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Attachments: Zenk Sentencing Submissionr.doc

Brian

Here is a draft for you to look at - any comments or suggestions

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Your Honour has requested that counsel respond by submission to your concerns regarding the sentence counsel recommended you consider at the first appearance in this matter.

The Crown takes the position that to properly respond to the issues the Court has raised, in addition to identifying relevant case authority from across Canada, the circumstances of the incident available to the Crown to rely upon to support of a conviction and obligations of the Crown must be touched upon. As the court is aware only the legal proof available to the Crown to support a conviction is that which the court can and must consider.

Your Honour is no doubt familiar with the case of R. v. Gardiner [1982] 2 S.C.R. 368 at page 414 the Chief Justice, then Justice Dickson, the highly regarded Manitoba jurist, wrote

> One of the hardest tasks confronting a trial judge is sentencing. The stakes are high for society and for the individual. Sentencing is the critical stage of the criminal justice system, and it is manifest that the judge should not be denied an opportunity to obtain relevant information by the imposition of all the restrictive evidential rules common to a trial. Yet the obtaining and weighing of such evidence should be fair. A substantial liberty interest of the offender is involved and the information obtained should be accurate and reliable.

Chief Justice Dickson continued at page 415 stating,

> To my mind, the facts which justify the sanction are no less important than the facts which justify the conviction; both should be subject to the same burden of proof. Crime and punishment are inextricably linked. "It would appear well established that the sentencing process is merely a phase of the trial process" (Olah, *supra*, at p. 107). Upon conviction the accused is not abruptly deprived of all procedural rights existing at trial: he has a right to counsel, a right to call evidence and cross-examine prosecution witnesses, a right to give evidence himself and to address the court.

Gardiner stands for the proposition that the facts, and in particular aggravating facts, upon which the Crown relies at sentencing are facts the Crown must be able to prove beyond a reasonable doubt. Accordingly, if the facts put forward by the Crown at a sentencing hearing are disputed by an accused who admits the essential ingredients of the offence the Crown will be required to adduce evidence and prove the disputed facts beyond a reasonable doubt.

The Gardiner case therefore reminds us that at each and every stage of a criminal prosecution, whether it be during the trial or at the sentencing hearing the Crown has the ultimate evidentiary onus of proof and that onus is proof beyond a reasonable doubt.

Recently, much has been said about this case outside the courtroom which is not evidence. Juries are reminded by judges on a daily basis that what they hear and read outside the courtroom about the case they are trying is not evidence. I am confident that judges sitting alone, that is without a jury, and at every level of court, disregard and never consider inflammatory, unsubstantiated and unreliable information or innuendo expressed outside the courtroom in their deliberations. Further, I am confident that this court and others disregard baseless [illegible] yellow journalistic commentary upon the professional integrity of counsel which breeds and fosters disrespect for the court process and Canadian judicial system.

The case of Boucher v. The Queen, [1955] S.C.R. 16, which this court is familiar with, where one of the issues before the Supreme Court of Canada was the alleged inflammatory language used by Crown counsel before the jury, addresses both the purpose of a criminal proceeding and the role of the Crown.

In Boucher Justice Rand 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. The role of prosecutor excludes any notion 'of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.

In the exercise of prosecutorial functions and responsibilities in all cases including this matter the Crown must be mindful of,

- the purpose of a criminal prosecution
- the duty of the Crown to present the available legal proof and,
- the obligation to be Crown to be satisfied that the evidence upon which the Crown relies where an accused enters a guilty plea is legal proof that can withstand a challenge based on the Gardiner requirement

Your Honour referenced at the initial sentencing your recollection that the accused was also charged with offences of impaired driving and refuse breathalyzer simpliciter, each of which even by indictment, have penalties prescribed by the Criminal Code less than that for the dangerous driving cause death offence to which the accused pleaded guilty.

Those charges were stayed when the guilty plea was entered. They were stayed because of the Crown's obligations I described to you in my introductory remarks. That obligation is to have and be able to present to the court available legal proof.

Your Honour will recall that scene was attended to by members of the East St. Paul Police Department. These officers, no different than other police officers, were responsible for gathering scene evidence and investigating whether criminal offences had occurred in addition to attending to the injured.

