

**THE CORNWALL  
PUBLIC INQUIRY**



**L'ENQUÊTE PUBLIQUE  
SUR CORNWALL**

**Public Hearing**

**Audience publique**

**Commissioner**

**The Honourable Justice /  
L'honorable juge  
G. Normand Glaude**

**Commissaire**

**VOLUME 21**

**Held at :**

Hearings Room  
709 Cotton Mill Street  
Cornwall, Ontario  
K6H 7K7

Monday, April 24, 2006

**Tenue à:**

Salle des audiences  
709, rue de la Fabrique  
Cornwall, Ontario  
K6H 7K7

Lundi, le 24 avril 2006

**Appearances/Comparutions**

Mr. Peter Engelmann	Lead Commission Counsel
Ms. Christine Morris	Commission Counsel
Ms. Louise Mongeon	Registrar
Mr. Peter Manderville	Cornwall Police Service Board
Mr. Neil Kozloff	Ontario Provincial Police
Acting Supt. Colleen McQuade	
Ms. G. Saccoccio Brannan, Q.C.	
M <sup>e</sup> Claude Rouleau	Ontario Ministry of Community
Mr. Mike Lawless	and Correctional Services and
	Adult Community Corrections
Mr. Peter Chisholm	The Children's Aid Society of
	the United Counties
Mr. Allan Manson	Citizens for Community Renewal
Mr. Dallas Lee	Victims Group
Mr. David Bennett	The Men's Project
M <sup>e</sup> André Ducasse	Diocese of Alexandria-Cornwall
	and Bishop Eugene LaRocque
Mr. Giuseppe Cipriano	The Estate of Ken Seguin and
	Scott Seguin and Father Charles
	MacDonald
Mr. William Carroll	Ontario Provincial Police
	Association

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1 --- Upon commencing at 2:05 p.m./

2 L'audience débute à 14h05

3 **THE REGISTRAR:** Order; all rise. À l'ordre;  
4 veuillez vous lever.

5 This hearing of the Cornwall Public Inquiry  
6 is now in session, the Honourable Mr. Justice Normand  
7 Glaude, presiding. Please be seated. Veuillez vous  
8 asseoir.

9 **THE COMMISSIONER:** Good afternoon, all.  
10 Mr. Engelmann.

11 **MR. ENGELMANN:** Good afternoon, Mr.  
12 Commissioner.

13 Just before we start on Mr. Cipriano's  
14 motion, I just want to speak to a couple of housekeeping  
15 matters, and I wanted to advise counsel and yourself, sir,  
16 that Detective Leaver, who was scheduled to begin her  
17 evidence at 2:00 on Wednesday is unfortunately not  
18 available on Wednesday, the 26<sup>th</sup>.

19 **THE COMMISSIONER:** M'hm.

20 **MR. ENGELMANN:** She is, however, available  
21 the full day on the 27<sup>th</sup>. So we're in a situation where  
22 unless Mr. Fulton, who is called tomorrow, rolls over into  
23 Wednesday, we may not be sitting on Wednesday.

24 **THE COMMISSIONER:** All right.

25 **MR. ENGELMANN:** I apologize to you all for

1 any inconvenience, but for personal reasons she is not  
2 available on that date, unfortunately.

3 As well, I think parties are aware of this,  
4 but on Monday, May 1<sup>st</sup>, I understand that decisions are  
5 being issued on the two preliminary issues that are before  
6 you.

7 **THE COMMISSIONER:** M'hm.

8 **MR. ENGELMANN:** And I just wanted to advise  
9 counsel that we will be starting the evidence of the  
10 Corrections corporate policy evidence, I believe, at one  
11 o'clock in the afternoon.

12 Now, with respect to the motion for this  
13 afternoon, sir, if we could just mark a few of the  
14 documents that have been filed with the Commission?

15 **THE COMMISSIONER:** Yes.

16 **MR. ENGELMANN:** First of all, you should  
17 have a Notice of Motion from Father Charles MacDonald.

18 **THE COMMISSIONER:** I do.

19 **MR. ENGELMANN:** If that could be M2-A1?

20 **THE COMMISSIONER:** Yes.

21 **--- EXHIBIT NO./PIÈCE NO. M2-A1:**

22 Father Charles MacDonald and the Estate of  
23 Kenneth Seguin - Notice of Motion

24 **MR. ENGELMANN:** You should have a reply from  
25 Father MacDonald. If that could be M2-A2?

1           **--- EXHIBIT NO./PIÈCE NO. M2-A2:**

2                           Father Charles MacDonald and the Estate of  
3                           Kenneth Seguin - Applicant's Reply

4           **MR. ENGELMANN:** And you should have a Book  
5           of Authorities for Father MacDonald. If that could be M2-  
6           A3?

7           **THE COMMISSIONER:** A Book of Authorities?

8           **MR. ENGELMANN:** It's a blue book.

9           **THE COMMISSIONER:** Okay. Yes.

10          **--- EXHIBIT NO./PIÈCE NO. M2-A3:**

11                           Father Charles MacDonald and the Estate of  
12                           Kenneth Seguin - Applicant's Authorities

13          **MR. ENGELMANN:** Just on that note, I want to  
14          apologize for the media present. I don't have a copy of  
15          that book for them. We will ensure in the future that we  
16          do. That book is also not scanned, so we will work off the  
17          paper copy.

18                           Then the next exhibit for the motion, if it  
19          could be the Submissions of the Citizens for Community  
20          Renewal, and if that could be M2-B1?

21          **--- EXHIBIT NO./PIÈCE NO. M2-B1:**

22                           Father Charles MacDonald and the Estate of  
23                           Kenneth Seguin - Submissions of the Citizens  
24                           for Community Renewal (CCR)

25          **MR. ENGELMANN:** Then the Submissions for the

1 Men's Project, if that could be M2-C1?

2 --- EXHIBIT NO./PIÈCE NO. M2-C1:

3 Father Charles MacDonald and the Estate of  
4 Kenneth Seguin - Submissions of the Men's  
5 Project

6 MR. ENGELMANN: And then for the Victim's  
7 Group, their submissions, if they could be marked as M2-D1?

8 --- EXHIBIT NO./PIÈCE NO. M2-D1:

9 Father Charles MacDonald and the Estate of  
10 Kenneth Seguin - Victim's Group Submission

11 MR. ENGELMANN: Then the affidavit of Lauren  
12 Schellenberger, if that could be M2-D2?

13 --- EXHIBIT NO./PIÈCE NO. M2-D2:

14 Father Charles MacDonald and the Estate of  
15 Kenneth Seguin - Affidavit of Lauren L.  
16 Schellenberger

17 MR. ENGELMANN: And then their Book of  
18 Authorities for the Victims Group, if that could be M2-D3?

19 --- EXHIBIT NO./PIÈCE NO. M2-D3:

20 Father Charles MacDonald and the Estate of  
21 Kenneth Seguin - Victims Group - Book of  
22 Authorities

23 MR. ENGELMANN: Mr. Commissioner, in  
24 reviewing the material that was provided to Commission  
25 counsel, Commission counsel discovered a case in noting up

1 the cases provided to us. It's a recent case from the  
2 Supreme Court of Canada which was not referred to by other  
3 counsel.

4 **THE COMMISSIONER:** M'hm.

5 **MR. ENGELMANN:** This is a case, *Toronto Star*  
6 *Newspaper Ltd. v. Ontario*. I think copies have been handed  
7 to everybody and it should also be scanned so that it's  
8 electronic. I'm not going to go into it in any detail, but  
9 I thought, in fairness to counsel, when we discovered cases  
10 earlier we gave parties a heads up, wrote them a letter and  
11 said, "You might want to look at particular provisions."  
12 And given the shortness of time, we did not have time to do  
13 that today.

14 **THE COMMISSIONER:** M'hm.

15 **MR. ENGELMANN:** But I just wanted to mention  
16 that case. Although we will not be making submissions to  
17 you on this particular motion, we thought we should alert  
18 you and the parties arguing this motion about this  
19 particular case. It appears to be the last word from the  
20 Supreme Court on the issue of limiting public access to  
21 legal proceedings. It's a direct follow-up to a case known  
22 as *Vancouver Sun* which is a case from the Supreme Court of  
23 Canada in 2004, and that case is referred to in the Victims  
24 Group Book of Authorities at Tab 11. Just the paragraphs  
25 that we think are of note, first of all, the references in

1           *Vancouver Sun* that are then picked up in *Toronto Star* are  
2 paragraphs 26 and 31.

3                         In the *Toronto Star* case, we would ask  
4 counsel, if they wish to make any submissions on this case,  
5 that they pay particular attention to paragraphs 7 and 31.

6                         The case, sir, the issue was whether the  
7 Dagenais/Mentuck test, and this is a test that's referred  
8 to in the *Vancouver Sun* case, which was developed in the  
9 context of publication bans at the time of trial, whether  
10 it applies as well at the pre-charge or investigative stage  
11 of criminal proceedings and, more particularly, whether it  
12 applied to ceiling orders concerning search warrants and  
13 the informations upon which their issuance was judicially  
14 authorized. The decision is not limited to ceiling orders  
15 for search warrant materials. It essentially confirms that  
16 the Dagenais/Mentuck test applies to all discretionary  
17 court orders that limit freedom of expression and freedom  
18 of the press in relation to legal proceedings, and that's  
19 the reference from paragraph 7 of the case.

20                         The case goes on to suggest that:

21                                 "Court proceedings are presumptively  
22 open in Canada and public access will  
23 be barred only when the appropriate  
24 court, in the exercise of its  
25 discretion, concludes that disclosure

1                                    would usurp the ends of justice or  
2                                    unduly impair its proper  
3                                    administration."

4                                    That's, of course, the follow-up on the  
5                                    Dagenais/Mentuck test.

6                                    **THE COMMISSIONER:** M'hm.

7                                    **MR. ENGELMANN:** So they're applicable at  
8                                    every stage of the judicial process. The Dagenais/Mentuck  
9                                    test, the case says:

10                                    "...must be applied in a flexible and  
11                                    contextual manner and regard must be  
12                                    had to the circumstances in which such  
13                                    an order was sought by parties with a  
14                                    real and demonstrated interest in  
15                                    either delaying or prohibiting public  
16                                    disclosure."

17                                    It's at paragraphs 31.

18                                    **THE COMMISSIONER:** Yes, I have that.

19                                    **MR. ENGELMANN:** I just thought we'd bring  
20                                    that to the attention of the parties, if they wish to  
21                                    comment on it. They may not. That is their prerogative.

22                                    And I know there are a couple of other  
23                                    preliminary issues on the motion. One that comes to mind  
24                                    is the fact that the motion concerns affidavit evidence  
25                                    which was tendered by the Victims Group in its submissions

1 for standing and funding. We're not dealing with  
2 substantive evidence for Phase I or Phase II of the  
3 inquiry.

4 There is an issue that's been raised by one  
5 of the parties dealing with Mr. Cipriano's right to bring  
6 the motion on behalf of the Estate of Ken Seguin, and  
7 that's an issue that will have to be dealt with as well,  
8 keeping in mind, I think, at that point in time that the  
9 motions for standing and funding were for both Phase I and  
10 Phase II.

11 **THE COMMISSIONER:** M'hm.

12 **MR. ENGELMANN:** I'll just leave that comment  
13 there.

14 Sir, those were just some preliminary  
15 contextual matters we wanted to bring to the parties'  
16 attention. I will turn it over to the Applicant and Mr.  
17 Cipriano.

18 **THE COMMISSIONER:** Thank you.

19 Mr. Cipriano.

20 --- NOTICE OF MOTION PRESENTED BY G. CIPRIANO ON BEHALF OF  
21 FATHER CHARLES MacDONALD

22 **MR. CIPRIANO:** Good afternoon, Mr.  
23 Commissioner.

24 **THE COMMISSIONER:** Good afternoon.

25 **MR. CIPRIANO:** I suppose I'll start off my

1       submissions firstly with what I intended when I brought  
2       this motion. I think that can be found very simply by  
3       reading the order that I request from the Commission in my  
4       original submissions, and that's simply an order to remove  
5       from the Commission website the affidavits that directly  
6       affect the Applicants or, in the alternative, to redact the  
7       portions that directly affect the Applicants on the basis  
8       that these affidavits are prejudicial with very little  
9       probative value. They're unreliable and they may bear  
10      little relevance with the mandate of the inquiry.

11                   **THE COMMISSIONER:** So what you're looking  
12      for then is a ban ---

13                   **MR. CIPRIANO:** No.

14                   **THE COMMISSIONER:** --- to the public access  
15      of those affidavits?

16                   **MR. CIPRIANO:** No. I never -- nowhere in my  
17      materials will you find the word publication ban.

18                   **THE COMMISSIONER:** M'hm.

19                   **MR. CIPRIANO:** I never sought to ban  
20      materials. What I'm seeking is that certain pieces of  
21      evidence not be included on the website because of the  
22      effect that it has.

23                   **THE COMMISSIONER:** Just so I understand, you  
24      don't want them on the website. So let's assume someone  
25      comes over to the desk at the front of the office and says,

1 "I would like to see the material that was filed on the  
2 standing hearing," would you permit people to have access  
3 there?

4 **MR. CIPRIANO:** Well, I suppose I would have  
5 to. I never asked that the materials be marked  
6 confidential or they be taken away altogether. I simply --  
7 the order that I requested refers to having them removed  
8 from the inquiry website, where they are available to the  
9 world at large and it could be used, as I will demonstrate  
10 shortly, and are being used in ways that distort facts, or  
11 that they be redacted so that the presumption of innocence  
12 is respected -- the constitutional presumption of innocence  
13 is respected.

14 **THE COMMISSIONER:** I guess my only question  
15 to that, before we get started, is if you wanted it off the  
16 website, what's to stop someone to come into the office  
17 and, I suppose, request a photocopy of the document, take  
18 it, scan it and put it on the website?

19 **MR. CIPRIANO:** Well, I suppose nothing could  
20 stop someone from doing that. If that happens, that could  
21 be an issue that we would have to revisit in the sense of  
22 how the affidavits are being used, but having them  
23 available on the website, it's not only the issue of  
24 accessibility, but it's the appearance that it gives in the  
25 sense that it could lead the public to believe that these

1 affidavits have been accepted as reliable, factual  
2 information, information that asserts that the Applicants  
3 are criminally responsible for certain acts in which they  
4 enjoy the presumption of innocence.

