SEPTEMBER 12, 2007

THE CLERK: Chief Judge Wyant presiding.

THE COURT: Just give me a moment, counsel, please. Morning.

There's one housekeeping matter, Mr. Minuk, that I'd like to, to deal with just before we proceed further, and this was referenced at the last time that the matter appeared before me. You had indicted that there were certain photographs that you'd provided to the court, and I asked you whether or not they were going to be tendered as exhibits and you indicated in the negative.

MR. MINUK: Correct.

THE COURT: I still of course have those photographs, and I think, for the completeness of the record, I think they should, if they're not filed as exhibits, I ought to be returning them to you. And for the record, there were two photographs that were provided, I take it, through you to me, from Corrina Encontre (phonetic), and two from Mr. and Mrs. Svensen (phonetic) --

MR. MINUK: Correct.

THE COURT: -- of Mrs. Taman, and so the, the record is clear, and you know that I have them, Mr. Wolson, I've, I've --

MR. MINUK: Mr. Wolson has them as well.

THE COURT: Right. I've looked at the, at the photographs. They were provided to me. They're not tendered as, as exhibits, however, and I intend to return them to the Crown.

So, madam clerk, in the same envelopes that you've provided them to me.

The -- I've asked counsel to return on the issue of the joint recommendation that was placed before the court at our last court sitting. The Manitoba Court of Appeal has

addressed the issue of joint recommendations in a number of cases, R. v. Lamirande (phonetic) , R. v. Sinclair, R. v. Broekaert, R. v. Thomas, R. v. McKay, and most recently in R. v. Perron, which both counsel filed at the last sitting of the court. And in fact, I note and I thank counsel that in the book of authorities that I'll refer to in a moment, I think at least of those cases, Sinclair, Broekaert, and McKay were in fact filed by counsel for the benefit of the court.

The governing principles concerning joint recommendations I think are properly articulated by Justice Steel in the Sinclair case when she said in part at paragraph 17 of the case:

> Thus the law with respect to joint submissions may be summarized as follows.

And she outlines five points, the first being that while the discretion ultimately lies with the court, and in that case she's referring to the sentencing court, the proposed sentence should be given very serious consideration.

The second paragraph says that the sentencing judge should depart from the joint submission only where there are cogent reasons for doing so. Cogent reasons may include among others and not exclusively of course. Then, where there sentence is unfit, unreasonable, would bring the administration of justice into disrepute or be contrary to the public interest.

In paragraph 3, she goes on to determine what kind of cogent reasons might exist for the sentencing court to take into account. In paragraph 4, she says, again speaking on behalf of the Manitoba Court of Appeal, the sentencing

judge should inform counsel during the sentencing hearing if the court is considering departing from the proposed sentence in order to allow counsel to make submissions justifying the proposal, and that was certainly emphasized in Perron, the last case that I referred to, and the major reason why the Manitoba Court of Appeal overturned the trial judge's decision to not go along with the joint recommendation in that case.

And number 5, if the trial judge is ultimately going to deviate from the joint recommendation, he or she must provide clear and cogent reasons for departing from the joint recommendation and goes on to sort of give some explanation as what the reasons might be, and says in part that reasons for departing from the proposed sentence must be more than an opinion on the part of the sentencing judge that the sentence would not be enough.

So it is pretty clear in those line of cases, and I appreciate counsel filing the leading ones, what the responsibility of a trial court is with respect to joint recommendations. It's been pretty clear and outlined in a number of those cases. And of course, you'll recall at the last sitting, as I said to counsel, that if the court was considering, and I say and I emphasize only at this point considering, since no decision has been made, considering not -- or departing from the joint recommendation, that I would inform counsel of that fact and would give counsel the opportunity to then to speak further to the joint recommendation, and it's clear that's something that the sentencing court and the sentencing judge must do.

As a result of that, and having regard to Section 718, the sentencing principles in the Criminal Code, Section 742, which are the governing principles with respect to conditional sentences, I considered this matter and have considered the matter at some length, and as a result, on

August 31st, as both of you know, I wrote a letter to you, Mr. Minuk, and you, Mr. Wolson, indicating that, that I was in fact contemplating rejecting the plea bargain in the matter before the court on the basis that this offence was committed by a police officer and that a higher standard of conduct is expected of a person in this position.

So I gave notice as, as the Court of Appeal clearly indicates I should, and I gave the reason and the basis upon which I had concerns. And I emphasize that at this point in time, I'm the, the operative word is contemplating, and that no decision has been made, and that I recognize counsel must have, and I respect, must have the right to make full answer and have the court's concern expressed and to answer that.

For the completeness of the record, the copy of the letter that I sent to you August 31st, 2007, I intend to file as an exhibit.

Madam clerk, the next exhibit number would be?

THE CLERK: That would be number S6.

THE COURT: S6. and that's the copy of the letter.

EXHIBIT S6: COPY OF LETTER OF CHIEF JUDGE WYANT WRITTEN TO MR. M. MINUK AND MR. R. WOLSON DATED AUGUST 31, 2007

THE COURT: And let me say that my concern was based on a number of cases which I reviewed. The leading case of which and both counsel have filed it is the case of Regina v. Cusack, a case from (1978) 41 C.C.C. (2d) at page 298, a decision of the Nova Scotia Supreme Court Appellate Division. And that case, the Cusack case, has been quoted in any number of cases, including a number of cases that

counsel have filed. But quoting Mr. Justice Hart, speaking for the Nova Scotia Court, he says in that case, quote:

> In my opinion, the paramount consideration in this case was the protection of the public from offences of this sort being committed by persons who are given special authority by our law to deal with individual members of society and to deter such persons from acting in breach of their trust. All citizens must have confidence that police officers who are invested with substantial rights of interference with individual liberties will exercise those rights with a scrupulous propriety, and that any failure to do so will not only result in dismissal from the position of trust, but also in the imposition of a substantial punishment.

And goes on to say:

> The commission of offences by police officers has been considered on numerous occasions by the courts and the unanimous finding has been that their sentence should be more severe than that of an ordinary person who commits the same crime because of the position of public

> trust which they held at the time of the offence and their knowledge of the consequences of this perpetration.

That case, and I think Cusack is certainly can be described as a leading case because it's quoted in so many cases was adopted and that principle adopted in a number of cases, a couple that, that I had looked at, a number of cases actually I had looked at, and for the record Regina v. Nixon, a decision of the British Columbia Court of Appeal (1991) British Columbia Judgments No. 486. And another position -- another case of Regina v. Langlois, this is a decision of the British Columbia Provincial Court in 2004, British Columbia Judgments No. 1372. Both cases adopted the comments of the Nova Scotia Court of Appeal in Cusack as a number of case, other cases have.

And I reviewed those cases, and then of course having written the letter to you, I was then provided with a case book, which I received yesterday -- I'm sorry -- on Monday. It was delivered on Monday, September the 10th, from you, Mr. Minuk, sent to me with a, I take it a copy to Mr. Wolson.

MR. MINUK: That's correct. Yes.

THE COURT: And the letter, the covering letter simply, it indicates for the record, enclosed please find supplementary sentencing authorities of the Crown in this matter. You've signed it and provided it to me.

The -- I intend to file the supplementary authorities then that are in this bound volume, and there are 20 of them, by my count, as Exhibit S7 then, I take it. Is that correct, madam clerk?

THE CLERK: Yes, it is, Your Honour.

THE COURT: All right. S7.

EXHIBIT S7: BOOK OF 20 SUPPLEMENTARY AUTHORITIES

THE COURT: And the cases can be summarized, many of the cases, most of the cases deal with offences committed by police officers and the principles, and as I referred earlier, some of the cases at the end deal with the leading cases from the Manitoba Court of Appeal with respect to joint recommendations, some of which I've already quoted. And I've had the opportunity to review, in large part all of those cases at some length.

Let me say, and I, I'm going to refer to a few cases, and I'm making these comments prior to, so that you're -- you know what, what the position is and some of the background with respect to the letter that I sent to you.

Most of the cases, with the exception of a couple, were, were offences committed by police officers during the course of their duty. I think that that's pretty clear. There were a couple of exceptions to that, one of the, Regina v. Blackburn, which is a case that I had reviewed independently during the time since our last appearance, and which in fact I see has been filed at tab number 8 by, by you, Mr. Minuk. And that, Regina v. Blackburn was a case involving an off duty police officer in Toronto. You'll recall that he was convicted of dangerous driving. This involved his, basically a road rage case and flashing a badge while he was off duty.

And there's another case that, that's been provided by counsel dealing with an off duty police officer and that's the Koopman case which I'll get to in a moment.

In the book of authorities that, that you'd filed, the Cusack case, as it has been quoted in other cases such as the ones I've described, was adopted in the case of

Dosanjh, which was tab number 10, in Chukka (phonetic) I hope I pronounce that correctly, at tab number 11, both of, both of which as I said, adopted the Cusack principles. And in fact the Dosanjh case, at page 4, paragraph 12 and this was a decision of Judge Baird Ellan, the former Chief Judge of the Provincial Court of British Columbia. She says at one point in paragraph 12:

> Certainly Mr. Dosanjh cannot deny he has a higher duty to uphold the integrity of the justice system when off duty than a regular member of the public.

So that's a quote that I've taken from that case, which counsel have filed.

In addition to that, one of the cases that you filed, Mr. Minuk, the third case, Regina v. Koopman, this is a decision of the Albert Court of Appeal, decision given in 1999 by Chief Justice Fraser of the Alberta Court of Appeal, and at paragraph 25 of page 5 of that decision, Chief Justice Fraser says as follows:

> "Third, police officers enjoy a special status in our community. To the extent that they are the people on the front lines with whom the public has contact, they represent the justice system. For a police officer to breach that trust and engage in a violent criminal act, even though off duty, has consequences for the administration of justice which go

> beyond the actions of the officer on the one night. Put simply, that undermines the public confidence in the in the police and in the end, in the of rule of law."

And as I said, these are a couple of quotes from cases that, that counsel have filed, in addition to the principles that I reviewed in the line of cases from Cusack on.

So that's, that's where we are. That's -- I wanted to give counsel a full understanding of the concern that the court has with respect to the joint recommendation and where that concern is focused. I think I've done that. The concern, therefore, obviously reflects on the joint recommendation both insofar as the recommendation for a conditional sentence and the lack of recommendation for a driving prohibition to be complete.

An d having said that, at this point in time, and I'll reserve the right obviously for some further comment, I now invite counsel to speak to, to that, and obviously in furtherance of the joint recommendation, knowing what the court's concern is in this particular case, and having regard to the fact and I -- that you have filed a number of, of cases before me.

