

## ***Paul A. Lobsinger***



*paul.lobsinger@ontario.ca*

*office 519-773-4467  
cellular 905-483-3197*

### **Professional Profile**

I am a member of the Toronto Police Service and I currently hold the rank of Sergeant. My career with the Toronto Police began on March 18, 1980. On January 2, 2008 I commenced a two-year secondment to the Ontario Police College in Aylmer, Ontario as an instructor in the academic section. I currently instruct new recruits in the area of the Ontario Highway Traffic Act, Ontario Provincial Offences Act, and various related pieces of provincial legislation. That instruction also includes impaired driving and collision investigation.

My career began in Traffic and I remained there for almost twelve years. In those twelve years I performed many of the duties associated to traffic investigation. I am qualified in the use of radar and laser speed measuring devices for traffic enforcement; in 1983 I became a qualified breathalyzer technician and performed more than 550 breathalyzer interviews; I have arrested a great number of drinking drivers myself and I estimate the numbers to be in the hundreds. I was also assigned the investigation of motor vehicle collisions.

After almost eight years away from traffic in the Homicide Squad, the Sexual Assault Squad and the Behavioural Assessment Section I returned to traffic in 2000. I was a uniformed traffic road supervisor for several months and then I accepted a position in the investigative office of Traffic Services in Toronto. I believe I would be on solid ground to say that this office is likely amongst the busiest dedicated traffic offices in Canada. Toronto has averaged approximately sixty fatal motor vehicle collisions each year I was there.

As a detective in the Investigative Office I shared my responsibilities with one other detective. My area of responsibility included supervising ten teams of investigators whose duties were focused on the investigation and management of serious and fatal motor vehicle collisions, fail to remain collisions, traffic related personation investigations and warrants.

My educational background with the Toronto Police Service includes but is not limited to the following:

- Ontario Major Case Management
- Threat Assessment (Anaheim, California)
- Threat Assessment (Washington, D.C.)
- Forensic Interviewing of Children
- Major Crime Investigative Techniques
- Accident Investigation Level 1
- Breathalyzer Technician
- Criminal Investigative Techniques
- Sexual Assault/Child Abuse
- Forensic Interviewing
- Scientific Content Analysis
- Advanced Scientific Content Analysis
- General Investigator
- Accident Investigation Level 2
- Reid's Nine Steps of Interviewing
- Professional Standards Complaints

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## Career Experiences

- 1991 – During my assignment to the Homicide Squad I was personally involved in the investigation of at least one dozen homicide investigations that ranged from gang style murders to prostitute murders to the murder of a police officer's spouse by a police sergeant. The 'Sergeant MATTISON' investigation was a unique opportunity to be involved in because it was not only a domestic homicide but the internal investigation of a member of the Toronto Police Service. This opportunity to work with some of the best investigators of the TPS provided me with the knowledge and experience that I continue to draw on to this very day.
- 1993/1995 – I was transferred from Traffic Investigation to the Sexual Assault Squad for the sole purpose of the Toronto Police investigation and prosecution of Paul BERNARDO and Karla HOMOLKA. That investigation developed into the joint forces operation known as the Green Ribbon Task Force and continued to the end of 1995, the conclusion of the case. The task force was made up of police officers, civilians and Crown Attorneys from different jurisdictions all working under one roof towards a common goal. I played a prominent role in the preparation of the Toronto Police report titled 'A Review of the Scarborough Rapist Investigation' that preceded the public review that was conducted by Justice Archie Campbell.
- 1996/1997 – I was assigned as the Toronto Police lead investigator in a serial rapist investigation in the Dufferin/Steeles neighbourhood that spawned a joint forces operation between the Toronto Police Service and York Regional Police Service. This investigation resulted in the successful apprehension, prosecution and conviction of Dwayne Michael LEWIS.
- 1997/2000 – I was assigned as the Toronto Police investigator responsible for the monitoring of offenders deemed to be high risks to re-offend violently and/or sexually upon their release from federal institutions. This involved making personal written application to the Attorney General of Ontario seeking permission to proceed with an application before a Provincial Court Justice to compel these high risk individuals to attend court and be bound by conditions on a recognizance even though a new offence had not been committed. The criminal law governing these individuals was relatively new, having been enacted in 1993 and further developed in 1997. This required constant personal training and interaction between federal and provincial correctional institutions, the Centre for Addiction and Research, law offices, Ministry of the Attorney General, Chiefs of Police, Courts and offenders. In 1999, the Toronto Police Service founded the Behavioural Assessment Section and I was appointed as the High Risk Coordinator. This greatly expanded my duties to include the assessment of when and how public warnings of high risk individuals would be made. The training standard that I helped to develop was presented to police agencies throughout Ontario and included local

community groups which proved to be a model that was adopted by other agencies. In fact, it was used in the production of a Federal Handbook titled, 'High-Risk Offenders – A Handbook for Criminal Justice Professionals.' One very unique aspect of the training involved lectures to the staff of federal institutions in Kingston and a provincial institution in Guelph. My testimony in a subsequent 1<sup>st</sup> degree murder trial involving one of these high risk offenders – Jason COLSON – was pivotal in having him found guilty as charged. An informed consent DNA sample that I had obtained was a valuable piece of evidence in that trial.

