

# HILL ABRA DEWAR

LITIGATION COUNSEL  
SUITE 2670 - 360 MAIN STREET  
WINNIPEG, MANITOBA R3C 3Z3

DOUGLAS N. ABRA, Q.C.    DAVE HILL    ROBERT A. DEWAR, Q.C.  
STEPHEN F. VINCENT    SHERRI WALSH    STEVEN FIELD  
FARON J. TRIPPIER    KAREN R. WITTMAN    RICHARD VAN DORP

E-MAIL: lawyers@hillco.mb.ca  
PHONE (204) 943-6740  
FAX: (204) 943-3934

COUNSEL THE HONOURABLE PETER S. MORSE Q.C.

WRITER'S E-MAIL: dabra@hillco.mb.ca  
WRITER'S EXTENSION: 228

September 8, 2006

Manitoba Justice  
510 - 405 Broadway  
WINNIPEG, MB R3C 3L6

**Attention: Brian Kaplan Director Regional Prosecutions  
and Legal Education**

**Re: Former Chief A. Harry Bakema  
East St. Paul Police Service  
Possible Obstruction of Justice  
Our File: 06199**

RECEIVED  
DEPT. OF JUSTICE  
SEP 11 2006  
DIRECTOR  
REGIONAL  
PROSECUTIONS  
AND LEGAL  
EDUCATION  
Rec'd by me Sept 11/06  
BK

I have reviewed the report of the investigation by the RCMP into a complaint by special prosecutor, Martin Minuk, that former Chief Harry Bakema ("Bakema") of East St. Paul Police Department ("ESPPD") may have obstructed justice during the course of an investigation by his Department. I have also spoken to the two RCMP investigators, Cpl. Todd Doyle and Cpl. Tracey Kennett.

Apparently Bakema has since been dismissed from ESPPD. However I understand the dismissal was for reasons unrelated to this matter.

Although it is clear that Bakema did not perform the investigation in question in a professional manner, and did not provide appropriate leadership to other members of his Department, I am not satisfied that there is sufficient evidence to prove that he intentionally interfered in the investigation. I am therefore recommending that no charge be laid.

## FACTS

1. Prior to becoming Chief of ESPPD, Bakema had been a member of Winnipeg Police Service ("WPS") for over thirty (30) years and had reached the rank of Patrol Sergeant. Before his retirement from WPS, he spent some years in District 3 and had experience as a Street Supervisor. But there is no evidence that he had much experience with respect to investigations of serious offences and, in particular, traffic collisions involving suspected impaired drivers.
2. At approximately 7:00 a.m. on February 25, 2005, a serious automobile collision occurred at the intersection of Highway #59 (Lagimodiere Blvd.) and Highway #101

**CONFIDENTIAL**

(Perimeter Highway North). An automobile driven by Derek Harvey-Zenk ("Harvey-Zenk"), who was an off-duty Constable with WPS, rear-ended another vehicle driven by Crystal Taman that was stopped at a red light. The collision resulted in the death of Ms. Taman.

