

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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Wednesday, July 30, 2008

Volume 23

INQUIRY PROCEEDINGS

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1 WEDNESDAY, JULY 30, 2008

2 UPON COMMENCING AT 9:00 A.M.

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

6 THE COMMISSIONER: Everybody is here.  
7 Good morning.

8 MR. PACIOCCO: Good morning,  
9 Mr. Commissioner. Good morning, Mr. Minuk.

10 THE WITNESS: Good morning,  
11 Mr. Paciocco.

12 BY MR. PACIOCCO:

13 Q Sir, in our progress through the  
14 chronology of events, we are up to the point where  
15 resolution discussions have been undertaken. You  
16 have had some serious contact with Mr. Wolson.  
17 And I want to take you now, if I can, to an e-mail  
18 that was sent by you to Brian Kaplan and Colleen  
19 Ireton. And this was sent on the 15th of July at  
20 12:54 p.m. This is a document that can be found  
21 in book R-2.91.49. It has been made Exhibit 227.

22 A I have that here.

23 Q Thank you, sir. This is a memo in  
24 which you indicate to Brian Kaplan, if you can  
25 look at page 3236 of the book for those counsel

1 who are orienting themselves that way, at page  
2 3236, approximately halfway down the page, you see  
3 the text of the e-mail addressed to Brian/Colleen.  
4 You are writing to update on the Zenk matter which  
5 is to start tomorrow morning. You acknowledge  
6 that Brian is away, but you are nonetheless  
7 keeping Colleen copied to ensure that what is  
8 going on with the prosecution is known, should  
9 there be any questions. And you indicate that  
10 Mr. Zenk, through his counsel, Richard Wolson, has  
11 advised that Mr. Zenk is prepared to plead guilty  
12 to the indictable offence of dangerous driving  
13 causing death; correct, sir?

14 A Correct.

15 Q So by this point, pretty much the deal  
16 is put to bed?

17 A Subject to entering the plea, but,  
18 yes, the deal is between Mr. Wolson and I, I would  
19 think, yes.

20 Q You have accepted that Mr. Wolson  
21 certainly is a man of his word and that this is  
22 going to happen?

23 A Yes, I do. But I always know there's  
24 always that last chance, but I wouldn't have  
25 expected it.

1           Q     Certainly.  And in your mind, you were  
2     no longer psychologically getting ready to present  
3     evidence for the Preliminary, you knew that this  
4     was going to be it?

5           A     Yes.

6           Q     You provide a bunch of information  
7     here in terms of evaluating the case, essentially  
8     explaining your thinking and agreeing to that  
9     particular resolution.

10            "The case includes witnesses...",  
11     you say,

12            "...members of the WPS, scene  
13     witnesses, ambulance and East St. Paul  
14     Police personnel, and an RCMP traffic  
15     accident reconstruction expert.  My  
16     opinion is that resolving this matter  
17     by taking the plea as offered is a  
18     very good resolution.  The evidence in  
19     support of the charge of both the  
20     drive impaired and refusal of  
21     breathalyzer is very, very weak.  By  
22     reason of the shoddy work of the East  
23     St. Paul Police, the charge of refuse  
24     breathalyzer is bound to fail.  The  
25     WPS members do not describe Zenk as

1                   being impaired. In speaking to the  
2                   RCMP expert, his assessment is that  
3                   the plea may in fact be more than what  
4                   might happen had the matter gone to  
5                   trial. What is left factually is  
6                   speed within posted limit, no evidence  
7                   of impairment, no evidence of erratic  
8                   driving before the collision. The  
9                   main issue will become sentencing  
10                  because the prevailing authorities on  
11                  the facts admissible support a  
12                  conditional sentence. I am of the  
13                  opinion that it is the appropriate  
14                  sentence in this case. It is unclear  
15                  if the family understands all of the  
16                  complexities and legal issues, but  
17                  they will be spoken to again. I will  
18                  write more tomorrow after the plea is  
19                  entered. It is expected that the case  
20                  will be remanded after the plea to set  
21                  up a sentencing hearing."

22                  And so you provide that explanation  
23                  for your thinking to Mr. Kaplan, for his  
24                  information, and it is now clearly on record. The  
25                  same day, you have some conversation with Sergeant



1 Carter, because he communicates with chief, former  
2 Chief Bakema telling him, "It appears there is  
3 going to be a guilty plea."

4 And at the same time, sir, a  
5 controversial issues alert is being prepared  
6 within the Ministry, which is ultimately dated  
7 July 16th, 2005, and it contains almost verbatim  
8 the information contained in this e-mail.

9 So you'd agree with me, sir, that  
10 things are pretty much set to go in terms of the  
11 plea?

12 A It would appear so, yes.

13 Q You go to court the next day,  
14 July 16th, and the transcript for that proceeding  
15 can be found at page 1608 of the tab J-60, which  
16 we have in our materials. This has also been made  
17 an exhibit. J-60 is exhibit 6.

18 A Exhibit 6, sir?

19 Q Yes, and I think it's on its way to  
20 you, sir.

21 A Okay.

22 Q I don't know whether you've been  
23 provided with that exhibit?

24 A That one, I don't have.

25 Q I'm going to take you to the only page

1 of the actual transcript after the cover page and  
2 I'm going to take you to line 10 where you  
3 indicate as follows:

4 "Your Honour, this matter was to begin  
5 today for the remainder of the week  
6 but I can tell you that in preparing  
7 for the matter, meeting with the  
8 witnesses and speaking to Mr. Wolson,  
9 where we're at, at the moment, is a 32  
10 person witness list, with agreements  
11 and whatnot, has now been pared down  
12 to 12. With that, we're asking simply  
13 that the matter go to tomorrow morning  
14 at 9:00 o'clock a.m. in court room 405  
15 before Chief Judge Wyant, and I expect  
16 that we will carry on from there.

17 Court: That's fine then. Thank you  
18 very much."

19 Sir, what did you intend to signify by  
20 advising the judge on this day, Judge Stewart I  
21 believe, that you were paring down the witness  
22 list from 32 persons to 12?

23 A That we had enough time to finish in  
24 the week allotted if the matter proceeded, and  
25 that by adjourning one day wouldn't matter.

1           Q     I see. So you wanted the judge to  
2 understand that the one day adjournment was not  
3 going to play havoc with the court schedule?

4           A     Right.

5           Q     Sir, it's quite clear from this that  
6 you were not prepared, at this point, to put on  
7 the public record that this matter was going to  
8 result in a plea?

9           A     No. I wouldn't do that ever until the  
10 accused enters his plea because, as I know, there  
11 is always that last minute risk that an individual  
12 may change his or her mind and they should be --  
13 shouldn't be speaking about the matter until it  
14 happens.

15          Q     Okay. Is that the same reason why,  
16 during your meeting with the Taman family on the  
17 13th of July, you didn't tell them about the  
18 resolution?

19          A     I told them that I anticipated that it  
20 might occur but that I did not -- I couldn't be  
21 certain.

22          Q     Okay. And we have gone through that  
23 testimony on that day so I'm not going to revisit  
24 it, sir. But essentially your position is that  
25 until we have a firm plea, it's not appropriate to

1 be making public --

2 A Yes.

3 Q -- statements about it?

4 And I know that some were left with  
5 the impression that by indicating that you had 32  
6 witnesses and you've cut it down to 12, you had a  
7 very strong case. It was not your intention to  
8 communicate that in any way, sir?

9 A I don't think -- not at all. I  
10 don't -- no.

11 Q Now, sir, you indicate the next day --  
12 if you can then go to -- or on this day  
13 actually -- you indicate to Mr. Kaplan in a memo  
14 dealing with the victim contact that you had, that  
15 you had a meeting with both the Tamans and the  
16 Sveinsons for two hours. I am going to take you  
17 to that right now, it's Exhibit 221, and you  
18 probably have it with you. For those of us with  
19 the books, it's in book R-2.91.83, R-2.91.83, page  
20 3316, which I believe is Exhibit 221, sir. It is  
21 a memo dated October 29th, 2007, from yourself to  
22 Mr. Don Slough?

23 A What's the exhibit number, sir?

24 Q The exhibit should be 221, unless I  
25 have misread the exhibit sheet.

1 A Yes.

2 Q You have listed 11 contacts with the  
3 victims over the course of your dealings in this  
4 case. And you will remember this was in response  
5 to some adverse publicity that suggested there  
6 wasn't adequate explanation of the resolution  
7 discussions. Item number 11 you put:

8 "July 16th, 2006, meeting with both  
9 the Taman and Sveinson families, two  
10 hours...",  
11 and then in brackets there's a plus sign.

12 What's the significance, sir, of the  
13 plus sign?

14 A Today, I don't -- I don't recall what  
15 that significance is at all today.

16 Q Does it not suggest that it's probably  
17 two hours and a little bit?

18 A That's what it would suggest, yes, but  
19 I don't recall.

20 Q When did those meetings happen, sir?

21 A I met with both the Taman family and  
22 the Sveinson family at the court house on the 16th  
23 of July, which was the day that we were to appear  
24 there in respect of this particular matter. And I  
25 went to the court house, was there for my

1 appearance. I would have gone from my office  
2 there, would have done whatever we needed to do  
3 that day, and would have remained there with them,  
4 and did remain there until all the questions that  
5 they would have asked of me would have been  
6 answered, going back and forth between them,  
7 because I wasn't able to speak to them together as  
8 a group, at least that environment was not  
9 permitted. And then would have packed up my  
10 materials, whatever they were, where they were,  
11 and would have returned back to my office. So the  
12 time that would have been described in there would  
13 be all of those activities.

14 Q Including sitting in court waiting for  
15 the matter to come on, sir?

16 A It would be everything from, I don't  
17 have the full record in front of me, but if I  
18 could look at the time record and compare it to --

19 Q All right. Why don't we do that then,  
20 sir?

21 A Yeah, because it might be better of  
22 assistance to me.

23 Q Yes, Exhibit 218.

24 A I have that.

25 Q If you can take a look at the date of

1 July 16th, it's at page 3401.46 of that document.

2 A Yes, I see that.

3 Q What it says, sir, is it says:

4 "Attend court for Prelim."

5 A Yes, and then it --

6 Q "Calls with Robert Taman, calls with

7 Lesley McCorrister, calls with

8 Sveinson family."

9 It doesn't indicate any meeting in the docket,  
10 does it, sir?

11 A Well, it doesn't say that, sir, but I  
12 know that that's exactly what happened on that  
13 particular day, and I would not have -- I would  
14 not have described the time that I would have  
15 spent after the short appearance on that day and  
16 separated it as an entry. I would have just  
17 included that as the whole morning's activity.

18 Q All right, sir. First of all, with  
19 the suggestion that it was a short appearance, we  
20 have heard testimony from both the Sveinsons and  
21 the Tamans that they sat and sat in that court  
22 room watching other matters being dealt with. So  
23 I don't know that they would join you in your  
24 description of short. What do you mean by short?

25 A Well, short would be to me an hour of

1 court time. I don't -- it was -- it was a brief  
2 court appearance, it was moments.

3 Q The case that you were addressing was  
4 moments, but you had to wait to get on, did you  
5 not?

6 A Well, if I had to wait to get on, it  
7 is -- when I look at the transcript, sir, it  
8 doesn't say what courtroom this is in, but I would  
9 assume, based on how the system works here in  
10 Winnipeg, is that all of the cases go to courtroom  
11 404. You sit there and wait there until your time  
12 is called. And then I might have had to wait some  
13 time for Mr. Wolson to arrive, I don't know if he  
14 arrived right at 10:00 o'clock, I can't tell you  
15 that today. And once some matters would be  
16 resolved, or not, cases would be moved, we would  
17 deal with this. And I can't tell you from the  
18 transcript if we got on right away or we didn't  
19 because this was just an adjournment.

20 Q Did you sit with them?

21 A Pardon me?

22 Q Did you sit with either of them  
23 physically in the courtroom?

24 A I would never sit with the family of  
25 one of the parties in the courtroom. I sit up at



1 counsel table.

2 Q Yes, that's what I would have  
3 imagined, sir. How much time did you actually  
4 spend physically in discussions with the Tamans  
5 and the Sveinsons?

6 A Well, I would have spent the entire  
7 time, in my mind and in my recollection, before  
8 the plea was entered, or before the adjournment  
9 rather, and after the adjournment, speaking to  
10 them individually about what was going on.  
11 Because the bulk of the time there would not be in  
12 court, as I look at it, because that court  
13 appearance is brief.

14 Q Sir, I can tell you what the testimony  
15 was that we heard from these families. The Taman  
16 girls say they were introduced to you outside that  
17 morning. They were outside having a smoke. And  
18 they said you spoke to their dad for a few minutes  
19 outside. Robert Taman and Jordan don't recall  
20 that occurring, but Kristin and Tara were clear in  
21 their testimony that that's what happened, they  
22 had not met you before.

23 They say that the next day, the 17th,  
24 there was some conversation both before and after  
25 the courtroom proceedings. And I'll talk to you

1 about that when we get to the 17th.

2 The Sveinsons indicate that their  
3 contact with you consisted of you leaning over the  
4 banister before the plea is entered, and they  
5 believe it's on the 17th, indicating he is  
6 pleading guilty.

7 None of these witnesses describe a  
8 meeting with you on the 16th. And the meetings  
9 that they do describe on the 17th are transient  
10 interactions and nothing that would even come  
11 close to approximating the two hours that's been  
12 recorded in the memo that you sent to Mr. Slough  
13 to indicate how extensive your dealings with the  
14 families were, sir. Do you have any comment on  
15 that?

16 A Well, I'm sorry, I'm not making up my  
17 time sheets, sir. I don't fabricate my time  
18 sheets. And if that's a suggestion that's being  
19 put to me, I will deny it. And that's what I have  
20 to say about the matter.

21 Q I want to be clear, sir, there's no  
22 suggestion being put to you about fabricating your  
23 time sheet, there's no one suggesting that you  
24 didn't spend 2.5 hours attending the court for  
25 Preliminary, calls with Robert Taman, calls with

1 Lesley McCorrister, and calls with the Sveinson  
2 family. The issue that I'm asking you about, sir,  
3 and giving you an opportunity to speak to, is the  
4 suggestion in the memo to Mr. Slough, where you  
5 are setting out the contact that you had with the  
6 victims, in an effort to explain how extensive it  
7 was, where you put two hours in that document. No  
8 one is suggesting you're trying to extra bill the  
9 government and I want to be clear about that. The  
10 question is, did you really spend enough time with  
11 them on that date to make a reference to a two  
12 hour meeting with the family, which is what you  
13 say, a fair description of the time spent on that  
14 day?

15 A Yes, that's my recollection of the  
16 day.

17 Q Now, you have, through the testimony  
18 of Mr. Wolson, been acquainted with the memorandum  
19 that he prepared for his internal file. It's been  
20 item S-100 in this proceeding, that's Exhibit 18.

21 A Thank you. Yes, sir, I have it.

22 Q At page 3501.

23 THE COMMISSIONER: I'm sorry, help me  
24 with that, Mr. Paciocco. What is it again?

25 MR. PACIOCCO: S, as in Simon, 100.

1 It is a memo that Mr. Minuk prepared for his file.

2 THE WITNESS: Mr. Wolson.

3 BY MR. PACIOCCO:

4 Q I am sorry, Mr. Minuk, I have a  
5 terrible habit of doing that.

6 A That's okay.

7 Q Page 3501 of volume S.

8 Sir, the last paragraph of that memo,  
9 and I've already asked you about this and I won't  
10 revisit it, but there's a reference to:

11 "There is a militant father and mother  
12 of the deceased."

13 And then it continues:

14 "The husband and the children are on  
15 side, but having said all of that we  
16 will meet with Judge Wyant and discuss  
17 the issues with him."

18 Now, Mr. Wolson was very fair in his  
19 testimony. He is not testifying to a firm  
20 recollection that the term "on side" was used by  
21 you, but he is very clear in his conclusion that  
22 that is what you had communicated to him, sir?

23 A Mr. Paciocco, when I met with the  
24 Taman family, I described to them the  
25 circumstances of the case as I understood it to

1 be, the problems with the case, and that this  
2 fellow was going to be pleading guilty, and  
3 explained to them what the range of sentences  
4 were. I was left with the distinct impression  
5 that, although they were unhappy with the state of  
6 the law, that, and as I related to you yesterday,  
7 had difficulty in understanding the issues  
8 relating to what a refusal of breathalyzer meant  
9 and how it could be relied upon, that they  
10 understood the circumstances that I was in and  
11 were fine with where we left off. And I will tell  
12 you that after the appearance, not in July, but  
13 certainly after the first submissions in front of  
14 Judge Wyant, that my relationship with them was no  
15 longer cordial. We were no longer effectively  
16 communicating. I didn't have a full  
17 understanding, as I wrote to Mr. Kaplan, that they  
18 did understand what it was that I was saying to  
19 them, because I probably have a tendency to speak  
20 in legalities, not in what the law was and what my  
21 obligation -- what I felt the problems were, but I  
22 did never ever get the message from them prior to  
23 this period of time that I should do something  
24 which was, or that I could do something, in the  
25 sense that my hands were tied by the law, or the

1 law as I explained it to them, and I think they  
2 understood that.

3 THE COMMISSIONER: Excuse me. Did you  
4 ever explain to them the problems with the  
5 charges?

6 THE WITNESS: In detail?

7 THE COMMISSIONER: In any detail, told  
8 them what was wrong, the difficulty that you were  
9 going to have in proving the impaired, refusal to  
10 provide sample and the criminal negligence? Did  
11 you ever say to them, these are the problems?

12 THE WITNESS: I probably, if I didn't,  
13 I would have explained to them in legal terms that  
14 there would have been constitutional problems,  
15 that there were problems at the scene, that there  
16 were problems with the administration of the  
17 breathalyzer demand. I wouldn't have detailed to  
18 them every little thing.

19 THE COMMISSIONER: Did you simply say,  
20 there are problems in this, this, this, this, but  
21 not explain to them what in fact the problems  
22 were?

23 THE WITNESS: I told them there were  
24 problems and I believe I would have touched on  
25 them. I can't remember today, but I may not have

1 given them the full extent that I might have given  
2 to a lawyer.

3 THE COMMISSIONER: Go ahead.

4 BY MR. PACIOCCO:

5 Q I want to pursue the observation by  
6 Mr. Wolson that the family is on side, sir. Even  
7 if, and we'll forget about the discussions and  
8 testimony of the Tamans about this meeting being  
9 heated and them being upset and crying and telling  
10 you they wanted a jail sentence, and not wanting  
11 the alcohol charges gone, even forgetting all of  
12 that, do you not agree, sir, that there is a  
13 difference between resignation, which you seem to  
14 be describing today, resigned acceptance and being  
15 on side?

16 A Well, that's not my language and I  
17 didn't convey that to anybody that they are on  
18 side. If Mr. Wolson interpreted it, the resigned  
19 to the state of affairs as being on side, that's  
20 how he wrote it but I wouldn't have told him that.

21 Q You would agree with me that  
22 Mr. Wolson is a very astute individual?

23 A Yes.

24 Q And he would be able to distinguish  
25 between someone communicating resignation and

1 someone communicating on side? I know you can't  
2 speak for his impression?

3 A I can't speak for that, but I wouldn't  
4 have conveyed that. So I don't know where, what  
5 Mr. Wolson is writing, I don't know.

6 Q The other thing I think the Commission  
7 would want to consider, and I will put it to you  
8 for your observations, is Mr. Wolson was very  
9 clear about the purpose for that inquiry, that he  
10 would have asked and that the judge would be  
11 interested in it, he'd want to know the position  
12 of the family because the position of the family  
13 could matter to a judge in a sensitive case like  
14 this. And so it was important to Mr. Wolson to  
15 find out. And given that, sir, do you not think  
16 that this is an issue of significance that would  
17 require fairly careful attention to what was being  
18 said? And I'm just trying to find out what you  
19 might have said to him to leave him with the  
20 impression that the family was on side?

21 A I don't know, and I can't speak for  
22 Mr. Wolson, and my -- and I have told you and I  
23 will tell you again, sir, as I said to you, that  
24 the family, as I understood it when we had our  
25 discussions, may not have liked what I had to do



1 but understood what I had to do. And to the  
2 extent that they understood that I was going to be  
3 asking for a jail sentence, they did understand  
4 that. The issue was whether or not the law would,  
5 and the sentencing authorities in Manitoba would  
6 permit, or would result rather in this fellow  
7 going to jail for a period longer than two years  
8 less a day and where that jail sentence was going  
9 to be served. But at no time did I ever leave  
10 these people, the Tamans or the Sveinsons, with  
11 the notion that the Crown would not be asking for  
12 a jail sentence, because the conditional sentence  
13 is a misnomer or misunderstood in some context  
14 because it is a jail sentence. And the issue is  
15 where that sentence might be served.

16 Q All right, sir. And I won't go  
17 through again with you the problems that may exist  
18 with your memo three days later to Mr. Kaplan that  
19 you don't know whether the family understands and  
20 how it is that you can take the position that you  
21 were sure they understood your situation on the  
22 13th, but on the 16th in the memo, you're not sure  
23 whether they understood your situation, sir?

24 A Well, I can't ever be sure that they  
25 are understanding. I'm trying my best.

1           Q     All right, sir. Now, Ms. Sveinson  
2     says that you got a call from her either on the  
3     16th or the 17th, she wasn't sure, about the case,  
4     that she wanted some answers about the case. You  
5     have it docketed, sir, for the 16th of July. We  
6     looked at your docket and one of the things you  
7     billed for is call with the Sveinsons. She said  
8     she called you to ask about the charges, and she  
9     asked you, and there was an indication to her,  
10    either earlier or at this point, that you were  
11    going to stay the three charges that you  
12    ultimately stayed. And she was of course upset  
13    about that and she asked you if this was as a  
14    result of a plea bargain. And her testimony was  
15    you said no.

16           A     Well, I wouldn't have -- whether I  
17    said no or I did not answer that question, I would  
18    not have answered that question to her, and I  
19    would have told -- if I hadn't informed Mr. Taman  
20    before speaking to her, I wouldn't have. And I  
21    also was not, at that point, comfortable, I'll  
22    tell you, speaking to Mrs. Sveinson on the  
23    telephone. If I was going to have a conversation  
24    with her, I would prefer that it would be in  
25    person. So I would have done whatever I needed to

1 do not to answer the question rather than say no.

2 Q I note, sir, that you are describing  
3 your reaction to that by talking about what you  
4 would have done, rather than what you did do, sir.  
5 I take it you don't recall the phone call?

6 A I don't recall.

7 Q But your position is that, based on  
8 your practice and the circumstances, you can't see  
9 yourself answering the question so she must be in  
10 error?

11 A Pardon me?

12 Q Your position seems to be that, based  
13 on your view and the circumstances at the time,  
14 she must be in error in suggesting that you gave  
15 her a no when she asked about a plea bargain?

16 A Or mistaken as to what it was that I  
17 had said to her.

18 Q All right, sir. Mr. Taman, at this  
19 point, one of the points you raised is you  
20 wouldn't have told her because you hadn't told  
21 Mr. Taman yet?

22 A I certainly wouldn't be talking to her  
23 before I spoke to Mr. Taman because I was not able  
24 to do that.

25 Q The next morning, July 17th, you have

1 a meeting with Chief Judge Wyant just before the  
2 9:00 o'clock hearing. What took place during that  
3 meeting that was attended to by yourself and  
4 Mr. Wolson?

5 A He was informed of the matter, the  
6 fact that the case had been resolved, that  
7 Mr. Wolson had informed him a bit of background  
8 about his client. I indicated to him that there  
9 were problems with the investigation conducted by  
10 the police, and that the Crown's case was not the  
11 strongest, at least on some -- it had been  
12 compromised. I didn't go into all of the detail  
13 because I didn't think that it was necessary to do  
14 that. And that Mr. Wolson and I had reached an  
15 agreement with respect to how his client would be  
16 pleading, what charges would be -- the Crown would  
17 not be proceeding with, and that as a result there  
18 would be a recommendation coming forward as to  
19 what the appropriate sentence was. And he heard  
20 that, and the issue of course was that it would be  
21 a recommendation for a conditional sentence, and  
22 he listened to all that. Basically told us that  
23 he wasn't going to be -- couldn't decide the case  
24 there, wasn't unfolding his hand, so to speak, and  
25 that he would wait, and then went on to speak to

1 us about the manslaughter decision that he was  
2 going to be delivering later that morning and that  
3 he was going to be -- that was a case, with senior  
4 counsel, where there was a joint recommendation  
5 for a conditional sentence on a manslaughter and  
6 that he was going to be following that joint  
7 recommendation. That's in a nutshell --

8 Q Sir, do you have a distinct  
9 recollection of using the words, or words that can  
10 only communicate the same thing with Chief Judge  
11 Wyant, "We had reached agreement"? Do you recall  
12 using those words or words that could only be  
13 understood to communicate that?

14 A I don't recall the specific words but  
15 certainly he would, Mr. Paciocco, Judge Wyant  
16 would have understood that Mr. Wolson and I had  
17 reached an agreement between ourselves as to both  
18 what the plea was going to be and as to what the  
19 sentence was going to be.

20 Q Sir, you understand that, and I know  
21 you do, that the distinction that has become an  
22 issue in this case is the distinction between  
23 reaching an agreement, in the sense of negotiating  
24 to a position on the one hand, as opposed to  
25 simply arriving at the same understanding of the

1 appropriate outcome on the other?

2 A Yes, I understand that.

3 Q When you talk about reaching an  
4 agreement, in your testimony today, allowing that  
5 you don't understand the specific words, is there  
6 any doubt in your mind, based on the conversation  
7 that this judge would have understood in chambers  
8 that you had negotiated your way to a conclusion,  
9 as opposed to coming before him and simply  
10 communicating that you both agree on what the  
11 outcome will be?

12 A Absolutely not. I would say to you  
13 the following, that I know -- well, I wouldn't say  
14 I know personally, but I know professionally Judge  
15 Wyant. I know his background as a defence lawyer.  
16 I know his background as a Crown Attorney. I am  
17 fully aware of his experience in that very area of  
18 the plea bargaining process and his, I would say,  
19 his skill as a prosecutor in that area as he then  
20 was, and his role as a judge, and I would have not  
21 had any misunderstanding at all that he understood  
22 that Mr. Wolson and I had reached a negotiated  
23 agreement. I would have not -- that was never  
24 something that I had ever misunderstood.

25 Q What I'm going to suggest to you, sir,

1 is that his background and his experience, as  
2 praise worthy and impressive as it might be, has  
3 nothing to do with what he would understand from  
4 your conversation, because those with that kind of  
5 experience have seen both kinds of arrangements.  
6 They have seen lawyers come forward who have  
7 negotiated an agreement, and they have also seen  
8 lawyers come forward who happen to agree on what  
9 the position is. And so whether he understood  
10 depends not on his experience, but on what you  
11 communicated to him. And so bearing that in mind,  
12 I will ask you one more time, sir. Did you use  
13 language that unequivocally communicated to him  
14 that this was a negotiated agreement?

15 A Yes.

16 Q The second point I want to pursue with  
17 you, sir, is Mr. Wolson's testimony about your use  
18 during the meeting of the phrase "historical  
19 anecdotal evidence of alcohol consumption," a  
20 phrase that has become a bit of a talisman to some  
21 of the problems that arose later.

22 A Yes.

23 Q Do you recall using that phrase during  
24 the meeting?

25 A I don't necessarily recall using it in

1 that meeting, and I don't know if Mr. Wolson is  
2 correct or not that I used it in that meeting and  
3 he's sort of remembering if I used it in court or  
4 that meeting. But if I did use it, I can't  
5 remember today and so --

6 Q Sir, you would agree with me that,  
7 having listened to Mr. Wolson's testimony, it was  
8 not a passing recollection of the phrase being  
9 used. His testimony was that he was disturbed by  
10 it and that he contacted you prior to August 22nd  
11 and discussed it with you, and that you read to  
12 him from your prepared submissions a passage  
13 indicating that no one could -- he did not appear  
14 to be affected by the alcohol, the officers'  
15 observation, and that's what gave Mr. Wolson  
16 comfort enough to say, you know what, Marty, if  
17 you really need to put in that phrase, then I can  
18 live with it, because you made it clear enough  
19 over here that it had no impact on  
20 Mr. Harvey-Zenk. That was a very specific  
21 recollection on his part. Are you saying he's  
22 mistaken about that?

23 A No, not at all. And if Mr. Wolson  
24 said it, I would take Mr. Wolson at his word.

25 Q Okay. So I think we can conclude



1 then, although you don't remember it, we're safe  
2 in relying on that testimony?

3 A Neither of us took notes at that time.  
4 If it's a phrase that stuck out in his mind, I  
5 would take him at his word.

6 Q All right, sir. You go into court  
7 after this meeting with the chief judge for a  
8 pretty -- and I don't use the term in a derogatory  
9 way, but a pretty perfunctory hearing. You go in  
10 on the 17th, and again we can look at the  
11 transcript just to see what took place that day.  
12 This is J-61. J-61 has been made Exhibit 7.

13 During that five-page transcript,  
14 Mr. Wolson stands and effectively indicates that  
15 his client is pleading. The court does the usual  
16 check to ensure that Mr. Harvey-Zenk understands  
17 the plea and is voluntarily entering it. There is  
18 some discussion administratively about how the  
19 matter is going to proceed from there. And then  
20 over on page 1615 --

21 A 1615?

22 Q Yes, page 5 of the transcript at line  
23 6, you indicate:

24 "Your Honour, with respect to the  
25 other matters, the Crown will be

1 entering stays of proceeding.

2 The Court: Yes, counts 1, refuse to  
3 provide breath sample, count 2  
4 impaired driving causing death and  
5 criminal negligence causing death,  
6 count 4, are all stayed."

7 You'd agree with me, sir, that that is the sum  
8 total of the comments made in court that day about  
9 the staying of those charges?

10 A Yes.

11 Q I'm going to take you to the laying  
12 and staying of charges policy that we examined  
13 early in your testimony. It's G-46. It's Exhibit  
14 216, sir, G-46, and I will be turning to page  
15 1393.

16 A I have 1393 in front of me, sir.

17 Q And I'm just checking my quote, sir.  
18 You can find the one that I'm interested in, sir,  
19 pretty much just before the middle of the page.  
20 It's in the second paragraph under the heading  
21 "Procedure staying charges" on page 1363. It's in  
22 the second paragraph under the heading "Procedure  
23 staying charges," the second sentence reads:  
24 "Where reasons of the public interest  
25 and the administration of justice do

1 not demand otherwise, and the stay or  
2 withdrawal occurs in a court of  
3 record, the reasons therefore shall be  
4 stated by the Crown Attorney.  
5 Where reasons of the public interest  
6 and the administration of justice do  
7 not demand otherwise and the stayer  
8 withdrawal occurs in a court of  
9 record, the reasons therefore shall be  
10 stated by the Crown Attorney."

11 You would agree with me, sir, that on  
12 the date when the evidence, or when the stays were  
13 announced, the 17th of July, you did not comply  
14 with that policy guideline set out by the Province  
15 of Manitoba?

16 A Well, I don't see that it's required  
17 that they be done on the day that the stays are  
18 entered. It can be done, as I would say, at a  
19 later time.

20 Q Okay. Let me --

21 A When that's --

22 MR. GREEN: Before my --

23 THE COMMISSIONER: Yes.

24 MR. GREEN: -- friend proceeds

25 further, I would think that in fairness,

1 Mr. Commissioner, my friend should read the first  
2 sentence of that particular paragraph to the  
3 witness. And that states:

4 "Where the Crown Attorney decides not  
5 to undertake or to stop a prosecution  
6 by reason of a public interest factor,  
7 a notation of this decision must be  
8 placed in the file relating to the  
9 case in question. Where reasons of  
10 the public interest...",  
11 et cetera. So we're talking about a public  
12 interest matter and I think that should be put to  
13 the witness.

14 THE COMMISSIONER: Yes.

15 MR. PACIOCCO: Mr. Commissioner, it's  
16 certainly not my interpretation of this paragraph  
17 that a public interest factor is the only case  
18 where you're supposed to make a public  
19 announcement of the reason for this stay, and that  
20 will be a matter for argument, but I put it to the  
21 witness that he has not complied with this so that  
22 he can respond to it.

23 THE COMMISSIONER: Thank you.

24 BY MR. PACIOCCO:

25 Q Mr. Minuk, your response was that you

1 didn't feel the need to respond to it on that day.  
2 I'd suggest to you first, sir, that July 17th to  
3 August 22nd is a gap of more than a month, and I  
4 don't think you will disagree with that, and that  
5 this case had received and was receiving a  
6 tremendous amount of publicity, and it was a case  
7 that was going to result in an outcome that I'm  
8 sure you knew was controversial.

9           Do you not agree with me, sir, that  
10 this policy was intended to permit the public to  
11 understand and feel more comfortable about the  
12 decisions that are being taken, and that delaying  
13 the explanation for five weeks is inconsistent  
14 with the underlying rationale? And in fairness,  
15 to you, sir, is really not a good decision, would  
16 you agree with that, sir?

17           A     I would agree that that is an  
18 interpretation, sir, but I would also say to you  
19 that the local practice is not that. The local  
20 practice is, as it is in this particular  
21 transcript, where perhaps much to the surprise of  
22 the Commissioner, this is what we do here. We  
23 enter this plea, no facts are heard, matter comes  
24 back on again, and these issues are dealt with.  
25 This is the local practice.

1           Q     So you'd agree with me that this is  
2     the local protocol provided for by Manitoba  
3     Justice for prosecutors and under your terms of  
4     retainer, you are bound by that protocol?

5           A     I do. And I read it that it should be  
6     done. It doesn't say that it needs to be done on  
7     that particular day.

8           Q     All right, sir. Well, I'm going to  
9     suggest to you that there was never a time when  
10    you explained why you withdrew or why you stayed  
11    the criminal negligence causing death charge, not  
12    a breath of it, sir, on August 22nd,  
13    September 12th, never. Would you disagree with  
14    that, sir?

15          A     I'm not going to disagree with you.

16          Q     And there was never a breath mentioned  
17    about why, on the public record, sir, about why  
18    you stayed the refusal charge, not on the 22nd,  
19    not on September 12th, never?

20          A     Well, I don't have the transcript in  
21    front of me, but if you're saying did I detail all  
22    of the reasons --

23          Q     Sir, you didn't detail any of the  
24    reasons is what I'm saying. And I'm just going to  
25    ask you again, in light of that, notwithstanding

1 that the practice might in your evidence be that  
2 you can wait or should wait five, six weeks while  
3 the public wonders what's going on, you never  
4 complied with that policy?

5 A I don't have all of the transcript in  
6 my mind, but would say to you that I would have  
7 hoped that I would have conveyed to the court  
8 sufficient reason that the police investigation of  
9 the matter was such that it compromised the  
10 prosecution.

11 Q You spoke only in generalities about  
12 the police investigation compromising the  
13 prosecution, sir. You're not really suggesting  
14 that that is an adequate explanation for the stay  
15 of very serious charges?

16 A Well, I don't understand, in reading  
17 this, that giving the summary of what it is that  
18 the problems are, which is an adequate police  
19 investigation which compromises a case is wrong.  
20 Some other lawyer may choose to detail every  
21 reason. If I gave a summary of it, I believe that  
22 I'm in compliance with the policy.

23 Q Sir, you'd agree with me --

24 THE COMMISSIONER: Just a second.

25 Mr. Green has another objection. I have not been

1 privy to the objection. May I be privy to the  
2 objection?

3 MR. GREEN: I'm very sorry.

4 THE COMMISSIONER: No, that's all  
5 right. I'm sure that the two of you had a good  
6 tete a tete, but will you let me know what's going  
7 on?

8 MR. GREEN: Yes. I think perhaps it  
9 would be more appropriately covered in  
10 re-examination, Mr. Commissioner.

11 THE COMMISSIONER: Thank you.

12 MR. GREEN: I was simply pointing  
13 something out to my friend which I thought was  
14 inconsistent with what he was suggesting. He  
15 disagrees.

16 THE COMMISSIONER: Okay. Thank you.

17 BY MR. PACIOCCO:

18 Q Sir, I was just about to put to you  
19 that the problems with your criminal negligence  
20 causing death charge did not arise from the  
21 quality of the investigation, they arose from the  
22 circumstances of the driving. Do you agree with  
23 that?

24 A Well, the circumstances of the  
25 driving, of course, but also one has to take a



1 look at the facts of the case and what the witness  
2 evidence was that was gathered, and then taking  
3 into account the evidence of Mr. Shaw, I believe  
4 it is, who would have been the only person to have  
5 seen -- or given credible evidence as to his  
6 observations, because he was the only one who  
7 really did, it wasn't there.

8 Q All I'm suggesting --

9 A Absence of fact and some law.

10 Q All I'm suggesting to you, sir, is  
11 even the general references to problems with the  
12 investigation does not begin to explain why you  
13 stayed the criminal negligence charge.

14 Sir, after the court, Mr. Sveinson  
15 testifies that he approached you, and he believes  
16 it's that day, and he approached you and he says:

17 "You bargained away three charges.

18 Are you gonna bargain away the  
19 sentence?"

20 He was angry. And you said:

21 "Oh, no, that is the judge's job."