The investigative function in criminal matters is for the most part performed by police personnel.

The court in my earlier submission heard that after a careful review of the investigative file presented to the Crown by the East St. Paul Police my concerns were such that I sought consent from counsel for the accused and the court to adjourn the preliminary inquiry so that the investigation file could be referred to the RCMP for investigation into the actions of those at the scene who investigative activities required review.

Whatever general investigation was undertaken by municipality of East St. Paul into the operation of its police force, I am told conducted by an individual named Tramley, is not the investigation and review I requested be conducted.

In the end after a complete and intensive review of the scene investigation and the subsequent related investigative activity by the RCMP it was clear to the Crown in the language of Boucher and Gardiner that the only available legal proof related to the offence of dangerous driving cause death – the very charge which the accused admitted. Legal proof which passed the threshold of "reasonable likelihood of conviction" but not necessarily the "reasonable doubt" test.

In short no evidence capable of meeting the required standard for prosecutions " a reasonable likelihood of conviction and all the moreso no evidence capable of resisting a Gardiner challenge was available to the Crown in respect of the offences of impaired driving and refusing the breathalyzer. If such evidence may have been available none was demanded or obtained at the scene in compliance with the requirements set out by the Supreme Court of Canada in R. v. Woods 2005 SCC 42 recently applied by Justice Clearwater in the case of R. v. Bowler 2007 MBQB 200.

Nonetheless the matter remained set for preliminary until the accused came forward.

As I informed you at the last appearance the best available evidence for the prosecution was that gathered by the RCMP Traffic Accident Reconstructionist. 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. In this regard the Crown is mindful that the accused offered to plead guilty to a very serious indictable offence and give up his right to trial on a matter fraught with issues more difficult for the prosecution than the defence.

In these types of cases where the evidence presented to the prosecution is weak

and the accused gives up a viable defence or provides another "quid pro quo" in exchange for a joint submission the Manitoba Court of Appeal is a relevant consideration the weight to be given to such a recommendation will greater. The Court of Appeal also directs that the sentencing court be made aware of the exigencies and weaknesses in the Crown's case are not tested by the Accused who gives up his right to trial.

These cases are in the material provided to you and are,

1. R. v. Broekart, 2003 MBCA 10
2. R. J.W.I.B., 2003 MBCA 92
3. R. v. Sinclair 2004 MBCA 48
4. R. v. McKay, 2004 MBCA 78
4.

I have reviewed these matters because I do not want there to be any misunderstanding as the circumstances the Crown has found itself in the prosecution of this matter and the importance and significance of the guilty plea to a prosecution at risk.

Furthermore, the Crown's obligation is put forward all available proof in a prosecution but equal thereto is the obligation not to put citizens to trial upon matters it cannot prove because,

a) of a lack of evidence

b) where the evidence gathered is inadmissible,

c) or the evidence gathered is the fruit of a charter breach

d) or any combination this list.

In this context the accused comes before you to be sentenced for the offence of dangerous driving causing death. Your Honour has been provided by the Crown with all the reported cases the Crown was able to gather from Manitoba Courts – this court, the Provincial Court, the Court of Queen's Bench and the Court of Appeal since 1999 considering the sentence to be imposed for offences of dangerous driving cause death the most recent of which is June 2007.

Notwithstanding the exigencies and weaknesses of the case the sentence recommended was at the high end of similar prosecutions absent the factor that the accused was at the time of the offence a member of the Winnipeg Police Service.

To respond to Your Honour's question the Crown has supplied to you a list of reported cases commencing with **R v. Cusack (1978), 41 C.C.C. (2d) 289 (NSSC – Appeal Division).** Cusack while uniformed and on duty stole money from the wallet of a citizen. There the court stated,

> *In my opinion the paramount consideration in this case is the protection of the public from offences of this sort being committed by persons who are given special authority by our law to deal with individual members of society and to deter such persons from acting in breach of*

their trust. All citizens must have confidence that police officers who are vested with substantial rights of interference with individual liberties exercise these rights with scrupulous propriety and that any failure to so act will result not only in dismissal from the position of trust but also in the imposition of substantial punishment.

The case brief contains, including Cusack,

R. v. Deane 1997 Ontario PC – OPP officer in charge of 32 person tactical Crowd Management Unit. Officer who shot Dudley George. Accused testified at trial and court held his story to be implausible and fabricated.