MR. WOLSON: Before I make my submission, and I appreciate Mr. Minuk will, will make his submission first, I'm going to want a few minutes to refer to Nixon and Langlois, two matters that -- two cases that you referred to.

THE COURT: All right. Then I will provide those cases to you.

MR. WOLSON: That's very kind of you.

THE COURT: Yes. And please take the time to read

them so that you'll have the opportunity to -- and as I said, I looked at those from the point of view of the principle that was enunciated in Cusack. So I'll provide those copies to you.

MR. WOLSON: Thank you.

THE COURT: And then we'll take a recess and --

MR. WOLSON: We could do that after my friend makes his submission. I don't want to delay proceedings. It won't take me long.

THE COURT: Sure.

MR. WOLSON: And I can certainly do that.

THE COURT: Thank you. Mr. Minuk.

MR. MINUK: Good morning, may it please the court, Your Honour, the Crown takes the position that to properly respond to the court, in addition to identifying relevant case authority from across Canada, the circumstances of the incident available to the Crown to rely upon in support of a conviction and obligations of the Crown must be touched upon.

Your Honour is aware that only the legal proof available to the Crown to support a conviction is that which the court can and must consider.

THE COURT: There's no question about that, Mr. Minuk.

MR. MINUK: On this point, Your Honour is familiar with the case of R. v. Gardiner. In that particular case at page 414, Chief Justice, the Chief Justice of the court, then Chief Justice Dickson, highly regarded Manitoba jurist wrote:

> "One of the hardest tasks confronting a trial judge is sentencing. The stakes are high for society and for the individual.

> Sentencing is the critical stage of the criminal justice system, and it is manifest that the judge should not be denied an opportunity to obtain relevant information by the imposition of all the restrictive evidential rules common to a trial. Yet the obtaining and weighing of such evidence should be fair. A substantial liberty interest of the offender is involved and the information obtained should be accurate and reliable."

The Chief Justice continued:

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

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

THE COURT: And if they don't, the benefit lies with the accused.

MR. MINUK: Correct.

> Gardiner therefore reminds us that at each and every stage of a criminal prosecution, whether it be at trial, and sentencing hearing upon conviction, or at a sentencing after a plea of guilty, the Crown has the ultimate evidentiary onus of proof and that proof is proof beyond a reasonable doubt.
>
> Recently, much has been said about this case outside the courtroom which is not evidence. Juries are reminded by judges on a daily basis

> that what they hear and read outside the courtroom about the case they are trying is not evidence. I'm confident that judges sitting alone, that is without a jury, and at every level of court disregard and never consider inflammatory, unsubstantiated and unreliable information or innuendo expressed outside the courtroom in their deliberations.
>
> Further I am confident that this court and others disregard baseless yellow journalistic commentary upon the professional integrity of counsel which bleeds and fosters disrespect for the court process and the Canadian judicial system.

In the case of Boucher v. The Queen, which the court is familiar with, one of the issues before the Supreme Court of Canada was the alleged inflammatory language used by the Crown before a jury. In Boucher, the judges, all of them, even in separate reasons, addressed both the purpose of a criminal proceeding and the role of the Crown. In Boucher, Justice Rand stated:

> "It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be

> credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of a prosecutor excludes any notion 'of winning or losing'; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of (legal) proceedings."

In the exercise of prosecutorial functions and responsibilities in all cases, including this prosecution, the Crown must be mindful of the purpose of the prosecution, a criminal prosecution, the duty of the Crown to present the available legal proof, and the Crown obligation to prove beyond a reasonable doubt that the evidence upon which the Crown relies where an accused enters a guilty plea is legal proof that can withstand challenges based on the Gardiner requirement.

Your Honour referenced at the initial sentencing hearing your recollection that the accused was also charged with the offences of impaired driving and refuse breathalyzer simpliciter, each of which, even when prosecuted by indictment have penalties prescribed by the

Criminal Code, much less severe than that for dangerous driving cause death, the offence to which the accused pleaded guilty. Those charges were stayed when the guilty plea was entered. They were stayed not because the accused pleaded guilty to dangerous driving, but because of the Crown's obligations I described to you in my introductory remarks. That obligation is to have and to be able to present to the court legal proof.

Your Honour will recall that the scene was attended to by members of the East St. Paul police department. These officers, no different than other police officers, were responsible for gathering scene evidence and investigating whether criminal offences had occurred in addition to attending to the injured. The criminal case investigative function in most cases is performed by police personnel, as is the case in this prosecution.

The court in my earlier submission heard that after a careful review of the investigative file presented to the Crown for prosecution by the East St. Paul police, my concerns were such that I sought consent from counsel for the accused and the court to adjourn a scheduled preliminary inquiry so that the investigation file presented to the Crown could be referred to the RCMP for independent investigation, including therein the actions of those at the scene whose investigative activities required review. What --

THE COURT: Well, in fairness, there was a reference, I don't think it was you provided me with all of that detail. I think that was actually Mr. Wolson, as I recall, who made reference to an independent review, but I wasn't, in fairness, I don't think I received any of that information.

MR. MINUK: Well, nonetheless, whatever private investigation was undertaken by the Municipality of East St.

Paul into the operation of its police force, I am told conducted by an individual named Tramley (phonetic), is not the investigation and review that I requested be conducted. In the end, after a complete and intensive RCMP review of the scene investigation and the subsequent related investigated activity, it was clear to the Crown in the language of Boucher and Gardiner that the only available proof related to the offence of dangerous driving cause death, the very charge which the accused admitted. Legal proof which passed the threshold of a reasonable likelihood of conviction, but not necessarily the trial threshold of proof beyond a reasonable doubt.

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

Nonetheless, this matter remained set for preliminary inquiry until the accused came forward. As I informed you at the last appearance, the best available evidence for the prosecution was that gathered by the RCMP traffic accident reconstructionist. Notwithstanding this evidence, conviction at trial cannot be a certainty. The exigencies of this case are such that a guilty plea to any charge the accused faced would not have been anticipated by the Crown.

In this regard the Crown is very mindful that the accused, who at the time of the offence was a police officer

offered to plead guilty to a very serious indictable offence and give up his rights to a preliminary inquiry and a trial on a matter fraught with issues more difficult for the prosecution than the defence.

The Manitoba Court of Appeal has commented, as Your Honour has noted, on the matter of joint submissions in cases where the evidence available to the prosecution is weak and the accused gives up a viable defence or some other quid pro quo in exchange for a joint submission on the matter of sentencing. The Court of Appeal has stated joint submissions of this nature are relevant and of greater weight when considering the recommendation.

The Court of Appeal also directs that the sentencing judge should be made aware of the exigencies and weaknesses of the case that are not tested by an accused who gives up his rights to trial. In this framework, Your Honour will understand my submission. The appeal cases are in the material provided to you, and as you noted are the cases of Broekaert, 2003 Manitoba Court of Appeal, J.W.I.B., 2003 Manitoba Court of Appeal, Sinclair and McKay both of 2004.

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

Furthermore, the Crown’s obligation is to put forward all available proof of a prosecution. Of equal importance is the obligation not to put citizens to trial upon matters it cannot prove because of a lack of evidence where the evidence was gathered in an inadmissible manner, where there's been a Charter breach, or any combination of the above.

With this background, the accused comes before you

to be sentenced for this offence of dangerous driving. Your Honour has noted and observed that the Crown provided to you all of the reported cases the Crown was able to gather from the Manitoba courts since 1999 on offences of dangerous driving. Perhaps the only distinction would be that the accused in those cases were not police officers.

Notwithstanding the exigencies and weaknesses of the case recommended of this case, the sentence recommended to you to consider was at the top end of similar prosecutions reviewed by the Manitoba courts. I will not review the quote that Your Honour set out from the Cusack case on the matter of the accused being a police officer since you've read it this morning.

However, Your Honour, will note that in that particular case, as in every other case that I've provided to you the courts have considered the factual circumstances of the case. In Cusack, while uniformed and on duty, he stole money from the wallet of a citizen.

I've provided to you the authority of the Ontario court in the case of R. v. Deane, a well-known case in both Canadian jurisdiction and Canadian history. Mr. Deane was the OPP officer in charge of the tactical unit at Ippewash. He was the officer who shot Dudley George. The officer testified at trial. The court found his evidence to be implausible and fabricated. He was sentenced to two years less one day to be served conditionally.

The Koopman case that I provided to you from 1999, was an RCMP officer not on duty committing a break, enter and assault in the nature of a home invasion, only stopped when his wife arrived on the scene who had been out looking for him. He was sentenced to 18 months in jail.

In the year 2000, the Manitoba Court of Appeal had occasion to review both a conviction and sentence appeal for a fellow by the name of Lesuk. Mr. Lesuk was an off duty

police officer, Winnipeg City Police Service, drinking in a bar involved in a motorcycle accident where a passenger was killed. Unlike this case, Mr. Lesuk's matter went to trial. He was then convicted by the jury only of dangerous driving and refusing the breathalyzer. Chief Justice Hewak, who then presided, don't recall if back then he was the Chief Justice, I think he was, sentenced Mr. Lesuk to a fine of $500 for the offence of refusing the breathalyzer and an absolute discharge for the offence of dangerous driving in circumstances where the passenger was killed.

In the Jackson case, which is from the B.C. Supreme Court, Mr. Jackson was convicted of careless storage of a firearm which arose in the context of a domestic proceeding. The issue in that case, as they are in many of these cases which have been provided to you, was whether or not the accused officer should be granted some form of discharge. The court in Jackson was not inclined to grant the discharge on the basis that the officer or the individual was a police officer sentencing the individual to a suspended sentence with two years probation.

In the case of Spencer, 2001 Quebec, the officer, a 23-year-old off duty intoxicated officer, assaulted a 15-year-old victim, who was bitten and punched. That sentence was a conditional discharge.

In the case of R. v. Pashe, from Manitoba, in the year 2002, Judge Elliott dealt with Mr. Pashe who was then off duty, pleaded guilty to a common assault. He too argued like Jackson for some form of discharge. Judge Elliott relying on Cusack said that the accused was not entitled to a discharge and imposed suspended sentence with probation.

Your Honour has already spoken about the Blackburn case. I won't review that. That is the road rage case.

In the case of R. v. Tait, 2005, an RCMP officer of 10 years experience convicted after trial, not after a

guilty plea, who committed an assault on duty, on that particular incident the accused, the suspect that he was dealing with was handcuffed. That suspect spat at the officer. The officer hit him three times, fractured his jaw in two places, requiring nine days in hospital and six weeks of jaws wired shut. In that case the court imposed a suspended sentence.

