved
5 alcohol, and to take it away was an insult to her.
6 The facts on the plea did not reflect reality.

7 I'm not saying that the victims can
8 steer the prosecution and put the Crown in a
9 position, look, marching orders, you go and prove
10 something that you can't prove. But in this case,
11 as I said earlier in my submissions, it is our
12 position that Mr. Minuk could have proven this.

13 The problem with the Sveinson
14 communication arises in large measure from the
15 Victims' Bill of Rights and the concern that
16 Robert Taman had and expressed to Mr. Minuk about
17 his talking to them prior to meeting with him. At
18 page 5836 Mr. Minuk testified that he felt he was
19 caught in the middle, he felt he needed to talk to
20 them but he couldn't. And this is borne out by
21 the fact that Mr. Kaplan indicated, whether it was
22 appropriate for Mr. Kaplan to ask him to write
23 this letter in response, Mr. Minuk said, look,
24 these people need to be talked to, they need to
25 talk to a person, they don't want a letter. So

1 what happens is that this dynamic emerges where it
2 becomes very difficult for Mr. Minuk, and he
3 described it, and that difficulty put him in a
4 tough spot because he felt he needed to talk to
5 them and he couldn't. And due to the Act itself,
6 Mr. Commissioner, he might have been between the
7 proverbial rock and hard spot. And I think he
8 fairly acknowledged that in his testimony. But he
9 acknowledges that he did not give them the reasons
10 for doing what he was doing. He referred in his
11 testimony to a problem with telling a non-lawyer
12 about charter issues. He failed to put it in
13 terms that the family could understand. Using a
14 phrase or a term like East St. Paul screwed up, in
15 our submission, hardly meets the requirement to
16 tell a family about why he is resolving a tragic,
17 sensitive case in the manner that he did.

18 I ask you to examine exhibit 227 in
19 this regard. It is very important evidence,
20 Mr. Commissioner. On July 16, 2007, Mr. Minuk
21 sent an email to Colleen Ireton and up to
22 Mr. Kaplan, wherein he stated:

23 "It is unclear if the family
24 understands all of the complexities
25 and legal issues, but they will be

1 spoken to again."

2 This is July 16, 2007.

3 "It is unclear if the family
4 understands all of the complexities
5 and legal issues, but they will be
6 spoken to again."

7 This never happened. They never gained an
8 understanding, and in my submission, never could
9 in light of the transcripts that reveal a
10 torturous dialogue between the court and Crown
11 counsel.

12 On July 17th, Victoria Sveinson said
13 she called Mr. Minuk and wanted information. She
14 asked if what happened was a plea bargain. And
15 Mr. Minuk said no. At page 5996 and 5997,
16 Mr. Minuk says he can't recall the telephone call,
17 but if it happened, he doesn't deny that it did,
18 he would have wanted to avoid answering the
19 question. Now, whether his reason for wanting to
20 avoid was that he had not discussed the issue with
21 Mr. Taman at that point, or otherwise, it is not
22 the best approach to take. This was the most
23 critical of times, and what we see is, by design,
24 communication that is calculated and almost
25 strategic to avoid conflict.

1 Now, such conflict might have been
2 unavoidable, but it was necessary for him to
3 articulate, notwithstanding the fact that he was
4 caught in a tough position in what he was doing.

5 Mr. Commissioner, I would like to move
6 away now from Mr. Minuk's involvement with the
7 Victims' Bill of Rights, and look at the issue
8 from the perspective of law enforcement agencies.
9 In addition to the Crown, the Victims' Bill of
10 Rights also imposes informational obligations on
11 relevant law enforcement agencies, in this case
12 the East St. Paul Police. In this area there were
13 also shortcomings.

14 The police are obliged, for example,
15 to explain the rights and remedies under the Act,
16 and they are obliged on request, subject to
17 important exceptions, to furnish information about
18 the investigation. We are asking you,
19 Mr. Commissioner, to consider whether those
20 obligations were met in this case. We are
21 suggesting that there was a failure to do so.

