

**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 126

Held at :

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

Wednesday, August 15, 2007

Tenue à:

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

Mercredi, le 15 août 2007

Appearances/Comparutions

Mr. Peter Engelmann	Lead Commission Counsel
Ms. Julie Gauthier	Registrar
Ms. Maya Hamou	Commission Counsel
Mr. John E. Callaghan Mr. Mark Crane	Cornwall Police Service Board
Ms. Suzanne Costom Ms. Diane Lahaie	Ontario Provincial Police
M ^e Claude Rouleau	Ontario Ministry of Community and Correctional Services and Adult Community Corrections
Mr. Stephen Scharbach	Attorney General for Ontario
Mr. Peter Chisholm	The Children's Aid Society of the United Counties
Mr. Allan Manson Ms. Helen Daley	Citizens for Community Renewal
Mr. Dallas Lee	Victims Group
Mr. David Sherriff-Scott	Diocese of Alexandria-Cornwall and Bishop Eugene LaRocque
Ms. Danielle Robitaille	Mr. Jacques Leduc
Mr. William Carroll	Ontario Provincial Police Association
Mr. John Westdal	Mr. Jos Van Diepen
Mr. Pradeep Chand	Mr. Ron Leroux

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1 --- Upon commencing at 9:51 a.m./

2 L'audience débute à 9h51

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, Commissioner, presiding.

8 Please be seated. Veuillez vous asseoir.

9 **THE COMMISSIONER:** Thank you. Good morning
10 all.

11 Good morning, Mr. Leroux. How are you doing
12 today?

13 **MR. LEROUX:** Fine.

14 **THE COMMISSIONER:** Mr. Engelmann.

15 **MR. ENGELMANN:** Good morning, Mr.
16 Commissioner.

17 Good morning, Mr. Leroux.

18 **MR. LEROUX:** Good morning.

19 --- **SUBMISSIONS BY/REPRÉSENTATIONS PAR MR. PETER ENGELMANN:**

20 **MR. ENGELMANN:** Sir, this morning, you'll
21 recall, I believe on Monday when my colleague Maitre Dumais
22 was here, he talked about an issue that arose dealing with
23 some correspondence that Commission counsel had received
24 from Mr. Leroux's psychologist, Dr. Wayne Nadler, who is
25 present, sir, by the way in the gallery.

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

2 **MR. ENGELMANN:** And there were issues about
3 disclosure of this correspondence to counsel for parties.

4 **THE COMMISSIONER:** Right.

5 **MR. ENGELMANN:** And there were also issues
6 dealt with in some of this correspondence about Mr.
7 Leroux's ongoing ability to testify ---

8 **THE COMMISSIONER:** Right.

9 **MR. ENGELMANN:** --- and some medical issues
10 that are set out in those letters.

11 I had discussions with his counsel, the law
12 firm, Harrison Pensa in London, dealing with a fellow by
13 the name of Dave Williams there. Mr. Williams has an
14 Ottawa agent here today from the firm of Lang Michener.
15 His name is Pradeep Chand. He is just to my immediate
16 right. I just wanted to introduce him.

17 I believe, sir, you know all other counsel
18 present. You have met Daniel Robitaille.

19 **THE COMMISSIONER:** Yes.

20 **MR. ENGELMANN:** The new counsel for Jacques
21 Leduc.

22 **THE COMMISSIONER:** Right.

23 **MR. ENGELMANN:** And I don't think there are
24 any other new faces as I look back.

25 And, sir, I met Mr. Chand a few minutes ago

1 this morning. He advised me that he wished to address
2 issues dealing with the disclosure of this correspondence.
3 I had indicated that it was Commission's counsel's view
4 that we should be disclosing and he is here to oppose that.
5 He is also here to deal with an issue about Mr. Leroux's
6 ongoing ability to testify.

7 **THE COMMISSIONER:** Right.

8 **MR. LEROUX:** I'm not sure for the purposes
9 of the motion, if I can call it that, whether Mr. Leroux
10 has to be in the witness box. I leave that to you.

11 **THE COMMISSIONER:** No, well, first of all, I
12 don't think that Mr. Leroux should be in the witness box.
13 I'm wondering whether he should be in the room at all.

14 And I say that, Mr. Leroux, out of the
15 greatest respect for you. When we discuss administrative -
16 - well, they are a little more than administrative matters
17 but I find that sometimes certain discussions are in your
18 best interests not to be here but I can hear submissions
19 about that and we can start with that.

20 **MR. LEROUX:** Right.

21 **MR. ENGELMANN:** In any event, Mr. Leroux, if
22 you want to step down. I don't think you have to be in the
23 witness box.

24 **THE COMMISSIONER:** No, no. If you can have
25 a seat there and we'll see.

1 **MR. ENGELMANN:** Perhaps counsel can speak to
2 that.

3 Thank you.

4 **THE COMMISSIONER:** So the first issue we
5 should decide is whether or not the witness should be in
6 the room while we discuss this matter.

7 **MR. ENGELMANN:** Yes, and the other issue
8 that I think Mr. Chand wants to speak to is whether or not
9 his motion on these two matters should be done publicly or
10 in camera.

11 **THE COMMISSIONER:** Right.

12 **MR. ENGELMANN:** And I will leave that to
13 him.

14 **THE COMMISSIONER:** Okay, thank you.

15 Good morning, sir.

16 ---**SUBMISSIONS BY/REPRÉSENTATIONS PAR MR. PRADEEP CHAND:**

17 **MR. CHAND:** Yes, good morning, Mr.
18 Commissioner.

19 Again, my name is Pradeep Chand. I'm here
20 as agent for the law firm of Harrison Pensa.

21 **THE COMMISSIONER:** Sir, how do you spell
22 your last name?