- 1997 – I was a member of the team that was instrumental in the launch of the Toronto Police Service internet website and subsequently received a Letter of Recognition from the then Chief of Police, David Boothby.
- 1999/2000 – I was assigned as the Major Case Manager in a serial rapist investigation in the Bathurst/Steeles neighbourhood that involved a joint forces operation between the Toronto Police Service and York Regional Police Service. The investigation resulted in the successful apprehension, conviction and prosecution of Sheon SIMON who is currently incarcerated as a dangerous offender.
- 1997/1998/2000 – I lectured to the Toronto Police Service International Fugitive Squad Seminar held in Toronto. My presentation focused on how the internet could be used by investigators in their daily chores.
- 1998 – I lectured on High Risk Offenders at the Toronto Police Service Sexual Assault Squad Seminar held in Toronto.
- 1998 – I lectured at the Georgian Bay Crime Conference involving several different police agencies and surrounding community representatives on the topic of High Risk Offenders in the community.
- 1999 – I lectured at the Toronto Police C.O. Bick College on the Ontario Major Case Management Course. The topic was High Risk and Dangerous Offenders.
- 2002 – I was assigned as the team leader for the Toronto Police Service investigation of the death of Police Constable Alan Kuzmich of the South Simcoe Police Service.
- 2005 – I lectured at the 'Alcohol and Off-Road Vehicles' joint conference of the Ontario Community Council on Impaired Driving (OCCID) and the Ontario Association of Chiefs of Police (OACP) in Sudbury on the topic of search and seizure of motor vehicles.
- 2006 - I lectured at the Ontario Association of Chiefs of Police (OACP) spring and fall traffic seminar in Aylmer on the topic of 'Current Issues in Traffic Policing'.
- 2007 – I lectured at the Toronto Police Traffic Seminar at the C.O. Bick

College on the topic of search and seizure of motor vehicles.

- 2007 - I applied for and was accepted as an instructor at the Ontario Police College in Aymer, Ontario.

### History with Toronto Police Service

<b>Appointed</b>	14 Division	1980/03 – 1980/04
<b>Police College</b>	Ontario & Toronto	1980/04 – 1980/11
<b>Uniform</b>	2 Traffic	1980/11 – 1982/08
<b>Communications</b>	Headquarters	1982/08 – 1983/02
<b>Uniform Breath Tech</b>	2 Traffic	1983/02 – 1986/03
<b>Uniform Breath Tech</b>	Western Traffic	1986/03 – 1989/07
<b>Traffic Investigator</b>	Western Traffic	1989/07 – 1991/06
<b>Investigator</b>	Homicide Squad	1991/06 – 1992/07
<b>Uniform</b>	North Traffic	1992/07 – 1993/05
<b>Investigator / Detective</b>	Sexual Assault Squad / Behavioural Assessment Section	1993/05 – 2000/02
<b>Uniform Sergeant</b>	Traffic Services	2000/02 – 2000/10
<b>Detective</b>	Traffic Services Investigative Office	2000/10 – 2007/09
<b>Uniform Sergeant</b>	Traffic Services	2007/09 – 2007/12
<b>Uniform Sergeant</b>	Ontario Police College	2008/01 -- current

### Education

<b>Grade 12 Diploma</b>	Merritton High School, St. Catharines, Ontario	1976
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**Opinion Evidence Relating to  
East St. Paul Police Investigative File**

**Quality and Adequacy of the Investigative File**

When I look at the investigative file bound and spread across six different volumes, it appears on its face to contain most if not all of the documents an investigator would require to properly place a case before a Crown Attorney for prosecution. That is not a comment on the adequacy of the documents contained in this file. Furthermore, it is certainly not in any order that I personally would prefer but that may have been done for easy shipping.

An investigative file is supposed to contain copies of all documentation related to each particular case and it should be set-up so as to allow fingertip access to any particular piece of information. Depending on the complexity of the case, the investigative file for the less complex matters is usually contained within an accordion type file folder with individual folders inserted in it. More complex cases can often be comprised of one or more banker's type boxes with hanging folders inserted. The individual folders within the file are then clearly labeled with individual categories set

out. There should be a standard file coordination method for grouping materials in categories so as to keep related materials together. Just as an example:

- Master occurrence report
- Record of Arrest(s) and supplementary Record of Arrest
- Accident Report
- Involved persons
  - Driver #1
    - Licence status
    - Statement
  - Driver #2
    - Licence status
    - Post mortem report
    - Toxicology report
    - Next of kin
  - Driver #3
    - Licence status
    - Statement
- Vehicles
  - Vehicle #1
    - Occupants
    - Registration
    - Insurance
    - Mechanical examination
  - Vehicle #2
    - Occupants
    - Registration
    - Insurance
    - Mechanical examination
  - Vehicle #3
    - Occupants
    - Registration
    - Insurance

- Mechanical examination
- Map/diagrams of the location
- List of exhibits and the continuity of each exhibit
- Photos
  - At scene
  - Post mortem
  - Aerial
- Witness List
- Police witnesses
  - Master list with brief synopsis of involvement
  - Notes, statements and will say reports
  - Court notifications
- Civilian witnesses
  - Master list with brief synopsis of involvement
  - Notes, statements and will say reports
  - Court notifications
- Media
- Internal correspondence
- External correspondence
- Crown Correspondence
- Disclosure
  - Disclosed
  - Not yet disclosed
- Other categories as may apply eg. Property owners when other than a highway is involved, Search warrants should they be involved, suspects, persons of interest, crime stoppers tips,

I have no way of knowing whether or not this file was kept neatly coordinated with a standard filing system or not prior to shipment to me. The way that it is compiled in the bound volumes delivered to me does not appear to place similar materials together to allow easy retrieval of any particular document and forces anyone looking for a particular document to scour the index sheet of each of the six volumes to find it.