22 In answering that question, you must
23 consider the evidence of Glenda Pedersen, who we
24 know acted as a victim officer and attended at the
25 residence. I must point out that Glenda Pedersen,

1 when she testified, gave in a very heartfelt and
2 emotional and meaningful way an apology to the
3 Tamans, in explaining how in order to cope with
4 the grief she felt they were feeling, that she
5 tried to remain stoic and firm, and that she
6 understood this could have been open to
7 misinterpretation. This, in our view, should be
8 accepted. But there were other issues that she
9 agreed, with the benefit of hindsight, would be
10 addressed, but nonetheless they were shortcomings
11 at that time.

12 First, there was the attendance at the
13 house with the volunteer. Now, we realize that
14 there was only one volunteer that was able to go,
15 but this was the first time this person had
16 attended at someone's house working as a
17 volunteer. And in our submission, it shouldn't
18 have happened. It was just simply too
19 overwhelming. And it was picked up upon by the
20 Taman family. You have to realize that when you
21 go to a home as a victims' officer, you are going
22 to be faced with many tough questions that are
23 geared more towards the actual events that took
24 place and resulted in the loss of life of a loved
25 one. The family or the victims, at that point,

1 may not be interested in dealing with information
2 pamphlets about grieving.

3 Now, with respect to her manner of
4 dealing with the emotional atmosphere and
5 remaining stoic, she agreed in hindsight, and this
6 is through no fault of hers, that it was difficult
7 for her to be there and to fulfill that role. She
8 made, in our submission, a very poor choice in
9 telling Jordan on the telephone, days after the
10 incident, that she did not have information to
11 give him or that she did not know the facts, when
12 she could have been better off to say, and she
13 acknowledged this, that at this time we can't
14 release that type of information. Now, this might
15 have been frustrating to the family, but it would
16 not have been as confusing and it would have saved
17 the family a great deal of concern about what the
18 police were doing. Because we know that they were
19 also operating with the information that they were
20 receiving from their cousin, Cecil Sveinson. So
21 he was giving them information, and they would
22 call the East St. Paul Police and ask for details,
23 and Ms. Pedersen's response was, I don't know,
24 rather than saying I can't comment, or I'm not the
25 person who can give you information, or I will

1 refer you to the investigating officer.

2 THE COMMISSIONER: What is the date of
3 that meeting with Carter and Bakema with the
4 family?

5 MR. CLIFFORD: I'm going to come to
6 that as well. That is my next point, apart from
7 telling you this, that with respect to the
8 material that Ms. Pedersen had provided, the
9 family had some difficulty with some of this
10 material. And this is not a major point but I do
11 want to point it out because it was raised and it
12 did cause some concern. Some of the material
13 related to the life span of surviving spouses when
14 you lose someone, and it is a pretty tough
15 pamphlet, I think, to look at on the day of losing
16 your husband or wife.

17 Dealing with your question, sir, the
18 Carter/Bakema visit, March 3rd, we know that as a
19 result of the press release, they attended the
20 residence and there was a complete gathering of
21 the family.

22 THE COMMISSIONER: That would be a
23 Monday. The accident was -- the fatal accident
24 was on a Friday, and it wasn't a leap year, so it
25 would be on a Monday.

1 MR. CLIFFORD: So then we go to
2 March 3rd. Now, I say apart from who did the
3 communicating, we know Officers Bakema and Carter
4 are there. The evidence is clear from the Tamans
5 and the Sveinsons that they were left with the
6 impression of the strength of the case and the
7 potential outcome. And this, to say the very
8 least, was not wise. Misinforming the victims
9 regarding expectations on the outcome of a case,
10 again, regardless of who said it, creates
11 tremendous potential for stress and confusion that
12 results from early indications about the outcome
13 and, thereafter, not seeing those results.

14 Section 7 of the Victims' Bill of
15 Rights requires that certain information gets
16 provided to the victim, and that includes status
17 on the investigation, but you need to balance that
18 with avoiding predictions as to the outcome of the
19 case. This case was a prime example of the
20 difficulties that can arise in failing to do so.

21 Moving to another area of the Victims'
22 Bill of Rights, Mr. Commissioner, as we've
23 learned, the Victims' Bill of Rights imposes broad
24 obligations on the prosecution service. Those
25 obligations are to provide information about the

1 court process, the role of the victims, the role
2 of the prosecutor, background information about
3 the possibility of resolutions, explanations about
4 sentencing, plea process, obtaining times and
5 dates, et cetera. We have learned that many of
6 these duties associated with information about
7 areas other than the actual prosecution are
8 assigned front line victims' rights workers. I
9 should state at the outset that we submit that the
10 front line workers more than adequately discharged
11 their duties subject to only a few errors. There
12 workers were Lesley McCorrister and Monica Dyck.