22 Do you recall that confrontation, sir?

23 A I don't recall these confrontations  
24 with Mr. Sveinson that you are putting to me. And  
25 to the extent that he's suggesting these things,

1 I'm going to say to you, Mr. Paciocco, in response  
2 to that, that I did my best to try to be cordial  
3 with the Sveinsons, to try to answer some  
4 questions that they may have put to me in  
5 generalities, but did my best not to engage in a  
6 lot of conversation with them or answer any  
7 specific questions after being directed not to do  
8 so by Mr. Taman. And because we were always in  
9 what we would call the same geographic  
10 environment, with the Tamans nearby and the  
11 Sveinsons nearby, I was in a very difficult  
12 environment and tried to be as general and  
13 non-specific as I could possibly be.

14 Q So, I take it that you would agree  
15 that the two-hour meeting that you have recorded  
16 in your memo to Mr. Slough, including the  
17 Sveinsons and the Tamans, couldn't have included  
18 very much time with the Sveinsons, if you didn't  
19 answer any questions, spoke only briefly and only  
20 in generalities?

21 A Well, no, I went back and forth  
22 between them. And I'm not going to tell you that  
23 I answered every question that they put to me.

24 Q Do you have a distinct recollection  
25 that this did not happen, sir?

1           A     I would not say that. I would have  
2     told him that I -- I wouldn't have told him  
3     anything about that because I could not speak to  
4     him about those matters.

5           Q     Sir, if he put a direct question to  
6     you, what would you have said? Would you have  
7     said, I can't speak to you?

8           A     I would have not answered the question  
9     and I would have said to him, before I speak to  
10    you about any of these matters, I have to speak to  
11    Mr. Taman.

12          Q     Sir, it's interesting, because that  
13    phrase, "Oh, no, that's the judge's job," is  
14    pretty much the same thing that Ms. Bukowski said  
15    that you said to her and to Mr. Shaw and to  
16    Ms. Beattie outside of court that same day. Do  
17    you recall saying that to them?

18          A     I don't remember speaking to them at  
19    all about that.

20          Q     All right, sir. The sentencing is  
21    ultimately set for August 22nd. And I notice that  
22    when you prepare your submissions for court, you  
23    write them out in tremendous detail and  
24    essentially go in and read those into court with  
25    maybe one or two changes here or there, fairly

1 minor changes, sir. Is that a fair description of  
2 your practice when it comes to submissions?

3 A Occasionally. I don't do it all the  
4 time, occasionally do that.

5 Q When do you do it, sir?

6 A Pardon me?

7 Q When do you do it?

8 A When do I -- when? It would be on a  
9 case by case basis, Mr. Paciocco. There are  
10 certain times when I would do it, certain times  
11 when I won't. I can't really identify them to you  
12 today.

13 Q If you wanted to run your submissions  
14 by somebody, I take it you'd have to do it?

15 A Oh, yes.

16 Q Okay. I'm going to take you to a  
17 document that's found in book I, volume I, the  
18 sentencing volume, at tab 58, I-58.

19 At tab I-58, sir, you will find Zenk's  
20 sentencing submission number one that was included  
21 in your file that was provided to the  
22 Commissioner. And it is a typed out and complete  
23 recitation of the sentencing submissions that were  
24 ultimately provided on the 22nd of August.

25 Now, sir, you advised Mr. Clifford in

1 your interview with him that you forwarded these  
2 submissions to Mr. Kaplan and to Mr. Slough for  
3 their review?

4 A Oh, yes, I agree with that.

5 Q What did you do that for, sir?

6 A I did it to alert them in advance to  
7 what it was that I was going to be saying. Of  
8 course, in their review, they would have issues of  
9 the policy, perhaps, in Crown policies, whatever  
10 they may be, more in mind than I do, given their  
11 senior position. So they could take a look at  
12 that and see whether or not there was some  
13 problems in that particular area, because they  
14 deal with this on a day-to-day basis. And at the  
15 same time, much the same as not having anybody to  
16 bounce off ideas on and get some suggestions on,  
17 and take some other person's point of view, not  
18 necessarily that I would adopt it, but keeping an  
19 open mind about these things, to hear what someone  
20 else might have to say about this. There would be  
21 no one in my office, so to speak, with experience  
22 in this area of the law that I could, or any  
23 familiarity with the case that I could speak to  
24 about it. So the whole variety of reasons.

25 Q Yes, sir, I suggest that you were

1 giving it to them in part to get their approval  
2 for what you were going to say?

3 A Well, the -- I agree with you that the  
4 impression is that if I send something, they read  
5 it, they don't send something back, they don't  
6 comment on it, they do comment on it, change it,  
7 certainly for their approval. That's the way it  
8 would look, I know that. But --

9 Q Sir, that's the way it is, isn't it?  
10 It's not just how it would look, that's the way it  
11 is?

12 MR. GREEN: Well, again, he was cut  
13 off in the middle of an answer. This is the  
14 second time.

15 THE WITNESS: I'm not asking them for  
16 their approval per se. I'm telling them what I am  
17 doing, I'm briefing them on it. And if they have  
18 any comment that they could give to me, that they  
19 would give to someone at their case conferences or  
20 senior management meetings, they might send it  
21 back to me. And with that, I can consider it or  
22 not consider it, I can deal with it, not deal with  
23 it. But I don't think -- to me, the process is  
24 not just, it is not about getting their approval,  
25 it's about telling them what I'm doing and trying

1 to get some discussion about it and if they --  
2 with nowhere else to turn to.

3 THE COMMISSIONER: Excuse me a second.  
4 Mr. Minuk, you have already run by them the plea  
5 bargain?

6 THE WITNESS: Yes, sir.

7 THE COMMISSIONER: And the conditional  
8 sentence?

9 THE WITNESS: Yes, sir.

10 THE COMMISSIONER: And they have  
11 agreed to both?

12 THE WITNESS: They didn't object to  
13 it.

14 THE COMMISSIONER: They didn't object  
15 to it, I'm sorry, I didn't put it correctly. They  
16 didn't object to both.

17 THE WITNESS: Yes.

18 THE COMMISSIONER: Why do you have to  
19 tell them what you are going to say?

20 THE WITNESS: Perhaps I don't need to.  
21 One of the factors may well -- one of the factors  
22 in this case was clearly the community interest in  
23 the matter. So to the extent that they would be  
24 aware of what I would be saying, they wouldn't  
25 hear about it after the fact, they would have no

1 way of hearing about it, they'd have to get a  
2 transcript. And keeping them informed I don't  
3 think is a bad thing. If it is, I would -- I  
4 wouldn't do it. And more -- at the same time, I  
5 was certainly left with the impression that it  
6 wasn't a bad thing to do, because if they did,  
7 they would be quick to tell me not to do these  
8 things.

9 BY MR. PACIOCCO:

10 Q Sir, I have been working to be very  
11 fair with you here, sir, and I just want to let  
12 you know that the suggestion of approval, the  
13 suggestion you would make the changes, the  
14 suggestion that this was vetted come from your  
15 words, not mine.

16 A Um-hum.

17 Q I'm going to take you to the  
18 transcript, page 89 of your interview with  
19 Mr. Clifford.

20 A Yes, I have the passage here, I see.

21 Q And I'm going to read it, sir.

22 A Okay.

23 Q Commencing with line 5:

24 "Q Now, when the manner is remanded  
25 over to the 22nd day of August, this



1 is the day, Mr. Minuk, that you put on  
2 the record the facts and are actually  
3 grounding the plea?

4 A Right. My recollection, sir, is  
5 that I would have prepared a written  
6 submission. That written submission  
7 would have been forwarded over to  
8 Mr. Kaplan and Mr. Slough. They would  
9 have had the opportunity to read it,  
10 and once having read it, then receive  
11 what I would consider to be to some  
12 extent an approval. I would have gone  
13 forward with it and I would have made  
14 any change, amendments or any changes  
15 that they would have asked or  
16 suggested that I make.

17 Q So your submission would have been  
18 vetted by --

19 A I don't know, I guess that's the  
20 word, vetted, but I gave them to them  
21 in advance."

22 So those, sir, are your words.

23 Mr. Wolson ultimately records in his  
24 document that you had indicated to him, and again  
25 he was very fair because he doesn't purport to

1 recollect the exact word, that you had vetted the  
2 resolution discussions with Mr. Kaplan and  
3 Mr. Slough. Do you recall his notation?

4 A Yes, I do, I do, I do.

5 Q And I take it, sir, you don't take any  
6 issue with his characterization of what you had  
7 indicated to him?

8 A I would have told him that I ran it by  
9 them, told them what I was doing, and that I  
10 didn't get any, I wasn't told the contrary  
11 which --

12 Q All right, sir. The 22nd of August,  
13 on that day you were expecting to go in and give  
14 the submissions, and there was, not an expectation  
15 but a potential, and one expressed to the judge  
16 that this could be it, you may not even need to go  
17 away and deliberate, you might be able to provide  
18 a decision at the end of our submissions. Do you  
19 remember those submissions being put to the judge?

20 A Oh, yes. I certainly expect that to  
21 occur that he might deliberate, he might not.

22 Q You certainly didn't expect what  
23 happened, to be called back on the 12th of  
24 September to address a concern that he had with  
25 the joint position being put forward?

1           A     Well, I didn't expect to be called  
2 back on September 12th, and I didn't expect to be  
3 called back on the issue which was identified in  
4 the letter because that was an issue that had been  
5 identified to the judge in what you call the  
6 pre-plea meeting and was raised -- was known on  
7 September -- in the first appearance in August.  
8 So when we got the letter talking about that  
9 particular issue, the police issue, I didn't  
10 expect that at all.

11           Q     You didn't expect September 12th at  
12 all?

13           A     No.

14           Q     Okay. You should be aware, sir, that  
15 the Tamans have testified that they had no idea  
16 that you were going to be making a joint  
17 recommendation for a conditional sentence. Now,  
18 they know that you had, on a number of occasions  
19 in their meetings with them, explained that  
20 conditional sentences were the law and you showed  
21 them the precedent book, but they did not,  
22 according to their testimony, understand that you  
23 were going to go in and join Mr. Wolson in asking  
24 the judge for a conditional sentence. Do you have  
25 any comment on that, sir?

1           A     They would have misunderstood what I  
2     told them, because to say that, to tell them that  
3     Mr. Wolson was asking for, was going to be asking  
4     for this, and for me to be telling them that this  
5     is what the Crown position was going to be, and my  
6     position was based on the law which I reviewed  
7     with him, and as I recall, or you suggested to me  
8     yesterday that I went through all these cases with  
9     Mr. Taman, how they could have misunderstood it, I  
10    don't know because --

11           Q     Are you sure that you told them this  
12    is going to be the Crown's position?

13           A     Yes.

14           Q     Sir, they provided testimony -- some  
15    of them did and I'll try and be specific -- of  
16    Robert having a conversation with you just before  
17    going into court. Tara Taman describes how, just  
18    before going in, you pulled the family into an  
19    ante-room for a conversation. You told them to  
20    listen to what you had to say, they would be  
21    happy. And Tara said that they were upset to  
22    learn that you were going to be making a joint  
23    position for a conditional sentence. And Kristin,  
24    Tara and Robert all testified that you showed the  
25    document with the terms on it and described to

1    them how you were going to be recommending jointly  
2    a conditional sentence.  And Robert Taman said to  
3    you:

4                    "Is there anywhere on that piece of  
5                    paper that you could put that the  
6                    family objects?"

7    All three of them say that.  And your response was  
8    no, and you went into court and proceeded with  
9    your business that day, sir.  Do you have any  
10   observations to make with respect to that  
11   testimony?

12                   A    Well, my only comment to that, sir,  
13   would be that the Tamans and I don't have the same  
14   recollection.

15                   Q    What is your recollection, sir?  Did  
16   you meet with them just before going in and show  
17   them the terms?

18                   A    I may have.  I don't know, because I  
19   know that I had the terms of the sentence drafted,  
20   I had supplied them to Mr. Wolson in advance so  
21   that he would be aware of the conditions that the  
22   Crown would be asking for.  I had indicated on the  
23   document the case authorities that I had drew  
24   these from, because I expected that if someone  
25   like Mr. Wolson might have asked me questions

1 about it, that I would have had the case authority  
2 to support them. And whether or not I reviewed  
3 that or showed that to the Tamans would not have  
4 stood out in my mind, because it was a document  
5 that was prepared for Mr. Wolson and ultimately  
6 for filing in court and I'm not -- I don't recall  
7 going over each and every one of these conditions  
8 with them.

9 Q All right, sir. So I take it that if  
10 you contest this conversation, and I'm not sure  
11 yet whether you do and I'm going to ask you that  
12 in a second, it's based on your expectations of  
13 how you would have behaved rather than a  
14 recollection, given that you don't have one? Do  
15 you contest --

16 A Yes. And unfortunately, sir, today  
17 I'm in a situation where I did not record every  
18 contact and every moment of time that I spent with  
19 the Tamans. And I can tell you that as a result  
20 of this experience, not only will I be doing that,  
21 but I will, from now on, be, and have been doing,  
22 recording conversations with people so that I will  
23 have a record, not of my own handwritten notes,  
24 but tape-recorded so that we don't get into these  
25 situations again.

1           Q     Mr. Sveinson gave similar testimony to  
2     this extent. His position, as you know, was that  
3     he confronted you about whether you plea bargained  
4     away the sentence and you said no. And his  
5     testimony is when he heard you making a joint  
6     submission with Mr. Wolson on the sentence in  
7     court, he took the view that you had lied to him  
8     on the earlier occasion. So I want you to be  
9     aware of his testimony. His testimony was he put  
10    it to you, you said no, you went in court and you  
11    did it. Do you want to respond to that, sir?

12           A     There's nothing I can say to  
13    Mr. Taman, or rather to Mr. Sveinson, who says I'm  
14    lying to him. If I tell you that I'm not, that's  
15    my opinion. I didn't, wouldn't. And if choosing  
16    not to speak to him is interpreted as lying, or  
17    trying not to answer his questions is interpreted  
18    as lying by him, that's one thing. But that's not  
19    how I conduct my business.

20           Q     I don't want to get sidetracked on  
21    this other point, sir, that you just raised, but I  
22    feel that I want to at least raise it now because  
23    it's fresh. When you were describing writing out  
24    the conditions and carrying them into court, you  
25    said that you did that so that you could give

1    them, for example, to Mr. Wolson so he would be  
2    aware of the conditions that the Crown would be  
3    asking for.  And you also said you wanted it with  
4    you in case he had an issue with any of those  
5    conditions, and you wanted to be able to see  
6    whether you had case authority to support them.  
7    Is that what you just testified to, sir, or did I  
8    mishear you?

9           A    I think I supplied that document to  
10   Mr. Wolson in advance of the court hearing, not on  
11   that day.

12          Q    Yes.  And you put that in there so  
13   that he would be aware of what the Crown will be  
14   asking for?

15          A    No.  If you recall, there was some  
16   issue about whether or not I would be writing to  
17   Mr. Wolson about, or confirming the matter.

18          Q    Yes?

19          A    And what I understood that I would be  
20   writing to Mr. Wolson about was to detail the  
21   conditions that we had talked about, the ones that  
22   I had listed for him, did put them down in writing  
23   and supplied the basis for why I was asking for  
24   those conditions, some of which I note here he had  
25   in his memo.  So when I would have drafted that, I



1 don't know, but I do know that I did supply that  
2 and it did ultimately become an exhibit in the  
3 court proceeding.

4 Q Yes?

5 A So that the judge wouldn't have to  
6 write them all out, so to speak, it was more as a  
7 convenience to the court that they would have all  
8 these conditions listed.

9 Q Yeah. I just wanted to clarify that,  
10 because I have to say that your earlier answer,  
11 although you didn't intend it to, created the  
12 impression that perhaps this was going to be  
13 something that might be new to Mr. Wolson?

14 A No.

15 Q And I recall you earlier saying you  
16 had worked this out as part --

17 A Yes, we had worked it out and I just  
18 wanted him to have it, not -- because what I  
19 understood I was giving to him in writing were the  
20 conditions, not a letter saying, well, you plead  
21 to this, I'll stay that. That was --

22 Q Fair enough, sir. You had some  
23 dealings with the Tamans after court on August  
24 22nd. Do you recall?

25 A I would have spoken to them after

1 court.

2 Q According to Kristin's testimony  
3 again, Robert Taman was angry at what had taken  
4 place in court. Tara said that Robert Taman  
5 confronted you with his dissatisfaction, and we  
6 had similar testimony, I believe, from Robert.

7 Do you recall having a testy or  
8 uncomfortable meeting with him after the 22nd,  
9 sir?

10 A Well, I would -- I don't -- I can't  
11 deny that it was uncomfortable after the  
12 appearances before Judge Wyant, everything after  
13 that was uncomfortable.

14 Q So it's a pretty clear indication,  
15 regardless of whatever impression you had before  
16 that, that they were not --

17 A After that.

18 Q -- in approval of what had happened?

19 A After the court proceedings.

20 Q Are you aware, sir, that Robert Taman  
21 called and complained to Lesley McCorrister,  
22 saying he was angry, trying to come to terms with  
23 the hearing and wondering why you didn't ask for a  
24 heavier sentence?

25 A No.

1           Q     This too is in a PRISM communication  
2     that, because of your lack of access to the  
3     system, you would not have been able to see?

4           A     I wouldn't have been able to see it,  
5     and unlike some situations which is occurring  
6     today, I mean, in the current time period, the  
7     PRISM memos were not sent to me. Now PRISM memos  
8     on files are being sent on a more regular basis.  
9     So although we don't have access, it appears that  
10    it has taken some steps to remedy that problem  
11    now, and asking for me to put my notes in so that  
12    the record will be running.

13          Q     Just for the record, so counsel are  
14    aware of the document I am referring to, sir, and  
15    if you do want to see it, you're more than welcome  
16    to it. It's in exhibit number 11, book L-74 at  
17    1922. And I do think you should still have  
18    Exhibit 11 on your desk, sir.

19                    He also wanted to know all the facts  
20    as to why the charges were stayed. He didn't feel  
21    that he had been furnished with an explanation.  
22    And Lesley McCorrister offers to set up a meeting.  
23    The next day Lesley calls you and tells you that  
24    Robert Taman wants to meet to fill in missing  
25    information. And you tell her that you are

1 prepared to meet with him once the sentencing is  
2 over. Do you recall that, sir?

3 A If I did say that, that I wanted to  
4 meet with him once the sentencing was over, it  
5 would strike me as being, I don't know why I would  
6 say that, but I definitely would be prepared to  
7 meet with him. I don't know why I would have  
8 wanted to wait until the sentencing was over.

9 Q Yes, sir, especially given that you  
10 would have known he was upset and this was a very  
11 painful experience for him, and whether it was as  
12 a result of miscommunication or not, he really  
13 wanted some answers, sir?

14 A I don't --

15 Q It would have been the appropriate --

16 A -- understand how that could have got  
17 lost in the shuffle. Because although today, sir,  
18 there may be some -- there is differences as  
19 between our recollections of what went on, I don't  
20 think that I ever demonstrated an unwillingness to  
21 meet with the Tamans. I think that I was always  
22 ready to meet with them if they wanted to meet.  
23 Q All right. Let's take a look then,  
24 sir, at the communication between Lesley  
25 McCorrister and yourself?

1 A Okay.

2 Q She records your conversation at page  
3 1924 of the same exhibit we have just been looking  
4 at. It's Exhibit 11, sir.

5 A Um-hum.

6 Q Book L-74.

7 A I don't have --

8 Q It's a thick bundle of PRISM  
9 communications.

10 A What page is it, sir?

11 Q 1924.

12 A Ah, yes, I see this. And on seeing  
13 it, I can tell you that -- although it's not clear  
14 from this notation here, sir, and I can't be  
15 certain of this recollection, there may have been  
16 some discussion about what action, if any,  
17 Mr. Taman could take against the East St. Paul  
18 Police. And if I were to say that I would have to  
19 get direction from prosecution as to what he can  
20 reveal, it would only be my need to get some  
21 information on the policy of what documents I  
22 could release to him, what information I could  
23 provide to him for his own purposes. That would  
24 be the only possible explanation that I can see  
25 for this.

1           Q     You can see that he's wanting to fill  
2     in all the missing pieces of information, sir.  
3     He's looking for information, according to  
4     Ms. McCorrister's records.  And although I think,  
5     in fairness to you, sir, people don't record  
6     everything that's said, there's no reference here  
7     at least to civil liability.  It has to do with  
8     the man wanting answers?

9           A     True.  But if I am seeking direction  
10    from prosecution as to what I can release to him,  
11    it would only be to me reasonable to conclude that  
12    he wanted, or my impression was in speaking to  
13    Ms. McCorrister was he wanted pieces of the file.  
14    And I don't know the policy on that.  I would not  
15    know it and would want to get direction from  
16    prosecution on what I could give to him.  Speaking  
17    to him about the file, I could.  And I see a  
18    distinction between what I -- I would not need  
19    approval from prosecutions to talk to him.

20          Q     Yes.  And did you ever seek approval  
21    from prosecutions or advice from prosecutions?

22          A     I didn't, because Mr. Taman stopped --  
23    well, after, certainly after September, there was  
24    never any contact again from Mr. Taman with me,  
25    period.

1           Q     So this is August 28th and you know he  
2     wants this, and you say that you'll meet with him  
3     after, after you check. And you don't check, sir?

4           A     Sir, I want to answer the question. I  
5     just want to go, if I can, to the next page here  
6     of this memo from Ms. McCorrister, if you would  
7     permit me?

8           Q     Yes, sir, please feel comfortable.

9           A     I was looking at the documents and may  
10    have missed your questions. Did you ask --

11          Q     No, sir, I was waiting for you.

12          A     Oh, I'm sorry, sir.

13          Q     No, no.

14          A     When I look at the next document on  
15    August 28th, where Ms. McCorrister recorded that,  
16    she reported that I wanted to get direction from  
17    Justice to what I could reveal and that there was  
18    issues about information leaking out. The more  
19    I -- the more I read about this, there would be a  
20    hesitancy on my part perhaps to reveal the  
21    documents, or to reveal the file between this  
22    August date and the date of the sentencing because  
23    matters were coming out in the newspaper and  
24    that -- I just, clearly, as I look at it, would  
25    have been taking a very sort of conservative

1 approach about what it is I could reveal between  
2 the time of the submission and any later dates. I  
3 just think that I'm probably being overly cautious  
4 at that time.

5 Q And do you recall the direction to you  
6 by Mr. Kaplan, when you floated the plea bargain  
7 arrangement to him, that you were to advise, keep  
8 the family advised of all the circumstances, sir?

9 A Yes, but I don't see that that's what  
10 they were asking for here. I don't interpret that  
11 as that. I think that they wanted portions of the  
12 file to see where the investigation had gone  
13 wrong, and that I was being cautious in my looking  
14 to see what I could give to them between the time  
15 that a submission had been made, before sentence  
16 had been imposed and that -- that's all I see that  
17 I was doing there.

18 Q I don't want to belabour the point,  
19 sir. I just want to point out that in both of  
20 those communications, to yourself and to  
21 Mr. Taman, they refer to him wanting to fill in  
22 all the missing pieces of information, or to find  
23 out all you can reveal. And there's no reference  
24 in either of these two concerns about actually  
25 getting copies of documents?



1           A     I'm at a liability, Mr. Paciocco, in  
2     that I cannot make entries into PRISM, could not  
3     at that time, did not see these, and would not  
4     have been in a position to correct them if I could  
5     have. I just can't, and there's no availability  
6     to do that and, unfortunately, that record is not  
7     complete.

8           Q     Sir, you learn on August 31st, by  
9     letter that was referred to when Mr. Wolson was  
10    testifying, that the judge is considering  
11    rejecting the joint position that was put before  
12    him on the 22nd of August. You certainly got that  
13    letter, sir?

14          A     Yes.

15          Q     And the first thing you do when you  
16    get that letter on the 31st of August, according  
17    to your docket, is you call Mr. Kaplan. Does that  
18    surprise you, sir?

19          A     August?

20          Q     August 31st?

21          A     Okay. Yes, I would have told him  
22    about that and kept him informed about that.

23          Q     Then on September 4th, sir, you meet  
24    with Mr. Kaplan and Mr. Slough?

25          A     Yes, because they would have wanted to

1 know whether or not I had sort of done the work  
2 that I was required to do, I guess, to address  
3 that particular issue -- or I would have, if not  
4 wanted to know, but I would have briefed them on  
5 what I had learned in studying and reading the  
6 cases dealing with the police issue and what it  
7 was that I was going to say. So, again, I would  
8 have -- and that for sure, as I recall it, was not  
9 an area that they would have done any research on,  
10 wouldn't have been familiar with at that time, and  
11 that would have been the purpose that I would have  
12 met with them at that time to brief them on that.

13 Q You then, again, wrote out your  
14 submissions for court, sir?

15 A Yes, I did.

16 Q And you sent them off to Mr. Kaplan  
17 for his comments and suggestions on September 9th,  
18 sir?

19 A Yes, I did.

20 Q You attend a meeting with Chief Judge  
21 Wyant and Mr. Wolson on September 10th, if I read  
22 your dockets correctly, sir. You've got it  
23 docketed for one hour?

24 A Yes. I don't know if the meeting with  
25 Judge Wyant and Mr. Wolson was, in fact, the full

1 hour, but I would have met with Mr. Wolson  
2 independently after. So it would have comprised  
3 the whole of that sort of activity.

4 Q What took place during that meeting?

5 A Pardon me?

6 Q What took place during the meeting?

7 A My recollection of that meeting was  
8 that we had discussed, as I recall it, the -- I'm  
9 pretty sure this was the meeting. There was a  
10 meeting with Judge Wyant where Mr. Wolson had  
11 described to him the circumstances about the  
12 telephone call that he had received at his office,  
13 the investigation about that. There was some  
14 personal matters that were discussed, which I  
15 don't think are particularly relevant, that  
16 concerned Mr. Wolson. There was an issue about  
17 when the sentencing was going to occur in order to  
18 accommodate some of these personal issues. There  
19 would have been, as I would have thought, as Judge  
20 Wyant regularly does, he would have then contacted  
21 the trial coordinator. He would have secured some  
22 dates. And that is sort of my -- I don't think  
23 that it was anything other than to deal with those  
24 personal -- well, the phone call and another  
25 personal matter that concerned Mr. Wolson, that I

1 don't think today is necessary to talk about,  
2 unless you think that it is?

3 Q No, sir. Thank you for that answer.

4 I want to go on to the plea bargain.

5 And of course, you are aware that an issue arose  
6 as a result of the submissions on August 22nd,  
7 that became the subject of criticism by the Chief  
8 Judge on September 12th. As matters unfolded, he  
9 sensed there was a change in his understanding of  
10 what had taken place August 22nd. He didn't feel  
11 that there was information communicated to him  
12 that this was a plea bargain. And he learned  
13 that, according to the transcript, for the first  
14 time on September 12th, sir.

15 When you made your submissions on  
16 August 22nd, sir, you would agree with me that you  
17 didn't once use the word "plea bargain" in your  
18 submissions?

19 A I didn't use it and it's not, I'll  
20 tell you, whether I -- it's just not, was not then  
21 the common practice to use that phraseology in the  
22 courts here in Winnipeg.

23 Q You didn't even use the word "joint  
24 submission," sir. I'm going to show you --

25 A Oh, no, I didn't. I may not have.

1 No, I didn't.

2 Q I'm going to show you the passages  
3 that I've been able to cull from the materials,  
4 and I have tried to do this as fairly as I can.  
5 And certainly if there are other passages you or  
6 your counsel want to refer to, certainly we are  
7 very interested in hearing about it. I'm going to  
8 ask the clerk to produce the Submissions on Nature  
9 of Resolution Discussions document that was handed  
10 to counsel this morning. If that could be made  
11 Exhibit 229, I believe.

12 THE CLERK: Exhibit 229.

13 (EXHIBIT 229: Submissions on Nature of  
14 Resolution Discussions)

15 MR. NOZICK: I don't think counsel  
16 received a copy.

17 THE COMMISSIONER: I'm sorry?

18 MR. NOZICK: I don't think counsel  
19 received a copy of that. I didn't.

20 THE COMMISSIONER: You didn't get a  
21 copy?

22 MR. NOZICK: I don't have one.

23 MR. PACIOCCO: I don't want to comment  
24 on the state of his desk, sir.

25 MR. NOZICK: This is considered

1 organized.

2 MR. LABOSSIERE: I have two copies, if  
3 it helps.

4 THE COMMISSIONER: There you are.  
5 Mr. Labossiere has got your extra copy.

6 MR. NOZICK: Thank you. You never  
7 know who you can trust.

8 THE COMMISSIONER: Exhibit what  
9 number?

10 MR. PACIOCCO: This would be Exhibit  
11 229.

12 BY MR. PACIOCCO:

13 Q The first bullet, sir, is just an  
14 observation on my part that you are free to  
15 disagree with, but there was no overt mention  
16 during your submissions that this resolution was  
17 negotiated. The closest you come in your comments  
18 to any indication of any collaboration between you  
19 and Mr. Wolson is the first bullet.

20 "Mr. Wolson and I, as you have heard,  
21 conversed about the authorities we  
22 were going to file respectively and  
23 put them together...",

24 that should read

25 "...in one booklet rather than

1 submitting two."

2 And I have the citation or reference there. Then  
3 you went on as follows, sir:

4 "With that, my assessment of the law  
5 is, in the authorities provided, that  
6 the appropriate penalty in this  
7 particular case is a jail term, a  
8 period of incarceration."

9 You also said during the course of your  
10 submissions:

11 "It's my submission to you that based  
12 on my reading of the case law, that  
13 the type of the sentence that Your  
14 Honour should impose is two years less  
15 a day jail term, to be served  
16 conditionally under certain  
17 conditions."

18 You went on:

19 "The conditions that I would ask Your  
20 Honour to impose, and I do have a copy  
21 of them for you..."

22 And then you continue, finally:

23 "Now, I can tell you that I have  
24 provided a copy of this list to  
25 Mr. Wolson and with Your Honour's

1                   permission, I'll provide it to the  
2                   clerk if Your Honour wishes."

3                   So, sir, given that every reference to  
4 the positions you were taking was prefaced by "I"  
5 rather than "we", given that there is no reference  
6 by you whatsoever to joint resolution, to  
7 negotiations, do you feel that you adequately  
8 communicated on the 22nd of August to this judge  
9 that you were there on a plea bargain? Do you  
10 feel that you adequately provided the judge with a  
11 foundation for understanding the nature of the  
12 arrangement that you had come to?

13                A     Yes. And my response to that would  
14 be, first of all, the meeting that we had with the  
15 judge in chambers, I would think that a judge, the  
16 judge understood it from my submissions. And when  
17 I received the letter of September 12th, asking me  
18 to come back, I didn't think that there was any  
19 misunderstanding, that the judge had any confusion  
20 about this, because he said, interestingly, in  
21 that letter not that he was considering rejecting  
22 the joint submission as to sentence, but that he  
23 was rejecting the plea bargain. So I didn't have  
24 any understanding -- misunderstanding about the  
25 judge not thinking or knowing this was a joint



1 recommendation --

2 Q All right, sir. There are two  
3 points --

4 A -- or plea bargain, both.

5 Q There are two points that I think the  
6 Commissioner may want to consider in that regard.  
7 Yes, Judge Wyant does use the term plea bargain in  
8 his letter to you to get you back into the court,  
9 absolutely he does.

10 The question I asked you had to do  
11 with whether you had communicated to him, not  
12 whether you think he understood it. I'm asking  
13 you whether on the 22nd of August, you were  
14 satisfied that you made the foundation for your  
15 plea arrangement clear to him, given the comments  
16 that were made in court that day?

17 A I do, sir.

18 Q Based on?

19 A Yes, I do believe that Judge Wyant,  
20 after hearing the entire submission that was made  
21 and the questions that he asked of me, understood  
22 that.

23 Q All right, sir. And I'm going to go  
24 through the entire submissions, including the  
25 Wolson submissions, and we'll see whether or not

1 he understood it was a plea bargain. Although the  
2 issue I am interested in, and I think the  
3 Commissioner will be interested in is whether you  
4 discharged your duty to make it clear what the  
5 foundation for the arrangement was.

6 First I want to make this observation,  
7 sir. Even if you had, as you testified, told  
8 Judge Wyant that it was a negotiated agreement in  
9 his chambers, do you feel that that is adequate in  
10 discharging the obligation to make sure that the  
11 foundation for the plea is presented to the judge,  
12 or do you not think that there is an important  
13 component to that authority that the public, the  
14 public needs to understand in a transparent way  
15 the nature of negotiations and what happens in  
16 court? And that even if a judge in chambers is  
17 given some heads up, the public still has no idea  
18 why the arrangement went down the way it did. Do  
19 you not think that's part, an important part of  
20 that authority, sir?

21 A I can't answer for how the public  
22 might interpret my remarks or how the -- but I can  
23 only tell you that when I prepared what it was  
24 that I said to the judge, I thought that it was  
25 being conveyed to him and to those who were

1 listening what it was that was going on in this  
2 case. If not the best communication, it may not  
3 be, but I was comfortable with it. And to the  
4 extent that I believed I had adequately  
5 communicated to the judge what it was that was  
6 going on and that he understood it, I think I did  
7 that. I appreciate that others may form the  
8 opinion that it wasn't, but I thought, in my  
9 opinion, it was.

10 Q With respect to the reference to joint  
11 resolution, which may or may not be a plea  
12 bargain, you understand that, with respect to  
13 joint resolution, Mr. Wolson makes several  
14 references to it. And it's, of course, in his  
15 interest to do that because he wants to ensure the  
16 judge accepts the plea position, and he  
17 understands the ideas of deference. He talks  
18 about this several times.

19 "You have a position that my friend  
20 and I have -- are advancing to you  
21 jointly, and one of the issues is that  
22 of his -- a driver's licence."

23 Another comment:

24 "If you were of the view that that  
25 range of sentence, as jointly

1 recommended by Crown and defence, is  
2 an appropriate range, then of course  
3 you would turn your attention to  
4 whether or not a conditional sentence  
5 would be appropriate."

6 Another:

7 "You would have before you a joint  
8 recommendation, in my view, that's  
9 supported by the authorities."

10 Next:

11 "So, in my view, the courts have said,  
12 on joint recommendations articulated  
13 by experienced counsel, that if the  
14 sentence recommended is well within  
15 the range of the accepted standard,  
16 and this is, that courts ought to give  
17 considerable attention to the  
18 recommendation of the lawyers."

19 And finally:

20 "In our deliberations and our  
21 discussions that's been taken into  
22 account in the submission that we are  
23 jointly recommending to you."

24 Not a reference to plea bargain or negotiated  
25 settlement in any of the comments by either of

1 you. And ultimately Chief Judge Wyant says:

2 "I recognize this is a joint  
3 recommendation by counsel."

4 Again, no indication by him on that day of a  
5 recognition of a plea bargain.

6 Is it your position, that based on the  
7 totality of those comments, that an observer in  
8 court would understand that this was a negotiated  
9 plea bargain?

10 A I can't answer for every observer in  
11 court, but I would say certainly to lawyers and to  
12 judges, that they would be able to make that  
13 determination. Whether or not someone who was not  
14 a lawyer, so to speak, or someone who was not  
15 versed even in criminal law and the proceedings in  
16 the court, and wasn't there every day, the  
17 corporate lawyer, I don't know. But to tell you  
18 that in the comment that the judge recognizes the  
19 joint recommendation that it's not all that clear  
20 either but certainly there's some -- there's a  
21 recognition, even though, as you have suggested to  
22 me, the language is not clear, it's not  
23 transparent, that the judge has got an  
24 understanding of what it is that we're speaking  
25 about.

1           Q     Sir, he knows that you both are coming  
2     in with the same position, or he knows it's a plea  
3     bargain, because it can be either of those things.  
4     A joint recommendation is, we agree on the  
5     outcome. It doesn't mean, does it, sir, that it  
6     was negotiated?

7           A     I'm only saying this to you,  
8     Mr. Paciocco, can only say this to you,  
9     Mr. Paciocco, that after the meeting that we had  
10    in chambers with the judge, there would be no  
11    misunderstanding on his part.

12          Q     Sir --

13          A     I would be surprised to hear that he  
14    did misunderstand. And --

15          Q     You would be --

16          A     -- moreover, sir, I would say to you  
17    that if I had even had an inkling that the judge  
18    had misunderstood, when I got his letter on  
19    September 12th, and he asked for me and  
20    Mr. Wolson, or Mr. Wolson and I to deal with the  
21    specific issue which is the factor of the  
22    individual being a police officer, had he even  
23    raised the issue that there was some  
24    misunderstanding, that we needed to address this  
25    issue, I would have.

1           Q     Sir, I'm just, before I ask the  
2     Commissioner for a break, there's one last point  
3     that's closely related, I'd like to tie up. You  
4     certainly understood you had a duty, a duty to  
5     make the foundation for your arrangement clear to  
6     the judge in the sentencing submissions. Do you  
7     agree with that?

8           A     I believe that I was required to do  
9     that and I thought that I had done that.

10          Q     On September 12th, you make reference  
11     to it. And under the heading September 12th in  
12     the document I have provided to you, page 2, I  
13     furnished two quotations where you recognized  
14     this, sir?