23 **MR. CHAND:** It's C-H-A-N-D.

24 **THE COMMISSIONER:** Chand?

25 **MR. CHAND:** Yes.

1 **THE COMMISSIONER:** Okay, thank you.

2 **MR. CHAND:** As Mr. Engelmann has already
3 indicated, the first issue that I want to discuss is the
4 issue of the in camera hearing.

5 **THE COMMISSIONER:** Right. No, no, sorry.
6 That may be your first issue but my first issue is whether
7 or not Mr. Leroux should stay within the body of the
8 hearing room.

9 **MR. CHAND:** Yes, Mr. Commissioner, my
10 submission on that point would be that Mr. Leroux should
11 remain within attendance at the Inquiry, at least in the
12 room, because I do feel that the issues that are at stake
13 for Mr. Leroux are very personal to him and he should have
14 the ability to hear the submissions of both his counsel as
15 well as any other counsel making submissions.

16 **THE COMMISSIONER:** I don't know if we've
17 ascertained his wishes.

18 Do you wish to stay here or do you -- okay,
19 fine.

20 **MR. CHAND:** Okay.

21 So if I may then turn to the issue of
22 whether or not this issue should go in camera.

23 **THE COMMISSIONER:** No, no, just a minute
24 now. That's fine. You have given me your view and the
25 reasons why, but I think the other parties might have an --

1 -

2 MR. CHAND: That's fair.

3 THE COMMISSIONER: So what we do is we go
4 one issue at a time.

5 MR. CHAND: Fair enough.

6 THE COMMISSIONER: We will go through
7 everyone and then we'll see how we'll go.

8 So you're saying he should stay.

9 MR. CHAND: Yes.

10 THE COMMISSIONER: And basically because it
11 affects -- it's about him?

12 MR. CHAND: That's correct.

13 THE COMMISSIONER: All right. Thank you.
14 Anything else on that issue?

15 MR. CHAND: I do not have any other issues.

16 THE COMMISSIONER: Thank you.

17 Mr. Manson.

18 MR. MANSON: Ms. Dunlop is going to ---

19 THE COMMISSIONER: Oh, sorry, yes.

20 MS. DALEY: Daley.

21 MR. MANSON: Daley.

22 ---SUBMISSIONS BY/REPRÉSENTATIONS PAR MS. HELEN DALEY:

23 MS. DALEY: Just to make it easy can I just
24 stand here.

25 THE COMMISSIONER: No, you can't.

1 **MS. DALEY:** Oh, okay.

2 **THE COMMISSIONER:** And the reason why you
3 can't is because the recording can't hear you.

4 **MS. DALEY:** Mr. Commissioner, Mr. Leroux
5 himself seems indifferent about whether he stays or
6 remains. He is a witness under cross-examination and as a
7 general rule in those circumstances the witness should not
8 be present for any discussions that bear directly on his
9 testimony, the credibility of his testimony, his role as a
10 witness. I just think we should adhere to that rule and it
11 doesn't appear that that's going to inconvenience Mr.
12 Leroux as I don't think he cares one way or the other based
13 on what he has told you.

14 **THE COMMISSIONER:** Thank you.

15 Mr. Lee.

16 ---**SUBMISSIONS BY/REPRÉSENTATIONS PAR MR. DALLAS LEE:**

17 **MR. LEE:** Good morning, sir.

18 **THE COMMISSIONER:** Good morning.

19 **MR. LEE:** I agree with Ms. Daley. My big
20 concern is that I don't really know what's coming here. We
21 haven't been provided materials. This is obviously a last
22 minute thing. I don't know what's going to be said and I
23 think out of an abundance of caution it's probably better
24 to have the witness excluded.

25 I don't see what harm it does to have him

1 excluded. He's got counsel representing him. He can be
2 filled in after the fact if appropriate.

3 **THE COMMISSIONER:** Thank you.

4 Does anybody vary from that?

5 All right. So we have short circuited that
6 a little bit.

7 Mr. Chand, do you -- Mr. Engelmann, do you
8 have any comments on that?

9 **MR. ENGELMANN:** No, sir.

10 **THE COMMISSIONER:** Thank you.

11 Do you have any further submissions?

12 **MR. CHAND:** I do not, Mr. Commissioner.

13 --- RULING ON SUBMISSIONS BY THE COMMISSIONER/DÉCISION SUR
14 REPRÉSENTATIONS PAR LE COMMISSAIRE:

15 **THE COMMISSIONER:** Thank you.

16 In the circumstances I am of the view that
17 Mr. Leroux should be asked to remain in the witness --
18 outside the hearings room. The reason for that is very
19 simply he is under -- he is a witness. He has been sworn.
20 He has given a lot of testimony and the cross-examination
21 has begun. I too don't know very much about what's going
22 to go on today and so out of an abundance of caution I
23 would ask that the witness be asked to go to the witness
24 room or outside wherever and be made available to come back
25 whenever we are ready.

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Mr. Chand.

MR. CHAND: Yes, Mr. Commissioner, which issue would you like me to continue with at this point?

(LAUGHTER/RIRES)

THE COMMISSIONER: You learn quick. That's good.

(LAUGHTER/RIRES)

Well, whether or not it should be in camera, I think, is the next issue.

--- MOTION BY/REQUÊTE PAR MR. PRADEEP CHAND:

MR. CHAND: Fair enough.

Mr. Commissioner, I understand that you have made a series of rulings with respect to confidentiality.

THE COMMISSIONER: M'hm.