In the case of Dosanjh, which Your Honour has referred to, that officer, not on duty, counts of an obstruction of justice, and was sentenced to three months, however, three months to be served conditionally.

In the case of C. v. R. (sic), a 44-year-old officer involved in domestic matters, the court declined to sentence -- or to permit the three month sentence to be served conditionally because they were of the view that even though the office was -- even though conditional sentence was on the table for this officer, it was recidivism, his likelihood of re-involvement which disentitled him to that sentence.

In the case of Auclair, that involved a native special constable. He pled guilty again in a domestic assault. He was sentenced to a conditional discharge.

The last case perhaps more interesting, in the context in which it arose, the Ferguson case. The Ferguson case is about an officer involved in a scuffle where he fired two shots at a suspect. The court concluded that the first shot fell within the acceptable notion of self-defence. It concluded that the second shot to the suspect's head was not in self-defence, and Mr. Ferguson was convicted of manslaughter.

In that circumstance, the trial court considered the law and imposed a conditional sentence for two years less a day. On appeal, the issues were more complex and of a constitutional nature. And without touching on whether or

not that sentence was appropriate or not, the court felt that the law obliged him to impose a four-year term for the firearm being involved in that particular offence. But for that, one might conclude if not constitutionally required to impose such a sentence that the sentence would not have been overturned.

The sentencing court or appellate courts in each of the cases the Crown has provided to you acknowledge that holding a police officer to a higher standard than an ordinary member of the public because that individual exercises special authority over individuals is an important factor for the courts to consider. As well as Your Honour has noted and these cases observe, the courts have considered in addition to the fact of the status whether or not the offence occurred while on duty or off duty.

The police factor, if I might be permitted to use that descriptive, is on reading of these cases one of the factors that is considered amongst a many other aggravating and mitigating factors that a judge must consider in each case and not by itself determinative.

In this matter, Your Honour will consider that the offence was committed by a police -- by an individual who was then a police officer. This fact will have to be considered in the specific context of this case which involves an individual who did occupy a special position, but one who the Crown recognized in making its recommendation gave up his right to trial and pleaded guilty knowing the exigent circumstances of the case which did not favour the Crown that I've already explained.

In the end the Crown is aware that the matter of sentencing is entirely within the discretion of the court. In the exercise of that discretion, Your Honour will consider the circumstances of the guilty plea, all of the aggravating and mitigating factors, including the police

factor, and accord the appropriate weight to each, including the position put forward to you for consideration.

Subject to any questions, that's my submission.

THE COURT: I do. Some comments and questions. I take it that, and I appreciate your recitation of Gardiner and Boucher, accurately presented, that you were presenting those more for the court of public opinion and for the public than this court appreciating that I appreciate a number of things. One, the duty, the somber duty on a Crown attorney to represent the interests of justice as Boucher has described, and secondly the fact that I would never consider any factor in a court case that was not presented in court. I hope that that's -- I hope that in reciting those you were citing them more for others than for me, Mr. Minuk, and not a reminder to me that I am not to take into account any other factor because clearly I would not, nor could not.

MR. MINUK: I don't want Your Honour to conclude for a moment that my comments on Gardiner and Boucher are in any way directed to Your Honour specifically. They do, however, cross or intersect with Your Honour's exercise of discretion because on the reading of the cases dealing with joint submissions, the Court of Appeal has made it clear that the circumstances surrounding the case and the plea to distinguish one form of joint submission from another should be put forward to the court.

So in that context to explain to in a larger sense the exigent circumstances of the case, the obligations of the Crown and the requirements of Gardiner, Your Honour will now know as the Court of Appeal has said, counsel ought to tell the court why is this circumstance different than another. So you now know that, the law you know, perhaps I didn't need to recite it in as great a detail as I did, but you will now be satisfied that when reading those cases and

responding to the question, you must ask yourself, did the Crown explain to me with the satisfaction that I'm required to have on the basis of the joint submission cases the circumstances of the case itself so as to distinguish this type of joint recommendation from one where two counsel simply stand up, an accused pleads guilty to an offence and a recommendation is made based on case law. And there's a purpose, a legal purpose for doing this which is set out clearly in my view in the case law.

THE COURT: All right. Well, let's, let's move to that. And so for the record, only the facts presented in this courtroom will be a consideration in my judgment, so that that's very clear for the record. But let's move on to the issue of joint recommendations because I have to say candidly, Mr. Minuk, I'm somewhat confused by your submission in one regard, and in a sense taken aback because I now have more information from you on the basis of the joint recommendation that was ever presented in these initial submission. And let me, let me elaborate.

As I heard you say and I, I may have to review the transcript, you indicated and clearly stated, and of course I clearly accept this that charges were not stayed because the accused pled guilty. They were stayed because the Crown did not have -- was satisfied it did not have the legal proof. Correct?

MR. MINUK: Correct.

THE COURT: Right. And I, and I accept that. And of course those charges can never be a factor in the court's consideration in this case whatsoever. They're not before the court.

You also I thought I heard you say in the beginning, that the Crown was satisfied that it did have proof of dangerous driving cause death, that, that you had -- hang on -- that, and that's what I heard you say, that

there was evidence available for that charge, not clearly for the other charges, and that --

MR. MINUK: I told you, if the language that I've used was that on the test for the prosecution and the laying of the charge was there a reasonable likelihood of conviction, the answer to that is yes. Can I, I said to you and further a trial is conviction or is the evidence sufficient beyond a reasonable doubt, that can never be a certainty.

THE COURT: Well, of course it can never be a certainty, but, but there's a fine line here, because I, I'm acutely aware of the role that plea bargains play in the court system. I'm acutely aware of what the Manitoba Court of Appeal has said on many occasions with respect to joint recommendations, and joint recommendations that are also plea bargains and, and the fact that they have said that not only should joint recommendations be given great weight by sentencing judges, particularly when they come from senior counsel as they do here, but further, if it as a result of a plea bargain where there is a quid pro quo, because there's exigencies of the evidence, that those are even further factors that the court should tread very lightly in, in not going along with the joint recommendation.

I read the transcript of our first proceedings here. I ordered it, the 22nd of August of 2007, I read it several times. Nowhere in that transcript, nowhere did either counsel talk about the exigencies of the evidence, a quid pro quo, a plea bargain, those words never existed. In fact, the, the whole representation that date from both counsel was that this was a joint recommendation supported by the evidence. In other words, the factual basis upon which a plea for a dangerous driving cause death, both counsel acknowledge was there, and in fact that the recommendation that was presented to me was in line with all

of the authorities in Manitoba, and you filed the case book and the only case that deviated was Eckert, and I think it was Eckert, and clearly, there were circumstances were quite different in that case, as counsel --

MR. MINUK: I, I appreciate all of that.

THE COURT: No. Hang on a second. But now, now you're coming back and now as I first heard you say, we couldn't prove these other cases but we could prove this and the accused came forward and said he was prepared to plea to that. That doesn't, it seems to me in that description, speak of a plea bargain or exigencies or quid pro quo. But then you went further and then said, the exigencies of this case, the guilty plea, gave up his rights to trial, you quoted basically what the Court of Appeal has said.

And I'm confused. I'm confused for a number of reasons. I never heard this before, never, and it's clearly a very, very, very significant part of the sentencing process. Now I'm hearing it the second time around when I called you back. And secondly, I'm not quite sure that what you said in the beginning really is in line with, with your comments that there's a plea bargain. Is there a plea bargain or not. That's, that's really the question. Could you prove dangerous driving cause death? And if you could, which is what I thought you said, then is there really a plea bargain because the accused offers to plead guilty because he accepts the fact that the factual basis for that plea is there? I mean, you have to be careful how you define plea bargain and exigencies.

MR. MINUK: No. I understand that. I understand that totally, Your Honour. And I will tell you quite frankly, that yes, the Crown is of the view of two things, (a) that there is a reasonable likelihood of conviction. We wouldn't have prosecuted the matter if there was not.

THE COURT: Um-hum.

MR. MINUK: Secondly, because the evidence is in this case, in my view, evidence of an expert from the traffic accident reconstructionist, which I told you about at the first hearing, which was the best available evidence, and that I told you clearly that although perhaps not as expressly as I did today, that there was anecdotal evidence of other matters which was not sufficient, in the Crown's view, that we were clearly of the view we could prove dangerous driving.

Now, does that mean that I can predict that a judge of the Court of Queen's Bench or a jury may reach that conclusion? I know from Lesuk, that a fellow was driving after drinking at a bar and a jury convicted the fellow simply of dangerous driving, not dangerous driving cause death. I, I don't know and cannot predict the outcome of the case, but I can tell you that the Crown did believe, does believe, always believed that we could prove dangerous driving. Wouldn't accept a guilty plea to it if we didn't think we could prove it. That in itself would be wrong.

So the purpose of my comments today are not to confuse you, not to in some way change or alter what it is that I said, but my sense was that when I left the courtroom that it was not clear to you in the language that was used that this was a case where the -- Your Honour had heard that there was an investigation, a subsequent investigation, the best evidence was anecdotal, and at the end of the day the Crown was left with only a traffic accident reconstructionist. Nothing in that regard, in my view, has changed.

THE COURT: I guess I'm probably not making myself very clear. There is, it seems to me, a difference to me between what is a meeting of the minds, in other words both counsel saying we believe the factual basis for a plea is here. We believe the, the recommendation is appropriate and

making that joint recommendation. And counsel -- or as opposed to counsel making a plea bargain where there are exigencies, and therefore, that forms part of the, of the recommendation. And as I said, I never heard any of that. In fact, the transcript's pretty clear that both counsel felt the factual basis was there, and both counsel also felt, in the meeting of the minds that the, that the sentence recommended was appropriate. And it seemed in your comments today seemed to bear that out for a while until you then said there were exigencies in the case. There's always uncertainty in the criminal case. There's no question. You can never predict the outcome of a, of a trial. That's different than exigencies and quid pro quo and what the Court of Appeal has said on many occasions, so --

MR. MINUK: Well, Your Honour, let me say this to you. In any case where the Crown is -- where the, where the charges laid allege what they did in this particular case, securing a committal may well be one thing. Certainly matters relating to Charter are never addressed at trial. And the overall effect of the case, if in fact the charges that were laid were to be such that the Crown would not be successful in proving them, the Crown needs to be mindful also of the effect of that on another charge it thinks it can prove, and as the dominos begin to fall, the strength of the case can be affected. And this is a case where the Crown didn't have the evidence, had a concern based on the case law, even though it believed that there could be a conviction, that there may not be.

