(g) On October 29, 2007, Chief Justice Wyant gave judgment, imposing the conditional sentence that had been requested. He was clearly critical of the way matters had been presented to him. He made comments that can be taken as expressing displeasure with:

a. The failure by counsel, including Mr. Minuk, to make it clear on August 22, 2007 that the position being put forward had been plea bargained;

b. The careful orchestration of facts that left the Court with an incomplete record of events; and

c. The decision by Mr. Minuk to mention anecdotal evidence of alcohol consumption when reciting the background facts, but then not attempt to prove alcohol consumption when it was denied.

He also took the unusual move of addressing Mr. Harvey-Zenk directly and telling him in detail what the public believes actually happened.

(h) While the sentencing hearings were ongoing, there were media reports that Mr. Minuk had:

a. Acted for police officers in the past; and

b. He and Mr. Wolson had acted in the past, including recently, as counsel for co-accused persons.

Part Three: My Opinion on the Issues Identified in Paragraphs (a) through (o) of Your Letter

Overview of Opinion:

As will be discussed below, on the basis of the facts that I have been asked to assume, there was no conflict of interest, nor was it otherwise inappropriate for Mr. Minuk to have acted as prosecutor in this case.

However, Mr. Minuk's action recommendation or agreement that Mr. Harvey-Zenk be released on a promise to appear without conditions was not appropriate.

The police investigation of this fatal collision was badly compromised from the outset. Without attempting to exhaustively list the challenges to a successful prosecution that were presented by the investigation, I take particular note of the following:

(a) none of the police officers who attended the scene took any steps to determine whether Mr. Harvey-Zenk had consumed alcohol or was impaired, despite the following;

   a. an unexplained accident in which Mr. Harvey-Zenk apparently failed to brake from highway speed before colliding with a parked car;

   b. paramedics who interviewed Mr. Harvey-Zenk reported to police officers that they detected the odour of an alcoholic beverage emanating from him;

   c. Cst. Graham detected but failed to note the odour of an alcoholic beverage in Mr. Harvey-Zenk's vehicle;

   d. Cst. Woychuk detected the odour of an alcoholic beverage while Mr. Harvey-Zenk was in his police vehicle; and

(b) after noting a strong odour of alcohol emanating from Mr. Harvey-Zenk, Sgt. Carter issued what he noted as a blood demand while Cst. Woychuk noted that a breath demand had been made;

(c) there were problems with the officers' notes, including:

   a. Chief Bakema had two sets of notes;

   b. no officers recorded having been advised by the paramedics that Mr. Harvey-Zenk smelled of alcohol;

   c. Cst. Graham's notes do not record that he smelled alcohol in the Harvey-Zenk vehicle, and there is no record of when he detected that odour; and

   d. Cst. Woychuk reported that Cst. Graham and Chief Bakema collaborated in the preparation of their notes, and that Chief Bakema directed Cst. Woychuk as to the content of Cst. Woychuk's notes.

There were also challenges to a successful prosecution that were unrelated to the flawed investigation. Winnipeg Police Service officers who were with Mr. Harvey-Zenk in the hours prior to the collision did not provide the Professional Standards Unit investigators with sufficient

information to establish how much Mr. Harvey-Zenk had to drink, and when he consumed alcohol.

In view of all of these issues, as discussed below, it is my opinion that staying or withdrawing the charge of refusing to provide a breath sample was within acceptable prosecutorial standards and consistent with Manitoba Crown policy directives. In addition, staying or withdrawing the charge of criminal negligence causing death was within acceptable prosecutorial standards and consistent with Manitoba Crown policy directives, and although some indicia of impairment were present, a prosecutor could reasonably conclude that Crown's case for impaired driving causing death was subject to significant vulnerabilities.

This case involved a "true" plea bargain, one involving a *quid pro quo*. A line of authority from the Manitoba Court of Appeal holds that joint submissions on sentence resulting from "true" plea bargains are owed an even greater measure of deference than the already substantial deference afforded any joint submission.[48] Because trial judges are required to extend that greater measure of deference in those circumstances, it follows that counsel should inform them when joint submissions are the product of a "true" plea bargain. As will be discussed below, however, in my opinion, Crown counsel's failure to alert the trial judge to this fact in this case did not amount to a failure to comply with acceptable prosecutorial standards, nor was it inconsistent with ethical principles.

The facts to be read in at the guilty plea usually form a central and often pivotal component of any plea agreement. Alcohol consumption was clearly an aggravating factor, and with the exception of the grave consequences of the offence, perhaps the most aggravating aspect of the facts that were read into the record to substantiate the guilty plea. Mr. Wolson did not object to Mr. Minuk's characterization of the evidence concerning alcohol consumption at the guilty plea on August 22, 2007, but required the Crown to prove the existence of this aggravating factor on September 12, when the proceedings were reconvened at the trial judge's initiative because he was considering departing from the joint submission on sentence. As will be discussed below, in my opinion and on the basis of the facts to which my attention has been drawn, acceptable prosecutorial standards required the prosecutor to prove that Mr. Harvey-Zenk had consumed alcohol, after that allegation fell into issue.

