TAMAN INQUIRY
OPINION

1.1 On December 5, 2007, by Order in Council 403/2007, the Lieutenant Governor of Manitoba appointed the Honourable Roger Salhany, Q.C. as a Commissioner to inquire into various aspects surrounding the conduct of the police investigation and subsequent prosecution of Derek Harvey-Zenk in relation to a fatal motor vehicle accident which occurred on February 25, 2005, and resulted in the death of Mrs. Crystal Taman.

1.2 By letter dated February 22, 2008, David M. Paciocco, Commission Counsel requested my opinion, with respect to certain matters listed as paragraphs (a) to (o) under the heading "Opinion Evidence Relating to the Conduct of the Prosecution". These fifteen areas of opinion (a-o) are contained at pages 9 and 10 of Mr. Paciocco's instructing letter. This opinion will address each of those areas *seriatim*, although some of them will be combined for the purpose of response.

1.3 Mr. Paciocco's letter also set out the "hypothetical" facts upon which the opinions are to be based. These facts are set out at pages 3-7 of Mr. Paciocco's letter.

1.4 This opinion is based upon the hypothetical facts set out in Mr. Paciocco's letter and referred to above. I have not had regard to the investigative file. In this respect I quote the following excerpt from page 2 of Mr. Paciocco's letter:

> "It would be burdensome to expect you to review and familiarize yourself with the entire investigation. Should you wish to do so, I can provide you with the investigative file. A more efficient way to proceed is for me to outline a hypothetical set of facts in this letter given what I suspect at this point the evidence will show. I will ask you to [*sic*] below to base aspects of your opinion on the assumption that these hypothetical facts are true."

1.5 In formulating my opinions I have also had regard to the ancillary materials provided by Mr. Paciocco, namely a binder entitled "Prosecutorial Standards and Ethics" as well as a binder of the transcripts of the sentencing proceedings. With respect to the latter, Mr. Paciocco's letter, at page 7, states: "To assist you in preparing your opinion, I am sending copies of the sentencing transcripts identified above." Further, Mr. Paciocco directed my attention to the transcripts in a number of paragraphs set out in the hypothetical facts. I take it from these references (in particular paragraphs e, f and g on pages 6 and 7 of Mr. Paciocco's letter) that I am to have regard to the transcripts not with respect to the hypothetical facts but rather with respect to what occurred in Court as between counsel and the Sentencing Judge.

THE HYPOTHETICAL FACTS

2.1 The following is a compilation of the hypothetical facts set out in Mr. Paciocco's letter. Again, my opinion is confined to these facts and an assumption that they are true.

2.2 The accused, Mr. Harvey-Zenk, was an off-duty Winnipeg police officer at the time of the relevant events. After working a shift on February 24, 2005, he went to a restaurant/bar in the late evening hours of that day. At the bar were numerous other off-duty Winnipeg police officers (as many as 25). At the restaurant/bar, Mr. Harvey-Zenk "consumed some alcohol". After 2:00 a.m. on the morning of February 25th, 2005, Mr. Harvey-Zenk with a number of other off-duty officers went to the home of Cst. Shawn Black. While alcohol was available, there was no direct evidence that Mr. Harvey-Zenk consumed any while at the Black residence.

2.3 At approximately 7:00 a.m. on February 25, 2005, Mr. Harvey-Zenk left the Black residence in his automobile. During the course of driving, Mr. Harvey-Zenk rear-ended a vehicle driven by Mrs. Crystal Taman. At the time of the collision, Mrs. Taman was stopped at a red light. In the time leading up to the collision, Mr. Harvey-Zenk's vehicle did not abate its speed. It was traveling at approximately 80 kilometers per hour which was the ordinary road speed at the location. His view of the road ahead was unobstructed, conditions were clear and visibility was excellent. As well there was signage leading up to the red light which indicated the existence of the red light.

2.4 Police officers from the East St. Paul Police Service arrived at the scene at approximately 7:16 a.m. None of the five officers who arrived at the scene set out to determine whether Mr. Harvey-Zenk had consumed alcohol or was impaired. The ranking officer on the scene, Chief Bakema, placed Mr. Harvey-Zenk in the back of a police vehicle at approximately 7:42 a.m. That police vehicle was operated by Cst. Woychuk, a police officer of 4 to 6 months experience. Chief Bakema's notes indicate that he placed Mr. Harvey-Zenk in the back of the police vehicle because of the cold and because of Mr. Harvey-Zenk's emotional condition. Mr. Harvey-Zenk remained in the vehicle until 8:08 a.m. when he was transported to the police station by Cst. Woychuk.

2.5 Cst. Woychuk has given two versions as to why he transported Mr. Harvey-Zenk to the station. One version was for a traffic accident report to be completed. The other version is that he did so on the instructions of Chief Bakema so that the matter could be taken care of by Sgt. Carter, a more experienced officer. There is no indication that Mr. Harvey-Zenk was arrested at the time he was transported nor is there any evidence that he was advised of his right to counsel.

2.6 The investigative file contains several indications that Mr. Harvey-Zenk may have had alcohol in his body at the time of the accident. These include the following:

a. Paramedics who interviewed Mr. Harvey-Zenk in the back of the police vehicle between 7:42 a.m. and 7:58 a.m. detected an odor of alcohol coming from him. One or more of the paramedics may have mentioned this to Cst. Woychuk.

b. Cst. Graham noted the odor of alcohol in Mr. Harvey-Zenk's vehicle.

c. Cst. Woychuk noted an odor of alcohol either while Mr. Harvey-Zenk was waiting in his police vehicle or while *en route* to the police station.

It is noteworthy that no demand was made, at the scene or *en route*, either for a roadside breath sample or an evidentiary breath sample.

2.7 At the East St. Paul Police Station at approximately 8:12 a.m., Sgt. Carter (who had not been at the accident scene) formed the opinion that Mr. Harvey-Zenk was impaired. He noticed a strong odor of alcohol and he observed that Mr. Harvey-Zenk was unsteady on his feet. Cst. Woychuk confirmed the unsteadiness. Sgt. Carter's notes record that he arrested Mr. Harvey-Zenk at 8:18 a.m. and then issued a blood demand. In his notes, Cst. Woychuk described the demand as a breath demand. Mr. Harvey-Zenk initially agreed to furnish a breath sample, consulted with counsel, and then refused.

2.8 With respect to the police officer's notes, the following facts are to be assumed:

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 Mr. Harvey-Zenk's vehicle.
d. Sgt. Carter's notes record a blood instead of a breath demand.
e. Cst. Pedersen, who processed Mr. Harvey-Zenk for the *Identification of Criminals Act* claims to have observed signs of impairment at that time, namely 1:25 p.m., but there is no record of such observations in her notes or in the Investigation Report.
f. There are reports by Cst. Woychuk made many months after the investigation, that Cst. Graham and Chief Bakema made their notes together and that he (Cst. Woychuk) crafted the contents of his own notes to reflect directions provided by Chief Bakema.

2.9 The Winnipeg Police Service Professional Standards Unit conducted the investigation of the off-duty police officers who had been in the company of Mr. Harvey-Zenk during the time prior to the accident. None of the witnesses interviewed could provide helpful information about the amount of alcohol Mr. Harvey-Zenk had consumed prior to the accident. At the same time, all of the witnesses who described noticing him said that he was showing no signs of impairment, including shortly before the collision. Some of those interviewed confirmed that Mr. Harvey-Zenk had been drinking beer at the restaurant bar, although the quantity was unknown. A waitress at the restaurant/bar, who was interviewed sometime later, made reference to an off duty police officer who had been celebrating his wife's pregnancy and who had consumed 7 or 8 pints of beer (Mr. Harvey-Zenk's wife was in fact pregnant at the time). However, the waitress did not pick Mr. Harvey-Zenk or anyone else out of the photo lineup notwithstanding that Mr. Harvey-Zenk's photograph was in the photo pack.

2.10 As this case involved a local police officer, Mr. Martin Minuk, a senior Winnipeg defence lawyer, was assigned to prosecute the case as an independent prosecutor. This assignment was consistent with Manitoba Justice Policy pursuant to Guideline No. 5: COU: 1.

2.11 While Mr. Harvey-Zenk was in custody, Mr. Minuk was consulted by Sgt. Carter. Mr. Minuk approved the charges being contemplated by Sgt. Carter and confirmed that Sgt. Carter could release Mr. Harvey-Zenk on a Promise to Appear without conditions.

2.12 The Preliminary Inquiry was scheduled to commence June 5, 2006. On April 21, 2006, Mr. Minuk was made aware of allegations by Cst. Woychuk respecting Chief Bakema's conduct during the investigation. As a result of this, Mr. Minuk caused an independent RCMP investigation to be undertaken into Chief Bakema's conduct and, at the same time, arranged to adjourn the Preliminary Inquiry which was re-scheduled for the summer of 2007.

2.13 In due course, Mr. Minuk received additional investigative material from the RCMP. It is to be assumed as a fact that this further material contained no significant evidence assisting the prosecution other than Cst. Pedersen's aforementioned unreported claim to have observed the signs of impairment of Mr. Harvey-Zenk at approximately 1:25 p.m. on February 25, 2005. It is to be further noted that Cst. Pedersen's observations are contradicted by a Winnipeg Police Service "Wellness Officer" who attended on Mr. Harvey-Zenk immediately before his release and noted no signs of impairment.