5 So I think there is a distinguishing feature  
6 there that we have to keep in mind, that it's the -- and  
7 nowhere in my materials do I say that the Commission has  
8 adopted the affidavits as being factually correct.

9 **THE COMMISSIONER:** No. In fact, I'm going  
10 to direct you to a spot where I indicated that:

11 "I do not make any findings on this  
12 other than the members of this group  
13 claim to be victims of sexual abuse."

14 **MR. CIPRIANO:** And I agree completely. I'm  
15 not suggesting -- I even went to the point of putting that  
16 in my reply in case -- I didn't want to be misquoted or I  
17 was leaving the presumption that I was suggesting that the  
18 Commission was adopting those affidavits as accurate or  
19 reliable.

20 **THE COMMISSIONER:** Right.

21 **MR. CIPRIANO:** But my submission is that  
22 having them available under a link called "Parties with  
23 Standing" could leave the perception or could lead to an  
24 inevitable conclusion by members of the public that these  
25 are reliable facts that have been accepted by the

1 Commission.

2 And so my motion today is not about a public  
3 ban. In fact, if -- and I'm not going to get in too deeply  
4 on the case law of publication bans because I'm not  
5 asserting a publication ban, but if a party seeks to assert  
6 a publication ban, the Supreme Court has established a very  
7 specific test. The media has to be notified they're given  
8 standing. I never notified the media. I'm not -- it's not  
9 an issue of publication ban. It's an issue of,  
10 essentially, the reliability of a piece of evidence and its  
11 prejudicial effect over its probative value. That's the  
12 bottom line of the motion.

13 **THE COMMISSIONER:** M'hm.

14 **MR. CIPRIANO:** If we could turn to Tab 1 of  
15 my Authorities? That's simply the Terms of Reference. If  
16 they're not scanned, I don't know if we have them  
17 available, but in any event, the section 7 of the Terms of  
18 Reference -- and this has been quoted at length in other --  
19 in previous occasions, but it simply says:

20 "The Commission shall perform its  
21 duties without expressing any  
22 conclusion or recommendation regarding  
23 the civil or criminal liability of any  
24 person or organization. The Commission  
25 in the conduct of its inquiry shall

1 ensure that it does not interfere with  
2 any ongoing legal proceedings relating  
3 to these matters."

4 With that in mind, I turn to Tab 4 of my  
5 materials and at page 3, this is the *Starr v. Houlden* case.  
6 At page 3, I guess that would be the third paragraph  
7 begins:

8 "The Commissioner, while specifically  
9 prevented from making a determination  
10 of criminal responsibility, could  
11 nevertheless do so by implication. A  
12 finding of intent, once the findings of  
13 fact are made regarding the existence  
14 of dealings and benefits, is almost an  
15 irresistible inference."

16 Turning again to Tab 5, Mr. Commissioner,  
17 page 9, that's the *Nelles* case. The second last paragraph  
18 on page 9 reads:

19 "Further, the fact that the findings or  
20 conclusions made by the Commissioner  
21 are not binding or final in future  
22 proceedings, it is not determinative of  
23 what he will decide. What is important  
24 is that a finding or conclusion stated  
25 by the Commissioner would be considered

1 by the public as a determination and  
2 might well be seriously prejudicial if  
3 a person named by the Commissioner as  
4 responsible for the deaths in the  
5 circumstances were to face such  
6 accusations in further proceedings. Of  
7 equal importance, if no charges are  
8 subsequently laid, a person found  
9 responsible by the Commissioner would  
10 have no recourse to clear his or her  
11 name."

12 And on the same case, page 10, I guess the  
13 third last paragraph beginning "It was probably  
14 inherent...", the last sentence in that paragraph reads:

15 "Where such an impasse arises it should  
16 be resolved, in our opinion, by a  
17 course that best protects the civil  
18 rights of the persons the limitation  
19 was designed to protect."

20 The reason I quote these cases and ---

21 **THE COMMISSIONER:** What do you mean? Who  
22 are the persons designed to protect, "the civil rights of  
23 the persons the limitation was designed to protect"? In  
24 our case, who do you say is that? The children who may  
25 have suffered sexual abuse?

1                   **MR. CIPRIANO:** No. I'm saying that part of  
2 -- well, the terms of reference are designed to protect all  
3 parties. So that includes my clients as well.

4                   **THE COMMISSIONER:** Well, of course it does.

5                   **MR. CIPRIANO:** And so if in the course of  
6 the Commission's work there could be something that comes  
7 up which may infringe certain rights that some of the  
8 parties enjoy, the terms of reference are there to protect  
9 and ensure that those rights are not infringed.

10                   **THE COMMISSIONER:** Well, let's read -- you  
11 better read the whole paragraph.

12                   **MR. CIPRIANO:** Okay. Well, that whole  
13 paragraph deals with the Applicants in that case which were  
14 the two nurses who had criminal charges brought against  
15 them but were subsequently discharged at a preliminary  
16 inquiry. And the Commissioner there referred a question to  
17 Divisional Court on whether he could make certain findings  
18 of fact with respect to who caused the deaths or what was  
19 the cause of death.

20                   **THE COMMISSIONER:** M'hm.

21                   **MR. CIPRIANO:** The Applicants then brought -  
22 - challenged or responded to that question by saying that  
23 the Commissioner did not have jurisdiction to make those  
24 findings and the Court of Appeal then discussing that and  
25 upholding the fact that the Commissioner didn't have

1 jurisdiction wrote that paragraph and it says:

2 "It was probably inherent in the terms  
3 of the Order in Council that the task  
4 of meeting the "need of the parents and  
5 the public as a whole to be informed of  
6 all available evidence" by "full  
7 examination" of the matters to be  
8 inquired into and "to ensure full  
9 public knowledge of the completeness of  
10 the matters referred to", but to do so  
11 "without expressing any conclusion of  
12 law regarding civil or criminal  
13 responsibility", was one of extreme  
14 difficulty, at times approaching the  
15 impossible. Where such an impasse  
16 arises it should be resolved, in our  
17 opinion, by a course that best protects  
18 the civil rights of the persons the  
19 limitation was designed to protect.  
20 The task of the commission is thus a  
21 delicate and difficult one, but the  
22 limitation imposed by the Order in  
23 Council must be obeyed."

24 **THE COMMISSIONER:** All right.

25 **MR. CIPRIANO:** And in that case, they're

1 referring to, with that specific paragraph, the rights of  
2 the Applicants that is the nurses who had been previously  
3 charged and had their charges disposed of and saying the  
4 terms of reference were designed to protect their rights as  
5 well.

6 And the reason I quote these cases, and  
7 again I don't want to be seen as suggesting that the  
8 Commission is adopting these affidavits for the truth of  
9 their contents, but it sets the parameters in which we're  
10 working. The point that these cases make is not simply  
11 that the Commission is prevented from explicitly making  
12 findings of fact or adopting the affidavits but it can do  
13 so by implication. And my argument is that having them  
14 posted on the website is doing so by implication.

15 I won't go through in great detail the cases  
16 at Tab 2 and the ruling on the terms of reference in Tab 3.  
17 They've been argued already, but I think the point to take  
18 is that the Supreme Court and then further Justice Lamer in  
19 adopting the decision of -- the *Krever* decision states that  
20 what the Commission cannot do is simply leave people  
21 factually guilty.

22 **THE COMMISSIONER:** I'm sorry? Yes, I know.

23 **MR. CIPRIANO:** And so I'm not going to go  
24 into quoting them in great detail. They've been done.  
25 They've been referred to, but the point to take is that he

1 can do so -- a Commission of Inquiry can do so by  
2 implication, especially when using words that resonate with  
3 criminal responsibility. And in my submission, when you  
4 have affidavits posted on the websites with links under  
5 parties with standing that make factual conclusions of  
6 criminal responsibility without any basis for those  
7 conclusions, I think first of all is not a complete story  
8 of what's occurred and they're misleading. Those whose  
9 rights have been affected by those affidavits have no  
10 opportunity to challenge, cross-examine on the reliability  
11 of those affidavits and ultimately anyone coming to the  
12 Commission website could be left with an impression that  
13 those have been accepted as true by the Commission.

14 If I can turn to again Tab 7, this was a  
15 notice sent to parties from yourself.

16 **THE COMMISSIONER:** M'hm.

17 **MR. CIPRIANO:** And at page 2, I guess it's  
18 the second last paragraph, it says:

19 "I can advise that if and when alleged  
20 victims are called, the purpose of  
21 their evidence will mostly be as  
22 regards to complaints made and not the  
23 substantial facts giving rise to the  
24 complaint. In other words, this is not  
25 a criminal trial. Furthermore, this

1 inquiry will not be used as a testing  
2 ground to gain advantage in any civil  
3 actions or provide fodder for the court  
4 of public opinion."

5 **THE COMMISSIONER:** M'hm.

6 **MR. CIPRIANO:** The reason I quote that, Mr.  
7 Commissioner, is because the affidavits make -- they assert  
8 criminal responsibility.

9 **THE COMMISSIONER:** Help me out with that.  
10 They don't say that Father MacDonald is a criminal. They  
11 say presumably I was abused by Father MacDonald.

12 **MR. CIPRIANO:** Well, case in point is that  
13 they are asserting criminal responsibility to the  
14 Applicants.

15 **THE COMMISSIONER:** Okay.

16 **MR. CIPRIANO:** When an Affiant says "I have  
17 been sexually abused by so and so", I don't see how that  
18 could be taken in any other way as to meaning a criminal  
19 act has occurred.

20 **THE COMMISSIONER:** Okay.

21 **MR. CIPRIANO:** And so in my submission,  
22 given the way you have said in that letter to the parties,  
23 I think there could -- we could be left with an apparent  
24 conflict with what's on the website and what the public can  
25 perceive and what they take from the website and then given

1           that letter that says that no conclusions of criminal  
2           responsibility will be made by the Commissioner.

3                     **THE COMMISSIONER:** So what's the paragraph?

4                     **MR. CIPRIANO:** That paragraph says that the  
5           Commission will not -- does not intend to make findings of  
6           criminal responsibility.

7                     **THE COMMISSIONER:** Right.

8                     **MR. CIPRIANO:** And my submission is having  
9           the affidavits on the website could come in conflict with  
10          that paragraph in that letter.

11                    **THE COMMISSIONER:** Okay.

12                    **MR. CIPRIANO:** Because it could be seen by  
13          the public as an implication that criminal responsibility -  
14          - the criminal responsibility assigned in those affidavits  
15          has been accepted by the Commission.

16                    **THE COMMISSIONER:** Okay.

17                    **MR. CIPRIANO:** Because if -- if the  
18          Commission cannot make findings and neither can it make  
19          findings by implication, it cannot engage in an analysis of  
20          whether those affidavits are true or not. It cannot engage  
21          in discussions or lead evidence to determine the  
22          reliability of those affidavits. And so by leaving them  
23          there, it's too easily -- the conclusion that those  
24          affidavits are reliable is very easy to make by people  
25          coming to the Inquiry Website.

1                   They will see that and they will simply see  
2                   that there is -- there are affidavits from parties with  
3                   standing that deal with criminal responsibility and those  
4                   are on the Commission Website and therefore must bring up  
5                   the factual circumstances giving rise to this Commission of  
6                   Inquiry.

7                   And so that's why I argue that having the  
8                   affidavits on the Website may be in conflict with the  
9                   paragraph in that letter.

10                  The affidavits themselves, Mr. Commissioner,  
11                  I would argue are prejudicial. They are not completely  
12                  reliable and they may not be completely relevant to the  
13                  mandate of the Commission. As I stated earlier, they do  
14                  express conclusions of criminal responsibility. Some of  
15                  them make clinical conclusions that are beyond the scope of  
16                  the Affiants. There is no basis for the conclusions that  
17                  are asserted, nor are they made on belief or information  
18                  based on belief.

19                  They don't say that "I verily believe I was  
20                  sexually assaulted". They simply state "I was sexually  
21                  assaulted". They don't say, "I believe that the Applicant  
22                  is a pedophile". They assert that the Applicant is a  
23                  pedophile. I think there's a difference there.

24                  The conclusions are explicit and so the  
25                  people affected do not have an ability to challenge these

1 conclusions. The people making these conclusions don't  
2 have the scope or the knowledge to make such conclusions  
3 and because the Inquiry cannot analyse or engage in the  
4 analysis of these conclusions, in my submission, having  
5 them on the Website, the Commission would be doing  
6 something that it cannot do directly.

7 **THE COMMISSIONER:** It seems to be a very  
8 popular site, the Commission Website.

9 **MR. CIPRIANO:** I wouldn't know that.

10 **THE COMMISSIONER:** Have you ever been on it?

11 **MR. CIPRIANO:** Yes, I have.

12 **THE COMMISSIONER:** Oh, okay, good. So I  
13 guess you can answer me this; why -- I think those  
14 affidavits have been on the Website since November 17,  
15 2005. So why have you only raised that in March of this  
16 year? I mean if it was something that was so terrible,  
17 that was so blatant, I mean I would have thought that you  
18 would have jumped on that at the first opportunity.

19 **MR. CIPRIANO:** Well, we were never given the  
20 affidavits to begin with when they were submitted.

21 **THE COMMISSIONER:** No, I understand that. I  
22 understand that but as of November 17<sup>th</sup>, the official spot  
23 for everything on this Commission is the Website.

24 **MR. CIPRIANO:** Okay.

25 **THE COMMISSIONER:** So why wait till now? And

1           having waited till now -- well, answer that one first?  
2           Help me out with that one. Why did it take so long to  
3           bring the application?

4                       **MR. CIPRIANO:** Well, one of the reasons is -  
5           - and you'll notice at Tab 6 of my materials, you'll find  
6           there are numerous letters going back and forth between  
7           counsel and Commission counsel.

8                       **THE COMMISSIONER:** M'hm.

9                       **MR. CIPRIANO:** Asking about the role of  
10          alleged complainants and what the Inquiry was intending on  
11          doing. It was unclear for a long time, at least from our  
12          perspective, what the Inquiry intended to do with -- first  
13          of all, if they even intended to call certain witnesses and  
14          if so, what they intended to do. And this is made clear.  
15          There are letters that begin from October 24<sup>th</sup>.