Finally, it is also my opinion, to be discussed below, that the joint submission on sentence called for a sentence that was extraordinarily lenient, and that in the circumstances brought the administration of justice into disrepute.

(a) Whether it is a conflict of interest or it is otherwise inappropriate to act as prosecutor where a police officer is the accused, after acting in the past for police officers;

In addressing this question, I have assumed that there is no issue of misuse of confidential information, but rather that the lawyer's duty of loyalty is at issue. Lawyers have a duty of

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48 *R. v. Broekart*, [2003] 4 W.W.R. 402, 171 C.C.C. (3d) 97, 170 Man.R. *(2d) 229 (C.A.)*. *R. v. Sinclair*, [2005] 4 W.W.R. 662, (2004), 185 C.C.C. (3d) 569, 22 C.R. (6th) 319, 184 Man.R. (2d) 1 (C.A.) and *R. v. McKay* (2004), 186 C.C.C. (3d) 328, 22 C.R. (6th) 327, 184 Man.R. (2d) 259 (C.A.)

unswerving loyalty to their clients. This duty is central to the integrity and effectiveness of the adversarial system and the administration of justice.[49]

As discussed above, a "conflicting interest" is "one that would be likely to affect adversely the lawyer's judgment on behalf of, advice to, or loyalty to a client or prospective client."[50]

In the criminal law context, convicted persons attempting to demonstrate that their counsel were operating under a conflict of interest, and that a verdict of guilt ought therefore to be set aside must demonstrate an actual, as opposed to potential, conflict, although they need not demonstrate actual (as opposed to potential) prejudice.[51]

It stands to reason that special care to avoid conflicts of interest is called for in the case of independent counsel appointed pursuant to Manitoba Department of Justice Guideline No. 5:COU:1. The purpose of that policy is "to ensure confidence in the justice process by providing for the appointment of independent counsel in those situations where a reasonable person would perceive that an accused person may receive differential treatment because of his/her relationship with Manitoba Justice."[52] That purpose would be frustrated if the independent counsel's independence could reasonably be called into question.

But the question remains as to whether it would be inappropriate for a lawyer who had acted in the past for police officers to act as prosecutor in this case. I have concluded that it is a matter of degree.

Lawyers are under a duty to ensure that public confidence in the administration of justice is not diminished by their actions. For example, there are several lawyers in Toronto who are well known for defending police officers. A large portion of their practices are devoted to representing police officers. Appointment of one of these individuals as a special prosecutor in a case with police officer defendants would cause reasonable and informed observers to doubt whether the public interest would be well served by having that lawyer continue to act as prosecutor.

On the other hand, there are numerous lawyers who have, at various times, represented individual police officers or police organizations, but for whom the representation of police forms only a small, and perhaps historic, portion of a diverse defence practice. It is a question of how much of their practice was dedicated to defending police officers, and how recently they had done so before taking on this file.

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49 *R v Neil*, [2003] 3 S.C.R. 631 (S.C.C.) at paras. 12-16, see also *MacDonald Estate v Martin*, [1990] 3 S.C.R. 1235

50 See Note 29, *supra*

51 *R v Neil*, supra, at para. 39

52 The policy sets out the following principal criteria for selection of an independent counsel:

- independence from government and the individuals involved in the specific case,
- excellence in the practice of law,
- a track record for integrity, and
- significant previous experience in either the prosecution or defense of criminal charges in the court system

No doubt there are in Manitoba experienced defence counsel who have acted "in the past for police officers", but who could have discharged the role of prosecutor in a manner that would not have impaired public confidence in this prosecution.

I have not been provided with any information concerning the proportion of Mr. Minuk's practice that involves defending police officers. It is therefore impossible for me to offer a definitive opinion as to whether it was appropriate for Mr. Minuk to accept the appointment as independent counsel in this case.

(b) Whether there is a conflict of interest or it is otherwise inappropriate to act as a prosecutor in a case where a the defence lawyer has, in the past, acted for a co-accused in a joint trial where you were counsel for another accused person;

No conflict of interest arises, and there is no impropriety in acting as prosecutor in these circumstances. It is rightly assumed that members of our profession will act in accordance with ethical standards regardless of their acquaintance with opposing counsel.

Lawyers who represent co-accused in a joint trial **may** cooperate with one another, and coordinate defence strategies and argument, as well as the preparatory work that occurs prior to and during a trial, where it is in the best interests of their clients to do so.

This is not always the case, however. There are many circumstances where it is not in the best interests of an individual client for defence counsel to cooperate with counsel for co-accused, such as where a defence is available to attributes more or all criminal liability with the other accused person, or where individual counsel elect to employ very different trial strategies.

Where competent and ethical counsel act in concert under appropriate circumstances (circumstances which are likely not apparent to the court or the public), it is in the focused and strategic furtherance of their own clients' defence interests, and a fulfillment of counsel's ethical and professional obligations in that regard. Where there is a coordinated and collaborative approach between counsel for co-accused at a joint trial, there should be no assumption that such an approach is an indication that the interests of counsel are in any way aligned, beyond individual counsel's obligation towards their respective clients.

