



*Taman Inquiry into the investigation and
prosecution of Derek Harvey-Zenk*

Honourable Roger Salhany, Q.C., Commissioner

Room 30 - 200 Vaughan Street, Winnipeg, MB R3C 1T5

March 4, 2008

Brian Gover
Stockwoods LLP Barristers
Suite 2512, 150 King St. W.
Toronto, M5H 1J9

Dear Mr. Gover,

Re: Taman Inquiry – Expert Testimony

Thank you, Brian, for agreeing to assist with the Taman Inquiry by appearing as an expert witness. As I indicated to you on the phone today, Mr. Richard Peck Q.C. will also be appearing as an expert witness. Whereas you have more dedicated experience as a full time prosecutor, like the prosecutor whose work is at issue during this Commission, Mr. Peck Q.C. is a defence lawyer with experience working as a special prosecutor.

The inquiry arose out of the aftermath of a traffic collision on February 25, 2005 in which a vehicle driven by an off duty Winnipeg Police Officer, Derek Harvey-Zenk, collided with a vehicle driven by Ms. Crystal Taman causing her death. As a result of the public disquiet about the subsequent prosecution of Mr. Harvey-Zenk, 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.

The terms of commission inquiry are as follows:

- (a) To inquire into the conduct of the police investigations surrounding the death of Crystal Taman on February 25, 2005, including, but not limited to.
 - (i) the correctness and adequacy of the procedures and practices that were followed, and
 - (ii) the good faith, objectiveness and professional standards with which the procedures and practices were applied and decisions made.
- (b) To inquire into whether all aspects of the prosecution of Derek Harvey-Zenk, including the Crown's position on sentence, were conducted in accordance with the professional and ethical standards expected of lawyers and agents of the Attorney General.

(c) To inquire into whether the services provided to the family of Crystal Taman were sufficient having regard to the requirements of the Victims' Bill of Rights.

(d) To give advice on whether findings on any of the above matters gives rise to the need for further study, review or investigation and, if so, by whom.

Your testimony would be sought with respect to topic (b) alone.

Of course, you are being conscripted as an expert witness based on your expertise and neutrality, and not because of any views you may have about the events. I have not elicited your opinions on the prosecution and you have not offered any. This is important to record because as Commission Counsel it is my function to put before the Commissioner the information that he requires to discharge his mandate. I do not represent any of the parties and do not have an interest in making any particular set of findings. I have therefore not sought an expert who will advance a particular position or serve a partisan interest but have asked you to participate because it is your judgment that matters. During your testimony, please provide the unvarnished, candid information that you, in your expert opinion, consider to be appropriate.

There are three orders of business I will address in this letter. First, I want to give you a heads up as to what I expect you may be called upon to testify about. Second, I want to provide you with the information you will require to perform your function. In this letter I will describe the general background information you will need in order to prepare your testimony. I will also attach select documents that I think you will require. Third, I want to ask whether you are prepared to provide us with an expert report in advance of the hearings that can be disclosed to the parties. I will say more about that below.

The Information You Require

As counsel to the Commission, I have already gathered a significant amount of material. It would not be appropriate to furnish all of this documentation to you given that you should not be asked to draw conclusions about what happened. The findings of fact are for the Commissioner to make after the evidence has been presented. It would be appropriate to share with you the investigative file that was in the hands of the prosecutor as your role will include assessing whether prosecutorial decisions were appropriately made. 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 – what I suspect at this point the evidence will show. I will ask you to base aspects of your opinion on the assumption that these hypothetical facts are true. If evidence shows them to be materially so, the Commissioner will profit from the opinions you offer. Should the facts change in material ways as the evidence unfolds, I will notify you of those changes in order to permit you to consider whether those factual variations affect your overall assessment and to enable you to modify your opinion, as required. As indicated, should you prefer to have the investigative file, it can be arranged.

The following are the hypothetical facts you may assume to be true in forming your opinions. You should also rely on the copies of the sentencing transcripts that I will be providing.