MR. CHAND: And right now we'll be referring to the Cornwall Public Inquiry Main Authorities, a document that was provided to me by Mr. Engelmann this morning. And right now I'm referring to the Rules of Practice and Procedure.

THE COMMISSIONER: M'hm.

MR. CHAND: Point number 39. And I read:

"Without limiting the application of section 4 of the *Public Inquiries Immigration and Refugee Protection Act*,

1 the Commissioner may in his discretion
2 and in appropriate circumstances
3 conduct hearings in private and/or
4 issue orders prohibiting the
5 disclosure, publication, broadcast or
6 communication of any testimony,
7 document or evidence when he is of the
8 opinion that the intimate, medical or
9 personal matters or other matters are
10 of such a nature having regard to the
11 circumstances that the desirability of
12 avoiding disclosure outweighs the
13 desirability of adhering to the general
14 principle that the hearing should be
15 open to the public.
16 Subject to the discretion of the
17 Commissioner, only the Commissioner,
18 Commission staff and counsel, counsel
19 for the parties with standing, counsel
20 for the witness who has been granted
21 confidentiality and media
22 representatives may be present during
23 the testimony being heard in private.”
24 I note in point number 39 it makes specific
25 mention of intimate, medical and personal matters.

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

2 **MR. CHAND:** In this case we will be -- I
3 more specifically will be making submissions having to do
4 with the disclosure of Dr. Nadler's reports.
5 These reports have not been made available to other
6 Commission staff or other lawyers here at the Inquiry.

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

8 **MR. CHAND:** These matters would raise, in my
9 view, some serious issues within the *Personal Information*
10 *Protection Act*.

11 **THE COMMISSIONER:** What ---

12 **MR. CHAND:** More specifically, *Personal*
13 *Health Information Protection Act*, and they affect more
14 personal issues effecting Mr. Leroux.

15 **THE COMMISSIONER:** What is it that you're
16 going to be asking for, I guess that's ---

17 **MR. CHAND:** I will be asking for my
18 submissions to be held in camera.

19 **THE COMMISSIONER:** No, I understand that,
20 and I'm sorry, maybe before we -- what is the relief, the
21 ultimate relief that you're asking for?

22 **MR. CHAND:** The ultimate relief that I'd be
23 asking for in this instance would be that the disclosure of
24 Dr. Nadler's reports not be available to any other counsel,
25 with the exception of yourself.

1 **THE COMMISSIONER:** Well, I'm not a counsel
2 but okay.

3 **MR. CHAND:** Yes.

4 **THE COMMISSIONER:** And the purpose of doing
5 that is?

6 **MR. CHAND:** Because of the ---

7 **THE COMMISSIONER:** No, no. What is the
8 ultimate relief? Are you saying you don't want him to
9 continue testifying?

10 **MR. CHAND:** That would be my second issue,
11 is that there are issues affecting his ability to continue
12 on as a witness at this point.

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

14 **MR. CHAND:** So essentially there are two
15 issues; number one is the disclosure of Dr. Nadler's
16 reports, and secondly Mr. Leroux's ability to continue on
17 as a witness.

18 **THE COMMISSIONER:** Okay. And on what basis
19 are you going to argue that Mr. Leroux can no longer --
20 cannot continue to testify?

21 **MR. CHAND:** My basis for that would be that
22 the reports submitted to Mr. Engelmann about Mr. Leroux's
23 ability to continue on as a witness.

24 **THE COMMISSIONER:** Okay. So there's motion
25 that you don't want him to continue to testify?

1 **MR. CHAND:** Yes.

2 **THE COMMISSIONER:** And on what basis would
3 you say that the other parties are not entitled to see
4 these documents?

5 **MR. CHAND:** Again, Mr. Commissioner, it's
6 our view that the disclosure of these reports raise serious
7 issue under the *Personal Health Information Protection Act*.

8 **THE COMMISSIONER:** Okay. And how are the
9 parties going to be able to argue if they don't see the
10 document?

11 **MR. CHAND:** Well, that's obviously a
12 consideration. I think that it's our submission that, Mr.
13 Commissioner, you should be able to see the reports and
14 then make a decision of whether or not those reports should
15 be disclosed to the other counsel.

16 **THE COMMISSIONER:** You understand, sir, that
17 this is not a trial?

18 **MR. CHAND:** I understand.

19 **THE COMMISSIONER:** It's an inquiry.

20 **MR. CHAND:** Yes.

21 **THE COMMISSIONER:** And that the parties have
22 all signed specific undertakings, in that disclosure to
23 them is not disclosure to the public and that the lawyers
24 and the few clients that have signed undertakings are bound
25 not to disclose this to anyone else, and for the clients

1 it's on a needs be kind of thing?

2 MR. CHAND: Yes.

3 THE COMMISSIONER: So we're not talking
4 about disclosure in the generic sense.

5 MR. CHAND: Yes.

6 THE COMMISSIONER: Okay. So can you address
7 that issue for me?

8 MR. CHAND: As I've indicated, Mr.
9 Commissioner, I'm mindful of your statements, however, it's
10 still our view that the reports, as submitted by Dr. Nadler
11 to Mr. Engelmann, obviously disclose a doctor-patient
12 relationship. They basically protect -- those reports have
13 to do with a doctor-patient relationship.

14 Furthermore, they do raise issues, from our
15 standpoint, under the *Personal Health Information*
16 *Protection Act*.

17 THE COMMISSIONER: Okay. Do you have a copy
18 of that Act?

19 MR. CHAND: I do not.

20 MR. SHERRIFF-SCOTT: I took the liberty of
21 bringing some, Commissioner, if you'd like one I have them
22 here.

23 THE COMMISSIONER: The star is rising.

24 (LAUGHTER/RIRES)

25 THE COMMISSIONER: So, Mr. Sherriff-Scott,

1 if you could bring some forward.