13 Ms. McCorrister testified that,
14 according to the expectations of her, she would be
15 providing information, communicating with the
16 family. She did indicate that there were some
17 difficulties in communication, and you recall the
18 evidence from both her and Ms. Dyck on the issues
19 of the address and telephone numbers. And with
20 any bureaucracy or any government office, not
21 everything is going to work perfectly.

22 According to the Taman family, she did
23 what was expected, but they acknowledged that the
24 lines of communication were not always clear, and
25 there was some frustration about the loss of the

1 telephone number and address.

2 She attended meetings with Mr. Taman,
3 she communicated with him, but she didn't attend
4 the most important meeting, and that was the one
5 where there was the discussion about the
6 resolution. And she indicated that she wishes
7 that she was there. She appreciated the
8 frustration that the family had with the system,
9 and told you that she recognized the system as
10 having the potential to be very hard on victims,
11 and described it at page 1104 in her testimony as
12 a hostile system. Again, she said Marty Minuk
13 spent more time with them than normal Crowns would
14 have. She indicated that Marty Minuk was
15 frustrated with the Sveinsons, as per page 1051 of
16 her testimony. Robert Taman had respect for her,
17 he described her as a good-hearted woman. His
18 issues with her were confined to the fact that her
19 position as an extension of the Crown restricted
20 her, but he had no complaints on a personal level.

21 Jordan stated that she treated him
22 with respect, courtesy and professionalism. Tara
23 testified at page 343, line 13, that Lesley
24 treated her and the family with respect, courtesy
25 and professionalism. Kristin Taman testified at

1 page 480, line 11, that Lesley McCorrister was:

2 "... was always extremely nice and
3 she is just a pleasant person to be
4 around."

5 I will deal with Ms. Dyck when I
6 address the victim impact statements a little bit
7 later.

8 An additional area, Mr. Commissioner,
9 and one of particular concern to some of the
10 witnesses that we heard from was the fact that the
11 Victims' Bill of Rights requires the prosecutors
12 to consult with victims about staying charges and
13 about resolution discussions. You have heard
14 evidence about whether that term "consult"
15 accurately describes what really happens. And you
16 have heard evidence relating to the question of
17 whether true consultation is even possible.

18 We, Mr. Commissioner, based on the
19 evidence, are asking you to consider whether
20 further attention needs to be given to the way
21 that that obligation is articulated in the
22 Victims' Bill of Rights. We received some very
23 helpful evidence on this point. We know that
24 section 14 of the Act requires that the director
25 of prosecutions must ensure that the victim is

1 consulted.

2 Ms. St. Hill, in evidence, testified
3 at page 887 in the testimony that the term
4 "consult" is problematic.

5 I refer you to exhibit 48, which is
6 R-4, page 3401.7 in our disclosure, and what this
7 is, is the 2005 policy statement on the subject of
8 victims. And at page 3401.8, there is a section
9 in there that deals with consultation with
10 victims. And what it states, amongst other
11 things, is that consultation does not mean that
12 the victim is entitled to direct the prosecution
13 or make the final decision with respect to how the
14 case is handled. It also states:

15 "Crown attorneys are required to
16 listen and seriously consider any
17 information the victim has to offer."

18 She testified that in practice and in her
19 experience, the Victims' Bill of Rights should not
20 impose restraints on the Crown Attorney's ability
21 to perform his or her function as an officer of
22 the court. In practice, Crowns are required to
23 listen and seriously consider any information that
24 the victim has to offer. She says this is a fair
25 description of the practice as opposed to the

1 section 14 wording of the bill.

2 Suzanne Gervais, the Victims' Rights
3 worker, testified at page 997 in her evidence that
4 the thing that pops out the most is around the
5 issue of consult. She told the Commission that it
6 can set up a sense of disappointment when one
7 might not be needed.

8 Ms. McCorrister, when she testified,
9 indicated at page 1094 that the word "consult" is
10 misleading. She agreed that the concept of listen
11 to and seriously consider would be much better.
12 That evidence is at page 1094 and 1095.

13 Monica Dyck testified at page 1193:

14 "We have always had concerns with
15 respect to the provision around
16 consultation and what that means and
17 how we operationalize that."