2.14 As a result of the investigation, Mr. Harvey-Zenk was charged with four counts as follows:

Criminal negligence causing death
Impaired driving causing death
Dangerous driving causing death
Refusing to provide a breath sample

2.15 On July 16, 2007, the first day of the rescheduled Preliminary Inquiry, the matter was adjourned to the following day, namely July 17, 2007. On July 17, 2007, Mr. Harvey-Zenk pled guilty to dangerous driving causing death. The plea was taken by Chief Judge Wyant. The other three charges were then stayed by Mr. Minuk. The matter was then adjourned for submissions to take place on August 22, 2007. On August 22, 2007, a single Sentencing Book of Authorities was offered to the Court (the authorities were endorsed by both counsel) and a joint position was taken requesting a conditional sentence of two years. No request was made for a Court ordered driving prohibition.

2.16 On September 12, 2007, Chief Judge Wyant reconvened Court for further argument. He was uncomfortable with the joint position that had been put forward. Three matters arose at that time:

a. Chief Judge Wyant appears, for the first time, to have understood that the joint position put forward on August 22, 2007, was not simply two lawyers agreeing on an appropriate sentence, but rather was being presented as a *quid pro quo* compromise or true plea bargain. Chief Judge Wyant was apparently troubled that the parties had not made it clear to him that this was the case during the August 22, 2007 submissions.

b. It was made clear to Judge Wyant on August 22, 2007, that the defence was not admitting to the consumption of alcohol by Mr. Harvey-Zenk. Apparently the defence took the position that its admission on August 22, 2007, that there was anecdotal evidence of alcohol consumption, was not an admission that there had in fact been alcohol consumption.

c. Mr. Minuk, after being asked by Chief Judge Wyant whether he was going to try to prove that Mr. Harvey-Zenk had alcohol in his body, declined to do so.

2.17 On October 29, 2007, Chief Judge Wyant gave Judgement and imposed the conditional sentence as requested. At that time, Chief Judge Wyant was critical of the way matters had been presented to him and made comments to this effect as follows:

a. There had been a 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. That the orchestration of facts had left the Court with an incomplete record of events.
c. While Mr. Minuk had mentioned anecdotal evidence of alcohol consumption he did not attempt to prove alcohol consumption when it was denied.

2.18 Finally, there were media reports that Mr. Minuk had acted for police officers in the past and that Mr. Minuk and Mr. Wolson had acted in the past as co-counsel for accused persons.

Observations on the Investigation and Provable Facts

3.1 The investigation in this case was inadequate. Given the nature of the accident, one would expect that the investigators on the scene would immediately focus their attention on the condition of the offending driver. This was a massive rear end collision with a catastrophic result. What resulted from the police attendance at the accident scene was a failure to gather meaningful evidence as to the condition of the accused.

3.2 There does not appear to have been any initial assessment of the condition of Mr. Harvey-Zenk by the attending investigators. Rather, Mr. Harvey-Zenk was placed in the back of Cst. Woychuk's police vehicle by Chief Bakema, the ranking officer on the scene, because of the cold and because of Mr. Harvey-Zenk's emotional condition. There is no suggestion that he was being placed under arrest at that time. Certainly there was no contemporaneous demand for either a roadside breath sample or an evidentiary breath sample.

3.3 At the East St. Paul Police Station, Sgt. Carter made certain observations of Mr. Harvey-Zenk respecting an odor of alcohol and unsteadiness. As a result, Sgt. Carter made a demand although the evidentiary record is equivocal as to whether that was a demand for a breath sample or a blood sample. Arguably the best evidence is contained in Sgt. Carter's notes, which record that he arrested Mr. Harvey-Zenk at 8:18 a.m. and issued a <u>blood</u> demand. A demand for a blood sample is authorized pursuant to Section 254(3)(b) of the *Criminal Code of Canada*. It is predicated on the belief that by reason of physical condition a person is incapable of providing a breath sample or that it would be impracticable to obtain a breath sample. Neither of those assumptions appear to

be present in the case of Mr. Harvey-Zenk. The demand for a blood sample in the circumstances present in this case would not be a valid demand and Mr. Harvey-Zenk would thus be entitled to refuse to provide the sample. While a trial judge would likely hear from Sgt. Carter that he recalled making a breath demand (apparently supported by Cst. Woychuk) the evidence, as I have said, is equivocal and the contemporaneous written record indicates that Sgt. Carter issued a blood demand.

3.4 The result is a paucity of evidence of impairment. While there was some evidence of persons noting an odor of alcohol in relation to Mr. Harvey-Zenk at the scene, none of the five officers who arrived at the scene set out to determine whether Mr. Harvey-Zenk had consumed alcohol or was impaired and no demand was made of him for either a roadside breath sample or an evidentiary breath sample at that time. At the police station Sgt. Carter noted an odor of alcohol on Mr. Harvey-Zenk and that he was unsteady on his feet. The unsteadiness was apparently confirmed by Cst. Woychuk. This is some evidence of impairment and, when coupled with the nature of the accident, might, in the absence of other evidence, be sufficient for a conviction for impaired driving. However, there is other evidence that is problematic to any successful prosecution for impaired driving.

3.5 Firstly, other off-duty police officers were with Mr. Harvey-Zenk prior to the accident and did not provide any helpful information about the amount of alcohol he had consumed and, more importantly, all who described noticing him said that he was showing no signs of impairment including shortly before the collision.

3.6 Secondly, there were observations made in the early afternoon of February 25, 2005 by Cst. Pedersen who processed Mr. Harvey-Zenk for the *Identification of Criminals Act* and claimed to have observed signs of impairment at that time. Unfortunately, there is no record of this in her notes or in the Investigation Report. Further, the "Wellness Officer" who attended with Mr. Harvey-Zenk immediately before his release noted no signs of impairment.

3.7 Given these facts we can safely conclude that a prosecution for the offences of impaired driving causing death and refusing to give a sample would be fraught with difficulty and marked by uncertainty. In my view, at the time of the plea, it could no longer be said that there existed a reasonable likelihood of conviction.

3.8 The facts that lend themselves to clarity of proof in this case relate to the accident itself. These may be stated simply. Mr. Harvey-Zenk drove his motor vehicle at an unabated speed of approximately 80 kilometers per hour into the rear of the vehicle occupied by Mrs. Crystal Taman thereby causing her death.

OPINIONS

4.1 I will give my opinion in each of the areas set out in paragraphs a-o (pages 9 and 10) of Mr. Paciocco's February 22, 2008 letter. In each case, I will state the issue as set out by Mr. Paciocco and then give my response. From time to time, I will combine issues that lend themselves to a common response.

4.2 (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;

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

RESPONSE:

I do not see any conflict arising in either of the above scenarios. With respect to the first issue, it is to be noted that there are a number of Canadian jurisdictions where members of the private Bar are retained, from time to time, to act as prosecutors. In British Columbia, for instance, members of the private Bar are often retained as prosecutors, sometimes as *ad hoc* prosecutors (a matter of convention that has existed for many years) and sometimes as special prosecutors appointed pursuant to Section 7 of the *Crown Counsel Act* of British Columbia. It is to be noted that the Manitoba Department of Justice Policy Directive of January 2005 also contains a provision for the appointment of independent counsel in certain circumstances including where the person to be prosecuted is a police officer. Page 3 of that policy statement contains one caveat, as follows: "Care must also be taken to ensure that the person selected has not had any previous dealings with the alleged offender." In my mind, the fact that a private practitioner retained to prosecute a police officer has, from time to time, defended police officers is entirely irrelevant. No conflict arises on the basis of class or occupation. Where a conflict might arise is in circumstances where the lawyer has previously represented the very person he or she is called upon to prosecute. There could also be an appearance of conflict if the lawyer had previously worked closely with the police officer who is the subject of the prosecution, or if the lawyer's practice consists entirely of representing police officers such that his or her livelihood depends on the continued business of police officers. With those three exceptions stated, I see no conflict arising where a lawyer who has previously represented police officers is retained to prosecute a police officer with whom he has not had any direct representational or working relationship.

The second scenario envisions a situation where a lawyer is prosecuting an accused who is represented by another lawyer with whom the prosecuting lawyer has worked in the past representing co-accused persons in a joint trial. In the absence of these two

lawyers working out of the same firm at the time of the prosecution, there is no conflict in my view. As members of the private Bar, we are often required to work with each other, and, sometimes, against each other. This is not a matter peculiar to the criminal Bar. Civil litigators often act on the same side of a *lis* (sometimes even for the same client) and then find themselves on opposite sides of a different brief. To my knowledge, no one has ever suggested that there is anything wrong with this.

I have also had regard to the *Manitoba Crown Attorneys Act* (in particular Section 4) as well as Chapter 5 of the Manitoba Law Society Rules on conflicts, and Chapters 5, 6 and 19 of the Canadian Bar Association's *Code of Professional Conduct* on conflicts and questionable conduct. Nothing contained in any of that material causes me to alter my opinion with respect to the above two scenarios.

4.3 (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.

RESPONSE:

In my opinion it is entirely appropriate and well within acceptable prosecutorial standards to recommend or express agreement with release of a person charged with the above referenced offences. To my knowledge, at least in British Columbia, it is commonplace for persons charged in circumstances such as these to be released, particularly where the matter involves a person with no prior convictions. Obviously, these considerations tend to be case-specific. I am aware of cases where detention has been sought in circumstances involving an accused with a criminal record and/or a high speed chase in a stolen car that results in a fatal accident.