15          A     Yes.

16          Q     The first, this is your comment:  
17                 "They do, however, cross or intersect  
18                 with Your Honour's exercise of  
19                 discretion because on the reading of  
20                 the cases dealing with joint  
21                 submissions, the Court of Appeal has  
22                 made it clear that the circumstances  
23                 surrounding the case and the plea to  
24                 distinguish one form of joint  
25                 submission from another should be put

1 forward to the court."

2 Next:

3 "So in that context to explain in a  
4 larger sense the exigent circumstances  
5 of the case, the obligations of the  
6 Crown and the requirements of  
7 Gardiner, Your Honour will know as the  
8 Court of Appeal has said, counsel  
9 ought to tell the court why this is a  
10 circumstance different from another.  
11 So you must ask yourself, did the  
12 Crown explain to me with the  
13 satisfaction that I am required to  
14 have on the basis of the joint  
15 submission cases the circumstances of  
16 the case itself so as to distinguish  
17 this type of joint recommendation from  
18 one where two counsel simply stand up,  
19 an accused pleads guilty to an offence  
20 and a recommendation is made based on  
21 case law."

22 Finally:

23 "The Court of Appeal also directs that  
24 the sentencing judge should be made  
25 aware of the exigencies and weaknesses



1 of the case that are not tested by an  
2 accused who gives up his rights to  
3 trial."

4 So there is no question that you do understand the  
5 distinction between a plea bargain and a joint  
6 recommendation and that you do understand your  
7 duties, sir?

8 A I think that I told the judge I  
9 understood it. I hope that you agree that, on  
10 reading this, that I understand it.

11 MR. PACIOCCO: Yes. Mr. Commissioner,  
12 it's a good time for the morning break.

13 THE COMMISSIONER: Yes. Fifteen  
14 minutes.

15 THE CLERK: All rise. This Commission  
16 of Inquiry is in recess.

17 (Proceedings recessed at 10:41 a.m.  
18 and reconvened at 10:55 a.m.)

19 THE CLERK: All rise, please. This  
20 Commission of inquiry is now reopened. Please be  
21 seated.

22 BY MR. PACIOCCO:

23 Q Ready, Mr. Minuk?

24 A I'm just organizing the documents  
25 chronologically, so if you ask me to pull them --

1 Q Very good. Let me know when you're  
2 ready to proceed?

3 A I am ready, I have them all set up  
4 chronologically again.

5 Q You heard Mr. Wolson testify about the  
6 foundation for the plea bargain as he understood  
7 it?

8 A Yes.

9 Q And as I understood his testimony, he  
10 indicated that it was a negotiated agreement in  
11 which you would stay the three charges, the  
12 breathalyzer refusal charge, the criminal  
13 negligence causing death and the impaired driving  
14 causing death charge, and agreed to a conditional  
15 sentence on terms agreed to between you, in  
16 exchange for his client pleading to the dangerous  
17 driving charge and giving up his right to a Prelim  
18 and trial?

19 A Yes, correct.

20 Q Is that a fair description of your  
21 view on what the plea bargain was, sir?

22 A Yes, sir.

23 Q I'm going to look at the statements  
24 you made to the judge during the course of your  
25 submissions to him.

1                   First, sir, do you agree with me that  
2    you told the judge outright on the 22nd of August  
3    that you were not staying the charges as the  
4    result of the plea bargain?

5                   A     I don't think that I told him that  
6    outright on September -- on September 22nd?

7                   Q     No, sir, August 22nd, the first  
8    appearance, sir, when he became, or ended up with  
9    what has been communicated is the perception that  
10   this wasn't a plea bargain. He thought it was  
11   just a joint resolution. Do you remember him  
12   telling you outright that it was not, the stay of  
13   the charges was not part of the plea bargain?

14                   I'm going to take you to the relevant  
15   passages, and you're welcome to look them up if  
16   you feel confident, or if you feel the need to do  
17   so. But in Exhibit 229, the submissions on the  
18   nature of the resolution discussions, the document  
19   I handed to you, if you turn to page 3, please?

20                   A     Page 3?

21                   Q     Yes?

22                   A     Okay.

23                   Q     On "Whether charges stayed as part of  
24   negotiations" is the heading I have created. This  
25   is what you said to him.

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

10 Next, sir, when you make the comment at page 1032:

11 "In short, no evidence capable of  
12 meeting the required standards for  
13 prosecutions, a reasonable likelihood  
14 of conviction, and all the more so, no  
15 evidence a Gardiner challenge was  
16 available to the Crown in respect of  
17 the offences of impaired driving and  
18 refusing breathalyzers."

19 Do you not agree that the first of those passages  
20 is a specific indication to him?

21 A As I said to you yesterday, that is  
22 not the best of advocacy, not something that I  
23 intended to say. And I know that the language  
24 that was pointed out, I looked at it in the draft  
25 of the documents, was different. Certainly, it's

1 not the case and I had hoped that I had clarified  
2 it in the body of the submission. That's all I  
3 can say.

4 Q Well, sir, in the body of the  
5 submission, what you in fact do is you repeat that  
6 twice more.

7 Now, I'm going to take a look at  
8 document J-63, which is the transcript from that  
9 date. It's Exhibit 9, and we have referred to it  
10 already with you, sir.

11 A What page would you like me to go to,  
12 sir?

13 Q 1709.

14 A Okay.

15 Q At line 20, Chief Judge Wyant is  
16 speaking to you, sir.

17 "As I heard you say and I, I may have  
18 to review the transcript, you  
19 indicated and clearly stated and of  
20 course I clearly accept that this,  
21 that charges were not stayed because  
22 the accused pled guilty, they were  
23 stayed because the Crown did not  
24 have -- was satisfied it did not have  
25 the legal proof. Correct?

1                   Mr. Minuk: Correct."

2       So if you misspoke yourself the first time, sir,  
3       you were given a direct opportunity to correct it  
4       and you reaffirmed what you said the first time.

5                   I'm going to take you now, sir, if you  
6       would to page 1714, line 5.

7                   "The court: Oh, and there is the  
8                   different, and there's no question but  
9                   there is -- there is a significant  
10                  difference. Your comment was, if I  
11                  have it right, the other charges are  
12                  stayed not because the accused pled  
13                  guilty to dangerous driving causing  
14                  death. That's what you said. But  
15                  because the Crown had the legal proof  
16                  of dangerous driving causing death,  
17                  and that's what I heard you say before  
18                  and that's what I heard you say today.

19                  Mr. Minuk: Well that's my opinion."  
20       So, sir, on three occasions, on both dates, the  
21       22nd and the 12th of September, you say the same  
22       thing. You tell the judge that that's not part of  
23       the plea bargain?

24                  A       I see that, sir. And I would only ask  
25       you to take a look also at the passage that is at

1 page 24, line 3, where although it's clear to me  
2 when I reread this that I'm not expressing myself  
3 clearly, what I'm trying to convey to the judge is  
4 that, on the test that I need to be mindful of, of  
5 a reasonable likelihood of conviction, that I  
6 believe that there is a case to prosecute, and  
7 that I was concerned that there was not a case  
8 beyond a reasonable -- case to prosecute -- there  
9 was not evidence beyond a reasonable doubt. And I  
10 am trying to explain to the judge, if not as  
11 clearly as I could have, that in my mind, and in  
12 reaching these discussions with Mr. Wolson, that I  
13 believed there was sufficient basis for the Crown  
14 to proceed, a reasonable likelihood of conviction  
15 would be the test, and that I always had in my  
16 mind the issue of whether or not we could prove  
17 these charges beyond a reasonable doubt, and the  
18 uncertainty of that is what was involved in the  
19 negotiation to get to the point that we were at.

20 Q Do you not agree, sir, that expressly  
21 telling him, once in your own invocation and twice  
22 when he's asking for clarity, that these charges  
23 are not being stayed because of the plea to  
24 dangerous driving, would leave him with the  
25 conclusion that the charges were not being stayed

1 because of the plea to dangerous driving?

2 A I agree with you. And I thought, you  
3 know, as we moved along, that he understood in my  
4 further explanations of what I was saying that I  
5 wasn't intending to convey that. I believed near  
6 the end of the morning, or the day, that I had  
7 cleared up that issue. If I didn't to his  
8 satisfaction, I didn't.

9 Q Well, sir, you're an experienced  
10 lawyer. If you think you have misspoke and the  
11 judge misunderstands you, you come right out and  
12 you say directly to the judge, as Mr. Wolson did  
13 on September 12th, I perhaps wasn't clear but, in  
14 fact, I misspoke, the charges were stayed because  
15 of the plea. Do you agree with me that that's how  
16 you do it? You don't just talk about the  
17 exigencies of the case in generalities and hope he  
18 picks up on it?

19 A That was, in hindsight, maybe I should  
20 have chosen that technique. I used the one that I  
21 did which I thought was -- how I dealt with it at  
22 that time.

23 Q All right, sir. The other foundation  
24 for the plea was the sentence, according to  
25 Mr. Wolson's interpretation and your explanation



1 today. I want to take you back to page 1 of that  
2 exhibit, 229. This is what you say about the  
3 sentence. Take a look at the third and fourth  
4 bullet under the heading "Minuk."

5 "With that, my assessment of the law  
6 is in the authorities provided that  
7 the appropriate penalty in this  
8 particular case is a jail term, a  
9 period of incarceration."

10 Second bullet:

11 "It is my submission to you that based  
12 on my reading of the case law that the  
13 type of the sentence that Your Honour  
14 should impose is two years less a day  
15 jail term to be served conditionally  
16 under certain conditions."

17 Do you agree with me, sir, that you're telling him  
18 there that you think the sentence that you are  
19 asking him to impose is the right one?

20 A Well, I'm telling him that I have  
21 researched this, that I think this is the right  
22 one. And did I go on to say that, more than that?  
23 No, I didn't. But I was certainly not intending  
24 to convey to him that I was in any disagreement  
25 with Mr. Wolson about it being the right one, and

1 that we had agreed on this. And again, sir, the  
2 judge wasn't clear in court, and you have already  
3 identified that to me, the judge was aware from  
4 the meeting that we had with him that there was  
5 going to be a joint recommendation as to the  
6 sentence. He was aware of that.

7 Q Yes, he's aware there's a joint  
8 recommendation, sir, but we've been over this.  
9 There's a difference between a joint  
10 recommendation and a negotiated plea bargain, sir.  
11 And you went into that court on the 22nd,  
12 regardless of what you told the judge in his  
13 chambers or what you think he understood, you went  
14 in and you expressly said two things. You said  
15 that the staying of the charges is not related to  
16 the plea of guilty to dangerous driving. And you  
17 said, I think this sentence is the right sentence,  
18 and you don't ever mention that it's derived from  
19 any negotiation. You present it as though this is  
20 your assessment of the case law. And the point I  
21 want to raise with you, sir, is, do you not  
22 understand how, given that you have in your  
23 expressed submissions undercut both of the legs of  
24 the plea bargain, that this judge would be left  
25 believing that this wasn't a plea bargain?

1           A     Well, I don't think he misunderstood  
2     that. I don't think that Mr. Wolson understood  
3     that. And if Mr. Wolson had some confusion that I  
4     was undercutting the plea bargain, or doing  
5     something about it, he would have raised that with  
6     me. And he never challenged me on it that he felt  
7     I was undercutting the plea bargain. I know he  
8     would have.

9           Q     Sir, the judge came into court on  
10    September 12th, and expressly on the record states  
11    that he did not understand that this was a plea  
12    bargain.

13          A     I understand, sir, that the judge said  
14    that. I know that he said that. It seems  
15    different to me than what it was that he wrote  
16    about in his letter. It was different than what  
17    he understood from our meeting. But I do know  
18    that he said that on the record. And to that  
19    extent, I can only tell you that I was surprised  
20    by that, and I had hoped to deal with that. And I  
21    had hoped that we would have dealt with that to  
22    his satisfaction. If we were not communicating  
23    properly between ourselves, then in that type of  
24    environment it can occur, it was a back and forth.  
25    But what I'm perhaps saying to you, sir, is that

1 if I thought that there was some confusion on the  
2 part of the judge, much like he asked directly  
3 about this police issue, that he would have raised  
4 these issues on August 22nd. He would have raised  
5 it somewhere. I just never understood that he  
6 misunderstood.

7 Q Sir, he asked you directly twice to  
8 make sure he understood, when you told him that it  
9 was not the plea to the dangerous driving that  
10 lead to the staying of the three charges, he put  
11 it to you twice.

12 A Well -- and I thought that as the  
13 morning went on that I had corrected that as we  
14 went along. That's all I can tell you. And I  
15 believed that he understood that, that I had  
16 misspoken myself. I didn't use that word, but I  
17 do believe that as you read through the remainder  
18 of the morning, that there was a lot of dialogue  
19 between myself and the judge where he had finally  
20 come around to understanding that I, in fact, had  
21 misspoken myself. And he said that he did now  
22 understand this, or at least I believe he  
23 understood it.

24 Q He said he understood that it was a  
25 joint position?

1           A     Well, I believe he understood it. I  
2     may have misinterpreted what it was he was telling  
3     me.

4           Q     Well, I just want to put the evidence  
5     as it is accumulated to you, sir. You got the  
6     fact that those are the comments you made overtly  
7     in court, which can be interpreted as inconsistent  
8     with the plea bargain you are now describing. You  
9     got the testimony of Victoria Sveinson that you  
10    told her there was no plea bargain, which I know  
11    you contest. You've got the testimony of Sveinn  
12    Sveinson asking you whether you plea bargained the  
13    sentence away, and you said no, that's up to the  
14    judge, which I know you contest. You got the  
15    testimony of Jordan Taman during the meeting with  
16    you in July, confronting you over whether there  
17    was a plea bargain, and you saying that there  
18    wasn't, which I know you're not comfortable with.  
19    But all together that evidence points to, if it's  
20    credited, the suggestion that maybe you didn't  
21    have it clear in your mind on August 22nd that  
22    this was indeed a plea bargain, and that maybe  
23    what you were really doing, sir -- and I want to  
24    put this to you for your comment, because of  
25    something you testified to yesterday -- you felt

1 that the only conviction you were likely to get at  
2 the end of this is dangerous driving, and you felt  
3 that the conditional sentence was the right  
4 sentence. And so when Mr. Wolson indicated his  
5 client was prepared to plead to the dangerous  
6 driving, your thinking was, that's what I'm going  
7 to get anyway, and I'm going to get a conditional  
8 sentence anyway. So I'm just putting it to you as  
9 a possibility that I want your comment on, that  
10 perhaps you hadn't fully processed exactly in  
11 analytical terms what the deal was. You took the  
12 offer because it was the same position you were  
13 shooting for?

14 A That's not right, sir, because I had  
15 to allow for the possibility, as we discussed  
16 yesterday, that taking the charges from top to  
17 bottom, if we could call it that, I knew that  
18 there perhaps was not a good likelihood of a  
19 conviction on the crim neg, the impaired driving,  
20 perhaps there was not enough there. The refusal,  
21 it was a charter issue, it could have gone  
22 somewhere. There were some problems, perhaps not  
23 a lot, with low percentage with a dangerous  
24 driving. But on the whole, when they are all  
25 prosecuted together, I knew that there were large

1 issues that would have to be dealt with. It's  
2 easy to talk about each one of these things in  
3 isolation, and that if I would have had a refusal,  
4 I could have prosecuted a refusal. If I had a  
5 dangerous driving, I could prosecute a dangerous  
6 driving. It was not laid out like that, it would  
7 all be prosecuted at once. The overwhelming  
8 effect of the evidence could have defeated, if not  
9 some, all of them. And to the extent that I also  
10 had in my mind that whether this was going to be a  
11 trial by judge, or trial by jury, that if it was  
12 going to be a trial by jury, who knows what the  
13 effect of this evidence would be on a jury?

14 I was aware in my mind of one case  
15 involving a police officer, the case is Lesuk,  
16 where he was driving a motorcycle and a person had  
17 fallen off the back of it, and he was acquitted of  
18 the dangerous driving. So I'm thinking about all  
19 of these things. I'm thinking to myself who knows  
20 what can happen, even though the dangerous driving  
21 is strong, I could even lose that. And making a  
22 deal on the charges and making -- was the right  
23 thing to do. And that's what we were talking  
24 about, and that was my thinking.

25 Q Thank you for that, sir. I want to

1 move on and look at the factual submissions that  
2 were presented to the court. You worked out with  
3 Mr. Minuk --

4 A Mr. Wolson.

5 Q I do apologize again. You worked out  
6 with Mr. Wolson the facts as they would be  
7 presented to the court?

8 A We had discussed them and what they  
9 were going to be, yes.

10 Q And we heard evidence from Mr. Wolson  
11 that he had some concern with your reference to  
12 anecdotal historical evidence of alcohol, and he  
13 claims that there was a discussion between the two  
14 of you about that. And you read to him passages  
15 of your submission to alleviate his concern?

16 A We discussed it. I told him why. I  
17 don't recall him -- I was here when he testified,  
18 I don't recall him saying why or offering up the  
19 explanation that I had given to him. But we did,  
20 and I told him why I thought that it was necessary  
21 to mention that.

22 Q All right. Now, I'm going to go to  
23 Exhibit 8, which is the August 22nd date, to look  
24 at the facts that were presented to the judge.

25 A Exhibit 8?



1 Q Exhibit 8.

2 A I don't have 8, sir, I only have 9.

3 Q It's coming.

4 A Thank you.

5 Q Starting at paragraph -- at line 11 on  
6 page 10, you have given him your factual synopsis,  
7 the one that you had written in advance, and you  
8 come to this summary at line 11 on page 1627.

9 A Yes, sir.

10 Q And you say:

11 "In this particular case, Your Honour  
12 is left with a situation where the  
13 accused, travelling in the light of  
14 day, early in the morning when people  
15 would be travelling to work, at a  
16 speed deemed to be within the posted  
17 speed limit, albeit not slowing at the  
18 intersection, not coming to a stop,  
19 without an observation of erratic  
20 driving and only anecdotal evidence of  
21 alcohol, not capable of proof of  
22 impairment, those facts Your Honour  
23 will have to take into account in  
24 assessing the appropriate sentence in  
25 this manner."

1 All right. So that's pretty much a  
2 summary of what you had to say earlier, sir?

3 A Yes.

4 Q What anecdotal evidence of alcohol did  
5 you have, sir?

6 A I told you yesterday and I'll say it  
7 again that what I was telling, what I was  
8 referring to was the police evidence that he had  
9 been at these various drinking establishments, or  
10 rather that drinking establishment, Branigan's,  
11 that he had been at Black's residence, that there  
12 was the positioning of alcohol in front of him,  
13 the possibility or inference to be drawn that he  
14 may have had a beer. That's what that was. And  
15 that's that reference to what I was speaking about  
16 when I talked about the evidence capable, or  
17 incapable of proving impairment. Because I, at  
18 this point, had made a decision in my mind that if  
19 I was not going to be proceeding on the refusal  
20 charge, I was not going to be proceeding on the  
21 impaired charge, and I did not have a causative  
22 link to simply the smell of alcohol on the man's  
23 breath, as I believed the ambulance people had,  
24 that what I was left with was this police evidence  
25 not capable of proof of impairment. That's what I

1 was saying.

2 Q The absence of a link from the smell  
3 on the breath, I take it is absence of a link to  
4 impairment. You can't tell if somebody is  
5 impaired if they have alcohol --

6 A Smell of alcohol doesn't mean  
7 impairment, period.

8 Q Of course not, but it does mean that  
9 they have consumed alcohol.

10 A Well, in what quantity, how much,  
11 when? And it's not an offence to drive a motor  
12 vehicle after having a drink.

13 Q All true, sir, all true. But just to  
14 summarize, if Exhibit 222 is still in front of  
15 you, that's the document I prepared with the  
16 status of the case chart.

17 A What exhibit?

18 Q 222. It would be one of those  
19 bulleted documents prepared to assist in  
20 organizing the evidence.

21 A What number again?

22 Q 222.

23 A I don't have 32 here.

24 Q No, 222.

25 A 222, I don't have that either. Oh,

1 yes, I do, here it is. Yes, sir.

2 Q Okay. If you will please turn to page  
3 2. With respect to evidence of alcohol, you had  
4 at bullet number one, the accused was at locations  
5 throughout the evening where alcohol was served  
6 and was observed to have alcohol in front of him  
7 by four officers at Branigan's.

8 Number four, you got a number of  
9 witnesses who note the smell of alcohol on him  
10 before arrival at the station, Mr. Woychuk,  
11 Mr. Rosser, Mr. Fontaine. Constable Graham, I  
12 know, smells it in the motor vehicle of which he  
13 was the only identified occupant.

14 And then you have some opinion  
15 evidence that I know is contradicted by other  
16 witnesses, but you do have some opinion evidence  
17 that he was impaired. Carter, at the station,  
18 forms that opinion and, of course, gives some  
19 symptoms consistent with alcohol consumption.  
20 Woychuk signs the prisoner log sheet and checks  
21 off positive for impairment. Pedersen, in her  
22 RCMP interview, forms the opinion that he is  
23 impaired.

24 So you have all that information  
25 available to you, sir, and I realize you have real

1 problems with your impaired case, but you have all  
2 that information available to you.

3           After the submissions, a judge puts  
4 the basis of the dangerous driving to you. And he  
5 puts it to you very clearly, sir, at page 1635 of  
6 the exhibit that you have there. And this is the  
7 passage that Mr. Wolson identified is one that  
8 troubled him. Starting at line 29 of page 1635.  
9 Now the judge makes it clear elsewhere in his  
10 reasoning that he distinguishes between impairment  
11 and the consumption of alcohol. And this is what  
12 he says at line 29:

13           "So it's fair to say that, in essence,  
14 the factual circumstances surrounding  
15 the Crown's acceptance of the plea to  
16 dangerous driving of a motor vehicle  
17 causing the death of Ms. Taman was a  
18 combination between the evidence of  
19 consumption of some alcohol, along  
20 with an accident that appears to be  
21 unexplained, where speed was -- there  
22 doesn't appear to be any evidence of  
23 excessive speed but -- but an accident  
24 where that occurred without braking at  
25 a red light.

1 Mr. Minuk: Absolutely, yes."

2 A I'm familiar with that passage.

3 Q On September 12th, you said it again,  
4 sir. On September 12th, at page 1717, perhaps  
5 going over to page 1716 to see the entire context  
6 of the conversation, line 23:

7 "The Court: I didn't -- I have to say  
8 Mr. Minuk, I read the transcript again  
9 last night. I don't recall you using  
10 that term, not the clearest of cases.  
11 In fact, I think that as you went  
12 through it, I came back to you on page  
13 18 and 19 and said.."

14 And then he reads the two passages we have just  
15 read, and you say "correct."

16 "Right. And you said, that's correct.  
17 And I said, that's a marked departure.  
18 And you said that's correct. And of  
19 course, marked departure is the  
20 definition --

21 I -- but that is, Your Honour, the  
22 Crown's view of the case.

23 Correct.

24 And that is the basis upon which the  
25 Crown accepts the guilty plea, because

1           the obligation of the Crown is not to  
2           accept a guilty -- to have some  
3           evidence. Now, whether or not that  
4           evidence is capable of resulting in a  
5           conviction at trial is another issue."

6   And you go on and you discuss the whole  
7   controversy about whether or not you have  
8   sufficient evidence for the other charges.

9           Sir, you said it to him again on that  
10   date.

11           A     What I was saying to him, sir, and I  
12   think that's an interesting -- you know, when I  
13   look at this, is that the judge is asking me not  
14   what it is which is the -- this is what I  
15   interpret him, understood him to be asking of  
16   me -- not what it was -- not what are the  
17   circumstances which make up the marked departure.  
18   Because when he asked me the question, what are  
19   the factual circumstances surrounding the Crown's  
20   acceptance of the guilty plea, not what are the  
21   factual circumstances of the marked departure that  
22   are before me here today, but why is it that the  
23   Crown is accepting this guilty plea to dangerous  
24   driving? I'm thinking to myself, after I have  
25   told him these facts, maybe he thinks that there

1 is no case here of dangerous driving, because I've  
2 told him what little evidence I have, that there's  
3 no evidence of impairment. Why is it that I'm  
4 even accepting a plea to this charge? So why is  
5 it that you would do this? And if he -- if I  
6 misunderstood that to be, why is it that the Crown  
7 is doing this, as opposed to why is it that you  
8 are telling me is the factual -- or the  
9 circumstances making up the marked departure, then  
10 I would have answered that question, which is what  
11 are the circumstances making up the marked  
12 departure that you're speaking about? I am  
13 answering him this question here, which I thought  
14 I was answering to him, which is that I've got a  
15 case of dangerous driving made up of a number of  
16 things, one of which includes alcohol. Alcohol, I  
17 told him, I don't think I can prove, but that's  
18 the problem with my case, but that's why I am  
19 accepting the plea because I think that it's the  
20 right thing to do. That's how I interpreted it.  
21 If it's wrong, and I was answering some other  
22 question and not the one he wanted to, I thought  
23 he was talking about my thinking, not the  
24 circumstances that I had spoken to earlier,  
25 because I thought that I made it clear to him that



1 I wasn't relying on alcohol at all at this time.

2 Q Well, sir, you would agree with me  
3 that there is a difference between alcohol  
4 consumption and alcohol intoxication?

5 A Yes, I do. But I'll say this to you,  
6 Mr. Paciocco, that when I reread these  
7 transcripts, and I've read them many times, and I  
8 know that you probably will get to this, but when  
9 we get to that point in September 12th, where  
10 there is a discussion between the judge and  
11 Mr. Wolson about what are the factors that go into  
12 the marked departure, not the factors that are for  
13 purposes later of sentencing or anything, but  
14 simply what are the factors of the marked  
15 departure that you're relying on, I don't think  
16 that I really change my position on this, which is  
17 that it wasn't alcohol that I was relying on, it  
18 was the driving, the circumstances of the driving  
19 and the day. And what I was trying to convey to  
20 the judge is that in accepting the guilty plea,  
21 that I did consider the alcohol issue, that's why  
22 I thought it was the right thing to do, and that  
23 was the problem with my case, and in accepting the  
24 guilty plea, that I had remedied the problem of my  
25 case dealing with the alcohol issue. And that's

1 what was my thinking. If I misunderstood the  
2 judge, if I misunderstood him on that day, if I  
3 misunderstood him on the other day, it is the  
4 case. But that I can only tell you what I was  
5 thinking, why I said what I said, and where I was  
6 coming from.

7 Q And you answered "absolutely, yes" to  
8 a pointed question from the judge that there were  
9 two bases for that plea, one being the consumption  
10 of alcohol and the other being driving and not  
11 abating speed before the collision; right?

12 A I did, sir, and I understood him to be  
13 speaking about the Crown basis for accepting the  
14 plea.

15 Q Yes, sir. And the Crown basis for  
16 accepting the plea, if you say yes to that, is the  
17 consumption of alcohol?

18 A Well, I disagree with that because  
19 that's not what I was telling the judge.

20 Q All right, sir.

21 A And if I didn't express that clearly,  
22 I thought that I had clarified that on other  
23 occasions in the transcript.

24 Q Now, you recall the judge asking  
25 Mr. Wolson about him learning that there had been

1 a refusal to provide a breathalyzer sample on the  
2 12th, he's asking him about that. In fact, it's  
3 August 22nd, he asks Mr. Wolson about that, and he  
4 wants to know effectively whether he can take that  
5 into account in determining the sentence.

6 Mr. Wolson's position is, you have here a case  
7 where this charge has been stayed, you can't make  
8 any use of it at all. Do you remember that, sir?

9 A Yes.

10 Q And he calls on you to comment, and  
11 you say you have no comment to that. So you just  
12 leave it in the hands of Mr. Wolson, correct, sir?

13 A Yes.

14 Q I just wanted to canvass with you,  
15 sir, whether you read the case law dealing with  
16 the ability of a judge to draw an inference from  
17 the refusal of an accused to provide a  
18 breathalyzer when considering issues of  
19 impairment, sir? There's a provision in the  
20 Criminal Code you may be aware of, section 258.7,  
21 that invites judges to draw inferences in cases  
22 where individuals refuse.

23 Did you read the case law with respect  
24 to that section before deciding to withdraw the  
25 impaired driving charge or stay the impaired

1 driving charge?

2 A I read that and my -- and will remain  
3 steadfast that the evidence that I had available  
4 to me would not have supported the impaired  
5 driving charge, and would not have been assisted  
6 in the refusal either, because I was of the view  
7 that the refusal was plagued with problems, and  
8 that both would be of no value.

9 Q Sir, you would have read the Ranger  
10 case from the B.C. Court of Appeal, 1983?

11 A I don't have --

12 Q I just want to get the citation so  
13 that the lawyers in the room, if they want to  
14 check up on this -- 1983(b) CJ number 1406, the  
15 B.C. Court of Appeal. What the Ranger case says,  
16 as I read it, is that even if there is not a  
17 conviction on refusal charge, if the failure of  
18 the conviction arises because of a technical  
19 problem, other than a foundational problem such as  
20 the absence of reasonable and probable grounds, a  
21 court is free to draw an inference that the  
22 accused may be impaired as a result of his  
23 refusal. It is but one factor to be put in the  
24 hopper, it is not definitive evidence of  
25 impairment, but it is something a court is

1 entitled to consider.

2                   Now, given that your primary problem  
3 with the breath sample was the possibility that a  
4 blood demand was read rather than a breath demand,  
5 that Mr. Harvey-Zenk certainly was given to  
6 understand ultimately that it was a breath demand  
7 and that the breath machine was being prepared,  
8 did you consider the possibility that you could,  
9 even if you lost the breathalyzer demand refusal  
10 charge on the technical grounds that Chief Carter  
11 may have misspoke, that you still might have been  
12 able to use that refusal as some evidence of  
13 impairment? Did that go through your thinking  
14 process?

15                   A     I think that there were more problems  
16 than that, sir. And Carter's evidence factually,  
17 where he described symptoms of this fellow being  
18 impaired, which no one else described at the time,  
19 may have also impacted on his case leaving huge  
20 factual problems, just not technical issues. And  
21 that to limit the problems with the breathalyzer  
22 demand to the issue of blood does not do fairness  
23 to the myriad of issues that arose from that  
24 particular matter.

25                   Q     Okay, sir. I will take your answer to

1 that and thank you for that. I'm going to move  
2 onto another issue now because I don't want to  
3 engage in legal debate with a witness.

4 A No, I understand.

5 Q September 12th, what happened on  
6 September 12th when Mr. Wolson stood up and said  
7 to the judge that alcohol could not be factored  
8 into the case and that the judge had no evidence  
9 before him of alcohol consumption? Do you  
10 remember that occurring, sir?

11 A I do recall that interchange.

12 Q Sir, were you surprised by that  
13 interchange?

14 A I was surprised that -- not just by  
15 that, but how we had arrived at that particular  
16 point, because I did not believe that there was  
17 any suggestion before the judge that the Crown was  
18 identifying, for the purpose of marked departure,  
19 alcohol. I didn't think that we had -- I don't  
20 believe I conveyed that to him.

21 Q Sir, I know that, that's not what I  
22 asked you. You answered it, I think, at the  
23 beginning of your question.

24 A I was surprised that we got there.

25 Q You said -- not that you got there.

1 Were you surprised when Mr. Wolson got up and said  
2 that to the judge?

3 A Well, yes, I was surprised because I  
4 didn't think that was an issue. I thought that we  
5 had settled that issue.

6 Q Mr. Wolson obviously didn't think it  
7 was settled, because he made a point of getting up  
8 and commenting on it, sir.

9 A I understand that. I thought that I  
10 did not -- well, the reason I thought it was  
11 settled was because I thought there was an  
12 understanding between Mr. Wolson and I that  
13 alcohol was not going to be forming part of the  
14 factors making up the marked departure, the  
15 offence. So I was surprised that he got to that  
16 point.

17 Q Mr. Wolson did?

18 A Yeah, I didn't think it was necessary  
19 because I thought that he and I had the comfort of  
20 knowing what it was that I was saying and that I  
21 wasn't relying on alcohol.

22 Q This was Mr. Wolson's evidence when he  
23 testified on what happened after the 22nd. And  
24 you responded "yes" to the questions that I put to  
25 you earlier, the two part question that Chief

1 Judge Wyant put to you that included alcohol  
2 consumption as one of the foundations for the  
3 plea. This is what he said. He said:

4 "That came as a surprise to me. What  
5 really concerned me was the  
6 questioning the judge gave to this."

7 And then he testified that prior to  
8 September 12th, he says:

9 "Before that I phoned Mr. Minuk and I  
10 said, I am going to raise this issue.  
11 I said, I'm assuming you don't have an  
12 issue with that because that is our  
13 agreement. I take it you will not  
14 take issue and call evidence, because  
15 that would be inconsistent with a  
16 clear understanding."

17 Now, that's what I wrote down when he testified.  
18 If he had that conversation with you, sir, there  
19 would have been no room for surprise when he stood  
20 up in court and made it clear to the judge that he  
21 did not accept that alcohol is a factor in the  
22 sentencing?

23 A Well, I agree with you. But as I said  
24 to you, I thought that we, Richard and I,  
25 Mr. Wolson rather and I understood that this was



1 not a problem. And if it became a problem, it  
2 became a problem in the submissions as they went  
3 in on that day in the court, because I thought  
4 that he and I had settled that issue and he had  
5 understood my position on it. That's all I can  
6 tell you, sir.

7 Q Sir, do you agree that you could have  
8 proved that Mr. Harvey-Zenk had alcohol in his  
9 body at the time of the accident? Forgetting  
10 about impairment, do you agree you could have  
11 proved that he had alcohol in his body?

12 A I could have proved that some people,  
13 that two people said that he had -- well, I could  
14 have called evidence. Whether or not I could have  
15 proven it is another issue. Which is I could have  
16 called evidence of the ambulance attendants, I  
17 could have called the evidence of Carter, I could  
18 have called the evidence of Woychuk, I could have  
19 called the evidence of Pedersen, and I could have  
20 then gotten into the very issues which caused me  
21 to enter into the plea bargain in the first place,  
22 which would have raised all of the problems. We  
23 would have been back to, Mr. Wolson would have  
24 been able to cross-examine these people,  
25 Mr. Wolson would have been able to adduce his own

1 evidence at that point if he wanted to. Because  
2 once -- I could have called it -- I foresaw all of  
3 the problems that, in calling it at some other  
4 time, than I did when I was put to it, and it was  
5 never my intention to call it in the first place  
6 for reasons of all of the problems.

7 Q Do you agree with me, sir, that you  
8 could have proved that he had alcohol in his body  
9 without attempting to prove that he was impaired  
10 by alcohol?

11 A I don't think that I could prove that.  
12 I could prove that people smelled alcohol on his  
13 breath, and the inference to be drawn from that  
14 would be that he had alcohol in his body. That's  
15 all I could have proven.

16 Q Yes.

17 A I could not have proven that he had  
18 alcohol in his body.

19 Q Well, sir, you just said that he had  
20 alcohol in his body from his breath. Do you not  
21 agree that the smell of alcohol on his breath is  
22 evidence that he had alcohol in his body?

23 A I'm not going to disagree with that,  
24 sir. But the effect of that is, to my mind, was  
25 of no weight. It could not be -- and I do

1 understand that there is jurisprudence that talks  
2 about just the presence of alcohol. I'm fully  
3 aware of that. My view was that the alcohol was  
4 not causative of anything, it could not be linked  
5 to anything at all to the manner of driving and,  
6 therefore, my opinion was that it would not be  
7 helpful to the prosecution to prove a factor in  
8 the marked departure.

9 Q Well, sir, it wasn't about the marked  
10 departure at this point, it was about the  
11 sentencing. And you are aware of the authority  
12 that says that the consumption of alcohol, even in  
13 the absence of impairment, is an aggravating  
14 factor in a dangerous driving charge?

15 A I don't agree with that, Mr. Paciocco,  
16 because as I read this transcript, and I read it  
17 over and over and over again, the discussion that  
18 Mr. Wolson is having is, with the judge, is on the  
19 factors which make up the marked departure. And  
20 then the judge -- Mr. Wolson is saying to the  
21 judge that alcohol is not a factor for you to be  
22 taking into account in the marked departure. He  
23 is not talking about it, at that point, near the  
24 end of the proceedings as alcohol, in my view, at  
25 the issue of sentencing. And as I interpreted

1 what was going on, sir -- and if you don't want me  
2 to answer, I won't, I will wait --

3 Q No, I want you to answer.

4 A I interpreted the question that was  
5 put to me by the judge, in the context of what  
6 Mr. Wolson has been arguing, which is that alcohol  
7 is not a factor in the marked departure, am I  
8 going to prove that fact for the purpose of the  
9 plea? That the plea to the charge at that point,  
10 as I saw it, was now -- the facts making up the  
11 plea was at issue, not the sentencing. Because we  
12 had returned from sentencing full bore back to the  
13 facts making up the plea.

14 Q Sir, he called you in on  
15 September 12th because he was considering  
16 rejecting the joint position on sentence. And you  
17 would agree with me that when a judge sentences an  
18 individual, it's based on the facts that he's  
19 given, whether they are given to provide the  
20 foundation for a marked departure or not?