18 Mr. Commissioner, it is clear that all
19 parties on the front line acknowledge that the
20 term or notion of consultation is not reflective
21 of how the Act is implemented, and Mr. Paciocco
22 will have recommendations in that regard. The Act
23 does not reflect the practice on a technical
24 reading and, in fact, could perhaps infringe upon
25 the independence of the prosecutor.

1 One comment Mr. Slough made is that we
2 are to be mindful that the Crown is not a lawyer
3 for the family and they have a public role to
4 play. They have to balance victims' issues and
5 the public duty to justice.

6 Mr. Commissioner, you have heard
7 evidence about the editing of victim impact
8 statements. This was certainly of great concern
9 to the Sveinsons. We are asking you to look at
10 the guidelines with respect to victim impact
11 statements and determine whether they are, in
12 fact, consistent with the Criminal Code
13 requirements and whether there is room for
14 modification. Mr. Paciocco will have
15 recommendations in this regard. But I will say
16 this: On the issue of editing, in our submission,
17 this issue can be addressed by focusing on the
18 cause or the need to edit. In other words, that
19 there is a threshold issue here. And I would ask
20 you to harken to the testimony of Robert Taman on
21 page 211, page 6, where he indicated:

22 "I would suggest a lot more
23 communication with the victims and a
24 definite defined layout of writing the
25 statement, and possibly even a visit,

1 either in their office or your home.
2 It is not like it is going to take
3 four or five hours, you just have to
4 be there to sort of present the
5 guideline. None of this takes a long
6 time, it is just a matter of
7 explaining it properly, so just better
8 communication."

9 Tara Taman indicated to the Commission on the
10 issue of the victim impact statements at page 343,
11 line 1:

12 "I really think there needs to be some
13 more guidance on how you write it.
14 You sit there for hours upon hours and
15 you have no clue what to put in there,
16 and then you look at their guidelines
17 as to what you can't put in there, and
18 it makes it even tougher."

19 Jordan Taman on the issue of the victim impact
20 statement at page 419, line 7 in evidence,
21 testified:

22 "These are to help you express
23 yourself. They are to help people
24 understand how you are feeling. If
25 you are putting restrictions on it,

1 you can't -- they don't actually
2 understand how you are feeling, they
3 don't understand why you are feeling
4 that way. I mean, yes, I think it is
5 a good thing, but I just don't think
6 there should be these restrictions."

7 On that point, the victim impact
8 statements and the guidelines and the assistance
9 that victims are given, you have that before you,
10 and the guidance materials are weighted heavily,
11 in my submission, in the negative. They focus on
12 what you can't include in the statement.

13 Lesley McCorrister testified at page
14 1100, and made it very clear that arrangements
15 could be made for victims to speak with Victims'
16 Rights workers for consultation on how to prepare
17 a victim impact statement. And this could be very
18 helpful.

19 Monica Dyck testified at page 1170
20 from her evidence that:

21 "It is a very difficult thing to
22 provide a victim impact statement. It
23 is a very emotional process for
24 people."

25 So what we were saying with respect to

1 the victim impact statements is that we have to
2 recognize it is a hard thing to do, and we need to
3 give some assistance to victims in doing so.

4 In conclusion, Mr. Commissioner, those
5 are my submissions regarding the Victims' Bill of
6 Rights, but I don't want to sit down, sir, before
7 I emphasize that when reflecting on victims'
8 issues we must, to some extent, resist our
9 instinct as lawyers to take an overriding approach
10 of compartmentalizing and dissecting and obsessing
11 over blame or shortcomings. What we ought to do
12 is look forward, and look from an empirical
13 perspective at what the Victims' Bill of Rights is
14 meant to achieve. In its simplest sense, this law
15 is designed to remind us that it reflects our
16 faith in the concept of compassion. I think such
17 an approach, Mr. Commissioner, would reflect the
18 spirit of Crystal Taman and the way she lived her
19 life.