(c) Whether it was appropriate or within acceptable prosecutorial standards to either recommend or express agreement with the release on a promise to appear without conditions, of a person accused of criminal negligence causing death, impaired driving causing death, dangerous driving causing death, and refusal to provide a breath sample;

Section 498(1)(b) of the *Criminal Code* permits an officer in charge to release a person arrested without warrant from custody if they are charged with ***an offence that is punishable by imprisonment for five years or less***. Impaired driving causing death and criminal negligence causing death are each punishable by life in prison.[53] Dangerous operation of a motor vehicle causing death is punishable by a term not exceeding 14 years in prison. In light of these

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53 Sections 220(b) and 255(3) of the *Criminal Code*

Criminal Code provisions, the legal basis for releasing Mr. Harvey-Zenk on a promise to appear was questionable. Even if the officer in charge did have the authority under the *Code* to release him in this manner, it was inappropriate to do so. My view is that the gravity of the alleged offences and public interest concerns called for a more restrictive form of release, with conditions that reflected both the nature of the alleged offences and the gravity of consequences of the alleged conduct of the accused, such as a prohibition on the consumption of alcohol and (potentially) attendance at any place licensed to sell alcoholic beverages, or even driving.

(d) Whether it is within acceptable prosecutorial standards to stay or withdraw a charge of refusing to provide a sample, on the hypothetical facts set out in this letter;

In order to obtain a conviction for refusing to provide a breath sample against Mr. Harvey-Zenk, the prosecution would had to prove the nature of the demand made, beyond a reasonable doubt. The conflicting notes in this case, as between Sgt. Carter's and Cst. Wolchuk's notes, may well have proven fatal to a successful prosecution for this offence. Competent defence counsel would point to the fact that Sgt. Carter's notes read that he made a demand for a "blood sample"[54] rather than a breath sample, and that Mr. Harvey-Zenk was charged only with refusing to provide the latter. For these reasons, Mr. Minuk's decision to withdraw the charge of refusing to provide a breath sample was a reasonable one, and in my view, it was within acceptable prosecutorial standards to stay or withdraw a charge of refusing to provide a sample, on the hypothetical facts set out above.

(e) Whether it is consistent with the Manitoba Crown policy directives to stay or withdraw a charge of refusing to provide a sample, on the hypothetical facts;

The relevant Manitoba Department of Justice policy directive provides as follows:

> In the assessment of the evidence, a bare *prima facie* case is not enough: the evidence must demonstrate that there is a reasonable likelihood of conviction. This decision requires an evaluation of how strong the case is likely to be when presented at trial. Crown Attorneys are to make this evaluation impartially and according to law.
>
> A proper assessment of the evidence will take into account such matters as the availability, competence and credibility of witnesses and their likely impression on the trier of fact, as well as the admissibility of evidence implicating the accused. Crown Attorneys should also consider any defences that are plainly open or have been indicated by the accused, and any other factors which could affect the likelihood of conviction.[55]

For the reasons outlined in the preceding section, in my view, the decision to stay or withdraw the charge of refusing to provide a breath sample was consistent with this directive.

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54 It does not appear from the assumed facts that Sgt. Carter had the grounds required to make a demand for a blood sample. Specifically, it does not appear that he had reasonable and probable grounds to believe that by reason of Mr. Harvey-Zenk's physicial condition, Mr. Harvey-Zenk may have been incapable of providing a breath sample, or that it would have been impracticable to obtain a sample of his breath: see *Criminal Code*, s. 254(3).

55 Manitoba Department of Justice Policy Directive/Guideline No. 2 INT 1 (April 2001), p. 1.

(f) Whether it is within acceptable general prosecutorial standards to stay or withdraw a charge of impaired driving causing death, on the hypothetical facts;

While we do not know what conversations went on between the prosecution and defence prior to Mr. Minuk's decision to stay the charge of impaired driving causing death, based solely on the facts outlined above, his rationale for deciding to stay the charge of impaired operation of a motor vehicle causing death is not clear.

In order to secure a conviction of the offence of impaired driving causing death, a prosecutor must prove, beyond a reasonable doubt that the accused person's ability to operate a motor vehicle was impaired by alcohol or drugs, that they drove and that their impairment caused the death of another person. Convictions for impaired driving are notoriously difficult to obtain.

It is true that there real issues concerning the admissibility of evidence of Mr. Harvey-Zenk's refusal to provide a breath sample. There were no apparent issues, however, around the admissibility of evidence concerning Mr. Harvey-Zenk's impairment, as reflected by numerous indicia. As is discussed below, however, the weight to be attached to those indicia is another issue.

Impairment can be proven through evidence of a number of criteria, including the accused person's conduct and driving. If the evidence of impairment establishes any degree of impairment, the offence of impaired driving is made out.