Hypothetical Facts

You may assume for the purposes of your opinion that Mr. Harvey-Zenk went to a restaurant/bar immediately after his shift, in the late evening hours of February 24, 2005. He was there with up to twenty-five other off-duty Winnipeg Police Officers. Reports indicate he consumed some alcohol. After 2:00 a.m., along with ten or so of the officers, he went to the home of Cst. Shawn Black north of Winnipeg. Again, alcohol was available, although no-one reported noting whether or not Mr. Harvey-Zenk consumed any alcohol at the Black residence. He left the residence close to 7:00 a.m on February 25, 2005. Shortly after his departure he collided with Ms. Taman's vehicle.

At the time of the collision Ms. Taman was commuting to work. Her vehicle was stopped for a red light. The light was about to turn green, or had just turned green when her vehicle was struck from behind by a vehicle, a light duty truck, being operated by Mr. Harvey-Zenk. You can assume that Mr. Harvey-Zenk's vehicle did not slow before the collision. His vehicle is reported to have been traveling at ordinary road speed, estimated by a witness to be in the range of 80 kilometres per hour. You may assume that the road he was traveling on was straight, giving Mr. Harvey-Zenk an unobstructed view of the intersection, and that the conditions were clear and visibility excellent. It was light out. There was traffic signage warning of the red light ahead, and that there were lights on the rear of at least two that were stopped at the lights. No explanation for Mr. Harvey-Zenk's failure to stop has ever been advanced.

As a result of the collision, Mr. Harvey-Zenk was charged with four counts, (1) criminal negligence causing death, (2) impaired driving causing death, (3) dangerous driving causing death, and (4) refusing to provide a breath sample.

You may assume for the purposes of your opinion that the following is true:

- (a) Police officers from the investigating police force, the East St. Paul Police Service, arrived at the scene at 7:16 or so. None of the five police officers who arrived at the scene set out to determine whether Mr. Harvey-Zenk had consumed alcohol or was impaired, in spite of the unexplained accident;
- (b) The ranking officer on the scene, Chief Bakema, escorted or placed Mr. Harvey-Zenk in the back of a police vehicle, probably at or around 7:42 a.m. That police vehicle was being operated by Cst. Woychuk, a police officer of between four and six months experience. It appears that Chief Bakema knew Mr. Harvey-Zenk to be an off-duty police officer and may have known him personally. Chief Bakema's notes record that he placed Harvey-Zenk in the back of the vehicle because of the cold and Mr. Harvey-Zenk's emotional

condition. The implication is that Mr. Harvey-Zenk was not being arrested. In any event, Mr. Harvey-Zenk remained in the vehicle until approximately 8:08 a.m. (in the range of 26 minutes) before being transported to the police station by Cst. Woychuk. The explanation offered by Constable Woychuk for the transportation of Mr. Harvey-Zenk to the station has varied. On one version, it was to complete a Traffic Accident Report. On another version, it was on the instructions of Chief Bakema so that the matter could be taken care of by Sergeant Carter, a more experienced officer who was at the station. At no time before he arrived at the police station was Mr. Harvey-Zenk advised of the right to counsel;

- (c) Although the evidence is unsettled, the investigative file contains several indications that while he was still at the scene police officers may have had the following reasons to suspect that Mr. Harvey-Zenk had alcohol in his body;
- a. Paramedics interviewing Mr. Harvey-Zenk in the back of the police vehicle at some point between 7:42 and 7:58 a.m. detected an odour of alcohol from Mr. Harvey-Zenk and it appears that one or even both of them mentioned it to a police officer, probably Cst. Woychuk;
 - b. Cst. Graham noted the odour of alcohol in Mr. Harvey-Zenk's vehicle; and
 - c. Cst. Woychuk noted an odour of alcohol either when Mr. Harvey-Zenk was waiting in the police vehicle on scene, or *en route* to the police station. His notes suggest that this occurred while *en route*.

No demand was made on scene or *en route* for a roadside breath sample or for an evidentiary breath sample.