16                      **THE COMMISSIONER:** So bottom line is you  
17          didn't look at the website.

18                      **MR. CIPRIANO:** I'm sorry?

19                      **THE COMMISSIONER:** You really didn't look at  
20          the website during that period of time.

21                      **MR. CIPRIANO:** I don't recall the first time  
22          I looked at the website.

23                      **THE COMMISSIONER:** No, what I'm saying is  
24          those letters ---

25                      **MR. CIPRIANO:** Yes.

1                   **THE COMMISSIONER:** --- were dealing with  
2 Phase I issues, right? And the documents that are put in  
3 for standing were the material that was filed on the issues  
4 of standing. Do we agree on that?

5                   **MR. CIPRIANO:** Yes.

6                   **THE COMMISSIONER:** Okay. So my question  
7 comes back -- that's Phase I material, all of those  
8 letters, right? So why would it take so long to bring the  
9 application, because those words were there as of November  
10 17<sup>th</sup> , correct?

11                   **MR. CIPRIANO:** I don't know when they made  
12 it onto the Commission website. I am not the person who  
13 runs the website. I don't know if they were put on that  
14 day. I mean, if you're telling me that, then I'll take  
15 that to be true.

16                   **THE COMMISSIONER:** As an aside, I find it  
17 astonishing that a party with standing would not be looking  
18 with great interest at the website to find out what's going  
19 on and what's being said. And I suppose I'm a little  
20 disappointed that you wouldn't be one of our most avid  
21 readers.

22                   **MR. CIPRIANO:** Well, what I can say is ---

23                   **THE COMMISSIONER:** That's just tongue and  
24 cheek with respect to being an avid reader, but the fact  
25 remains is why did it take until now?

1                   **MR. CIPRIANO:** Well, as I was saying  
2 earlier, numerous letters went back and forth between  
3 counsel and Commission counsel ---

4                   **THE COMMISSIONER:** All right.

5                   **MR. CIPRIANO:** --- regarding the role of the  
6 alleged complainants, if any.

7                   **THE COMMISSIONER:** M'hm.

8                   **MR. CIPRIANO:** It was uncertain for a long  
9 period of time, up until, I would say, January 2006 what  
10 role alleged complainants would play. And even to this day  
11 it's, to a point, uncertain what role they will play given  
12 that there's decisions pending by the Commission. It was  
13 not made certain until early January and then by the letter  
14 by yourself from January 17<sup>th</sup> that to some extent the  
15 Commission intended on hearing from alleged complainants.

16                   With that in mind, we have to be concerned  
17 with -- again, I'm not saying that the Commission is  
18 adopting what the affidavits say, but we have to be  
19 concerned, as the Supreme Court states, that the  
20 implication that can be left by certain actions that the  
21 Commission takes, i.e. having affidavits that conclude  
22 criminal responsibility up on the website and so, by  
23 implication, leaving those to be factually correct.

24                   **THE COMMISSIONER:** Sir, I'm going to ask you  
25 a question again. I would ask you to answer it, please.

1           So are you telling me that had you -- had Mr. Engelmann  
2           written to you in January and said "We're not going to call  
3           the alleged victims. We're not." Does that mean you  
4           wouldn't bring your application -- you wouldn't have  
5           brought your application?

6                       **MR. CIPRIANO:** Perhaps not. I don't -- it's  
7           difficult to answer because that didn't happen.

8                       **THE COMMISSIONER:** Okay. So why did it take  
9           -- you're telling me that you knew these documents were on  
10          the website and you held off until you saw what was going  
11          to happen in Phase I to bring the application?

12                      **MR. CIPRIANO:** Well, when it became apparent  
13          that, without arguing the previous motion all over again,  
14          that if Commission counsel intended to lead certain  
15          substantive facts into evidence, then of course we had to  
16          be concerned with the implication that what the -- of the  
17          conclusions that those affidavits state.

18                      **THE COMMISSIONER:** The doctrine of Laches,  
19          are you aware of that one?

20                      **MR. CIPRIANO:** Yes.

21                      **THE COMMISSIONER:** Okay. So I guess I'm  
22          asking again, why did you wait all this time? I mean, I  
23          would have thought that if you were so concerned about the  
24          prejudicial value, that you would've brought your  
25          application the moment you would've become aware that these

1 things were on the website.

2 **MR. CIPRIANO:** And I brought it once I  
3 learned how or what Commission counsel intended to do with  
4 the role of alleged victims. I suppose that's my answer to  
5 your question.

6 **THE COMMISSIONER:** Okay. Fair enough.

7 **MR. CIPRIANO:** Because as I -- and this is  
8 why I referred to the letter of January 17<sup>th</sup>. The  
9 Commission has to keep in mind not only its role in not  
10 making factual conclusions of guilt but also the  
11 implications it can leave to the public. And again, when  
12 the Commission says that it will or has decided it will  
13 hear from alleged complainants, then the prejudicial effect  
14 of the affidavits is heightened. It's heightened, sorry.

15 **THE COMMISSIONER:** Okay.

16 **MR. CIPRIANO:** And so by having them  
17 available, in my submission, it could run counter to the  
18 letter that was sent to parties on January 17<sup>th</sup> saying we're  
19 not going to get into substantial facts. This is not a  
20 court of public opinion. We're not here to assign criminal  
21 responsibility and, in my submission, having them up on the  
22 website, available to the public, given that now we do  
23 know, at least to some extent, that the Commission intends  
24 on hearing from alleged complainants, notwithstanding what  
25 role they might play but just simply that they intend on

1 hearing from alleged complainants, having them, in my  
2 submission, on the website does run counter to what is  
3 stated in that letter because it could, by implication,  
4 leave the applicants in the public domain as being guilty  
5 of crimes for which they enjoy the presumption of  
6 innocence.

7 I mean, ultimately, if the Commission cannot  
8 make findings of criminal responsibility, if the Commission  
9 cannot engage into whether those affidavits are true or  
10 not, then one has to wonder what role they would play in  
11 executing the Commission mandate. And leaving them on  
12 there with the prejudicial conclusions that they do come to  
13 could, in my submission, or does in fact, in my submission,  
14 leave the people affected guilty of offences for which they  
15 enjoy their presumption of innocence.

16 I think if the Terms of Reference are going  
17 to be respected, if the letter of January 17<sup>th</sup> is to be  
18 respected, in my submission, the affidavits should play a  
19 very small role in the mandate and so really have no place  
20 on the Commission website.

21 The reasons I suggest that the affidavits  
22 are prejudicial, firstly, is they do express conclusions of  
23 criminal responsibility. There are affidavits that suggest  
24 the applicants are pedophiles. They make conclusions on  
25 which the affiants are not qualified to make. They provide

1 no basis for this, no evidentiary basis for those  
2 conclusions. The people affected by the affidavits really  
3 cannot challenge these conclusions. This is not a criminal  
4 trial and neither can the Commission engage in an analysis  
5 of whether these conclusions are true.

6 And so the fact that there are conclusory  
7 statements of criminal responsibility or assigning certain  
8 psychiatric behaviours to the applicants, in my respectful  
9 submission, could be seen and is seen by the public that  
10 these factual findings are accepted by the Commission.

11 It creates an irresistible inference that  
12 they are accepted, that they are reliable and that they are  
13 the basis of the inquiry. And it cannot be stressed  
14 enough, Mr. Commissioner, that some of the people affected  
15 do enjoy the presumption of innocence. It's a  
16 constitutional presumption and, to the extent that it  
17 affects Father MacDonald and his charges which have been  
18 stayed, that presumption is irrebuttable. It cannot -- the  
19 Commission cannot now do what cannot be done and that is  
20 leave him factually guilty. It would be overly prejudicial  
21 and it's not the role of the Commission to do that.

22 And when I speak about prejudice I'm not  
23 talking simply in the abstract of potential prejudice. If  
24 we turn to my Reply under the heading of "Prejudice",  
25 specifically paragraph 29, I've posted here part of a

1 website which has already cut and pasted the affidavits and  
2 put them onto their own website which calls itself  
3 theinquiry.ca. And if we simply read the underlined  
4 portion of that, it says:

5 "In order to avoid confusion,  
6 therefore, I have decided to post only  
7 those affidavits which are specifically  
8 related to the allegations of a  
9 paedophile ring and cover-up which  
10 prompted calls for an inquiry."

11 And then if we are up on the Internet and  
12 reading that website, what follows is all of the  
13 affidavits. And this is probably the best example I can  
14 give of how people visiting the Commission website can see  
15 things -- can see the affidavits not for the limited  
16 purposes for which they were admitted but for being  
17 reliable, accurate representations of the factual basis of  
18 the inquiry and accepting the conclusion of the affidavits  
19 as true.

20 **THE COMMISSIONER:** But when I'm reading this  
21 affidavits -- the link that you're reading, the word  
22 "allege" comes in. So unfortunately, and I suspect that  
23 these people don't necessarily agree, but your underlining  
24 says:

25 "In order to avoid confusion,

1                                   therefore, I have decided to post only  
2                                   those affidavits which are specifically  
3                                   related to the allegations of a  
4                                   paedophile ring and cover-up which  
5                                   prompted calls for an inquiry."

6           And going down:

7                                   "This list does not include the many  
8                                   sex abuse allegations of victims who  
9                                   did not apply for standing at the  
10                                  inquiry."

11                                 So from my reading of this, the people are  
12                                 very careful to say that these are only allegations.

13                                 **MR. CIPRIANO:** Well, I guess we have to read  
14                                 the first statement and see "alleged" in quotes.

15                                 **THE COMMISSIONER:** Well, "affidavits are  
16                                 real and alleged victims...", yes.

17                                 **MR. CIPRIANO:** When we're on that website,  
18                                 it has every single affiant on it. There's no separation  
19                                 between real and alleged. There's just simply affidavits.

20                                 **THE COMMISSIONER:** I'm only going with what  
21                                 you've given me.

22                                 **MR. CIPRIANO:** And I'm telling you, Mr.  
23                                 Commissioner, that the website ---

24                                 **THE COMMISSIONER:** You're giving me evidence  
25                                 now?

1                   **MR. CIPRIANO:** No. Well, if we can go to  
2 the website we can view it for ourselves.

3                   **THE COMMISSIONER:** No ---

4                   **MR. CIPRIANO:** I mean, at the expense of not  
5 having a 30-page reply, I didn't cut and paste the names  
6 but ---

7                   **THE COMMISSIONER:** Rule number one is that  
8 you can't give me evidence.

9                   **MR. CIPRIANO:** Okay. I'm not giving you  
10 evidence. I'm simply stating that there's no effort made  
11 to distinguish between a real and an alleged victim.  
12 "Alleged" is in quotes suggesting the belief of the word  
13 alleged. And so this is what I would submit a perfect  
14 example of how the allegations contained or the conclusions  
15 contained in the affidavits are -- can be treated as the  
16 factual basis giving rise to the inquiry. It can be  
17 treated as true and accepted by the Commission. There's no  
18 effort made to distinguish between a real and an alleged  
19 victim. And who knows how many other websites are out  
20 there like this.

21                   These affidavits, in my submission, arouse  
22 certain emotion in the public, certain hostilities. They  
23 create evidentiary problems for the Commission because,  
24 obviously, as I stated earlier, the Commission cannot  
25 analyse them and nor can they accept them as true. There

1 is no opportunity to challenge the assertions, and it does  
2 unfairly rebut the presumption of innocence.

3 Any person visiting that website or the  
4 Commission website will be led to believe that these are  
5 the facts giving rise to this inquiry.

6 The affidavits are not, in my submission,  
7 reliable. Firstly, many of them are boilerplate  
8 affidavits; they simply repeat themselves. The statements  
9 are conclusory rather than explanatory. No basis for their  
10 conclusions is given. No basis is given as to what steps  
11 some of the Affiants took in support of their conclusions  
12 and a really troubling aspect is that they can be  
13 misleading, and I have quoted the affidavit of Mr. Renshaw.  
14 In think that's a case in point in which someone is  
15 prepared to misrepresent himself either before a court or  
16 before an inquiry under oath. There are problems with that  
17 affidavit.

18 We turn to -- I believe it's my original  
19 notice. His affidavit asserts firstly ---

20 **THE REGISTRAR:** What paragraph?

21 **MR. CIPRIANO:** Paragraph 19, I am sorry.  
22 His affidavit asserts that he was abused in 1983 at the age  
23 of 20. Of course, since being an adult at the age of 20,  
24 he is not a victim of child sexual abuse.

25 Paragraph 4(c) asserts that Father MacDonald

1 is a pedophile. Of course, he provides no clinical or  
2 evidentiary basis for this conclusion nor does he provide  
3 any qualifications he has to make this conclusion.

4 Paragraph 5 reads that he was raised in a  
5 family of devout Catholics and as a result of his sexual  
6 abuse he has had a total loss of his Catholic faith.

7 This gentleman testified under oath and his  
8 answers to questions about his Catholicism are reproduced  
9 and, in my submission, I think they speak for themselves.  
10 This person is prepared to mislead himself under oath and  
11 mislead the Commission or a court, and this is what the  
12 Commission has posted on its website; facts that are  
13 inaccurate and misleading and so it can, in my submission,  
14 by implication, leave the public with an idea that these  
15 are accepted as true by the Commission.

16 I am going to deal finally with an issue  
17 that came up in the submissions on behalf of the victims  
18 and that is the issue of estoppel and whether this motion  
19 resonates with the motion that I had brought earlier. To  
20 an extent, I agree, some of the principles that I have  
21 quoted may overlap with the motion brought earlier on the  
22 issue of jurisdiction, but in my respectful submission,  
23 this is not the same argument.

24 Firstly, the jurisdiction issue is still  
25 pending and, secondly, regardless of what decision is made

1 on that issue and any appeal that may follow, parties are  
2 still able to object on the basis of relevance and  
3 reliability and prejudicial effect. So regardless of what  
4 ruling is given on the jurisdictional issue, any party,  
5 including Commission counsel, can object to certain  
6 evidence if it's considered -- or if they make submissions  
7 that they believe it's unreliable or prejudicial.

8 I have provided two cases, the *Seaboyer* case  
9 at Tab 7 and *Mohan* at Tab -- sorry, *Seaboyer* at Tab 8 and  
10 *Mohan* at Tab 9, both of them dealing with how even  
11 admissible evidence can be excluded on the basis of  
12 prejudicial effect.