Perhaps another way to view this would be to consider the matter of a first offender, with a good background, and with roots in the community, against the provisions of Section 515(10) of the *Criminal Code*. It is hard to imagine a situation in which such a person would be subject to a detention order on a show cause hearing and equally hard to imagine where the Crown would even seek to show cause in such circumstances. One possible exception might be where the person has a significant drinking history of which the Crown is aware. Yet even in such circumstances it seems to me that a likely scenario would be a consent release pursuant to Section 515 (2)(d) with the condition that the person abstain from the consumption of alcohol during the term of the recognizance and seek such counseling as directed by a Bail Supervisor.

4.4(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.

(e) Whether it is consistent with the attached Manitoba Crown Policy Directives to stay or withdraw a charge of refusing to provide a sample, on the hypothetical facts set out in this letter.

RESPONSE:

The decision of whether to stay a charge goes to the core of the exercise of prosecutorial discretion (see *Krieger v. Law Society of Alberta*, (2002) 168 C.C.C. 3d 97 (S.C.C.) at paras 46-47). Also worthy of note is the quote from Walsh, cited in Proulx and Layton "Ethics and Canadian Criminal Law" at page 650: "The *sine qua non* of a prosecutor's duty is discretion. This is recognized as essential to the effective working of our system."

In the context of the exercise of discretion to stay a charge, the Manitoba Policy Directive of April, 2001, appears to me to be consonant with other statements on the topic. As noted in the Manitoba Policy Directive "...the test for exercising the discretion to stay charges is whether there continues to be a reasonable likelihood of conviction and whether there continues to be a public interest in proceeding." The Policy Directive also states that the test for reasonable likelihood of conviction arises from the state of the evidence and that "...[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 to or have been indicated by the accused and any other factors which could affect the likelihood of a conviction."

In my view it was within acceptable prosecutorial standards and consistent with the Manitoba Crown Policy Directives to stay the refusing to provide a sample charge on the hypothetical facts set out in Mr. Paciocco's letter. I say this because in my view, particularly in light of the problems with proof as set out in paras. 3.1-3.7 of this opinion, it cannot be maintained that there was, in fact, a reasonable likelihood of conviction on that charge. Some of the potential problems that arise are set out below.

The refusal charge was dependent upon the validity of the demand. A legal duty to provide a sample only arises where there is a lawful demand pursuant to the provisions of the *Criminal Code*. If the demand is deficient, there is no obligation to provide a sample. In other words, it is only an offence to fail or refuse to provide a sample where there is a lawful, valid demand pursuant to section 254 of the *Code*.

The existence of reasonable and probable grounds to make a breath or blood demand is a statutory and constitutional precondition. In this case, the officer who made the demand (Sgt. Carter) was not one of the investigating officers at the scene. The grounds available to Sgt. Carter in support of his making a demand for a bodily sample were somewhat limited. It appears that the basis for a demand consisted of the motor vehicle accident, an odor of alcohol and observations of unsteadiness of Mr. Harvey-Zenk at the detachment. A swaying or unsteadiness on the feet is often cited as a factor leading to a breath demand. In this case it is noteworthy that Mr. Harvey-Zenk had recently been in a serious motor vehicle accident. It is also noteworthy that none of the investigating officers at the scene had made a breath demand of him.

While there existed some indicia in support of a demand (in particular, an unexplained motor vehicle accident, the odor of alcohol and unsteadiness) it is likely that the sufficiency of the grounds would have been raised at trial. It was arguable, given the failure of a number of officers at the scene to make a breath demand, that the requisite grounds did not exist.

Further, under section 254(3) of the *Code*, a demand for a breath sample will be a proper demand only if it is made "forthwith or as soon as practicable" after the police determine that reasonable and probable grounds exist. In this case, there was no demand until almost 40 minutes after Mr. Harvey-Zenk was first dealt with by the police.

If a trier of fact accepted that the demand was deficient, due to insufficient grounds or excessive delay in making the demand, then there would have been no legal obligation to provide a sample and the accused would have been entitled to an acquittal on the refusal count.

In addition to the validity of the demand, there was a potential issue as to the right to counsel. Mr. Harvey-Zenk had been placed in the back of a police cruiser at 7:42 a.m. He was transported to the police detachment at 8:08 a.m. for further investigation. There is no indication that he was advised of his right to counsel prior to receiving a breath demand at 8:18 a.m.

Had this matter proceeded to trial, Mr. Harvey-Zenk could have advanced a *Charter* application based on a possible infringement of section 10 of the *Charter*. It is arguable that both the informational and the implementational aspects of the right to counsel guaranteed by section 10 were not afforded to Mr. Harvey-Zenk until a considerable time after he was detained. Although he was ultimately provided with access to a lawyer, the right to counsel arises upon detention and there was arguably a considerable delay in this case.

Finally, there is the problem with the precise wording of the demand (i.e. breath or blood) as referenced above in para. 3.3.

It is difficult to provide an accurate opinion as to what ruling would result from such an application, as the trial judge's determination of the time of detention would depend on the evidence on the *voir dire*, including what was in the mind of Mr. Harvey-Zenk. It is clear, however, that the right to counsel was a further issue that could have been raised with respect to the refusal count.

4.5(f) Whether it was within acceptable general prosecutorial standards to stay or withdraw a charge of impaired driving causing death, on the hypothetical facts set out in this letter.

(g) Whether it is consistent with the attached Manitoba Crown Policy Directives to stay or withdraw a charge of impaired driving causing death, on the hypothetical facts set out in this letter.

RESPONSE:

The proof of impaired driving in this case suffers similar infirmities to the proof of refusal to provide a sample. In short, the investigation was inadequate and critical steps in the investigation had been omitted. There is simply a paucity of evidence and what evidence does exist tends to be flawed or contradicted. These frailties can be summarized as follows:

i None of the five police officers who attended the scene set out to determine whether Mr. Harvey-Zenk had consumed alcohol or was impaired.

ii While paramedics detected an odor of alcohol coming from Mr. Harvey-Zenk, no police officer recorded having been advised of this fact.

iii Cst. Graham noted the odor of alcohol in Mr. Harvey-Zenk's vehicle but did not make a written record of this.

iv Cst. Woychuk noted an odor of alcohol from Mr. Harvey-Zenk either on scene or *en route* to the police station but made no demand for either a roadside breath sample or for an evidentiary breath sample.

v Prior to the "demand" made by Sgt. Carter, no demand was made of Mr. Harvey-Zenk for a roadside breath sample or an evidentiary breath sample either at the scene or *en route* to the police station.

vi At the police station, Sgt. Carter formed the opinion that Mr. Harvey-Zenk was impaired as he noticed a strong odor of alcohol and observed Mr. Harvey-Zenk to be unsteady on his feet. Cst. Woychuk apparently confirmed seeing the unsteadiness. There are several comments that need to be made here. Firstly, the mere odor of alcohol is not sufficient to prove impairment. Secondly, the

unsteadiness may well have resulted from the significant accident that Mr. Harvey-Zenk had been involved in. Thirdly, Cst. Woychuk's evidence would have been subject to very significant cross examination given that he crafted the contents of his own notes to reflect directions provided by Chief Bakema.

vii Off duty police officers who had been with Mr. Harvey-Zenk, and who noticed him, said that he was showing no signs of impairment including shortly before the collision.

viii The waitress at the restaurant/bar was unable to identify Mr. Harvey-Zenk in a photo-pack lineup. Moreover, there does not appear to have been any effort made to eliminate the other 25 off-duty police officers who were present as being the person celebrating his wife's pregnancy.

ix While there is some indication that Mr. Harvey-Zenk consumed some alcohol while at the restaurant/bar after his afternoon shift there is apparently no evidence as to either how much he consumed or when he consumed it or the nature of his drinking pattern.

In sum, the available evidentiary record presents a very marginal case of impaired driving coupled with a host of difficulties in proof. In these circumstances it is my opinion that it was well within the exercise of prosecutorial discretion to stay the charge of impaired driving causing death. Again, and as noted in the previous section, the Manitoba Crown Policy Directives are consonant with acceptable prosecutorial standards in this respect.

4.6 (h) Whether it is within acceptable general prosecutorial standards to stay or withdraw a charge of criminal negligence causing death, on the hypothetical facts set out in this letter.

(i) Whether it is consistent with the attached Manitoba Policy Directives to stay or withdraw a charge of criminal negligence causing death, on the hypothetical facts set out in this letter.

RESPONSE:

To answer this question requires an analysis of the distinction between the offences of criminal negligence causing death and dangerous driving causing death.

A number of authorities have held that the offence of criminal negligence causing death is intended to capture more blameworthy conduct than that captured by the offence of dangerous driving causing death. The two principle differences in the severity of the two offences appear to be as follows:

i. the fault standard for dangerous driving is a "marked departure" from the

norm, while the fault standard for criminal negligence is a "marked and substantial departure" from the norm; and,

ii. for dangerous driving, the conduct in issue must demonstrate "dangerousness to the public", while the conduct in issue for a criminal negligence offence must meet the more stringent standard of demonstrating "wanton or reckless disregard for the lives and safety of others".