2 **MR. SHERRIFF-SCOTT:** Sure. Thank you.

3 **THE COMMISSIONER:** Mr. Manson, I'm afraid
4 that your chances of winning the star of the week is
5 dwindling.

6 **MR. MANSON:** I see that, and the day is
7 early.

8 **(LAUGHTER/RIRES)**

9 **THE COMMISSIONER:** Mr. Chand, I guess what I
10 want to do is have as much of this heard in the public
11 forum as possible.

12 **MR. CHAND:** Yes.

13 **THE COMMISSIONER:** And so I don't know that
14 -- I think that we can continue on dealing with this issue
15 of the personal health information submissions with respect
16 to that regard in public and I'll decide what we do with
17 respect to disclosure and other matters. We may well go
18 into in camera later on but I'd like to hear from you on
19 this matter.

20 **MR. CHAND:** On the disclosure of ---

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

22 **MR. CHAND:** Well, I would be getting into
23 that within my submissions more in detail but at this point
24 I can't make any specific reference to the *Personal Health*
25 *and Information Protection Act*.

1 **THE COMMISSIONER:** Okay. Satisfy me then
2 that we should go in camera.

3 **MR. CHAND:** All right.

4 I am making now reference to the directions
5 of process, request for confidentiality of victims or
6 alleged victims identities.

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

8 **MR. CHAND:** On page 5, section 6 -- page 5
9 just about halfway down the page ---

10 **MR. ENGELMANN:** Perhaps before Mr. Chand
11 continues, I think he's referring to one of your rulings,
12 sir. Perhaps we could have it put up on the screen ---

13 **THE COMMISSIONER:** Yes.

14 **MR. ENGELMANN:** --- so that other parties
15 can follow.

16 **THE COMMISSIONER:** Thank you.

17 **MR. ENGELMANN:** If you give the date of the
18 decision, sir.

19 **MR. CHAND:** Yes. I'm referring, Mr.
20 Commissioner, to a decision of October 31st, 2006.

21 **THE COMMISSIONER:** M'hm. I'm just waiting
22 for it to come up on the screen.

23 **MR. CHAND:** Yes.

24 **THE COMMISSIONER:** Do you have it? Can you
25 put it on?

1 All right. So where ---

2 **MR. CHAND:** Yes. Proceeding down to page 5
3 approximately halfway down the page ---

4 **THE COMMISSIONER:** Yes.

5 **MR. CHAND:** Yes. It indicates:

6 "Section 6 of the Order in Council also
7 speaks of the privacy interests.

8 Pursuant to sections 3 and 4 of the
9 *Public Inquiries Act* and section 6 of
10 the Order in Council I have
11 discretionary power to limit the
12 publicity of proceedings. This power
13 is subject to the *Dagenais/Mentuk* test,
14 which I feel necessary to outline again
15 as follows. The test is as follows: A
16 publication ban or other discretionary
17 order that limits freedom of expression
18 and freedom of the press in relation to
19 legal proceedings should be ordered
20 only when a) such an order is necessary
21 to prevent a serious risk to the proper
22 administration of justice or to an
23 important interest because reasonably
24 alternative measures will not prevent
25 the risk, and b) the solitary effects

1 of the order outweigh the deleterious
2 effects on the rights and interests of
3 the parties and the public, including
4 the effects on the right to free
5 expression, the right of the accused to
6 a fair and public trial and the
7 efficacy of the administration of
8 justice. The *Dagenais/Mentuk* test also
9 applies to all discretionary orders
10 that limit the freedom of expression
11 and freedom of the press in relation to
12 legal proceedings and proceedings of
13 Commissions of Inquiry."

14 It is our submission, Mr. Commissioner, that
15 this information has to do with the intimate medical and
16 personal matters affecting Mr. Leroux and should not be
17 disclosed for that reason.

18 **THE COMMISSIONER:** Okay.

19 **MR. CHAND:** The effect -- the
20 confidentiality as well -- as well they effect the
21 confidentiality interests of Mr. Leroux as well as certain
22 medical information that should not be disclosed to other
23 counsel attending the inquiry.

24 **THE COMMISSIONER:** All right.

25 **MR. CHAND:** Those are my submissions.

1 **THE COMMISSIONER:** All right.

2 Thank you.

3 Mr. Manson or Ms. Daley, I'm sorry, or Mr.
4 Engelmann can you help us out here?

5 ---**SUBMISSIONS BY/REPRÉSENTATIONS PAR MR. PETER ENGELMANN:**

6 **MR. ENGELMANN:** Yes. Maybe just before
7 counsel speak to it, maybe I could address the issue very
8 briefly. I just want to make sure that we have some
9 information before you, sir, on this issue.

10 The *Personal Health Information Protection*
11 *Act*, which Mr. Sherriff-Scott has kindly passed out to a
12 number of counsel, has a number of sections that might come
13 into play here.

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

15 **MR. ENGELMANN:** Section 4 deals with the
16 definition of personal health information, and as you'll
17 see, it's on page 7 of my copy ---

18 **THE COMMISSIONER:** Yes.

19 **MR. ENGELMANN:** I'm not sure if it's the
20 same as yours, sir, at the bottom of the page?

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

22 **MR. ENGELMANN:** It relates to the physical
23 or mental health of the individual, including information
24 that consists of the health history of the individual's
25 family. It talks a little bit more about -- it's a fairly

1 broad definition of health information.

2 Unfortunately, counsel haven't seen the
3 letters that are referred to. I submit to you, sir, that
4 they do contain personal health information from a treating
5 psychologist who is involved in psychotherapy with the
6 particular witness.