At the same time, the Crown is aware that the accused is represented by, by experienced counsel who would likely be aware, certainly of the problems with the case, including the effect of putting in a case which would be damaged as it related to the other significant charge, dangerous driving. And balancing all of those, when the

accused comes forward to say I will plead to this charge without the Crown having to put in the case run the risk of the negative effect of what is not there, that needs to be considered.

THE COURT: Oh, and there's no question, but there is, there is a significant difference. Your comment was, if I'm have it right, the other charges are stayed not because the accused pled guilty to dangerous driving cause death. That's what you said. But because the Crown had the legal proof of dangerous driving cause death. And that's what I heard you say before and that's what I heard you say today.

MR. MINUK: Well, that's my opinion.

THE COURT: All right. Opposing counsel, defence counsel, looking at a case, it's not unreasonable for them, let's talk in the abstract, to look at a case and say, I believe that the Crown has the legal proof and has the evidence to prove dangerous driving cause death, therefore I -- my client is prepared to plead to it. That is a meeting of the minds and it may result then in a joint recommendation for sentence or may not. In this case it did. That is not a plea bargain. That is not a, that is not a presentation to the court based on exigencies or quid pro quo. That is a meeting of the minds where both counsel, experienced in the law, looking at the evidence, say we believe that if this matter were to go to trial, a conviction would be registered on this charge, therefore we're prepared to waive our right to a trial and plead guilty, throw ourselves on the mercy of the court, you know and that's, remorse of course is a factor, guilty plea is a factor in sentencing.

That is different to a case where counsel both approach and say, in effect, we've got trouble with this case. You know, when it ultimately goes to trial, maybe the Crown will get a conviction, maybe they won't, and both

counsel then because of the exigencies of the evidence, giving a quid pro quo, then say we will present, we will, we will make a plea bargain, which the courts have recognized is a proper exercise of discretion and appropriate in a criminal court proceeding.

MR. MINUK: Yes.

THE COURT: But I didn't hear you at any time in the previous submissions, nor even here, say that this was really a plea bargain until you then said exigencies and plea bargain, but and that quotes the Manitoba Court of Appeal all right, and quotes it properly, but I still don't see how this is a plea bargain and exigencies other than you telling me it is, because the factual basis you guys presented it to me, don't seem to justify that. Do you see my problem?

MR. MINUK: I understand Your Honour's view. I can only tell you that in the Crown's research there have been cases where on the -- Your Honour will recall I told you at first incident -- first instance we could not prove the speed. We had the circumstance of a person who rear-ended another vehicle with no erratic driving, and a circumstance of another civilian saying that this driver was driving within the speed limit.

THE COURT: Speed limit.

MR. MINUK: There are cases, I don't have the name of the case at my fingertips at the moment, where in similar facts Justice Keyser found that the accused in that circumstance was not guilty of dangerous driving.

Now, whether it was expressly said to you or not, it is, in my respectful view, clear and ought to have been clear to you that the Crown was presented with a file, if it wasn't said by me, it was said by Mr. Wolson, that a further investigation was required. The result of that investigation still left the Crown with what it was

available to it. And at the end of the day, yes, the Crown may be of the view that the nature of this incident is such that we can prove dangerous driving. On the other hand, Mr. Wolson told you that it was a momentary inadvertence and there is certainly enough case law in Manitoba, including the decision the name of which I cannot recall, decided by Judge Giesbrecht where the accused was driving a transport vehicle, fell asleep at the wheel, wandered over into another lane, and was acquitted of the dangerous driving charge.

So the exigencies are really matters of law and matters of evidence as it comes out. And inescapably, Your Honour, no matter which way you try to describe it, the facts of this case are crucial to the determination of the outcome where, yes, some judges of some courts may conclude that this is on these facts what the Crown says is dangerous driving. Others not. This is not the clearest of cases where the evidence is so overwhelming, and I think that I clearly expressed that to you at the last appearance, and my purpose in telling you this today was not to confuse you in any way, but to remind you that I was telling you this was not the clearest of cases.

THE COURT: I didn't -- I, I have to say, Mr. Minuk, I read the transcript again last night. I don't recall you using that term, not the clearest of cases. In fact, I think that as you went through it I came back to you on page 18 and 19 and said:

> "So is it fair to say that, in essence, the factual circumstances surrounding the Crown's acceptance of the plea to dangerous operation of a motor vehicle causing the death of Mrs. Taman was a

> combination between the evidence of consumption of some alcohol ...

And I think you called it historical and anecdotal evidence of the consumption of alcohol.

> ... along with an accident that appears to be unexplained where speed was -- doesn't appear to -- there doesn't appear to be any evidence of excessive speed but, but a but an accident occurred without braking ...

MR. MINUK: Correct.

THE COURT: Right. And you said, That's correct. And I said, that’s a marked departure. And you said, That's correct. And of course, marked departure is the definition --

MR. MINUK: I -- but that is, Your Honour, the Crown’s view of the case.

THE COURT: Correct.

MR. MINUK: And that is the basis upon which the Crown accepts the guilty plea, because the obligation of the Crown is to not accept a guilty -- to, to have some evidence. Now, whether or not that evidence is capable of resulting in a conviction a trial is another issue.

THE COURT: It’s always another issue, but you did say here today you were satisfied the Crown had the legal proof for dangerous driving cause death, not for any other charge, and that then Mr. Wolson came forward and said he was prepared on behalf of his client to enter a plea. That doesn’t speak of a plea bargain.

MR. MINUK: No.

THE COURT: It doesn't speak of exigencies, Mr. Minuk, it doesn't, it doesn't. I'm sorry.

MR. MINUK: Well, Your Honour may --

THE COURT: If, if that's what you said and it doesn't jive with the plea bargain and exigencies. You see my problem.

MR. MINUK: What I'm telling Your Honour is that the Crown in its view needed to have, needs to have available legal proof to do the prosecution. That's what I told you. That's the law.

THE COURT: And you felt you did.

MR. MINUK: And we felt that we did. However, I also told you that the Crown was of the view that notwithstanding the proof that it had that the case was weak. That's not contradictory.

THE COURT: When did you say that?

MR. MINUK: This morning. And I think that I clearly said that to you last week.

THE COURT: No.

MR. MINUK: Well, if you didn't understand that, I'm very, very, very, like I'm concerned that it didn't --

THE COURT: Do you have the copy of the transcript? Do you have a copy of the transcript?

MR. MINUK: No, I don't have a copy of it. I'm concerned that that message was not conveyed to you.

THE COURT: Fine. Thank you.

MR. MINUK: That I, I'm -- I don't (inaudible) I'm certainly, I'm very, like I'm surprised that Your Honour -- I, I appreciate you've read the transcript. I understand your view of it, but if it was not conveyed that the Crown had some concerns about this case, and in fact that issue wasn't even raised at -- by specifically as you're asking me to respond to it today. In the Crown's view, we told you we had concerns about the investigation. We had I think at

that, I think I did highlight that for you, that the East St. Paul Police investigation was not satisfactory, that the best available evidence was that of a traffic accident reconstructionist, who was still unable to determine speed. That we had some historical anecdotal evidence. The -- and to the extent that it's historical and anecdotal may not even be admissible at trial.

And so if Your Honour is of the -- doesn't thinks that by saying historical anecdotal evidence would be a comment Your Honour that the Crown was of the view that that evidence was admissible, I, I would think that that's not the -- that type of language does not convey the, the evidence to be admissible. And historical anecdotal evidence doesn't even convey the timeframe within which this evidence might be addressing.

So in the end, it's my view that Your Honour is left with what it was that you were left with, which was that a case which was not very strong on facts, I don't think that there was any suggestion to you that there was a case strong on facts. And that combined with the law leads to many, many cases where the Crown is of the view it can prove a case. In this particular case, the accused came forward and indicated that he would be prepared to plead guilty to that charge, therefore, relieving the Crown of the trial obligation of having to prove all of these matters beyond a reasonable doubt, which were expressed to you to be a concern, initially and again today.

THE COURT: None of those comments, Mr. Minuk, about a weak case, concerns of prosecution, problems with East St. Paul investigation, were given to me in the transcript originally by you.

MR. MINUK: Well --

THE COURT: Those are all new factors here today, and in, in any event, I have your, I have your comments.

MR. MINUK: Well, if I might just say one thing in reply to that, which is as well if it wasn't clear to you at the outset, Your Honour said it wasn't, having then clearly read the law that Your Honour highlighted before I even had a chance to look at it or to identify it to you, the Court of Appeal said, as I see it, that where you're invited back and you have to explain the circumstances under which the position is put forward, then you must do it. If it wasn't said to you initially, it wasn't conveyed to you in the clearest of terms initially, then the further obligation is to do it when you're called upon to justify or to explain a position you put to the court.

THE COURT: And, and that's fair game, and I'm simply indicating to you that things that you had indicated to me were told to me before, I don't find in the transcript, first of all. You are certainly entitled to free reign in terms of the further justification of the representations, and I'm certainly expressing to you that I'm somewhat, as I said, confused with respect to the first description that you felt you had a case that you could prove, and then the accused came and offered to plead guilty, and how that meshes with what we describe as a plea bargain and quid pro quo, but I have your, I have your comments on that.

MR. MINUK: I think that the distinction that Your Honour is -- or the, the divergence that we have is counsel's opinion that a case is one that will result in conviction when counterbalanced with the law that suggests there may not always be a conviction on these facts. That's a risk that has to be considered. On these facts it was considered seriously because of the reasons that I've told you, which as Your Honour says were not conveyed to you clearly at the outset, but you now know with the clearest of language without using descriptive terminology what the

problems were.

THE COURT: Which as I've indicated is new, and doesn't seem to correspond with the comments and the quote I gave you from page 18 and 19 about your accepting marked departure.

MR. MINUK: Well, I don't find that they're contradictory, because I do believe that the Crown in of its view believes it can prove this case. Now, that is the reason why prosecutions go forward. If you don't -- can't prove the case you shouldn't put it forward. But having said that, all of the problems that are inherent in the prosecution will leave someone else to be of the view, including judges and juries, that the Crown was wrong. And the Crown can never have that certainty at trial, particularly in a case of this sort. You can believe that we can prove a case and certainly have enough to put forward the case, whether or not it results in that conviction and the effect of putting in a trial where there are so many other problems need to be considered. And that's all I'm telling you today, is that if it wasn't clearly said to you, the opportunity is to do so today as the Court of Appeal directs.

THE COURT: I think the opportunity certainly should have been availed at the first sentencing without any question, not that you ought not to say it here, Mr. Minuk, but you can appreciate that being a significant part of the Court of Appeal comments, that if in fact I accept that this was a plea bargain as you've described, that is certainly a factor, and would have been a factor in the intervening time, but unless there's anything further, it might be an appropriate time for a recess. You wanted to read the cases, Mr. Wolson.