I. Basic Elements of the Offences

In *R. v. Beatty*, the Supreme Court of Canada restated the test for the offence of dangerous operation of a motor vehicle as follows:

> (a) The *Actus Reus*
>
> The trier of fact must be satisfied beyond a reasonable doubt that, viewed objectively, the accused was, in the words of the section, driving in a manner that was "dangerous to the public, having regard to all the circumstances, including the nature, condition and use of the place at which the motor vehicle is being operated and the amount of traffic that at the time is or might reasonably be expected to be at that place".
>
> (b) The *Mens Rea*
>
> The trier of fact must also be satisfied beyond a reasonable doubt that the accused's objectively dangerous conduct was accompanied by the required *mens rea*. In making the objective assessment, the trier of fact should be satisfied on the basis of all the evidence, including evidence about the accused's actual state of mind, if any, that the conduct amounted to a marked departure from the standard of care that a reasonable person would observe in the accused's circumstances. Moreover, if an explanation is offered by the accused, then in order to convict, 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.
>
> - *R. v. Beatty* (2008), 228 C.C.C. (3d) 225 (S.C.C.) at para. 43

In expanding on the fault standard for dangerous operation of a motor vehicle, the Court in *R. v. Beatty* noted that it is based upon the standard of a "marked departure" from the norm:

> In the case of negligence-based offences such as this one, doing the proscribed act with the absence of the appropriate mental state of care may instead suffice to constitute the requisite fault. The presence of objective *mens rea* is determined by assessing the dangerous conduct as against the standard

expected of a reasonably prudent driver. If the dangerous conduct constitutes a "marked departure" from that norm, the offence will be made out. As stated earlier, what constitutes a "marked departure" from the standard expected of a reasonably prudent driver is a matter of degree. The lack of care must be serious enough to merit punishment. [emphasis added]

- *R. v. Beatty*, *supra*, at para. 48

The elements of criminal negligence causing death require conduct which constituted a "marked and substantial" departure from the norm, and which also "demonstrated a wanton and reckless disregard for the lives of others". In *R. v. Willock*, Doherty J.A. held as follows:

> Criminal negligence in the context of driving-related allegations of criminal negligence requires proof that the accused's conduct constituted a marked and substantial departure from that expected of the reasonable driver and proof that the conduct demonstrated a wanton or reckless disregard for the lives or safety of other persons. The requisite wanton or reckless disregard may, but not must, be inferred from proof of conduct that constitutes a marked and substantial departure from that expected of the reasonable driver: *R. v. Waite* (1986), 28 C.C.C. (3d) 326 at 343 (Ont. C.A.), aff'd (1989), 48 C.C.C. (3d) 1 (S.C.C.).
>
> - *R. v. Willock* (2006), 210 C.C.C. (3d) 60 (Ont. C.A.) at para. 29

II. Differences Between the Offences of Dangerous Driving and Criminal Negligence

One key difference between the two offences is the distinction between the "marked" and "marked and substantial" standards. The Supreme Court of Canada noted in *Beatty*, *supra*, that these two standards can engage some similar types of analysis, but noted that the offence of criminal negligence "...is higher on the continuum of negligent driving..." than dangerous operation of a motor vehicle. [para. 48] As Beard J. of the Manitoba Court of Queens Bench noted in *R. v. Tayfel*, the distinction between these standards can be a difficult to one to draw:

> The difference between criminal negligence involving the operation of a motor vehicle and dangerous driving is found in the degree by which the manner of operating the vehicle exceeds that of a reasonable person in the circumstances. In general, the courts have adopted the standard of a "marked and substantial or significant" departure from the standard of a reasonable driver to describe criminal negligence and a "marked" departure from the standard of a reasonable driver for dangerous operation of a motor vehicle. Wilson, in his article, found that the cases have not always been consistent in this area. He states as follows at p. 447:
>
> Subsequent driving decisions [following *Hundal*] have been of little

assistance in finding a consistent test for criminal negligence causing death and dangerous operation of a motor vehicle causing death. There are a number of decisions that view criminal negligence as a more serious offence than dangerous driving. In these cases dangerous driving has been defined as "a marked departure" while criminal negligence is "more marked" or "a marked and substantial departure". Professor Stuart describes this attempted distinction as "artful and very difficult to draw".

- *R. v. Tayfel*, [2007] M.J. No. 406 (Q.B.) at para. 40

In addition to this issue of the difference between a "marked departure" and "marked and substantial departure", criminal negligence also requires that the circumstances of the offence involve a greater degree of dangerousness. In *R. v. Landreville*, Fish J.A. (as he then was) held that the "wanton and reckless disregard" element requires the presence of more serious circumstances than the "dangerous to the public" element:

> Section 219 of the *Criminal Code* provides that every one is criminally negligent who, in doing anything or omitting to perform a legal duty, "shows wanton or reckless disregard for the lives or safety of other persons". Showing a "wanton or reckless disregard for the lives or safety of other persons" certainly connotes more blameworthy conduct than operating a motor vehicle "in a manner that is dangerous to the public, having regard to all the circumstances". As well, section 662(5) of the *Criminal Code* specifically provides that dangerous operation offences under section 249 are "included" in the criminal negligence offences created by sections 220 and 221.

- *R. v. Landreville* (1994), 91 C.C.C. (3d) 274 (Que. C.A.) at p. 278.
- See also *R. v. Tayfel*, *supra*, at paras. 41-42

As the Ontario Court of Appeal summarized in *R. v. J.L.*, differences between the offences of dangerous driving and criminal negligence engage both the "physical and the mental elements of the offence":

> 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.
>
> 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 (Q.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 (Q.C. A.).

The trial judge did not make a specific finding that the appellant's driving represented a marked departure from the norm. This omission in this case means that the trial judge failed to analyze the extent to which the appellant's physical act was a marked departure from the norm. Deschamps J.A. in *Palin* is clear that both the physical and mental elements of the offence must meet a higher standard than that of dangerous driving. This higher standard has been described as a marked and substantial departure from the standard of care of a reasonable person: *Waite v. The Queen* (1989), 48 C.C.C. (3d) 1 (S.C.C.) at 5. It is not self-evident that the appellant's act of putting the car in gear with a person on the hood satisfies this higher standard.

The trial judge appears to have concluded that because the appellant realized there was a risk of injury to his friend by driving with him on the hood, he was "wanton" or "reckless." The fact that a reasonable person would realize that there is a risk of injury would also support a finding of dangerous driving. To establish that conduct is wanton or reckless the consequences must be more obvious. The greater the risk of harm the more likely it is that the consequences are the natural result of the conduct creating the risk. It is from this conduct that the conclusion that the accused had a wanton or reckless disregard for the lives or safety of others is drawn: *Anderson*, *supra*, at 486-487. In this case, the admission of the appellant as to his state of mind is an important factor, but so, too, is his driving. The offence of criminal negligence punishes, not a state of mind, but the conduct of the accused. See *R. v. Tutton* (1989), 48 C.C.C. (3d) 129 (S.C.C.) at 139-40, McIntrye J. Thus the physical action of the appellant is as critical to the determination of wanton or reckless conduct as the mental element. [emphasis added]

- *R. v. L.(J.)* (2006), 204 C.C.C. (3d) 324 (Ont. C.A.) at paras. 14-18
- See also *R. v. Tayfel*, *supra*, at paras. 41-42

However, it is noteworthy that the elements of "wanton and reckless disregard" and "marked and substantial departure" can in some cases engage the same analysis. As Doherty J.A. held in *R. v. Willock*, *supra*, "...the requisite wanton or reckless disregard may, but not must, be inferred from proof of conduct that constitutes a marked and substantial departure from that expected of the reasonable driver." Accordingly, the

difference between criminal negligence and dangerous driving is sometimes more generally summarized as the difference between a "marked departure" and a "marked and substantial departure".

The offence of criminal negligence accordingly has features which differentiate it from the offence of dangerous driving, as is set out in the summary of the elements of criminal negligence in *R. v. Tayfel, supra*:

> In summary, the elements of criminal negligence causing death that are at issue in this case are as follows:
>
> (i) *marked and substantial departure from the conduct of a reasonable person*
>
> - that the conduct of the accused was both a marked and a substantial departure from the conduct expected of a reasonable person in the circumstances of the accused;
>
> - criminal negligence requires more than just carelessness or a small or momentary lapse in care – the conduct of the accused must be a marked departure from the conduct of a reasonable person and must also be a substantial departure;
>
> *(ii) wanton and reckless disregard for the lives and safety of others*
>
> - that the accused, by his conduct, showed a wanton and reckless disregard for the lives and safety of other persons;
>
> - wanton disregard means a heedless or unrestrained disregard for the consequences of your actions; likewise, reckless means an indifference to the consequences of your actions;
>
> - for the accused's actions to constitute wanton or reckless disregard for the lives or safety of others, that conduct must be a marked and substantial departure from what we would expect of a reasonable person in such circumstances, and that conduct must show a heedless, unrestrained, reckless disregard for the lives or safety of others - a small error, or a momentary lapse in care, that results tragically in death or bodily harm, is not sufficient conduct to constitute criminal negligence; the greater the risk of death or bodily harm occurring from the type of conduct engaged in by the accused, the more likely it is that engaging in such conduct shows wanton and reckless disregard for the lives and safety of other persons;

(iii) objective test

> the Crown does not have to prove that the accused knew or foresaw the consequences of his action - the act or omission speaks for itself, so that if the act or omission constituted a marked and substantial departure from what we would expect of a reasonable person in those same circumstances, and showed a wanton and reckless disregard for the lives or safety of others, then the conduct constitutes criminal negligence whether or not the accused recognized the obvious and serious risk to the lives and safety of others. [emphasis added]

- *R. v. Tayfel*, supra, at para. 4

III. Conclusion

The offence of dangerous operation of a motor vehicle requires conduct which was "dangerous to the public" and constituted a "marked departure" from a reasonable standard of care. Criminal negligence requires conduct which meets a more onerous and blameworthy threshold. The conduct in issue must demonstrate a "wanton and reckless disregard for the lives of others" and constitute a "marked and substantial" departure" from a reasonable standard of care.