7 So then I think there may be a number of
8 sections of this Act that may apply, but I think where we
9 go next is section 49, which is on page 31 of my copy.

10 **THE COMMISSIONER:** Well, it starts on 30,
11 but okay, yes. M'hm.

12 **MR. ENGELMANN:** Okay. Yes, our copies, I
13 think, are a bit different.

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

15 **MR. ENGELMANN:** Subsection (1) says:

16 "Except as permitted or required by law
17 and subject to the exceptions and
18 additional requirements, if any, that
19 are prescribed, a person who is not a
20 health information custodian and to
21 whom a health information custodian
22 discloses personal health information
23 shall not use or disclose the
24 information for any purpose other
25 than..."

1 All right. So in this case we have Dr.
2 Nadler, who is a health information custodian, disclosing
3 personal health information to me as a non-health
4 information custodian.

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

6 **MR. ENGELMANN:** So we have section 49 coming
7 into play. But it does say:

8 "...shall not use or disclose the
9 information for any purpose other
10 than..."

11 And you'll note, sir, (b) the purpose of
12 carrying out a statutory or legal duty. Under the *Public*
13 *Inquiries Act*, sir, under our -- and obviously under the
14 Order in Council are rules of procedure, Commission counsel
15 is required to disclose any and all relevant information to
16 counsel for parties with standing.

17 And as I indicated to you earlier -- I may
18 not have, but in reviewing one of these letters, it is
19 apparent to me that they contain -- the letter contained
20 relevant or arguably relevant information. I felt I had a
21 duty to disclose the information and contacted the law firm
22 of Harrison Pensa and Dr. Nadler at that point.

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

24 **MR. ENGELMANN:** So I think 49(1)(b) comes
25 into play.

1 As well, sir, section 9 talks about the non-
2 application of the Act in certain situations.

3 **THE COMMISSIONER:** Section 9, you say?

4 **MR. ENGELMANN:** Section 9. It's on page 10
5 of my version.

6 **THE COMMISSIONER:** Yes, it is.

7 **MR. ENGELMANN:** And it says "Non-
8 application of the Act" and in (2) it says:

9 "Nothing in this Act shall be construed
10 to interfere with..."

11 And you'll see at 2(c) and 2(b):

12 "...the law of evidence or information
13 otherwise available by law to a party
14 or witness in a proceeding in the power
15 of a court or a tribunal to compel a
16 witness to testify or to compel the
17 production of a document."

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

19 **MR. ENGELMANN:** So I just wanted to point
20 those sections out. I think the Act has application, but I
21 think clearly from just a cursory reading of the Act, we
22 would fall into certain exceptions given the situation we
23 find ourselves in. I just wanted to point that out at the
24 start, sir, if I could.

25 **THE COMMISSIONER:** All right.

1 **MR. ENGELMANN:** I'm sure counsel have some
2 submissions.

3 **THE COMMISSIONER:** Ms. Daley.

4 **--- SUBMISSIONS BY/REPRÉSENTATIONS PAR MS. DALEY:**

5 **MS. DALEY:** Obviously your wish is that we
6 address comments to whether we go in camera or not at this
7 point.

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

9 **MS. DALEY:** As I'm sure everyone in the room
10 appreciates, this witness has been a very, very significant
11 witness for the Inquiry.

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

13 **MS. DALEY:** I think it would be very
14 difficult to explain to the community a decision that would
15 perhaps affect his continued testimony in the absence of a
16 public record. I just think it's a difficult thing to do.

17 If I hear my friend Mr. Chand correctly, the
18 ultimate ask is going to be that.

19 I think we can go forward in public right
20 now and deal with the issue under the statute. I don't
21 think there's any reason to go in camera on that issue.

22 If I could help you with one further section
23 that Mr. Engelmann didn't mention, if you would please look
24 at section 41, which I have on page 24, and I would direct
25 your attention to 41(d), and this provision of the statute

1 obviously provides that in any judicial or legal
2 proceeding, an order with proper foundation and
3 jurisdiction can be made that records be disclosed.

4 So I understand what Mr. Chand is saying
5 about the statute, but our request is going to be that you
6 make an order under section 41(d) so that the parties to
7 this Inquiry or their counsel can at least have knowledge
8 of the matters that Dr. Radler (sic) appears to want to
9 raise -- or sorry, Dr. Nadler wants to raise in aid of
10 discontinuing this very important witness' testimony. I
11 think we should deal with that issue in public.

12 **THE COMMISSIONER:** Sure.

13 **MS. DALEY:** Thank you.

14 **THE COMMISSIONER:** Okay. Mr. Lee, do you
15 have any further comments?

16 --- **SUBMISSIONS BY/REPRÉSENTATIONS PAR MR. LEE:**

17 **MR. LEE:** Simply to say that I agree with
18 Ms. Daley and Mr. Engelmann with the applicable sections of
19 the statute, and I don't see any reason that issue can't be
20 dealt with publicly.

21 I suspect and I submit that you should rule
22 in the end on that issue, that the parties are entitled to
23 the disclosure of the letters, and what I would ask at that
24 point is that we be given a short break to review them and
25 then be able to make proper submissions to you on whether

1 or not the rest of the argument should proceed in camera or
2 not.

3 **THE COMMISSIONER:** Thank you.

4 **MR. LEE:** Thank you.

5 **THE COMMISSIONER:** Mr. Chisholm, any
6 comments?

7 --- SUBMISSIONS BY/REPRÉSENTATIONS PAR MR. CHISHOLM:

8 **MR. CHISHOLM:** Good morning, sir.

9 **THE COMMISSIONER:** Good morning, sir.