Without a standard case management system, it can be difficult to manage even the most straight forward investigation effectively.

I don't have a copy of the particular Crown Envelope per se, but I do believe that Item O (fax to Kaplan) of the investigative file identifies what the initial Crown Envelope contained and all of those documents are within the investigative file. Even though Item O is referred to as 'fax to Kaplan', I believe it is the cover sheet for the Crown Envelope to Brian Kaplan. The Crown Envelope, especially the Crown Envelope for a first appearance, does not necessarily contain the same materials as the investigative file. However, at some point prior to the matter being tried in court, everything in that investigative file should have been disclosed to the Crown Attorney. 'Everything' sounds rather encompassing and it is meant to. As police investigators it is not our responsibility to disclose materials to the defence but it is our duty to disclose it to the Crown Attorney. It is the responsibility of the Crown Attorney to decide what and when materials are disclosed to defence counsel. It is very important to maintain proper records of materials disclosed to the Crown Attorney should defence counsel ever raise an issue that they were never given any particular item. There does not appear to be a proper record of disclosure in the file.

There are individual items that do seem to be missing from the investigative file and I don't know if they still exist. The collision reconstructionist examined the scene and the motor vehicles extensively. I know he took calculated measurements by use of a total station tool. Not being a reconstructionist myself but having managed fatal motor vehicle investigations for several years, I noticed that there does not appear to be a scale diagram of this scene in his report or elsewhere in the file. A scale diagram is a must in a fatal motor vehicle investigation. There does not appear to be a digital copy of his measurements in the file either. Even before the reconstructionist's report is near finished, the digital data is turned over to the Crown for disclosure. Defence is then in a position to have their own expert examine the data. Those are two things that would be expected to be disclosed to the Crown Attorney in this case and they are not in this file.



In cases similar to this, I have seen the collision reconstructionist use their training to try and make a determination of the speed of the vehicle that rear-ended the stopped vehicles. In his report at page 13, Constable Blandford states in part: *'Since it has been determined that V1 and V2 were stopped at the intersection when the collision occurred and post collision speed that they possessed was acquired in the collision. Most of the elements to determine speed through in-line momentum were present in this case. However the collision and post collision movements of V3 precluded any opportunity to ascertain the speed of this and the other vehicles involved in this incident through in-line momentum.*

*Any post collision speeds for V1 and V2 would be at best estimates that would be subject to much discussion.'*

The first sentence of that determination does not seem to be complete. I mean it just hangs there without ending. One sentence should not make or break a report but the material referred in this paragraph is very important in my own opinion of Constable Blandford's conclusions. I don't possess anywhere near the technical skills required of a collision reconstructionist but I do believe a trained collision reconstructionist given access to the same material as Constable Blandford, would be remiss in not taking the time to do the mathematical calculations to try and determine a speed for the Dodge Dakota pickup. Had this step been taken, it is my opinion that a speed could have been reached. That being said, even if Constable Blandford had obtained a minimum speed of 80-100 kilometres per hour for the Dodge Dakota I don't believe it would have changed anything relating to the end result of the drinking and driving charges. Post collision speeds for V1 and V2 are not really an issue in this investigation.

I notice there are no post mortem photographs of Crystal Taman. Again, I don't know if they exist. I do know that during investigations of this type in which I have been involved, at least one police officer and often more than one, attends the post mortem examination. Most often it is either the lead investigator/case manager or

the collision reconstructionist accompanied by a police photographer. One of the attending officers is then required to report to the original occurrence the fact that they attended and what they observed. There does not appear to be a record of any police officer attending the post mortem.

Collision Reconstructionist Christopher Blandford in delivering his report to the East St. Paul Police directs the report to Constable Ken Graham. This appears to be the only indication that Constable Graham played some major role in this investigation. There does not appear to be anything that would lead me to believe he was the case manager or the lead investigator of this investigation. It causes me to wonder whether Constable Blandford was given information to that effect or whether something happened to change responsibilities after he left the scene.

I do not see an official Record of Arrest for this individual in the file. The fact that it is not included in the investigative file would lead me to believe one did not exist. I don't know if that is common practice in East St. Paul but it would certainly draw the attention of the case manager at the least and the supervisor approving the file wouldn't be able to miss it.

The incident report authored by Chief Bakema found at tab 'S' in the investigative file has a date and time along the bottom footer of 2006/02/24/12:39:31 AM 22. Not knowing the file system being used by the East St. Paul Police, I assume that date and time to indicate when this documented may have been printed. But it leaves me to question where the original is. It had to have been printed much earlier than one year from the incident. According to the cover sheet to Brian Kaplan found at Tab 'O' of the investigative file, the Crown Envelope was delivered to the Crown March 1, 2005. Even the disclosure log found at tab 'F' of the investigative file indicates a '1 page incident report of Chief of Police Harry Bakema' was disclosed to the Crown. This incident report from Chief Bakema is four pages long. The state of the notes in the entire file leaves open an opportunity for someone to question if this is the original document.

A properly maintained investigative file allows the case manager to review all the material in their possession so as to allow them to conduct a complete and thorough investigation. The case manager then places that investigative file before a Crown Attorney. It is my opinion that this investigative file would certainly have given a Crown Attorney who reviewed it, the immediate knowledge that a prosecution for any or all of the charges was in serious jeopardy.