21 A Mr. Paciocco, he wrote us a letter on  
22 September 12th telling us -- calling us back in,  
23 to come in because he was thinking of rejecting  
24 the plea bargain, i.e. joint submission, on the  
25 fact that the person was a police officer. And

1 gave no indication whatsoever that there was any  
2 other thinking in his mind at that time.

3 Q Sir, I'm going to tell you, I'm going  
4 to give you a passage and make a suggestion to  
5 you. It's on page 58 of the transcript of  
6 September 12th. It's at page 1738.6, page 1738.6.

7 A Yes, I have that page in front of me.

8 Q Line 10, this is going to be the  
9 reaction to the judge to the position that  
10 Mr. Wolson has put forward that he cannot consider  
11 alcohol in the body. Forget about impairment, you  
12 can't even consider alcohol.

13 "The court: Correct? I mean, and you  
14 have clarified it now, I mean by  
15 saying that impairment was not a  
16 factor, that seemed pretty  
17 self-evident to me at the time because  
18 the Crown had accepted that, and  
19 clearly if impairment was a factor, we  
20 might be talking about a different  
21 charge. But by saying impairment when  
22 you meant to say consumption of  
23 alcohol isn't a factor that -- and I  
24 appreciate you meant to say that.

25 Yes.

1                   But it wasn't said and you can  
2                   appreciate now that that --  
3                   Well, I am --  
4                   -- significantly changes the position  
5                   from my position as well."

6   The judge is telling Mr. Wolson, and you present,  
7   that now having a case that's based solely on  
8   driving with no consumption of alcohol,  
9   significantly changes the position from his  
10  position, which of course was the position of a  
11  sentencing judge. Do you not agree that this  
12  judge was very interested in the issue of  
13  consumption of alcohol, not impairment, but  
14  consumption?

15               A     Consumption of alcohol as a factor in  
16  the marked departure. Could I establish, and  
17  that's what he was asking me, was I going to call  
18  evidence that the consumption of alcohol was a  
19  factor to be considered in the marked departure?  
20  That was the question which I believed he was  
21  asking of me. And I did not believe that there  
22  was any evidence that would establish that his  
23  consumption of alcohol could be a factor in the  
24  marked departure and, therefore, I answered the  
25  question to the judge, no, when he asked me to

1 call evidence.

2 Q All right. Well, let's look at the  
3 decision not to call the evidence, sir.

4 The judge, after this, consistent with  
5 Gardiner -- now he's got counsel telling him, I  
6 don't accept that fact. Now, we all understand as  
7 lawyers that the onus falls to you, if you want  
8 that fact to be considered in sentencing. And  
9 Gardiner is, you would agree with me, a sentencing  
10 case. It's not about marked departures, it's a  
11 sentencing case.

12 A Well, I didn't -- it is a sentencing  
13 hearing, but we were at the point now where  
14 Mr. Wolson is rejecting the facts based on the  
15 plea.

16 Q Because he's concerned about what it's  
17 going to do to the sentence. He's got a judge who  
18 is going to possibly jump a joint position.

19 A Well -- but if he's concerned about  
20 the facts which make up the plea, then we're back  
21 at square one, which is resolving the factors --  
22 the facts of the plea. And we would return to  
23 sentencing once we settled that issue. That's how  
24 I understood what we were doing at that point in  
25 time.

1 Q Okay. So you have a recess. And you  
2 went back and you contacted Mr. Kaplan, right?

3 A Yes, sir.

4 Q And you came back from that and you  
5 said, we're not going to be proving alcohol?

6 A Um-hum.

7 Q That conversation with Mr. Kaplan, you  
8 weren't just reporting what had taken place, it  
9 was a "what should I do" conversation, wasn't it,  
10 sir?

11 A Well, it was not necessarily just a  
12 "what should I do" conversation, but this is what  
13 I'm thinking of doing, this is what I want to do.  
14 And to the extent that I would take their input as  
15 well on that issue on what should I do, because  
16 this is my opinion, I was interested in that as  
17 well. But I had to tell them, I thought, I  
18 believed I needed to tell them where I was at,  
19 what it was that I wanted to do or did not want to  
20 do, and get any insight again. And I -- as I  
21 would have, had I been able to consult elsewhere,  
22 just sort of, this is where I'm in, this is the  
23 situation, am I thinking clear? And given the  
24 environment of the day, sir, and the attention,  
25 and just the questions back and forth, that I



1 didn't think that it was being irresponsible for  
2 me to call them, tell them what I was doing, and  
3 get a sort of second look, so to speak, just to  
4 make sure that I was not, in the stress of the  
5 moment, not thinking clearly.

6 Q And you might change your mind as a  
7 result of the conversation with them? You wanted  
8 their input because you might change your mind?

9 A If I wasn't thinking clearly, perhaps  
10 that would be a good point to get some advice on.

11 Q Because what you told Mr. Clifford  
12 about this conversation, and you'll find it at  
13 page 112 of the transcript, starting at line 11.

14 A I'm with you.

15 Q "Q And did you bring this up with  
16 anybody?

17 A I spoke with Mr. Slough and  
18 Mr. Kaplan about it.

19 Q And could you tell me about that  
20 conversation?

21 A The conversation was to -- I  
22 reported to them what the judge had  
23 said, so to see there was some effort  
24 on my part to at least secure an  
25 adjournment, put that to them,

1                   indicated to them what the situation  
2                   was. And the response that I gave to  
3                   the judge was as a result of that  
4                   conversation."

5       Correct, sir?

6                   A       That's true, because the response I  
7                   gave to the judge was as a result of the  
8                   conversation that I had with him where the issues,  
9                   as I have told you, were set out.

10                  Q       Sir, you didn't tell the Taman family  
11                  that you were going to consult with highly placed  
12                  Ministry of Justice officials when you walked out?

13                  A       No, sir, I did not.

14                  Q       Did you give them a reason as to why  
15                  you were stepping out of court?

16                  A       No.

17                  Q       Did you give them a reason as to why  
18                  you had stepped out of court when you came back  
19                  in?

20                  A       Not at all.

21                  Q       All right, sir. And I'm putting this  
22                  to you again in fairness, because there has been  
23                  testimony to this effect and I wanted to give you  
24                  an opportunity to respond. I think you are aware  
25                  that three of the Tamans, Robert, Tara and

1 Kristin, all indicated that you leaned over the  
2 bathroom and explained you just -- or the banister  
3 and explained you just had to go to the bathroom?

4 A First of all, the court adjourned, I  
5 suspect that one of the things I might have done  
6 was gone to the washroom. Anybody would have seen  
7 it, it was around the corner, and that's where I  
8 made my phone call from. So maybe they -- I  
9 wouldn't have told them that, that's where I made  
10 my phone call, it was the only place that was  
11 private, so to speak, where I thought I could make  
12 my phone call.

13 Q So you never said that to them, sir?

14 A No.

15 Q All right, sir. I'm going to take you  
16 to a document that has not been referred to yet in  
17 evidence. It's from a book we have not pulled out  
18 yet called prosecutorial standards and ethics,  
19 volume X, volume X-2. It's a very thick volume,  
20 and I'm going to be taking everyone to tab 8 of  
21 that volume. Prosecutorial standards and ethics,  
22 volume X-2, tab 8. It is probably best to open  
23 first to page 252.

24 A What page, sir?

25 Q 252.

1 A 252.

2 Q And what you will see is a Manitoba  
3 Department of Justice policy directive, subject  
4 plea bargaining, dated October 10, 1990?

5 A Yes, sir.

6 Q And I'm going to take you to page 254  
7 and point number 9. And what it says, sir, is:

8 "Crown counsel should not agree to  
9 sanitize or play down certain facts in  
10 exchange for a guilty plea. All of  
11 the facts relating to the incident  
12 which can be proved and which are of  
13 significance must be disclosed to the  
14 judge."

15 I take it, sir, that that requirement of the  
16 policy directive doesn't catch you by surprise,  
17 given that it also --

18 A No.

19 Q -- I think you would agree, is a  
20 proposition of ethical responsibility for lawyers  
21 in presenting guilty pleas?

22 A Correct.

23 Q And I put that to you, sir, because we  
24 have obtained expert reports relating to the  
25 conduct of yourself in connection with the

1 prosecution of this case. They are in conflict.  
2 And in fairness, I want to put to you that  
3 Mr. Peck does not find a problem with your  
4 decision not to prove alcohol, and he feels in  
5 fact that mentioning anecdotal historical evidence  
6 on your part was overreaching because you couldn't  
7 prove it.

8                   Mr. Gover, on the other hand, takes  
9 the view that your conduct in connection with the  
10 alcohol issue violates that particular policy  
11 directive. He takes the position that the  
12 presence of alcohol in the body, consumption of  
13 alcohol is a matter of significance because the  
14 law provides that it is an aggravating factor in  
15 dangerous driving cases. That you had the means  
16 to prove that Mr. Harvey-Zenk had alcohol in his  
17 body, ergo, you did not present,

18                   "...all of the facts relating to the  
19 incident which can be proved and which  
20 are of significance."

21 I'm inviting you to comment on his opinion, sir.

22                   A     I don't believe that -- I don't agree  
23 with Mr. Gover's assessment of the case that I had  
24 to work with, nor do I agree with Mr. Gover's  
25 assessment that I would have been successful in

1 getting anywhere with that issue. And as I've  
2 said to you before, in going to that point, it  
3 would invite a revisiting of all of the issues,  
4 which were the problems, which I thought at the  
5 end of the day would have the effect of not  
6 getting me there. And that was the decision I  
7 made. So I disagree with him.

8 Q Just to be clear, sir, you are, when  
9 you make that response, bearing in mind the  
10 distinction between simple consumption of  
11 alcohol --

12 A Yes.

13 Q -- and impairment. Okay, sir.  
14 Another point he makes, and I'm sure it dawned on  
15 many who have read the transcript, is there seems  
16 to be a logical inconsistency between the position  
17 that you took and the sentence you requested and  
18 that was provided by the judge. Two of the  
19 conditions, and they are referred to at page 1631  
20 of the transcript of August 22nd, two of the  
21 conditions that were put forward were as follows,  
22 starting at line 10, that he, Derek Harvey-Zenk,  
23 "...abstain absolutely from the  
24 consumption of alcohol, from the  
25 possession of alcohol, and the

1 consumption and possession of  
2 nonprescription drugs and other  
3 intoxicants."

4 The next condition is at line 18:

5 "That he attend, participate and  
6 complete a substance abuse assessment  
7 and treatment as directed by the  
8 supervisor."

9 And the question that I want to give you an  
10 opportunity to respond to is why you would have  
11 asked for, and I presume you did and you correct  
12 me if I'm wrong, why you would have asked for  
13 alcohol conditions in connection with a sentence  
14 of a man who was sentenced on the basis of facts  
15 that do not include the consumption of alcohol?

16 A The reason that I asked for that  
17 condition, sir, is -- I don't know if I did say  
18 this to you yesterday or not, but I reviewed all  
19 of the cases, I believe from 1999, or mid to late  
20 '90s onward to 2006 or '07, dealing with both  
21 dangerous driving causing death cases and impaired  
22 driving causing death cases. I concluded what the  
23 range of sentence was, and that it was similar in  
24 both cases for certain types of offenders. And  
25 after that, then I went through each one of these

1 cases and I looked at the conditions that the  
2 Court of Appeal imposed for the terms of the  
3 conditional sentence. And in one particular case  
4 that I can recall, which was one where a fellow  
5 was driving a City of Winnipeg dump truck on one  
6 of the Perimeter ring roads around the city, who  
7 had gone through a red light, the case was  
8 Daschmidski (ph). Mr. Daschmidski, as I recall,  
9 got a jail sentence. It was reversed on a Court  
10 of Appeal, by Court of Appeal to a conditional  
11 sentence. There was no alcohol in Daschmidski,  
12 and the Court of Appeal imposed that condition.  
13 And when I went through the conditions, I took  
14 them from these cases and put them in there. And  
15 that was the basis for why I was doing them. And  
16 I was of the view that even if in Daschmidski  
17 there was no alcohol which would form part of the  
18 offence, and the Court of Appeal felt it was  
19 appropriate for this to occur, then that was an  
20 appropriate condition. That's how I based the  
21 decision. I used those cases, sir.

22 Q Are you confident that the Daschmidski  
23 case in the Court of Appeal did not involve any  
24 evidence of alcohol on the part of  
25 Mr. Daschmidski?



1           A     Off the top of my head, sir, today, I  
2 cannot recall, but I believe it was one -- I think  
3 it was one, I'm pretty sure, I may be confused  
4 about that, but I'm pretty sure that it did not.  
5 But I didn't reread the case before coming here  
6 today, but it's one that stands out in my mind  
7 because I think that on the material that I  
8 provided to the judge, on the list of sentencing  
9 authorities, that I did have the cases on some  
10 occasions other than statutory and typical  
11 conditions, and I think the citation for where I  
12 got that condition was on the paper -- not on the  
13 paper before the judge, it was on the paper I gave  
14 to Mr. Wolson.

15           Q     I'm not going to pretend, standing  
16 here, that I have information about what the facts  
17 of that case were, sir, but things do fall through  
18 the cracks sometimes, but you would agree with me  
19 that when judges craft conditions, they should be  
20 addressing it relating to the facts of the case  
21 they have?

22           A     Well, yes. But that would be the  
23 presumption, I would agree with that, sir. But  
24 that's where -- I'm as certain as I can be today,  
25 without going over that.

1 MR. WEINSTEIN: Can I assist the court  
2 on this case?

3 THE COMMISSIONER: I'm sorry?

4 MR. WEINSTEIN: Can I assist the court  
5 on this case?

6 THE COMMISSIONER: You will get a  
7 chance.

8 MR. WEINSTEIN: No, no, it's nothing  
9 contentious.

10 THE COMMISSIONER: Maybe you want to  
11 assist, Mr. Paciocco?

12 MR. WEINSTEIN: I will.

13 THE COMMISSIONER: Have you answered  
14 the question, whether you agree that when judges  
15 craft conditions to be imposed on people that have  
16 been sentenced, that it should relate to the facts  
17 of the case?

18 THE WITNESS: Well, I didn't answer  
19 it.

20 THE COMMISSIONER: I mean, do you  
21 agree or don't -- I mean, if you don't agree, then  
22 I'm going to have to change the next edition, I'm  
23 a little concerned.

24 THE WITNESS: No, no, no, I'm not  
25 going to tell you that they shouldn't, but I do

1 know that there are many conditions that get  
2 imposed which --

3 THE COMMISSIONER: I thought, I'm  
4 sorry, I thought that was the law, that the Court  
5 of Appeal has said over and over again that the  
6 conditions imposed should reflect the facts upon  
7 which the conviction was registered?

8 MR. PACIOCCO: I'm going to  
9 rehabilitate the reputation of the Court of  
10 Appeal, not by saying that there was alcohol found  
11 as a fact in the case. Mr. Daschmidski had been  
12 charged with alcohol related offences but was not  
13 convicted of them and there was no finding of  
14 alcohol. However, Mr. Daschmidski had a prior  
15 conviction of refusing to provide a breath sample.  
16 And when the court provided the conditions, they  
17 left the treatment condition discretionary to the  
18 probation supervisor. They did impose an alcohol  
19 prohibition.

20 BY MR. PACIOCCO:

21 Q Sir, I want to look at some of the  
22 factual representations that were made to the  
23 court during the sentencing. I want to take a  
24 look at August 22nd, volume J-62 for the lawyers,  
25 at page 1623.

1                   At line 20, when you were relating the  
2 facts to the court, you say:

3                   "All of the people with whom the  
4 accused was with that evening were  
5 interviewed by Professional Standards.  
6 The homeowner related that the  
7 gathering came to an end at his  
8 residence when he began to clean up  
9 and retire for the evening or early  
10 morning near to or just after  
11 4:00 a.m. on February 25th. He told  
12 investigators that some of his  
13 colleagues remained at his home, and  
14 when he woke around 6:30 a.m., those  
15 who had remained were readying to  
16 leave. One of those persons was the  
17 accused."

18                   Now, the homeowner, we can take it  
19 from our collective knowledge, would have been  
20 then constable, now sergeant Black, sir?

21                   A     Yes.

22                   Q     Then again at page 1634, line 8, after  
23 the court poses a question about the gathering  
24 coming to an end, the court says at line 5:

25                   "And the gathering sort of came to an

1                   end you said at around 4:00 o'clock in  
2                   the morning but some stayed -- is --  
3                   is --

4                   Mr. Minuk: Yes, it's the owner of the  
5                   home couldn't really identify who, how  
6                   many stayed, why they stayed."

7                   Sir, you are presenting those as facts  
8                   to the judge. You certainly read the statement of  
9                   Constable Black that had been provided to the  
10                  Winnipeg Police Service Professional Standards  
11                  Unit?

12                  A     Yes.

13                  Q     And you would have recognized that  
14                  those claims that he went to bed at 4:00 o'clock,  
15                  got back up at 6:30, and discovered that some  
16                  people had stayed and he couldn't really say who  
17                  stayed and who didn't, are totally inconsistent  
18                  with the statement he furnished, sir?

19                  A     I know that, sir. And that is what he  
20                  told me when I met with him less than a month  
21                  before. I remember that. He told me that in his  
22                  office. And to the extent that he told me that,  
23                  it only added to what I had otherwise concerns  
24                  about, which is the quality of the police evidence  
25                  that I was going to be getting. And but for the

1 fact that he was the homeowner -- and I wouldn't  
2 have wanted to call Sergeant Black as a witness  
3 other than to say that people went to his house.  
4 And if I could have got it in elsewhere, I might  
5 have done that. But that's what he told me.

6 THE COMMISSIONER: I'm sorry, did you  
7 not have his statement from the Professional  
8 Standards Unit, which is contrary to what you are  
9 now saying he told you?

10 THE WITNESS: I did.

11 THE COMMISSIONER: Did you not  
12 confront him on it?

13 THE WITNESS: I told him that, and  
14 this is what he told me. He told me that he  
15 remembered this is what had happened. So I don't  
16 know, sir, what more I could do with this fellow,  
17 other than what he was telling me. And I didn't  
18 find that I was getting what I would call a lot of  
19 cooperation generally from these people for the  
20 purpose of the prosecution. The very -- I would  
21 say that, and that's all I can tell you about it,  
22 it's 20 plus people essentially not cooperating.

23 BY MR. PACIOCCO:

24 Q I take it, sir, that you didn't have  
25 confidence in this information he gave you, given

1 that it was contradicted by his earlier statement?

2 A I'm not sure that I could have  
3 confidence in the earlier statement, confidence in  
4 what he told me, I wouldn't have confidence,  
5 period, in that evidence.

6 Q Sir, I'm just curious as to why you  
7 would present it as a fact to the judge, if it's  
8 something you didn't have confidence in? Why  
9 didn't you just say to him that I have had  
10 contradictory reports about what happened, and  
11 here they are, as opposed to presenting a  
12 sentencing judge with a crisp description of what  
13 happened, based on statements you don't trust?

14 A Well, because this is what he told me  
15 when I met with him, and this is what I expected  
16 he was going to be telling the court and,  
17 therefore, was what I thought I would end up  
18 having to deal with. And then if it happened that  
19 he said something else other than that when he  
20 testified, I would have had to have dealt with  
21 that situation when it occurred.

22 THE COMMISSIONER: Excuse me, could  
23 you tell me when that meeting occurred?

24 THE WITNESS: Oh, I don't have the  
25 date.

1 THE COMMISSIONER: Approximately?

2 THE WITNESS: Oh, in July the --

3 MR. GREEN: 11th.

4 THE COMMISSIONER: 11th.

5 THE WITNESS: About three weeks before  
6 this, four weeks before this.

7 THE COMMISSIONER: And did you speak  
8 to him alone?

9 THE WITNESS: Yes, sir, in my office.

10 THE COMMISSIONER: And how long did  
11 you discuss this matter with him?

12 THE WITNESS: I think we might have  
13 been, I don't --

14 THE COMMISSIONER: Approximately?

15 THE WITNESS: Half an hour.

16 THE COMMISSIONER: You were with him,  
17 and he told you that he fell asleep?

18 THE WITNESS: Yes, sir. Well, that he  
19 had rested for a couple of hours and got up.  
20 That's what he told me.

21 THE COMMISSIONER: And the statement  
22 to the Professional Standards Unit indicated that  
23 he was awake when everybody was leaving, that  
24 there was no indication that he had ever fallen  
25 asleep. Were you aware of that?



1                   THE WITNESS: Well, he did say that  
2     there were people that were readying to leave his  
3     place when he woke up. I don't think that he --  
4     and I think I said that to the judge, that when  
5     he -- he may not have told you, he may not have  
6     told Professional Standards that he had fallen  
7     asleep for a short period of time, but he did tell  
8     me when he woke up people were there and they were  
9     getting ready to leave.

10                  THE COMMISSIONER: Thank you.

11                  THE WITNESS: And I indicated that to  
12     the judge, that there were people there and  
13     getting ready to leave.

14     BY MR. PACIOCCO:

15                  Q     So the other passage I'm looking for,  
16     and I have recorded it incorrectly, so I apologize  
17     for the delay, is a comment that you had about the  
18     opportunity of individuals to have -- all right.  
19     I had it recorded wrong. I had my questions  
20     confused.

21                  Sir, you indicated at page 1625, line  
22     29:

23                  "In addition, as I told you, members  
24     of the Winnipeg Professional Standards  
25     Unit conducted lengthy interviews with

1 all people with whom the accused was  
2 working that day, with whom he had  
3 spent some time. Through the  
4 investigation, anecdotal evidence of  
5 alcohol consumption by the accused  
6 sometimes prior to the collision was  
7 identified."

8 And then you go on to talk about how proof of  
9 impairment was not possible. It would be  
10 difficult at best.

11 The judge subsequently makes a comment  
12 about the officers and their failure to make  
13 observations. At line 34 on page 1632, he says:

14 "Other police officers, and you  
15 indicated, and correct me if I'm wrong  
16 that at the -- as a result of the  
17 investigation by the Professional  
18 Standards Division of the City of  
19 Winnipeg Police Services, that having  
20 interviewed those persons, no one,  
21 what they collectively historically  
22 said that was that no one paid  
23 attention to who ate what or who drank  
24 what at that particular location?"

25 Your answer, of course, was "correct."

1 And he goes on and he says at line 16:

2 "It's not relevant, and I stress not  
3 relevant to the sentencing of this  
4 matter, that might not be the  
5 observation one might make of police  
6 officers who are trained in the powers  
7 of observation and of recollection.  
8 However, I'll leave the point at this  
9 time."

10 So he's expressing some kind of, I don't want to  
11 put too strong a spin on it, but he's expressing  
12 some question to you as to why these trained  
13 observers wouldn't make observations, in the  
14 circumstances of the case. Do you see that, sir?

15 A I do, and although I didn't say I  
16 agree with you, I said I understand that, and was  
17 conveying to the judge in that remark, I don't  
18 think a disagreement with his observation. I  
19 don't think that I would disagree with that.

20 Q So, later, two pages later on page  
21 1635 at line 18, he says:

22 "So, in essence, people said he had  
23 something to drink but we don't know  
24 how much?"

25 And you say:

1 "They weren't watching."

2 And he says:

3 "Or what?

4 Or didn't pay attention. And in fact,  
5 some of them even went so far as to  
6 say that because of his rank, not to  
7 be disrespectful to anyone who was a  
8 member of the police services, but  
9 because of his rank, many of these  
10 were senior officers, they barely paid  
11 attention to him because he was simply  
12 on a shift but wasn't truly friendly,  
13 so to speak, with the other officers."

14 Sir, did you find that a credible explanation?

15 A From the police?

16 Q Yes?

17 A Whether I found it credible or not, it  
18 is what was told to me by Anderson, Humniski. I  
19 am not going to tell you that I found the 23, or  
20 20 plus police officers and the statements they  
21 provided were necessarily credible. The problem  
22 is, I have these statements to deal with as a  
23 Crown Attorney, and they are not helpful to the  
24 case. And they were going to be all, I'm sure,  
25 called by Mr. Wolson, had the matter gone to

1 trial, to defeat the prosecution.

2 Q Yes, sir. And the point, the reason  
3 I'm bringing this up is twofold. I mean, first  
4 you indicate at line 26, "many of these were  
5 senior officers." You are aware, sir, that there  
6 were only sergeants in that group?

7 A I am doing it by rank. That's what  
8 Humniski and Anderson told me, just by number, not  
9 by -- I don't mean rank as in their --

10 Q So you have a clear recollection of  
11 that conversation with those sergeants, sir?

12 A Yes, we're talking about the numbers,  
13 we're not talking about whether --

14 Q You mean badge numbers, seniority?

15 A Badge numbers, yes, when they came to  
16 the job.

17 Q This was put to all those witnesses  
18 and they all denied there was anything to that,  
19 and they denied ever telling you that they had  
20 some practice of not socializing with people of  
21 lower ranks or seniority, sir. Are you able to  
22 give confidence to the fact that you got this  
23 information from these police officers?

24 A Yes. That's what they told me. And I  
25 can't tell you why it is that they are telling me

1 things. I have my own suspicions.

2 Q The next issue I want to deal with is  
3 the testimony, not the testimony but the  
4 submissions about the state of Mr. Derek  
5 Harvey-Zenk's memory on the occasion in question.  
6 We all understand, sir, that the defence has no  
7 obligation to assist during the sentence. They  
8 don't have to provide facts to the court. But  
9 there was a suggestion made in this case by  
10 Mr. Minuk that --

11 THE COMMISSIONER: Mr. Wolson.

12 BY MR. PACIOCCO:

13 Q Mr. Wolson, there was a suggestion  
14 made by Mr. Wolson in this case at page 1663, that  
15 Derek Harvey-Zenk was being forthright and he's  
16 never tried to make excuses. And that must have  
17 struck you, sir, as a submission that was in  
18 mitigation, in the sense that this man is  
19 accepting responsibility but he can't really help  
20 you. This is what he says, line 29,

21 "Never once, never once has Derek ever  
22 offered to me any concern for himself.  
23 He's never tried to make excuses. He  
24 has been forthright in what he can  
25 remember. He received what they

1 believe is a concussion at the time of  
2 this incident, but he always thought  
3 only of the family of Crystal Taman."

4 And then subsequently at page 1678, there is a  
5 submission at page 15:

6 "I think, quite frankly, that may well  
7 have happened."

8 The judge is asking him whether there is the  
9 explanation for the vehicle. He said:

10 "I think that might well have happened  
11 but I don't know that. And Derek  
12 doesn't know that because of the head  
13 trauma that he suffered. So I can't  
14 tell you that, but I think that may  
15 have happened..."

16 with respect to the possibility of falling asleep.

17 Did you accept the memory lapse  
18 suggestion to be true when it was provided to you,  
19 sir, provided to the court?

20 A I don't know, and did not know what  
21 Mr. Wolson's defences might be, and I never heard  
22 them disclosed to me at all prior to court at any  
23 time. And what I seem to hear him saying was that  
24 this was in the nature, would have been in the  
25 nature -- what I understood him to be divulging at

1 some point while he was making these comments  
2 would be, had the matter gone to trial, I could  
3 have now expected that he would have had that type  
4 of defence. That's -- because that was the first  
5 that I had heard of it, so I would have to sort of  
6 wonder, like, well, I guess this was going to be a  
7 possible defence that Mr. Wolson would be  
8 advancing.

9 Q Well, are you suggesting an automatism  
10 defence, sir?

11 A No, I don't know that, I don't know  
12 that -- momentary lapse, hit his head, I don't  
13 know what it was, you know, where he was going  
14 with this. I didn't hear it until that day.

15 THE COMMISSIONER: Counsel is behind  
16 you, he wants to make an objection.

17 MR. KING: Yes, I want to object. How  
18 can this witness anticipate what defence  
19 Mr. Wolson is going to -- is going on in his mind  
20 at that particular time, how can this particular  
21 witness offer his opinions on that?

22 THE COMMISSIONER: Well, I think the  
23 question is directed to Mr. Minuk to see whether  
24 or not he was told, or had any understanding of  
25 what Mr. Wolson was going to say, whether it was



1 factual or hyperbole, whether it was just throwing  
2 something out. And I think the question is, did  
3 you know in advance --

4 THE WITNESS: No, not at all.

5 THE COMMISSIONER: -- what he was  
6 going to say?

7 THE WITNESS: No.

8 THE COMMISSIONER: And once he said  
9 it, did you -- I think from there, Mr. Paciocco  
10 wants to know from there whether he took any steps  
11 to do anything. Go ahead.

12 BY MR. PACIOCCO:

13 Q Sir, it was said to you in a context,  
14 in the sentencing context, explaining that this  
15 individual has been forthright with the court, or  
16 he's been forthright and he was taking  
17 responsibility. That was the context in which it  
18 was said; right?

19 A Well, it's in that whole passage that  
20 he's saying -- I don't know what he means by  
21 saying his client has been forthright, that could  
22 mean simply that he pleaded guilty. Who knows  
23 what Mr. Wolson is talking about.

24 Q You'd agree with me that defence  
25 counsel would want their client to appear to be

1 cooperative with the court so that they could show  
2 appropriate remorse and the rest of it, and that  
3 that might help in the sentencing; isn't that your  
4 experience, sir?

5 A Yes, except that I know Mr. Wolson is  
6 going over the top here, his client had pleaded  
7 guilty to charge. That's it, that's all he did.  
8 He's advocating in a grand manner about his client  
9 being cooperative, when all I understood from what  
10 had occurred was that he had plead guilty to the  
11 charge, spared the trial, so to speak, and was  
12 forthcoming in admitting criminal responsibility.

13 Q My point is a different one, sir. My  
14 point has to do with the indication that this man  
15 has no memory. And what I'm going to suggest to  
16 you, sir, is you had evidence available to you  
17 that would have, arguably, made that submission  
18 unlikely. You had evidence that he had taken  
19 legal advice at the station immediately after the  
20 incident, that he had signed release documents.  
21 You had evidence of a traffic accident report in  
22 which his injuries were described and there was no  
23 such indication. You had statements in there from  
24 witnesses at the scene who asked him if he was  
25 okay and he said he was fine. You had that

1 information, and what you didn't have was you  
2 didn't have any proof or any medical certificates  
3 or anything to show that the man had actually  
4 sustained a concussion?

5 A Correct. That was Mr. Wolson's  
6 position --

7 Q Yes?

8 A -- advanced just on that day. He  
9 hadn't even advanced, it was not advanced on an  
10 earlier occasion.

11 Q You understand under the Criminal Code  
12 that any position taken by the defence, any  
13 representation of fact that is contested has to be  
14 proved on the balance of probabilities, correct,  
15 sir?

16 A Yes, sir.

17 Q And I'm just wondering why you didn't  
18 notify the judge that you were not accepting that,  
19 and if Mr. Wolson wanted to present his client as  
20 being forthright to the limited extent of his  
21 abilities, given his concussion, that he should  
22 get evidence in there to prove that this man in  
23 fact had no memory?

24 A The reason I didn't was that I did not  
25 think that it would have any effect at all on the

1 issue of the sentence. And because Mr. Wolson was  
2 challenged on, or had some discussion about it  
3 with the judge, it struck me that the judge was  
4 not putting a lot of weight on that as well.

5 Q Thank you for that, sir. The last  
6 series of questions I want to ask you, and I do  
7 apologize that it's taken this long.

8 A Oh, no, no, that's fine.

9 Q The last series of questions that I  
10 want to ask you have to do with your dealings with  
11 the Tamans after court, and then the Victim Impact  
12 Statement.

13 A Okay.

14 Q After court on September 12th, sir,  
15 you saw the Tamans?

16 A Not --

17 Q You learned at some point, we heard  
18 earlier that the two Taman daughters had been at  
19 the scene and had made some observations, which  
20 included Mr. Harvey-Zenk basically being free to  
21 move around while the police officers were there?

22 A That was -- that was their  
23 observation --

24 Q Yes.

25 A -- as related to me.

1           Q     And I simply put it to you to try and  
2 trigger your memory about the conversation that  
3 occurred on that day, sir. And I want to give you  
4 an opportunity to respond to another statement  
5 that has been testified to by Robert, Jordan and  
6 Tara, who all indicate that they wanted answers  
7 and they approached you and they wanted to know  
8 what had happened during the investigation, and  
9 they wanted that kind of information. And it was  
10 in that context that they say you said to them:

11                     "Well, your daughters were at the  
12 crime scene, ask them, they know  
13 everything, they are your ace up your  
14 sleeve."

15 That was the testimony of three of the Tamans in  
16 connection with the meeting on September 12th.  
17 And I just wanted to give you an opportunity to  
18 respond to that, sir?

19           A     All I can tell you, sir, and I  
20 remember Mr. Clifford asking me this question, a  
21 "ace up my sleeve" is not a term I would use, I  
22 can't even remember using that, certainly not my  
23 language. And to the extent that they -- my  
24 recollection today is that in discussing that  
25 matter with them, that if there were any

1 observations that were made by these women when  
2 they arrived at the scene that would have been  
3 helpful for the purpose of the prosecution, it  
4 didn't strike me that it was. And to the extent  
5 that they would have been capable of observing  
6 what had gone on at the scene, once they arrived,  
7 which was long after -- was sometime after the  
8 accident, they could make those observations. And  
9 my recollection is that some of their observations  
10 didn't seem to accord with what the evidence was,  
11 because they seemed to think that he had been  
12 permitted to walk around for a long time outside.  
13 But, in any event, I would have never said to them  
14 that this is your ace up the sleeve, and I don't  
15 even know why, in what context it could have  
16 helped.

17 Q The only suggestion I'll put to you  
18 about context is you had testified earlier about  
19 some indication that they may have wanted to bring  
20 a civil suit against the East St. Paul Police  
21 related to the investigation, and that kind of  
22 comment might make some sense in the context of a  
23 conversation about that, sir?

24 A It would except for the fact that I  
25 would not be saying to them that this is the ace

1 up their sleeve. I don't -- that's not my  
2 language, sir. I don't speak like that.

3 Q All right, sir. Thank you for that.  
4 The last topic I want to deal with has to do with  
5 the Victim Impact Statement --

6 A Yes, sir.

7 Q -- of Victoria Sveinson. You were  
8 notified by, and it's a joint statement, I should  
9 say, of Victoria and Sveinn Sveinsons. You were  
10 notified by Monica Dyck of some concerns arising  
11 out of the statement that she had received, sir,  
12 in terms of its content?

13 A Well, yeah, she indicated to me that  
14 she had concerns about the content of the Victim  
15 Impact Statement.

16 Q We understand that she sent a  
17 memorandum to you. This memorandum will be found  
18 in book R-2.91.52, and it is an exhibit already.  
19 Sveinn R-2.91.51, Exhibit 37. And it records, as  
20 discussed -- this is on August 8, 2007 by the way,  
21 in anticipation of the 22nd hearing.

22 "As we discussed, enclosed are the  
23 Victim Impact Statements of Crystal  
24 Taman's parents and her sister. I  
25 have briefly reviewed them and suspect

1                   there are some portions of the  
2                   Sveinson statement that may be  
3                   concerning. As a result I am  
4                   forwarding them to you for your review  
5                   in terms of appropriateness of the  
6                   content and any discussion you need to  
7                   have with them as a result. I will  
8                   say also that often Crowns have  
9                   actually had a higher tolerance for  
10                  allowing certain things in these  
11                  statements that we would ordinary  
12                  suggest are problematic, particularly  
13                  in circumstances where there has been  
14                  a fatality. I leave it to you to deal  
15                  with that, with my apologies."

16       Right?

17               A     Yes, sir, I see that.

18               Q     And you decide to edit the statement.

19       And I am going to ask the clerk to provide you  
20       with another document that has been exhibited here  
21       at tab O-81.a.3. O-81.a.3, and I do apologize for  
22       not having the exhibit number. Exhibit 36, could  
23       it be, is that Victim Impact Statement?

24               A     I don't have it.

25               Q     No, you don't have it yet, sir.



1 A Oh, sorry.

2 Q It's coming your way. It's book  
3 O-81.a.3 and the page is 2128.

4 A Thank you.

5 Q Sir, I don't know whether the copy you  
6 have indicates in highlight what parts have been  
7 edited out. I know that we had a highlighted copy  
8 and when it became photocopied it did not  
9 translate onto the photocopy. I can tell you that  
10 the edits begin down at the bottom of page 2128,  
11 beginning in the last sentence on the long  
12 paragraph:

13 "Only very severe impairment or  
14 extreme reckless negligence could  
15 explain how anyone could possibly ram  
16 into a bright yellow car that was  
17 stopped at a red light which is  
18 preceded by amber blinking lights."

19 Sir, there have been criticisms levelled at you  
20 for editing, and I am going to give you an  
21 opportunity to explain the edits that you have  
22 made. This first one that I've just read to you,  
23 sir, why would you have taken that out of the  
24 Victim Impact Statement?

25 A Because it struck me that what was

1 being alluded to here was the offence of impaired  
2 driving causing bodily harm, or extreme reckless  
3 negligence, which I would understand to be perhaps  
4 criminal negligence, wanton reckless, disregard.  
5 Those were not offences which were before the  
6 judge. And the explanation that was being offered  
7 by -- the writer of this was offering up some  
8 explanation for how these offences occurred. And  
9 I just didn't think that under the directions  
10 which I would have had in front of me at the time,  
11 that this was just an inappropriate comment, not  
12 for that.