13 In *Seaboyer*, at paragraph 23 of my reply,  
14 the Supreme Court says that virtually:

15 "Virtually all common law jurisdictions  
16 recognize a power in the trial judge to  
17 exclude evidence on the basis that its  
18 probative value is outweighed by the  
19 prejudice which may flow from it."

20 In *Mohan*, the Supreme Court said that:

21 "Evidence that is otherwise logically  
22 relevant may be excluded on the basis,  
23 if its probative value is overborne by  
24 the rights of prejudicial effect, if it  
25 involves an inordinate amount of time

1                   which is not commensurate with its  
2                   value or if it is misleading in the  
3                   sense that its effect on the trier of  
4                   fact, particularly a jury, is out of  
5                   proportion to its reliability. While  
6                   frequently considered as an aspect of  
7                   legal relevance, the exclusion of  
8                   logically relevant evidence on these  
9                   grounds is more properly regarded as a  
10                  general exclusionary rule."

11                 And finally the next paragraph Chief Justice  
12                 McLachlin writes in *Seaboyer* -- enumerates four factors  
13                 that can be considered in performing this balancing of  
14                 relevance and prejudicial effect. And those basically deal  
15                 with arousing the emotions of prejudice or hostility and  
16                 sympathy; creating side issues that can distract the jury  
17                 or, in this case, the public, of the main issues; third,  
18                 likelihood that the evidence offered and the counter proof  
19                 will consume an undue amount of time.

20                 Well, here we can't even offer counter proof  
21                 because this is not a criminal trial and we have here,  
22                 hanging on the Commission website, criminal conclusions.

23                 And:

24                                 "...the danger of unfair surprise to the  
25                                 opponent when, having no reasonable

1 ground to anticipate this development  
2 of the proof, he would be unprepared to  
3 meet it."

4 And again, I fall back on the issue here  
5 that this is not a trial and so we can't sit here and try  
6 to meet or disprove some of the allegations.

7 And so the argument I am making today is not  
8 a repeat of the jurisdictional issue. Some of the  
9 principles might overlap but ultimately it's an issue of  
10 prejudicial effect versus prohibitive value, reliability  
11 and relevance.

12 We have had the letter stated by yourself,  
13 Mr. Commissioner, from January and we have heard that the  
14 Commission is not going to make findings of criminal  
15 liability and so in my respectful submission, in order to  
16 be true to that, we cannot leave on the website exhibits  
17 that, by implication, have, in my submission, in the  
18 public's view, created the reliability and the truth of  
19 these affidavits.

20 The applicants enjoy presumption of  
21 innocence. That is a constitutional presumption.

22 If we could just have one moment.

23 **(SHORT PAUSE/COURTE PAUSE)**

24 **MR. CIPRIANO:** I will just end off by saying  
25 this; the fact that the affidavits are there posted and

1           there is a resistance to having them moved, I think, could  
2           suggest that some parties don't value the presumption of  
3           innocence.

4                       **THE COMMISSIONER:** It's a pretty strong  
5           comment.

6                       **MR. CIPRIANO:** Well ---

7                       **THE COMMISSIONER:** I think we are all  
8           Officers of the Court here and I think that everyone here  
9           is duty bound to uphold that principle.

10                      **MR. CIPRIANO:** Well, if we are duty bound,  
11           then I think we owe it to the Terms of Reference and to  
12           what we've said that the Commission should not and cannot  
13           take these conclusions as fact and cannot leave them by  
14           implication out there ---

15                      **THE COMMISSIONER:** There is a right to a  
16           difference of opinion and if you are going to say that if  
17           people take a different view than yours, they are not  
18           upholding the values of the Charter and the basis of  
19           principles of justice, I hate to see you walk out of here  
20           after with the rest of your confreres.

21                      **MR. CIPRIANO:** No, no, no, what I'm saying  
22           is -- I don't want to be misquoted. What I'm saying is ---

23                      **THE COMMISSIONER:** I thought I had you  
24           pretty well there, but okay.

25                      **MR. CIPRIANO:** No, what I'm saying is if we

1 are going to respect the presumption of innocence -- people  
2 are certainly entitled to have a difference of opinion. I  
3 am not saying they are not entitled to have a difference of  
4 opinion; they are. But that difference of opinion cannot  
5 be seen by the public as being enshrined by the Commission  
6 when the Commission cannot itself make findings. And so it  
7 is going back to what I am saying; that having them there  
8 on the website will and has, by implications, shown them to  
9 the public to be reliable pieces of information and, in my  
10 submission, that's what this Commission cannot do.

11 **THE COMMISSIONER:** M'hm.

12 Can you help me out on your last paragraph  
13 in your Applicants' Reply?

14 You indicate that:

15 "The Applicants also agree that issues  
16 of relevance, materiality and  
17 confidentiality ought to be determined  
18 on a witness-by-witness basis as  
19 articulated by the Citizens for  
20 Community Renewal."

21 What do you mean by that?

22 **MR. CIPRIANO:** I am sorry. Which paragraph  
23 are you quoting?

24 **THE COMMISSIONER:** The last one in your  
25 document.

1                   **MR. CIPRIANO:** There I was adopting the  
2                   submissions made by the counsel for the Citizens for  
3                   Community Renewal and I think this ---

4                   **THE COMMISSIONER:** What do you mean by that,  
5                   though?

6                   **MR. CIPRIANO:** If I could just refer to the  
7                   materials.

8                   **THE COMMISSIONER:** It sounded like you were  
9                   accepting that if are calling alleged victims, then we  
10                  should be deciding issues with respect to what they are  
11                  going to say and -- is that what you mean?

12                  **MR. CIPRIANO:** No. Simply, if we look at  
13                  paragraph 8 of their materials ---

14                  **THE COMMISSIONER:** Just a second.

15                  **THE REGISTRAR:** Their submissions?

16                  **MR. CIPRIANO:** Their submissions, yes,  
17                  sorry.

18                  **THE COMMISSIONER:** Paragraph 8.

19                  **MR. CIPRIANO:** M2-B1.

20                  **THE COMMISSIONER:** Oh, of course. Okay. I  
21                  see what you mean.

22                  **MR. CIPRIANO:** That's what I meant in terms  
23                  of adopting that paragraph.

24                  **THE COMMISSIONER:** Yes.

25                  **MR. CIPRIANO:** And I also adopt the

1 paragraph earlier where -- and this is what I stated at the  
2 outset. I am not asking for a publication ban. I am  
3 asking for -- the remedy I am seeking is that they be  
4 removed or redacted to the extent that they affect the  
5 Applicants.

6 **THE COMMISSIONER:** Well, just a minute now.  
7 If they are removed from the website and  
8 they're still available at the front desk, all you are  
9 doing really is taking a one-step remove. So someone from  
10 the public can come, can ask for a photocopy. Is that your  
11 position?

12 **MR. CIPRIANO:** Subject to whatever rules the  
13 Commission makes, yes.

14 **THE COMMISSIONER:** The rules as they stand  
15 are every document, unless ordered otherwise, is available  
16 to the public.

17 **MR. CIPRIANO:** M'hm.

18 **THE COMMISSIONER:** All right? So what you  
19 are telling me -- and I just want to understand -- what you  
20 are telling me is you don't want a ban. We will take those  
21 documents off the website and we will leave them at the  
22 front desk and people can come and photocopy them at a  
23 cost, right?

24 **MR. CIPRIANO:** That's all I asked for.

25 **THE COMMISSIONER:** Okay. Well, no, you are

1       also -- "or redaction". Now, wouldn't "redaction" be, in  
2       effect, censorship, just taking away things from the  
3       public? Then you are not just taking it from the website  
4       to put it on the desk. You're getting the black marker out  
5       and you're wiggling away here. So what is it that you  
6       want?

7                   **MR. CIPRIANO:** I asked for the two in the  
8       alternative.

9                   **THE COMMISSIONER:** Right, but doesn't the  
10      redaction amount to a ban?

11                  **MR. CIPRIANO:** No, the affidavits would  
12      still be there. It would be information that is not  
13      relevant or reliable that would not be there.

14                  **THE COMMISSIONER:** And that's according to  
15      you.

16                  **MR. CIPRIANO:** Yes. I am here making the  
17      submission that the information is not relevant or reliable  
18      and it is highly prejudicial.

19                  **THE COMMISSIONER:** Okay.

20                  **MR. CIPRIANO:** And it has very little  
21      probative value.

22                  **THE COMMISSIONER:** All right.

23                  **MR. CIPRIANO:** And -- sorry.

24                  **THE COMMISSIONER:** Can I just say that -- so  
25      Father MacDonald has standing here.

1                   **MR. CIPRIANO:** Yes.

2                   **THE COMMISSIONER:** And the reason he has  
3 standing is because he's been charged -- it's gone through  
4 the court process -- and sought standing because he had  
5 something to add to this inquiry. Right?

6                   **MR. CIPRIANO:** Well, he sought standing to  
7 protect his interest.

8                   **THE COMMISSIONER:** Right. Okay.

9                   So if it's been out there for four or five  
10 months already -- how many months, I don't know. November,  
11 December, January, February, March -- five months. Isn't  
12 the issue of confidentiality out the window?

13                   **MR. CIPRIANO:** Well, I never said anything  
14 about confidentiality.

15                   **THE COMMISSIONER:** Okay.

16                   **MR. CIPRIANO:** I mean, I stated this  
17 earlier. It's -- anyone can go to the courthouse and order  
18 the indictment or information.

19                   **THE COMMISSIONER:** M'hm.

20                   **MR. CIPRIANO:** Order the transcripts.

21                   **THE COMMISSIONER:** M'hm.

22                   **MR. CIPRIANO:** Now, that could create  
23 another problem because there are publication bans on the  
24 transcripts themselves.

25                   **THE COMMISSIONER:** On which transcripts?

1                   **MR. CIPRIANO:** Those relating to the court  
2 proceedings.

3                   **THE COMMISSIONER:** Right.

4                   **MR. CIPRIANO:** So, I mean, that's a separate  
5 set of issues.

6                   **THE COMMISSIONER:** Oh, yes.

7                   **MR. CIPRIANO:** We may have to cross that  
8 bridge when we arrive there, but I mean, you can't stand  
9 here and argue for confidentiality the fact that he was  
10 charged. As I said, that's in the public domain.

11                   **THE COMMISSIONER:** And anybody in the public  
12 domain would know that Father Charles MacDonald was charged  
13 with sexual assaults and that there are allegations out  
14 there that he assaulted people from this community.

15                   **MR. CIPRIANO:** Those were the allegations.

16                   **THE COMMISSIONER:** No, but that's generally  
17 known, isn't it?

18                   **MR. CIPRIANO:** Well, I mean, anyone can go  
19 and read the charge, the wording of the charge and the  
20 information or indictment.

21                   **THE COMMISSIONER:** M'hm.

22                   **MR. CIPRIANO:** It's there. I mean, I can't  
23 -- no one can stop people from doing that. They're at  
24 liberty to do that. It's part of the court procedures.

25                   **THE COMMISSIONER:** So just one last thing

1           though. What's the difference? You're saying that you  
2           have no problems with keeping those documents public, but  
3           not so public as they are accessible to more people or, put  
4           another way ---

5                         **MR. CIPRIANO:** Well ---

6                         **THE COMMISSIONER:** --- you want them to be  
7           less public?

8                         **MR. CIPRIANO:** I'm more concerned with the  
9           implications that it leaves to the public having them on  
10          the website.

11                        **THE COMMISSIONER:** Okay. But you're not  
12          concerned that they're left at the front desk here?

13                        **MR. CIPRIANO:** That could create problems  
14          should they be misused, and that may be an issue that may  
15          have to be revisited if they are misused in any way.

16                        **THE COMMISSIONER:** M'hm.

17                        **MR. CIPRIANO:** But if they're -- in my  
18          submission, having them available on the website creates a  
19          sense that the Commission has taken them and accepted them  
20          to be true, has given them a rubberstamp of approval.

21                        I'm not saying the Commission has done that,  
22          but it's the ---

23                        **THE COMMISSIONER:** No, no.

24                        **MR. CIPRIANO:** --- perception it creates,  
25          and if provided that other inquiry websites which, in my

1 submission, has done that very fact.

2 **THE COMMISSIONER:** Well, I guess the other  
3 point is you seem to think that being on a website gives  
4 credibility. With my kids, they take the view that you  
5 don't believe anything that's on a website because it's  
6 just there. You know, it can be done by anybody.

7 **MR. CIPRIANO:** I don't know who the authors  
8 of the website are. I mean, I'm just saying I can't stop  
9 them from creating websites. They're at liberty to do  
10 that.

11 **THE COMMISSIONER:** M'hm.

12 **MR. CIPRIANO:** But this Commission has a  
13 duty to ensure that -- and this is when I quoted from *Starr*  
14 *v. Houlden* that the Commission, through its actions, can  
15 leave people or can make findings by implication. And  
16 again, I go back to the issue of the website. Having them  
17 on the website could create the implication, the  
18 irresistible inference, that the affidavits are accepted as  
19 true by the Commission.

20 And I'm not saying that that is, in fact,  
21 the case, but it's the perception. So I agree; I don't  
22 know what the public knows of the minutia of issues that  
23 can come up, but the Commission is duty-bound to recognize  
24 how the public can perceive its acts, its actions and, in  
25 my submission, is duty-bound to ensure that the public --

1 and that it does not leave a perception to the public that  
2 it adopts as true the conclusions made by the affidavits.

3 I want to go back to an issue, because I  
4 don't want to leave the impression that I was saying  
5 something. I may have said it in the wrong terms on the  
6 issue of presumption of innocence. I wasn't suggesting  
7 that parties don't follow that presumption of innocence.

8 What I was trying to put forth is that  
9 that's a fundamental principle in our legal system.

10 **THE COMMISSIONER:** M'hm.

11 **MR. CIPRIANO:** And it has to be respected.  
12 And by leaving them there, it could -- that presumption can  
13 be rebutted by the public and the Commission is duty-bound  
14 to ensure that the public does not inextricably lead to a  
15 conclusion that the Commission has rebutted that  
16 presumption. That's all I meant to say by that. I didn't  
17 mean to offend you, Mr. Commissioner, or any other party.