As can be readily seen from considering authorities in the area, the distinction between dangerous driving causing death and criminal negligence causing death is one of degree, although the level of degree is somewhat amorphous. Perhaps the best that can be done is to look at the difference in the fact patterns of some of the cases to see what guidance may be gleaned.

In *R. v. Landreville* (1994), 91 C.C.C. (3d) 274 (Que. C.A.) the accused, who had consumed substantial amounts of alcohol during the day, struck and seriously injured a cyclist. The accused was convicted of criminal negligence causing bodily harm at trial and the conviction was upheld by the Court of Appeal.

In the case of *R. v. Fortier* (1998), 127 C.C.C. (3d) 217 (Que. C.A.) the accused was convicted of criminal negligence causing death at trial and the conviction was upheld in the Court of Appeal. The accused was driving while impaired, having spent several hours in a bar prior to the incident. While going up a hill she attempted to pass another vehicle against a double line on the roadway, notwithstanding that her visibility was limited by the crest of the hill.

In *R. v. Dyck* (2002), 317 A.R. 372 the accused ran a red light and struck another vehicle. He was convicted of dangerous driving causing bodily harm at trial and the conviction was upheld in the Court of Appeal. It is noteworthy that the accused was acquitted on charges of impaired driving causing bodily harm and driving while over .08.

While the trial judge had referred to the fact that the accused had "consumed some alcohol" the Court of Appeal found that this was nothing more than a recitation of the narrative of facts and did not form a part of the trial judge's finding of dangerous driving.

In *R. v. Jackson* (1994), 52 B.C.A.C. 219 the accused was convicted of dangerous driving causing death. His vehicle had crossed a double yellow line striking an oncoming vehicle at the crest of a blind hill. Apparently the accused had fallen asleep and had no intention of passing a car that was ahead of him. The differences between this case and the case of *Fortier supra* would appear to be that alcohol was a factor in *Fortier*, *supra*, and that the accused had intended to cross the double line to pass another vehicle.

This brief review of the case law tends to indicate that convictions for criminal negligence causing death will occur in circumstances where the accused was impaired and/or engaged in driving conduct that entailed a high degree of risk taking.

Turning now to the hypothetical facts of the case under review what we have is an unexplained rear end collision with no evidence of braking and some evidence that the accused had consumed some alcohol. I take the use of the word "unexplained" to mean that no explanation was offered by the accused. All of this (including the state of the investigatory record) leads me to conclude that the Crown's case of dangerous driving causing death was comparatively strong while a case of criminal negligence causing death was questionable. In these circumstances it is my opinion that it was within acceptable general prosecutorial standards (and the Manitoba Crown Policy Directives) to stay the charge of criminal negligence causing death.

4.7 (j) Whether it is within acceptable general prosecutorial standards to agree, on the hypothetical facts set out in this letter, 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.

(k) Whether it is consistent with the attached Manitoba Crown Policy Directives to agree, on the hypothetical facts set out in this letter, 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.

RESPONSE:

Given the opinions I have expressed in the preceding sections of this report, it is my view that it was within acceptable general prosecutorial standards (and the Manitoba Crown Policy Directives) to agree to a plea to dangerous driving causing death with the other counts being stayed. In my view this was a clear case of dangerous driving causing death. Death resulted from an accident based on driving which substantiates a marked departure from the standard of care that a reasonable person would have observed in the accused's circumstances. (See *R. v. Beatty, supra,* at para. 43.)

The question now to be answered is whether the joint position for a conditional sentence of two years was within acceptable general prosecutorial standards (and the Manitoba Crown Policy Directives).

A useful way to approach this question is by reviewing Manitoba sentencing cases involving convictions for dangerous driving causing death at or before time of sentencing in the case under review. In fact, it appears that the list of cases presented to Chief Judge Wyant in the joint Book of Authorities was very comprehensive. The research which I requested be done disclosed that there are no reported Manitoba cases between January 1, 2002 and August 21, 2007 in which the accused was convicted of dangerous driving causing death which were not in the Book of Authorities. (This research reviewed the 19 Manitoba Judgements returned by a Quicklaw search for the phrase "dangerous driving causing death"). Thus, it would appear that counsel put the relevant authorities properly before Chief Judge Wyant. These cases were referred to by Crown Counsel at pages 10 and 11 of the August 22, 2007, transcript of submissions.

Counsel referred to a total of 11 cases, the earliest being *R. v. Macdonald* from 1999 and the most recent *R. v. Perron* from 2007. Both are decisions of the Manitoba Court of Appeal, *Macdonald* being the imposition of a 15 month conditional sentence order and three year driving prohibition for impaired driving causing bodily harm, and *Perron* being a 2 year conditional sentence order for dangerous driving causing death and two counts of dangerous driving causing bodily harm.

Of the remaining nine cases, all but one are from the Manitoba Courts. The case that is not from Manitoba is *R. v. Areco*, a 1999 decision of the Ontario Court of Appeal involving a conviction for dangerous driving causing death where the accused was sentenced to a 12 month conditional sentence order and a 3 year driving prohibition.

Of the remaining eight cases, six resulted in conditional sentence orders, one in a suspended sentence and one, *R. v. Eckert*, a 2006 decision of the Manitoba Court of Appeal, in a sentence of 2 years imprisonment. The *Eckert* case would appear to be distinguishable from the rest based on the fact that the accused had previously been convicted of 14 driving offences, a minor criminal record and exhibited extremely

reckless driving immediately prior to the accident. The bottom line is that the vast majority of the reported cases out of Manitoba for dangerous driving causing death resulted in conditional sentence orders, most of which were for 24 months. The various factors which the Manitoba Courts took into account in granting these orders included lack of criminal record, remorse, previous good character and employment history.

It is trite to say that sentencing under our law is highly discretionary in the sense that Parliament has seen fit to grant Trial Judges considerable leeway to cut the cloth of the sentence to fit both the circumstances of the case and the circumstances of the offender. Emphasis is added to this by the fact that only a small number of offences in the *Criminal Code* are subject to mandatory minimum sentences. It is also accurate to say that different Canadian jurisdictions tend to have different sentencing trends for the same offences. For example, in British Columbia conditional sentences for a certain type of drug offence may be comparatively frequent whereas the same drug offence in Saskatchewan would most often draw a straight sentence of imprisonment. In Manitoba the research tends to indicate that for the offence of dangerous driving causing death the Courts tend to use the conditional sentence provisions of the *Criminal Code* with some frequency, as reflected by the cases referred to above. In light of this, it is my view that it was within proper Crown discretion to agree to a joint position for a conditional sentence of two years in exchange for a plea to dangerous driving causing death.

4.8 (l) Whether it was within acceptable general prosecutorial standards to agree or to decide not to prove the accused had consumed alcohol after that allegation fell into issue, on the hypothetical facts set out in this letter.

RESPONSE:

A starting point for this issue is the case of *Boucher v. The Queen* (1954), 110 C.C.C. 263 (S.C.C.) at page 270 where Rand J stated:

> "It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength, but it must also be done fairly." [emphasis added]

The key phrase here is "relevant to what is alleged to be a crime". Given the state of the investigatory record in the present case my view is that the proper way to apply this phrase is to consider whether it was relevant to the plea to dangerous driving causing death that the accused had consumed "some alcohol" at the restaurant/bar in the late evening of February 24, 2005, or the early morning hours of February 25, 2005. It seems to me that the mere fact that the accused had consumed "some alcohol" hours

before the accident would not be relevant in the absence of cogent evidence that the consumption had led to a condition of intoxication or impairment that contributed to the marked departure from the norm. Perhaps the best explication of this point is found in the case of *R. v. Pisler* (1973), 8 C.C.C. (2d) 387 (B.C.C.A.) at 389 where the Court cited with approval the English Court of Criminal Appeal case of *R. v. McBride* as follows:

> "In the opinion of this Court, if a driver is adversely affected by drink, this fact is a circumstance relevant to the issue of whether he was driving dangerously. Evidence to this effect is of probative value and is admissible in law. In the application of this principle two further points should be noticed. In the first place, the mere fact that the driver had had drink is not of itself relevant: in order to render evidence as to the drink taken by the driver admissible, such evidence must tend to show that the amount of drink taken was such as would adversely affect a driver, or, alternatively, that the driver was in fact adversely affected. Secondly, there remains in the Court an overriding discretion to exclude such evidence if in the opinion of the Court its prejudicial effect outweighs its probative value."

This passage seems to me more a statement of common sense than an enunciation of legal principle. It is the effect of the consumption of alcohol that is important rather than the mere fact that some alcohol had been consumed. Absent the ability to tie the consumption to the offence the fact of consumption stands as irrelevant.