MR. WOLSON: I'd also, I would appreciate very much in view of the discussions that you've had with the

Crown to if I could see the transcript for a moment during the recess.

THE COURT: Absolutely.

MR. WOLSON: I would be obliged.

THE COURT: Yes. And then I'd like it back.

MR. WOLSON: Oh, of course.

THE COURT: During the recess. We'll take a recess. Thank you.

THE CLERK: Order, all rise. Court is in recess.

(BRIEF RECESS)

THE CLERK: Court is now re-opened.

MR. MINUK: I just wanted to say one further thing, Your Honour.

THE COURT: Sure.

MR. MINUK: You related the series of questions and answers that we had at page 17, 18 of the transcript. I'd only ask you to take a look again also at the middle of paragraph 10 where in the --

THE COURT: Paragraph 10 or page 10?

MR. MINUK: Page 10. Where in the middle of the paragraph the explanation of the anecdotal evidence is said to you to be evidence not capable of proof of impairment, and above that before that the facts limited as they were for the court to consider on the issue of dangerous driving.

THE COURT: Right. Which was as -- and that's why I clarified it, that the combination between the -- there's no issue of impairment, clearly there isn't.

MR. MINUK: Correct.

THE COURT: That the Crown is relying on, or that the court can rely on, but the anecdotal and historical evidence of the consumption of some alcohol along with it unexplained accident was the basis of the plea, as, as I

clarified on 17 and 18.

MR. MINUK: Yes.

THE COURT: Okay. Thank you. Thank you. Mr. Wolson.

MR. WOLSON: Thank you.

Before I respond in particular detail to a letter that I received from your office and your further explanation of that letter this morning, I do want to talk for a moment about the media coverage of this case, because it has taken on a life of its own.

While I certainly appreciate freedom of press and the need for that principle, I must say that I was shocked by articles that I read which objectively viewed can be taken as a personal attack on the character of Mr. Minuk by inference, innuendo and otherwise. I don't need to tell you, and I state that Mr. Minuk is a leading member of the bar. His integrity is of the highest standard and above reproach. Some suggestions made in media accounts are in my view, scandalous and without foundation.

And I don't say that out of friendship, because quite frankly other than a professional relationship we don't share a friendship socially, no different than a relationship I share with most people in the crime justice system when you're fortunate to have been doing this for three-and-a-half decades you, you get to know most of the people who work in the area that you work in and we share a professional relationship.

There have been, in my view, opinions advanced in the media as to evidence, sentence, and opinions generally. I know, however, that it's trite to say that these should not form any part of your deliberations and will not. This is not trial by media and must never be.

Now, prior to appearing before you this morning I had occasion to review notes, while I didn't review the

transcript, but notes which were fairly accurate of submissions made by counsel, and I've now confirmed the accuracy of those. And of course I've had the opportunity of reading your letter, addressing your concerns that you're contemplating rejecting the plea bargain advanced for a conditional sentence on the basis that this is an offence committed by a police officer, and that a higher standard of conduct is expected of a person in this position, and you've articulated that thought this morning in reference to some of the authorities.

And I appreciate you providing me with a copy of Langlois and Nixon, because I will refer to them as well as I will refer to all of the cases that are put before you. I must say that prior to the book being submitted to you, I reviewed many of these authorities so I was aware that they were coming to you, and the only additional case that I want to provide to you is the -- and I put it on the dais this morning, was the decision of the Chief Justice of the Court of Queen's Bench in Lesuk, so that you would know, because the appeal from sentence is dealt with in a very summary fashion, and I thought it may be important for you to have that, and I'm going to deal with that as well this morning.

THE COURT: I appreciate, and I -- Lesuk was also filed I think in your case book.

MR. MINUK: The Court of Appeal reasons, yes.

THE COURT: Right. Okay.

MR. WOLSON: You'll recall in the Court of Appeal it was dealt with in just a paragraph indicating that while on the lenient side it was within the range, and that's all tat the Court of Appeal in effect said about the Lesuk case on sentence, and therefore I think it's important that you have Chief Justice Hewak's reasons.

THE COURT: I appreciate that, and I think it and ought to be filed, as I filed the other cases, as Exhibit

S8.

MR. WOLSON: Thank you.

THE CLERK: Exhibit S8 entered.

EXHIBIT S8: LESUK CASE

MR. WOLSON: The position that I advance today is one that I advanced when we appeared before you last, and in particular with regard to a question that you put to me, where I said to you that what you have here, in my view, clearly, I think it's at page 59.

THE COURT: Thank you.

MR. WOLSON: That alcohol does not play a part in the plea of the accused. I had indicated to you that I thought this was a case of in effect not keeping a proper look out, that there was a departure from the norm, I say to you, by inference you would have accepted that by accepting the guilty plea.

What I should have done, and I'll do it today in a very blunt terms. When the Crown answered a question from you at page 18, where you said to the Crown that the basis of the Crown accepting a plea was the factual circumstances to accept the plea, you said at page 18, was a combination of evidence of consumption of some alcohol and unexplained accident. I thought that I made it very clear to the court that I don't accept that. I don't accept the consumption of alcohol being any part of this plea. I said that to you in terms at page 59 when I responded to you, and I say that to you again today.

Anecdotal evidence is not evidence. And I say to you if the Crown wants to advance that prove it. That's not part of this plea and while I use the word impairment at page 59, I say to you that anecdotal evidence, as far as I'm concerned, is not evidence that you ought to consider, so

and, and I note that you, you seem to have a disconcerted look.

THE COURT: I do, because that's not what's on the -- I can deal with that. That's not what you said on page 59. You talked about impairment.

MR. WOLSON: I did, and, and I said to you that impairment isn't in issue --

THE COURT: Right.

MR. WOLSON: -- in this case.

THE COURT: Absolutely. And, and I don't think --

MR. WOLSON: Yes. I should have said alcohol isn't in issue in this case, because I don't believe that it is. I think, and what I was trying to express, what I was trying to express to you when you raised with me at the time that this issue that should a police officer receive an additional penalty, a more severe penalty, what I was trying to express was that in my view, impairment, alcohol consumption I, I could have said, but I didn't, is not the issue in this case. The issue in this case is an unexplained accident, and I think I referred the court to one of the cases that where a, a school teacher on his way to work found himself in the oncoming lane of traffic, Burfoot, and, and there was an unexplained accident. That's the position that I take, and I've taken that position, I, I believe I was pretty clear on that, and I want to be clear on that today, so that I told Mr. Minuk I would be articulating this prior to today, and, and I want that to be clear on the record.

So let me then address the position clearly in response to your concern regarding a police officer whether or not a more severe penalty is required. I say you must look at the factual circumstances of the commission of the offence. When we appeared before you last time, there was a case book filed jointly. I reviewed several cases from the

Manitoba courts, Court of Appeal, Queen's Bench and Provincial Court, as well as courts from across the county. A review of those cases will demonstrate that in a number of cases, the aggravating factors outweigh the circumstances of the case at bar. Cases where there were blood alcohols that were well above the legal limit, aggravating factor without question. Speed, extreme speed, evidence of prolonged dangerous driving. And I state again to you that it's the position of the defence that this is a marked departure from the norm capable of sustaining a conviction for dangerous driving, failing to keep a proper look out, but I don't accept anecdotal evidence.

The fact that there had been an impaired driving causing death and refuse breathalyzer charge stayed --

THE COURT: Not relevant.

MR. WOLSON: -- is not relevant. The matter, in my view, ends there.

THE COURT: Absolutely.

MR. WOLSON: Now, as to the arrival at the joint submission, this is a case where two experienced counsel view the evidence that was available by way of disclosure to me and subsequent disclosure after the adjournment prior to the preliminary inquiry that reveal to me some difficulties, I would say as defence counsel. And the Crown wanting a conviction on dangerous driving, the accused wanting a sum certain, both counsel acknowledging at least as between ourselves issues which may have been litigated, may have been successfully litigated, an arrival at a joint submission was made before you. That's part of counsel arriving at a joint recommendation, and we did so based on a position of the accused that I've articulated that I would be advancing, and we did so based on case authorities which we've provided to you where there were more aggravating factors in other cases, and part of the -- and I told you

this last time in response to a question that you had at page, I think it was 59, that part of our -- part of what went into the mix was the fact that he was a police officer, though off duty at the time.

If the media is critical of that, or if civilians are upset about it, it's the Crown that has conduct of the case, and in my view, the positions that I articulated before you last time, and I expand on today should satisfy you that on the factual circumstances of this case, that a penalty of a conditional sentence in itself an effected jail sentence but to be served in the community is an appropriate penalty to be imposed on Derek Harvey-Zenk.

A review of the cases presented to you last time, in my view, sets out the position that the sentence we have recommended to you is not only within the range, but at the higher end of the range of the cases that have been resolved in the last number of years in this jurisdiction and others, the difficulty of course is that there aren't other cases that are the same exactly as this case in that the additional feature here involves an off duty police officer, and that's why I say to you, with respect, you must look at the facts of the case.

The submission that I advanced before you when I last appeared, in my view, takes into account the factors that you've raised.

Now, I want to expand because you had asked me about sleep and sleep deprivation when we appeared before you last time, and I, I can tell you that Harvey-Zenk had worked I think a 10 hour shift, had gone out and gotten something to eat, and then went to a friend's house before leaving to go to his home.

THE COURT: Please --

MR. WOLSON: You know, I can't make submissions in these circumstances.

THE COURT: I caution the people in the audience, this is a court of law. I would request that there be no comment whatsoever during the submissions of counsel.

Do you wish an adjournment, Mr. Wolson?

MR. WOLSON: Try again.

THE COURT: If -- just before you do that -- if, if there's any further comments or outbursts, I'll have to have the sheriffs remove those people responsible. I would not like to do that. Thank you.

Could you just go back for a moment, please?

MR. WOLSON: Yes. I was indicating I was responding to some questions you had for me last time, and I indicated to you that Harvey-Zenk had gone from work, then had gone to a friend's place and had left to go home. He doesn't -- and there was a head injury. I can't relate to you the circumstances of how the accident occurred. It's unexplained. I would expect that perhaps he did fall asleep, I don't know. But I can tell you, as I said last time, that that's the position of the accused. That this is not an offence of anecdotal evidence which should play a part in your reasoning for sentence.