18 **THE COMMISSIONER:** Well, no, I wasn't  
19 offended. I'm not the people back there.

20 **MR. CIPRIANO:** It probably came out the  
21 wrong way, but that's what I meant to put across when I  
22 said that.

23 **THE COMMISSIONER:** I'm sure if you buy  
24 everyone coffee, they will all forgive you.

25 **(LAUGHTER)**

1                   **MR. CIPRIANO:** But in any event, those would  
2 be my submissions. If you have any further questions ---

3                   **THE COMMISSIONER:** No, not at this time. I  
4 might later on.

5                   **MR. CIPRIANO:** Okay.

6                   **THE COMMISSIONER:** Thank you.

7                   We'll take a short break. We'll take the  
8 afternoon break now, please.

9                   **THE REGISTRAR:** Order; all rise. À l'ordre;  
10 veuillez vous lever.

11                   The hearing will reconvene at 3:25.

12 --- Upon recessing at 3:11 p.m./

13                   L'audience est suspendue à 15h11

14 --- Upon resuming at 3:28 p.m.

15                   L'audience est reprise à 15h28

16                   **THE REGISTRAR:** Order; all rise. À l'ordre;  
17 veuillez vous lever.

18                   This hearing of the Cornwall Public Inquiry  
19 is now in session. Please be seated. Veuillez vous  
20 asseoir.

21                   **THE COMMISSIONER:** Mr. Manson.

22 --- SUBMISSIONS BY/REPRÉSENTATIONS PAR MR. MANSON:

23                   **MR. MANSON:** Good afternoon, Mr.  
24 Commissioner.

25                   **THE COMMISSIONER:** How are you?

1                   **MR. MANSON:** You have already been referred  
2 to paragraph 8 of our brief submission, and that is the  
3 heart of our position. We don't support Mr. Cipriano's  
4 request for relief, but we have some sympathy with his  
5 concerns and would suggest that they scratch the surface of  
6 a very real issue that the Commission is going to have to  
7 deal with at some time.

8                   And so I am going to address some remarks  
9 because of that to get ready for the future.

10                   I think there are three basic principles  
11 that need to be reconciled. The first is the Commission  
12 must be able to fulfill its mandate. It's the mandate that  
13 determines relevance and materiality both with respect to  
14 examinations in-chief and cross-examination, even cross-  
15 examination with respect to credibility. So that's  
16 principle number one. The Commission must be able to  
17 fulfill its mandate.

18                   Number two, to the greatest extent possible,  
19 all Commission proceedings, including documents that it  
20 relies upon, should be public.

21                   Principle number three, while individuals  
22 may have privacy interests that should not needlessly be  
23 violated, more important is the principle that the  
24 Commission should be respectful of the presumption of  
25 innocence. And I use the word "respectful" advisedly. I'm

1 not suggesting that the Commission should be deferential  
2 and that the presumption of innocence necessarily trumps  
3 all other concerns.

4 Throughout these proceedings, Mr.  
5 Commissioner, you've reminded the parties and the public  
6 that the inquiry's role is not to find guilt or innocence  
7 but to pursue questions about how the justice system and  
8 local institutions handled allegations of abuse of young  
9 people in Cornwall.

10 It's the concern of the Citizens for  
11 Community Renewal that either the application be dismissed  
12 or else no relief be granted that prejudices the  
13 Commission's ability to rule on arguments that will  
14 inevitably be made later in a fuller context.

15 In this regard, I want to just quickly refer  
16 to the opening that we've already -- our opening statement  
17 that we've already filed because there's something in it  
18 that may prove to be controversial with respect to the  
19 other parties. It's our position that the Commission will  
20 need to consider some details of complaints that have been  
21 made in the past.

22 If you're going to look at responses, you  
23 need to look at the allegations. And I'm not going to go  
24 in any great detail into that process at the moment other  
25 than to say in our opening statement, as one of the

1 details, we have included whether the allegation had a  
2 credible basis. Now, this may be controversial.

3 We're not suggesting that the Commission  
4 should be considering whether an allegation was true, but  
5 whether it had a credible basis is another matter. That,  
6 in some way, determines how it should have been pursued.

7 Now, Mr. Cipriano is concerned that the  
8 public will make assumptions of guilt. Perhaps that's  
9 true, perhaps not. Perhaps, to some extent, it can't be  
10 avoided, but maybe it can be ameliorated and it may well be  
11 that later, when we have a real context -- by that, I mean  
12 a real witness, a will-say statement, some opportunity to  
13 consider the situation -- that we will be able to recognize  
14 -- reconcile, rather, your fulfilling of your mandate with  
15 respect for the presumption of innocence, but we can't do  
16 that now.

17 Your comments earlier about timeliness we  
18 agree with entirely, but there's two aspects to timeliness.  
19 On the one hand, this is an untimely motion because it is  
20 so late. Part of its lateness is the fact that you have  
21 already made decisions with respect to standing and funding  
22 based on the material that's filed, and the Commission has  
23 to be concerned about its public image. It's our position  
24 that the public are entitled to consider your rulings on  
25 standing and funding and, in order to do so, they have to

1 have access to the material that you relied upon. It  
2 doesn't enhance the Commission's integrity if someone who  
3 is concerned about your funding and standing rulings is  
4 faced with a redacted or missing affidavit. That's  
5 timeliness in the sense of being late.

6 Timeliness in the sense of being premature  
7 was what I was speaking about a moment ago. There is no  
8 proper factual context.

9 The time will come when the Commission will  
10 have to face those issues, but our concern is if you don't  
11 dismiss this motion, which we submit you should, no rulings  
12 with respect to the affidavits be made that in any way  
13 prejudice the real issues and the hard issues that are  
14 going to come forward.

15 If you make any rulings with respect to the  
16 affidavits, Mr. Commissioner, we would submit that they  
17 should be interim, that any order should only be an interim  
18 one pending the re-raising of the issue, if Commission  
19 counsel calls the particular affiant, at which point the  
20 parties can properly address how to balance fulfilling the  
21 Commission's mandate with whatever personal interest a  
22 named individual may bring forward, whether it's  
23 confidentiality, privacy or the presumption of innocence.

24 I want to say two things about the  
25 submissions that Mr. Lee is going to make in a minute.

1 First, we agree with his position on the Dagenais/Mentuck  
2 test, and in that regard, if I can just point out how it  
3 was phrased in paragraph 26 of the *Toronto Star* case.

4 **THE COMMISSIONER:** Where are we now?

5 **MR. MANSON:** This is the case that Mr.  
6 Engelmann circulated earlier today.

7 **THE COMMISSIONER:** And it's in what tab now?

8 **MR. MANSON:** If you look at page 26, the  
9 test -- paragraph 26, rather, in paragraph (a):

10 "Such an order is necessary in order to  
11 prevent a serious risk to the proper  
12 administration of justice."

13 In our position, that claim has not been  
14 made out this afternoon. But if you look at the next  
15 phrase:

16 "...because reasonably alternative  
17 measures will not prevent the risk..."

18 I would submit, Mr. Commissioner, that you  
19 keep that in mind when we revisit this issue down the road.  
20 It may well be that there are reasonably alternative  
21 measures that can respect the presumption of innocence  
22 while at the same time permit the Commission to fulfill its  
23 mandate.

24 **THE COMMISSIONER:** M'hm.

25 **MR. MANSON:** Our concern is if the Motion

1        isn't dismissed we don't want the Commission to start down  
2        a narrow road that may be so narrow that it's difficult to  
3        turn around and come back, which is why you've got our  
4        paragraph 8 and 9:

5                                "Any ruling or order should only be of  
6                                an interim nature and shall not bind  
7                                the Commission or the parties with  
8                                respect to issues dealing with  
9                                allegations of abuse."

10                              Relevance, materiality, confidentiality,  
11        privacy, presumption of innocence, these are the hard  
12        questions that we're going to have to deal with and we need  
13        to wait until the proper context.

14                              So we would ask you to either dismiss the  
15        Motion, Mr. Commissioner, or, if anything is going to be  
16        done with respect to the affidavits, make it only of an  
17        interim nature.

18                              **THE COMMISSIONER:** But, Mr. Manson, Mr.  
19        Cipriano says that the Dagenais test shouldn't apply  
20        because it's not a publication ban that he's seeking.

21                              **MR. MANSON:** Well, I'm reminded of a very  
22        nice little phrase that the Chief Justice just used, "Life  
23        doesn't fall into neatly tagged juridical boxes." What's a  
24        publication ban? What's a website ban? I'm not sure that  
25        it really matters. I think we set out in paragraph 7 that,

1 perusing the Act and your rules, you seem to have three  
2 powers. You can make an order restricting publication or  
3 disclosure in some fashion, which could mean dealing with  
4 the website. Whether Mr. Cipriano wants to call it a  
5 publication ban or not is neither here nor there. You can  
6 mark the affidavits or portions of them as C documents. We  
7 certainly don't support that. Or, say, you could order  
8 that the affidavits or parts of them be removed from the  
9 Commission's website. Those seem to be, we would submit,  
10 within your power.

11 **THE COMMISSIONER:** M'hm.

12 **MR. MANSON:** They're related to the question  
13 of openness and accessibility and it's certainly true;  
14 Dagenais/Mentuck is all about the criminal process. It's  
15 usually not about accused persons. It's usually about  
16 victims, third parties, et cetera. The same principles  
17 apply, and that is that, first and foremost, is openness  
18 and that there has to be a very strong argument to diminish  
19 openness.

20 So it's our submission that whether we're  
21 looking at A, B or C under paragraph 7, that the basic  
22 principle is the Dagenais/Mentuck principle.

23 **THE COMMISSIONER:** All right.

24 **MR. MANSON:** Thank you, Mr. Commissioner.

25 **THE COMMISSIONER:** Mr. Lee, I suppose.

1           --- SUBMISSIONS BY/REPRÉSENTATIONS PAR MR. LEE:

2                   MR. LEE: Good afternoon, Mr. Commissioner.

3                   THE COMMISSIONER: Good afternoon, sir.

4                   MR. LEE: I will attempt today to follow the  
5 order set out in my submissions in terms of the areas I  
6 want to touch on, but I'd like to begin, however, by  
7 picking up where Mr. Manson left off; with paragraphs 8 and  
8 9 of the Citizens for Community Renewal submissions. I  
9 don't expect any of my friends here to disagree with me  
10 that everyone, all counsel for all parties, seems to agree  
11 with the idea that this motion needs to be confined to the  
12 direct issues that we're dealing with today. This should  
13 not be a broad sweeping motion. It should not find a  
14 decision coming out of it that affects things down the line  
15 and this deals with the standing and funding applications  
16 and those affidavits filed in relation to these applicants.  
17 And so I'd like to go on the record saying that.

18                   Now, that being said, I'd like to discuss a  
19 little bit further exactly what this motion applies to and  
20 specifically in respect of the fact that it was brought  
21 with the Estate of Kenneth Seguin named as an applicant.

22                   I've set out in my materials, beginning on  
23 the first page of my materials, the fact that our  
24 submission is that Mr. Cipriano does not have standing to  
25 bring this application on behalf of the Estate of Ken

1 Seguin, and this goes back, I think, Mr. Commissioner, to  
2 your reasons for decision dated November 17<sup>th</sup>, 2005 in which  
3 you announced your decision with respect to standing and  
4 funding for all parties that applied or most parties that  
5 applied. I think you asked for further submissions from a  
6 couple of parties. And I've set those out in my materials,  
7 and I don't think we need to turn to the transcript  
8 necessarily. Essentially, what you said was that the  
9 Estate of Ken Seguin would have standing for Part 2 but it  
10 would not have standing for Part 1 because it was  
11 unnecessary given that the Ministry of Community Safety and  
12 Correctional Services were representing his interests in  
13 Part 1.

14 And whether that became particularly  
15 relevant, as you recall, is when Mr. Cipriano brought his  
16 first motion relating to the jurisdiction of the inquiry  
17 and you, yourself, without mention from any other party,  
18 brought up the fact that you had some concerns that he  
19 purported to bring a motion on behalf of, once again,  
20 Charles MacDonald as well as the Estate of Ken Seguin.  
21 That transcript is found at -- now, my materials do not  
22 have the correct tab. My materials -- Tab B of my  
23 materials is not the right transcript. I'm looking for a  
24 transcript that begins -- that is February 23 and begins at  
25 page 29. That is found at Tab C of my materials when it

1           should've been at Tab B. I'm not sure which tab of your  
2           materials it would be at. No, sorry. This is a tab to my  
3           submissions, not to my Book of Documents.

4                           Can you go to -- oh, it looks like Tab B.  
5           Okay. So it appears to be fine in yours.

6                           So in that transcript, beginning at line 23,  
7           you say:

8    "So Mr. Cipriano, I guess the first  
9    thing when I'm looking at this, and  
10    I've just perused it, is that you're  
11    purporting to bring this on behalf of  
12    Father Charles MacDonald and the Estate  
13    of Kenneth Seguin."

14                           Mr. Cipriano replies:

15    "Yes.

16    "THE COMMISSIONER: This is a Phase I  
17    matter. We are in Phase I and  
18    Corrections is acting for the Estate of  
19    Ken Seguin with respect of Phase I."

20                           You then go on, further down the page, and  
21           you say:

22    "...I think what you might want to do  
23    then is bring leave to bring the motion  
24    on behalf of the Estate of Ken Seguin  
25    because there might be some issue from

1 Corrections and from other parties as  
2 to whether or not you have the ability  
3 or the standing to do that at this  
4 point."

5 Mr. Cipriano replies:

6 "Very well. I can do that."

7 Mr. Cipriano obviously made the decision  
8 during the last motion that he would not do that. He did  
9 not seek leave and he did not mention Ken Seguin in his  
10 submissions at all. And yet, this Motion is also brought  
11 on behalf of Ken Seguin and Charles MacDonald. Our  
12 position is that the estate wasn't properly included in  
13 this Motion as well and that Mr. Cipriano does not, in  
14 fact, have standing.

15 I obviously don't have the benefit of a  
16 transcript but I think I was paying fairly close attention  
17 this morning and I didn't hear any argument specifically  
18 related to Mr. Seguin, but I'll assume that he did not give  
19 up his position and did not ---

20 **THE COMMISSIONER:** Yes, but it could be  
21 argued that the standing hearings are not part of Phase I.