### **Investigative Errors**

It is my opinion that there were major investigative errors that would eventually have proven fatal to all or most of the charges that were placed before the court. I base my opinion on my training and my experience as an investigator, and the investigative file review that I have done.

Ideally, what should have taken place at the collision scene at the intersection of Provincial Trunk Highway 59 and Perimeter Highway 101 is that the first police officer at the scene should have taken control of the scene and immediately surveyed the necessity for safety and medical attention for those who required it. From the material I have reviewed it appears that Chief Bakema and Constable Ken Graham were the first police officers on the scene at about 0716hrs. Being the highest ranking officer at the scene, that responsibility should have fallen on Chief Bakema.

From the investigative file itself it is very difficult to determine what Chief Bakema and Constable Graham were doing at the scene. It appears that the driver of the Green Hyundai, Kathy Beattie was not suffering from any injury that required the attention of the police, and the deceased Crystal Taman was in no position to receive medical attention from the police. It appears that nobody even tried to determine if the driver of the third involved motor vehicle, Derek Grant Harvey mordenzenk required medical attention until 0740hrs. That is almost twenty-six minutes from the time the first police officers arrived at the scene. And yet, in one set of Chief Bakema's notes (page 65) it is clear from the first entries in his memorandum book at about 0710hrs

that he was aware that the driver of the truck was responsible for this collision and that a witness who is named in those particular notes provided information that the 'truck flew by him on left, ran into back of yellow car stopped'. That being the case, there does not appear to be any effort on any officer's part to find the person responsible for this collision. In his other set of notes, chief Bakema makes no mention of having knowledge that the driver of the truck was responsible for the collision or of the witness who provided that information until after 0742hrs - after he has already placed Mr. Harveyordenzenk in the rear of Constable Woychuk's car. That second set of notes appears to have been made subsequent to the first set only because the page numbers are later in the book. *(by having only photo copies I cannot determine if they are from the same book or another book)* It also appears that it is the second set of notes that were submitted to the investigative file as listed on the Disclosure Inventory #1 found at Tab 'F'. At one point subsequent to his dealings with Mr. Harveyordenzenk, Chief Bakema and Constable Graham closed the intersection. Common sense dictates that the intersection was already closed by that time.

Chief Bakema should have taken responsibility for coordinating the efforts of all police officers and immediately should have assigned a police officer as the lead investigator. Chief Bakema would then also be free to direct the other officers as the situation called for. The ideal candidate for that investigation was Constable Graham who was right there with the Chief. In addition, Chief Bakema should have relayed the information he had about the driver of the truck to Constable Graham. In one or two minutes with witness Graham Shaw, a police officer could have established the time of the collision and learned how the collision took place. I see nothing in the investigative file that would have prevented Constable Graham from taking on that responsibility. From the investigative file it appears that Constable Pedersen and Constable Woychuk had not yet arrived on scene. Constable Graham would have been in a position within a minute or so of arriving on scene to seek the driver of the truck to determine if he/she required medical attention. It didn't happen.

Constable Graham would have been in a position to observe Mr. Harveyordenzenk less than ten minutes after the collision. Constable Graham would have been in a position to determine that Mr. Harveyordenzenk's ability was impaired by alcohol. Knowing that a yet unexplained collision had taken place, that at least one person had most likely lost their life, that Mr. Harveyordenzenk had the odour of an alcoholic beverage on his breath shortly after seven o'clock in the morning and observing him for a brief period of time, I would expect that any police officer would have formed the grounds to believe Mr. Harveyordenzenk's ability to operate a motor vehicle was impaired by alcohol and placed him under arrest for impaired driving causing bodily harm/death.

If that officer was Constable Graham then he would have been in a position to advise Mr. Harveyordenzenk of his Right to Counsel and to administer the standard police caution against saying anything that could be used against him. That same officer would then be required to make a demand for samples of his breath and that Mr. Harveyordenzenk accompany him for that purpose.

If the arresting officer had any concerns that Mr. Harveyordenzenk required medical attention he could have had paramedics examine him or he could have taken him to the hospital to get checked out. He would still have been under arrest, and he would still be compelled to provide the samples of breath that had been demanded as soon thereafter as is practicable. So, even if he was detained at the hospital, he would still be required by law to provide those samples as soon as it was practicable.

From the investigative file it appears that Constable Pedersen arrived at the scene at about 0720hrs and Constable Woychuk arrived at about 0722hrs.

Again, if the arresting officer was Constable Graham, and if he was required to investigate the collision because of a special skill set that he possessed, he would have been in a position to transfer custody of Mr. Harveyordenzenk to either Constable Pedersen or Constable Woychuk for transport to the nearest breathalyzer

facility. The transporting officer would have been required to be told a) the time of the collision, b) that Mr. Harveymordenzenk had been arrested for impaired driving causing bodily harm or death, c) that rights to counsel had been provided and what responses Mr. Harveymordenzenk had provided, d) that a standard caution had been given and any response that evoked, e) the time of the collision, and f) that samples of his breath had been demanded and the time of that demand.

If Constable Pedersen or Constable Woychuk possessed the skills necessary to investigate the collision, Chief Bakema should have assigned one of them to investigate the collision and directed the arresting officer to take Mr. Harveymordenzenk to the nearest breath testing facility.