Now, when I, when I make that submission to you, then the question, if you accept my position, and I submit there's no proof otherwise, then what you have to decide on top of issues that I've already explained as to plea and how we arrived at a joint recommendation before you, if you accept that, you would then have to decide whether or not in these circumstances an off duty police officer should be more severely treated, and in doing so, does that disentitle him to a conditional sentence, a jail term but to be served in the community. And I submit with respect that when you review the cases, unfortunately the only case that may have some similar application is the Manitoba decision of Lesuk, and that's why I sought to get you the reasons for judgment.

But I want to review the cases that are submitted in the, in the case book. Cusack, I would say the substantial difference between Cusack is a breach of trust while on duty. What he did was he took a wallet from the person that he stopped for a highway traffic offence and took money out of it. It's -- and the court in, in passing sentence was concerned about the fact that police officers have a, a jurisdiction to stop people, and the abuse of that particularly in these circumstances, was a factor that caused the court a lot of concern, and comments were made, and it is a 1978 decision, and you've commented that other cases have looked at it. But comments were made at page 7 of that decision, paragraph 14:

> In my opinion, the paramount consideration in this case is the protection of the public from offences of this sort being committed by persons who are given special authority by our law to deal with individual members of society and to deter such persons from acting in breach of their trust. All citizens must have confidence that police officers who are vested with substantial rights of interference with individual liberties exercise these rights with scrupulous propriety.

The court went on to say, and I think this is the paragraph that you have concerns about:

> Commission of offences by police

> officers has been considered by numerous courts and the unanimous finding has been their sentences should be more severe than that of an ordinary person who commits the same crime because of the position of public trust which they held at the time.

In my view, you always must relate that paragraph, those words to the facts of the circumstances of the commission of the offence, and when I look at the cases that are submitted before you, and the two cases that you were kind enough to provide me with today, the Langlois and Nixon cases, which I'm going to refer to, I think that principle while articulated by judges, refers to the particular circumstances of the particular case. And the question then becomes, do you in every case issue a more severe penalty for an off duty police officer? Or do you look at the facts related to the case. And I, I state now, and I've said it before, and I'll likely say it again before I end my submission to you, a conditional sentence is a jail sentence. It is in itself a severe penalty.

And when I look at, for instance the Deane case, at tab 2, a criminal negligence causing death case, the case was contested, not a plea, and in some of the cases that are before the court, and in particular one of the cases that you referred to today, Nixon or Langlois, I'll deal with it when I get there, were cases where there was a lack of remorse, which doesn't exist in the case before you today, either by way of a plea, which can be considered that, or other evidence that you have which was put before you when we appeared before you last.

In the Deane case, while there was a death

involved, criminal negligence causing death, and acknowledging as the judge did in that case that there were aggravating and mitigating factors, as there are before you today, and the aggravating factor in Deane was that he was a peace officer, a community based disposition was imposed. So the point that I make in a number of these cases is that while every case is different obviously, there are cases of serious nature where courts have considered that it is a police officer involved as an aggravating feature, but then in the end result, having regard to all the facts of the case, imposed a conditional sentence, a jail sentence in the community.

I know that you've read these cases and, and I see that you're, you're familiar with the facts of the case, and I don't think, although I've reviewed them all and have comments on all of the cases, I think it's trite to say that in cases where conditional sentences weren't imposed, they wouldn't have been imposed whether or not the officer was on or off duty at the time of the offence. They wouldn't have been imposed if there had been a civilian involved, like Koopman at tab 3, a home invasion which, which would have attracted a sentence of a penitentiary term, no matter where the offence had taken place, no matter who committed it, never mind that it was an off duty police officer, it was a home invasion and anyone committing that offence would have received a penitentiary term. If anything Koopman received a penalty at the lighter end of the continuum of sentences.

In Blackburn at tab 8, a case that you referred to today as to an off duty police officer involved in a dangerous driving situation, there are three comments I make about Blackburn. One, the allegation of dangerous driving was a continuation over a lengthy period of time. Secondly, the conduct of Blackburn was such that when he flashed his police officer badge, the court concluded that in effect he

took him self out of the position of an off duty position to an on duty police officer and in fact that was the position articulated by Blackburn's counsel. What the court said, the conduct was willful, unnecessary, borne out of anger. The conduct persisted for some time and then he flashed his badge. The court referred to it as road rage, different than the case at bar.

A number of other cases that you have before you dealt with whether or not a discharge would be appropriate. In some cases discharges were granted. In other cases they weren't, but in many of the cases where discharges were not granted, courts were clear to say they wouldn't have granted one whether it was a civilian on duty or off duty police officer. Dosanjh was one of them where the court said even if the offence committed against the administration of justice by a non-police officer there would be no merit to a defence position that a discharge ought to be given to the accused in Dosanjh.

And I think it's clear that when either an on duty or off duty police officer breaches in effect a trust such as an offence against the administration of justice, an offence of theft in a position of trust, that those cases in my view, would factually find themselves in a different alignment than in the case at bar.

I want to deal with Lesuk because if anything it comes closest to the case at bar, but it doesn't come all the way because of the circumstances of a jury trial, counsel believing obviously that they had a pretty strong case against Lesuk and a jury convicting of dangerous driving, although not dangerous causing death, but dangerous driving and the resulting sentence which was imposed by the Chief Justice of this province of a discharge on the dangerous driving, and I'll review that with you then in the -- I think you'll refer to it as S8.

What the chief justice said on the first page of the document that I handed to you, the community, line 3:

> The community has a right to look up to police officers not only for protection from harm, but also as examples of right thinking, right living, law abiding members of society who are there to help them not hurt them. Judging from the reports of the incident, including the trial, the community's perception of police officers once again through your actions that evening has taken a hit and has been negatively affected, and perhaps in some cases even destroyed.

The court went on to talk about the, the death of the woman involved who was a passenger in Lesuk's, on Lesuk's bike. What the judge said at page 29, line 7, and I think it has particular significance to the case at bar:

> In my view, the fact you are a police officer cannot, should not and does not influence my thinking when I consider the appropriate sentence.

I'm reading from page 29, line 7.

> In my view the fact that you are a police officer cannot, should not

and does not influence my thinking when I consider the appropriate sentence. You must be dealt with just as any other person facing these kinds of convictions. Those factors of past good behaviour should be taken into account by the sentencing court just as factors of bad conduct should be. The appellate courts have said, this court should look at the effect of these convictions will have on your future as a police officer. From the various letters of support that have written on your behalf I'm satisfied there is a total absence of threat or recidivism. I'm also of the view that your actions that evening amounted to serious bad judgment on your part, the results of which in my opinion you are not likely to forget or repeat. In spite of what and how this case has been reported in the media, referred to on the talk shows, when I consider all of the facts that have been presented during the course of the trial, including the verdict of the jury, I'm satisfied that the disposition I'm about to make would not adversely affect on public confidence in the justice system. You have already been denounced and stigmatized, placed

> on suspension by the Police Service and have been without -- and have been financially punished as a result of your suspension without pay.
> The justice system ...

At page 30, line 4,

> ... is strong enough to maintain credibility and respect on the basis of circumstances of this case and previous history and conduct, that credibility and respect would not be impaired by the sentence I am about to impose.

The charges were dangerous driving and refusing a breathalyzer.

Now, I can tell you that Crown counsel in submissions on sentence on that case asked the court to take into account the fact that Mr. Lesuk was a police officer, and asked the court to consider that in his reasons for decision. I was advised by counsel that that position was a similar position articulated in the Court of Appeal on appeal from conviction by Lesuk and on appeal on sentence by the Crown.

And at page 16 of tab 4, the Court of Appeal in dismissing the sentence appeal said the following:

> There is no merit to the sentence appeal, an absolutely discharge for the offence of dangerous driving and the circumstances while clearly

> on the lenient side is not manifestly unreasonable and they refer to a number of cases.

I don't argue that paragraph for an analogy of sentence of a discharge, but I put that paragraph before you because the Court of Appeal dealt with penalty where a police officer was involved, albeit off duty, on a charge of dangerous driving, and refusing the breathalyzer where obviously a fatality had occurred.

THE COURT: But not convicted of the fatality.

MR. WOLSON: Not convicted of the causal connection between the two, but a discharge was imposed by the chief justice and maintained by the Court of Appeal. So I, I take from that and I advance that to you that in considering a sentence that you feel to be appropriate, the court still imposed a discharge as not being contrary to the public interest. That's a consideration that you'll have in terms of determining whether or not a conditional sentence is in issue in this case in part while I don't think you'll have any difficult finding that the sentence may well be within the range except for the fact that he's a police officer, if I take the devil's advocate for a moment, at least on the issue of public confidence, the Court of Appeal on a case involving a police officer was of the view when they had to consider the issue of public interest that a discharge could still be given, and I say it was the Crown's position that his being a police officer ought to be taken into account.

I can tell you as well counsel in arguing that case argued and obviously the chief justice found that as a factor that the -- at page 29, line 30:

> You have already been denounced and

> stigmatized and placed on suspension, financially punished.

So that that was a factor that the courts consider and is a factor that in my view you ought to consider in the fact that a police officer here, albeit off duty, has already faced a pretty severe penalty in terms of livelihood.

You referred to two cases that I wanted to deal with, the Nixon and Langlois decision, and lumping them together just for a moment on the issue of facts, I think again it's incumbent on a court to look at the circumstances of the, of the offence, and Nixon, an on duty police officer, who because of his position obviously would have been in -- had the opportunity to interfere with a prisoner, and the allegation to which the court found him to be guilty, was that he had beaten up or was a party to the offence of, of a beating of an individual while he was in custody and while on duty, while the police officer was on duty.

The public expects at page 3 of 8, referring to a -- or a comment by a court by the Nova Scotia Court in the O'Donnell case which was referred to in the Nixon decision:

> The public expects a high standard of conduct on the part of a trained police officer and any abuse of power on the part of the police must be resolutely constrained. It's an abuse of power in this case on these facts because of his position vis-à-vis a police officer and assaulting somebody in custody, or being a party to that.

The court went on to consider the seriousness of what, what occurred in Nixon, and in Langlois a decision that you referred to, just reading from the head note in Langlois, Langlois was sentenced to 21 days incarceration to be served in the community. Langlois committed an assault on a person while on, while on duty and a person that he came across during a highway traffic stop, and assaulted the victim. The court imposed the conditional sentence, again obviously would have to consider the issues that you'll have to consider in this case. The court said the aggravating factors here are his lack of remorse and his guilty plea. Had Langlois not been a police officer a suspended sentence with probation would have been appropriate. So there was a distinction being a police officer while on duty committing an assault, and I say, with respect, that the court has to look at here are the facts for which the accused has pleaded.