22 **MR. LEE:** It could be. My submission on  
23 that would be that this motion, it would seem to me, in the  
24 grand scheme of thing, affects the standing phase of this  
25 inquiry. It affects Phase I. It could affect Phase I. We

1 don't know yet what the effect of these affidavits -- of  
2 this order being granted. We don't know what the effect of  
3 you making an order redacting these affidavits or removing  
4 them from the website, or whatever it may be. I don't know  
5 the nature of the order that you may make and it could  
6 affect Part 2.

7 My submission is that appropriately here Mr.  
8 Cipriano should've brought a motion for leave or should've  
9 applied for leave to represent Ken Seguin in the entirety  
10 of the inquiry for the purposes of this motion for any area  
11 it could touch and, in my submission, this could touch  
12 Phase I in some way.

13 **THE COMMISSIONER:** Okay.

14 **MR. LEE:** Now, regardless of whether or not  
15 Mr. Cipriano has standing to bring this on behalf of the  
16 Estate of Ken Seguin, I have difficulty understanding what  
17 prejudice the Estate of Ken Seguin could suffer as a result  
18 of these affidavits being up. I've put at paragraph 9 of  
19 my submissions that, as an example, it is well settled that  
20 an estate cannot maintain an action for liable or slander  
21 and that defamation is a solely personal act ---

22 **THE COMMISSIONER:** Okay. Let's leave the  
23 Seguin argument alone and let's get on with the merits of  
24 the case.

25 **MR. LEE:** Certainly.

1                   Now, I've included in my materials as the  
2                   second point, I suppose -- I've raised the issue of issue  
3                   estoppel.

4                   **THE COMMISSIONER:** M'hm.

5                   **MR. LEE:** I suppose more properly my concern  
6                   is with the timing and the appropriateness of this Motion.

7                   Last month, Mr. Cipriano brought the motion  
8                   with respect to the jurisdiction of the Commission. The  
9                   gist of that argument, as I understand it, was that if  
10                  victims are permitted to testify, the effect will be that  
11                  Father MacDonald will be left "factually guilty", is the  
12                  phrase that Mr. Cipriano used. And he essentially argued  
13                  that the public either would not or could not appreciate  
14                  the nature of the inquiry and the limitations imposed upon  
15                  the Commission in the sense of its inability to find --  
16                  make determinations as to criminal or civil responsibility.  
17                  And he argued, therefore, the result of any allegation made  
18                  would be that the public would consider it to be true and  
19                  that Father MacDonald would have no recourse to clear his  
20                  name.

21                  It would seem to me, Mr. Commissioner, that  
22                  those same arguments are being voiced again here today with  
23                  respect to this. By leaving Father MacDonald's name in  
24                  these affidavits, he's going to be left factually guilty  
25                  and that the Commission has a duty, if you will, to ensure

1           that that doesn't happen.

2                         Now, my concern, I suppose, is either one of  
3           two things. This perhaps was more properly brought at the  
4           same time as the jurisdiction motion since it seems to me  
5           it ties in with that. Or at the very least I would suggest  
6           that it would've been appropriate to wait for your ruling  
7           on the jurisdiction motion before bringing this motion to  
8           see whether or not there was a direct answer to this  
9           question in there. I'll leave that at that.

10                        Now, one of the big questions that's arisen  
11           today from Mr. Cipriano's arguments is whether or not this  
12           is a publication ban. It's a little bit semantic, I  
13           suppose. My argument would be that he's attempting to  
14           limit accessibility to these affidavits and so there's --  
15           whatever you want to call it -- it seems to me it certainly  
16           looks like a publication ban and it feels like a  
17           publication ban.

18                        I agree with what Mr. Manson had to say,  
19           that regardless of what we title this, if we can't strictly  
20           apply the Dagenais/Mentuck test it's because this  
21           technically isn't a publication ban. At the very least,  
22           the principles therein are good ones and I would submit to  
23           you that the same test should apply.

24                        And the burden, we have to remember, is on  
25           Mr. Cipriano, I would submit, to justify this infringement

1 on the principle of openness and I'm hoping that -- well, I  
2 guess I'm not hoping -- my submission to you is that that  
3 principle of openness certainly applies to this proceeding  
4 and I can -- I won't bring you there, but I'll draw your  
5 attention to the *Toronto Star Newspaper v. Ontario* case  
6 that Mr. Engelmann passed up today and the paragraphs he  
7 pointed you to early on today.

8 Now, the test set out in *Dagenais* and  
9 refined in *Mentuck* is actually set out, as Mr. Manson  
10 pointed out, at paragraph 26 of the *Toronto Star* case.  
11 Just to reiterate, it said:

12 "A publication ban should only be  
13 ordered when: (a) such an order is  
14 necessary in order to prevent a serious  
15 risk to the proper administration of  
16 justice because reasonably alternative  
17 measures will not prevent the risk;  
18 and...[secondly] the salutary effects  
19 of a publication ban outweigh the  
20 deleterious effects on the rights and  
21 interests of the parties and the  
22 public, including the effects on the  
23 right to free expression, the right of  
24 the accused to a fair and public trial,  
25 and the efficacy of the administration



1                    *Dagenais*, a 'real and substantial'  
2                    risk. That is, it must be a risk the  
3                    reality of which is well-grounded in  
4                    the evidence. It must also be a risk  
5                    that poses a serious threat to the  
6                    proper administration of justice. In  
7                    other words, it is a serious danger  
8                    sought to be avoided that is required,  
9                    not a substantial benefit or advantage  
10                   to the administration of justice sought  
11                   to be obtained."

12                   And so there are a couple of principles that  
13                   we need to pull out of that. The first one obviously is  
14                   that the risk needs to be serious or there needs to be a  
15                   real and substantial risk, as they put it in *Dagenais*.

16                   And the second is that you require the risk  
17                   to be well-grounded in the evidence, and I'll return to the  
18                   evidentiary basis of this motion later, but I think those  
19                   are important points to pull out of that.

20                   Now, I think it's trite to say that the open  
21                   court principle is important and it's especially important  
22                   in a democratic society and, as I've said and as Mr.  
23                   Engelmann pointed out in the *Toronto Star* case, it applies  
24                   to all judicial proceedings and, I would submit, this  
25                   inquiry.

1                   At paragraph 32 of my submissions, I have a  
2                   principle taken out of Canadian Newspapers in Canada, and  
3                   that is simply that:

4                                "Curtailement of the strong public  
5                                policy in favour of openness can only  
6                                be justified where it is necessary to  
7                                protect social value of superordinate  
8                                importance."

9                   I would like to take you -- there are only  
10                  two cases that I intend to take you to in any detail, and  
11                  the first one is *Waxman v. Waxman* which is at Tab 14 of my  
12                  materials. We can start on the first page of that, page 1  
13                  of 8. The head note does a good job of at least setting up  
14                  what this case is all about it and it reads:

15                                "This is a motion by Defendant Waxman  
16                                for a non publication order in respect  
17                                of his evidence. During the course of  
18                                his cross-examination, Waxman moved for  
19                                an order of non publication without  
20                                having given prior notice to the other  
21                                parties. He argued that the  
22                                publication of his testimony would  
23                                result in embarrassment to him and his  
24                                family and might have an effect on  
25                                other litigation in which he was

1                   involved. Waxman argued that his  
2                   family should not have to hear further  
3                   unfounded allegations against him and  
4                   that his business opportunities have  
5                   been hurt by information which had  
6                   already been published concerning this  
7                   litigation."

8                   Now, at paragraph 3 of the decision, Justice  
9                   Saunderson sets out the grounds initially raised by  
10                  Waxman's counsel, Mr. Lenczer, and they were that -- and  
11                  it's quoted in the trial decision, just really  
12                  embarrassment for the sake of embarrassment and the second  
13                  consequence of publication was the effect on litigation out  
14                  there.

15                  Justice Saunderson dismissed the first  
16                  ground, just really embarrassment for the sake of  
17                  embarrassment. He didn't let that get any further.

18                  At paragraph 6, however, it's important to  
19                  notice that it's written:

20                         "Although I permitted Mr. Lenczer to  
21                         call the evidence of Robert Waxman  
22                         about possible harm that could arise if  
23                         the non publication order were not  
24                         granted, I refuse to receive  
25                         documentary and viva voce evidence on

1                   the motion detailing past publication  
2                   of allegations unrelated to the Philip  
3                   litigation."

4                   And I point that out in that in this case  
5                   it's important to note that there was evidence before the  
6                   Court of exactly what the prejudice and harm would be, and  
7                   Waxman himself gave evidence. The Court continues at  
8                   paragraph 7:

9                   "Waxman gave evidence that various  
10                  articles have appeared in the press  
11                  which have been personally devastating  
12                  and damaging to his reputation. He  
13                  said that he's been concerned for his  
14                  family, principally for his children  
15                  who have expressed concerns about what  
16                  they have heard at school. Since the  
17                  litigation commenced on July 30, 1998,  
18                  articles have appeared in the press  
19                  from time to time relating to the  
20                  Philip litigation. Now, although  
21                  Waxman has denied all the allegations,  
22                  those articles have had the same type  
23                  of devastating effect. They have  
24                  damaged his reputation in the metals  
25                  industry. He has not been able to

1                   obtain employment in the same vein than  
2                   he previously had."

3           And at paragraph 12:

4                   "He submitted that damage to  
5                   reputation, damage to business  
6                   opportunities and damage to one's  
7                   children constitute irreparable harm.  
8                   Further, the balance of convenience is  
9                   to protect Robert Waxman's reputation  
10                  against a smidge of evidence that  
11                  really is irrelevant to this case."

12           And those are obviously Waxman's words there.

13                   And so over on page 4 of 8 near the bottom  
14                  of the page, just above paragraph 20, the trial judge asks  
15                  the question that he needs to answer, and that question is:

16                   "Will Robert Waxman suffer irreparable  
17                   harm if the publication order is not  
18                   made?"

19           Paragraph 21, he writes:

20                   "Evidence of irreparable harm must be  
21                   clear and not speculative. It must be  
22                   serious enough to justify a departure  
23                   from the general principle of  
24                   openness."

25           Over the page at paragraph 23, he writes:

1 "Even accepting that it would be very  
2 unpleasant to read about serious and  
3 unproven allegations in the newspaper,  
4 the Supreme Court of Canada has held  
5 that the sensibilities of individuals  
6 are generally no basis for exclusion of  
7 the public from judicial proceedings."

8 Finally, if I can turn to the judge's final decision at  
9 paragraph 41 on page 7 of 8 at the bottom, he writes:

10 "Given the direction provided by the  
11 Supreme Court that sensibilities of  
12 individuals, as a general rule, form no  
13 basis for exclusion of the public,  
14 given the nature of possible harm  
15 balanced against the public interest in  
16 openness and given the other  
17 considerations set out earlier, I find  
18 no overriding factors of subordinate  
19 importance or circumstances giving rise  
20 to the possibility of serious harm or  
21 prejudice to Robert Waxman sufficient  
22 to warrant a departure from the general  
23 principle that court hearings should be  
24 open to and accessible to the public by  
25 media report and, accordingly, the

1 motion is dismissed."

2 So in this case we had Mr. Waxman who was  
3 trying to stop allegations against him from being made  
4 public. In that case, the press had reported on the  
5 allegations as well as the litigation. The applicant  
6 alleged in that case that the effects of the allegations  
7 were devastating, not only on himself but also on his  
8 family and his business. Mr. Waxman publicly denied all of  
9 the allegations and, I would submit, all of those factors  
10 are similar to what we have here.

11 What sets this case apart is that we had  
12 actual evidence from Mr. Waxman as to the prejudice. And  
13 despite all of that, the Court still refused to infringe  
14 upon the principle of openness.

15 Another point I would like to bring up is  
16 that this is in a civil litigation context, private parties  
17 battling over whatever it is they're battling over. We're  
18 dealing with a public inquiry here. I would suggest to you  
19 that the principle of openness in a public inquiry is even  
20 higher than it is in civil litigation despite the fact that  
21 in civil litigation it's an overriding principle. So as I  
22 said, that's the first case that I wanted to bring to your  
23 attention.

24 As I've said, regardless of whether we call  
25 this a publication ban or Mr. Cipriano calls it something

1       else or you determine whether it's a publication ban or  
2       something else, I submit that the burden is on Mr. Cipriano  
3       and Mr. MacDonald to lead evidence to justify the remedy  
4       that they're seeking.

5                    Along those lines, Tab 40 -- or sorry,  
6       paragraph 41 of my submissions, I've set out a principle  
7       from the *Dagenais* case and I'll just read that to you as  
8       well:

9                                "The party seeking to limit the  
10                               openness of the inquiry process bears  
11                               the burden of justifying that  
12                               limitation by demonstrating that the  
13                               ban is necessary, that it relates to an  
14                               important objective that cannot be  
15                               achieved by another method, that it is  
16                               as limited as possible and that there  
17                               is a proportionality between a salutary  
18                               and deleterious effects of the ban."

19                    But again, we submit that no evidence  
20       whatsoever has been filed in support of the present motion  
21       and, as a result, Mr. Commissioner, I submit to you, you  
22       have no basis on which to make this decision. You have no  
23       evidence as to what the prejudice is on the applicant.

24                    The problem with that, Mr. Commissioner, is  
25       that these affidavits, as you know, were submitted as part

1 of my client, the Victims Group's application for standing  
2 and funding and these affidavits represent the best  
3 evidence that was available in furtherance of the purposes  
4 of applying for standing and funding. I would submit that  
5 they formed a significant portion of our application. They  
6 must have informed your decision in some way.

7 We're in a difficult position with this, Mr.  
8 Commissioner, because if we don't include those affidavits  
9 and if we don't have something in those affidavits saying  
10 that, "I, the affiant, am a victim of sexual abuse and  
11 that's why I have something to do with this inquiry and  
12 that's why I'm entitled to standing and funding," we would  
13 inevitably have garnered criticism that we needed better  
14 evidence, but now that we've put evidence in, we're getting  
15 criticism that it went a little too far.

16 Now, there's been a lot said to date.  
17 You've said it and Mr. Manson said it and Mr. Cipriano has  
18 addressed it, about the timeliness of this motion.  
19 Obviously, we would echo the sentiments of Mr. Manson that  
20 this should have been brought at the time. This document  
21 was made -- these documents were made an exhibit. You made  
22 it clear during public hearings that they were going to be  
23 scanned and go on the website.