3. The collision occurred in an area that is within the jurisdiction of ESPPD. As a result, Bakema attended the scene in the company of Cst. Jason Woychuk. They arrived at the accident scene at approximately 7:22 a.m. Cst. Glenda Peterson and Cst. Ken Graham of ESPPD also attended the scene in separate police cars.
4. Harvey-Zenk was out of his vehicle when the police officers arrived. Bakema spoke to him and then escorted him back to the police car where Woychuk was located. Bakema instructed Woychuk that he was going to put Harvey-Zenk in the back seat. According to Woychuk, Bakema told him that Harvey-Zenk was "*possibly impaired*".
5. Woychuk alleges that he asked Bakema what he should do and that Bakema responded that he should not do anything yet, but should leave Harvey-Zenk in the back seat. Bakema said that he was going to call Sgt. Norm Carter of ESPPD and ask him to come to the scene to assist. Woychuk was instructed to wait for Carter. According to Woychuk, Bakema also told him that Harvey-Zenk was a member of WPS.
6. At that time, Woychuk was a very junior officer. He had only been with ESPPD for approximately four months. Prior to that he had worked for approximately two months with Dakota Ojibway Police Service ("DOPS"). Woychuk had no experience investigating serious traffic accidents such as this particular one. But he had experience in arresting impaired drivers, in reciting rights under the *Charter of Rights and Freedoms*, in charging and cautioning suspects and in administering breathalyzer demands.
7. There is no evidence that, prior to escorting Harvey-Zenk to the police car, Bakema had told Harvey-Zenk that he was under arrest, that he had charged and cautioned Harvey-Zenk or that he had given a breathalyzer demand to Harvey-Zenk. Nor is there any indication that Bakema had instructed Woychuk to perform any of these duties. According to Woychuk, he was merely instructed to watch Harvey-Zenk until Carter arrived at the scene.
8. By his own admission, Woychuk did not keep Harvey-Zenk under constant observation. Woychuk periodically got out of the police car and assisted in directing traffic around the accident scene. Woychuk says that he did not notice any signs of impairment or smell an odour of liquor when Harvey-Zenk was initially turned over to him. Woychuk claims that he was suffering from a head cold and his sense of smell was affected.
9. Various ambulances attended the scene of the collision. One of the ambulance attendants, Paramedic Edward Rosser, got into the back seat of the police car with Harvey-Zenk to examine him. The two of them had a brief conversation wherein

CONFIDENTIAL

Harvey-Zenk gave a medical history to Rosser. But Harvey-Zenk did not respond to any other questions that Rosser asked him.

10. Rosser did smell liquor on Harvey-Zenk. As a result, he asked Harvey-Zenk how much liquor he had consumed. Harvey-Zenk did not reply. In view of the brief conversation, Rosser was unable to give an opinion as to whether Harvey-Zenk was intoxicated. But he did tell Woychuk that he could smell liquor on Harvey-Zenk.
11. Shortly before 8:00 a.m., Bakema instructed Woychuk that, rather than wait for Carter at the scene, he escort Harvey-Zenk to the ESPPD station and meet Carter there. According to Woychuk, Bakema instructed him to tell Harvey-Zenk that he was being taken to the police station to complete a Traffic Accident Report ("TAR"). En route to the police station, notwithstanding his head cold, Woychuk says that he did smell a slight odour of liquor coming from Harvey-Zenk. They arrived at the ESPPD station at approximately 8:12 a.m.
12. Woychuk provided background information to Carter who then spoke to Harvey-Zenk. According to Carter, he smelled a strong odour of liquor on Harvey-Zenk's breath. Furthermore, Harvey-Zenk was unsteady on his feet. As a result Carter formed the opinion that Harvey-Zenk was impaired. He placed Harvey-Zenk under arrest for impaired driving causing death and/or bodily harm. He informed Harvey-Zenk of his rights under the *Charter* and gave a breathalyzer demand. After consulting counsel, Harvey-Zenk refused to take the breathalyzer.
13. Woychuk had been working all night and therefore went off duty shortly after arriving at the ESPPD station. That evening, after he had returned to duty, he began to make his notes about the attendance at the scene of the collision and his involvement in the investigation. Bakema and Graham were present in the office at that time, also doing their notes and reports.
14. Woychuk alleges that he spoke to Bakema about what to put in the notes. He alleges that Bakema instructed him not to refer in the notes to Rosser having told Woychuk that he could smell liquor on Harvey-Zenk. Woychuk also alleges that Bakema instructed him not to mention in the notes that Bakema had told Woychuk at the scene that Harvey-Zenk might be impaired.
15. As a result of the collision, Harvey-Zenk was charged with various drinking/driving offences, including cause death by criminal negligence, impaired driving causing death and refusing to take a breathalyzer. Mr. Minuk was assigned as special prosecutor and a preliminary hearing date was set.
16. After Bakema was dismissed as Chief of ESPPD, Carter was appointed Chief. In preparation for the preliminary hearing, apparently Carter met with the various officers who would have to testify, including Woychuk.