From the investigative file, it appears that most of the collision investigation itself was being done by RCMP Constable Blandford so there does not seem to be anything that would have pre-empted any of the officers at the scene except Chief Bakema from being the lead investigator. Chief Bakema needed to remain available to control the resources and delegate responsibilities. Either Constable Pedersen or Constable Woychuk were available to take verbatim statements from any witnesses that may have remained at the scene and could have been delegated to do so by Chief Bakema. If more officers were required, Chief Bakema could have mustered the resources to use either his officers or to request assistance from another police agency.

Whoever was delegated to take the arrested subject to the station would be prudent in inquiring from the dispatcher the location of the nearest breath testing facility and also alert the dispatcher to have a qualified breath technician prepared to accept the subject.

It appears that there was plenty of help available to secure the scene.

Upon arrival at the breath testing facility, the subject would have been paraded before an officer in charge, and the officer in charge would have been advised the

reason for the arrest, that rights to counsel had been given, a caution had been read, and that a demand had been made for samples of his breath and that was why he was brought to the station. This would be to determine that the subject was lawfully in custody.

Ideally, Mr. Harveyordenzenk would have been afforded an opportunity to speak with counsel in private and then because of the requirement that breath samples be collected as soon as practicable, he would have been taken directly to the breath technician. The transporting officer would be required to inform the breath technician of the reason for the arrest, the time of the collision, that right to counsel had been given and that Mr. Harveyordenzenk had been afforded an opportunity to speak to counsel and that a demand for samples had been made and the time they were made.

Once suitable samples of breath had been collected, Mr. Harveyordenzenk would have been taken to either an interview room or a report room for processing. In consultation with an experienced investigator, a determination of which charges to lay against Mr. Harveyordenzenk would then be determined. In a situation such as this, the Officer in Charge would be consulted as to the suitability of having Mr. Harveyordenzenk remain in custody or be released. In my own experience, it has not been unheard of to release a subject facing criminal charges in a fatal motor vehicle collision. More often than not, a person facing the same four charges as did Mr. Harveyordenzenk would remain in custody and be taken to court to be brought before a Justice.

The necessary paperwork would be completed prior to transport to court or release. If the decision to release an individual is made then only the paperwork necessary up to that point would need to be completed. It is not common practice to keep individuals in custody longer than they need be kept. The rest of the paperwork would be completed after they left the station.

If, while an individual was in custody, their counsel of choice arrived at the police station and wanted to speak privately with their client, it would certainly be accommodated. It is a very good practice to only allow the following persons to interview a person in custody. Police officers involved in the investigation, defence counsel, members of law enforcement or government agencies involved in the investigation, at the request of the investigating officer, crown attorney or assistant, a parent, relative, spouse or adult friend (young persons only), spouse or immediate relative (at conclusion of investigation only), a consular official, where the person in custody is a foreign national.

If the arrest had followed a track similar to what I have laid out, there would be a much more reasonable prospect of conviction than in this instance. It is my opinion that with the track that it followed, according to the investigative file, I don't believe a conviction would be likely on any of the charges laid. I base that opinion on what I have previously mentioned as well as what I will describe in point form here.

It is my opinion that there are so many investigative errors in this investigation the table could not have been tilted more in favour of an accused person if they had been pre-ordered.

- He is involved in a collision in which his motor vehicle was travelling at approximately the speed limit of 80 kilometres per hour and drove straight into the back of a stopped vehicle – a vehicle that had been stopped for some time
- A collision that took the life of a woman at the scene or shortly thereafter
- At least four police officers, one of which is a senior ranking officer, attended the scene and no one clearly took charge of the scene or the subsequent investigation





- He is identified as the person responsible for the collision by an eye witness who indicated he was operating his motor vehicle in a manner that was a marked departure from the norm
- He is spoken to by a senior ranking police officer who had information that he was the person responsible for the collision
- A senior ranking police officer who does not make a single note in his memorandum book about his dealings with him
- That same senior ranking police officer who at some point, completes a second set of notes that includes some of his dealings with him and an observation that he had blood on his nose and that he was distraught
- That same senior ranking police officer in his second set of notes moves the information pertaining to the eye witness from the start of his notes in the first set, until after his involvement with Mr. Harvey Mordenzenk in the second set
- That same senior ranking police officer who makes no inquiries as to his consumption of alcohol or as to the reason for the collision and makes no notation about his checking for the involvement of alcohol
- That same senior ranking police officer who makes a notation in his second set of notes that the subject identified himself as a cop
- That same senior ranking police officer who makes no notes advising Constable Woychuk or any other police officer of the fact that the subject was a police officer
- That same senior ranking police officer takes him and places him in the rear of another officers police vehicle and makes no notes as to telling him or telling the police officer why he was being placed there

- The police officer in that police vehicle makes no notes as to why Mr. Harveymordenzenk is in the back of his police car nor does he make any notes as to why he takes him to the police station however, in his narrative report, he includes that he was told by the Chief that the male was there until he received medical attention and to remain with him because he was distraught
- The transporting police officer at no time tells Mr. Harveymordenzenk why he is being taken to the station or if he is under arrest or not
- The transporting police officer has no notes pertaining to the collision itself or even the time it took place
- The transporting officer detects a slight odour of liquor from Mr. Harveymordenzenk sometime prior to arriving at the station
- The transporting officer notes he met Sergeant Carter at the rear entrance to the office but it appears from the file he may have left Mr. Harveymordenzenk in the police vehicle while he sought out Sergeant Carter
- Sergeant Carter in his letter to Crown Attorney Martin Minuk on the 25<sup>th</sup> of April 2006 indicates he received instructions from Chief Bakema about 8:00AM via radio at the station to remain there and await the arrival of Woychuk. That is not what his notes indicate. His notes indicate that S/Constable Olfert told him to remain in the station. In the letter to Crown Attorney Minuk he also states he has no details of the collision except what dispatch told him and he doesn't specify other than the initial call out from home. That call doesn't indicate a time for this collision.
- Constable Woychuk has no details of the collision in his notes, has no notes indicating he knows the time of the collision and he has no notes of telling Sgt. Carter the time of the collision.