24 And if I can turn you to Tab C of my  
25 submissions, it's an excerpt from a transcript of February

1 23<sup>rd</sup>, '06.

2 **THE COMMISSIONER:** No, it's not. November  
3 5<sup>th</sup> -- November 7<sup>th</sup>, sorry, is Tab C.

4 **MR. LEE:** Oh, sorry, yes, that's what I'm  
5 looking for, at page -- sorry, I'm obviously having trouble  
6 finding it. Page 96, is that correct?

7 **THE COMMISSIONER:** Yes.

8 **MR. LEE:** Beginning at line 6, you say:

9 "The other issue, I suppose, is given  
10 that they are now exhibits, these  
11 matters are now in a public domain. I  
12 know that the press wants to view the  
13 copies that we have, and it is my  
14 intention that eventually these  
15 submissions will be scanned and put on  
16 the webcast as part of the transcript  
17 of today's proceedings. So having said  
18 that, is there anyone -- any folks that  
19 have presented today that have any  
20 questions or comments about their  
21 material being published?"

22 At that point my colleague, Mr. Talach,  
23 stood up and said that we inadvertently had somebody who  
24 had requested anonymity, GR who filed an affidavit, had  
25 signed an extremely legible signature that you would have

1           been able to glean his name from, and Mr. Talach asked that  
2           that be dealt with in some way. Nobody else raised any  
3           objections.

4                       **THE COMMISSIONER:** They hadn't seen your  
5           material.

6                       **MR. LEE:** No, they hadn't seen my material.

7                       And the next point that I was going to get  
8           to is it would seem to me at that point, when you asked  
9           everybody in this room whether or not they had any problem  
10          with putting the materials on the website, Mr. Cipriano or  
11          Mr. Neville -- I wasn't here that day; I have no idea who  
12          appeared for them -- it would seem to me that it would have  
13          been prudent to say, "Well, hold on a minute; we don't know  
14          what's on there. Why don't you let us have a look at it  
15          before you go ahead and put it on the website?" That would  
16          have been prudent. It would have been prudent to say,  
17          "Well, I'll make a note to go look at the website once it's  
18          up there and see what's on there." I believe Madam Clerk  
19          decided it was five months since that's been posted before  
20          this motion is brought.

21                      It's not appropriate. It's too late.

22                      Now, the other decision that I was hoping to  
23          bring you to, and I'm not going to bring it to you in as  
24          much detail as I did Waxman, is *Orpin*, and that's at Tab 17  
25          of my materials. And again, I'll begin with the head note

1 just to set the context:

2 "This was an application by a doctor  
3 for a ban on any further publication of  
4 his name pending his appeal. The  
5 College of Physicians and Surgeons also  
6 applied for an order to protect the  
7 complainant by banning the publication  
8 of her name or of any information which  
9 could serve to identify her. The  
10 College had found the doctor guilty of  
11 sexual impropriety with a woman patient  
12 and revoked his licence to practise  
13 medicine. The doctor's appeal was from  
14 this decision."

15 So the context is slightly different in this  
16 in that, admittedly, Orpin, in this case, had had a finding  
17 of misconduct made.

18 Now, what happened in this case was that the  
19 finding was made and the doctor expressed his intention to  
20 appeal, and the rules of the College state that pending an  
21 appeal, he is permitted to practise medicine despite the  
22 fact there had been a finding of misconduct, but pending  
23 appeal he's allowed to practise.

24 The editor of the Ottawa Citizen -- and this  
25 is set out at the bottom of page 2 in the last two

1 paragraphs -- the editor of the Ottawa Citizen thought that  
2 that was newsworthy, presumably from the point that he was  
3 shocked somewhat to find out that this doctor could  
4 continue to practise.

5 So what happened was the editor of the  
6 newspaper caused a search to be made of the records of the  
7 Court and found the name of the doctor. The editor  
8 assigned a story and a reporter actually spoke to the  
9 doctor -- I'm at the top of page 3 here -- who the Court  
10 describes as speaking very freely about his position with  
11 respect to the appeal.

12 And in the second paragraph:

13 "The doctor said that he was innocent  
14 and never had sex with the woman and  
15 was appealing the decision because the  
16 College would not hear evidence showing  
17 that his approach to therapy was valid.  
18 He advanced to the reporter the  
19 argument that his therapy methods were  
20 well documented in professional  
21 literature. He described his  
22 therapeutic approach as a loving but  
23 fraternal approach to therapy that  
24 involves hugging and touching... And so  
25 on January 5..."

1 Two paragraphs down from there:

2 "...the story was published. It recited  
3 the facts of the decision. It named  
4 the doctor and it quoted the doctor's  
5 interview in which he claimed to be  
6 innocent."

7 Now, in the middle of page 4 of *Orpin* the  
8 Court sets out three points that it feels make this case  
9 somewhat unusual. And the first, as I've said, is that:

10 "...the applicant does have a number of  
11 previous findings against him of  
12 professional impropriety and,  
13 particularly, that kind of sexual  
14 impropriety."

15 So the Court writes:

16 "To that extent, it is a matter of  
17 public record that he has, in the past,  
18 been found guilty of this kind of  
19 conduct. This case is therefore  
20 somewhat unusual because the public  
21 record already contains findings  
22 against him disclosing his identity as  
23 a person who has engaged in the kind of  
24 conduct found by the College here. The  
25 second is that the name of the doctor

1 has already been published and to the  
2 extent the cat is out of the bag and  
3 cannot be put back into the bag and,  
4 finally, the doctor decided to give an  
5 interview to the newspaper in which he  
6 sought to advance his position with  
7 respect to the merits of his appeal on  
8 the findings of the College."

9 And the Court writes, in making its  
10 decision, on the last page that:

11 "It is undoubted that the publication  
12 of the appellant's name will cause harm  
13 and distress to him. That is true of  
14 every publication of a finding of  
15 misconduct. The courts, in weighing  
16 those factors against the powerful  
17 presumption of openness in judicial  
18 proceedings, have come down on the side  
19 of the public's right to know what  
20 transpires in their courts of law. I  
21 see nothing in this case with respect  
22 to the doctor to displace that powerful  
23 presumption in our law of access by the  
24 public, including the press towards  
25 courts of law."

1                   Now, before Mr. Cipriano gets up here for  
2                   reply, I will make it clear that I am not suggesting that  
3                   this case is perfectly analogous to what we're dealing with  
4                   here in that Mr. MacDonald's charges have been stayed. He  
5                   enjoys the constitutional presumption of innocence. This  
6                   Commission has not made a finding of misconduct and will  
7                   not make a finding of misconduct with respect to Father  
8                   MacDonald.

9                   But the general principles set out in *Orpin*  
10                  are applicable. As in *Orpin*, Father MacDonald has long  
11                  been the focus of allegations of sexual abuse that have  
12                  received significant media attention.

13                  At Tab 9 of my authorities is the Queen and  
14                  MacDonald, the decision where Justice Chilcott stayed the  
15                  charges against Father MacDonald. I just very briefly want  
16                  to bring you to two paragraphs. The first is paragraph 30  
17                  which is at page ---

18                  **THE COMMISSIONER:** What tab?

19                  **MR. LEE:** Tab 9.

20                  **THE COMMISSIONER:** Sorry. Okay.

21                  **MR. LEE:** Page 5 of that decision at  
22                  paragraph 30. The third line of paragraph 30, the first  
23                  full sentence is,

24                                 "Some of the unusual aspects of the  
25                                 evidence which the transcripts will

1 disclose are the charge of obstruction  
2 against Malcolm MacDonald and the  
3 extraordinary amount and extent of  
4 media coverage."

5 At paragraph 45, ---

6 **THE COMMISSIONER:** But that's Malcolm  
7 though. That's not Father MacDonald.

8 **MR. LEE:** No. This still deals with Charles  
9 MacDonald. The reason I believe, and Mr. Cipriano can  
10 correct me if I'm wrong, but I believe that the reason that  
11 the charges of obstruction against Malcolm MacDonald are  
12 relevant is because he was the lawyer who drafted the  
13 release in the *DS* case. So I think Justice Chilcott was  
14 just going through here stating that there were a number of  
15 things that made this case fairly bizarre. I don't care  
16 about the Malcolm MacDonald part at all. I was simply  
17 reading for continuity to get to the part about where  
18 there's been an extraordinary amount and extended media  
19 coverage.

20 Does that make sense, Mr. Commissioner?

21 **THE COMMISSIONER:** Sure.

22 **MR. LEE:** Okay. Paragraph 45, the second  
23 last full sentence reads:

24 "He has made some 50 court appearances  
25 and the allegations have received

1 massive publicity both locally,  
2 nationally and internationally."

3 I've also submitted with my submissions an  
4 affidavit from my clerk and that's Exhibit M2-D2. I  
5 thought it was prudent to have some evidence before the  
6 Court of the types of publicity regarding Father MacDonald  
7 that was out there, the span of time this publicity has  
8 covered and the nature of that publicity.

9 So I simply asked -- as my clerk swears in  
10 her affidavit, I asked her to search out and find media  
11 articles relating to Charles MacDonald and the publicity  
12 surrounding him.

13 So the first at Exhibit A to her affidavit  
14 is a copy of a newspaper article from the *Cornwall Standard*  
15 *Freeholder* dated March 1996. And the reason that I'm  
16 bringing you this is that the fourth last paragraph says:

17 "In a written statement released to the  
18 CBC TV program Fifth Estate last  
19 December, MacDonald said, 'The  
20 allegations are fabricated and  
21 lifeless, fuelled by a media against  
22 which one is unable to defend himself.  
23 I emphatically state that I am not  
24 guilty of these allegations against  
25 me.' "

1                   In Ms. Schellenberger's affidavit at  
2                   paragraph 5, she states that she has viewed that  
3                   documentary and she agrees that he did indeed have one of  
4                   his supporters during that program profess his innocence.  
5                   And the reason I bring that up is it's akin to *Orpin* where  
6                   Dr. Orpin took advantage of the media and used the media to  
7                   get out the message that he didn't do this and that the  
8                   allegations against him were false.

9                   Now, the exhibit set out in Ms.  
10                  Schellenberger's affidavit were drawn, as I said, from  
11                  March of 1996 to February of 2005 and I think we all know  
12                  there's been a fair amount of publicity surrounding this  
13                  inquiry. So presumably, to date, that publicity continues.

14                  Not only, however, has the publicity been in  
15                  the sense of matter of fact reporting on charges being laid  
16                  but on some of the activity and some of the reaction to  
17                  what's happened.

18                  If I can have you turn to Exhibit D, this is  
19                  taken from the CBC News website and it's dated May 9, 2002.  
20                  This is at the time where apparently efforts were underway  
21                  to have an inquiry called in Cornwall.

22                  The second paragraph speaks of the  
23                  Survivors' Network of those Abused by Priests or SNAP-  
24                  Canada and it apparently represented -- I don't know if  
25                  that group still exists -- but it represents victims of

1 sexual abuse by priests. It says that it wants the church  
2 to,

3 "stop using legal delaying tactics to  
4 fight claims of abuse, ..."

5 And two paragraphs down,

6 "David Gagnon delivered that message  
7 Thursday to the Canadian Conference of  
8 Catholic Bishops in Ottawa. He says,  
9 'The trial of Father Charles MacDonald  
10 in Cornwall is a perfect example of  
11 church obstruction'."

12 So clearly this demonstrates the anger in the allegations  
13 of scandal and wrongdoing report in the media.

14 Now, the reason I brought all this up, Mr.  
15 Commissioner, is that Father MacDonald's name has been  
16 published countless times. He's faced criminal charges in  
17 relation to sexual abuse of young persons. His employer  
18 has settled civil claims against him and in the words of  
19 the Court, the cat is most definitely out of the bag. And  
20 as we know, Father MacDonald has been granted standing and  
21 funding to have his interest represented at the inquiry.

22 Mr. Cipriano has repeatedly made a point of  
23 advancing the position that Mr. MacDonald maintains his  
24 innocence, that his charges were stayed, that he has never  
25 had a finding of misconduct against him or a finding of

1           guilt. And I submit to you, Mr. Commissioner, that it is  
2           inconceivable, given the volume and nature of this media  
3           coverage, that these affidavits could prejudice Charles  
4           MacDonald in any meaningful way.

5                           And more specifically, I would submit to you  
6           that if there is some prejudice, we don't know what it is  
7           because we have no evidence in front of us and you have no  
8           evidence in front of you about the nature of the prejudice,  
9           about the extent of the prejudice and my submission is that  
10          you can't possibly weigh the effect of that prejudice  
11          against the general principle of openness because you have  
12          no details or no evidence as to what that prejudice is.

13                           Subject to any questions you might have,  
14          those are my submissions.

15                           **THE COMMISSIONER:** Just one comment.

16                           **MR. LEE:** Sure.

17                           **THE COMMISSIONER:** I suppose that the  
18          Diocese would have settled -- may have settled a civil suit  
19          does not by itself indicate any wrongdoing.

20                           **MR. LEE:** To be perfectly clear in my  
21          position, I have not suggested and will not suggest that  
22          there has been any finding of misconduct against Charles  
23          MacDonald and I recognize that.

24                           **THE COMMISSIONER:** Okay. No, but by saying  
25          that the Diocese has paid out money on his behalf, you

1 know, I guess we'll go to Mr. Cipriano. Aren't you finding  
2 -- you're saying that to me. Why do you say that? Because  
3 you want me to infer that something happened?

4 **MR. LEE:** I don't think you need to infer  
5 that something happened. I don't think you need to ---

6 **THE COMMISSIONER:** Then why do you say it?

7 **MR. LEE:** I suppose I said it because it's  
8 been a focus of media attention. It was certainly the  
9 focus of the *DS* case. I would argue that the *DS* case is  
10 what got the ball rolling so to speak and formed the basis  
11 of this inquiry. It's been the focus of media attention  
12 and that media attention has ---

13 **THE COMMISSIONER:** I know. I know but  
14 that's not the point. Maybe we're all wrong about that  
15 because it could be without prejudice. It could be a  
16 nuisance claim. It can be a lot of things. So if we're  
17 going to throw in the mix arguments to show that Father  
18 MacDonald is -- is what? He was involved in a civil suit,  
19 yes, okay. That's okay, but I don't want to read in too  
20 much about civil suit.