While there are conflicting authorities concerning the application of the "marked departure from the norm" test, as it applies to evidence of bad driving offered as proof of impairment, evidence of any aspect of the accused person's conduct, including his driving, can be used evidence of impairment. Although slight departures from normal driving standards do not constitute proof of impairment, even in the presence of evidence of alcohol consumption, evidence of abnormal or improper driving can constitute such proof.[56]

An accused person can be convicted of impaired driving when a combination of alcohol and fatigue resulted in the impairment.[57]

In addition to an accused person's conduct and driving, evidence of other physical indicia of impairment can also constitute proof of impairment, including the odour of an alcoholic beverage, slurred speech, and lack of coordination. Evidence of all the circumstances and reported tests and observations must be taken into account by a trial judge, who must be satisfied

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56 *R v Stellato* (1993), 78 C C C (3d) 380, 18 C R (4th) 127 (Ont C A), aff'd [1994] 2 S C R 478n, 90 C C C (3d) 160n, 31 C R (4th) 60n, *R v Andrews* (1996), 104 C C C (3d) 392, 110 W A C 182 (Alta C A), leave to appeal to S C C refused 106 C C C (3d) vi, 135 W A C 79n

57 See, for example, *R v Pelletier* (1989), 51 C C C (3d) 161 (Sask Q B)

beyond a reasonable doubt that the reasonable inference to be drawn from that evidence is that the accused was impaired.[58]

In Mr. Harvey-Zenk's case, there was evidence of driving that markedly departed from good driving practices and standards (i.e., driving into the back of a stopped vehicle while travelling at a speed of 80 kilometres per hour, with no obstacles to visibility, and having made no apparent effort to stop), odour of alcohol, glassy eyes, and staggering while walking, accompanied by some evidence (which would likely be challenged) of alcohol consumption.

Clearly, at least a *prima facie* case existed against Mr. Harvey-Zenk for impaired driving causing death. On the other hand, once could readily imagine a plausible defence case being mounted, even on the assumed facts. Specifically, there was no erratic driving observed prior to the collision, Mr. Harvey-Zenk's lack of physical coordination could be explained as a result of the accident, and physical phenomena such as the odour of alcohol and glassy eyes are notoriously unreliable indicia of impairment.

Defence counsel would have factored these items into their overall assessment of the case. In light of the quality of the investigation, one could well imagine a diligent prosecutor reasonably concluding that there were significant impediments to the successful prosecution of this charge. Given those impediments, it is my opinion that it was within acceptable general prosecutorial standards to stay or withdraw a charge of impaired driving causing death, on the hypothetical facts.

(g) Whether it is consistent with the Manitoba Crown policy directives to stay or withdraw a charge of impaired driving causing death, on the hypothetical facts;

For the reasons outlined in the paragraphs above, in my view, it was consistent with the Manitoba Crown policy directives to stay or withdraw the charge of impaired driving causing death, on the facts I have been asked to assume.

(h) Whether it is within acceptable general prosecutorial standards to stay or withdraw a charge of criminal negligence causing death, on the hypothetical facts;

In order to prove criminal negligence causing death, the Crown would have to prove beyond a reasonable doubt that Mr. Harvey-Zenk showed a wanton and reckless disregard for the lives or safety of other persons, and that Mrs. Taman's death resulted.[59]

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58 *R. v. Landes* (1997), 161 Sask. R. 305, [1997] S.J. No. 785 (Sask. Q.B.)

59 In *R. v. J.L.*, the Court of Appeal for Ontario discussed offences of dangerous driving and criminally negligent driving, and outlined the differences between the two offences, in the context of a case that also involved a fatality:

> The offence of criminal negligence causing death is at the high end of a continuum of moral blameworthiness. A lesser offence along the same continuum is the dangerous operation of a motor vehicle in s. 249 of the *Criminal Code* which requires that the vehicle be driven, "in a manner that is dangerous to the public, having regard to all the circumstances." At the lower end of the continuum is careless driving under the *Highway Traffic Act*, R.S.O. 1990, c. H.8, s.130. See *R. v. Hundal* (1993), 79 C.C.C. (3d) 97 (S.C.C.) at 106, Cory J. Whether specific conduct should be categorized as criminal negligence is one of the most difficult and uncertain areas in the criminal law. *Anderson, supra*, at 484-485.

It is true that no explanation has ever been offered for Mr. Harvey-Zenk's failure to stop, or even brake, prior to colliding with the victim's car. There is no question that this represented a marked departure from the standard of care required of any driver. This departure could have been used as of evidence of both dangerous and impaired driving.

Wanton and reckless disregard for the lives or safety of other persons, however, is far more difficult to prove. Proof of the mental element of the offence of criminal negligence causing death requires some degree of awareness or advertence by the accused to a threat to the lives or safety of others, or alternatively, a wilful blindess that is culpable in light of the gravity assumed.[60] Under the circumstances, and in light of the apparent dearth of direct witness evidence for these events, it would be very difficult for the prosecution to prove this beyond a reasonable doubt. For this reason, in my view, it was a reasonable exercise of discretion for Mr. Minuk to stay the charge of criminal negligence causing death and proceed instead with the charge of dangerous driving causing death.