CONFIDENTIAL

17. During Woychuk's meeting with Carter, Woychuk disclosed that, when he was preparing his notes, he had been instructed by Bakema to write the notes in order to coincide with Bakema's notes and the notes of Graham. More significantly, Woychuk told Carter that Bakema had instructed him not to mention in his notes that Bakema had expressed the opinion that Harvey-Zenk might be impaired.
18. Carter reported this information to Mr. Minuk, who in turn reported it to Manitoba Justice. It was decided that the RCMP should conduct an independent investigation of the entire matter.
19. During the course of the RCMP investigation, Woychuk was interviewed on two separate occasions. Many other people at the scene of the collision, including ESPPD members, civilian witnesses and attending ambulance paramedics were also interviewed. In essence, the whole investigation into the collision that had been initially conducted by ESPPD was redone.
20. Cst. Bryan Maloney and Cst. Randy Chudyk of ESPPD were interviewed. Notwithstanding that they were not involved in the investigation of the collision, both of them had reviewed the ESPPD report. They were both very concerned about various issues, including the length of time that had transpired between Harvey-Zenk being initially detained by Bakema and Woychuk at the scene and Carter's reciting to Harvey-Zenk his rights under the *Charter* and the breathalyzer demand at the police station.
21. Although Bakema apparently at no time told Harvey-Zenk that he was under arrest, by placing him in the police car and telling Woychuk to detain him, clearly in law Harvey-Zenk was under arrest. In the opinion of Maloney and Chudyk, the *Charter* rights and the breathalyzer demand should have been administered at that time. Apparently Chudyk and Maloney both expressed their views to Woychuk about the delay.
22. When Maloney and Chudyk were interviewed by the RCMP investigators, they both also expressed significant concerns about Bakema's competence as a police officer. Both of them had been involved in prior criminal investigations with Bakema and both were of the view that he really did not know what he was doing. According to Maloney, Bakema was not capable of doing the job of Chief. According to Chudyk, Bakema had no idea what he was doing, especially as it related to management at the scene of a criminal offence.
23. Graham was also interviewed. According to various members of ESPPD, Bakema and Graham were quite friendly and it was obvious that Graham was Bakema's favourite officer. Apparently he has since also been dismissed from ESPPD for reasons unrelated to this case.
24. At the scene of the collision, Graham searched Harvey-Zenk's vehicle. He alleged that he could smell a strong odour of liquor inside the vehicle. He also noticed that there was a WPS uniform in the vehicle. Graham seized that uniform. But Graham had no direct contact with Harvey-Zenk.

CONFIDENTIAL

25. According to Graham, he told Bakema that he smelled liquor in the vehicle. But, according to Graham, at no time did Bakema express an opinion to Graham that he believed that Harvey-Zenk was impaired. According to Graham, he and Bakema also discussed between themselves the issue of whether Bakema actually knew Harvey-Zenk. Graham's explanation about this conversation is somewhat unclear. Apparently Bakema did comment to Graham that he had worked with Harvey-Zenk at District 3. But Bakema also supposedly said that he didn't really remember Harvey-Zenk.
26. Bakema's notes about his attendance at the accident scene are very sparse. His formal investigation report is not much better. There is nothing to suggest that Bakema noted any signs of impairment on Harvey-Zenk. There is a reference to Harvey-Zenk having told Bakema that Harvey-Zenk was a "cop".
27. As part of the investigation, Bakema was contacted by RCMP Cpls. Doyle and Kennett. He was advised of the nature of the investigation and was asked whether he was prepared to give a statement under charge and caution. Bakema said that he wanted to consult a lawyer and would get back to the RCMP investigators. He never did.

#### ANALYSIS

Pursuant to s.139(1) of the *Criminal Code*, in order for a person to be found guilty of obstruct justice, he or she must wilfully attempt to obstruct, pervert or defeat the course of justice (emphasis added). Judicial decisions that have interpreted the offence make it clear that it requires specific intent.

In this case, I am simply not satisfied that there is sufficient evidence against Bakema to charge him with the offence. In my opinion, there is no reasonable likelihood of conviction. In order to convict Bakema of the offence, the Crown, in essence, would have to prove that he intentionally concealed evidence and/or intentionally mishandled the investigation of the collision.