13 Q Okay, sir. The next is the following  
14 line:

15 "Then it is most distressing to hear  
16 that alleged criminals in situations  
17 like these have the right to refuse  
18 breath tests. Such rights completely  
19 override their victim rights to the  
20 truth and to the attainment of  
21 justice."

22 Why was that edited out, sir?

23 A Well, I looked at it as a comment  
24 about the criminal law, and a general comment  
25 about the state of the law and not about this

1 particular matter, and I didn't understand the  
2 purpose of Victim Impact Statements to be for that  
3 purpose.

4 Q So the purpose of a Victim Impact  
5 Statement is effectively to describe the impact of  
6 the event on a victim, the injury to them, the  
7 psychological stress, the pain and heartache, but  
8 it is not intended to be a forum for making law  
9 reform recommendations. Is that fair, sir?

10 A Yes.

11 Q Next you have on the following page,  
12 if you can go down to the second word "imagine"  
13 that appears on the page. The page starts with  
14 the word "imagine" and then about six lines later,  
15 it says:

16 "Imagine being told you can't get a  
17 copy of her autopsy report because it  
18 may be used as evidence in a court  
19 proceeding."

20 You took that out, sir. Are you able to explain  
21 why that came out. In fact, I'll continue reading  
22 so the whole passage is in there.

23 "As a parent you will have to wait for  
24 years before you can get to know the  
25 actual causes of your child's death,

1                   that the person responsible for her  
2                   death has access to information  
3                   through his lawyer."

4    Okay. Go ahead, sir, why did that theme, the  
5    autopsy report and the delay in getting access to  
6    it because of the criminal case, why did that get  
7    removed, sir?

8                   A     I consider that to be a comment which  
9    was directed at, again, government officials, and  
10   not necessarily directed to the proceeding itself.  
11   And that's why I did it, for that purpose. Again,  
12   I perceived this to be a complaint about the  
13   system as opposed to the specifics of this  
14   particular matter.

15                  Q     I realize these are judgment calls.

16                  A     Yes.

17                  Q     And all of us can have our judgment  
18   second-guessed, and I'm sure it's not pleasant,  
19   but I do want to put this to you, sir. Could you  
20   not have taken the view that as a result of the  
21   crime being prosecuted, a process was set in place  
22   that was very painful for these people. It was  
23   not only the death of their daughter, but the  
24   process that inevitably followed the death of  
25   their daughter that was causing them anguish. And

1 one of the things that was very troubling to them  
2 was the idea that they couldn't find out the  
3 details of their daughter's death, but the man who  
4 caused the death of their daughter could. And  
5 that this isn't really a criticism of the system  
6 so much as it is a description of one of the  
7 impacts that this whole thing has had on them?

8 A That's one way of reading it, I'm  
9 hoping that after we go through this, I have  
10 something to say about this function.

11 Q You will be welcome to do so, sir.

12 A I don't want to lose thought of that.  
13 I am hoping that you will keep that with you.

14 Q Okay. The next:  
15 "Additionally, the drawn out lengths  
16 of time it takes for many of these  
17 cases to get to court prevents the  
18 healing process from even beginning."

19 A Again, there was a judgment call on  
20 systemic issues that are facing the justice  
21 system. And you know, on hindsight, I probably  
22 wouldn't have done any editing.

23 Q Yes?

24 A It's just easier.

25 Q Yes?

1           A     But I did at that time, because I was  
2     trying to balance what I considered to be the  
3     criteria set out versus systemic and legal issues,  
4     and made my judgment based on that.

5           Q     The balance of the comments in this  
6     paragraph are clearly attempts to challenge the  
7     plea bargaining system and the types of sentences  
8     that are being imposed by courts. Again, I heard  
9     you say that you might not take anything out, but  
10    that is definitely something that most, I think,  
11    would recognize doesn't fall within --

12          A     Yes.

13          Q     -- the parameters of a Victim Impact  
14    Statement, sir. But as for the other things I  
15    heard you say it's easier not to take them out. I  
16    was going to ask you, given the correspondence you  
17    got from Mr. McCorrister, that there is a lot of  
18    latitude typically given in these cases?

19          A     I agree there's a lot of latitude, and  
20    I just wish that, you know, the Commissioner may  
21    write that Crown Attorneys shouldn't be put into  
22    the position of having to do this, because it  
23    makes it very difficult when you make these kinds  
24    of judgment calls about editing or not editing  
25    Victim Impact Statements, and puts them in a

1 precarious situation of having to make decisions  
2 about what not to put before the court on victims.  
3 And it's a very, it's a next to impossible  
4 position and it shouldn't be a requirement.

5 THE COMMISSIONER: What are the  
6 reaction of the judges if you get one of these  
7 Victim Impact Statements that they feel do not  
8 comply with the code or the regulations,  
9 provincial regulations?

10 THE WITNESS: Well --

11 THE COMMISSIONER: Do they criticize  
12 the Crown or do they simply comment on it and go  
13 on their way?

14 THE WITNESS: Well, most of them  
15 wouldn't comment on it, that's not my experience.  
16 But I will tell you that in a recent experience  
17 that I had with Justice Oliphant -- if Your  
18 Lordship's interested, I can tell you.

19 THE COMMISSIONER: Yes.

20 THE WITNESS: I was on a matter with  
21 Mr. Glazer, whose name has come up here.  
22 Mr. Glazer and I had Victim Impact Statements  
23 which both he and I thought might offend some of  
24 the rules or requirements. What we did was we put  
25 it before Justice Oliphant, and we said to him,

1 Justice Oliphant, each of us have some views about  
2 this report, Victim Impact Statement. Each of us  
3 have some opinion which might be what is  
4 appropriate and what isn't. You are an  
5 experienced trial judge. You can read this  
6 yourself. You can, you, on a regular basis,  
7 exclude statements, evidence, if it's not relevant  
8 you can exclude this, you won't take it into  
9 account, and we're comfortable with that. And I,  
10 quite frankly, like that process and would  
11 encourage that as opposed to editing.

12 THE COMMISSIONER: Well, isn't that  
13 the general practice? The judges will say  
14 nothing, they are not going to criticize the  
15 Crown, and simply either comment or not comment on  
16 it. Isn't that your experience?

17 THE WITNESS: They generally don't  
18 comment unless invited.

19 THE COMMISSIONER: So if they don't  
20 comment, why remove anything?

21 THE WITNESS: Well, they get it  
22 edited.

23 THE COMMISSIONER: I'm sorry?

24 THE WITNESS: They would get it edited  
25 already, unless there was no editing. That's what



1 I am saying to you, is that the editing would  
2 occur -- the document is presented to the Crown to  
3 review, see whether or not any editing should be  
4 done. And if there is editing, the report that  
5 the judge gets is the edited report, so the judge  
6 wouldn't see that which might be objectionable or  
7 isn't there. So what I'm saying to you is, I  
8 would prefer not to have to put lawyers into this  
9 situation, just give the judge the report  
10 unedited. And judges are experienced enough, in  
11 my view, to be able to read and exclude.

12 THE COMMISSIONER: Are you saying the  
13 practice in Manitoba is that the Crowns will edit  
14 their Victim Impact Statements?

15 THE WITNESS: Yes. And that was the  
16 purpose for which this Victims' Services worker  
17 sent me this report, was to review it and to edit  
18 it. And I believe, I don't know whether she  
19 testified to it or not, but she indicated to me  
20 that she thought that my editing was less than  
21 what others might have done.

22 BY MR. PACIOCCO:

23 Q She testified to that, sir.

24 A So, what I'm saying is that I believe  
25 that it puts Crown Attorneys in a very

1 uncomfortable position to have to do that, and  
2 it's better just to submit the report and let the  
3 judge, who can make these decisions, make them.

4 Q All right, sir. I just have a couple  
5 more points on this topic?

6 A Sure, all right.

7 Q One is that you wrote to Ms. Sveinson  
8 to explain to her that you were editing this  
9 statement. It is a document that has also been  
10 put into evidence, and I can put before you if  
11 you'd like to see it, but it's a letter in which  
12 you invite her to contact you to discuss the  
13 matter if she wants to. But you inform her by  
14 mail. And I'm just asking you, sir, whether you  
15 feel that really was an appropriate way to deal  
16 with what was going to be, in all certainty, a  
17 very sensitive issue?

18 A The only reason that I did that, sir,  
19 was because I wanted to send the report along with  
20 it -- with the -- like I wanted to send the report  
21 to her to show her what I had edited. And I could  
22 have called her in advance and said, I'm going to  
23 be delivering this to you. I just would only say  
24 that because the relationship was difficult, that  
25 it was easier just to send a letter, attach the

1 report, and invite her to contact me. Because  
2 even had I contacted her, I couldn't be sure that  
3 she would have had the copy, and I just wanted her  
4 to have a copy.

5 Q All right. And I was going to ask you  
6 if it was because the relationship was difficult?

7 A Yes.

8 Q And you did provide that. The last  
9 point with respect to the Victim Impact Statement,  
10 sir, is that you write in that letter that the  
11 guidelines exclude attaching photographs and  
12 newspaper articles. And we have looked at the  
13 guidelines, sir, and what they do is, they don't  
14 list photographs and articles as exclusions, but  
15 they have a provision in there where you should be  
16 giving them to the Crown Attorney rather than  
17 directly attaching them, to give the Crown  
18 Attorneys, I presume, some discretion. Is that  
19 your understanding of the rules as well?

20 A Well, yes, and I did get the  
21 photographs.

22 Q Yes.

23 A And I'm sure you'll be asking me about  
24 that, but I did get the photographs and I did deal  
25 with them.

1           Q     Yes.  In fact, you did give them to  
2     the judge?

3           A     I gave them to the judge, yes, and  
4     kept the originals for safekeeping.

5           Q     Yes.

6           A     And there was some confusion about  
7     that.  And I wrote back to the Sveinsons, I  
8     believe, both Mr. and Mrs., to let them know that  
9     I had given the photographs to the judge and that  
10    I have kept the originals for safekeeping, and I  
11    didn't want them to get lost.  And I would return  
12    them to them instantly when they asked for them.

13          Q     Because we have no indication, sir, of  
14    any conversation or communication in which you  
15    explain to Ms. Sveinson that you were going to be  
16    giving the photographs to the judge.  There was  
17    some confusion in their mind as to whether that  
18    had happened.

19          A     I'm sorry?

20          Q     And I'm just putting it to you,  
21    because I can indicate from the testimony of  
22    Victoria Sveinson, this was a very big issue for  
23    her.  And if you had made the decision to give  
24    them to the judge anyway, why not let her know  
25    that you were going to do that, as opposed to

1 simply telling her, the rules don't allow it?

2 A Sir, I believe that I did tell her  
3 that I was going to give them to the judge, and  
4 they were given to him in an envelope in open  
5 court. I didn't think that there was any  
6 misunderstanding that's what he was getting.

7 Q No, not at the time, sir, but a week  
8 had passed from the time you provided the letter,  
9 and there would have been that week of concern,  
10 and then ultimately it proved to be for not with  
11 respect to the photograph?

12 A Yes, the concern was for not  
13 ultimately and, obviously, could have been allayed  
14 immediately. I do agree with that, yes.

15 Q The only last point I want to make on  
16 the photos is that Chief Judge Wyant asked you if  
17 you wanted to make them exhibits. He had them, he  
18 says he's looked at them, and he invited you to  
19 make them exhibits and you chose not to. Was  
20 there a reason for that, sir?

21 A Well, I didn't think that anybody was  
22 asking for them to be made as exhibits. My  
23 understanding was that they wanted them displayed  
24 in the courtroom. And I didn't think that, even  
25 when I was being asked to have them on display, so

1 to speak, that anybody wanted them marked as  
2 exhibits, it was more just to have the photo  
3 there. So, therefore, because I didn't understand  
4 that there was a need to make these exhibits in  
5 the cause, but rather just in the room, I didn't  
6 do that.

7 Q Okay. And I just wanted to get your  
8 view on -- the reality is that some of the  
9 confusion in their mind about whether the  
10 photographs even got before the judge may have  
11 arisen from the decision not to file them. And  
12 whether you might have a sense that it just might  
13 have been cleaner and easier to file them?

14 A Probably would have been, but, you  
15 know, as I said, the judge did get them. I sent  
16 the copies to Wolson, everybody knew, at least I  
17 believed that it was clear that the judge was  
18 getting it. And if it wasn't made clear enough --

19 Q Okay, sir. I just want to put to you,  
20 you know that there have been fairly stinging  
21 criticisms from the families about the way that  
22 they perceive you to have dealt with them, and the  
23 Victims' Bill does require that they be treated  
24 with respect and courtesy and compassion. And I  
25 just wanted to give you an opportunity to indicate

1 to the Commissioner whether you feel that you did  
2 discharge that responsibility, sir?

3 A Sir, I try to conduct myself politely  
4 and respectfully with all people that I deal with.  
5 I did my best, I thought, in a very difficult  
6 circumstance, where it was hard for me to find  
7 some balance between the understanding of the  
8 dynamic that was going on, and it would not be in  
9 my nature to offend people or to treat them with  
10 disrespect. And if we each got off to a wrong  
11 foot, that would be the Tamans, the Sveinsons and  
12 myself, on various issues which ultimately  
13 affected the relationship, that's not  
14 inconceivable in matters of this kind. And  
15 notwithstanding getting off on the wrong foot,  
16 although this isn't the type of place where you  
17 would be calling people to testify about your  
18 manner, I have always maintained what I believe to  
19 be a more soft bedside manner, if I can call it  
20 that, even though that's not really a term used in  
21 our profession, more reserved for physicians, but  
22 that's how I would answer the question.

23 Q All right, sir. And I would have cut  
24 you loose at that point, but I have one small  
25 matter, and I promise to be out of here by

1 12:46:03. It has to do with an e-mail that went  
2 to Mr. Wolson that was shared with us during his  
3 testimony, and I know you were present at the  
4 time, with the radio broadcast issue?

5 A Yes.

6 Q And in that e-mail from Bangkok, you  
7 say:

8 "I will be back in the city Saturday  
9 evening. If you are planning any  
10 challenges or motions for bias and  
11 recusal, please let me know as soon as  
12 you can."

13 What prompted you to raise the issue of bias or  
14 recusal of this judge?

15 A I can tell you that I had heard as a  
16 rumour, as Mr. Wolson testified to, that this  
17 matter was going onto the radio, so to speak, that  
18 it was going to be live. And of course,  
19 Mr. Wolson said to me that this is nonsense and it  
20 would never occur. And from there, we had what I  
21 would call a lawyers like conversation, what would  
22 you do if this really did occur, would you do  
23 this, would you do that, I'm not sure, I don't  
24 know. It was more, it was banter, so to speak, as  
25 between ourselves on the issue of this topic. And



1     again, when I wrote to him, when what we  
2     understood to be a rumour to be now confirmed and  
3     there was reality to this, I was quizzing him now  
4     back to this conversation that we had, which we  
5     probably didn't put a lot of stock in at the time,  
6     which was, well, now that it is happening and you  
7     really do have to think about this, as opposed to  
8     where you were before, which is nonsense and it  
9     never would happen, are you going to do something  
10    about it?

11           Q     But why bias and recusal, sir, why did  
12    that come up?

13           A     Only because it was the judge who was  
14    doing this on his own, and whether or not he might  
15    ask the judge not to hear this case because he  
16    thought that maybe the judge was doing something  
17    inappropriate.  Nothing more than that.

18           Q     Okay, sir.  You're going to have to  
19    keep speaking for one minute, otherwise I will  
20    have cut you loose earlier than I promised my  
21    colleagues.

22           A     I'm sure that I could speak --

23                   THE COMMISSIONER:  You don't really  
24    have to.

25                   MR. PACIOCCO:  I will not joke again

1 with the witness, Mr. Commissioner. I am finished  
2 my questions.

3 THE COMMISSIONER: Yes.

4 MR. PACIOCCO: And thank you for your  
5 endurance.

6 THE COMMISSIONER: Thank you. We'll  
7 break for lunch, and we'll make sure to break at  
8 1:15 for coffee -- I'm sorry, 3:15 for coffee.

9 MR. PACIOCCO: And we are coming back,  
10 I'd imagine, at 2:00 o'clock, sir?

11 THE COMMISSIONER: Yes, an hour and 15  
12 minutes.

13 THE CLERK: All rise. This Commission  
14 of Inquiry is now in recess.

15 (Proceedings recessed at 12:46 p.m.  
16 and reconvened at 2:00 p.m.)

17 THE CLERK: All rise, please. This  
18 Commission of Inquiry is now reopened. Please be  
19 seated.

20 MR. PACIOCCO: Two documents that were  
21 referred to were not exhibited. I will clean  
22 those up. One of them is volume I, tab 58, which  
23 were the draft submissions prepared by Mr. Minuk  
24 for the August 22nd date. If that could be made  
25 what I understand will be exhibit 230.

1 (EXHIBIT 230: I-58, Zenk sentencing  
2 submission (typed notes) #1 - 9 pages)  
3 MR. PACIOCCO: The other document I  
4 would like to have exhibited was the prosectorial  
5 standards and ethics document that was referred  
6 to. There are two large volumes of documents that  
7 contain excerpts from various Professional  
8 Standards protocols and ethical manuals. They  
9 will be referred to by the expert witnesses, and I  
10 think both volumes should be filed as the same  
11 exhibit. Those documents I believe are tabs  
12 X-1.a, and X-1.b.

13 THE CLERK: It says X-1 and X-2.

14 MR. PACIOCCO: X-1 and X-2.

15 THE CLERK: Exhibit 231.

16 (EXHIBIT 231: X-1 and X-2, volumes of  
17 documents that contain excerpts from  
18 various Professional Standards  
19 protocols and ethical manuals)

20 MR. PACIOCCO: Both of those documents  
21 containing background information will be supplied  
22 to the experts and will be referred to in that  
23 context. I have no further questions at this  
24 time.

25 THE COMMISSIONER: Thank you.

1 BY MR. ZAZELENCHUK:

2 Q Mr. Commissioner, before I begin I  
3 apologize to you that I let my emotions get the  
4 better of me a couple of days ago, and I will  
5 endeavor to put a shorter leash on myself. My  
6 apologies, Mr. Commissioner.

7 Mr. Minuk, I'm going to try not to go  
8 over things that Mr. Paciocco went over, but there  
9 are a few points that I feel I have to go through.

10 Do you have your transcripts, sir?

11 A Yes, I do, Mr. Zazelenchuk.

12 Q Just on the point of the strength of  
13 your dangerous driving case --

14 A I didn't hear you, Mr. Zazelenchuk. I  
15 think you are speaking too close to the  
16 microphone, your voice may not carry.

17 Q Sorry. Just on the point of strength  
18 of your dangerous driving case -- can you hear me  
19 now?

20 A I can hear you, yes.

21 Q Okay. Can we go to page 78 of your  
22 transcript, sir?

23 A Yes, I have that in front of me, sir.

24 Q At line 22 you did tell Commission  
25 Counsel that you thought you could prove dangerous

1 driving; correct?

2 A That was my opinion, you know, had a  
3 reasonable chance of success, yes.

4 Q And more articulately at the top of  
5 page 80, again you said:

6 "I believe I have evidence which I can  
7 prove a case beyond a reasonable  
8 doubt. Will a conviction be entered  
9 because I have evidence? No."

10 You are simply stating that you believe you have a  
11 good case but you can't predict what will happen  
12 in a courtroom?

13 A Correct, I think that's a fair  
14 assessment always made by a lawyer.

15 Q I would agree with you, sir. If I  
16 could refer you to exhibit 9, which is your  
17 transcript, that's J-63?

18 A What page, Mr. Zazelenchuk?

19 Q 1712.

20 A Yes, I have that.

21 Q And at line 15 you are essentially  
22 saying the same thing.

23 "I -- I don't know and cannot predict  
24 the outcome of the case, but I can  
25 tell you that the Crown did believe,

1           does believe, always believed that we  
2           could prove dangerous driving.  
3           Wouldn't accept the guilty plea to it  
4           if we didn't think we could prove it.  
5           That in itself would be wrong."

6    Again, you thought you had a good case, but like  
7    with every other case, there is no guarantees?

8           A     There is no guarantees ever at trial.  
9    And I would add, Mr. Zazelenchuk, that the  
10   variables, as you might appreciate, in trials by  
11   judge alone, as opposed to trials by judge and  
12   jury, are also different.

13          Q     The variables are there all of the  
14   time, I agree with you.

15                 Now, you indicated to Commission  
16   Counsel that you didn't interview Kathy Beattie,  
17   Garth Shaw, Denise Bukowski, Rolland Fontaine and  
18   Edward Rosser, and I believe you indicated that  
19   you felt you didn't need to interview them because  
20   you had adequate statements from them. Was that  
21   the reason?

22          A     And more that I accepted what they  
23   said as being truthful.

24          Q     Okay. Did you ever consider that  
25   maybe the witnesses would have benefited from

1 being interviewed?

2 A Well, the witnesses would have  
3 benefited had the matter proceeded. But to the  
4 extent that -- when I'm making my assessment of  
5 the case itself, I would do that early on without  
6 the benefit of interviewing witnesses. I would  
7 read their statements. And in this particular  
8 case I believed, word for word, so to speak, when  
9 Mr. Shaw said that he believed the car was going  
10 80 kilometres an hour.

11 Q I appreciate that, sir, but as of  
12 Friday, July 13th, there hadn't been a firm  
13 resolution; correct?

14 A Correct, sir.

15 Q Okay. And just for your information,  
16 when these five people testified before this  
17 tribunal, four of them told us that they had never  
18 been in a courtroom before.

19 A Well, I'm sure that that would happen  
20 probably with the majority of civilian witnesses.

21 Q And do you not see a benefit in  
22 interviewing witnesses ahead of time to decrease  
23 their anxiety level and to help them be more  
24 comfortable in giving their evidence?

25 A I'm not going to dispute that it might

1 help. I think that no matter what the help is,  
2 the moment they sit in the witness box, that  
3 anxiety will return.

4 Q Okay. So you don't see a benefit in  
5 that, you don't think preparing your witness makes  
6 them a better witness when they give their  
7 evidence?

8 A I didn't say it wouldn't make them a  
9 better witness, Mr. Zazelenchuk. I said I would  
10 speak to them, I would speak to them before they  
11 testified because I would have the opportunity to  
12 do that at the courthouse, indicate to them that I  
13 would be taking them through their statements,  
14 which they would have had a copy to read, and  
15 spent what I believe would have been enough time  
16 to review their statements. In most cases their  
17 evidence was factual and not controversial and I  
18 would have lead them through it. And I don't  
19 think that it was evidence that was not  
20 problematic, that these witnesses needed to be  
21 prepped, and would be subject to intense  
22 cross-examination. But, yes, it would have made  
23 them comfortable.

24 Q I wonder if Madam clerk would be good  
25 enough to give you exhibit 77? And that,



1 Mr. Commissioner, doesn't appear in any book, it  
2 was one of the documents that came by later.

3 THE COMMISSIONER: That's Mr. Rosser's  
4 report?

5 MR. ZAZELENCHUK: Yes.

6 BY MR. ZAZELENCHUK:

7 Q You see, Mr. Minuk, Mr. Rosser gave  
8 evidence before this tribunal and was able to  
9 produce an ambulance patient care report that he  
10 filled out, and he filled it out later on in the  
11 morning of the 25th of February, 2005. And if we  
12 turn to the second page of that report, we've got  
13 a little narrative about a quarter of the way  
14 down?

15 A Yes, I see it. I'm reading it.

16 Q The last word in the third line, and  
17 going on to the fourth line,

18 "Patient smelled of liquor."

19 Do you see that?

20 A Yes, I was aware that he had made that  
21 observation.

22 Q But the point is that this report, you  
23 will agree with me, is a report made by a person  
24 who is obliged to make it; correct?

25 A Well, he is required to make it in the

1 course of his employment, yes.

2 Q And it is made very close to the time  
3 in question?

4 A Yes, sir.

5 Q And it is good evidence of alcohol  
6 consumption?

7 A The report itself, perhaps not. His  
8 record -- is that what this is -- but I would have  
9 called the man to testify, and I would have  
10 introduced his document for that purpose, but I  
11 would think that his oral testimony would be as  
12 good or better than this report. These would be  
13 his notes that he made at the time, and would be  
14 required to make. And I expect in the case of an  
15 ambulance attendant, or some other person of that  
16 sort, if they didn't remember the incident, that  
17 he would use his or her report to refresh their  
18 memory and to report on what they recalled at that  
19 time. So, yes, there would have been his  
20 observations that the man smelled of liquor, and  
21 from that, the inference would be that there was  
22 some consumption of liquor.

23 Q But the report itself is something  
24 done in the course of business, isn't it, you will  
25 agree with me on that?

1 A It is a business record, yes.

2 Q Sure. And that's admissible as  
3 evidence?

4 A Well, I would have filed it through  
5 the person. I'm not -- I'm not suggesting I  
6 wouldn't have. In fact, I believe that I actually  
7 asked -- I think it was Mr. Paciocco yesterday  
8 showed me a letter where I asked for this type of  
9 record because I intended to file it if the matter  
10 had gone to trial, that's why I was looking for  
11 it.

12 Q But you never did get it, did you,  
13 sir?

14 A Today, I can't recall, sir, if I did  
15 get it.

16 Q Okay. We can move on. Jason Woychuk,  
17 was -- if this matter had gone to Preliminary, you  
18 had no choice, you had to call Jason Woychuk;  
19 correct?

20 A Yes, sir.

21 Q Okay. And you had received, and we  
22 can go to it, you had received an opinion of then  
23 Mr. Abra with respect to the RCMP investigation?

24 A Yes, sir.

25 Q And I'm going to volume P-3.88.a at

1 this time, Mr. Commissioner, and it is page  
2 2856.6. It starts at 2856.1. If we could go to  
3 page 6 of that report, sir, it is 2856.6. Are you  
4 with me?

5 A I have the page 2856.6, which is page  
6 6 of the letter.

7 Q Yes. Okay. Mr. Abra has been,  
8 Mr. Abra as he then was, was known to you for many  
9 years?

10 A I know of Mr. Abra, yes.

11 Q Sure, he used to practice law four or  
12 five floors below you in the Trizec Building?

13 A That would be fair, sir.

14 Q And he is another person who does  
15 special prosecutions and has done for a long time  
16 for the Government of Manitoba?

17 A Yes, then, before his appointment.

18 Q Before his appointment, certainly.  
19 And you will not disagree with me that he was a  
20 fine litigator?

21 A No disagreement, sir.

22 Q Okay. Let's look at the third  
23 paragraph on page 6. And Mr. Abra, as he then  
24 was, is expressing his opinion that Woychuk would  
25 be a weak witness. Do you see that?

1           A     Yes, I do, sir.

2           Q     And I take it, you would agree with  
3     that opinion, that Mr. Woychuk would be a weak  
4     witness?

5           A     Well, I agree that he would be a weak  
6     witness, period.

7           Q     And will you agree with me that weak  
8     witnesses can be prepared to try and make their  
9     evidence better than worse?

10          A     I'm not sure that I'm following you  
11     with that, because Mr. Woychuk, or Constable  
12     Woychuk, whatever you prefer, would have to  
13     testify as to what it is that he did or did not  
14     do. He was a police officer reporting on his  
15     activities. And to the extent that I would have  
16     to examine him in chief, my obligation would be to  
17     have him detail his activities. I'm not sure that  
18     I could rehabilitate what it is that he did do or  
19     didn't do, because those are historical events  
20     which have occurred in the past that he would have  
21     to talk about.

22          Q     That's true. But can you not sit down  
23     with him, ask him why he did things, ask him to  
24     provide cogent explanations? Can that not be done  
25     with a witness?

1           A     Perhaps, he can offer up some  
2     explanation.  However, my view would be that this  
3     is a fellow who had significant problems, both in  
4     his initial activities as to how he recorded them,  
5     his reporting to Mr. Carter was one thing, and as  
6     I recall his interviews with the RCMP, there was  
7     somewhat of a recanting or stepping back from what  
8     it was that he had told Mr. Carter.  And he, on  
9     cross-examination, would have had a lot of  
10    difficulty that I'm not sure any degree of  
11    preparation could assist, because of what it was  
12    that he was doing and not doing.  People would be  
13    challenging him.  Mr. Wolson would challenge him  
14    on his activities.

15           Q     Sir, you didn't see any benefit in  
16    trying to prepare him to give his evidence?

17           A     I intended to meet with him.  I told  
18    you yesterday how it was that I planned to meet  
19    with him on Sunday, even though there was  
20    discussions between Mr. Wolson and I about  
21    settling the matter, that I had a personal issue  
22    which --

23           Q     I understand that.

24           A     And that I apologized to Mr. Carter  
25    for that.  I planned to meet him again.  And the

1 way that the matter, as I saw it, unfold, would be  
2 Winnipeg Police Service witnesses that could  
3 assist, if we could use that language, civilian  
4 witnesses, East St. Paul people, traffic  
5 reconstructionist, and I would have had Monday  
6 night, I would have had Tuesday night to meet with  
7 people and be ready for them.

8 Q Okay. While we are on Mr. Abra's  
9 opinion, he in his penultimate paragraph, pages 6  
10 to page 7, he indicates that based on his review  
11 of the East St. Paul Police Department reports,  
12 and the RCMP, he believed that there was still  
13 sufficient evidence to proceed with the charges  
14 against Mr. Harvey-Zenk. Do you see that there,  
15 sir?

16 A I do.

17 Q Yeah. And you will agree with me that  
18 this is a second opinion that you are getting from  
19 the closest thing that you have to a counterpart  
20 in the kind of work you do?

21 A Mr. Zazelenchuk, I can't tell you with  
22 any degree of certainty that Mr. Abra would have  
23 received anything other than the RCMP report. I  
24 don't know if he received the entire disclosure  
25 package that I did. And I do see that he does

1 reach this conclusion. And the only thing that I  
2 can say to you in reply is that I did contact  
3 Mr. Abra after he rendered his opinion and  
4 indicated to him that I disagreed with his  
5 opinion.

6 Q Fair enough. Perhaps this document  
7 could become an exhibit, Mr. Commissioner?

8 THE CLERK: Exhibit 232.

9 (EXHIBIT 232: P-3.88.a Letter - Abra  
10 to Kaplan - September 8/06)

11 BY MR. ZAZELENCHUK:

12 Q Now, just before we leave the subject  
13 of not interviewing witnesses, you also didn't  
14 interview Ken Graham; is that correct?

15 A Yes.

16 Q Okay. Madam clerk, if you would be  
17 good enough to show this witness exhibit 176, and  
18 that's at S-98.b. That's a document Mr. Wolson  
19 testified that the original was in his hand and it  
20 appears to be a witness list for the potentially  
21 upcoming preliminary inquiry; correct?

22 A Yes.

23 Q And Mr. Wolson indicated that, as a  
24 courtesy in the finest tradition of the bar, you  
25 provided him with this list as to the order in



1 which you intended to call the witnesses?

2 A Yes. Subject, of course, to their  
3 availability, but that was the plan.

4 Q Absolutely. So the plan was to start  
5 off with six City of Winnipeg Police witnesses?

6 A Yes.

7 Q And the plan was to start off with  
8 Mr. Humniski, or Sergeant Humniski?

9 A That order, sir, would be loose, if I  
10 could call it that. I don't think this would be a  
11 matter of when these officers would be available.  
12 And I would also consult with Mr. Wolson on any  
13 particular order he might want, it wouldn't have  
14 affected the telling of that part of the case.  
15 So, these were the people, the order --

16 Q I can appreciate that it is a work in  
17 progress.

18 A Yes.

19 Q And I have done a trial or two myself,  
20 they don't always go the way you plan them?

21 A Yes, I know that.

22 Q What I'm suggesting is this was the  
23 plan?

24 A Yes.

25 Q And it was subject to modification, as

1 is always the case?

2 A These were the witnesses that were  
3 intended to be called at the Preliminary.

4 Q Sure. And this was roughly the order?

5 A Certainly the order following, like  
6 the 17th, the 18th, the 19th, the 20th, that would  
7 be more fixed, the only loose day would be the  
8 16th.

9 Q And I'm curious, if you could tell me  
10 why would you start off with the City of Winnipeg  
11 Police officers?

12 A Because the evening began with police  
13 officers working, and it struck me that,  
14 chronologically, I might begin at a point in time  
15 in the history of the matter, which I saw as a  
16 starting point, which was where this person was,  
17 where he was working on that day, where he ended  
18 up, and how he came to be at a point in time that  
19 he got into his car, or truck as we know it to be,  
20 his motor vehicle. So it made sense to me to  
21 start in that historical fashion. And then move  
22 through to the civilians, who were at the scene,  
23 who were involved; then to the people who attended  
24 next, right after that. Then, because people  
25 attended before the East St. Paul Police, then

1 call them; and then the last person, the traffic  
2 reconstructionist. So it struck me it would  
3 unfold the telling of the story, or the evidence  
4 which tells the story of the incident, so to  
5 speak, in a logical fashion. That's where I was  
6 going.

7 Q During your direct evidence yesterday  
8 on at least three occasions, I will quote you my  
9 notes if you wish, but I don't think it is  
10 necessary, on at least three occasions you told us  
11 that you knew the City of Winnipeg Police officers  
12 were better defence witnesses than prosecution  
13 witnesses, or words to that effect?

14 A Yes, sir.

15 Q You recall that?

16 A Yes, sir.

17 Q Why would you open from weakness?

18 A Mr. Zazelenchuk, I knew that based on  
19 the absence of an identification by  
20 Ms. O'Halloran, even though police officers were  
21 at Branigan's, even though I wanted to put  
22 Mr. Zenk, if the matter proceeded, at Branigan's.  
23 So without an identification from the people who  
24 worked there, it struck me that the easiest way to  
25 do this would be to call, not all, but at least

1 some of the Winnipeg Police Service officers who  
2 could put him there.

3 I do appreciate there were risks to  
4 the prosecution in doing that. At least he would  
5 be there. The only people that could put him at  
6 Mr. Black's would be police officers. So to the  
7 extent that, in the telling of the narrative of  
8 what lead up to the time he left, I didn't see  
9 that there would be any means, if the matter  
10 proceeded, of letting the judge hearing the case  
11 understand how and where, or how it was that  
12 Mr. Zenk had spent the evening and early morning  
13 hours leading up to his getting into the car. I  
14 appreciate, as you say, that there were problems,  
15 but where else would this evidence come from?

16 Q Well, even if we accept that you want  
17 to put Mr. Zenk at Branigan's and at Sean Black's,  
18 why not just call one witness, why call six  
19 witnesses who are going to be nothing but trouble  
20 for you?

21 A Well, I may have made that decision as  
22 I went along, but to the extent that I needed to  
23 have what I thought was a sufficient number there,  
24 in the event that I needed to call them, I would  
25 have. I'm not telling you that, when I'm doing a

1 preliminary inquiry, that these are the people  
2 that I want there. This was the select group I  
3 thought that I could get the evidence out of, in  
4 questioning, that would get me that part of the  
5 narrative. Because they are all there, if I'm  
6 satisfied that the narrative is out, I may not  
7 need all of these people. But I can't just go  
8 there and not have these witnesses subpoenaed, in  
9 the event that there is some issue, and then start  
10 looking for them. It is better to have what I  
11 thought was maybe over the top, but that's it.

12 Q I wonder if Madam clerk would be good  
13 enough to give you exhibit 209? That's one of  
14 Mr. Paciocco's charts, Professional Standards Unit  
15 interviews on Derek Harvey-Zenk alcohol  
16 consumption.

17 A This is 209, sir.

18 Q 209, yes. I'm sorry, the witness has  
19 that.

20 Down on the bottom of page 1 we've got  
21 Mr. Paciocco's analysis of what the various  
22 witnesses were able to see, and down at the bottom  
23 of page 1 we have got Chris Humniski, and at  
24 Branigan's, "definitely not, didn't even see him."  
25 And at Sean Black's, "I didn't even notice him, I

1 really didn't even notice him." You see that, it  
2 is the last entry on page 1, sir?

3 A Yes.

4 Q Now, that's the excerpt from their  
5 police -- Professional Standards Unit interview,  
6 that's the relevant excerpt. And you will agree  
7 with me that Humniski wouldn't have been much  
8 help?

9 A I said to you, I may not have called  
10 him. At the end of the day, Mr. Zazelenchuk, I  
11 likely could have established all of this with  
12 Mr. Black alone.

13 Q Well, let's take a look at Mr. Black.  
14 He is on page 1, he is fourth from the top. And  
15 he says at Branigan's:

16 "But drinking, no, no idea."

17 And at his place, "no," in response to a question:

18 "Do you know how much Derek had to drink?"

19 Again, he wouldn't be very helpful other than  
20 placing him there?

21 A But he places him there.

22 Q Okay. So once he is placed there you  
23 don't need the other five?

24 A Places him there, I believe it was  
25 Mikawoz who had said he had a beer in front of

1 him. I am trying to remember this.

2 Q That was Michalik.

3 A Yes.

4 Q Page 2, fourth from the top, Ted  
5 Michalik:

6 "I couldn't see how many, how much he  
7 was drinking. I noticed he had a beer  
8 in front of him."