(i) Whether it is consistent with the Manitoba Crown policy directives to stay or withdraw a charge of criminal negligence causing death, on the hypothetical facts;

In light of the conclusion that I have reached in the previous section, it is my opinion that the decision to stay or withdraw the charge of criminal negligence causing death was consistent with the applicable Manitoba Crown policy directive.[61]

(j) Whether it is within acceptable general prosecutorial standards to agree, on the hypothetical facts, to a plea bargained arrangement that would result in the staying of charges of criminal negligence causing death, impaired driving causing death, and refusing to provide a sample, in exchange for a plea of guilty to a dangerous driving causing death plea and a joint position for a conditional sentence of two years;

The joint position as to sentence is perhaps the most difficult element of the agreement reached between Crown and defence counsel.

The lesser offence of dangerous driving requires that the accused's conduct amounted to a marked departure from the standard of care that a reasonable person would observe in the accused's situation. If an explanation is offered by the accused for his driving, "the trier of fact must be satisfied that a reasonable person in similar circumstances ought to have been aware of the risk and of the danger involved in the conduct manifested by the accused." *Hundal, supra,* at 108 The standard is the modified objective standard

Criminal negligence requires a more elevated standard The departure from the norm must be more marked in *both the physical and the mental elements* of the offence See *R v Palin* (1999), 135 C.C C (3d) 119 (Qc C.A), leave to appeal refused [1999] C S C R no 106 (S C C) at 126-27, Deschamps J A The requirement for a greater marked departure in both the physical and mental elements is consistent with the higher level of moral blameworthiness associated with criminal negligence, namely, wanton or reckless disregard for the life or safety of others See *R v Fortier* (1998), 127 C C.C (3d) 217 (Que C A)

60 *R v Tutton*, [1989] 1 S.C R. 1392, (1989), 48 C C.C (3d) 129

61 Manitoba Department of Justice Policy Directive/Guideline No 2 INI 1 (April 2001), p. 1

In my opinion and based on the hypothetical facts, it was not within acceptable general prosecutorial standards to agree to this plea bargained arrangement. While there were problems in proving the charges of criminal negligence causing death, impaired driving causing death and refusing to provide a breath sample that justified not proceedings with them, a conditional sentence of two years for the offence of dangerous driving causing death is extraordinarily lenient. As is discussed below in connection with the next question, in the circumstances of this case (which included evidence of alcohol consumption and some indicia of impairment, coupled with an unexplained collision causing a fatality), entering into a joint submission for imposition of that sentence tended to bring the administration of justice into disrepute.

(k) Whether it is consistent with the Manitoba Crown policy directives to agree, on the hypothetical facts to a plea bargained arrangement that would result in the staying of charges of criminal negligence causing death, impaired driving causing death, and refusing to provide a sample, in exchange for a plea of guilty to a dangerous driving causing death plea and a joint position for a conditional sentence of two years;

The Manitoba Department of Justice policy directive on appointment of independent counsel required the independent counsel, Mr. Minuk, to be guided by the prosecution policies issued on behalf of the Attorney General of Manitoba and applicable to all prosecutions undertaken by the province.[62] This included the policy directive on plea bargaining. It is noteworthy that the latter policy directive states in part,

> It is proper for Crown counsel to make agreements respecting pleas or sentence with a view to avoiding an unsuccessful prosecution. Thus, for example, where deficiencies in the available evidence create a substantial likelihood of acquittal, it is appropriate for Crown counsel to agree to pleas of guilty to lesser but related charges, or agree to recommend a less severe sentence than would otherwise be sought, provided such agreement does not bring the administration of criminal justice into disrepute.[63]

The sentence imposed as a result of the joint submission in this case (conditional sentence of two years with no driving prohibition under s. 259 of the *Criminal Code*) was extraordinarily lenient. Was it so extraordinarily lenient as to be outside the appropriate range of sentence? In my view, it was.

It is true that in many cases involving conduct that occurred prior to December 1, 2007, courts imposed conditional sentences for dangerous driving causing death[64]. Notably, however, Parliament has expressed the view that conditional sentences should not be available for those convicted of this offence. On December 1, 2007, amendments to the *Criminal Code* introduced through Bill C-9[65] came into effect.[66] Section 742.1 was amended to provide that conditional

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62 Manitoba Department of Justice Policy Directive/Guideline No 5 COU-1 (January 2005), p 5

63 Manitoba Department of Justice Policy Directive/Guideline No 2 PLE 1 (October 1990), p 2

64 See, for example, *R v Guppy*, [2003] O J No 1216 (Ont C J), *R v McKay*, [1997] S J No 443 (Sask Q B)

65 R S., c C-46

sentences would no longer be available for offences involving serious personal injury (as defined by s. 752) **and** those offences punishable by maximum terms of imprisonment of 10 years or more. Dangerous driving causing death is clearly a serious personal injury offence, and it is punishable by a maximum term of imprisonment of 14 years. While s. 11(i) of the *Charter of Rights* would have guaranteed Mr. Harvey-Zenk the benefit of the lesser punishment if he were sentenced after December 1, 2007 – meaning that as a matter of law, a conditional sentence would have remained available to the sentencing court – the Crown could reasonably cite the amendment as evidencing Parliament's intention that conditional sentences not be granted for this type of offence.

In my opinion, given the available evidence of alcohol consumption (even if it was "historical and anecdotal"[67]), the presence of some indicia of impairment and the absence of any explanation for Mr. Harvey-Zenk's failure to stop, a two year conditional sentence for the offence of dangerous driving causing death was so lenient as to be outside the appropriate range of sentence and to bring the administration of justice into disrepute.