- (d) Upon Mr. Harvey-Zenk's arrival at the East St. Paul police station at or around 8:12 a.m., Sgt. Carter, who had not been at the accident scene, formed the opinion that Mr. Harvey-Zenk was impaired. Sgt. Carter noted a strong odour of alcohol and observed that Mr. Harvey-Zenk was unsteady on his feet as he was being escorted into the station to an interview room. Cst. Woychuk apparently confirmed seeing 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 describes it as having been a breath demand. In any event, you can assume that Mr. Harvey-Zenk initially agreed to furnish a breath sample, consulted with counsel, and then refused to provide a sample;
- (e) You can assume that there are the following issues relating to the officer's notes:
- a. Chief Bakema had two sets of notes;

- b. No officers record having been advised by the paramedics that Mr. Harvey-Zenk smelled of alcohol;
 - c. Cst. Graham's notes do not record that he smelled alcohol in the Harvey-Zenk vehicle and there is no record of when this happened;
 - 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, 1:25 p.m., yet there is no record of it in her notes or in the investigation report; and
 - 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 himself crafted the contents of his own notes to reflect directions provided by Chief Bakema;
- (f) The investigation of the Winnipeg Police Service witnesses who had been in the company of Mr. Harvey-Zenk prior to the accident was conducted by Winnipeg Police Service Professional Standards Unit. That investigation produced no police witnesses who could provide helpful information about the amount of alcohol Mr. Harvey-Zenk had consumed prior to the accident, and all of those witnesses who described noticing him said that he was showing no signs of impairment, including shortly before the collision;
- (g) Some of the police witnesses confirmed that Mr. Harvey-Zenk had been drinking beer in unknown quantities at the restaurant/bar. A waitress told investigators that if he was the officer who had been there a few weeks before for the Super Bowl and who was celebrating that his wife was wife, then he had consumed seven or eight pints of beer. (Mr. Harvey-Zenk's wife was in fact pregnant at the time.) When subsequently shown a photo pack including a photo of Mr. Harvey-Zenk, however, the waitress did not pick him or anyone else out.

You may assume that because the case involved a local police officer, and consistent with Manitoba Justice Policy (a copy of the relevant policy is enclosed), an independent prosecutor was assigned. Mr. Martin Minuk, a senior Winnipeg defence lawyer who had prosecuted cases for the province on other occasions, was retained. You may assume for the purposes of your opinion that:

- (a) Mr. Minuk was consulted by Sergeant Carter while Mr. Harvey-Zenk was still in custody. He approved the charges being contemplated by Sergeant Carter, and advised Sergeant Carter that he could release Mr. Harvey-Zenk on a promise to appear without conditions;

- (b) On April 21, 2006, not long before the scheduled June 5, 2006 preliminary inquiry, Mr. Minuk was made aware of allegations by Cst. Woychuk about Chief Bakema's conduct during the investigation. By this point Chief Bakema was no longer chief of police. Sergeant Carter had replaced him. You may assume that as a result of the allegations Mr. Minuk caused an independent RCMP investigation to be undertaken into Chief Bakema's conduct, and he arranged for the adjournment of the preliminary inquiry, which was rescheduled for the following summer;
- (c) As a result of that investigation, Mr. Minuk subsequently received additional investigative material from the RCMP. You may assume that it contained no significant evidence assisting the prosecution, other than Cst. Pedersen's unrecorded claim to observing signs of impairment on Mr. Harvey-Zenk at 1:25 p.m. You should note, however, that those observations are contradicted by Winnipeg Police Service "Wellness Officer" who attended with Mr. Harvey-Zenk immediately before his release and noted no signs of impairment. The RCMP investigation also disclosed some modest inconsistencies in statements made by Cst. Woychuk which defence counsel could attempt to exploit were he to testify at trial;
- (d) It is uncontested that on July 16, 2007, the first day of the rescheduled preliminary inquiry, the matter was adjourned to the next day. On July 17, 2007, Mr. Harvey-Zenk pled guilty to dangerous driving causing death before Chief Justice Wyant. The other three charges were stayed by Mr. Minuk. No factual foundation was offered at that time for the plea that was made;
- (e) I am providing you with the transcript of the proceedings of August 22, 2007. You should satisfy yourself about what occurred. You will note, however, that there was a single sentencing book of authorities offered to the court, which was endorsed by both counsel, and that a joint position was taken requesting a conditional sentence of two years, on conditions that had been recorded in advance. No request was made for a court ordered driving prohibition.
- (f) On September 12, 2007, Chief Justice Wyant reconvened court for further argument. He was uncomfortable with the joint position that had been put forward. Again, I am providing you with the transcript of the proceedings for that date. You should satisfy yourself about what occurred. Please note at least the following three potentially important things:
- a. It appears that Chief Justice Wyant understood for the first time at this hearing that the joint position offered during the August 22, 2007 hearing was not just two lawyers agreeing on an appropriate sentence, but rather was being presented as a *quid pro quo* compromise or true plea bargain. Manitoba authority requires more judicial deference to plea bargains than joint positions, and you will notice that Chief Justice Wyant was troubled