I realize that the case law gives rise to some debate on this point. For instance, *R. v. Brannan*, [1999] B.C.J. No. 2669 (CA) the Court stated that "... alcohol consumption may be relevant to factors in sentencing, such as measuring the gravity of the offence or assessing culpability of the offender..." [para. 12]. In *R. v. Wilson*, [2001] B.C.J. No. 1195 (CA) the Court held that the fact of the acquittal for impaired driving did not mean that no weight could be given to the accused's alcohol consumption on sentencing for a conviction of dangerous driving causing death. [see also *R. v. Berge*, [2004] B.C.J. No. 724 (SC)]

While our research found no consideration of *Brannan*, *Wilson*, or *Berge*, in Manitoba authorities, one case *R. v. Proulx*, [1997] M.J. No. 563 (CA), seems to suggest that alcohol consumption may be considered for sentencing purposes even when it was not a factor in the accident where the accused pled guilty to one count of dangerous driving causing death and one count of dangerous driving causing bodily harm. In that case, the Manitoba Court of Appeal allowed the accused's appeal from a sentence of 18 months incarceration and substituted a conditional sentence. In considering the circumstances of the offence the Court commented: "Although alcohol was not a factor

in the result, Mr. Proulx had apparently consumed some alcohol prior to the accident" [at para. 5]. Although the Manitoba Court of Appeal's decision was later reversed by the Supreme Court of Canada [2000] SCJ No. 6, the Supreme Court made no mention of alcohol being improperly considered as a factor by the Court below. In my view, nothing in these cases stands for the proposition that the consumption of alcohol is relevant to sentencing absent some evidence that it was an aggravating factor.

In the present case, the Crown had determined that it would stay the charge of impaired driving causing death. As noted earlier in this report, that was not surprising given the state of the investigatory record. Accordingly, I do not see that the mere fact of the consumption of "some alcohol" was a relevant factor in the sentencing process. Thus, it is my conclusion that Crown Counsel was acting within acceptable prosecutorial standards in deciding not to attempt to prove the consumption of alcohol in this case.

4.9 (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.

(n) Whether, judging from the transcripts enclosed, 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 the plea bargain.

RESPONSE:

In order to respond to these two issues it is necessary to examine the legal framework for joint submissions in Manitoba.

The law respecting joint submissions in Manitoba is clearly set forth in the case of *R. v. Sinclair* (2004), 185 C.C.C. (3d) 569 where Steel J. set out the law as follows:

> There is a continuum in the spectrum of plea bargaining and joint submissions as to sentence. In some cases, the Crown's case has some flaw or weakness and the accused agrees to give up his or her right to a trial and to plead guilty in exchange for some consideration. This consideration may take the form of a reduction in the original charge, withdrawal of other charges or an agreement to jointly recommend a more lenient sentence than would be likely after a guilty verdict at trial. Evidence always varies in strength and there is always uncertainty in the trial process. In other cases, plea negotiations have become accepted as a means to expedite the administration of criminal justice. That is the case here, where the accused's decision to forego his right to a trial must be considered within the context of a backlog in trial dates and the months already spent in pretrial detention. The clearer the *quid pro quo*, the more weight should be given an appropriate joint submission by the sentencing judge. See *R. v. Broekaert*

(D.D.) (2003), 170 Man. R. (2d) 229, 2003 MBCA 10, 171 C.C.C. (3d) 97, at para. 29, and *Booh*, at para. 11.

Recognizing that the cases fall at various places in the continuum, the essence of the plea bargain or submissions should be placed on the record in open court. The judge must have a solid factual basis on which to make an independent, reasoned decision. If a trial judge is not given or fails to inquire into the circumstances underlying a joint sentencing submission, then he or she will be hard pressed to determine whether there is good cause to reject that joint submission:

> In my opinion no "thorough appreciation of the relevant facts, can occur in the absence of a careful and diligent inquiry of counsel as to the circumstances underlying a joint sentencing submission. [*R. v. C.(G.W.)*, at par. 20 *per* Berger J.A.]

If the joint submission is as a result of, for example an evidentiary gap in the Crown's case or the absence of an essential witness, this is information that should be provided to the court by counsel, and particularly Crown Counsel. If, after being provided with that information and those submissions, the judge is still considering departing from the joint recommendations, he or she should advise counsel of that fact and provide them with an opportunity to make further submissions, if they so wish. Counsel may be able to respond to concerns the sentencing judge may have for departing from the recommended sentence. See *R. v. Thomas* (O.) (2000), 153 Man. R. (2d) 98, 2000 MBCA 148, at para. 7, *Broekaert*, at paras. 10-11, *Booh*, at para. 13, and *R. v. Hatt* (2002), 163, C.C.C. (3d) 552, 2002 PESCAD 4, at para. 15. If, after those submissions, the sentencing judge remains of the view that the joint submission is unfit or unreasonable, the judge may impose a different sentence, but must give clear reasons for doing so.

Thus, the law with respect to joint submissions may be summarized as follows:

> (1) While the discretion ultimately lies with the court, the proposed sentence should be given very serious consideration.
>
> (2) The sentencing judge should depart from the joint submission only when there are cogent reasons for doing so. Cogent reasons may include, among others, where the sentence is unfit, unreasonable, would bring the administration of justice into disrepute or be contrary to the public interest.
>
> (3) In determining whether cogent reasons exist (*i.e.*, in weighing the adequacy of the proposed joint submission), the sentencing judge must taken into account all the circumstances underlying the joint

submission. Where the case falls on the continuum among plea bargains, evidentiary considerations, systemic pressures and joint submissions will affect, perhaps significantly, the weight given the joint submission by the sentencing judge.

(4) The sentencing judge should inform counsel during the sentencing hearing if the court is considering departing from the proposed sentence in order to allow counsel to make submissions justifying the proposal.

(5) The sentencing judge must then provide clear and cogent reasons for departing from the joint submission. Reasons for departing from the proposed sentence must be more than an opinion on the part of the sentencing judge that the sentence would not be enough. The fact that the crime committed could reasonably attract a greater sentence is not alone reason for departing from the proposed sentence. The proposed sentence must meet the standard described in para. 2, considering all of the principles of sentencing, such as deterrence, denunciation, aggravating and mitigating factors, and the like.

There are several important points which arise from the *Sinclair* case and are pertinent to the issue under review:

1. There is a continuum in the spectrum of plea bargaining and joint submissions as to sentence.

2. This continuum includes at the one end a true plea bargain and at the other a pure joint submission based on both the Crown and defence having independently assessed the case and arrived at the same conclusion as to the appropriate resolution. Between these two extremes are evidentiary considerations and systemic pressures.

3. A joint submission based on a true plea bargain, i.e., where there is a clear *quid pro quo*, requires greater weight to be assigned to the joint submission by the sentencing judge.

4. The essence of the plea bargain or submissions should be placed on the record in open Court.

5. There is a particular duty on Crown Counsel to ensure that this information is clearly placed before the Court.

Chief Judge Wyant was critical of counsel, and particularly critical of Crown Counsel, for not having made it clear during the August 22, 2007 sentencing proceedings that the case before him was more in the nature of a true plea bargain than a pure joint submission. [See in particular the following references from the September 12, 2007,T., page 23, ll. 13,19; p. 24, l. 10; p. 25, l. 4; p. 25, ll. 6-28; p. 26, l. 30- p. 27, l. 14; p. 28, l. 13- p. 29, l. 5; p. 29, ll. 7-15; p. 33, ll. 28-34; p. 34,.ll. 13-24; p. 35, ll. 23-32;]

Chief Judge Wyant made further comments critical of the manner in which the case had been presented to him during the course of the sentencing proceedings on October 29, 2007. [See October 29, 2007 transcript as follows: p. 3, ll. 8-26; p. 5, l. 33- p. 6, l.3; p. 7, l. 20- p. 8, l. 7; p. 8, ll. 14-19; p. 15, ll. 6-8; p. 19, ll. 12-29; p. 21, ll. 21-32.]

In order to put the Sentencing Judge's comments into perspective it is necessary to examine what occurred in the earlier appearances before him.

On July 16, 2007, counsel appeared before the Honourable Judge Stewart. At that time, Crown Counsel advised the Court that the witness list had been reduced from thirty two persons to twelve persons and then requested that the matter be put over to the following day before Chief Judge Wyant.

On July 17, 2007, the parties appeared before the Honourable Chief Judge Wyant, at which time Mr. Harvey-Zenk elected to be tried by a Court composed of a Provincial Court Judge and entered a plea of guilty to the charge of dangerous driving causing death. During the course of this process Chief Judge Wyant stated to Mr. Harvey-Zenk "...there will be representations by counsel, they may even dove-tail and be made in a joint fashion, but ultimately the sentence to be imposed is, as Mr. Wolson said, up to the Court". [T., July 17, 2007, p. 3, ll. 2-5]. The matter was then adjourned to August 22, 2007. Near the close of the proceedings Crown Counsel advised the Court that counts 1, 2 and 4, namely, refusing to provide a breath sample, impaired driving causing death and criminal negligence causing death were stayed. [T., July 17, 2007, p. 5, ll. 6-11].

On August 22, 2007, the sentencing proceedings commenced before Chief Judge Wyant. Early in those proceedings, Crown Counsel set out the factual overview of the incident [August 22, 2007, T. P. 5, l. 12- p. 9, l. 5; p. 10, ll. 11-20.] The facts were then amplified as a result of a question from the Court [T., August 22, 2007, p. 15, l. 18- p. 19, l. 17] This was followed by a number of victim impact statements being presented to the Court by members of the deceased's family. [August 22, 2007, T., p. 20, l. 22- p. 42, l. 31].