21 **MR. LEE:** Fair enough.

22 **THE COMMISSIONER:** All right?

23 **MR. LEE:** Yes.

24 **THE COMMISSIONER:** Thank you.

25 **MR. LEE:** Are those your questions? Thank

1           you.

2                           **THE COMMISSIONER:** Mr. Bennett.

3           **--- SUBMISSIONS BY/REPRÉSENTATIONS PAR MR. BENNETT:**

4                           **MR. BENNETT:** Good afternoon, Mr.  
5 Commissioner.

6                           I don't intend to repeat any of the  
7 arguments we've heard from other counsel today. I would  
8 like to tell you why I'm here because I find it quite  
9 interesting that my client took position on this. When I  
10 first saw the motion, my initial reaction was, "Well,  
11 what's the big deal? This is between Father MacDonald and  
12 the Victims Group. That's really where there's an issue  
13 and we shouldn't take a position." My client said, "Wait a  
14 minute. Wait a minute. There is a real problem here."

15                           **THE COMMISSIONER:** M'hm.

16                           **MR. BENNETT:** This isn't between them. This  
17 is a much bigger issue and that's why they advised me to  
18 come here today, and it has to do with the openness and the  
19 public issue of this inquiry and going back to the Order in  
20 Council where it's to look at the allegations. What my  
21 client is really concerned about is every time someone  
22 makes an allegation, it's like "No, no, you're not allowed  
23 to make an allegation. You're not allowed to say  
24 anything." And they're saying every time we want to say we  
25 want to be a witness, we want to say anything, we're not

1 allowed to get up there and say anything.

2 I'm not saying that's what has been decided  
3 yet, but that's the perception and they said it's a very  
4 important issue and they said what's even more important is  
5 when these things are a perspective of somebody who has  
6 been -- who is a survivor, is out there that there  
7 shouldn't be a limitation on what they're saying and that  
8 if there is a limitation, but once it's out there, you  
9 can't turn around and say, "No, no, your evidence that's  
10 out there has been accepted, not for the truthfulness but  
11 it's out on the website".

12 You can't start taking things off. This  
13 gives a really bad perception and would set a horrible  
14 precedent if evidence that wasn't objected to at the time  
15 or even quickly after because at first I had sympathies for  
16 Mr. Cipriano. I thought they didn't have funding at the  
17 time when this first came out. They wouldn't have had an  
18 ability to review these affidavits before they went on, but  
19 we're five months later and I thought I may be in the same  
20 position because I won't be here all the time.

21 Something may happen and obviously I don't  
22 have to protect the same type of interest as Mr. Cipriano  
23 and the interest of his client is probably more serious  
24 with respect to damage to reputation potentially than my  
25 client. But when we're looking at it, we're saying this is

1 -- it sets a bad precedent if things aren't done in a  
2 timely manner. And I always read this motion to be a  
3 publication ban and I was quite surprised when I heard it  
4 isn't. And I'm actually quite flabbergasted at the idea  
5 that we take it off the website and put it back in the  
6 clerk's office because it's taking me back -- this whole  
7 inquiry has been quite eye-opening for myself because my  
8 litigation experience is at the time when we didn't have  
9 things so out as we do on the Web and I see the great  
10 attempts by this Inquiry.

11 I commend the Inquiry on making this so  
12 public by having live webcast, by having the transcripts  
13 available, this is the modern world we're in. And what I  
14 hear is an idea that we go back 10 to 15 years the way  
15 litigation and inquiries and anything was conducted where  
16 it took due diligence and really interested parties where  
17 they'd have to go search for the information.

18 Here we have the information being posted  
19 that is filed properly in evidence and that's the way it  
20 should stay. There is a real concern about taking away  
21 from the openness and the publicness of this inquiry.

22 So those really are my submissions and  
23 finally I concur with my friend that any ruling on this  
24 motion really should be limited to the fact that this is  
25 dealing with material for standing and shouldn't set

1 broader implications.

2 Those are my submissions today.

3 **THE COMMISSIONER:** Thank you.

4 **MR. BENNETT:** Thank you.

5 **THE COMMISSIONER:** I think that's it.

6 Mr. Cipriano, a short reply.

7 **MR. MANDERVILLE:** Excuse me, Mr.

8 Commissioner.

9 **THE COMMISSIONER:** Oh, sorry.

10 **MR. MANDERVILLE:** I did not file any  
11 material, but I did intend to make a brief submission.

12 **THE COMMISSIONER:** And I'm sorry, who are  
13 you again?

14 **MR. MANDERVILLE:** Peter Manderville for the  
15 Cornwall Police Service.

16 **THE COMMISSIONER:** I -- no?

17 **MR. MANDERVILLE:** Pardon me? No, what, Mr.  
18 Commissioner?

19 **THE COMMISSIONER:** I'm not inclined to hear  
20 from you because the deal was you were supposed to provide  
21 written material. So I will listen to you on why I should  
22 let you because everyone has gone through now, everybody,  
23 and now we're down to Mr. Cipriano and he's going to say,  
24 "Wait a minute now, I haven't heard -- I haven't even been  
25 able to read what you were going to say".

1                   So go ahead.

2                   **MR. MANDERVILLE:** What I am going to say  
3 will not harm Mr. Cipriano's interests nor undermine his  
4 submissions. I simply wish to point out the other side of  
5 the coin stated with such clarity by Mr. Manson.

6                   **THE COMMISSIONER:** No, no, no. Mr.  
7 Manderville, why should I let you speak now because you  
8 haven't filed material? Were you here or would someone  
9 from your office not know that if you wanted to file  
10 material, you had to do it?

11                   **MR. MANDERVILLE:** I can't say that our  
12 office was unaware of that.

13                   **THE COMMISSIONER:** Okay. So why should I  
14 let you speak now?

15                   **MR. MANDERVILLE:** I simply want to alert the  
16 Commission to a point which has not been raised today  
17 concerning the openness of this inquiry and information  
18 that is produced in public and whether any portions of it  
19 are redacted. It's simply a point to bring to the  
20 Commissioner's attention to the extent it has not been  
21 brought concerning legitimate redaction or editing issues,  
22 that being an item of particular concern to my client where  
23 documents might make reference to a young person's criminal  
24 record, for example; information that was previously made -  
25 - ordered sealed by a Court Order, for example.

1                   My point simply, Mr. Commissioner, is that  
2                   the Commission should be alive to this before posting  
3                   documents, so that suitable editing can take place without  
4                   impinging on Mr. Cipriano's points and merely expanding on  
5                   Mr. Manson's points that the other side of the coin is  
6                   there are legitimate issues for this Commission to consider  
7                   in the context of editing documents down the road.

8                   That is the point I wish to make. You may  
9                   wish to hear from me further; you may decide I have added  
10                  nothing to your considerations. That is the point I wished  
11                  to make.

12                  **THE COMMISSIONER:** Anybody object to this  
13                  gentleman saying anything more or anybody agree?

14                  Go ahead.

15                  --- **SUBMISSIONS BY/REPRÉSENTATIONS PAR MR. MANDERVILLE:**

16                  **MR. MANDERVILLE:** I don't have very much  
17                  more to add. Simply put, Mr. Commissioner, there are going  
18                  to be documents out there where, through inadvertence or in  
19                  the rush to produce documents to the Commission, there may  
20                  be a reference to a young person's criminal record. And of  
21                  course the *Youth Criminal Justice Act* requires that those  
22                  not be published; that there would be a statutory  
23                  prohibition that the Commission should be aware of.

24                  Similarly, there would be instances or could  
25                  be instances where someone's name or information that has

1           been made the subject of a Court Order, Sealing Order, has  
2           been inadvertently disclosed, and I simply urge the  
3           Commission, as I am sure it will be, to be alive to that  
4           down the road, so that whatever ruling you are inclined to  
5           make regarding Mr. Cipriano's motion, it not be such a  
6           ruling that precludes you from editing documents as  
7           appropriate down the road.

8                           Those are all the points I wish to make on  
9           that.

10                           **THE COMMISSIONER:** Thank you.

11                           **MR. MANDERVILLE:** And I take it you have no  
12           questions of me?

13                           **THE COMMISSIONER:** None.

14                           Mr. Cipriano?

15           --- **REPLY BY/RÉPLIQUE PAR MR. CIPRIANO:**

16                           **MR. CIPRIANO:** Thank you, Mr. Commissioner.  
17           I will just try to be very, very brief.

18                           Firstly, with respect to an issue about --  
19           an issue that was raised by Mr. Lee with respect to me  
20           having the burden to show the prejudice.

21                           **THE COMMISSIONER:** M'hm.

22                           **MR. CIPRIANO:** I think that may be the case  
23           if I was seeking a publication ban, and as I said earlier,  
24           there are mechanisms in place for that and I haven't  
25           followed those mechanisms because that's not what I am

1 seeking.

2 In my submission, I don't believe the burden  
3 is on me to show actual prejudice to make this submission.  
4 If one just simply reads the case of *Nelles*, *Nelles* didn't  
5 show actual prejudice. It was case -- it was a question  
6 that was stated, and the Court of Appeal stated in response  
7 that it's the implication that can be left. And so I  
8 disagree with the assertion that I have to show actual  
9 prejudice. But in the event that I do, I believe, in my  
10 submission, that I have shown actual prejudice by the  
11 website that I quoted in my materials.

12 Another point raised was the case -- Mr. Lee  
13 put up the case of Father Charles MacDonald, the stay  
14 application, and there was reference made to the bizarre  
15 things that happened during that case. And without getting  
16 into details, if one simply reads the transcripts of every  
17 single proceeding, one will realize the bizarre things that  
18 happened during that case. There are not all directly  
19 related to Father MacDonald.

20 **THE COMMISSIONER:** M'hm.

21 **MR. CIPRIANO:** I don't know how much weight  
22 to be put in that comment by Justice Chilcott without  
23 actually reading all the transcripts because they relate to  
24 a host of various issues rather than just simply his own  
25 charges.

1                   And finally, I agree with Mr. Manson's  
2                   submission about the balancing that has to be done with the  
3                   presumption of innocence and the ability of the Commission  
4                   to fill its mandate. I agree with that.

5                   I think the Commission has a very important  
6                   role, but also a very difficult role in executing its  
7                   mandate because of the balancing that has to take place.  
8                   You know, Mr. Bennett was here saying we need this to be --  
9                   a lot of the parties have said that we need this to be an  
10                  open process, and let me leave off by saying the affidavit  
11                  has to serve certain things based on what has happened in  
12                  the past.

13                  There are transcripts illustrating what has  
14                  happened that certain witnesses have come forward and  
15                  testified under oath during proceedings and to simply leave  
16                  the affidavits there, in my submission, without contrasting  
17                  them with what has been said in the past would not be a  
18                  full public inquiry. It would not be the openness  
19                  principle that we're seeking here.

20                  The point is that the affidavits present a  
21                  misleading and one-sided view of the facts and, in some  
22                  respects, as was shown by Mr. Redshaw I think, a very  
23                  misleading view of the facts. And it is that perception  
24                  that this Commission is duty-bound to ensure that the  
25                  public is not left with a finding by the Commission either

1 by implication or an actual finding that these facts are  
2 accepted as they are posted on the Commission website.

3 Subject to any questions, Mr. Commissioner,  
4 those are my submissions.

5 **THE COMMISSIONER:** Thank you. All right.  
6 Yes, do you have any other comments?

7 **MS. MORRIS:** No, Your Honour, thank you.

8 **THE COMMISSIONER:** Thank you.

9 Any other matters to be dealt with this  
10 afternoon?

11 No. Then we will adjourn until tomorrow  
12 morning at 10:00 I believe.

13 **MR. DUCASSE:** Your Honour, there is one  
14 outstanding issue.

15 **THE COMMISSIONER:** Oh!

16 **MR. DUCASSE:** Your Honour, Mr. Lee, on  
17 behalf of the Victims Group, and the Diocese has reached an  
18 understanding with respect to some redactions to some  
19 affidavit material which was previously filed, and we  
20 wanted to take the opportunity, given that we are  
21 addressing these types of issue at this juncture, to maybe  
22 address that issue with you now. But given the time  
23 constraints, I am assuming you would prefer to hear from us  
24 tomorrow morning.

25 **THE COMMISSIONER:** So you are saying you and

1 one -- these are affidavits that are where?

2 **MR. DUCASSE:** The Diocese has had  
3 discussions with Mr. Lee. We wrote to Commission counsel,  
4 the Diocese wrote to Commission counsel on Friday  
5 explaining the terms of the agreement, which has been  
6 reached with respect to some minor redactions to the  
7 affidavit material, which was included in their funding  
8 submissions.

9 **THE COMMISSIONER:** In the funding  
10 submissions.

11 **MR. DUCASSE:** Of the Victims Group, that's  
12 correct, Mr. Commissioner.

13 **THE COMMISSIONER:** I guess we will deal with  
14 that tomorrow. I query, just because you and the Victims  
15 Group agree on something, I don't know if the other parties  
16 have received that documentation.

17 **MR. DUCASSE:** I can confirm, Mr.  
18 Commissioner, that Mr. Sherriff-Scott's correspondence was  
19 copied to all counsel.

20 **THE COMMISSIONER:** They may have some  
21 comments to make about that and I may have some comments to  
22 make about that as well.

23 **MR. DUCASSE:** Very well, Mr. Commissioner.

24 **THE COMMISSIONER:** So tomorrow morning,  
25 then.

1                   **MR. DUCASSE:** Thank you.

2                   **THE COMMISSIONER:** Thank you.

3                   **THE REGISTRAR:** Order; all rise. À l'ordre;  
4                   veuillez vous lever.

5                   The hearing is now adjourned. L'audience  
6                   est ajournée.

7                   --- Upon adjourning at 4:30 p.m./

8                   L'audience est ajournée à 4h30

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C E R T I F I C A T I O N

I, Sean Prouse a certified court reporter in the Province of Ontario, hereby certify the foregoing pages to be an accurate transcription of my notes/records to the best of my skill and ability, and I so swear.

Je, Sean Prouse, un sténographe officiel dans la province de l'Ontario, certifie que les pages ci-hautes sont une transcription conforme de mes notes/enregistrements au meilleur de mes capacités, et je le jure.



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Sean Prouse, CVR-CM