10 **MR. CHISHOLM:** You've indicated in the past
11 on several occasions the importance of open and transparent
12 hearings. I would submit that this would be a situation
13 that we would want to follow along that theory.

14 The applicant in this matter, Mr. Leroux,
15 and Mr. Leroux's counsel set out the -- in a broad form,
16 set out the provisions of the *Personal Health Information*
17 *Protection Act* 2004, has not referred us to any of the
18 sections contained in that Act. Mr. Engelmann has put us
19 onto the sections that would be applicable.

20 I would submit that there is nothing in
21 these sections that Mr. Engelmann put to us that would show
22 a statutory reason why this application cannot be heard in
23 the public forum, and that brings us, if we don't have a
24 statutory prohibition, then we're left with the
25 *Dagenais/Mentuck* test.

1 I would submit that there is no evidentiary
2 foundation, no application record, nothing of any sort that
3 would allow the applicant to satisfy either branch of the
4 *Dagenais/Mentuck* test and on that basis, the test is not
5 met. The application to have an in camera hearing should
6 be dismissed.

7 Mr. Leroux, as Ms. Daley has indicated, is
8 an important witness. The community has an interest, a
9 great interest, I would submit, in hearing this motion
10 dealing with this particular witness, and for that reason I
11 would oppose the application and ask that the requested
12 order not be granted and the application be heard in a
13 public forum.

14 Subject to your questions, those would be my
15 submissions.

16 **THE COMMISSIONER:** Thank you.

17 Mr. Scharbach.

18 **--- SUBMISSIONS BY/REPRÉSENTATIONS PAR MR. SCHARBACH:**

19 **MR. SCHARBACH:** I agree with some of the
20 comments that have been made earlier that to the extent
21 possible, the Inquiry should be conducted in public, and it
22 seems to me that if at the moment we're dealing with the
23 issue of the disclosure of the material that's been
24 provided to Mr. Engelmann to counsel, it seems to me that
25 that is an argument that can be dealt with in public,

1 because until you make that decision, we really have no and
2 we will not be discussing any details concerning Mr.
3 Leroux's medical condition, if there is one.

4 So I would suggest that essentially I agree
5 with what Mr. Lee said. The issue of whether or not the
6 material can be disclosed to counsel really seems to me to
7 turn on an argument involving the Act, and I think that can
8 be made in public.

9 And once, if you decide then that disclosure
10 should be made and counsel get to see those documents then
11 we can make a considered argument as to whether the
12 interest of maintaining that material in public outweighs
13 the public -- the desirability of having a hearing in
14 public. So, essentially, I think I agree with Mr. Lee.

15 **THE COMMISSIONER:** Thank you.

16 **MR. SCHARBACH:** Thank you.

17 **THE COMMISSIONER:** Ms. Robitaille.

18 **MS. ROBITAILLE:** No submissions.

19 **THE COMMISSIONER:** Thank you. Mr. Sherriff-
20 Scott.

21 --- **SUBMISSIONS BY/REPRÉSENTATIONS PAR MR. SHERRIFF-SCOTT:**

22 **MR. SHERRIFF-SCOTT:** On the issue of the in
23 camera nature or the request for an in camera proceeding
24 and as someone who has not satisfied you before on the
25 *Dagenais/Mentuck* Test ---

1 **THE COMMISSIONER:** I am glad you conceded
2 that.

3 **(LAUGHTER/RIRES)**

4 **MR. SHERRIFF-SCOTT:** Without prejudice, of
5 course.

6 I feel I can hearken back to the concerns in
7 the case law and echoed by you that perhaps it would have
8 behoved my friend to tender some evidence in the form
9 perhaps of an opinion that there would be damage to the
10 witness if this matter were to proceed in the public domain
11 which we are not favoured with, and since the burden on the
12 case law is squarely on him to demonstrate the harm by way
13 of evidence, I think that should have happened and it
14 hasn't.

15 And for all of the other reasons expressed
16 by my friends, I would support their submissions that the
17 matter should go forward at least at this preliminary stage
18 in public.

19 Just a few other things on the statutes so
20 that you have the points that I wanted to make for
21 completeness if you had it before you, Commissioner, and
22 turn to page 4, which is the definitional section of the
23 Act, you will see that a proceeding is defined as not only
24 including a court and a tribunal but also a commission.
25 Page 4 in the middle of the page, the word "proceeding" is

1 defined.

2 **THE COMMISSIONER:** Section 4?

3 **MR. SHERRIFF-SCOTT:** No, sorry, page 4,
4 Commissioner, which is in the centre.

5 **THE COMMISSIONER:** Yes, okay.

6 **MR. SHERRIFF-SCOTT:** Definitions are under
7 Section 2.

8 **THE COMMISSIONER:** Right, I've got it, okay.

9 **MR. SHERRIFF-SCOTT:** But a proceeding
10 encompasses this body including a tribunal as well as a
11 court and, of course, sections 9 and 41 specifically
12 contemplate exclusion in terms of the administration of
13 justice for a commission, tribunal, court, et cetera.

14 And so you have not only a power to order
15 it, all you need must do is make a decision that it is
16 germane and that is sufficient to encompass, in my view,
17 the definition of a rule or a decision and thus the Act has
18 no application to you.

19 Moreover, you are not, nor is Mr. Engelmann,
20 a personal health custodian at this juncture.

21 Those are my submissions. Thank you.

22 **THE COMMISSIONER:** Thank you. Mr.
23 Callaghan, anything to -- yes?