9 A But also below that Mikawoz said:

10 "No, actually, I believe it was a beer  
11 but I don't know."

12 So I thought that he too could speak to that  
13 issue.

14 Q Okay. One last question about exhibit  
15 176. I notice -- exhibit 176?

16 A The witness list, yes.

17 Q The witness list, I notice that  
18 Officer Pedersen, Glenda Pedersen isn't on the  
19 list. Is there some reason for that, sir?

20 A No particular reason, other than I  
21 would have thought that the people that I was  
22 calling would have been sufficient for the  
23 purposes of a committal. And I knew as well that  
24 Pedersen had not made any notes of this particular  
25 matter. It came up in the RCMP report later. She

1 would have been subjected to cross-examination by  
2 Mr. Wolson, and if at all to be called, she didn't  
3 need to be called at the preliminary, could have  
4 been called at the trial. Again, issues for  
5 committal -- issues at trial would be different,  
6 Mr. Zazelenchuk.

7 Q I'm aware of that, sir. It is just  
8 that it would occur to me that Officer Pedersen  
9 had some positive evidence of alcohol consumption  
10 and possibly impairment, and I would have thought  
11 she would have been a much more helpful witness  
12 than a second or third Winnipeg Police Service  
13 officer. I guess it is a judgment call, is that  
14 what you are telling me?

15 A I wasn't going to be calling witnesses  
16 who were going to be subjected to intense  
17 cross-examination over all of these issues, if I  
18 thought I could get a committal, believed I could  
19 get a committal on the witnesses that I had. That  
20 was my focus. I wasn't going to lay the  
21 foundation for Mr. Wolson to establish his defence  
22 on every witness.

23 Q Okay. We can move on, sir. I want to  
24 deal with your dealings with the Winnipeg Police  
25 Service Professional Standards Unit, if I might?



1 A Sure.

2 Q And I wonder if Madam clerk would be  
3 good enough to give you exhibit 137, which is  
4 Q-1.89.b.4, Mr. Commissioner, and page 2924.

5 THE COMMISSIONER: Page?

6 MR. ZAZELENCHUK: It begins at 2924,  
7 Mr. Commissioner.

8 THE COMMISSIONER: Thank you.

9 MR. ZAZELENCHUK: No, it begins at  
10 2908, I am sorry, but I want to go to page 2924.

11 BY MR. ZAZELENCHUK:

12 Q Now, these are -- are you at page  
13 2924, Mr. Minuk?

14 A Yes, 2924, page 55 at the top.

15 Q That's it. Now, you recall, it is not  
16 a memory test and I don't expect it to be, but you  
17 recall that early on in these proceedings you had  
18 some conversations with then Sergeant Poole?

19 A Yes.

20 Q And I think you logged that in your  
21 time records, we can go there, but I don't think  
22 it is necessary. This is Sergeant Poole's notes  
23 of a conversation that occurred on March the 1st  
24 of 2005. And down about the middle of the page,  
25 he writes:

1 "Marty observes that he does not have  
2 a copy of the report as yet but feels  
3 that charge..."

4 I think it is charge of, but I am not sure.

5 "...refusal, he is going to want to  
6 know where the suspect was and what he  
7 was doing if there is any possibility  
8 of learning details to assist the  
9 prosecution."

10 That's what he writes. Do you recall a  
11 conversation to that effect?

12 A I don't recall that conversation, but  
13 I wouldn't think that he would write it if we  
14 didn't have it.

15 Q In fact, if you look on your log  
16 sheet, which is exhibit 218, we see that March of  
17 '05 -- do you have that, sir?

18 A I believe you, Mr. Zazelenchuk, if you  
19 say there is an entry there that says I had a chat  
20 with him, I'm not denying that I had a chat with  
21 him.

22 Q Okay. If we turn the page -- it looks  
23 like it was a rather long conversation -- if we  
24 turn the page and go to the second half of the  
25 page, you see there is that break between the

1 notes, that empty line about halfway down?

2 A Yes.

3 Q Okay. If we go two lines down after  
4 that, this is Sergeant Poole writing about what  
5 you are saying.

6 "If he...",

7 meaning Bakema,

8 "...has no resources, then shall ask

9 for help of Winnipeg Police Service.

10 Willing to help, yes. Where, what,

11 who, how much, warrants."

12 Do you see that?

13 A The bottom -- I'm in the middle of the  
14 page.

15 Q Do you see that passage?

16 A "Advise Marty that Bakema was aware  
17 of this."

18 Is that the passage?

19 Q Yes -- no, the next paragraph, it  
20 begins, it begins -- I can't -- it looks like "who  
21 to compel." Do you see that?

22 A Yes.

23 Q And the next five lines?

24 A Okay, I'm reading.

25 Q Does that jog your memory at all, sir?

1 Do you recall having a conversation with Sergeant  
2 Poole about the desirability of establishing the  
3 history of Harvey-Zenk and that the Winnipeg  
4 Police Service should be assisting if East St.  
5 Paul doesn't have the manpower. Do you recall  
6 that conversation?

7 A I do recall that conversation about  
8 whether or not East St. Paul had the capacity to  
9 do this work.

10 Q Okay. And you knew that, early on in  
11 these proceedings, that Winnipeg would be doing  
12 some of the work; is that correct?

13 A Well, I knew that Winnipeg Police  
14 Service was contacted by East St. Paul Police, I  
15 believe originally to assist them in doing some of  
16 these interviews, so, yes, I was aware of that.  
17 As I understood it, East St. Paul was a very small  
18 detachment, maybe four or six members, that's it.  
19 They had to do their regular work, and just had so  
20 much to do with this investigation that they  
21 didn't think they had the resources to do it.

22 Q Okay. I will try and get to the  
23 point, sir. The point is that early on in this  
24 investigation, beginning of March, I suggest you  
25 were of the opinion that the drinking history of

1 Mr. Harvey-Zenk was something that would be very  
2 useful to you?

3 A Yes.

4 Q And these notes detail discussions  
5 that you are having with Staff Sergeant Poole  
6 about the desirability of obtaining these, this  
7 history?

8 A Well, therefore, to interview people  
9 that he was with and to try and find out what they  
10 could find out.

11 Q Okay. We are on the same page. If we  
12 could move on, just one last point on Mr. Poole's  
13 notes, if we can move on to page 2928. That's 60  
14 at the top. And are you there, sir?

15 A Yes.

16 Q The note is:

17 "Call from Marty Minuk regarding our  
18 investigation being front page news.  
19 Not impressed that some member appears  
20 to be talking to the media."

21 Now we heard from Sergeant Poole that you weren't  
22 happy that the media ran a story about this, is  
23 that correct?

24 A Whether I just expressed my  
25 dissatisfaction that they were in the middle of an

1 investigation, talking to the media about it, and  
2 I didn't think that it would be appropriate for  
3 the police to be investigating and for them to be  
4 speaking to the media about their investigation.  
5 It struck me that's not a helpful thing to be  
6 doing, unless they are needing the media to assist  
7 them in locating people.

8 Q Okay. Let's move on. Can we go to  
9 page 64 of the same exhibit, Mr. Commissioner.

10 A Yes.

11 Q Here we have Staff Sergeant Poole  
12 logging that he phoned you on March the 7th to  
13 inform you that the Branigan's aspect starts  
14 today. That's in the fourth line down, do you see  
15 that?

16 A Yes.

17 Q And do you recall being kept in  
18 contact, keeping in contact with Sergeant Poole  
19 about the investigation that was going on?

20 A To the extent that he was informing me  
21 about how long it was taking, yes, and what they  
22 were doing, yes.

23 Q Okay.

24 A At the end of the day, I'm hoping that  
25 they are doing their work and that he is just

1 reporting in to me.

2 Q Okay. Can we go to exhibit 218,  
3 please, which is your time log?

4 A Yes, sir.

5 Q And in fairness, it is not really a  
6 time log, it is your statement of accounts, isn't  
7 it?

8 A Right.

9 Q And I notice that from time to time  
10 there are initials other than M.S.M. that appear,  
11 and that would be one of your juniors or one of  
12 your associates assisting you on the file?

13 A Yes.

14 Q So the formula is that you send in one  
15 bill, whenever you send it, and if somebody else,  
16 if you second somebody else in the firm to work on  
17 the file, that goes on the same bill?

18 A It gets a number, anybody that does  
19 anything with that file gets number, they log  
20 their time, it gets logged into the computer  
21 program, and it is entered. It is entered by  
22 different assistants at different times, that's  
23 how it is.

24 Q I appreciate that, sir. But my  
25 question was when you were sending bills to the

1 Government of Manitoba, if you and one of your  
2 associates worked on the file, you wouldn't send  
3 in two bills, you would send in one bill and it  
4 would be itemized the way it is here?

5 A Yes, and that's the form they  
6 requested of us.

7 Q Yeah, and I just wanted to confirm  
8 that.

9 A That's how we were supposed to do it,  
10 unless something has changed.

11 Q And were you ever -- we heard from, I  
12 can't remember if it was Inspector Poole or  
13 Sergeant Girard, we heard that some of the PSU  
14 investigation was sensitive to issues like  
15 overtime and budget constraints. In your work as  
16 a special prosecutor for the Government of  
17 Manitoba, have they ever put constraints on your  
18 prep time or anything like that?

19 A Well, I know that it didn't happen  
20 because much has been made of it, but I planned to  
21 meet Mr. Woychuk on Sunday morning at  
22 9:00 o'clock, so it doesn't really matter to me  
23 when it is. I -- there is no constraints on my  
24 time or when I work.

25 Q Maybe you didn't understand my



1 question, sir.

2 A Was it overtime issues or --

3 Q No, no. I will come at it from  
4 another aspect. Many, many years ago, when you  
5 and I both did Legal Aid work, there is maximum  
6 preparation time?

7 A There is no such -- there isn't that,  
8 no.

9 Q And that's what I wanted to get at.

10 A Provincial Government of Manitoba, no.

11 Q Thank you. If we could move on to  
12 document R-1.91.3, and that's page 3112,  
13 Mr. Commissioner. I don't think that document has  
14 been entered as yet.

15 Now, you don't have that document,  
16 sir. Madam clerk is handing it to you.

17 Now, that's a four-page document, the  
18 first page is irrelevant for our purposes, it is  
19 an email to Mr. Wolson and Mr. Weinstein. The  
20 second page is a letter to Mr. Wolson saying:

21 "Enclosed please find a disclosure  
22 list along with copies of all  
23 documents indicated therein. Also  
24 enclosed is a CD containing the  
25 witness statements."

1 Do you see that, sir?

2 A Yes.

3 Q And then we have the disclosure  
4 inventory and it goes on for two pages?

5 A Yes.

6 Q And it has got a variety of documents,  
7 it has got the appearance notice, various reports,  
8 et cetera; correct?

9 A Yes.

10 Q Okay. Now, I just want to go through  
11 a few of the documents with you. Entry number 4  
12 is a series of police reports from East St. Paul,  
13 and I totaled up the pages, it comes to 12?

14 A Yes, sir.

15 Q Entry number 8 is a handwritten  
16 statement, and it is five pages; correct?

17 A Yes, sir.

18 Q We turn the page and go to number 22,  
19 we've got 12 pages of notes?

20 A At that particular time, yes.

21 Q 23 is four pages of notes?

22 A Yes, sir.

23 Q 24 is three pages of notes?

24 A Yes, sir.

25 Q 25 is seven pages of notes?

1 A Yes, sir.

2 Q 26 is six pages of notes?

3 A Yes, sir.

4 Q And 27 is a report of Sergeant Girard,  
5 it is 22 pages long?

6 A Yes, sir.

7 Q And 29 -- sorry, 28, is a report of  
8 Roxburgh and it is five pages long?

9 A Yes, sir.

10 Q Well, I added those pages up and they  
11 come to 74 pages. Will you take issue with that,  
12 sir?

13 A No.

14 Q Okay.

15 A Other than to add them, but I believe  
16 you.

17 Q Okay. And the CD ROM contained 26  
18 interviews?

19 A Yes.

20 Q And I don't know if you are computer  
21 literate or not, I'm not, and if I got a CD ROM,  
22 I would give it to my secretary and say, type it  
23 up.

24 A I do listen to the statements on my  
25 computer, so I would listen to them in real time,

1 which is what they are, as opposed to -- but I do  
2 get requests from counsel of your --

3 Q Luddite?

4 A No, I don't say that disrespectful,  
5 but counsel like yourself who either aren't  
6 familiar, or are going try to get these  
7 transcribed.

8 Q Here is the point, sir. Commission  
9 Counsel, I believe, had the CD ROM transcribed,  
10 and I counted up the pages, and I can show you to  
11 them, they are here, they are in F-2, 2 and 3.  
12 And there is about 488 pages of interviews?

13 A Yes, sir.

14 Q You will accept that?

15 A I don't disbelieve you.

16 Q I can show you one so you can see how  
17 big it is.

18 A No, no, I believe you.

19 Q You will agree with me that the  
20 documents that I just referred to, the 74 pages of  
21 notes and reports, and the 488 pages of  
22 interviews, that's a substantial amount of  
23 documents?

24 A Yes. And as I look at the date, this  
25 seems to be the first of the disclosure that was

1 sent out to Mr. Wolson.

2 Q That's correct.

3 A The initial package.

4 Q And you will agree with me, sir, that  
5 assimilating, digesting those documents, is not a  
6 small matter. We can argue about whether it is  
7 two days work or four days work, or three days  
8 work, but you will agree with me that it is a  
9 substantial amount of work, isn't it?

10 A I don't think that reading this  
11 material would take that long, that is the first  
12 batch of material. And the longest time,  
13 unfortunately, because there were no transcripts  
14 of the statements, would be sitting with my  
15 computer and taking it with me, and keeping the  
16 disk in, and listening to these statements, that  
17 would take longer than reading the written  
18 material.

19 Q Sure, maybe. And you would want to  
20 take notes or listen to them a second time?

21 A Well, not necessarily on the first  
22 time, first read through.

23 Q You put in your log, and we will go to  
24 that in a moment, sir, you put in your log that it  
25 took you an hour to prepare the disclosure list?

1           A     Yes, that would be fair, because I  
2     have the package, I'm counting the pages, I'm not  
3     reading the material necessarily, I'm just  
4     assembling it, copying it, getting it all ready,  
5     making sure that I described it properly.

6           Q     Let's go to exhibit 218, sir, that's  
7     your time log?

8           A     Yes.

9           Q     Let's go to the third page, which is  
10    3401.30?

11          A     Yes.

12          Q     And we've got an entry there, "3, May  
13    '05, prepared disclosure inventory, one hour"?

14          A     Yes.

15          Q     The entry prior to that is "review  
16    written report from WPS, PSU, discussion with R.  
17    Wolson, attended court for remand"?

18          A     Yes, okay.

19          Q     And that's 1.6 hours?

20          A     Yes.

21          Q     Now, you will agree with me that in  
22    2.6 hours, you are not going to go through that CD  
23    and those 74 pages of notes in any kind of  
24    reasonable detail?

25          A     Well, Mr. Zazelenchuk, I wouldn't have

1 listened to all of the statements, but certainly  
2 in reading the report of the PSU, I would have had  
3 the summary and knew what it was that I was going  
4 to be listening to, which was, over time, a number  
5 of statements which would not, as you've described  
6 to me earlier, statements that were helpful to the  
7 police.

8 Q Sorry?

9 A But in the reading of the material,  
10 that is -- I don't know how much of this time was  
11 broken up.

12 Q That's what is causing me a problem,  
13 sir, and I'm going to try and confront it head on.  
14 If we look at the May 3, '05 entry, okay, prepare  
15 disclosure entry?

16 A Yeah.

17 Q And then we start going down there,  
18 and we turn the page, and we turn the page again,  
19 and we turn the page again until we get to page  
20 3401.33, at which point we are in December. I  
21 don't know when, there is no entry here for any  
22 kind of substantial work on those documents, on  
23 your part. Do you see that, sir?

24 A Yes, I see that. And I'm not sure  
25 what you are suggesting, Mr. Zazelenchuk, but I

1 think you are suggesting to me that while this  
2 matter is on remand, and while disclosure is  
3 coming, I'm not constantly working on this file.  
4 And --

5 Q That's not what I'm suggesting to you,  
6 sir, but you can finish.

7 A Yes, it doesn't show that I'm working  
8 on this file on these records.

9 Q What I'm suggesting to you, sir, is  
10 you are the special prosecutor charged with  
11 prosecuting this case.

12 A Yes.

13 Q You have been given a substantial  
14 amount of information. You have quite properly  
15 skimmed through that information very quickly, and  
16 forwarded it on to defence counsel, as you are  
17 legally obliged to do. But what I can't see in  
18 your time records is when you sat down with this  
19 material, or when you had your junior sit down  
20 with this material and say, I want to take a look  
21 at this and I want to see how good my case is.

22 A Well, Mr. Zazelenchuk, I can tell you  
23 that -- well, the only explanation I would have  
24 for you is maybe I didn't charge enough or record  
25 enough time. But I'm not sure that I understand



1 what the question is, that we all have a lot of  
2 files, we take them in, we prepare for them, we  
3 read through them. I hand out my disclosure. I'm  
4 not necessarily working on them all the time. And  
5 I manage my time, what I believe to be  
6 effectively, and begin to move files in and out of  
7 my preparation stage, as they get closer or  
8 further away from cases that I'm working on. My  
9 practice, as you know, is a litigation practice.  
10 I'm in court virtually every day or at least --

11 Q Often?

12 A We go back along way, you know that.  
13 It is a matter of moving in and out files as they  
14 need to be moved in and out.

15 Q You know, every window in my house is  
16 broken, so I'm really reluctant to throw stones.  
17 I can appreciate that when you get a big brief,  
18 that you may not get to it immediately, that you  
19 may not get to it for a couple of weeks, that you  
20 may not get to it for three or four weeks. You  
21 have a luxury I don't, you have some juniors  
22 running around your firm that you can draw on, and  
23 I don't. I'm simply concerned that what I see  
24 here -- and I would like you to clear it up for  
25 me, because I don't want to hurl an accusation.

1           A     We can go through it, Mr. Zazelenchuk.  
2     If we take a look at these police notes, which  
3     amount to about 12 pages. The notice of intention  
4     to seek greater punishment is about --

5           Q     That wasn't one of the pages, sir. I  
6     didn't refer that in the 74 pages.

7           A     The handwritten and the typewritten  
8     statement of Garth Shaw is the same document.

9           THE COMMISSIONER: Excuse me, what are  
10    you looking at?

11          THE WITNESS: I'm looking at the  
12    disclosure that he has presented to me. It is the  
13    same document. One is a handwritten version, one  
14    is a typed version.

15          Photographs, these are notices of  
16    forfeiture, disqualification, seizing of vehicles,  
17    licence plate information, the Environment Canada  
18    reports. These are single page documents that I  
19    see daily that wouldn't require me to spend a lot  
20    of time on.

21    BY MR. ZAZELENCHUK:

22          Q     Sir, when I went through the documents  
23    that I added up for the 74 pages of notes and  
24    reports, I was careful, I didn't include vehicle  
25    seizures or anything like that in there. And we

1 can go over that again. And what I'm really  
2 concerned about is the fact that you get a CD ROM,  
3 which translates into almost 500 pages of  
4 interview, 488 by my count. And this is an  
5 important aspect of the case. And we can go  
6 through the disclosure list, but I would prefer  
7 you to go through exhibit 218 and tell me when you  
8 did this?

9 A Well, Mr. Zazelenchuk, I can't tell  
10 you other than the fact --

11 THE COMMISSIONER: Just a second.  
12 Give your best explanation as to why your docket  
13 doesn't show that you spent a lot of time on this  
14 file, and let's get on it with.

15 THE WITNESS: I don't know why. I  
16 know that I carried around the CD of the  
17 statements with me and I would listen to them at  
18 various times at home, and if I didn't record the  
19 time, I didn't record the time.

20 MR. ZAZELENCHUK: I'm going to move on  
21 Mr. Commissioner, there is only one more point I  
22 want to make.

23 BY MR. ZAZELENCHUK:

24 Q In the statements, one of the things  
25 that became obvious to more than one person,

1 myself included, when we went through the  
2 statements, is that two of the officers appeared  
3 to have receipts. Are you aware of that, sir?

4 A Yes.

5 Q And would you not agree with me that  
6 those receipts could have been extremely helpful  
7 in obtaining Branigan's records which, in fact,  
8 were never obtained until Commission Counsel did?

9 A Yes.

10 Q And will you agree with me that if you  
11 had pursued the matter of those receipts at a very  
12 early stage in April -- or sorry, not April, in  
13 May or June or July, or even August of 2005, there  
14 might have been some good evidence there?

15 A I don't recall when I wrote to Carter  
16 about them. I did write to him about this. I  
17 don't recall when it was.

18 Q It was towards the end of '05 or the  
19 beginning of '06.

20 A I don't recall.

21 MR. ZAZELENCHUK: Those are my  
22 questions, Mr. Commissioner.

23 THE COMMISSIONER: Need help,  
24 Mr. McDonald?

25 MR. McDONALD: I'm trying to keep the

1 load to a minimum, Mr. Commissioner.

2 THE COMMISSIONER: Yes, I would be  
3 most grateful if you did.

4 MR. McDONALD: I appreciate your  
5 observation and I will do my best.

6 Let me adjust this so I'm not heard to  
7 be shouting. Is that fine? Can people hear me at  
8 this distance?

9 THE COMMISSIONER: I can hear you and  
10 that's really all that's important.

11 MR. McDONALD: Thank you.

12 BY MR. McDONALD:

13 Q Mr. Minuk, I hope to be brief. There  
14 are some points, however, I would like to cover  
15 with you.

16 A Mr. McDonald.

17 Q I would like you to have the clerk put  
18 before you, please, exhibit 217, which is a  
19 document to which Mr. Paciocco referred you to, it  
20 is at volume G, page 1385?

21 A I have a copy of --

22 Q Tab G-45.

23 A I do. I have the excerpt 217.

24 Q And that, sir, is the conditional  
25 sentences policy directive from the Province of

1 Manitoba?

2 A Yes, sir.

3 Q And you will recall that Mr. Paciocco  
4 questioned you in significant detail about the  
5 contents of that document, your understanding of  
6 it, and whether you felt obliged to follow it?

7 A Yes, sir.

8 Q Mr. Paciocco read numerous sections of  
9 the document to you verbatim; is that correct?

10 A Yes, sir.

11 Q Including many quotes from the first  
12 page, and some quotes from the second page, do you  
13 recall that?

14 A Yes, sir.

15 Q You see the bullet points on the  
16 left-hand column at the top half of page 2?

17 A Yes, sir.

18 Q He read to you several of those, is  
19 that correct?

20 A Yes, sir.

21 Q What is the last bullet point?

22 A Do you want me to read it, sir?

23 Q Yes, would you read that into the  
24 record please?

25 A It says:

1 "A Crown Attorney is not required to  
2 argue that a conditional sentence is  
3 inappropriate in the face of clear  
4 authority to the contrary."

5 Q And in asking you whether you complied  
6 with that policy directive, do you agree that  
7 Mr. Paciocco did not read that bullet point to  
8 you?

9 A I don't recall that it was read.

10 Q Is that a significant point from your  
11 perspective, Mr. Minuk?

12 A It would suggest to me that if my  
13 research on the law in Manitoba was, for example,  
14 in the case of dangerous driving causing death, or  
15 impaired driving causing death, that the sentence  
16 that was to be considered, depending on the facts,  
17 was a conditional sentence, that even though what  
18 Mr. Paciocco reminded me of yesterday, which is  
19 that the cases of grievous or bodily harm or death  
20 might be ones where a conditional sentence should  
21 be argued for, it would at least support the idea  
22 that the Court of Appeal ruled otherwise and there  
23 was authority for it, that a Crown Attorney would  
24 not be in violation if they follow their court  
25 authority.

1           Q     And that's, in fact, what you were  
2     saying you did in this case.  You felt bound by  
3     Manitoba precedent that the conditional sentence  
4     that you were jointly recommending was within the  
5     range recommended or established by the Court of  
6     Appeal?

7           A     That was the result of my research,  
8     yes.

9           Q     So that bullet point then is an  
10    important part of that overall policy document,  
11    you would agree with that?

12          A     Yes, sir.

13          Q     Thank you.  Now, you've given a lot of  
14    testimony in this case, and I'm going to try and  
15    sum some of it as fairly and briefly as I can in  
16    the hope that we can get through these  
17    proceedings.  I want to focus on the opinion that  
18    you expressed about the destiny of the  
19    alcohol-related charges.  You are with me?

20          A     Yes.

21          Q     You testified, if I understood your  
22    evidence correctly, that you were of the view that  
23    the alcohol-related charges were destined to fail  
24    because of the conduct of the police officers at  
25    the scene.  Would you agree with me?



1           A     If I said that, I wasn't talking  
2 necessarily about their conduct, I'm talking about  
3 the investigation.

4           Q     Yes, what they did or did not do at  
5 the scene. My point is at the scene is what you  
6 were talking about?

7           A     Yes, that's where it started, at the  
8 scene, yes.

9           Q     And you are not suggesting that  
10 anything that then Sergeant Carter did or did not  
11 do violated any of Mr. Zenk's charter rights;  
12 would you agree with that?

13          A     Not at that point, no.

14          Q     Well, in fact, would you agree with  
15 me, sir, that nothing that Sergeant Carter did  
16 violated any of Mr. Zenk's charter rights, that  
17 any charter rights with which you had concern were  
18 confined to things that occurred or did not occur  
19 at the scene?

20          A     Yes, it didn't appear that he had done  
21 so.

22          Q     Thank you. I'm trying to sort some of  
23 the notes, Mr. Commissioner, many of the points  
24 have been covered. My apologies, but I just  
25 require a short minute.

1                   Now, I would like to talk to you  
2   briefly, Mr. Minuk, about the blood/breath issue,  
3   it has been canvassed with you. As you know,  
4   Sergeant Carter, I think you have been made aware,  
5   Sergeant Carter testified in these proceedings  
6   that he is satisfied that he brought the error in  
7   his notes to your attention at some point in time,  
8   although he couldn't be precise as to when. He  
9   made reference to a note that he made on the file  
10  folder where he said that, "I advised Prosecutor  
11  Minuk of the blood/breath issue." You have heard  
12  that evidence?

13                 A    Yes, sir.

14                 Q    And if I understood your evidence  
15  correctly, sir, you did acknowledge that you  
16  recalled having discussions like that with  
17  Sergeant Carter, but like him, you couldn't be  
18  sure exactly when it was?

19                 A    Yes. My best effort to recall would  
20  be that it would have been at the time that we met  
21  to discuss the Woychuk revelation, if we can call  
22  it that.

23                 Q    Your best recollection, and although  
24  you have no note, as you have confirmed, is that  
25  it may have occurred when you met with Sergeant

1 Carter on February 24th, when he made the  
2 disclosure to you?

3 A Of?

4 Q 2006?

5 A That's with Woychuk, yes.

6 Q But made the disclosure about  
7 Woychuk -- sorry, that was April the 21st?

8 A Yes.

9 Q And Sergeant Carter's evidence was  
10 that he thought it was at the first meeting that  
11 he had with you, which would have been on February  
12 the 24th, 2006?

13 A I don't think so.

14 Q But, again, you don't have any notes  
15 of that, sir?

16 A No.

17 Q And you are not saying it didn't  
18 happen, you are just saying, your best  
19 recollection is that it occurred at the April 21st  
20 meeting?

21 A Yes. And had I heard it then,  
22 Mr. McDonald, my practice would have been to ask  
23 him to provide a supplementary report, which I  
24 would have needed to disclose to Mr. Wolson. And  
25 the fact that so much time had passed in the

1     intervening period, it strikes me that not having  
2     received that, I didn't likely get it on that  
3     particular day and it probably came on the day of  
4     the Woychuk --

5             Q     All right. In any event, you would  
6     agree with me, sir, that the only documents that  
7     you received from the East St. Paul Police  
8     Department, as part of the police disclosure, that  
9     contained reference to the blood demand, was the  
10    three places that it appears, as authored by  
11    Sergeant Carter, twice in his notes, once in his  
12    rough notes, once in his final notes, and once in  
13    his narrative?

14            A     Yes, I didn't get a copy of the front  
15    page of --

16            Q     No, I understand that was recently  
17    disclosed as part of this inquiry.

18            A     Yes. I only had what was disclosed.

19            Q     My point is this, sir, you will agree  
20    with me that by the time you undertook resolution  
21    discussions with Mr. Wolson, in July of 2007,  
22    there was no doubt in your mind that it was  
23    Sergeant Carter's position that the demand that he  
24    administered at 8:21 a.m. was a breath demand and  
25    not a blood demand?

1           A     I expected that he would testify to  
2     that.

3           Q     Yes?

4           A     However, as I explained to  
5     Mr. Paciocco, I expected that he would be  
6     intensely cross-examined on that issue.

7           Q     I appreciate that, sir. I just want  
8     you to confirm for the record that you were  
9     acutely aware, by the time you undertook  
10    resolution negotiations and discussions with  
11    Mr. Wolson, that Sergeant Carter would testify  
12    that the initial demand was a breath demand and  
13    not a blood demand and that he had committed  
14    errors in his notes. Is that fair?

15          A     Yes, he would testify to the error.

16          Q     Yes. And you would also agree with me  
17    that at no time during your resolution discussions  
18    with Mr. Wolson, did he raise with you the issue  
19    that he felt that a blood demand may present a  
20    problem for the prosecution?

21          A     Well, Mr. Wolson didn't discuss with  
22    me the areas of attack on the prosecution, other  
23    than to generally indicate the areas. He didn't  
24    raise, didn't unfold his hand on specifics, he  
25    talked in generalities. And the generalities --

1 and reminded me that I had a bad case on alcohol.  
2 And as we know, I agreed with him on that. So  
3 Mr. Wolson was very close to the vest on what it  
4 was that he was sitting on.

5 Q So, you will agree with me then that  
6 he did not raise with you, during the resolution  
7 discussions, the fact that he felt that you had a  
8 bad case because a blood demand had been issued?  
9 You would agree with that?

10 A No, we didn't speak about that.

11 Q All right. Thank you. And of course,  
12 you did take some comfort from the fact that there  
13 was corroboration in writing from Woychuk, in his  
14 notes, as to the fact that a breath demand was the  
15 first demand to be administered? It was there,  
16 you acknowledge that?

17 A It was there.

18 Q I understand the vulnerability issue,  
19 sir, I just want confirmation that you were aware  
20 that it was there in writing?

21 A It was there.

22 Q Yes. Now, you were present yesterday  
23 when Mr. Wolson testified, correct?

24 A The day before, yes.

25 Q Sorry, the day before, my apologies.

1 A No problem.

2 Q You heard him outline what he  
3 perceived to be problems with the alcohol-related  
4 charges?

5 A Yes, sir.

6 Q You heard him, I believe, make  
7 reference to the fact that he felt that one of the  
8 mistakes at the scene was that Woychuk could have  
9 made a demand for a roadside screening device  
10 test. Do you recall him saying that?

11 A Yes.

12 Q Again, I preface my comments by the  
13 fact that I'm not a criminal lawyer, and I'm  
14 learning this stuff as it goes, and it can be  
15 complicated, I will be the first to acknowledge  
16 that. But my understanding of the pre-conditions  
17 for a roadside screening test are that the police  
18 officer must either find the person driving,  
19 actually driving a car or a vehicle, under that  
20 circumstance, if he suspects alcohol is in the  
21 body, he can make a roadside screening demand. Is  
22 that right?

23 A Well, I don't necessarily -- knew that  
24 he was driving a vehicle?

25 Q No. As I read the code, sir, the

1 roadside screening demand can be made by a police  
2 officer in two situations. One where he finds a  
3 person actually driving a vehicle and suspects  
4 there is alcohol in the person's body?

5 A Yes, that's one.

6 Q That is one, and the other one is if  
7 he finds the person in the care, custody and  
8 control of the vehicle. That's the other  
9 condition. Is that consistent with your  
10 understanding?

11 A More or less verbatim reading of the  
12 section.

13 Q All right. So I'm right then?

14 A As I recall it, yes.

15 Q Okay. Thank you. You would agree  
16 with me that on the facts presented to you, given  
17 that Woychuk never saw Zenk driving the car, never  
18 came across him driving the car, and never came  
19 across him in possession, custody or care of a  
20 vehicle, he could not have made a roadside  
21 screening device demand on those facts, could he?

22 A I don't agree with that. I think he  
23 had sufficient information before him that there  
24 was one person who was trapped in a vehicle, who  
25 was deceased, there was another person in front, a



1 female who was driving in the front car who was  
2 being taken away, or being attended to by  
3 ambulance people. And there was a single  
4 individual who all the inferences would have  
5 suggested he was the person driving that vehicle,  
6 and not only driving it, but in care and control  
7 of that vehicle, and would have had reasonable  
8 grounds to demand from him -- if he had, once he  
9 had smelled the alcohol, enough grounds to make  
10 the demand for him if he did not believe that he  
11 was impaired. And I think that Woychuk could have  
12 done that.

13 Q But you are aware, sir, that Woychuk's  
14 evidence is that he only smelled the alcohol on  
15 his way back to the station, transporting  
16 Harvey-Zenk back to the station, you are aware of  
17 that?

18 A Nonetheless, I believe that he could  
19 have made the demand. Because if he didn't, he  
20 then would have smelled the alcohol, would have  
21 believed him to be the driver, and if he didn't  
22 have reasonable and probable grounds to make the  
23 breath demand, that he could have gotten it had he  
24 asked him -- I now smell the alcohol, I'm going to  
25 make a roadside demand. The issue, whether or not

1 it would have been admissible or not, I'm not here  
2 to argue with, but I think that there was a  
3 sufficient basis for him to make the demand.

4 Q Perhaps, I should have made my  
5 questions clearer, and for that I apologize.  
6 Would you agree with me that on the facts, as I've  
7 presented them to you, given Woychuk's knowledge  
8 that he could not have made a demand, the results  
9 of which would have been admissible in the case of  
10 a refusal, grounds for conviction for refusing a  
11 roadside screening demand?

12 A I would have argued that he had the  
13 grounds to do it and that it should be admissible,  
14 and that he was not in error in making that  
15 demand.

16 THE COMMISSIONER: What were his  
17 grounds, if he didn't suspect that he had alcohol  
18 until he was driving him on the way to the  
19 station? He had no suspicion of alcohol, as I  
20 recall, or maybe I'm wrong on that, until he  
21 started to drive him, and he was in his vehicle.  
22 Is that the point that you are trying to make?

23 MR. McDONALD: That's the point I'm  
24 trying to make, Mr. Commissioner, that when  
25 Mr. Wolson suggested that he thought one of the

1 mistakes made was Woychuk's failure to make a  
2 demand for a roadside screening test, my point was  
3 simply this, and again I apologize for my  
4 inexperience in the criminal law. As I read the  
5 code, that can only be done if Woychuk found him  
6 actually driving the vehicle, or in the care,  
7 custody or control of the vehicle. And I think  
8 Mr. Minuk agreed with the conditions precedent,  
9 but still says he would have argued, had such a  
10 demand been made, it would be justified under the  
11 circumstances and admissible. I think that sums  
12 up my exchange with Mr. Minuk on that. Is that  
13 fair, Mr. Minuk?

14 THE WITNESS: Yes. Clearly didn't see  
15 him driving, they arrived after the fact, and if  
16 they -- I believe they could have made the demand  
17 of him.

18 BY MR. McDONALD:

19 Q That's your opinion?

20 A I believe that's going to be the case  
21 often perhaps in collisions that happen where  
22 police officers arrive at the scene, believe the  
23 person to be driving the car, smell alcohol, don't  
24 believe necessarily that they are impaired, and  
25 make the demand. I don't think that's unusual.

1           Q     So what you are saying then, in your  
2     experience, is there is no need for strict  
3     compliance with the requirements of the code  
4     provision? Is that what you are saying?

5           A     I'm saying to you that the inference  
6     could have been drawn by these officers that he  
7     was the person driving the vehicle.

8           Q     But Woychuk's evidence was that he  
9     arrived on the scene, he parked there, he was  
10    there for a few minutes, and Mr. Zenk was put in  
11    the back of his car. He never testified that he  
12    saw Zenk driving a vehicle, or in the care,  
13    custody or control of any vehicle at all.

14          A     I don't think any of the officers  
15    would have seen him driving the vehicle at the  
16    time of the accident.

17          Q     I understand that. And that condition  
18    then for the roadside screening demand was not  
19    available to anybody, was it?

20          A     I don't agree with that interpretation  
21    of the section, and I believe that they would have  
22    been well within their authority to make the  
23    demand.

24          Q     That presupposes that they had a  
25    roadside screening device available to them?

1 A That I don't know at all.

2 Q Did you make any inquiries to  
3 determine -- I will just finish, please. Did you  
4 make any inquiries at all to determine whether the  
5 East St. Paul Police force had available to them a  
6 roadside screening device?

7 A I did not.

8 Q Thank you. I want to ask you a couple  
9 of questions, sir, about the search warrants at  
10 Branigan's. It has been covered in considerable  
11 detail, I don't want to belabour the point.