Defence counsel then addressed the Court. During the course of his submissions, defence counsel stated:

> "If you were of the view that that range of sentence, as jointly recommended by Crown and defence, is an

> appropriate range, then, of course, you would turn your attention to whether or not a conditional sentence would be appropriate, as my Friend has recommended and I join him in that recommendation."
> [August 22, 2007, T. p. 54, ll. 20-25]

The above excerpt marks the first time in the proceedings that the notion of a joint recommendation was raised [apart from Chief Judge Wyant's comments to the accused referenced above]. Shortly thereafter, defence counsel made several further references to the matter before Chief Judge Wyant being in the nature of a joint recommendation [August 22, 2007, T., p. 56, l. 4- p. 57, l. 10; p. 58, ll. 15-19 and ll. 31-34]

Following this, Chief Judge Wyant acknowledged that what was before him was a joint recommendation. [August 22, 2007, T., p. 63, ll. 30-31; p. 64, ll. 21-22]. Chief Judge Wyant then indicated that he wished to reflect on the matter and the case was adjourned. The Chief Judge was concerned about how the fact that Mr. Harvey-Zenk was a police officer at the time of the offence should be taken into account in sentencing. The proceedings resumed on September 12, 2007. After reviewing the governing principles respecting joint submissions contained in the *Sinclair* case, Chief Judge Wyant confirmed that he had sent counsel a letter advising that he was contemplating rejecting the "plea bargain" [September 12, 2007, T. p. 4, ll. 1-6.] The purpose of the proceedings was to enable counsel to make submissions to justify the joint proposal. At that time, Chief Judge Wyant's concern with the joint proposal was whether Mr. Harvey-Zenk, having been a police officer at the time of the offence, was to be held to a higher standard than the ordinary person in the context of the sentencing process. After Chief Judge Wyant had set out his concerns and had made reference to a number of authorities respecting the special position of a police officer in the sentencing context, Crown counsel addressed the Court, in the process of which reference was made to the cases of *R. v. Boucher, supra,* and *R. v. Gardiner* (1982), 68 C.C.C. (2d) 477 (S.C.C.). The purpose of this part of Crown counsel's submissions was apparently to explain to the Court why the charges of impaired driving causing death and refusing a breath sample had been stayed by the Crown. Of note is the following comment by Crown Counsel:

> "Those charges were stayed when the guilty plea was entered. They were stayed not because the accused pleaded guilty to dangerous driving, but because of the Crown's obligations I described to you in my introductory remarks. That obligation is to have and to be able to present to the Court legal proof."
> [September 12, 2007, T., p. 15, ll. 3-8]

Shortly after the above comment, Crown counsel made the following statements:

> "...after a complete and intensive RCMP review of the scene investigation and the subsequent related investigative activity, it was clear to the Crown in the language of *Boucher* and *Gardiner*, that the only available proof related to the offence of dangerous driving cause death, the very charge which the accused admitted. Legal proof which passed the threshold of a reasonable likelihood of conviction, but not necessarily the trial threshold of proof beyond a reasonable doubt.
>
> In short, no evidence capable of meeting the required standard for prosecutions, a reasonable likelihood of conviction, and all the more so, no evidence resisting a *Gardiner* challenge was available to the Crown in respect of the offences of impaired driving and refusing the breathalyzer." [September 12, 2007, T., p. 16, l. 4-18]
>
> ...
>
> "Nonetheless, this matter remained set for preliminary inquiry until the accused came forward. ....Notwithstanding this evidence, conviction at trial cannot be a certainty. The exigencies of this case are such that a guilty plea to any charge the accused faced would not have been anticipated by the Crown.
>
> In this regard the Crown is very mindful that the accused, who at the time of the offence was a police officer, offered to plead guilty to a very serious indictable offence and give up his rights to a preliminary inquiry and a trial on a matter fraught with issues more difficult for the prosecution than the defence.
>
> The Manitoba Court of Appeal has commented, as your Honour has noted, on the matter of joint submissions in cases where the evidence available to the prosecution is weak and the accused gives up a viable defence or some other *quid pro quo* in exchange for a joint submission on the matter of sentencing. The Court of Appeal has stated joint submissions of this nature are relevant and of greater weight when considering the recommendation.
>
> The Court of Appeal also directs that the sentencing judge should be made aware of the exigencies and weaknesses of the case that are not tested by an accused who gives up his rights to trial. "
>
> [September 12, 2007, T., p. 16, l, 13- p. 17, l. 16]

Further, Crown Counsel stated:

> "I have reviewed these matters because I do not want there to be any misunderstanding as to the circumstances the Crown has found itself in in this prosecution and the importance and significance of a guilty plea to a prosecution at risk,"
> [September 12, 2007, T., p. 17, ll. 22-26]

After reviewing the question of the higher standard expected of police officers, Crown Counsel stated:

> "This fact will have to be considered in the specific context of this case which involves an individual who did occupy a special position, but one who the Crown recognized in making its recommendation gave up his right to trial and pleaded guilty knowing the exigent circumstances of the case which did not favour the Crown that I've already explained."
> [September 12, 2007, T., p. 21, ll. 23-29]

There then ensued a lengthy colloquy between Crown Counsel and Chief Judge Wyant [September 12, 2007, T. P. 23, l. 10- p. 35, l. 32] . During the course of this interchange, Chief Judge Wyant expressed concern that he now had new information respecting the joint recommendation that had not been previously presented to him although he remained confused as to the precise nature as to the dealings between the Crown and defence respecting the issue of a joint recommendation. [See for instance, the Judge's comments at the September 12, 2007 T., p. 25, ll. 15-28; p. 27, ll. 4-14; p. 28, l. 13- p. 29, l. 15; p. 31, ll. 28- 34; p. 33, ll. 28-33; p. 34, ll. 19-24].

Toward the end of the discussion, however, it appears that Chief Judge Wyant was beginning to accept that the joint recommendation was in the nature of a plea bargain. [See September 12, 2007, T., p. 35, ll. 23-31].

Judge Wyant's ultimate conclusion that this was in fact a plea bargain seems to be justified by the subsequent comments of defence counsel when he stated:

> "And the Crown wanting a conviction on dangerous driving, the accused wanting a sum certain, both counsel acknowledging at least as between ourselves issues which may have been litigated, may have been successfully litigated, an arrival at a joint submission was made before you".
> [September 12, 2007, T., p. 41, ll. 24-29]

Defence counsel then set out to deal with the cases respecting sentencing in the context of the special status of a police officer. [September 12, 2007, T., p. 44, l. 1- p. 53, l. 17].

Following this review of case law, defence counsel stated:

> "But I think when you deal with a plea bargain as there was put before you last time, a joint submission, I think counsel will take into mix their cases, its part of what counsel do. The strength of their cases, the weaknesses of their cases, and in effect at the end of the day the accused by entering this plea, justifiably so, on the basis that I've articulated, did so in terms of the joint submission for reasons that I have stated earlier to you."
> [September 12, 2007, T., p. 53, ll. 25-33]

In response, Chief Judge Wyant made certain comments indicating that he remained perplexed as to the precise nature of the joint submission before him. In particular, Chief Judge Wyant stated:

> "And last time that was never presented, and Mr. Minuk now says that this was in fact a true plea bargain. And I just, I need to canvas that with you, because there's no question it's a joint submission. The two of you have a meeting of the minds not only with respect to, the fact that the plea is justified, but on the basis of the sentencing precedents what the Court ought to consider. <u>But is it a plea bargain? That's the question</u> [emphasis added]
> [September 12, 2007, T., p. 54, ll. 27-34]

Defence counsel responded by saying, in part, the following:

> "Now, I don't know that I can go further than that. I think that when counsel look at the case and they see difficulties with the case, its part and parcel of the process of the discussion that led to the joint recommendation."
> [September 12, 2007, T., p. 55, ll. 19-23]

After a further interchange between counsel and the Court, defence counsel stated:

> "Well, I think with respect counsel who, who have been around for awhile look at a case. They see some difficulties in the case which they would try to exploit should the matter proceed. There were some problems here. It doesn't take from the position that any defence counsel must have when his client enters a guilty plea. I advance that proposition to you that there's responsibility here, and, and that was accepted by the accused. I think in part you just must accept that in advancing a recommendation all these matters

go into the mix."
[September 12, 2007, T., p. 56, ll. 20-29]

In the face of these comments, it would appear that Chief Judge Wyant had not reached a final understanding of the nature of the joint submission before him. This is reflected in his comments toward the very end of the September 12, 2007 proceedings:

"...and you can appreciate that there is some new information that I have received from you today, both in relation to the factual basis of the plea, and in relation to the basis upon which the plea bargain of the joint recommendation was made and that whole discussion, both of which are new information to me and, and matters upon which I'll have to reflect."
[September 12, 2007 Proceedings, p. 67, ll. 14-20]

The matter was then adjourned for sentencing until October 29, 2007.