I put the position to you last time we were here when you asked me, I referred to it as a momentary lapse. I think clearly it's not keeping a proper lookout, deviating from the norm. Now, those are the facts that I submit were the basis of the plea. I -- if I haven't made that clear to you last time, I do today, and I think when you look at the facts, and the basis for the plea, I, I can without question justify the plea having regard to case authorities. But I think when you deal with a plea bargain as there was put before you last time, a joint submission, I think counsel will take into mix their cases, it's part of what counsel do. The strength of their cases, the weaknesses of their cases, and in effect at the end of the day the accused by entering this plea, justifiably so, on the basis that I've articulated, did so in terms of the joint submission for reasons that I've stated earlier to you.

I'd be pleased to answer any questions that you

have, if you wish to address me on any questions.

THE COURT: I do. I think three or four points, if I might. Let's start with the, the last point, which was something that you raised before, and that's with respect to your comments on the joint submission, and I think your comment was, and I, I may not have it accurately, before was as to the arrival of the joint submission, two experienced counsel view the evidence and subsequent disclosure revealed some difficulties, et cetera, and therefore that led to the joint submission. And of course you're aware, and I've canvassed this with Mr. Minuk earlier, that there are joint submissions and there are joint submissions as a result of plea bargains. The two things are actually different. A joint submission is where counsel have a meeting of the mind, because they accept the factual basis for the plea, and in fact based on sentencing precedents accept that a certain sentence or something within a range of a certain sentence is appropriate.

A joint recommendation based on a plea bargain is where there are exigencies. Where there are difficulties in the case, not where there's just an acceptance that there's the factual proof, but difficulties in the case such so that the extreme uncertainty of the subsequent trial, and there's always uncertainty, as I've pointed out to Mr. Minuk, but the extreme uncertainty based on the exigencies cause counsel to engage in a quid pro quo and arrive at a plea bargain. And last time that was never presented, and Mr. Minuk now says that this was in fact a true plea bargain. And I just, I need to canvass that with you, because there's no question it's a joint submission. The two of you have a meeting of the minds not only with respect to the, the fact that the plea is justified, but on the basis of the sentencing precedents what the court ought to consider. But is it a plea bargain? That's the question.

MR. WOLSON: Well, I think when experienced counsel discuss cases and they point out as defence would do that there's some weakness here, but in return for that not contesting the matter and believing that a, a plea can be made justifiably, as I have and as I've said to you earlier today, then in my view, you ought to accept that two counsel who know the case advance a position of a recommendation, obviously we take into account what our positions are. We take into account that there may be some issues of, of -- that are contested because of I might say issues as to the nature of the investigation, it's just part of the process. I didn't, I didn't put it on the record before, quite frankly. I, I simply indicated to you the basis of the plea, the fact that the plea is not as a result of impairment as I stated before, but as a result of, of momentary lapse and not -- I ought to have said not keeping a proper lookout in the circumstances. That's the nature of the plea.

Now, I don't know that I can go further than that. I think when counsel look at the case and they see difficulties with the case, it's part and parcel of the process of the discussion that led to the joint recommendation.

THE COURT: So on one hand you're saying that on a factual basis you're satisfied that there's a factual basis upon which your client enters a plea, that is a marked departure as based on a momentary lapse or now as you expand it, not keeping a proper lookout.

MR. WOLSON: I didn't, if I didn't justify that quite frankly, I ought not to be standing before you on a plea. Every counsel when there's a plea entered by their client have to be satisfied that there's a basis for that plea. But having said that, I say that the accused gave up his right to have a trial and challenge the nature of the

investigation here, which may have resulted in a different conclusion, but he chose the route of accepting responsibility and in fact expected -- I shouldn't say expected -- I advanced the position that we sought in a joint recommendation as sum certain.

THE COURT: But you can appreciate my difficulty here. I hope you can, Mr. Wolson, and I tried to articulate to Mr. Minuk that fine line between the meeting of the minds and acceptance of responsibility, and acceptance that the factual and legal basis upon which the pleas entered and the recommendation is made is there as opposed to the type of joint recommendation that's based on significant problems in the case, which I never heard before.

MR. WOLSON: Well --

THE COURT: You see the, you see the difference. Not that, not that of course a joint recommendation in the absence of a plea bargain based on exigencies is not worthy of acceptance, of course, but simply that that's one of the factors that the Court of Appeal has outlined.

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

THE COURT: And the second thing I'd like to, to pursue is the other thing that's new for me today in addition to the aspect of exigencies, if there are some. And that's the, the change basis of the factual nature of the plea.

MR. WOLSON: I don't think that's new, quite frankly.

THE COURT: Well, hear me out.

MR. WOLSON: Yes.

THE COURT: And I appreciate you bringing this to my attention, because I, I specifically asked the question of Mr. Minuk as we -- and we've gone through page 18 and 19 specifically asked the question what was the basis upon which the Crown accepted the plea and we've gone through and Mr. Minuk accepted that again today. And on page 59, you talked about the fact that it was inadvertence and not brought up by impairment. Now, that's been elaborated on, but it's in my respectful view a significant difference to go from the fact that when you said not by impairment, which Mr. Minuk accepted, and the court has to accept, to the, to the comment now that, that the anecdotal evidence of alcohol is also not a factor, that, that you meant to say that, and that wasn't part of it. That you meant to say alcohol as opposed to impairment last time basically.

MR. WOLSON: You know, prior --

THE COURT: Is that, is that what I understand?

MR. WOLSON: It is, it is and prior to your raising that with Mr. Minuk today, in my preparation I had in my notes and I have in my notes on the issue of speaking to sentence an area to expand on that. My comments to you today don't come as a result of your exchange with Mr. Minuk. My comments come to you because I had, I had thought that in response to your question at page 59 I had answered the question by telling you that it's the defence position that alcohol isn't a part of this case by way of plea. It may be semantical, but that's the impression that I tried to create last time. I don't take a different position today, and --

THE COURT: Oh, and, and please, I --

MR. WOLSON: Yes.

THE COURT: -- I apologize if that's the impression I -- I'm not suggesting that you're taking a different position today as a result of the fact that you're called back to court or anything that I may have said to Mr. Minuk. I accept completely what you've said. But it is, you can appreciate that what you may have meant to say last time is different to what you said last time.

MR. WOLSON: Well --

THE COURT: Correct? I mean, and you've clarified it now, I mean by saying that impairment was not a factor that seemed pretty self-evident to me at the time because the Crown had accepted that and, and clearly if impairment was a factor we might be talking about a different charge. But by saying impairment when you meant to say consumption of alcohol isn't a factor, that -- and I appreciate you meant to say that.

MR. WOLSON: Yes.

THE COURT: But it wasn't said and you can appreciate now that that --

MR. WOLSON: Well, and I'm --

THE COURT: -- significantly changes the position from my position as well.

MR. WOLSON: Then I'm pleased to have the opportunity to clear that up, but that was the position that I, I attempted to articulate when we were here last time. Sometimes you'll appreciate that when counsel are on their feet the words come out and the point that I was trying to make to you then and that I make to you now is that when you consider the factual basis --

THE COURT: Yes.

MR. WOLSON: -- from the defence perspective, the consumption of alcohol is not a factor, and in the absence of the Crown proving so, it's not a factor I should take

into account. That's right. But, but my position in attempting to respond to your question last time was to tell you, in effect, that you ought to look at this as momentary lapse, or I should have been clear on in failing to keep a proper look out as the marked departure. That's the offence to which the accused has entered his plea. That's the basis of the dangerous driving.

THE COURT: And, and I understand that.

MR. WOLSON: I think you have that point.

THE COURT: I, I have the point. I understand it. I think you can appreciate that would be a different impression now from than I had before, but one that --

MR. WOLSON: Well, I'm glad I had that opportunity then.

THE COURT: And that leaves me to the obvious question then, Mr. Minuk. The case law is very clear and you've, you've articulated it earlier. When there's a factual difference in the presentation of a case between counsel, and there clearly is on that point, the consumption of alcohol, the court is obligated to accept the version given by the defence or the accused through his counsel in the absence of the Crown proving or moving, or asking to prove the fact. So I, I am obliged clearly to ask you if you intend or wish to call any evidence on that point or simply leave the point as it is?

MR. MINUK: What I'd like to do before I answer the question is ask you for five minutes, and --

THE COURT: Absolutely.

MR. MINUK: -- then I'll come back and answer the question. I could answer the question now but I think that it might take too long, and I prefer to have the five minutes beforehand.

THE COURT: I'm -- as long as you know what my question is, that's --

MR. MINUK: Oh, I know what the question is, I just need maybe two minutes.

THE COURT: Okay.

MR. WOLSON: I can tell you as I said earlier, I raised this point prior to articulating it today, I've raised it with my friend in advance of today, and the answer that I've received was one that I expected in the circumstances. So I, I tell you that I don't raise it without having put it to counsel before.

THE COURT: And I would have expected that you would. And your position is that the factual basis is a momentary lapse, not keeping a proper look out. That's the factual basis of the marked departure which supports the plea.

MR. WOLSON: The not keeping a proper lookout is the basis for, for the plea, and it was the basis for the plea in, in Burfoot. It was and it has been considered in other cases of dangerous driving.

THE COURT: But, but you cannot because of your client's injury tell me why the proper look out wasn't kept. I'll come back to that after I hear from Mr. Minuk. Take -- I'll just be in the back.

THE CLERK: Order, all rise. Court is in recess.

(BRIEF RECESS)

THE CLERK: Court is now re-opened.

MR. MINUK: I wonder if the court might permit me to mull this over a bit while you ask the rest of your questions of Mr. Wolson, or if you think that it's necessary I'll answer them now before I go further.

THE COURT: It's a significant question. I'll allow you all the time to -- that you need.

MR. MINUK: I wanted to take a look at the

transcript as well, because I believe that I addressed that issue before you and I want to look at it again. I want to make sure, I want to see that again if I could.

THE COURT: All right. Let, let me just then -- the -- I'll just move on for a moment. I'll come back to that. The head injury, this is I take it, gentlemen, a documented head injury as a result of the accident that's caused the lack of memory?

MR. WOLSON: That's the position I advanced to you. I don't know whether -- I didn't seek a medical report on that issue. I, I can only tell you that's the position that was advanced to me from the beginning and that's what I advanced to you.

THE COURT: I, I think I need the answer to this, to my question before I move on, if I do, to anything else, Mr. Minuk.

MR. MINUK: All right. Would you permit me a look at the transcript then?

THE COURT: Yeah. I think -- yes, how much time do you need? I'm just concerned about the fact that we've been here for a while. I, I don't want to unduly prolong the proceedings, but it's a significant point and I want to give you every opportunity to consider whether or not you're going to call evidence.