Sentence – 2 years less one day served conditionally

R. v. Koopman 1999 Alberta CA – RCMP officer, guilty plea to Break, enter and assault, near to a home invasion

Sentence – 18 months jail

R. v. Lesuk 2000 Manitoba Court of Appeal – off duty police officer drinking in a bar involved in motorcycle accident where passenger was killed, charged with impaired driving and dangerous driving cause death and refusal. Convicted of dangerous driving simpliciter and refusal.

Sentence – dangerous driving – absolute discharge
Refusal - $500 fine.

R. v. Jackson 2000 BCSC – Victoria BC police officer convicted of careless storage. Charge arose in context of a domestic violence prosecution.

Sentence – suspended sentence with 2 years probation.

R. v. Spencer 2001 QC C.Q. – 23 year old off duty intoxicated officer assaulted a 15 year victim who was bitten and punched.

Sentence – conditional discharge

R. v. Pashe 2002 Man P.C. – off duty officer pleaded guilty to a common assault domestic in nature. Judge Elliot. She quoted from Cusack.

Sentence – suspended sentence with probation for 2 years, not the

discharge he asked the court to consider

R. Blackburn 2004 Ontario CA – off duty police officer driving unmarked car convicted of dangerous driving. held that the appellant's conduct endangered the public he was driving in an aggressive fashion, that he was driving at a high rate of speed, that he was flashing his lights, that he was moving his vehicle abruptly, and that he was tailgating. This pattern of driving continued after the appellant encountered Ms. Lee's vehicle. In addition, the appellant braked his own car twice and, on the second occasion, came to a full stop in the passing lane of a multi-lane high speed highway, thereby exposing Ms. Lee and the travelling public to the risk of serious injury. As well, as I have said, the appellant also used his police badge in an attempt to stop Ms. Lee's vehicle. Based on these facts, in my view, the grant of a discharge in this case would be contrary to the public interest and would not accord with the need for general deterrence.

Sentence was 30 days at trial – reduced on appeal to 20 days

R. v. Tait 2005 BC PC – 10 year RCMP officer convicted of ACBH after trial. Assault occurred while officer was on duty. Assaulted the complainant who was handcuffed after he spat at officer. Officer hit him 3 times and fractured his jaw in 2 places requiring 9 days in hospital and 6 weeks of jaws wired shut.

Sentence – suspended sentence with probation for 18 months

R v. Dosanjh 2006 BCPC – convicted after trial of one count of attempt to obstruct justice. Accused counseled cousin to lie to police about the origins of funds seized from a residence.

Accused is a 13 year – 37 year old member of the Victoria Police Force.

Case offers a good review of other cases involving police officers both on and off duty.

Sentence – 3 months – served conditionally

R. v. C.(R.) 2006 Ontario SC – accused 44 year male convicted of one count ACBH and 3 common assault relating to domestic violence issues. Court concluded chances of recidivism high – rejected therefore conditional sentence

Sentence – 3 months

R. v. Auclair 2006 QC CQ – native special constable pleaded guilty to ACBH – a domestic violence incident.

Sentence – conditional discharge (24 months probation)

R. v. Ferguson 2006 Alberta CA – RCMP officer in scuffle with prisoner fired 2 shots – one in the abdomen and one in the head. Second shot resulted in conviction for manslaughter.

Sentence – Court of Appeal concluded Trial Judge erred in constitutional analysis and substituted 4 year term for conditional sentence of 2 years.

In all of the cases cited and submitted the sentencing court or appellate court on an appeal acknowledge a holding police to a higher standard than ordinary members of the public because of the special authority police exercise over individuals. This factor however is but one that is considered amongst the many other aggravating and mitigating factors a judge must consider in each case and not alone a determinative factor.

In this regard your Honour will consider that the offence was committed by the accused who was then a police officer. This aggravating fact will have to be considered in the 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 this case, which did not favour the crown, that I have already explained.

In the end the Crown is aware that the matter of sentencing is entirely within the discretion of the court. In the exercise of that discretion your Honour will consider all the aggravating and mitigating factors and accord the appropriate weight to each including the position put to you for consideration.