12 You agree with me that in order to  
13 obtain a warrant to seize documents, a police  
14 officer must swear an affidavit?

15 A Yes.

16 Q And in that affidavit, he must swear  
17 that he has reasonable and probable grounds to  
18 believe that specific identifiable documents are  
19 on the premises at the time that he is seeking the  
20 warrant. Do you agree with me there?

21 A The specific document --

22 Q You have to identify the document that  
23 you want to seize?

24 A Or documents that you are looking for.

25 Q Yes. And you specifically instructed

1 Sergeant Carter to look for receipts from  
2 Branigan's that would evidence the manner of  
3 payment made by Mr. Harvey-Zenk; correct?

4 A Yes.

5 Q And you will acknowledge for me, sir,  
6 that there was no evidence whatsoever as to the  
7 manner of payment, if any, that Mr. Harvey-Zenk  
8 made at Branigan's Restaurant? There was no  
9 suggestion that he had used a credit card, you  
10 would agree?

11 A I did not know whether he paid in cash  
12 or whether he paid by credit card, I did not know.

13 Q And you would agree with me, sir, that  
14 it is inappropriate for a police officer to go on  
15 a fishing expedition by way of a search warrant?

16 A I would think that if you are looking  
17 for the presence of an individual at a particular  
18 establishment, that you have some reasonable and  
19 probable grounds to believe that he was there,  
20 evidence to support that he was there, some  
21 suggestion that he consumed food, potentially may  
22 have had some beverages, that there would be  
23 enough grounds to say that the person was there,  
24 engaged in business with the establishment, there  
25 is likely to be a record of it, and it would not

1 be a fishing expedition. If there was no  
2 suggestion that he had done anything other than  
3 popped in, said hello and left, that might be a  
4 fishing expedition. But the evidence, as I  
5 understood it, was that he was there, engaged in  
6 commercial activity to some extent in that he had  
7 eaten, and maybe even had something to drink. And  
8 I know that you have to pay for that. So to the  
9 extent that I know you have to pay for it, he  
10 would either pay in cash or with some form of  
11 currency, or maybe a credit card, or even an  
12 Interac by automatic debit. So to look for  
13 records which would be for the commercial  
14 activities of the person you knew was there,  
15 believed was there, I don't think is a fishing  
16 expedition at all. I think that you would get a  
17 warrant for that.

18 Q My question to you, sir, was not  
19 whether what you were asking him to do was a  
20 fishing expedition. My question was, would you  
21 agree that you can not use -- go on a fishing  
22 expedition by way of a warrant? You would agree  
23 with that?

24 A Well, I would think that the issue  
25 would be, first, a threshold issue whether or not

1 the person who is issuing the warrant believed  
2 that the police officers have laid the foundation  
3 in order to get the warrant. I would assume that  
4 they wouldn't be just out generally searching  
5 things for no purpose, he would have to set it out  
6 in an affidavit. And all I'm saying to you,  
7 Mr. McDonald, is that I believe there could be  
8 sufficient material set out in the I.T.O., in the  
9 information to obtain, which would justify getting  
10 a search warrant in these circumstance.

11 Q We are back again, sir, to the facts  
12 of this case. My question to you still remains as  
13 it was a general one, you agree with me that you  
14 can not use a warrant to go on a fishing  
15 expedition? Do you agree with that simple  
16 statement?

17 A Yes, there has to be some reason for  
18 getting a warrant.

19 Q Thank you. In any event, as we know,  
20 you didn't get what you considered a satisfactory  
21 response from Sergeant Carter on that note;  
22 correct?

23 A Yes. And having heard what he  
24 testified to, I just wish he would have phoned me.

25 Q I understand your position, and you



1 covered that with Mr. Paciocco.

2                   You also raised with Sergeant Poole,  
3 as was demonstrated by Mr. Zazelenchuk a few  
4 minutes ago, that you also discussed the warrant  
5 issue with Sergeant Poole and the Winnipeg Police  
6 Service. You recall that?

7                   A     Yes.

8                   Q     And I take it from that you were  
9 asking the Winnipeg Police Service, as part of  
10 their investigation of Branigan's, to investigate  
11 the question of a search warrant at Branigan's;  
12 correct?

13                  A     Both.

14                  Q     Yes. Thank you.

15                   THE COMMISSIONER: Mr. McDonald, I'm  
16 concerned that I have breached my undertaking to  
17 counsel to break at 3:15, we are now four minutes,  
18 four and a half minutes over that. So we will  
19 take a 15 minute break for those who are addicted  
20 to coffee.

21                   MR. McDONALD: Thank you,  
22 Mr. Commissioner. I will conclude shortly after  
23 we resume.

24                   THE CLERK: All rise. This Commission  
25 of Inquiry is now in recess.

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

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

6 BY MR. McDONALD:

7 Q Thank you, Mr. Commissioner. Mr.  
8 Minuk, just one further point on the Carter  
9 disclosure to you of the problems that he -- that  
10 were revealed to him by Woychuk. As we know from  
11 the evidence, Woychuk made his disclosure to  
12 Carter on February 24, 2006, after Sergeant Carter  
13 had left a meeting at your office, and Woychuk was  
14 driving him back to East St. Paul. We also know  
15 that Carter did not make disclosure to you until  
16 April the 21st. And you testified yesterday that  
17 you were away, out of the city, for an extended  
18 period of time on another prosecution in Norway  
19 House?

20 A An inquest, yes.

21 Q Sorry, an inquest at Norway House.  
22 And you couldn't remember exactly how long you  
23 were gone, but you did say on your own, that it  
24 was an extended period of time?

25 A Yes.

1           Q     Could I just get you to confirm for  
2     the record, sir, that the delay in Carter making  
3     the disclosure to you did not materially prejudice  
4     the timing of the prosecution?  Would you agree  
5     with that?

6           A     I can't say that the additional -- the  
7     month of delay would have caused lengthy delays  
8     and when this matter would be resumed.  I don't  
9     have the answer to that.

10          Q     But you never complained to Sergeant  
11     Carter, for example, that gee, he should have done  
12     this on the 24th, as soon as he found out, did  
13     you?

14          A     Well, I don't recall if I expressed  
15     that to him, but -- I don't recall.

16          Q     You have no recollection of expressing  
17     any concern or disappointment to Sergeant Carter  
18     about the length of time he took to make the  
19     disclosure; is that safe?

20          A     I don't recall today that -- no.

21          Q     Thank you.  And you are aware that  
22     when he did make the disclosure, Sergeant Carter  
23     had spent a lot of time analyzing the various  
24     reports and notes of the various officers who were  
25     involved in the issues to see what sense he could

1 make of what disclosure was being made; you recall  
2 that?

3 A I know that he did his own internal  
4 investigation in order to get to where he was.

5 Q And that was a reasonable thing to do  
6 so he could present to you his best position on  
7 the issue that he had been confronted with; you  
8 would agree with that?

9 A Yes, I would think that he would want  
10 to do some checking after he heard that  
11 disclosure.

12 Q And that was a reasonable thing for  
13 him to do, you agree?

14 A More than reasonable, I think he  
15 should have.

16 Q Thank you. Now I want to turn to the  
17 memo to Don Slough from you that was prepared in  
18 December of 2007.

19 A Yes.

20 Q Mr. Paciocco touched on that document  
21 earlier. It is in volume R-2, at tab 91.73 and  
22 the series of documents pertinent to it start at  
23 page 3287. Could I, please, get you to go there?

24 A Yes.

25 Q Are you at page 3287?

1           A     Okay.

2           Q     And this is the email to you from Don  
3 Slough.

4           A     I have that as 3288. Are you sure,  
5 sir?

6           Q     I have page 3287 being exhibit 142,  
7 being an email from Don Slough to you dated  
8 September 19th, 2007, at 10:52 a.m. I hope we are  
9 working from the same pages.

10          A     I don't have that page, the page that  
11 Mr. Paciocco showed to me yesterday began at 3288.

12          Q     My apologies, and perhaps I could ask  
13 the clerk to provide you with exhibit 142, at  
14 91.72, R91.72. Mr. Commissioner, have you  
15 found --

16                   THE COMMISSIONER: I have. I have it  
17 right in front of me.

18          MR. McDONALD: Thank you. My  
19 apologies, Mr. Commissioner, my understanding is  
20 this document is not an exhibit yet. I ask that  
21 the clerk put before the witness the document that  
22 appears in the documents at R-2.91.72 and we will  
23 mark it as exhibit.

24                   THE CLERK: It will be exhibit 233.

25

1 (EXHIBIT 233: R-2.91.72 Hard copy of  
2 email from Don Slough to Martin Minuk  
3 sent 9/19/07, 10:52)

4 BY MR. McDONALD:

5 Q Mr. Minuk, if I'm understanding the  
6 chronology of the documents correctly, this is the  
7 document that initiated the creation of your memo  
8 to Mr. Slough or to Mr. Kaplan, dated September  
9 the 20th; is that correct?

10 A Yes.

11 Q And the email to you from Mr. Slough  
12 read.

13 "Hi, Marty, further to our  
14 conversation yesterday I spoke to the  
15 deputy and he suggested that I ask for  
16 a written record on the Zenk matter.  
17 The reason for doing so is to get the  
18 most complete information so I can do  
19 a briefing note for the Premier. I  
20 need to complete the note for Friday.  
21 I have been asked if you could provide  
22 information on the following."

23 So you understood from that that the  
24 Premier wanted to be briefed on what was going on  
25 with the case, and Mr. Slough had some specific

1 questions for you that he wanted you to answer; is  
2 that correct?

3 A Yes.

4 Q And the specific questions that he  
5 wanted are enumerated in the email below the  
6 passage I just read to you; correct?

7 A Yes.

8 Q And then as I understand it, the  
9 document at page 3289, is a draft response that  
10 you prepared in respect to those questions; is  
11 that correct?

12 A Yes, I have this back now, yes.

13 Q So, in other words, that's the reply  
14 that you drafted and submitted to Mr. Slough for  
15 his review and comment before putting it in final  
16 form, correct?

17 A Yes.

18 Q And it was your intention, sir, in  
19 preparing that document, to answer the specific  
20 questions posed by Mr. Slough?

21 A My intention, yes, and to review what  
22 I wrote with him to see whether -- sorry, to  
23 review with him and to see whether or not it  
24 satisfied what it was that he needed, because I  
25 had not been involved in that type of request ever

1 before.

2 Q Yes, I understand that. And Mr.  
3 Paciocco covered that with you in some detail and  
4 he also covered with you the fact that some  
5 changes were made from the draft to the final  
6 document. You recall that?

7 A Yes, that's correct.

8 Q And he referred you specifically to  
9 item number 7 on page 1. You recall that?

10 A Yes.

11 Q In your initial draft you simply  
12 wrote, "at 8:21 Carter read the blood demand."

13 A Yes. I was reporting it right out of  
14 the notes.

15 Q Yes. But that's all you wrote at that  
16 point?

17 A Yes.

18 Q And then in the expanded draft you  
19 went on to add considerably more detail in point  
20 7; correct?

21 A Right.

22 Q And that, I take it, was added as a  
23 result of the discussions that you had with Mr.  
24 Slough and Mr. Kaplan?

25 A Would have been as a result of that.



1 Q So you changed the response to  
2 accommodate the discussions you had with them?

3 A Well, I don't think that I changed my  
4 response, I think I added to it to identify the  
5 argument that was going to be made or could  
6 potentially be made by the defence, if  
7 Mr. Carter's explanation was disbelieved. I don't  
8 think that I added anything. I think it was more  
9 information in case someone like the Premier  
10 asked, "well, what is the matter with that?"

11 Q But, sir, would you not agree that on  
12 a fair reading of the memorandum it appears as  
13 though you are answering the specific questions  
14 put by Mr. Slough in the initial memorandum;  
15 that's what it looks like?

16 A Yes.

17 Q And it looks to me, sir, as if you are  
18 reciting facts that supported the position that  
19 you understood to be the case?

20 A The first part, simply the facts taken  
21 from the notes, that's it.

22 Q Right. But even though at that point  
23 in time you've already acknowledged that you knew  
24 that it was Carter's position that at 8:21 he did  
25 not make a blood demand, he made a breath demand?

1 A Well --

2 Q You knew that?

3 A Yes. But I'm reciting the times that  
4 are set out in the notebook, and the summary of  
5 the investigation as it was recorded.

6 Q Why didn't you put in there so that  
7 the facts were clear that you were putting before  
8 the government folks that Sergeant Carter had told  
9 you that no blood demand had in fact been made,  
10 one had never been made, it was always a breath  
11 demand? Why didn't you put that in there?

12 A I really don't know, other than we  
13 would have discussed this, and I would have added  
14 what it was that was asked of me.

15 Q Well, did Mr. Slough and Mr. Kaplan  
16 know that it was Mr. Carter's position that he had  
17 never made a blood demand, that he had always made  
18 a breath demand? Did you tell them that?

19 A I don't know if I told that to Mr.  
20 Slough. I might have told it to Mr. Kaplan. I  
21 don't remember today, sir, honestly I can't tell  
22 you.

23 Q But, Mr. Minuk, you would agree with  
24 me that an important fact in this case was whether  
25 an inappropriate blood demand had been made or

1 whether it was in fact a breath demand at that  
2 point in time; you would agree with that?

3 A It was a fact to be considered in the  
4 whole of the matter. And whether Mr. Carter, even  
5 if it was the breath demand, as opposed to the  
6 blood demand, had he been believed on that, there  
7 would have been issues with respect to that as  
8 well, and whether or not that demand itself was a  
9 proper demand.

10 Q But, sir, when you sent the final  
11 version, which is at page 3296 and 3297, what you  
12 added to paragraph 7 certainly leads me, as a  
13 reader, to conclude that you were telling Don  
14 Slough and Brian Kaplan that Sergeant Carter had  
15 made an inappropriate blood demand and that was a  
16 circumstance that you took into account in making  
17 the deal that you had already made. Is that not a  
18 fair interpretation of the document?

19 A To someone that didn't have the  
20 background that those gentlemen had, that would be  
21 fair.

22 Q You agree with me that nowhere do you  
23 say in the body of your reply that what you are  
24 doing is really putting down what you expect Mr.  
25 Wolson to argue? You didn't put that down, did

1 you?

2           A     This is what I -- no, I didn't say  
3 this is what I expect Mr. Wolson to be arguing,  
4 but I would understand that Mr. Slough in reading  
5 this in preparing whatever note he was, that this  
6 is what he would know for himself, these are the  
7 arguments that I expect Mr. Wolson to be making.  
8 I didn't know that -- I'm preparing something for  
9 Mr. Slough, I sent him a draft, we have a  
10 conversation about it, I sent him back another  
11 document. After our conversation he says to me  
12 that he is happy with this, and I don't really  
13 know at the end of the day what he is taking from  
14 my conversation with him, what he is taking from  
15 my memo, and what he is relying on. I don't know  
16 that. I'm only doing what I thought I was doing,  
17 and as I said to Mr. Paciocco, I was focused on  
18 what it was that the defence arguments were going  
19 to be as opposed to what it was that I was going  
20 to be leading as evidence.

21           Q     But, sir, nowhere in that memorandum  
22 in response to specific questions do you say that  
23 this is what I think the defence is going to do  
24 with this, do you?

25           A     No. But I think that Mr. Slough, who

1 is one year behind me at the bar, so if I was  
2 called in '79, that he would be getting on to 28  
3 or 29 years, that he would understand that.

4 Q Here is where I'm having trouble, Mr.  
5 Minuk, and I'm trying to be as fair as I can. The  
6 narrative in the final version that was sent on  
7 page 2, reads in part, the first full sentence on  
8 the second line, "this inappropriate demand," now  
9 that's the blood demand to which you are making  
10 reference, correct?

11 A Yes.

12 Q "Was not pursued by Carter, who did 44  
13 minutes later read the breath demand." Don't you  
14 agree, sir, you are presenting a factual scenario  
15 whereby Carter made an inappropriate blood demand  
16 first and not for a further 44 minutes later did  
17 he make a breath demand? Isn't that the way that  
18 reads?

19 A It can be read like that. What I am  
20 telling you is what I was telling him what it was  
21 that I saw Mr. Wolson arguing, and we had a  
22 conversation about this. So to the extent that he  
23 was happy with the information that he was  
24 provided, I don't -- I'm not sure that I can  
25 answer your question, other than to tell you this

1 is what I was addressing.

2 Q I'm sorry --

3 A And I agree that you read it in the  
4 way that you do.

5 Q I'm sorry, Mr. Minuk, to belabour this  
6 point, but I thought you just told me earlier that  
7 you had no discussions with Mr. Wolson about the  
8 blood and breath issue?

9 A No. I didn't say that I had  
10 discussion with Mr. Wolson, I said this is what I  
11 anticipated he would argue.

12 Q Then the concluding sentence in the  
13 part added, sir, says, "That fact," in other words  
14 the improper blood demand, "that fact clearly  
15 establishes that the blood demand was  
16 inappropriate in the circumstances."

17 A If it is accepted, yes. If it is  
18 accepted as a fact that he did that, then it would  
19 be inappropriate. If it is not accepted as a fact  
20 then it isn't. This is what Mr. Wolson would be  
21 arguing, that on three different occasions,  
22 notwithstanding this man's explanation, I  
23 anticipated he would argue that this is a fact  
24 that you have to consider.

25 Q You were not then, sir, if I'm

1 understanding your evidence, saying that as of  
2 September 20, 2007, you were proceeding on the  
3 assumption that Sergeant Carter had made an  
4 inappropriate blood demand; is that fair?

5 A I never said that I was.

6 Q All right. Now I want you to look at  
7 item six in the memo, which says:

8 "At 8:18 a.m. Carter places Zenk under  
9 arrest for impaired cause bodily harm  
10 and impaired cause death. Until this  
11 point Zenk was not under arrest, given  
12 an ASD or breathalyzer demand or  
13 charter warnings."

14 That's number six, correct, point six  
15 on page 1?

16 A Yes.

17 Q And you are making a point there that  
18 until that point in time Zenk was not under  
19 arrest, given an ASD or breathalyzer demand or  
20 charter warnings, and that was important?

21 A Yes.

22 Q Your next entry is item 7, which is  
23 821, which we have already discussed, which we  
24 know was recorded as a blood demand but was in  
25 fact a breath demand, we know that. What did you

1 leave out between 8:18 and 8:21 that Carter did?

2 A The breath demand, however I addressed  
3 that in the paragraph, 44 minutes later, I don't  
4 know -- the 9:05, brought to the breathalyzer  
5 room, read the demand --

6 Q Let's have a look at Sergeant Carter's  
7 narrative to see what he did between 8:18 and 8:21  
8 which you did not include in this memo, and I want  
9 to ask you why you didn't include these items in  
10 the memo. And this, Mr. Commissioner, is found in  
11 Sergeant Carter's narrative, which, of course, is  
12 an interpretation of his notes or an expansion of  
13 his notes, volume E-1, tab 23K, page 456. It is  
14 exhibit 114. You see my trouble, Mr. Minuk, in  
15 your completed memo you jump -- in your factual  
16 recital you jump from 8:18 saying no charter  
17 warnings or cautions at that point, then you go to  
18 8:21. But if look at Sergeant Carter's report at  
19 8:19, Sergeant Carter reports that he advised the  
20 male of his rights under the charter. So one  
21 minute after you observed there had been no  
22 charter, there is a charter warning given, yet you  
23 omitted that. Do you see that?

24 A Yes, I understand that, sir, but my  
25 point is not -- I'm not explaining about Carter's



1 failure to do those things, I'm making a  
2 observation about what happened before the fellow  
3 got to Carter.

4 Q And at 8:20, sir, he records that he  
5 gave the police caution?

6 A Yes.

7 Q You see that? Aren't those important  
8 facts to recite in the scheme of things, that  
9 Carter, when he did receive this man into his  
10 custody and he did arrest him, he immediately  
11 chartered and cautioned him, isn't that important?

12 A It is relevant. But to me it  
13 doesn't -- nothing turned on it as far as I was  
14 concerned that was problematic.

15 Q All right. Thank you. The last point  
16 that I would like to cover with you, Mr. Minuk, is  
17 a reference that you made in your evidence  
18 yesterday to making a telephone call to MPI. Do  
19 you recall that?

20 A Yes, it is in my --

21 Q Yes, it is in your time docket, and I  
22 will assist you there, if you could look at  
23 exhibit 218, please?

24 A Yes, I remember.

25 Q And it is on page 3401.32?

1 A Yes, sir. What page again was that?

2 Q 3401.32.

3 A Okay.

4 Q And you see the time entry there,  
5 September the 28th, '05?

6 A Yes.

7 Q You say, "Call to MPI re Ministerial  
8 correspondence." Do you see that?

9 A Yes.

10 Q Now, if I'm understanding things  
11 correctly, you were calling MPI because of the  
12 request you had received from Justice to draft a  
13 reply to a letter that Justice had sent to you  
14 from the Sveinsons; is that correct?

15 A Yes.

16 Q And that is exhibit 219?

17 A Right.

18 Q At page 3115 is the fax transmission  
19 cover sheet from Mr. Kaplan to you, asking you to  
20 draft a signature on the Justice issues and  
21 forward them to -- forward your response for  
22 Brian's review. You recall that?

23 A Yes.

24 Q And you have established that you  
25 didn't draft the response, and for the reasons you

1 have discussed. But I just want to take you to  
2 the letter that's attached, that appears at page  
3 3116, 3117, 3118. That's the letter that you were  
4 asked to draft a response to, is that correct?

5 A I don't have it in front of me, I'm  
6 looking for it, but, yes. What is the exhibit  
7 number again, sir?

8 Q I'm not sure if it is part of the  
9 exhibit or not, but exhibit 219 is the fax  
10 transmission sheet.

11 A Okay. Yes, I have got it.

12 Q All right. And the three page letter  
13 is part of the exhibit, is it, Mr. Minuk?

14 A Yes.

15 Q And this is the letter that you  
16 received and were asked to draft a response. What  
17 was it in that letter, sir, that made you phone  
18 MPI?

19 A Today, I would have to read through  
20 this letter, sir.

21 Q Let me see if I can help you,  
22 Mr. Minuk. Do you recall --

23 A There is a line here that says:  
24 "When death caused by a vehicle  
25 accident, victims must deal with

1 MPIC."

2 Q That's exactly the section that I was  
3 going to direct you to. It is my understanding,  
4 and maybe this will refresh your memory, were you  
5 under the impression, from reading this letter and  
6 having had discussions with the Sveinsons, that  
7 they were very upset with Manitoba Public  
8 Insurance and the way Manitoba Public Insurance  
9 had processed their claim?

10 A I don't know if they had processed a  
11 claim for them or not. But I knew, and anybody  
12 reading this would know, that they were very upset  
13 about MPI.

14 Q So was it on the basis of the content  
15 of the middle paragraph on page 3117 that  
16 motivated you to call MPI? And it reads for the  
17 record:

18 "In addition to all of this, when  
19 death is caused by a vehicle accident,  
20 the victims must deal with MPIC. That  
21 is the biggest atrocity of all. They  
22 administer their laws like the  
23 dictatorial SS did. They show  
24 absolutely no compassion and are  
25 trained to be as hard and cold as

1 possible."

2 Is that the paragraph, sir, that motivated you to  
3 call MPI?

4 A Well, yes, it was likely, now that  
5 you've read it out.

6 Q And go down to the next paragraph, did  
7 this influence you in making your call to MPI?

8 "I know the argument is that money  
9 cannot bring back our loved one and  
10 that is true, but that is all the more  
11 reason why a settlement in such a case  
12 should be substantial, just like the  
13 sentence for a crime, it should  
14 reflect the seriousness of the crime  
15 and the fact that our loved one cannot  
16 be brought back makes it as serious as  
17 it possibly could be."

18 And then continues on that:

19 "Similarly, an insurance settlement  
20 should reflect the value of a human  
21 life."

22 Do you see that?

23 A Yes, sir.

24 Q You concluded, I take it, that the  
25 Sveinsons were very unhappy with MPI, calling them

1 dictatorial SS types and so on?

2 A Reasonably obvious, yes, sir.

3 Q Yes. And who at MPI did you call?

4 A I don't recall who I talked to. I  
5 believe that the purpose of my call was to find  
6 out if MPIC had some type of public relations  
7 person, or somebody who could provide some  
8 information about that. And if I did find that  
9 out, I would have conveyed it by phone to  
10 Mr. Kaplan. That's what I would have done.

11 I do recall that I wrote to him, told  
12 him that the MPI matters were outside of my  
13 experience, I didn't know anything about them.  
14 And that I didn't think it would be appropriate  
15 for me to be responding on behalf of MPI. I  
16 likely would have said that, that it would not be  
17 appropriate for me to respond on MPI issues.

18 Q I'm going to ask you this series of  
19 questions, and I ask Mr. Commissioner to stop me  
20 if you are familiar with the program in Manitoba,  
21 because I think it is important to know that to  
22 put this letter in context.

23 And, Mr. Minuk, you may not be the  
24 best witness for this, same as I'm not the best  
25 witness for criminal law, but I will try and be as

1 fair with you as to the state of automobile  
2 insurance law as I can be in Manitoba, and I'm  
3 sure you have some familiarity with it.

4 A Just as a consumer of its product.

5 Q Yes. As you know, we have in Manitoba  
6 a universal, compulsory, no-fault automobile  
7 insurance system, and have had since 1994. You  
8 are aware of that?

9 A Well, I know we have no-fault  
10 insurance.

11 Q Are you aware that the citizens of the  
12 Province of Manitoba have had their right to sue  
13 for injuries, or compensation for personal injury  
14 and death, removed effective March the 1st, 1994?

15 A The date, I wouldn't know, but my  
16 understanding is you can not sue anymore in  
17 Manitoba.

18 Q Yeah. You can not sue for damages for  
19 personal injury or death in Manitoba, you  
20 understand that?

21 A That's what I understand the situation  
22 to be.

23 Q And a victim's only recourse is  
24 pursuant to the regulations passed under the MPI  
25 Act. Are you aware of that?

1           A     That is now entering into an area that  
2     I would have no familiarity with.

3           Q     Perhaps we will try and get more  
4     information on the system through another witness.  
5     You are quite wise not to venture into fields,  
6     unlike myself.

7                     In any event, I want to refer you to  
8     another letter on this issue, which is at volume  
9     O, tab 81.a.11. If I could ask the clerk to put  
10    that before you, please? It is exhibit 33,  
11    introduced I believe in the first segment of these  
12    proceedings, exhibit 33.

13          A     Yes.

14          Q     And this is another letter to the then  
15    Minister of Justice, Honourable Gord Mackintosh,  
16    from the Sveinsons. And I direct you to page 2,  
17    midway down, the first paragraph below which  
18    reads:

19                     "As I also stated in my first letter,  
20                     there is no justice."

21    I take that reference to be to the letter that I  
22    just referred you to.

23                     "Is it justice when MPI's no-fault  
24                     insurance can circumvent any other  
25                     laws like the Fatal Accident Acts, for



1           example? What type of legislators in  
2           their right minds would institute such  
3           Gestapo like rulings? That is a  
4           dictatorship imposed on a so-called  
5           democracy whose subjects presumably  
6           should have some human rights. Is it  
7           justice when fair play is applied only  
8           to criminals, while innocent victims  
9           are stripped of all rights to any  
10          action, as well as a right to  
11          information surrounding the dead loved  
12          one's case."

13        Is that consistent, sir, with your understanding  
14        that the Sveinsons were disturbed at the manner in  
15        which they were treated by MPI and the settlement  
16        they received, and they were upset about that?

17           A     It certainly confirms to me that they  
18        again are upset with MPI. I don't know what their  
19        dealings were with them. I know clearly, by  
20        reading what they were saying, that they were  
21        upset.

22                   MR. McDONALD: Thank you. That's all  
23        I have.

24                   THE COMMISSIONER: Thank you.

25                   MR. ZAZELENCHUK: Mr. Commissioner,

1 Madam clerk drew to my attention that one of the  
2 documents that I referred to wasn't marked as an  
3 exhibit.

4 THE COMMISSIONER: Yes.

5 MR. ZAZELENCHUK: That was R-1.91.3, I  
6 apologize for that and ask that it be marked now.

7 THE COMMISSIONER: Thank you.

8 (EXHIBIT 234: R-1.91.3, Hard copy of  
9 email from Martin Minuk to Hymie  
10 Weinstein and Richard Wolson sent  
11 5/27/05 11:23 a.m.)

12 MR. LABOSSIERE: Thank you,  
13 Mr. Commissioner.

14 BY MR. LABOSSIERE:

15 Q Mr. Minuk, I wanted to ask you a  
16 couple of questions surrounding the issues that  
17 you referred to, and I don't mean to ascribe any  
18 meaning to it, but the Carter and Woychuk  
19 revelation, you know the issue I'm speaking of?

20 A Yes.

21 Q And as I understand it, sir, prior to  
22 learning of that you had received some material  
23 from East St. Paul and the Winnipeg Police  
24 Service, some reports, some statements and so on,  
25 and interviews. And you had gone through that.

1 And at some point you received a phone call from  
2 Sergeant Carter advising you that there was some  
3 new information which potentially contradicted  
4 what you had; is that correct?

5 A I'm not sure if that's the right, or  
6 as it was described by Mr. Paciocco yesterday,  
7 that I had been out of town on the inquest at  
8 Norway House, that I had a meeting already  
9 pre-arranged with Sergeant Carter, and that I  
10 expected that he would be there on that Friday, I  
11 think it was, when he came. And it is likely that  
12 this was a pre-arranged meeting, not a phone call  
13 from him. Because it was set up, I think that's  
14 the way it was, not as you suggested, but the way  
15 Mr. Paciocco put it forward to me.

16 Q Thank you. And the point that I was  
17 getting at, and I apologize for that, was simply  
18 that you had a series of information, you reviewed  
19 the information, and at some point, whether a  
20 pre-arranged interview, or phone call, however you  
21 received it, you received new information which  
22 was different than you had previously received;  
23 correct?

24 A Well, yes.

25 Q I think the word you used, it was a

1 little unsettling to you?

2 A Yes.

3 Q And you asked Sergeant Carter to  
4 prepare a new report for you?

5 A Yes.

6 Q And one of the reasons you did that,  
7 of course, was so that you could disclose this new  
8 information to defence counsel; is that right?

9 A Ultimately, that, and also that I  
10 wanted a narrative of this so that it could be  
11 considered, because I thought that the actions  
12 described to me were inappropriate by police  
13 officers and that it might require investigation.

14 Q And I wasn't suggesting it was the  
15 only reason, but one of the reasons, surely, was  
16 that when you received this new information, you  
17 knew as your role as special prosecutor that you  
18 had an obligation to disclose any new information  
19 to defence counsel?

20 A Yes.

21 Q And ultimately we know you did that,  
22 you gave that to defence counsel?

23 A Yes.

24 Q And that's something that you would do  
25 any time you were a special prosecutor, on this or

1 any other file?

2 A I think that I have disclosure  
3 obligations, and sometimes I can -- there is some  
4 timing issues that sometimes come into play, but I  
5 believe that disclosure obligation is an ongoing  
6 obligation and I would disclose ongoing, yes.

7 Q It goes without saying, sir, and I'm  
8 not suggesting to the contrary, but it goes  
9 without saying that in making your submissions to  
10 Chief Judge Wyant, you were careful to be as  
11 accurate as you could be as to the facts?

12 A Yes.

13 Q And you certainly wouldn't want to  
14 mislead the judge?

15 A No.

16 Q Again, I'm not suggesting that you did  
17 in any way. And certainly you wanted to ensure  
18 that the submissions you were making and the  
19 conclusions you were asking the judge to draw were  
20 reasonable? That's fair?

21 A That's right.

22 Q And as I understand it, you would have  
23 then reviewed all of the facts you had, outlined  
24 the ones you felt were relevant to the judge?

25 A Right.

1 Q And then pointed him to some specific  
2 conclusions that you felt were reasonable on those  
3 facts; is that fair?

4 A Yes.

5 Q And one of those conclusions, sir,  
6 that I understand you drew with respect to the  
7 lack of any evidence as to the consumption of  
8 Derek Harvey-Zenk at Branigan's, was that much  
9 like any night out with friends and colleagues, no  
10 one paid attention to who ate what, who drank  
11 alcohol, who did not; correct?

12 A From an inference to be drawn from all  
13 of the statements that were there, that's what  
14 people seemed to be saying.

15 Q And, in fact, you said that? That was  
16 part of your submission, correct?

17 A Yes.

18 Q And as a result, you obviously believe  
19 that to be a reasonable inference from the facts,  
20 correct?

21 A Yes. I think that, generally  
22 speaking, people don't head out planning to recall  
23 in great detail what they did on their day.

24 Q Right. And you expanded upon that in  
25 your submissions, and you said in the normal human

1 condition, when people are out for an evening,  
2 they are unlikely taking notes of what is going on  
3 and not likely paying attention; correct?

4 A Right.

5 Q And furthermore, you also reasonably  
6 concluded and submitted to Chief Judge Wyant that  
7 there was a large group there, and certainly none  
8 were expecting to be interviewed the following  
9 morning, or day, or days later about an incident  
10 which, or an evening which would be otherwise  
11 unremarkable; correct?

12 A Well, certainly, on the way it started  
13 out, I didn't think that -- I would think that any  
14 person would conclude that they wouldn't expect to  
15 be interviewed about what they did. However, as  
16 circumstances changed, they ought to have known  
17 they were going to be interviewed.

18 Q Right. And the statement that I just  
19 read you were your words and that was your  
20 submission to Chief Judge Wyant?

21 A Yes.

22 Q And in part, you were, were you not,  
23 giving Chief Judge Wyant some explanation as to  
24 why all of the police witnesses who were at  
25 Branigan's with Derek Harvey-Zenk weren't able to

1 provide any evidence of alcohol consumption;  
2 correct? That was the purpose of those  
3 statements?

4 A That was my assessment of why it was  
5 that they might not have been able to.

6 Q Right. Now, you will recall both  
7 Commission Counsel and Mr. Commissioner asked you  
8 about a statement that's made in your memo to  
9 Mr. Slough on September 20th of '07, that was  
10 exhibit 143 that Mr. McDonald had just drawn your  
11 attention to. In particular, it is on page 3297,  
12 you can review it if you like to, I don't intend  
13 on spending a lot of time pointing it out, but  
14 just to point you to the area. Do you recall  
15 there was a statement in there that you were asked  
16 about, with words to the effect that some officers  
17 themselves reported their impairment was such that  
18 they did not remember much of that evening. Do  
19 you recall that?

20 A Yes.

21 Q In fairness, and as I understand your  
22 evidence, sir, you would agree that you don't  
23 really remember where it is that that piece of  
24 information came from? You would agree with that?

25 A Well, I said yesterday and I would



1 remain to it today that that information likely  
2 came from Humniski, Anderson, and one or both.

3 Q And that's why I'm saying, you said  
4 words like that yesterday, that you are trying to  
5 remember back, and it likely came -- and I take  
6 from that, sir, that you don't have a firm  
7 recollection today where that information came  
8 from; correct?

9 A No, but they were the senior fellows  
10 that I interviewed and it likely came from them.

11 Q But you really can't say today, for  
12 sure, where it came from; correct?

13 A No. But I know I spoke to them, so my  
14 best assessment is that it would have been them.

15 Q And as I understand it, this memo was  
16 written September 19th or 20th of 2007; correct?

17 A Yes.

18 Q And as I understand the evidence to  
19 date, the last contact that you had with any of  
20 the officers you mentioned would have been the  
21 second week of July, around July 11 or 13th, is  
22 that fair?

23 A That would be fair. I wouldn't have  
24 spoken to them after.

25 Q Sorry?

1           A     I wouldn't have spoken to them after  
2     the 17th of July, I don't believe.

3           Q     And then the weekend following any  
4     last contact with them, you gave your evidence,  
5     and I accept that, that you had essentially come  
6     to the arrangement that you did with Mr. Wolson,  
7     and it was clear that the preliminary hearing was  
8     not going to proceed; correct?

9           A     Well, there were certainly  
10    indications, of course, of that all along, as I  
11    said to you before, and I said to Mr. Paciocco,  
12    that if there is going to be a plea, I like to  
13    have it entered to have that certainty.

14          Q     Right. But I think you were candid in  
15    acknowledging to, I believe it was Commission  
16    Counsel, that in your mind you were essentially  
17    not preparing direct exams, for example, or  
18    preparing witnesses?

19          A     No.

20          Q     Because you had a pretty good idea  
21    that it was going to resolve?

22          A     Um-hum.

23          Q     Now, you may or may not be aware, but  
24    I want to put it to you that both Sergeants  
25    Anderson and Humniski certainly have not said at

1 any time, including before this Commissioner, that  
2 they were impaired or that their recollection was  
3 in any way affected by reason of impairment.

4 A All right.

5 Q And they were very clear in that  
6 recollection.

7 A Well, I'm sure they were when they  
8 spoke to you about it. I'm telling you that I'm  
9 equally clear in mine.

10 Q When you say equally clear, you have  
11 been fair with me to say that the information  
12 likely would have come from them, but you can't  
13 say for sure?

14 A I'm reasonably confident, sir, that it  
15 was one or the other or both. All right. I'm  
16 sure they are clear in their denial.