(l) Whether it is within acceptable general prosecutorial standards to agree or decide not to prove that the accused had consumed alcohol after that allegation fell into issue, on the hypothetical facts;

Analysis of this issue requires reference to the record.

In reading in the facts substantiating the defendant's plea of guilty to the offence of dangerous driving causing death, Mr. Minuk stated:

> Through (the Winnipeg Police Service Professional Standards Unit's) investigation, anecdotal historical evidence of alcohol consumption by the accused, some times prior to the collision, was identified. The investigation, however, did not permit conclusions to be drawn from this history. Proof of impairment, by reason of the investigation, would be difficult at best.[68]
>
> . . .
>
> In this particular case, Your Honour is left with a situation where the accused, travelling in the light of day, early in the morning when people would be travelling to work, at a speed deemed to be within the posted speed limit, albeit not slowing at the intersection, not coming to a stop. Without an observation of erratic driving and only anecdotal evidence of alcohol, not capable of proof of impairment. Those facts Your Honour will have to take into account in assessing the appropriate sentence in this matter.[69]

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66 Although Bill C-9 came into effect on December 1, 2007, it received Royal Assent on May 31, 2007. This should have been known to the prosecutor in July 2007, when the plea negotiations apparently took place

67 **Transcript of Proceedings, September 12, 2007**, page 33, lines 5-7

68 **Transcript of Proceedings, August 22, 2007**, page 8, line 34 to page 9, line 5

69 **Transcript of Proceedings, August 22, 2007**, page 10, lines 11-20

In this case, Mr. Wolson did not require proof of the anecdotal evidence of alcohol consumption when the facts were read in on August 22, 2007.[70] In his submissions on that day, Mr. Wolson did not deny that his client had consumed alcohol, nor did he expressly agree with it. He did, however, deny that his client was impaired and put his client's plea of guilty to dangerous driving causing death in terms of inadvertence.[71]

The parties' joint submission as to sentence included the submission that conditions attaching to the conditional sentence include that the defendant abstain from the consumption and possession of alcohol and other intoxicants, and that he attend, participate and complete a substance abuse assessment and treatment program, as directed by his supervisor.[72]

In setting out his understanding of counsel's positions regarding alcohol consumption, the trial judge said:

> ... I accept that the Crown doesn't allege that, it's not a factor, although the Crown relies on some evidence of historical drinking as part of the, as part of the facts supporting the plea.[73]

There is authority for the proposition that any consumption of alcohol is an aggravating feature in dangerous driving cases.[74]

Before Crown counsel concluded his rendition of the facts supporting the guilty plea but before the victim impact evidence was led, the trial judge again sought to clarify his understanding of the basis for the guilty plea and the attendant finding of guilt. When he did, the following exchange took place between the trial judge and Crown counsel:

> THE COURT: So it is fair to say that, in essence, the factual circumstances surrounding the Crown's acceptance of the plea to dangerous operation of a motor vehicle causing the death of Mrs. Taman was a combination between the evidence of consumption of some alcohol along with an accident that appears to be unexplained where speed was – doesn't appear to – there doesn't appear to be any evidence of excessive speed but, but a –
>
> MR. MINUK: Well, that and –
>
> THE COURT: – but an accident where – that occurred without braking at a red light?
>
> MR. MINUK: Absolutely, yes. That there was an accumulation of what would otherwise be Highway Traffic violations that would set this apart from –

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70 It may be observed, as the trial judge did in his reasons for sentence (**Transcript of Proceedings, October 29, 2007**, page 21, lines 21-24) that cases such as the one at bar point to the advisability of reducing agreed upon facts to writing and filing them as agreed statements of fact

71 Mr Wolson submitted,

> in this case, the nature of the accident, itself, is not one that was brought on by an impairment because that wasn't the position articulated by the Crown, that Derek was impaired at the time, but through inadvertence and – which, in my view, falls into the area of dangerous driving [**Transcript of Proceedings, August 22, 2007**, page 59, lines 3-8]

72 **Transcript of Proceedings, August 22, 2007**, page 14, lines 10 through 13 and 18 through 27. Note that the latter condition was sought in reliance on two other cases where there was "historical evidence, anecdotal as it was, of alcohol consumption prior to driving, but impairment could not be proven" lines 20 through 23

73 **Transcript of Proceedings, August 22, 2007**, page 62, lines 11 through 15

74 See *R. v. Garneau*, [2007] J.Q. No. 12762 (C.Q.C.C.), cited in *R. v. Tremblay*, [2008] M.J. No 194 (MBQB)

> THE COURT: And that's the marked departure, the combination of those factors is the marked departure?
>
> MR. MINUK: Correct, yes. Yes. That – this is not just a pure accident.[75]

On September 12, 2007, Mr. Wolson argued that by submitting on August 22 that inadvertence was the basis for guilty plea and pointing out that the Crown was not contending that Mr. Harvey-Zenk was impaired,