- Sergeant Carter notes that the transporting officer, Constable Woychuk, told him that he had a male subject in the rear of his police vehicle who was involved in the accident and there was one fatality involved. He also told him that the subject had declined medical attention at the scene and was being brought to the station to complete a Traffic Accident Report. Sergeant Carter also notes that Constable Woychuk told him he detected a slight odour of liquor from the subject enroute to the station
- Constable Woychuk has no notes as to advising the dispatcher that he was taking a subject to the station

**It is my opinion based on the investigative file, that at this point in the investigation, any charges that could flow from the investigation may be in jeopardy because Mr. Harveymordenzenk was detained and transported in the back of a police vehicle to a police station without ensuring requirements of the Charter of Rights and Freedoms had been met. Section 7 of the Charter of Rights and Freedoms sets out – Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principals of fundamental justice. Section 9 of the Charter of Rights and Freedoms sets out – Everyone has the right not to be arbitrarily detained or imprisoned. Most importantly of the three, Section 10 of the Charter of Rights and Freedoms sets out – Everyone has the right on arrest or detention a) to be informed promptly of the reasons therefore; to retain and instruct counsel without delay and to be informed of that right; and c) to have the validity of the detention determined by way of *habeus corpus* and to be released if the detention is not lawful.**

- It appears Mr. Harveymordenzenk had not been searched and had been left alone in the police car while Constable Woychuk went into the station to see Sergeant Carter. Their notes disagree on the meeting location. There is also no notes that the police car was searched subsequent to removing Mr.

Harveymordenzenk from it. This alone could be suggested to have been a time when Mr. Harveymordenzenk could have consumed alcohol. It need not be proven.

- In less than four minutes of observing Mr. Harveymordenzenk, Sergeant Carter formed the opinion that his ability was impaired by alcohol
- Sergeant Carter placed him under arrest. In his rough notes he does not note the reason for the arrest. In his memorandum book notes he indicates arrest – impaired causing death – impaired cause bodily harm or *and I can't make out the next* line until I read his incident narrative when it becomes clear. The reason for the arrest that he notes in his incident narrative is Impaired Driving Cause Death/Bodily Harm or some similar charge in relation to the incident.

**In four minutes Sergeant Carter not only noticed that Mr. Harveymordenzenk had been drinking but formed the opinion that his ability to operate a motor vehicle was impaired by alcohol. Yet Chief Bakema didn't note any indication of alcohol let alone impairment and Constable Woychuk notes a slight odour of liquor yet doesn't conclude impairment. This could be a serious problem at trial.**

**Although it may be slight, there may be a violation of Section 11(a) of the Charter of Rights and Freedoms. Any person charged with an offence has the right - a) to be informed without unreasonable delay of the specific offence. The 'or some similar charge in relation to the incident' could be troublesome. I am not familiar with a 'similar charge' or what Sgt Carter could be referring to.**

- After advising Mr. Harveymordenzenk of his right to counsel and cautioning him, Sergeant Carter in his rough notes indicates at 821 – blood DYU Yes Will you comply-yes. In his memorandum book notes he indicates at the

same time – Writer read Blood Demand. In his incident narrative at 0821hrs he notes – Writer read the accused the blood demand. He advised he understood and agreed to provide breath samples.

**In my opinion there was no reasonable prospect of conviction on a charge of refuse samples from this point forward. Taken on its face – Sergeant Carter made a demand for blood samples because he notes it in his rough notes, his memorandum book, and his incident narrative – the demand in my opinion is not a lawful demand. I reproduce section 254(3) of the Criminal Code to make my point.**

254(3) Where a peace officer believes on reasonable and probable grounds that a person is committing, or at any time within the preceding three hours has committed, as a result of the consumption of alcohol, an offence under section 253, the peace officer may, by demand made to that person forthwith or as soon as practicable, require that person to provide then or as soon thereafter as is practicable

(a) such samples of the person's breath as in the opinion of a qualified technician, or

(b) where the peace officer has reasonable and probable grounds to believe that, by reason of any physical condition of the person,

(i) the person may be incapable of providing a sample of his breath, or

(ii) it would be impracticable to obtain a sample of the person's breath,

such samples of the person's blood, under the conditions referred to in subsection (4), as in the opinion of the qualified medical practitioner or qualified technician taking the samples

are necessary to enable proper analysis to be made in order to determine the concentration, if any, of alcohol in the person's blood, and to accompany the peace officer for the purpose of enabling such samples to be taken.

The only time a peace officer can make a demand for samples' of a person's blood is where the officer believes on reasonable and probable grounds that by reason of a physical condition of the person, the person could not provide a sample of his breath or it would be impracticable to obtain a sample of his breath. There don't appear to be reasonable and probable grounds to believe there was any physical condition interfering with Mr. Harveymordenzenk's ability to provide a breath sample; therefore, Sergeant Carter could not lawfully demand samples of his blood. Sergeant Carter then directs Constable Woychuk to take the subject to the 'breath room'.