17 Q And you would agree with me, though,  
18 sir, that the statement that you've ascribed to  
19 them is not in any police statement or interview?

20 A Correct.

21 Q You haven't made and didn't make any  
22 notation --

23 A Correct.

24 Q -- prior to that interview --

25 A Right.

1 Q -- of those comments. And certainly  
2 that's not information that was disclosed to  
3 defence counsel? You would agree with that?

4 A That I can't tell you, sir.

5 Q There is certainly no record that you  
6 can point to that it was; correct?

7 A Right.

8 Q And you would agree that nowhere in  
9 your submissions before Chief Judge Wyant, when  
10 you dealt with the so-called anecdotal historical  
11 evidence, did you say at any time that some of the  
12 officers were impaired, and as a result their  
13 recall was affected? You didn't make any of those  
14 comments during your submissions before Judge  
15 Wyant?

16 A I haven't -- today, I'm sorry,  
17 Mr. Labossiere, I don't have it in front of me. I  
18 haven't read it over, don't have it memorized.

19 Q You will take me at my word?

20 A If you are saying that is, I will take  
21 your word. I would have to -- I can't.

22 Q Now, you also, and I want to draw your  
23 attention to another area that was pointed out to  
24 you, and that is that during your submissions  
25 before Chief Judge Wyant, you made some comments

1 about the homeowner, Sergeant Black, being asleep  
2 at some point during the evening. Do you recall  
3 that?

4 A Yes.

5 Q I'm suggesting to you, sir, that it is  
6 possible that you may have misunderstood that it  
7 was Sean Black who was asleep, because we do know,  
8 and the evidence is, and you would have been aware  
9 of it in the statements, that Dave Harding at some  
10 point was asleep during the evening. Is it  
11 possible that you may have misunderstood who it  
12 was that was asleep?

13 A I didn't think I did.

14 Q But you would agree with me, that it  
15 is possible?

16 A Well, anything is possible, but I'm  
17 just telling you, sir, that I did not form the  
18 impression that I was mistaken about that.

19 Q And again, sir, there is no notation  
20 of this statement?

21 A No.

22 Q And this isn't something that was  
23 disclosed to the defence?

24 A Not that I recall.

25 Q And I'm suggesting to you, sir, that

1 the reason I believe you may have been mistaken is  
2 because if Sean Black had told you that he was the  
3 one who fell asleep, this was a direct  
4 contradiction from the evidence that you had in  
5 police statements. It is something that you  
6 surely would have told Mr. Wolson?

7 A I likely would have. However, again,  
8 if it wasn't disclosed to him, it was that only  
9 because the focus of the conversation between  
10 Mr. Wolson and I had changed from the discussion  
11 of how we were putting the case in to whether or  
12 not there was going to be a resolution. And you  
13 know, clearly during that period of time things  
14 have the potential to get sidetracked.

15 Q But I know you, Mr. Minuk, and I'm not  
16 suggesting that you would have done this, in fact,  
17 I expect that you absolutely would have, very  
18 important piece of information is coming forward  
19 which would have assisted Mr. Wolson, not just in  
20 his preparation for the prelim, but in determining  
21 what an appropriate plea bargain would be, it is  
22 the kind of information that you would have  
23 disclosed?

24 A I don't think it would have affected  
25 Mr. Wolson's case to the extent that the plea

1 bargain would have changed. And I said to you, if  
2 it fell off, it fell off because it got  
3 sidetracked on plea negotiations, and would have  
4 been brought back on the table again if we would  
5 have proceeded to preliminary inquiry, because I  
6 would have reviewed again with Mr. Black what it  
7 was he was going to say in court at the  
8 courthouse, and if something new came up like that  
9 again and I was reminded of it, I would have told  
10 Mr. Wolson right away, and have had occasion to  
11 deal with Mr. Wolson in very similar -- in other  
12 kinds of prosecutions where witnesses say things  
13 to me in pre-court interviews, and I tell it to  
14 him before we go in.

15 Q And so, as I understand it, your best  
16 recollection today is that Sean Black was the  
17 individual who told you, but you are allowing for  
18 the possibility that perhaps it was Dave Harding,  
19 or that Sean Black spoke of Dave Harding being  
20 asleep?

21 A I'm telling you, sir, my recollection  
22 is that it was Mr. Black. I don't believe that I  
23 was mistaken about that, but I can only tell you  
24 what my recollection is. Okay?

25 Q Now, another issue that you dealt with

1 in your evidence at length, Mr. Minuk, was what  
2 you referred to as the overwhelming authority in  
3 Manitoba for conditional sentences, at the time  
4 that Derek Harvey-Zenk was sentenced, for driving  
5 related fatalities. You recall that?

6 A That's -- if I used the word  
7 overwhelming, but I certainly think that was then  
8 the authority in Manitoba at the appellate level.

9 Q And you agree with me, sir, that those  
10 authorities involve both situations where alcohol  
11 is involved and where it isn't, correct, in  
12 Manitoba?

13 A Yes. I think that on a reading of  
14 them there are cases of impaired cause death,  
15 dangerous driving cause death, where people get  
16 these sentences.

17 Q And as I understood it, very early on  
18 in this process, you were trying to prepare the  
19 family, as a result of those decisions, for the  
20 prospect that even if there was a conviction of  
21 impaired driving cause death, there was a real  
22 possibility, in fact a likelihood given this  
23 individual's background, Derek Harvey-Zenk, that a  
24 conditional sentence would have been imposed;  
25 correct?



1           A     Whether I was preparing them or not,  
2     when asked the question what did I think would  
3     happen, I'm telling them what I think would happen  
4     based my understanding of the case law, that I was  
5     aware of, that I kept nearby, and that may well be  
6     in part preparing them for what they might hear  
7     from a judge, but it is certainly telling them  
8     what I understood the law to be.

9           Q     And that included, and at that time  
10    you were still thinking about a potential impaired  
11    driving cause death conviction; correct?

12          A     We weren't anywhere at that point, in  
13    the case, other than on adjournments and moving  
14    forward.

15          Q     Let me be blunt. You are probably  
16    well aware, probably more than anybody, that the  
17    media has certainly inferred, if not suggested  
18    outright, that as a result of a series of  
19    investigative flaws and other flaws by you and  
20    others, that Derek Harvey-Zenk was spared a  
21    conviction of impaired cause -- impaired cause  
22    death, impaired driving cause death. You recall  
23    that? You are aware of that?

24          A     I will say this to you that I, as much  
25    as it might come as a surprise to you, do not, and

1 have not been reading newspaper articles about  
2 this matter for some time now. Okay.

3 Q You are aware --

4 A Not reporting -- and not wanting to  
5 comment on what the newspaper is reporting, I  
6 don't think that I'm in a position to do that,  
7 although -- so, I don't.

8 Q I'm not asking you to comment on what  
9 the media has reported or hasn't. What I'm  
10 putting to you, sir, and I want to be fair to you,  
11 that a suggestion has been made that as a result  
12 of investigative flaws by the police, primarily,  
13 that Derek Harvey-Zenk was not convicted of  
14 impaired driving cause death?

15 A That might be what the media is  
16 reporting, sir, but I can tell you that I cannot  
17 tell you that -- I'm not reading the material and  
18 I'm not subscribing to the material.

19 Q And my point, sir, is that I'm sure  
20 you would agree with me, given your evidence and  
21 your understanding of the law, that even if Derek  
22 Harvey-Zenk had plead guilty, or had been  
23 convicted of impaired driving cause death, it is  
24 absolutely possible, in fact likely, that you  
25 would be dealing with a conditional sentence in

1 any event. Isn't that right?

2 A I'm going to tell you that there are  
3 cases which support that position. I'm going to  
4 tell you that Mr. Wolson is going to be arguing  
5 that position, or any defence lawyer is. I'm  
6 going to tell you that I would expect, if the  
7 decision went some other way, that a defence  
8 lawyer would likely appeal it. But can I tell you  
9 that it is going to happen? No.

10 Q I wasn't asking you to pre-determine  
11 it.

12 A This is my reading, there are cases in  
13 Manitoba which support that authority, that line  
14 of authority. That's all I can tell you, sir.

15 MR. LABOSSIÈRE: Thank you. Those are  
16 my questions, Mr. Minuk.

17 BY MR. WEINSTEIN:

18 Q We heard from Staff Sergeant Poole  
19 about a discussion he had with you about  
20 Professional Standards being called in, or being  
21 utilized to interview all of the officers at  
22 Branigan's and that. And he was asked  
23 specifically whether you expressed any qualms  
24 about that, and he said you did not. And is that  
25 your recollection also?

1 A Yes, sir.

2 Q And one of the reasons you knew is  
3 because East St. Paul had a small police  
4 department; correct?

5 A Well, I was aware from Mr. Carter, I  
6 believe, that they didn't have a large force, and  
7 that there was lots of work to do, so they were  
8 going to get assistance.

9 Q Right. And we know, and we have seen  
10 it in a document, that Professional Standards Unit  
11 interviewed 28 people over a period of time;  
12 correct?

13 A Yes, sir.

14 Q And was it important to you that they  
15 should be interviewed as soon as possible?

16 A Yes.

17 Q Now, I'm not going to belabour the  
18 blood/breath issue, I just wanted one or two  
19 questions on that. You knew from disclosure that  
20 blood demand was there on three occasions in the  
21 notes; correct?

22 A Well, yes, it is obvious it is there.

23 Q Yeah. You knew that, and you knew  
24 subsequently that Sergeant Carter told you that,  
25 in fact, the mistake made three times is not

1 correct, it is breath, correct? You knew that?

2 A Yes.

3 Q Okay. And just along the lines of my  
4 learned friend, Mr. McDonald, he said to you,  
5 well, you had Woychuk who says he heard the word  
6 breath? You heard Mr. McDonald refer to that,  
7 correct?

8 A Yes.

9 Q But down the road, am I correct in  
10 understanding and hearing your evidence, and I  
11 stand corrected, you had some concerns about how  
12 good a witness Mr. Woychuk would be; is that  
13 correct?

14 A Yes.

15 Q Okay. And you don't know, naturally,  
16 what is in a judge's mind; correct?

17 A Not unless he or she tells us.

18 Q Right. So even with Carter saying, if  
19 it went to the court, no, I meant breath, there is  
20 still a possibility that the judge might have a  
21 reasonable doubt and come to the opinion that it  
22 could have been blood demand made; correct?

23 A Yes.

24 Q That was a concern you had?

25 A Yes, yes, yes.

1 Q All right. Now, down the road Carter  
2 tells you about what Woychuk is telling him;  
3 correct?

4 A Yes, sir.

5 Q And that leads to you calling in the  
6 RCMP, correct?

7 A Well, it leads me to go to Mr. Kaplan,  
8 sir, to going to Manitoba Justice to talk to them  
9 about this issue which is concerning me, and that  
10 I don't know the best way to deal with it.

11 Q I'm sorry to interrupt you, but I have  
12 no concern about you going to Mr. Kaplan. I've  
13 heard that, and they called Mike Horn?

14 A Mike Horn, and that's how it gets to  
15 the RCMP.

16 Q I'm not going there, I'm not concerned  
17 about that, maybe someone else is, but I'm not.  
18 You decided after consultation to have the RCMP  
19 investigate; correct?

20 A Yes.

21 Q Based on what Carter told you that  
22 Woychuk told him; correct?

23 A Yes.

24 Q Not being critical, but perhaps I am.  
25 Why would you not, before you decided that this is

1 a route, perhaps, why would you not have Woychuk  
2 in to do your own interview of him?

3 A Because I thought that this should be  
4 investigated not by lawyers, not by Crown  
5 Attorneys, but by police officers, an outside  
6 agency. I did not think that it was for me to  
7 conduct this investigation.

8 Q I'm not asking you about conducting an  
9 investigation, I'm asking you about conducting one  
10 interview?

11 A Well, I don't think that it was that  
12 simple for me, Mr. Weinstein. It was a very  
13 disturbing matter. And I believed, I did not  
14 think it was appropriate for me to be interviewing  
15 anybody. I believed that the appropriate thing to  
16 do was to refer this matter to Manitoba Justice  
17 and to get some advice on where to go with this  
18 disclosure, and that decision was that it be  
19 investigated by an outside agency. And I still  
20 today think that it would be improper for me to  
21 interview Mr. Woychuk. It should have been done,  
22 on that allegation, not by me but by others who  
23 would take a statement from him, and that a Crown,  
24 not me, but someone else would assess it.

25 Q Forget about interviews then. You

1 knew from what Carter told you, followed up by a  
2 four or five page letter from Carter that you  
3 asked him to detail it, one of the claims being  
4 made by Woychuk is that Mr. Bakema told him to put  
5 in his notes, and there was a mention of a TAR,  
6 Traffic Accident Report, correct, so the notes,  
7 his notes would coincide with Bakema's, correct,  
8 you remember that?

9 A Yes, sir.

10 Q So I'm not asking you to do an  
11 interview at this stage with Woychuk. But did you  
12 sit down and on your own, forget about -- we are  
13 not asking you to embark on a huge  
14 investigation -- did you sit down, because you had  
15 disclosure, and compare the notes of Woychuk with  
16 Bakema to see, in fact, if they do coincide?

17 A I did not do that. I wanted the  
18 entire matter, Mr. Weinstein, looked at by  
19 someone, by investigating authorities and not by  
20 myself. I did not want to commence -- I  
21 understand your suggestion that I should do an  
22 interview and review. I thought there should be  
23 an investigation and that's how it should have  
24 been handled.

25 Q Because we have heard subsequently



1 that the TAR is in Woychuk's notes, but not in  
2 Bakema's. You weren't here for that.

3 A No, I don't know.

4 Q Let me now jump ahead to getting ready  
5 for a plea. All right. And I'm specifically  
6 talking about this meeting you have with Judge  
7 Wyant, Chief Provincial Court Wyant, and  
8 Mr. Wolson and yourself. And Mr. Wolson touched  
9 upon this, but you didn't on one specific point.  
10 Fine, you sit down and you discuss -- don't look  
11 so puzzled, I haven't come to that point yet. All  
12 right. You sit down with Mr. Wolson, and you fill  
13 in Chief Provincial Judge Wyant, basically a brief  
14 outline; correct?

15 A Yes.

16 Q What the nature of the driving was, he  
17 is a police officer, things like that, and ending  
18 up with a recommendation, a joint recommendation  
19 that both sides are going to ask for a conditional  
20 sentence; correct?

21 A That's a loose summary but --

22 Q Fine. If you want to give more  
23 detail, you can go ahead?

24 A No, no, that's fine.

25 Q I'm trying to save time. At the end

1 of the discussion, he is made aware that it is  
2 going to be a joint recommendation of a  
3 conditional sentence, okay?

4 A Yes.

5 Q And we have heard that, I believe  
6 towards the end of the meeting, maybe shortly  
7 before you were leaving, you and Mr. Wolson, he  
8 makes reference to the fact that he is going to  
9 be, later that morning, imposing a conditional  
10 sentence on a manslaughter. You recall that?

11 A Yes.

12 Q Mr. Wolson gave evidence to this,  
13 about what impression that left with him. When  
14 you heard that, and as you are walking out, what  
15 impression did that leave with you, him throwing  
16 that in?

17 A Had it not been for the comment about  
18 the other case, I probably wouldn't have had much  
19 of an impression at all, because Judge Wyant  
20 didn't disclose much.

21 Q He made that comment. And my question  
22 is --

23 A Once I heard that comment, I thought  
24 he was to some extent at least conveying an  
25 impression that it was not something that he found

1 objectionable.

2 Q Right. Because he is going to be  
3 imposing a conditional sentence on a manslaughter  
4 that has a maximum life, and impose a conditional  
5 sentence. So did it not give you some assurance,  
6 not 100 per cent, because he didn't tell you 100  
7 per cent, because he didn't tell you he was going  
8 along, but did it not give you some assurance,  
9 some comfort level that he is probably going to go  
10 along with it?

11 A As a lawyer you try to read what the  
12 signals might be, and that you would read as a  
13 signal that says, well, yeah, I think this is  
14 okay, I think I will go with it.

15 Q Right.

16 A But you never know.

17 Q No, I know. Nothing is for certain.

18 A Nothing is for certain, and Judge  
19 Wyant said that, that he wasn't really unfolding  
20 his hands on this case.

21 Q Just another small point, just touched  
22 upon by Mr. Paciocco, when you made reference to a  
23 charge of crim neg, okay?

24 A Yes.

25 Q Dangerous driving, we know what the

1 standard is, crim neg, would you agree that the  
2 proof is a little more difficult than dangerous  
3 driving?

4 A I would agree with that, and I think  
5 that's a fair assessment of the law.

6 Q Right. I am asking --

7 A I'm sure there would be good factual  
8 reasons for making a distinction between the two.

9 Q I'm asking you to put on your defence  
10 counsel hat for a moment, as opposed to special  
11 prosecutor. At least in this province, when  
12 people are charged, in your experience, with  
13 dangerous driving and crim neg, okay, has it not  
14 been your experience that if you offer a plea to  
15 dangerous driving, the Crown doesn't hesitate to  
16 accept that and stay the crim neg? Has that been  
17 your experience, your knowledge?

18 A I would say this to Mr. Weinstein,  
19 that on reading of the cases, which I've read over  
20 time in Manitoba, where there is these joint  
21 charges of crim neg cause death and dangerous  
22 driving cause death, and even impaired cause  
23 death, that many of them are resolved here in  
24 Manitoba on the dangerous driving cause. And when  
25 you read the recitation of the charges and the

1 history, so to speak, or the summaries of the  
2 cases, and certainly in the appellate courts they  
3 will often describe that the accused was charged  
4 with this, this, and this, and entered a guilty  
5 plea to that.

6 Q All right. I just want to touch upon  
7 again, very briefly -- I think it felt like hours  
8 you were being asked questions about contact with  
9 Kaplan, Slough, contact with the department, you  
10 as an independent prosecutor, special prosecutor,  
11 and consulting with them. You have been a special  
12 prosecutor for years now; correct?

13 A Yes, sir.

14 Q Pardon me?

15 A Yes, sir.

16 Q I can't hear you.

17 A Sorry. Yes, sir.

18 Q All right. Have there been many  
19 occasions that your decision has been overruled by  
20 "superiors"?

21 A Not that I can think of.

22 Q Can you think of any?

23 A No.

24 Q And you have handled a fair amount of  
25 them over the years?

1           A     I think so, yes.

2           Q     All right. So in this particular  
3 case, when you sent them a copy, and you have been  
4 referred to it, of your draft submission that you  
5 were going to make to sentence, okay. You forward  
6 it on to them. Were any changes made to that as a  
7 result of what was said to you by Kaplan or  
8 Slough?

9           A     Today, sir, I can't remember. And I  
10 know sometimes there may be some -- if it was  
11 typed by me as opposed to dictated and typed by my  
12 assistant, sometimes it may be cosmetic or  
13 typographical changes, but I can't think of --

14          Q     I'm not talking about --

15          A     I can't think of a situation where  
16 they directed me on the content or told me not to  
17 say something.

18          Q     All right. And nor have you been  
19 overruled in your decision, correct, in decisions,  
20 as you've just told us?

21          A     Not that I'm aware of.

22          Q     You talked about the fact that you are  
23 not reading the newspapers and subscribing to the  
24 newspapers and reading about the case; is that  
25 correct?

1 A Right.

2 Q Okay. But let me go back in time, I'm  
3 not talking about the reporting of this inquiry.  
4 You were aware, and Mr. Wolson made reference to  
5 this, and Mr. Commissioner, I'm referring to  
6 volume J, tab J-63. That's the September 12th  
7 appearance in court. You probably read this in  
8 preparation for your testimony yesterday?

9 A Yes, sir.

10 Q Okay. Mr. Wolson, this was  
11 September 12th, and he starts off his submission,  
12 he talks about some articles that have been  
13 published in the newspaper?

14 A I just want to make it clear, sir,  
15 before we go forward, that it is the consequence  
16 of those articles that I made the decision that I  
17 made that I've told you about.

18 Q Right. Just, if you just listen to my  
19 question?

20 A Okay.

21 Q He said, and I'm referring to line,  
22 page 1723, Mr. Commissioner, line 18 into 19.

23 "Some suggestions made in the media  
24 accounts are in my view scandalous and  
25 without foundation."

1 And let me just refresh your memory. One of the  
2 allegations made, or innuendos made, was the fact  
3 that because you and Mr. Wolson had been  
4 co-counsel in the summer, last summer on a  
5 manslaughter, that it is as though there was an  
6 innuendo that you were giving him a special deal.  
7 Surely, you knew about that comment?

8 A Yes, sir.

9 Q Right. And you've already responded  
10 to that. Just so we get everything out in the  
11 open, and keeping that in mind about the  
12 scandalous allegation, or innuendo, you mentioned  
13 that years ago that you acted for police officers  
14 and you mentioned the Alexander docks case;  
15 correct?

16 A Yes.

17 Q That's probably 15 years ago,  
18 something like that?

19 A Your memory of it would likely be as  
20 good as mine.

21 Q It is a long time ago?

22 A Yes, sir.

23 Q And there were numerous police  
24 officers charged, and you and I were co-counsel on  
25 that; correct?



1 A Yes, sir.

2 Q You mentioned the Shaver case;  
3 correct?

4 A Yes.

5 Q This is five police officers charged  
6 with offences, one of them who unfortunately was  
7 my client had 34 charges. Yours had three. And  
8 you were correct that your client was discharged  
9 at the preliminary; correct?

10 A I believe, yes.

11 Q And that's my recollection. So up  
12 until that time we were co-counsel again?

13 A Yes, sir.

14 Q Fortunately, you didn't have to go  
15 through the six month jury trial, fortunately.  
16 And there is no reason to put on the record that  
17 they were all acquitted, so I won't put that on  
18 the record. Just as I won't put on the record the  
19 three people -- oh, and the case last summer, the  
20 three security guards, I was co-counsel again with  
21 you and Mr. Wolson; correct?

22 A Yes, sir.

23 THE COMMISSIONER: Unfortunately,  
24 Mr. Weinstein, we have no system in Canada like  
25 they have in the U.S. TV where you just strike it

1 from the record. So it will have to stay there.

2 MR. WEINSTEIN: Okay. So they were  
3 acquitted.

4 BY MR. WEINSTEIN:

5 Q The case you had last summer, I was  
6 co-counsel, because there were three security  
7 guards; correct?

8 A Yes, sir.

9 Q And I won't put on the record again  
10 that they were also all acquitted; correct?

11 A Yes, sir.

12 Q All right.

13 THE COMMISSIONER: Is there a question  
14 arising out of that?

15 MR. WEINSTEIN: I'm coming to that.

16 THE COMMISSIONER: All right.

17 BY MR. WEINSTEIN:

18 Q But since that time last summer, and  
19 even though we were co-counsel years ago, you have  
20 prosecuted police officers that I have defended;  
21 is that correct?

22 A Yes, sir.

23 Q And in fact, at the present time,  
24 there are at least two cases where I'm defending a  
25 police officer and you are the special prosecutor?

1           A     I will have to take your word on it,  
2     because I have been here for a long time and don't  
3     remember all of the files that I have ongoing at  
4     the moment.  And I'm sorry for that, sir.

5           Q     Well, one of them we know is an  
6     impaired cause bodily harm out in rural Manitoba?

7           A     Oh, yes, sir, yes, I do know that  
8     matter.

9           Q     And one is on remand at the present  
10    time.

11          A     Thank you, sir.

12          Q     All right.  So you and I have been  
13    co-counsel together, you and I have been opposing  
14    counsel; correct?

15          A     Yes, sir.

16          Q     And we still are opposing counsel?

17          A     Still.

18          Q     And have I not on numerous occasions,  
19    notwithstanding the fact that we have been  
20    co-counsel before, have I not on numerous  
21    occasions called you unreasonable in the positions  
22    that you are taking with my police officers?

23          A     All the time.

24          Q     Yes.  And is it -- I don't know, I'm  
25    tempted to ask you if you don't like me or don't

1 like them, but I won't ask you that.

2 A Well, you always tell me that I'm  
3 being unreasonable.

4 Q And I have also called you several  
5 names, but we won't get into that. Just because  
6 we have been co-counsel, are you going to do  
7 anything to benefit my client?

8 A No, I never would.

9 Q Thank you, sir. I'm sorry, one last  
10 question.

11 THE COMMISSIONER: Only one.

12 MR. WEINSTEIN: Yes, it is only one,  
13 as opposed to other counsel who just go on.

14 BY MR. WEINSTEIN:

15 Q You received the Abra report?

16 A The who?

17 Q The Abra --

18 A Yes, I received the report of Mr.  
19 Abra.

20 Q And that was already referred to. And  
21 Mr. Abra came to the opinion that there was not  
22 sufficient evidence to proceed or lay a charge of  
23 obstruction against Mr; Bakema, correct?

24 A Correct.

25 MR. WEINSTEIN: Thank you, sir.

1 MR. KING: Mr. Commissioner, normally  
2 at this time Mr. Prober does interject,  
3 essentially, I have discussed it with Mr. Jack and  
4 also Mr. Nozick, and they have both agreed that  
5 Mr. Prober can -- our table can ask questions  
6 after them, if that's not a problem with the  
7 Commission.

8 THE COMMISSIONER: You have all agreed  
9 that Mr. Prober can go to the end?

10 MR. KING: No, just before Mr. Green.  
11 I just thought I would put that on the record.

12 THE COMMISSIONER: Well, it is now  
13 4:46, late in the day. And how many -- you have  
14 one witness tomorrow, Mr. Paciocco?

15 MR. PACIOCCO: We have one witness  
16 scheduled for tomorrow. It is our expert Richard  
17 Peck, who is flying in, and Mr. Peck is only  
18 available -- he can stay Friday, heaven forbid,  
19 but I want to put that flag up the pole. We have  
20 got several gentlemen who are going to be  
21 cross-examining this witness, and I imagine he is  
22 probably going to be here until the mid morning  
23 break or later. I think we can get Richard Peck  
24 done tomorrow. But if we don't, I'm going to be  
25 asking you if we can't have special arrangements

1 and sit on Friday. The logistics have already  
2 been worked out for that. If we manage to finish  
3 Mr. Peck in miracle time, we would call, if we  
4 could, Mr. Kaplan, and get him started. We have a  
5 handful of witnesses left.

6 THE COMMISSIONER: I am sorry?

7 MR. PACIOCCO: We have a handful of  
8 witnesses left, and we have two days scheduled  
9 next week as fill in time, we have two days  
10 scheduled to sit and two days fill in time. The  
11 fill in times are August 7th and August 8th. It  
12 is still my hope that we won't require those. We  
13 have to prepare our submission that is going to  
14 take an appreciable time. The submissions are  
15 scheduled for August 11th, 12th, 13th and 14th.

16 THE COMMISSIONER: You certainly are  
17 not going to take four days?

18 MR. PACIOCCO: No, I can't imagine  
19 they are going to. And what I am going to  
20 suggest, and again I wanted to fly this up the  
21 flag pole so that everybody is aware, that we not  
22 start on the 11th, that people have the 11th as an  
23 extra preparation day, so that we can come in on  
24 the 12th and begin our submissions on that day.  
25 So the sooner we get finished, if we allow that

1 extra day, people will have five or six days, if  
2 necessary, to get their submissions done.

3 THE COMMISSIONER: Mr. McDonald.

4 MR. McDONALD: Thank you,  
5 Mr. Commissioner. I would just like to ask if  
6 Mr. Paciocco could indicate what his understanding  
7 is as to the order of submissions? I meant to  
8 raise that with him and I haven't done that yet,  
9 but this seems an appropriate time to do that, so  
10 we all know what to expect when submission time  
11 comes upon us.

12 THE COMMISSIONER: Shouldn't you be  
13 asking me that, rather than Mr. Paciocco?

14 MR. McDONALD: It can be to you too.  
15 And I think you will be guided by Mr. Paciocco's  
16 preference, if I'm reading you correctly.

17 THE COMMISSIONER: Well, I will listen  
18 to what he has to say, but in the end I reserve  
19 the right to make that final decision.

20 MR. McDONALD: Yes, you do. And if  
21 you have any preference that you would like or  
22 have in respect to order of submissions, the  
23 sooner that you could impart that to us, the  
24 better it would enable us to prepare our  
25 presentations.

1 THE COMMISSIONER: What do you  
2 suggest, Mr. Paciocco?

3 MR. PACIOCCO: I very humbly suggest  
4 that the Commission Counsel would go first. And I  
5 suggest that because there will be recommendations  
6 made to you. These counsel will not have advance  
7 notice of what those recommendations are, because  
8 we are still formulating them. They are going to  
9 want to respond to some of those recommendations,  
10 so they should have the opportunity to do that.

11 I would take the position that we  
12 should follow the same basic order that we have  
13 been following all along. We are going to try and  
14 approach the submissions in a thematic way so it  
15 may be possible to deviate from that and try and  
16 have the witnesses who are interested in the East  
17 St. Paul Police, for example, or counsel  
18 interested in East St. Paul go. We can try and  
19 vary it according to theme, but I suspect that  
20 given that there is a lot of overlap, we are best  
21 off just to go in the order that we have got now.

22 And I do anticipate the need for  
23 Commission Counsel to respond to things that are  
24 raised by other lawyers, so the order I envisage  
25 is Mr. Clifford and myself splitting the



1 submissions. Then counsel going in the order  
2 which they have been appearing before you for  
3 questioning, and then Mr. Clifford and I having  
4 some reply.

5 THE COMMISSIONER: Yes. Anybody have  
6 any suggestions?

7 MR. ZAZELENCHUK: Mr. Commissioner, I  
8 don't have any suggestions, but I have a couple of  
9 questions which will assist me in preparation.  
10 Firstly, whether this honourable tribunal has any  
11 inclination to impose time limits on the  
12 submission? I know in Supreme Court you are told  
13 you have an hour and that's the end of it. Of  
14 course, they don't deal with as many facts as we  
15 have here. But that's one question I have.

16 The other question that I have is  
17 whether, and I appreciate that Commission Counsel  
18 wants a reply, and I appreciate that Commission  
19 Counsel wants to speak last, but I wonder if Your  
20 Honour is considering giving any of the rest of us  
21 some limited form of reply to something that might  
22 be raised by people who speak after us? These are  
23 only questions that I ask because they will assist  
24 me in preparing my submissions.

25 THE COMMISSIONER: Anybody else?

1 MR. WEINSTEIN: Yes, Mr. Commissioner.  
2 I agree, it is strictly your decision.  
3 Mr. Paciocco's suggestion carries no more weight  
4 than any of ours on this point. However, I do  
5 agree wholeheartedly with Commission Counsel that  
6 he should go first and then we can go in the order  
7 that we have been to date. And if counsel wants  
8 to switch around, subject to approval by Your  
9 Honour, that might be allowed.

10 There is one thing that I would ask  
11 the Commissioner to think about, and that is  
12 giving the Commission Counsel right of reply to  
13 submissions. I know in the draft rules of  
14 procedure he had the right to re-examine  
15 witnesses. It remained silent on the suggestion  
16 raised by my learned friend as far as submissions  
17 and his right of reply. You know, I don't want --  
18 I should say I submit -- I would hate to see it  
19 going back and forth.

20 Commission Counsel is here to, as fair  
21 as he can, make his submission and make  
22 recommendations and that. And we are entitled to  
23 make recommendations or make submissions,  
24 naturally. But to give him the right of reply,  
25 with respect, in my opinion should not be allowed.

1 He can do as full and thorough job as he does, and  
2 will in his opening submission. But to start  
3 taking issue with things that are being said by  
4 other counsel who have a real interest, because we  
5 are representing our clients, so I'm asking you to  
6 think about it, not that I want an answer today or  
7 suggest that you give an answer today. But that's  
8 the one issue I really have with what is being  
9 suggested.

10 THE COMMISSIONER: Thank you.

11 MR. GREEN: Mr. Commissioner, I  
12 realize that we are operating and will be  
13 operating under fairly tight time constraints, but  
14 I'm wondering if there is any way that we could  
15 get some advance notice of what counsel for the  
16 Commission intends to say in his submissions?  
17 That's certainly the way that most court  
18 proceedings, most court processes go on, that the  
19 person who is sort of espousing a position has to  
20 give some advance notice. It may be impossible,  
21 but if there were some way of working that, that  
22 would be of great assistance to counsel, I  
23 believe, and I think probably would save time in  
24 the long run.

25 And I hate to disagree with my friend,

1 Mr. Weinstein, but I don't think anybody really --

2 THE COMMISSIONER: But you are going  
3 to?

4 MR. GREEN: Yes, I am. I will put it  
5 on the record. I don't think anybody really  
6 believes that Mr. Paciocco won't be discussing  
7 this matter with you after we have packed our bags  
8 and gone home. I think that's to be expected. So  
9 I'm wondering if that isn't kind of illusory to  
10 raise it. Thank you.

11 THE COMMISSIONER: Well, I can tell  
12 you that I don't know what other Commissioners do,  
13 but I will be writing this report, not  
14 Mr. Paciocco or anybody else.

15 MR. GREEN: I'm not suggesting that he  
16 will, but I'm sure that it is expected that there  
17 will be assistance from counsel in that process.  
18 That was my only point.

19 THE COMMISSIONER: Well, I may even  
20 seek assistance from other counsel. I have until  
21 the end of September to complete my report, but I  
22 can tell you that I took it on the understanding  
23 that I could ask for an extension. I intend to  
24 spend some time on this report. I think it is  
25 very important. I don't know how others feel

1 about it, but I think it is very important and the  
2 issues are very important. And it may be that  
3 once I get into my report, I may need some  
4 assistance. I may ask for that assistance in  
5 writing, or I may convene again, but it will  
6 probably be in writing. But I would like to take  
7 things as they come rather than to have any set  
8 rules.

9 MR. PACIOCCO: Yes, Mr. Commissioner,  
10 to respond to those two issues. With respect to  
11 notice ahead of time of what it is I'm going to be  
12 saying, I hope I have notice ahead of time of what  
13 it is that I am going to be saying. We barely  
14 have five days, if we are lucky and we finish the  
15 evidence, to amass submissions on over 4,000 pages  
16 of transcripts and many, many volumes of  
17 documents. We want to give you submissions that  
18 include references to transcripts and documents to  
19 assist you in writing your report. It is going to  
20 be a tremendous burden to get that done, and we  
21 are probably not going to stop from the time we  
22 get up until the time we go to bed for that  
23 period. I would love to be able to give everybody  
24 heads up, but I think they know what the issues  
25 are. Those who have issues that are of concern

1 for their clients have been given our best notice  
2 of where the interests are. It is just not  
3 realistic for me to undertake anything that I  
4 can't deliver.

5           On the other issue of whether  
6 Commission Counsel should go last, I understand  
7 that this isn't an adversarial context, I have  
8 never seen a situation where argument doesn't have  
9 some right of reply for the party who goes first.  
10 But the main issue is, we are here to assist you,  
11 Mr. Commissioner, we are here to provide a fair  
12 and balanced approach to the evidence, based on  
13 what the proof illustrates. I think it would be  
14 of interest and of assistance to you to have our  
15 input on the submissions that are made by those  
16 who, as Mr. Weinstein indicated, have an interest  
17 in the outcome. So for us to come in and make  
18 sure that we understand the context in which  
19 submissions are made, and the quality of those  
20 submissions as they impact upon your duty, I think  
21 it would be more than appropriate and, in fact, in  
22 my opinion it is necessary for us to make reply to  
23 submissions.

24           THE COMMISSIONER: As I said earlier,  
25 I'm not only going to rely upon you for your

1 assistance, but I'm going to rely on all counsel.

2 Talking about reliance, I would trust  
3 that with the evening, counsel who were  
4 cross-examining tomorrow will be so well prepared  
5 that cross-examination will move expeditiously,  
6 without unnecessary repetition of evidence that  
7 has already been given today, and that we should  
8 finish the cross-examination quite quickly.

9 MR. McFETRIDGE: I just have one  
10 comment to make on the submissions, and you can  
11 advise us later. I just wanted to know whether or  
12 not you wanted to hear argument separately on the  
13 Victims' Bill of Rights phase, and then go to the  
14 second phase, or just hear them together? I don't  
15 have any preference one way or the other, but I  
16 would like to hear what you have to say on that.

17 MR. PACIOCCO: We have given some  
18 thought to that, because of the obvious overlap of  
19 issues, including the testimony you have heard  
20 here, I think it would be much more efficient --  
21 if we divide the submissions, Mr. Clifford will be  
22 doing the Victims' Bill of Rights submissions on  
23 behalf of Commission Counsel, but because of the  
24 overlap in issues for other counsel, I think it  
25 would probably be more efficient for counsel to be

1 prepared to argue both issues when they arise.

2 THE COMMISSIONER: We have hit the  
3 magic hour. 9:00 o'clock tomorrow morning.

4 THE CLERK: All rise. This Commission  
5 of Inquiry is adjourned to tomorrow morning at  
6 9:00 o'clock.

7 (Proceedings adjourned at 5:00 p.m.)

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COURT REPORTERS' CERTIFICATE

Debra Kot and Cecelia Reid, court reporters in the Province of Manitoba, do hereby certify the foregoing pages are a true and correct transcript of our Stenotype notes as taken by us at the time and place hereinbefore stated.

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Cecelia Reid

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Debra Kot

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