20 Now, the final thing I want to say to
21 you, Mr. Commissioner, is that -- and it won't be
22 done when I'm finished because Mr. Paciocco is
23 going to take some time to make the
24 recommendations, but, quickly, it was a privilege
25 to have appeared before you and the Commission, to

1 have acted as Commission Counsel and to have
2 served the people of Manitoba. It was not only a
3 privilege for me to be here, but it was also a
4 privilege for me to have met my new colleagues in
5 this room, despite my being a foreigner, and
6 perhaps not seeing eye to eye, and having some
7 interesting debates with my new colleagues, they
8 were always very kind to Mr. Paciocco and I. They
9 treated us with professionalism, respect, courtesy
10 and kindness, and for that I want to thank them.
11 And thank you, Mr. Commissioner, for your
12 attention throughout this inquiry. And now
13 Mr. Paciocco will make recommendations.

14 THE COMMISSIONER: Thank you,
15 Mr. Clifford.

16 MR. PACIOCCO: I'm not going to thank
17 the colleagues in the room quite yet, we have two
18 more days for them to beat up on us. I will gage
19 whether it is appropriate after those days are
20 finished.

21 Those then, Mr. Commissioner, are the
22 submissions of Commission Counsel. You can be
23 sure that it was very difficult for us to get up
24 and say the things that we said, and it happened
25 only after tremendous reflection and with great

1 reluctance and regret. It is --

2 THE COMMISSIONER: It will be as
3 difficult for me to say the things that I'm going
4 to have to say.

5 MR. PACIOCCO: It would be certainly
6 much better if we could have come here and
7 conducted the inquiry and found at the end of the
8 evidence that everything was rosy, but you don't
9 usually see public inquiries where that's going to
10 be the outcome. We certainly don't regret
11 fulfilling what we understand to be our duty, but
12 we do regret the implications it will have for
13 everyone who will be touched by the submissions that
14 we make, regardless of the conclusions that you
15 come to. Certainly reputations are, but never
16 should be, based on the worst moments of
17 individuals, and certainly on their most public
18 moments. In a public inquiry there is a risk that
19 that might happen, and we weighed that before
20 making the submissions that we did. Ultimately,
21 we are quite aware of the fact that many, if not
22 all of the individuals who have been subject to
23 the trenchant analysis and criticism that has come
24 their way, have in other contexts served this
25 community very well. Nonetheless, there was a

1 burning need for the truth, and we had an
2 obligation to come forward and go where the
3 evidence went, and provide the submissions that we
4 read into those tea leaves. You know, we are not
5 arrogant enough to believe that we have
6 necessarily hit the nail on the head, that's why
7 you have all of these other counsel with standing
8 who are going to get up and make their
9 submissions, and I know that you will keep an open
10 mind and listen to the submissions that they have
11 to make.

12 Ultimately, when you do the report,
13 your analysis of exactly what happened will be of
14 tremendous value. In many public inquiries, the
15 past is the past. But in this case, much of the
16 impetus for this exceptional measure was the need
17 to clear the air and get access to the truth. So
18 simply scribing what happened and narrating events
19 will provide a tremendous public service and it
20 will provide a tremendous boon to the families of
21 the victim and to the people of this province, and
22 all of those who were affected by it.

23 Still, we have the opportunity to look
24 to the future. And many things have come to light
25 as a result of the events that have been described

1 to you. And we make recommendations based on our
2 submissions and based on our understanding of the
3 evidence, and everyone in this room should
4 understand that the recommendations that are now
5 to come your way are not yours unless and until
6 you agree with them. These are the submissions of
7 Commission Counsel, and the recommendations are
8 made without the benefit of us listening to the
9 submissions of our colleagues. But as things
10 currently stand, we have to put these on the table
11 so that our friends will have the chance to come
12 forward and make their contribution to your
13 ultimate decision, whether you accept the
14 positions we are taking.

15 I'm going to begin in the order on
16 which we presented the submissions with the East
17 St. Paul Police. Commission counsel respectfully
18 recommends to you, sir, that you should recommend
19 to the Minister of Justice that he cause to be
20 taken such further investigation of the conduct of
21 Harry Bakema, Ken Graham, Jason Woychuk, and/or
22 Norman Carter as the Attorney General of Manitoba
23 may consider advisable. Secondly, we are
24 recommending that you cause further investigation
25 into the investigative training available to and

1 the qualifications required of East St. Paul
2 Police Officers.