24 --- SUBMISSIONS BY/REPRÉSENTATIONS PAR MR. CALLAGHAN:

25 **MR. CALLAGHAN:** I agree with my friends. I

1 just make one observation. The *Dagenais/Mentuck* Test
2 requires a balance by you and, on the one side, as Ms.
3 Daley has indicated, frankly this has probably been the
4 most important witness to address the rumour and innuendo
5 that both myself and Mr. Engelmann spoke about in opening
6 submissions.

7 The evidence frankly to date has been a
8 revelation to a lot of people, including myself. Some of
9 it is to come out in cross-examination.

10 Against that, when you talk about that
11 importance and you are left with, for us, nothing to argue
12 on the other side because they want to shroud it in
13 mystery, I don't see how I am going to be able -- where I
14 will be able to assist you on that balance test without
15 seeing this information. And it just doesn't make any
16 sense for you to not go ahead on such a significant issue
17 without it. I remind you that when we had this issue
18 before, the documents were provided in respect to Mr. DS.

19 Thank you.

20 **THE COMMISSIONER:** OPP. Ms. Lahaie.

21 **---SUBMISSIONS BY/REPRÉSENTATIONS PAR MS. LAHAIE:**

22 **MS. LAHAIE:** Good morning, Mr. Commissioner.

23 **THE COMMISSIONER:** Good morning.

24 **MS. LAHAIE:** I would echo the submissions
25 made by Mr. Scharbach.

1 I think in the spirit of dealing with issues
2 one at a time as you have done this morning, Mr.
3 Commissioner, that the question of whether we should go in
4 camera to deal with whether the document should be released
5 to the parties, we would not be discussing the content of
6 the document itself and, at this point, I believe that
7 should be done in an open forum.

8 **THE COMMISSIONER:** Thank you. Mr. Carroll.

9 --- **SUBMISSIONS BY/REPRÉSENTATIONS PAR MR. CARROLL:**

10 **MR. CARROLL:** Good morning. The objective
11 of openness and transparency, in my respectful submission,
12 can only be achieved by this aspect of the proceedings
13 being held in public, sir, for the reasons already
14 advanced.

15 **THE COMMISSIONER:** Thank you. Mr. Rouleau,
16 did I skip over you?

17 **MR. ROULEAU:** Yes, you did.

18 **THE COMMISSIONER:** I am sorry.

19 **(LAUGHTER/RIRES)**

20 **THE COMMISSIONER:** I knew you wanted to be
21 -- how do you call that in baseball, the clean-up batter?

22 --- **SUBMISSIONS BY/REPRÉSENTATIONS PAR MR. ROULEAU:**

23 **MR. ROULEAU:** Clean-up batter? Well, I
24 don't have much to add. I have to agree that we can still
25 go on in public, and I believe that step one is for us to

1 get disclosure so that we can appreciate the situation and
2 take it from there.

3 **THE COMMISSIONER:** Thank you.

4 ---**SUBMISSIONS BY/REPRÉSENTATIONS PAR MR. ENGELMANN:**

5 **MR. ENGELMANN:** Sir, at this stage, unless
6 there were intimate personal or medical information
7 required to make this part of the argument, again, I would
8 agree with several of my friends who have made the comment
9 that this should be done in open.

10 **THE COMMISSIONER:** Oh, well ---

11 **MR. ENGELMANN:** I don't know if Mr. Chand
12 has some comments to make at the end.

13 **THE COMMISSIONER:** Any further comments with
14 respect that at this point?

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

16 **MR. CHAND:** Mr. Commissioner, I realize that
17 my friends have some concerns of whether or not I've
18 proffered any evidence in respect of the first branch of
19 the *Dagenais/Mentuck* Test.

20 The reason I have not done that is that the
21 medical reports speak to that very issue about this serious
22 risk being done if this information was, in fact, made
23 available to the public. All I can say ---

24 **THE COMMISSIONER:** But where are we going to
25 show this to the public?

1 **MR. CHAND:** I', sorry, Mr. Commissioner?

2 **THE COMMISSIONER:** The issue right now, you
3 see I think You -- I didn't communicate effectively.

4 What we have to do is go step-by-step.

5 **MR. CHAND:** Yes.

6 **THE COMMISSIONER:** I think eventually, if we
7 get to some point, we may have to revisit the issue of
8 whether it should be in camera or not.

9 **MR. CHAND:** Yes.

10 **THE COMMISSIONER:** But right now, we are
11 just discussing the issue of whether or not the issue of
12 disclosure to the parties should be done in camera or not.
13 And so what have got to say? Do you have anything more to
14 add on that issue?

15 **MR. CHAND:** I don't. Not on that specific
16 issue.

17 **THE COMMISSIONER:** Thank you.

18 **MR. CHAND:** Okay.

19 **THE COMMISSIONER:** Well, it is clear to me
20 that this motion was brought on in an urgent basis, I
21 suppose, because of timeliness. We have the witness who is
22 about to continue to be cross-examined, and there are
23 matters that came to light during the summer break or
24 whatever.

25 And so it is somewhat understandable that

1 there is no written material. However, the fact that there
2 is no written material does not help me in deciding the
3 issue in favour of the Applicant. It is clear that -- and
4 I have held consistently that when and if possible issues
5 should be decided and argued publicly.

6 I can understand the parties that they do
7 not have any disclosure at this point and so they cannot
8 effectively argue one way or the other on that issue.

9 However, for the time being, I would say
10 that clearly the *Dagenais/Mentuck* Test -- and I'm sorry, I
11 haven't asked the media to respond to this issue because I
12 am ruling in favour that the hearing continue to be public
13 for at least the next issue. And the next issue is whether
14 or not disclosure to the parties should be had.