that the parties had not made it clear to him during the August 22, 2007 sentencing arguments that the joint position they were advancing had been plea-bargained;

- b. It was made clear to Chief Justice Wyant that the defence was not admitting the consumption of alcohol by Mr. Harvey-Zenk. 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 was in fact alcohol consumption;
 - c. Mr. Minuk, after being asked by Chief Justice Wyant whether he was going to try to prove that Mr. Harvey-Zenk had alcohol in his body, declined to do so.
- (g) On October 29, 2007, Chief Justice Wyant gave judgment, imposing the conditional sentence that had been requested. You are being furnished with that transcript. You will note that he was clearly critical of the way matters had been presented to him. He made comments that can be taken as expressing displeasure with:
- a. The failure by counsel, including Mr. Minuk, to make it clear on August 22, 2007 that the position being put forward had been plea bargained;
 - b. The careful orchestration of facts that left the Court with an incomplete record of events; and
 - c. The decision by Mr. Minuk to mention anecdotal evidence of alcohol consumption when reciting the background facts, but then not attempt to prove alcohol consumption when it was denied.

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

- (h) You may assume that while the sentencing hearings were ongoing, there were media reports that Mr. Minuk had:
 - a. Acted for police officers in the past; and
 - b. He and Mr. Wolson had acted in the past, including recently, as counsel for co-accused persons.

Additional Information

To assist you in preparing your opinion, I will be sending you copies of the sentencing transcripts identified above.

As indicated, should you require access to the investigative file used in this prosecution, I can furnish it to you. As you might expect, it is substantial.

Further Research

I have retained a student researcher who has assembled background materials that you may find of assistance in preparing your opinion. I am currently assembling the material and will forward it to you imminently. The materials will include the relevant excerpts from the Manitoba Code of Professional Conduct and from the Crown Policy Manual as well as other relevant materials. All parties will receive a copy of those materials prior to the hearing.

If you wish additional research to assist in furnishing your opinion, please let me know and I will arrange to have it done.

Your Evidence

I anticipate that your testimony would have two parts:

- (a) General Description of General Prosecutorial Standards; and
- (b) Opinion evidence in response to hypothetical questions posed by counsel, including Commission Counsel.

(a) General Description of Appropriate Investigative Procedures

The general background information that we will be seeking from you will be about the role of the Crown, Crown discretion, and relevant ethical and professional standards. I anticipate that a very general overview of these issues will suffice. Although they are well known to lawyers and much of this is trite, this is a public inquiry and members of the public should be apprised of these matters. The Manitoba Crown policies that are included with this letter will help you situate your opinion according to Manitoba standards. Key areas of questioning are apt to include:

The role of the Crown

- (a) What is the role of the Crown?
 - A primer on the role of the prosecutor as a minister of justice
 - a primer on the role of the prosecutor as an Officer of the Court
 - A generic description of the role of the Attorney General as the head prosecutor and of the delegated authority held by Regional Crown Attorneys. Full-time line prosecutors, and agents retained to prosecute
 - a discussion of the role of Ministerial policies
 - a description of challenges in communicating and enforcing Ministerial policies
 - a primer on the role of the Crown in police investigations both before and after charges are laid

Ethics

- (b) When will a prosecutor be in a conflict of interest, and how should the prosecutor respond when faced with a potential conflict of interest?
- (c) Is plea bargaining appropriate for prosecutors, and what ethical limitations are there when undertaking plea bargains?
- (d) What ethical obligations does a prosecutor have in presenting a plea bargained arrangement to a court?