MR. MINUK: I, I appreciate that, and the issue that I need to consider is those issues which I addressed to you this morning, which is the availability of that evidence, its reliability, if there is evidence, I don't want to say that there is or that the Crown intends to call any evidence at all.

MR. WOLSON: I wonder if we could then stand the matter down for 15 minutes, only because of --

MR. MINUK: I just want to look at the transcript and --

THE COURT: I'm just thinking about a little longer actually.
MR. WOLSON: 12:30.
THE COURT: 12:45.
MR. MINUK: Okay.
MR. WOLSON: Thank you.
THE COURT: 12:45. Read the transcript. If you need longer send a message.
MR. MINUK: No. I, I'm only going to read my submission so I think that 12:30 will be fine.
THE COURT: We'll do it till 12:45.
MR. MINUK: Okay. Sure.
THE COURT: And so you need to read the transcript to answer the question as to whether you'll call evidence.
MR. MINUK: No. I, I know that I addressed this issue and told you what it was that the Crown was doing and not doing. And my sense is that I will confirm to you that we are not calling evidence, and I just want to --
THE COURT: Okay. We'll adjourn to, we'll adjourn to 12:45.
MR. MINUK: Yeah.
THE COURT: Thank you.
THE CLERK: Order, all rise.

(BRIEF RECESS)

THE CLERK: Court is now re-opened.
THE COURT: Apologize. I was a little bit longer than I anticipated.
MR. MINUK: The answer to your question is no.
THE COURT: I'm sorry?
MR. MINUK: The answer to your question is no.
THE COURT: Is no. And I take it then would go without saying that you would concur with Mr. Wolson that

the factual basis for the plea is still maintained even in the absence of that, that factor, the proof of the fact of consumption of alcohol.

MR. MINUK: Crown's not calling evidence.

THE COURT: I don't think that was quite my question.

MR. MINUK: I missed the clerk's -- missed you through the clerk.

THE COURT: The, the question was that in the absence of the proof of the fact of alcohol, I'm obliged to accept the --

MR. MINUK: Yes, Your Honour is correct on the application of the Gardiner principle.

THE COURT: But you accept that, that the factual basis still remains for the plea.

MR. MINUK: Well, if the Crown's not proving otherwise or calling evidence Your Honour has to accept it.

THE COURT: I'm asking whether you agree with it.

MR. MINUK: Well, we're not calling any evidence, so you have the position of the Crown.

THE COURT: With respect, I, I'll accept the answer, but I don't think you answered my question, Mr. Minuk.

MR. MINUK: I'm -- if my position is that we are not proving otherwise, I'm not sure what more I can say to you because --

THE COURT: I'm simply asking whether or not in the absence of proof to the otherwise, do you accept that Mr. Wolson's --

MR. MINUK: I think that the law is that the -- whether if the Crown is not proving otherwise, the law is that the court is obliged to accept that.

THE COURT: Right. Absolutely. But that --

MR. MINUK: And whether --

THE COURT: But then I need, I need to know what the position of the Crown is, if you have one, on whether or not the factual basis for the plea still remains in the Crown's view.

MR. MINUK: Yes. Oh, yes.

THE COURT: That's my question. Thank you.

MR. MINUK: Oh, yes, yes, yes, yes.

THE COURT: The next point then is because of the nature of the head injury of which -- do I -- and I'm not trying to put you on the spot, Mr. Wolson. I understand that obviously the -- there's certain presumptions that still apply, but there's no other information that you can present to me medical reports or otherwise.

MR. WOLSON: I was advised that the airbag deployed, that he hit quite firmly. I can tell you that an additional fact, although it's not quite on point, but you may wish to know this, I indicated to you last time that Dr. Davis had, had suggested that he seek further help, and he's sought that out and has had two meetings with a doctor in Brandon, Dr. Richard (phonetic).

THE COURT: So as a result of the head injury, of which there's no medical evidence, but there's no memory is I take it that's the position that you're advancing. There's no memory of what occurred basically for a period of time.

MR. WOLSON: He doesn't recall the accident.

THE COURT: Okay. What about before the accident, does he recall that?

MR. WOLSON: You know, I've asked him that on some occasions and he doesn't have a firm recollection of, of what preceded the accident and the hours before, and we've had a discussion about that. I can tell you that one of the officers at the scene thought he was in a state of shock when they dealt with him. I can only tell you what I'm

advised. I don't normally seek out medical evidence like that, that isn't something that I would ordinarily do. I'm advancing a position that I've been told and that's what I tell you.

THE COURT: Yes. I appreciate that and I'm not asking you to do anything more than that. You can appreciate that it leaves the court with a bit of a gap in terms of what occurred from end of shift to the time of the accident on the basis of the lack of recollection and, and no evidence that's being placed that really that I can accept. Right?

MR. WOLSON: You know, it's not uncommon in these types of cases. Burfoot is a case that springs to mind. I was counsel for Mr. Burfoot. It was a similar situation, and it's not uncommon in these cases that there is no recall of the incident, for one reason or another, whether it's shock, whether it's, whether it's an injury, whether it's a psychological thing. But that's the position that I put to you in answer to your question.

THE COURT: And there's no -- he didn't go to the hospital that, that morning?

MR. WOLSON: He went to the hospital later to I think the Victoria Hospital. He was experiencing some difficulties, and I think saw somebody there or privately, I'm not sure, but had sought some, some advice out, but they couldn't tell whether he suffered a concussion or he didn't. At least that's what I'm advised.

THE COURT: But basically, and I, I'm not asking you to answer this. I'm stating this more as a, as a fact that --

MR. MINUK: I'm moving over only because the clerk and you are --

THE COURT: -- as a matter of fact that basically from the time that the shift ended to the accident, there

really isn't much information that is being presented to me, and I appreciate it may not be available to be presented to me, but it's not being presented to me in terms of what happened in those many hours between the end of shift, which I think is some time, you can correct me if I'm wrong, was 10:00 or 11:00, as I recall from the previous day, to 7:00 in the morning. What, what happened?

MR. WOLSON: There was anecdotal evidence, which I have made my comments on, and, and quite frankly, I think, and I don't -- and I'm not attempting to be rude, I think you have the position of my client and you ought to sentence accordingly on that position that I've based.

THE COURT: And I wasn't asking for anything further. And, and the last question I have I think is one that I assume both of you will agree with, and I don't want you to take any, anything from it, but just, I take it you would agree with me that off duty or not, a police officer always bears the powers that are bested in her or him as a police officer, off duty or not.

MR. WOLSON: I do take slight issue with that. I think you have to look at the facts of the case.

THE COURT: Oh, no, I know. I --

MR. WOLSON: And, and I think, I think when you do that, this isn't that type of case where you should concern yourself with a general principle. I think each case may be an exception, and I think this may be one of those.

THE COURT: I have your point.

MR. WOLSON: Yes.

THE COURT: I'm just simply asking that if you disagree with that position that, that powers exist, whether or not that's something I should take into account, I have your point on that.

MR. WOLSON: Well, the Court of Appeal didn't take it into account in the circumstances of Lesuk, neither did

the Chief Justice when he sentenced Lesuk.

THE COURT: I understand. I have the point.

MR. WOLSON: Thank you.

MR. MINUK: Whether it's a factor or not, I can't dispute that once he takes the oath he's (inaudible).

THE COURT: Anything further from either counsel? All right. It's, it was clear to me before I entered the courtroom today that I would not be in a position to render a decision based on the purpose of this. It's obviously even more apparent at this particular point in time, I've given the matter a great deal of thought, and I'll have to give the matter a great deal of further thought, a great deal of further thought, as I contemplate now what I've heard, and you can appreciate that there is some new information that I've received from you today, both in relation to the factual basis of the plea, and in relation to the basis upon which the plea bargain or the joint recommendation was made and that whole discussion, both of which are new information to me and, and matters upon which I'll have to reflect.

I'm mindful of my comments before, and the comments of both counsel, and particularly you, Mr. Wolson, with respect to the desire to reach a decision and a conclusion of this particular matter expeditiously, and I'm mindful of that, and I'm quite frankly as anxious I think as anyone to, to reach that point.

Bearing that in mind, I had hoped that we might be in a position, that I might be in a position to, to do that prior to, to your unavailability that you commented on before. I think in all of the circumstances, and particularly now bearing in mind what I've heard this morning, I don't think that's possible, and, and it's certainly no fault of yours that you're not available, Mr. Wolson. You clearly need to be here at the time that the

decision is rendered, but I think the combination of the additional information and the reflection that I need, along with the, the schedules of counsel are, are going to require that it's going to take a little bit longer than we probably all would want in order for me to render a decision. And I -- you know, if, if the schedules were such, we could do it a little earlier but I'm, and I assume that both counsel agree that you need to be here for the decision.

Bearing that in mind and knowing what you said before about some unavailability for an extended period of time starting relatively soon, I'm going to suggest a date in October, and I'm going to suggest October 29th, at one o'clock and ask whether or not you two are available at that time for a decision.

MR. WOLSON: I am.

MR. MINUK: I'm available.

THE COURT: That doesn't cause any difficulties with your schedules? Then I'm going to fix October the 29th at 1:00 p.m. I have an anticipation of that agreement spoken to the trial coordinator with respect to the availability of courtrooms. The courtroom will be courtroom 210. For those of in the audience, that is on the second floor of this part of the Law Courts Building, courtroom 210 is the large Queen's Bench courtroom. So we'll fix October 29th at one o'clock in courtroom 210, subject to anything, anything further then. All right. Court's adjourned till then. Thank you.

THE CLERK: Order, all rise. Court is now closed.

(PROCEEDINGS ADJOURNED TO OCTOBER 29, 2007)

CERTIFICATE OF TRANSCRIPT

I hereby certify the foregoing pages of printed matter, numbered 1 to 68, are a true and accurate transcript of the proceedings, transcribed by me to the best of my skill and ability.

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TRACY WIENS
COURT TRANSCRIBER

I N D E X

EXHIBITS:

THE PROVINCIAL COURT OF MANITOBA

BETWEEN:

HER MAJESTY THE QUEEN

- and -

DEREK GRANT HARVEYMORDENZENK,
also known as DEREK GRANT HARVEY-ZENK,

Accused.

TRANSCRIPT OF PROCEEDINGS, before The Honourable Chief Judge Wyant, held at the Law Courts Complex, 408 York Avenue, in the City of Winnipeg, Province of Manitoba, on the 12th day of September, 2007.

APPEARANCES:

MR. M. MINUK, for the Crown

R. WOLSON, Q.C., for the accused