In reviewing this part of the investigative file common sense dictates that Sergeant Carter actually made a demand for samples of breath and wrote it down wrong or he is not well experienced in processing alleged impaired drivers. My initial thoughts are that he simply wrote it down wrong but then I am left to try and understand his notes where he indicates he 'read' the blood demand to Mr. Harveymordenzenk. If Sergeant Carter read the blood demand - this is what he would have heard himself say out loud.

"In my opinion, your ability to operate a motor vehicle is impaired by alcohol. You are required to provide samples of your blood to enable an analysis to be made in order to determine the concentration, if any, of alcohol in your blood and to accompany me for that purpose.....(continued below)

Up to this point he may not have noticed he was reading the wrong demand. But if he read this next sentence there is absolutely no rational

**explanation for him not noticing what certainly doomed any prosecution for this offence.**

Blood samples will only be taken by or under the direction of a qualified medical practitioner and if the qualified medical practitioner is satisfied that the taking of the samples will not endanger your life or health."

**I cannot explain why Sergeant Carter didn't recognize his error when he saw it on the paper in front of him and heard it with his own ears. My initial thoughts of writing it down wrong are destroyed by what actually took place.**

- At 0834 Sergeant Carter notes at multiple locations that the accused said 'I'm sorry did you give the demand?' His rough notes and his memorandum book do not record an answer to the question. In his incident narrative completed some time later he indicates that he answered in the affirmative but he doesn't say what the answer was.

**The answer to the question of the accused is of utmost importance in any investigation such as this. To not write down the answer to that question could likely prove fatal. It is my opinion that if a serious problem with the demand didn't already exist, this may be recoverable by way of *viva voce* evidence. Given what has already taken place, it is my opinion this is very serious.**

- At 904 Sergeant Carter in his memorandum book indicates someone in breath room preparing. On my hard-copy and my digital copy the name is obliterated.
- At 905 both Sergeant Carter and Constable Woychuk have notes about Carter requesting Woychuk escort Mr. Harveymordenzenk to the breath room. It appears that Sergeant Carter overhears Mr. Harveymordenzenk tell Constable Woychuk he didn't want to supply samples. Sergeant

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Carter recorded the response as "I don't want to". Constable Woychuk records it as "No, I don't want to provide a sample". Carter then asks him again if he will provide samples and he says 'No". From the investigative file I am lead to believe that Sergeant Carter then read this to Mr. Harveyordenzenk. "You may be charged with refusing or failing to comply with a demand made to you to accompany a peace officer for the purpose of enabling an analysis to be made in order to determine the concentration, if any, of alcohol in your blood. Will you accompany me for that purpose (or) will you now give samples of your breath (blood) where applicable) suitable to enable an analysis to be made."

**When looking at the refusal caution it certainly applies differently in different circumstances. Firstly, is he failing to accompany Sergeant Carter? Because that is a charge of 'Fail to Accompany' in itself and it would still be subject to any Charter breaches that came before this. It certainly appears that he is failing to accompany either Sergeant Carter or Constable Woychuk. The charge should then be 'fail to accompany'. Or is he refusing breath samples that according to the notes were never demanded? Or is he refusing a blood sample that was in my opinion, unlawfully demanded and not even capable of being taken? Not knowing exactly how Sergeant Carter read the demand to Mr. Harveyordenzenk having the photocopy of the refusal caution at Tab 'E' is not helpful at all. It is my opinion that this is the final nail in the coffin for the refuse charge and it is definitely not recoverable at this point.**

- Sergeant Carter consulted his local Crown Attorney at approximately 1015hrs and according to his notes he was advised he would be using Special Prosecutor Martin Minuk for this matter. He spoke to Mr. Minuk within minutes and as a result of what Sergeant Carter said to Mr. Minuk at about 1035hrs, I take from the file that he was of the belief that it was sufficient to release Mr. Harveyordenzenk on a promise to appear. The charges to be alleged would be 1) refusal, 2) impaired cause death, 3)

dangerous cause death, and 4) criminal negligence cause death. There is no record of what Sgt. Carter said to Mr. Minuk

**It is my opinion based on the state of the file, that the Special Prosecutor was not aware of the facts as they actually existed.**

- In his narrative report Chief Bakema indicates that Constable Graham detected a strong odour of liquor coming from inside Mr. Harveymordenzenk's vehicle. It does not appear in his notes other than his narrative that was completed some time later
- Subsequent to the date of the event, it is clear from the investigative file that Chief Bakema continued on a number of dates to interview people involved in the investigation. He did not disclose any notes other than statements of the people he interviewed and they are on separate statement forms. Any involvement he had with the file subsequent to the date is not included in the file and therefore could not possibly have been disclosed
- Chief Bakema interviewed what turned out to be the only eye witness to the collision. This is the best if not the only person to put Mr. Harveymordenzenk behind the wheel of the vehicle prior to the collision and throughout the collision
- In his interview of Vernon Stevens, Chief Bakema hears Mr. Stevens describe what appears now to be Mr. Harveymordenzenk. At one point Mr. Stevens says "There was a Dodge truck off in the ditch up the road, about 15 metres past the yellow car. There was a gentleman standing about 15 ft west of where the truck was parked. He seemed pretty out of it, dazed".