Standards of Performance

- (e) What is the role of the prosecutor where the prosecutor determines that an investigation has been defective?
- (f) What is the appropriate standard for proceeding with charges, or alternatively, withdrawing or staying charges?
- (g) Do supervisors exercise authority over the appropriateness of plea bargained arrangements, and, if so, what standards are used to judge the appropriateness of a plea bargained arrangement?

Supervision

- (h) Are there any external controls on the discretion and competence of prosecutorial decisions?

Opinion Evidence Relating to the Conduct of the Prosecution

We are seeking your opinion on the quality and propriety of specific things that appear to have occurred during the prosecution. You are to base your opinions for now on the hypothetical facts described above. In offering your opinion, please consider:

- (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 a the defence lawyer has, in the past, acted for a co-accused in a joint trial where you were counsel for another accused person;
- (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;
- (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;
- (f) Whether it is 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;
- (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 Crown policy directives to stay or withdraw a charge of criminal negligence causing death, on the hypothetical facts set out in this letter;
- (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;
- (l) Whether it is within acceptable general prosecutorial standards to agree or decide not to prove that the accused had consumed alcohol after that allegation fell into issue, on the hypothetical facts set out in this letter;
- (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 you will receive, sufficient efforts had been taken by the prosecutor, in the context of all submissions made, to alert the presiding judge to the fact that the joint position was arrived at as a result of a plea bargain;
- (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 plea of guilty.

Please understand that if you must furnish qualified answers to any of these questions, you are of course free to do so. Should you feel incapable of providing expert assistance on any of these issues, you should refrain from doing so.

Since you have worked extensively as a prosecutor, it is my present intention to call you before I call Mr. Peck. I would look to you to give the general background information on the role of the Crown and to respond to the specific factual issues identified. It is my present intention to have Mr. Peck focus on the specific factual issues identified, given his particular experience as a special prosecutor.

Your Expert Report

I am mindful that this is a significant undertaking on your part. I am reluctant to impose but it is important that we provide disclosure to the parties so that they can prepare for your evidence. I am therefore requesting that you provide an Expert Report that can be disclosed to the parties.

Unless you wish to do so, there should be no need for your report to include responses to the general background information that you will be asked to describe during your testimony. The parties will be receiving copies of the research materials that are being gathered.

Your report should disclose your opinions on items (a) – (o) under the heading *Opinion Evidence Relating to the Conduct of the Prosecution* above. The responses need not be lengthy and can be furnished in bullet form should you prefer. I would appreciate it if you could furnish this by the end of April.

Anticipated Schedule

It is our hope that your evidence can be provided during the first week in August. It is hypothetically possible that we could be in a position to call you by late July. Our ability to achieve either of these outcomes depends on our progress. We may have to reschedule at a mutually convenient time. Please let us know if there are any strict limits on your availability.

Remuneration and Expenses

The Taman Inquiry is prepared to pay you a reasonable professional witness fee. Please be advised that the government rate payable to lawyers by the province is \$200.00 per hour.

Please keep track of your expenses. Reasonable expenses will be paid according to Government of Manitoba guidelines. If you should require research assistance, we can discuss rates of payment. You are authorized to travel to Winnipeg by regular economy

air. The Commission will arrange your travel and accommodation, as required and in consultation with you.

Curriculum Vitae

To assist in making disclosure, could you provide me at your convenience with a copy of your *curriculum vitae*? If you could identify your prosecutorial experience and policy, public service or continuing legal education work related to the role and discharge of prosecutorial responsibilities, it would be greatly appreciated.

I realize that this is a significant undertaking on your part. Your work will provide significant benefit to the Commission.

Yours very truly,

David M. Paciocco