3 With respect to the Winnipeg Police
4 Service, we are recommending that you recommend to
5 the Minister of Justice that he cause a study to
6 be commissioned to identify suitable alternatives
7 to having the Winnipeg Police Service Professional
8 Standards Unit investigate criminal allegations
9 made against Winnipeg Police Officers, whether the
10 allegations being investigated fall within the
11 jurisdiction of the Winnipeg Police Service or
12 not. We recommend that you recommend to the
13 Minister that he cause appropriate measures to be
14 taken to prevent police investigators in the
15 province from giving police witnesses special
16 procedural concessions before they are interviewed
17 in criminal matters, including the right to
18 consult with their police association, the right
19 to have interviews scheduled during shift hours,
20 or the right to be warned about criminal, civil,
21 or administrative implications of the statements
22 they give.

23 With respect to independent
24 prosecutors, we recommend that you recommend that
25 the Minister cause the amendment of the

1 appointment of independent counsel protocol, and
2 that he replace terms and conditions of
3 appointment D with the following:

4 "Independent prosecutors are required
5 to keep the Department of Justice
6 advised of all significant decisions
7 that they propose to take in
8 connection with the cases they are
9 assigned. This is to be done solely
10 to keep the Department of Justice
11 officials apprised of the status of
12 the case and to enable the Attorney
13 General or Deputy Attorney General to
14 give direction as contemplated by
15 Section C of this policy."

16 As you are aware, Mr. Commissioner, term and
17 condition C permits the Deputy Attorney General or
18 the Attorney General to give direction in cases
19 where independent counsel will be acting
20 inappropriately and that that direction must be
21 made public. So we are indicating to you that
22 this is an appropriate reason to receive
23 information from counsel as to what is intended so
24 that that policy can be given effect.

25 Continuing with the policy that we put

1 forward to you by way of recommendation, sir.

2 "Independent prosecutors should not

3 consult with the Department of Justice

4 officials before making decisions, but

5 may secure legal assistance from

6 Department of Justice officials who

7 have special expertise in the area

8 being prosecuted on strategies for

9 implementing the decisions that have

10 been taken by independent counsel.

11 Should the legal advice received cause

12 the independent counsel to change

13 their strategy or position, this must

14 be disclosed publicly on the Manitoba

15 Justice website after the trial judge

16 has rendered a verdict in the case or

17 the charges stayed. Subject to this

18 policy, independent counsel has full

19 access to all parties within and all

20 documents and information held by the

21 Department of Justice for the Province

22 of Manitoba. In addition, independent

23 prosecutors may utilize departmental

24 prosecutors to attend to

25 administrative and preliminary tasks

1 on their behalf, such as remanding a
2 matter at the request of the
3 independent prosecutor. If the
4 independent counsel wishes to exercise
5 the ongoing right of access, the
6 director of regional prosecutions and
7 education shall facilitate such
8 contact between the departmental
9 prosecutor and employees and the
10 independent counsel and assist in
11 accessing any documentation held by
12 the Department of Justice."

13 You will recognize, sir, that the last half of
14 that is simply reiteration of what is already
15 found in the policy. The first part is intended
16 to make the independence of the counsel more
17 meaningful and to ensure that it is protected and
18 everything is transparent.

19 We would also recommend that you
20 recommend to the Minister that he establish a
21 standing group of experienced criminal lawyers who
22 are independent of Manitoba Justice and who are
23 able and prepared to provide advice and counsel to
24 any independent prosecutor in making or
25 implementing their decisions. And that when that

1 system is established, to make relevant amendments
2 to the appointment of independent counsel
3 guidelines. This, of course, is to provide the
4 sounding board that independent counsel may
5 require, without compromising either the substance
6 or appearance of independence.

7 We recommend that you recommend to the
8 Minister that he cause the Ministerial policy to
9 issue, relating to the presentation of guilty
10 pleas, requiring that at the appearance where the
11 plea of guilty is made, prosecutors must present
12 the presiding judge with the factual foundation
13 for the criminal charge and call for a clear
14 admission of facts to be made by the accused. And
15 further requiring that in complex or serious
16 cases, as defined by Manitoba Justice, that
17 prosecutors shall attempt to secure in writing the
18 agreed statement of facts that will form the
19 foundation for the plea. Had those practices been
20 followed in this case, much of the agony that has
21 been caused to Mr. Minuk and to the families would
22 have been avoided.