> I thought I made it very clear to the court that I don't accept that. I don't accept the consumption of alcohol being any part of this plea ... Anecdotal evidence is not evidence. And I say to you that if the Crown wants to advance that prove it.[76]

Mr. Wolson reiterated this position several times during his submissions on September 12, 2007:

> ... what I was trying to express was that in my view, impairment, alcohol consumption I, I could have said, but I didn't, is not the issue in this case ... [77]
>
> ... this is not an offence of anecdotal evidence which should play a part in your reasoning on sentence.[78]
>
> ... from the defence perspective, the consumption of alcohol is not a factor, and in the absence of the Crown proving it, it's not a factor I should take into account.[79]

Eventually, on September 12, 2007, the trial judge asked the prosecutor if he was going to call any evidence on the issue of alcohol consumption.[80] After two brief recesses, Mr. Minuk declined to call any evidence on the issue.[81]

Had the parties not been required to re-attend before the sentencing judge, it is unclear whether or when Mr. Wolson would have registered the concerns he did, or asserted that his client did not admit to the consumption of any alcohol. It is unclear from the record whether any agreement existed as between counsel concerning the facts to be placed before the sentencing court in support of the guilty plea. One would expect counsel to carefully memorialize their shared understanding of the factual basis to be provided to the Court, together with an explanation of why the Crown was not seeking to prove aggravating factors.

With those circumstances in mind, was it within acceptable general prosecutorial standards for the prosecutor to agree or decide not to prove that the accused had consumed alcohol after that allegation fell into issue? In my view, if in the circumstances of this unexplained collision

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75 **Transcript of Proceedings, August 22, 2007**, page 18, line 29 to page 19, line 12

76 **Transcript of Proceedings, September 12, 2007**, page 39, lines 7-31

77 **Transcript of Proceedings, September 12, 2007**, page 40, lines 16-19

78 **Transcript of Proceedings, September 12, 2007**, page 43, lines 19-21

79 **Transcript of Proceedings, September 12, 2007**, page 58, line 32 to page 59, line 1

80 **Transcript of Proceedings, September 12, 2007**, page 59, lines 15-25

81 **Transcript of Proceedings, September 12, 2007**, page 62, line 30 to page 63, line 20

alcohol consumption was of sufficient significance to warrant inclusion in the facts read into the record as foundation for the guilty plea, the prosecutor should have been able and willing to prove alcohol consumption.[82] I note that the Manitoba Department of Justice policy directive on plea bargaining expressly states that "Crown counsel should not agree to sanitize or play down certain facts in exchange for a guilty plea" and that "(a)ll of the facts relating to the incident which can be proved and which are of significance must be disclosed to the Judge."[83] I also note that the *Federal Prosecution Service Deskbook* similarly describes as unacceptable any agreement "to withhold from the court facts that are provable, relevant, and that aggravate the offence."[84]

What is at stake in these decisions is the factual basis for the sentence. This engages the duty of counsel not to mislead the court. I agree with the view expressed by Proulx and Layton that while Crown and defence counsel can negotiate regarding the facts to be relied on for the purposes of sentencing, it is not acceptable to reach an agreement respecting facts that amounts to misleading the court.[85] The decision not to attempt to prove consumption of alcohol was tantamount to an agreement not to place facts before the court.

The position taken by both counsel in this case was paradoxical: Mr. Wolson did not object to the facts as they were read by Mr. Minuk on August 22, 2007. Further, he agreed to a condition of the conditional sentence prohibiting alcohol consumption in a joint submission concerning that sentence. He then (on September 12) objected to any consideration of alcohol as an aggravating factor. For his part, Mr. Minuk cited alcohol consumption in the facts he read into the record on August 22, 2007, and proposed a condition prohibiting alcohol consumption. But then, in the face of Mr. Wolson's objections, Mr. Minuk withdrew any references to alcohol consumption. The approaches taken by counsel do not invite a single, logical explanation.

(m) Whether it is within acceptable prosecutorial standards and/or ethical principles to present a joint position to a judge without making it clear to a judge that the joint position was arrived at as a result of a plea bargain;

In a series of cases that the trial judge cited during the September 12, 2007 proceedings, the Manitoba Court of Appeal has held that heightened deference should be extended to a joint submission as to sentence that is the product of a plea bargain.[86] This implies a duty on counsel

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82 The evidence of Cst. Woychuk, Cst. Graham, Sgt. Carter and the paramedics at the scene was capable of establishing alcohol consumption by Mr. Harvey-Zenk sometime prior to the collision.