During the course of delivering his Reasons on Sentence on October 29, 2007, it appears the Chief Judge Wyant accepted that the case before him was a true plea bargain, or at least closer to a true plea bargain than a pure joint submission [see for instance October 29, 2007, T., p. 7, l. 20- p. 8, l. 7]. Indeed, this appears to be the conclusion that the Chief Judge reached toward the end of the sentencing when he stated:

"A dangerous driving case based on inadvertence, and in the absence of aggravating circumstances like the consumption of alcohol and the other factors already mentioned, and based, as I now know, on a true plea bargain should not attract a jail sentence for anyone, even one like Mr. Zenk who is subject to a higher standard."
[October 28, 2007, T. p. 19, ll. 21-27]

Of particular note are the Chief Judge's comments respecting why the nature of the joint submission was not put before him during the August 22, 2007 portion of the hearing:

"I will confess that I wondered why all of this was not mentioned before. I can only conclude that this was a serious but <u>inadvertent</u> omission. However, the information on this point substantially changed the picture for me. It was critically important information but it should have been presented in a complete form in August."
[October 29, 2007, T. p. 8, ll. 14-19]

Further, Chief Judge Wyant stated:

"We are all guilty, from time to time, of lack of clarity. However, it is of utmost importance, we would all agree, that in a Court

I do not wish to leave this matter without a comment on the nature of the litigation that was presented to Chief Judge Wyant. Cases of this nature put great pressures and great demands on counsel. The media focus is intense, the facts are tragic and the emotional atmosphere of the courtroom can sometimes verge on being overwhelming. As I reviewed the record of this case as contained in the transcripts it was apparent to me that all of these factors were at play. These are precisely the circumstances in which mistakes are sometimes made by counsel. It must be remembered that there is no such thing as a counsel of perfection nor, in my view, will there ever be one.

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

RESPONSE:

To a certain extent this issue has been dealt with in Section 4.8 (l), *supra*. As I see this issue, it relates to Crown counsel's decision not to attempt to adduce evidence of alcohol consumption on the part of Mr. Harvey-Zenk. The matter flows from Crown counsel's outline of the facts during the August 22, 2007, Sentencing Proceedings. In the course of that exercise, Crown counsel stated:

> "In addition, as I told you, members of the Winnipeg Police Service Professional Standards Unit, conducted lengthy interviews of all people with whom the accused was working with [*sic*] that day and with whom he had spent time.
>
> Through that investigation, anecdotal historical evidence of alcohol consumption by the accused, sometimes [*sic*] 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." [emphasis added]
>
> [August 22, 2007, T., p. 8, l. 29- p. 9, l. 5]

It was Crown counsel's reference to "anecdotal historical evidence of alcohol consumption" that caused the later problems. Later, in discussions between Crown counsel and the Court, Chief Judge Wyant referred back to Crown counsel's comment about "anecdotal historical evidence" of the consumption of alcohol by the accused. This evidence was to the effect that some person or persons had told investigators that the accused had something to drink but it could not be ascertained as to how much. [August 22, 2007 Proceedings, p. 18, ll. 8-28]. The Court then stated:

> "So is it 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..."
[August 22, 2007, T., p. 18, ll. 29-34]

Crown counsel acknowledged that was the factual basis. Subsequently, during the course of a review of the sentencing jurisprudence, defence counsel stated:

"But every other case before you, where there is either alcohol involved, to an extent of readings of over .08, to where no alcohol is involved, to where, like in this case, there is mention of it by the Crown but no proof of it, in all the cases, in cases that the facts were more egregious than the one before you..." [emphasis added]
[August 22, 2007, T., p. 55, ll. 26-31]

When the Sentencing Proceeds resumed on September 12, 2007, the issue of "anecdotal historical evidence" arose again. [See in particular September12, 2007, T., p. 36, l. 22- p. 37, l. 2]. At that time, Crown counsel confirmed what he had said during the August 22, 2007 proceedings. During the course of his response, defence counsel advised Chief Judge Wyant that he did not "...accept the consumption of alcohol being any part of this plea." and, further that, "Anecdotal evidence is not evidence. And I say to you that if the Crown wants to advance that prove it. That's not part of this plea and while I use the word impairment at page 59, I say to you that anecdotal evidence, as far as I'm concerned, is not evidence you ought to consider..."
[September 12, 2007, T., p. 39, ll. 26-34].

Defence counsel's position obviously caused some consternation in Chief Judge Wyant given the discussion that ensued between the Court and defence counsel [September 12, 2007, T., p. 57, l.5-p. 59, l. 7] This led Chief Judge Wyant to then ask Crown counsel if he wished to adduce evidence respecting the consumption of alcohol on the part of the accused [September 12, 2007, T. p. 59, ll. 15-25]. After a further exchange between Chief Judge Wyant and Crown counsel on this point [September 12, 2007, T., p. 61, ll. 19-30] and after a brief recess, Crown counsel advised the Court that he would not be seeking to call evidence on this point. [September 12, 2007, T., p. 62, l. 32- p. 63, l. 20]

During the course of delivering his Reasons on October 29, 2007, Chief Judge Wyant was critical of both Crown and defence counsel respecting this factual issue [October 29, 2007, T., l, 4- p. 5, l. 14] . In particular, Chief Judge Wyant stated:

"If counsel were disputing any fact relative to the joint recommendation, there is an obligation to notify the Court. I received no such notification."
[October 29, 2007, T., p. 5, ll. 12-14]

The Chief Judge then made further adverse comment to the approach of counsel and stated that the proceedings of September 12, 2007, "...might be viewed as a zealous attempt to support a joint recommendation that was in some jeopardy." [October 29, 2007, T., p. 9, ll. 11-18]

The issue which I am asked to consider is whether Crown counsel furnished the Court with adequate information for the factual underpinnings of a plea of guilty. Again, this problem arose from Crown counsel's reference to "anecdotal historical evidence" of alcohol consumption of the part of the accused. Crown counsel clearly knew the content and extent of the investigative record and must have known what was available (or not available) as proof. Crown counsel's decision not to attempt to adduce evidence on this point must mean that he determined that there was not a sufficient evidentiary basis to satisfy the requirements in *Gardiner, supra*, or that the effort to prove the matter would not advance the Crown's case in any material way.

The real problem here is that unless Crown counsel had a sufficient evidentiary basis for the assertion that there was "anecdotal historical evidence" then he should simply have omitted that from his August 22, 2007, submissions. In other words, in my opinion, it is not the failure to call evidence that is a problem but rather the reference to the "anecdotal historical evidence' in the first place. My conclusion in this respect echos that of Chief Judge Wyant. [See, in particular, his remarks at October 29, 2007, T., p. 14, l. 10- p. 15, l. 5.]

In the Manitoba Policy Directive Guideline No. 2:PLE:1 "Plea Bargaining" paragraph 9 reads as follows:

> Crown Counsel should not agree to sanitize or play down certain facts in exchange for a guilty plea. All the facts relating to the incident which can be proved and which are of significance must be disclosed to the judge.

I see no suggestion anywhere on the record that Crown counsel in the case at Bar agreed to sanitize or play down certain facts in exchange for a guilty plea. In fact, if there had been such an inappropriate agreement, one would not expect defence counsel to challenge the Crown to prove the matter as he did at the September 12, 2007, proceedings [T., p. 39, ll. 26-34]. However, I do think the second part of paragraph 9 of the Policy Directive is applicable to this issue. To iterate, that sentence reads: "All of the facts relating to the incident <u>which can be proved</u> and which are of significance must be disclosed to the judge." [emphasis added] The key part of that sentence is the phrase "which can be proved".

As noted above, when Crown counsel was challenged on this matter he was granted a brief recess after which he declined to attempt to adduce evidence on the point. In my view, there are two possibilities as to why Crown counsel chose this course. The first is that he considered the matter and concluded that it did not lend itself to proof. The

second is that he concluded, on a cost-benefit analysis, that it would not advance the case. Based on the hypothetical facts he might be able to prove that at some undetermined time (likely between 5 to 8 hours prior to the accident) the accused had consumed some alcohol. It does not appear from the facts that the evidence would be any higher than this. I am cognizant of the statement of the waitress at the restaurant/bar who was interviewed at some undetermined time after the accident. I note, however, that she was unable to identify the accused and further that there does not appear to have been any effort to eliminate the other 25 off-duty police officers as being the person celebrating his wife's pregnancy.

All of this leads back to the question of why he would mention the fact in the first place. My conclusion is that he was over-reaching. It is not that he failed to present the factual underpinnings of a guilty plea so much as an overstatement of what he was capable of proving. Again, in the highly charged atmosphere of this sentencing proceeding, a mistake of this nature is understandable.

I do not feel I should leave this area without one final comment. This factual problem would have been avoided had the parties proceeded by way of an Agreed Statement of Facts. Such a procedure requires the parties to turn their minds to the facts well in advance of the Sentencing Proceedings and has the added merit of providing certainty and clarity to the Court.

CONCLUSION

In sum, it is my opinion that there were two areas in which Crown counsel erred. The first relates to his having failed to adequately set out the basis of the joint submission for the Sentencing Judge in his initial submissions at the August 22, 2007, proceedings. Like Chief Judge Wyant, I would ascribe this error to inadvertence and note that Crown counsel moved to correct this error when the Court resumed at the September 12, 2007, continuation.

The second error was the reference to "anecdotal historical evidence" of alcohol consumption which Crown counsel declined to attempt to prove when challenged on it. This, as I have said, appears to be an act of over-reaching.

Having said this, I do not find there to be any suggestion of unethical conduct on the part of Crown counsel in the course of handling this tragic and difficult case.