23 We recommend that you recommend to the
24 Minister that he cause a Ministerial policy to
25 issue requiring all prosecutors who resolve

1 criminal charges through resolution discussion to
2 state clearly for the record the basis upon which
3 the resolution was reached, including by
4 stipulating any compromises or concessions that
5 have been made by the prosecutor in securing the
6 guilty plea, and explaining with specificity any
7 exigencies that motivated the prosecutor to stay
8 any related charges or to refrain from providing
9 aggravating facts, or to agree to the sentence
10 being proposed.

11 If you accept this recommendation,
12 Mr. Commissioner, you will want to make provision
13 for privilege issues and public policy immunity
14 questions, so that there is no obligation on
15 prosecutors to disclose information that can be
16 harmful.

17 You will note that the proposal being
18 put to you, if accepted by you, puts to bed the
19 controversy over what the staying of charges and
20 laying of charges protocol that is currently in
21 place really means, because the position of
22 Commission Counsel is, regardless of what it was
23 crafted to say, there is tremendous utility in
24 having transparency. And indeed, the law of
25 Manitoba, as provided by the Manitoba Court of

1 Appeal, requires explanation for negotiated
2 settlements, and that carries with it the need to
3 explain why charges are stayed and that's why, put
4 in this policy, it will clarify any ambiguity that
5 remains.

6 With respect to the Victims' Bill of
7 Rights, Commission Counsel is recommending that
8 you recommend to the Minister that he takes steps
9 to promote an amendment to the Victims' Bill of
10 Rights that would enable the parents and children
11 of a deceased victim to enjoy the informational
12 rights provided for in the Victims' Bill of
13 Rights, in cases where the parents or children
14 request access to those rights on the basis that
15 the spouse of the victim may be unable or
16 unwilling to disseminate information to them.

17 We recommend that you advise the
18 Minister that he take steps to promote an
19 amendment to section 14 of the Victims' Bill of
20 Rights, that would have replaced the overreaching
21 promise to "consult" victims on the matters
22 enumerated in that provision with the right of
23 victims to have their views "listened to and
24 seriously considered." You will recognize that
25 language from the Ministerial policy and it

1 certainly reflects the reality that the term
2 "consult" does not.

3 We recommend that you recommend to the
4 Minister that he examine methods for ensuring that
5 victims are offered, and on request, are provided
6 with personal assistance in preparing their victim
7 impact statements. This would remove much of the
8 difficulty caused by the slant in the victims'
9 direction as to what can not be included, and it
10 would have made it much more simple for the family
11 to have complied with this very difficult
12 undertaking.

13 We recommend that you recommend to the
14 Minister that he examine whether there are means
15 to furnish independent prosecutors with complete
16 access to the PRISM system, and if so, to make the
17 PRISM system available to independent prosecutors.
18 You heard Mr. Minuk and the difficulties he
19 encountered in not knowing about many things that
20 he certainly should have known about in order to
21 discharge his obligations, and we hope that that
22 recommendation can be implemented and avoid that
23 type of problem.

24 And finally, we recommend that you
25 recommend to the Minister that he take steps to

1 ensure that independent prosecutors are provided
2 with training in the requirements and the ethic of
3 the Victims' Bill of Rights, and that they are
4 required to attend any training sessions that may
5 be offered to line Crowns dealing with the
6 provision of victim services.

7 Those, Mr. Commissioner, are our
8 submissions and the recommendations that we would
9 ask you to consider. We do look forward to
10 hearing the perspectives of our colleagues and
11 certainly will take them into account before
12 arising for any reply that we might offer you,
13 sir.

14 THE COMMISSIONER: Thank you.
15 Tomorrow morning. I know I have had you all -- I
16 have been pushing all of you, and I'm very
17 grateful to you. But we will start tomorrow
18 morning. Anything else?

19 MR. PACIOCCO: That's it,
20 Mr. Commissioner, both my voice, my mind and the
21 clock are telling me that it is time to quit.

22 THE COMMISSIONER: All right. Thank
23 you. 9:00 o'clock.

24 THE CLERK: Order. All rise.
25 Adjourned until 9:00 a.m.

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(Proceedings adjourned at 5:05 p.m.)

COURT REPORTERS' CERTIFICATE

Debra Kot and Cecelia Reid, court reporters in the Province of Manitoba, do hereby certify the foregoing pages are a true and correct transcript of our Stenotype notes as taken by us at the time and place hereinbefore stated.

Cecelia Reid

Debra Kot

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