83 Manitoba Department of Justice Policy Directive/Guideline No. 2:PLE 1 (October 1990), p. 3.

84 FPS *Deskbook*, ch. 20, "Plea and Sentence Discussions and Issue Resolution" (2005) section 20.3.4.

85 The Hon. M. Proulx and D. Layton, *Ethics and Canadian Criminal Law* (Toronto: Irwin Law Inc., 2001), p. 695.

86 See **Transcript of Proceedings, September 12, 2007**, page 1, line 32 to page 6, line 34, and especially the references to *R. v. Broekart*, [2003] 4 W.W.R. 402, 171 C.C.C. (3d) 97, 170 Man.R. (2d) 229 (C.A.); *R. v. Sinclair*, [2005] 4 W.W.R. 662, (2004), 185 C.C.C. (3d) 569, 22 C.R. (6th) 319, 184 Man.R. (2d) 1 (C.A.) and *R. v. McKay* (2004), 186 C.C.C. (3d) 328, 22 C.R. (6th) 327, 184 Man.R. (2d) 259 (C.A.). In *R. v. Broekart*, Hamilton J.A. commented (at para. 29):

> The amount of weight to be accorded to a joint submission will depend on all of the circumstances. One of the circumstances can be whether the joint submission arises out of a plea bargain situation, or as a result of a joint submission on a guilty plea to the offence charged. By plea bargain I mean the situation where an accused person pleads guilty to the offence charged, or a lesser offence and, by doing so, gives up a viable defence, or provides another

– and prosecutors in particular – to inform trial judges when joint submissions are the result of plea bargains. A prosecutor's failure to provide this information to the court would not normally amount to an ethical breach,[87] given that defence counsel is equally well positioned to provide it and that when they are inclined to reject joint submissions, trial judges are under an obligation to inform counsel of that fact and invite further submissions on the issue.

It seems unusual that an experienced judge or lawyer would not have either recognized or assumed that the joint position advanced by counsel in this case was the result of a "true" plea bargain.

(n) Whether, judging from the transcripts you will receive, sufficient efforts had been taken by the prosecutor, in the context of all submissions made, to alert the presiding judge to the fact that the joint position was arrived at as a result of a plea bargain;

In my opinion, the prosecutor did not take sufficient efforts to alert the trial judge to the fact that the joint position was arrived at as a result of a plea bargain at the initial sentencing hearing in this case on August 22, 2007. The trial judge was correct in stating as he did on September 12, 2007,

> Nowhere in [the August 22, 2007] transcript, nowhere did either counsel talk about the exigencies of the evidence, a *quid pro quo*, a plea bargain, those words never existed. In fact, the, the whole representation from that date from both counsel was that this was a joint recommendation supported by the evidence.[88]

Later during the proceedings on September 12, 2007, the trial judge reiterated,

> But I didn't hear you at any time in the previous submissions, nor even here, say that this was really a plea bargain until then you said exigencies and plea bargain, but and that quotes the Manitoba Court of Appeal all right, and quotes it properly, but I still don't see how this is a plea bargain and exigencies other than you telling me it is, because the factual basis [counsel] presented it to me, don't [sic] seem to justify that.[89]

Crown counsel then pointed out that the Crown could not prove speeding or erratic driving prior to the collision,[90] and characterized the prosecution's case as "not the clearest of cases where the

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"quid pro quo" in exchange for a joint submission on sentence. Here there was no plea bargain in the sense described. Whether a plea bargain or joint submission as here, the circumstances surrounding the agreement are a relevant consideration.

In *R. v. McKay*, Steel J.A. explained (at para. 13), "The clearer the quid pro quo, the more weight should be given an appropriate joint submission by the sentencing judge." For a case involving a "true plea bargain", see *R. v. Lamirande*, [2007] 1 W.W.R. 389, (2006), 211 C.C.C. (3d) 350, 205 Man. R. (2d) 245 (C.A.), also cited by the trial judge.

87 It would be a clear ethical transgression for a prosecutor to fail to advocate in support of a joint submission on sentence in anything other than unequivocal terms. For example, although legally correct, it would be ethically wrong to emphasize that a joint submission is not binding on the court, and that the court is free to depart from it in certain circumstances.

88 **Transcript of Proceedings, September 12, 2007**, page 24, lines 26-31.

89 ***Ibid.***, page 29, lines 7-14.

90 ***Ibid.***, page 29, lines 18-23.

evidence is so overwhelming",[91] "a case which was not very strong on facts".[92] Crown counsel correctly stated,

> ... If it wasn't said to you initially, it wasn't conveyed to you in the clearest of terms initially, then the further obligation is to do it when you're called upon to justify or to explain a position that you put to the court ... you now have with the clearest of language without using descriptive terminology what the problems were.[93]

(o) Whether on the transcripts in this case, and in light of the hypothetical facts adequate information was furnished by the prosecutor to satisfy the ethical and professional obligations of a prosecutor presenting the factual underpinnings of a plea of guilty.

Negotiated resolutions present special issues for counsel. Among the most challenging aspects of resolution discussions is negotiating the facts to be placed before the court. On the facts of this case, it is reasonable to conclude that consumption of alcohol played some role in the offence committed by Mr. Harvey-Zenk – if only to make him more susceptible to drowsiness.

It is clear that the trial judge struggled in trying to understand the guilty plea's factual underpinnings. In my opinion, the public interest required that evidence of alcohol consumption be brought to the attention of the sentencing court, and proven as necessary. In failing to prove this fact, the prosecutor in this case failed to meet his professional obligations.

Yours truly,

Brian Gover
BG/ln

Attachment: *curriculum vitae*

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91 ***Ibid***, page 30, lines 17-18

92 ***Ibid***, page 33, lines 16-18

93 ***Ibid.***, page 34, lines 8-12; page 34, line 33 to page 35, line 1