With respect to the issue of whether Bakema concealed evidence, the only evidence against Bakema is Woychuk's version of events. There is no corroboration to support Woychuk's allegation that Bakema made the comment at the scene that he thought that Harvey-Zenk was "*possibly impaired*". Furthermore, there is no corroboration of Woychuk's allegation that Bakema instructed him not to include that comment in his notes.

Woychuk's allegation that Bakema also instructed him not to refer in his notes to Paramedic Rosser's comment about smelling liquor on Harvey-Zenk is not really relevant. As part of the ESPPD investigation of the collision, Rosser was formally interviewed and a statement was taken, presumably with Bakema's knowledge. In his statement, Rosser again refers to smelling liquor on Harvey-Zenk. It cannot be argued therefore that Bakema was attempting to suppress Rosser's evidence in that regard.

CONFIDENTIAL

In his statements to the RCMP investigators, Woychuk is very vague and confused as to exactly what was said to him by Bakema. In particular, in his second statement to RCMP investigators, Woychuk indicates quite clearly that he is not even sure that Bakema instructed him not to put the reference to Harvey-Zenk's possible impairment in his notes.

From my review of his statements, I have formed the distinct impression that Woychuk has spoken at various times to other members of ESPPD such as Carter, Chudyk and Maloney about the whole incident and what occurred. In my view, Woychuk really cannot distinguish what he actually remembers and what he is imagining as a result of talking to others.

I am satisfied that Woychuk would be a weak witness for the prosecution if Bakema were charged. Yet it is his testimony upon which the Crown would have to rely. The evidence of what he told Carter, Chudyk and Maloney would be inadmissible at any trial. Not only is it hearsay, but also the rules of evidence clearly provide that previous consistent statements by a witness are not admissible.

Another concern that I have about Woychuk is that he apparently has remarked at various times to a number of people that he is annoyed with both Bakema and Graham. He perceives that they "ducked" their responsibilities at the collision scene and left him with too much responsibility, considering his inexperience as a police officer. By making such statements, Woychuk has shown definite antagonism to both Graham and Bakema. This bias would undoubtedly be utilized to attack Woychuk's credibility at trial if Bakema were charged. It would severely undermine the weight to be attached to Woychuk's testimony.

With respect to the issue of whether Bakema intentionally mishandled the investigation, the Crown would have to prove that Bakema was generally an experienced and competent police officer who knew how to conduct a proper investigation at a collision scene. As indicated previously, there is no evidence that he had much experience in investigations of this nature. More significantly, according to Maloney and Chudyk, Bakema was not a competent police officer. To the contrary, in their opinions, he was virtually incompetent.

Whether Chudyk and/or Maloney are correct in this assessment is irrelevant. It is the only evidence available as to Bakema's competence (or lack thereof). There is no evidence to refute their opinions.

Another difficulty with this case is that there is no strong evidence of Bakema having a motive to obstruct the investigation. Notwithstanding that the Crown does not have to prove motive in a prosecution, it is certainly helpful to have evidence of motive. There is no direct evidence that Bakema knew or was friends with Harvey-Zenk or that he had any particular reason to assist him. He apparently only knew that Harvey-Zenk was a fellow police officer.

It is indeed unfortunate that a serious and tragic case such as this one was not investigated thoroughly and professionally. But, in conclusion, I reiterate that I am simply not satisfied that there is sufficient evidence upon which to lay a charge against Bakema. However, based upon

**CONFIDENTIAL**

HILL ABRA DEWAR

7

September 8, 2006

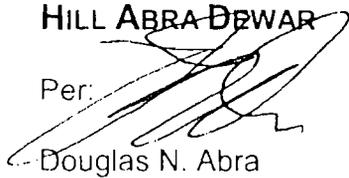
my review of the evidence in both the reports of ESPPD and the RCMP, I do believe that there is still sufficient evidence to proceed with the charges against Harvey-Zenk.

Should you have any questions concerning this matter, or wish to discuss it further, please do not hesitate to contact me. In the meantime, I am returning the file to you.

Yours truly,

HILL ABRA DEWAR

Per:



Douglas N. Abra

DNA/ff  
encl.

CONFIDENTIAL