- In his interview of Edward Rosser almost a month after the collision, Chief Bakema knows this witness examined Mr. Harveyordenzenk and detected alcohol. Strong but noticeable liquor on Mr. Harveyordenzenk
- There does not appear to be a statement of Kathy Beattie (involved driver) other than the fifteen lines found on the traffic accident report found at Tab HHH and it appears that statement was taken by Chief Bakema

**Chief Bakema continued to play a major role in the investigation after the scene was cleared and Mr. Harveyordenzenk was charged. It is not known when or where he learned that Constable Graham noticed a strong smell of liquor in the Dodge Dakota. Of each person he interviewed, Chief Bakema does not ask one of them if they believed Mr. Harveyordenzenk's ability was impaired by alcohol. His interview of Garth SHAW at the scene does not come close to meeting any type of acceptable interview standard I am aware of. In fact, the first question he asked witness paramedic ROSSER was whether there was an officer in the truck while he examined the subject. He would have been one of - if not the best person to ask if he thought the subject's ability to operate a motor vehicle was impaired by alcohol. Witness Vernon STEVENS described that Mr. Harveyordenzenk was 'pretty out of it - dazed' and yet he did not ask him anything more about that or even to clarify that point. On the traffic accident report there is a statement of Kathy BEATTIE. This appears to have been taken the day after the collision. Why did he not interview her? He did not ask her one question. Or did he?**

**It is my opinion that Chief Bakema should not have been interviewing persons from this collision. That was not his role. I get the impression that Sergeant Carter assumed carriage of this investigation from day one and there is nothing to suggest he assigned Chief Bakema to conduct these interviews. Again, it appears there was not one specific person in charge**

**of this investigation. Was Sergeant Carter aware of these witnesses? Why was Chief Bakema completing portions of the accident report?**

- The vehicle belonging to Mr. Harveyordenzenk was seized by police

**I do not see a specific reference to the authority for the seizure. I do not see a Report to a Justice on Form 5.2.**

**There appear to be items listed on the four separate disclosure logs that are not easily identifiable nor contained in the investigative file.**

**It is my opinion that these are the major investigative faults that placed the prosecution of Derek Grant Harveyordenzenk in jeopardy from the first day of this investigation.**

### **Quality of the Notes Taken or Reports Filed**

I will make my opinion on the quality of the notes and reports very direct and to the point. Earlier, I included the requirements and acceptable standards for police notes in general and there is no need to go over them. Anyone reviewing what is acceptable police note-taking in the attached Appendix J can very easily come to the same conclusion as I have.

The police notes can be described as shoddy, incomplete, unprofessional and at times they appear to be evasive. Quite often officer's notes do not even match up with the incident or narrative report they authored. I have no ability to determine if a supervisor signed the memorandum books of the East St. Paul Police on a daily basis as a measure of quality control in that most photocopies are not inclusive of an entire day including the start and end of a shift but it does not appear so.

It is my opinion, that if a matter such as this went to trial, any competent defence counsel would relish the opportunity to cross-examine many of the officers whose notes are contained within this file and a successful prosecution would not result.

## **Sergeant Paul Lobsinger – Report Addendum**

**May 8, 2008**

In light of the report I submitted to the Taman Inquiry, I have been asked two questions by Commission Counsel David Paciocco relating to that report at page 56.

I was asked the following questions:

At page 56 of the Report you indicate "It is not uncommon for police service "B" to utilize their Professional Standards branch to assist police service "A". This is an issue in the Taman inquiry. Derek Harvey Zenk (the name we have been using) was a Winnipeg police officer. Many of the witnesses to his drinking patterns were Winnipeg police officers. East St. Paul police did not question these witnesses. Instead, it co-opted the Winnipeg Police Service Professional Standards Unit to conduct the questioning. The PSU treated the matter as it would an internal investigation. It cautioned the officers, and delayed their questioning so they could consult counsel and union representatives. The PSU from Winnipeg also conducted the investigation of lay witnesses at the drinking establishment where the officers had been. I have two questions:

1. Does this kind of thing fall within your statement at p.56 of the Report? In other words, are the examples you are thinking about when you say "It is not uncommon for police service "B" to utilize the Professional Standards branch to assist police service "A" comparable to this case?
2. Is it within your expertise to offer an opinion on the propriety of what happened here and if you believe it to be, what is your opinion?

This does fall exactly within my statement at p.56 of the Report and I believe it to be standard practice for this type of investigation. I base my opinion on my personal experience as a police officer with the Toronto Police Service. In this instance, as soon as the East St. Paul Police involved the Winnipeg Police Service Professional Standards Unit it became not only an East St. Paul criminal investigation but also an internal investigation of the Winnipeg Police Service. It must also be remembered that I am not privy to what information East St. Paul Police gave to the Winnipeg Police Service when making the request.

Whether or not this falls within my expertise to offer an opinion on the propriety of what happened here will ultimately be decided by someone else, however, I do believe through my experience and training I am qualified to give an opinion on the matter. I was personally involved in the investigation of a Toronto Police officer who was involved in a complicated fail to remain property damage

collision that was heavily suspected to involve alcohol. The suspect officer was arrested later the same day by two of my officers and it was believed that he was coming from a lengthy shift party. Toronto Professional Standards officers investigated the 'where had he been prior to the collision' aspect of the collision and I do believe the officers in that instance were afforded the same opportunities as were afforded Derek Harvey Zenk's companions.

The practice of affording any potential police witness the opportunity to speak to counsel or their association representative in an investigation such as this is standard practice. I believe that it would be prudent for the Professional Standards Unit to afford each and every officer they questioned the opportunity to consult counsel and/or their Association representative. Personally, I would not want there to exist any perception or suggestion that there was any coercion or suggestion of reprisals involved in any of the interviews. By doing this it would attempt to allay any fear of not simply seeking the truth.