15 Now, do you have anything to add on that
16 issue, Mr. Chand? You have cited the *Personal Health*
17 *Information Protection Act*. We have heard from some of the
18 Parties saying that it probably doesn't apply, and that was
19 their submission. Do you have anything to add on that
20 issue?

21 **MR. CHAND:** No, thank you.

22 **THE COMMISSIONER:** Thank you. I am prepared
23 to deal with the issue of disclosure at this time.

24 ---RULING ON MOTION BY THE COMMISSIONER/DÉCISION SUR
25 REQUÊTE PAR LE COMMISSAIRE

1 In my view, the public -- well, first of
2 all, Mr. Engelmann has indicated that in his view
3 disclosure should be had. He is indicating that -- and
4 correct me if I am wrong, Mr. Engelmann, but you have
5 reviewed the letters, and you have indicated that as far as
6 you are concerned as Commission Counsel, the contents of
7 those letters are relevant or arguably relevant, which
8 would bring us to the disclosure level with respect to this
9 Inquiry and that the *Personal Health Information Protection*
10 *Act*, given the sections that you have quoted, would not in
11 any way interfere with the limited disclosure that we have
12 instituted for the purposes of this Inquiry.

13 ---SUBMISSIONS BY/REPRÉSENTATIONS PAR MR. ENGELMANN:

14 **MR. ENGELMANN:** That is correct, sir, and I
15 didn't refer to 41 because that's with respect to
16 disclosure from Dr. Nadler directly.

17 **THE COMMISSIONER:** Yes.

18 **MR. ENGELMANN:** It's been disclosed to us as
19 Commission counsel. Therefore, I think it's section 49 and
20 I think as Commission counsel and our role to act in the
21 public interest and our requirement to disclose any and all
22 relevant evidence, that when I first read the one letter of
23 July 30th it became apparent to me that I thought had a duty
24 to disclose.

25 **THE COMMISSIONER:** Okay. So for purposes of

1 the record, can you give me dates?

2 MR. ENGELMANN: Yes, I can.

3 THE COMMISSIONER: So we can identify these
4 documents.

5 MR. ENGELMANN: I'll do it chronologically,
6 sir, if I may.

7 THE COMMISSIONER: Yes.

8 MR. ENGELMANN: They start with a letter
9 dated April 19th, 2007.

10 THE COMMISSIONER: Yes.

11 MR. ENGELMANN: This is a letter from Dr.
12 Nadler to me.

13 THE COMMISSIONER: M'hm.

14 MR. ENGELMANN: Then there is a very brief
15 letter from Dr. Nadler to me dated June 27th, 2007.

16 Then there is the letter of July 30th, 2007
17 and that's a letter from Dr. Nadler to me. In this letter
18 he refers to the provision of previous correspondence. The
19 previous correspondence at the time, I did not think there
20 was a need to disclose. Getting the July 30th letter and
21 reading its contents I then thought there was a need to
22 disclose it and the previous correspondence. So I just
23 wanted to explain my actions.

24 Then there were two letters this weekend,
25 one dated August 11th, 2007 from Dr. Nadler to me -- or

1 sorry -- addressed to you, sir.

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

3 **MR. ENGELMANN:** And then a letter dated
4 August 12th, 2007 and, again, that's a letter from Dr.
5 Nadler addressed to you again. Those are letters I have
6 reviewed.

7 **THE COMMISSIONER:** And I think we should,
8 for the purposes of the public and those listening, that
9 the procedure that we have instituted is that when people
10 write to me that you screen those letters.

11 **MR. ENGELMANN:** Yes, either myself or a
12 member of the Commission legal team.

13 **THE COMMISSIONER:** And that accordingly I
14 think we should reinforce the fact that I have not read
15 those letters.

16 **MR. ENGELMANN:** Yes. So with your ruling
17 then, sir, what I would like to do is -- I have copies---

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

19 **MR. ENGELMANN:** ---of all of this
20 correspondence for you and also for the parties.

21 I don't want to make anything an exhibit at
22 this stage because we are just disclosing but, sir, I think
23 it might be appropriate, obviously, for you to see a copy
24 of this as well for the purpose of the arguments coming.
25 So we can perhaps either mark the exhibits by

1 identification -- we can mark the letters by identification
2 or we can simply -- you just look at them and the parties
3 can look at them and we can ---

4 **THE COMMISSIONER:** That's an interesting
5 thought, you know, and what I have tried to do is go step
6 by step on all of those.

7 **MR. ENGELMANN:** Yes.

8 **THE COMMISSIONER:** And so I don't know
9 whether the parties can comment as to whether I should read
10 this if they haven't read it first.

11 **MR. ENGELMANN:** Fair enough, and perhaps I
12 should -- that's a good point.

13 Perhaps we should just disclose to the
14 parties at this stage and we'll wait for argument and if
15 it's appropriate we'll talk about how if at all the letters
16 are given to you.

17 **THE COMMISSIONER:** M'hm, okay.

18 **MR. ENGELMANN:** Why don't, if it's
19 satisfactory, sir, we could take a break?

20 I could with the assistance of Ms. Hamou
21 give counsel copies of these letters under the disclosure
22 provisions that we have with all the parties and then for
23 the purposes of where we go from here, counsel can make
24 submissions as to whether or not the correspondence should
25 be before you and if so in what fashion.

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

2 Mr. Chand.

3 **MR. ENGELMANN:** Absolutely. Mr. ---

4 **MR. CHAND:** Chand.

5 **MR. ENGELMANN:** --- sorry -- Chand wants to
6 make one more submission. I apologize.

7 **THE COMMISSIONER:** Yes.

8 **MR. CHAND:** Yes, Mr. Commissioner. I just
9 have a few more comments, if I may?

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

11 --- MOTION BY/REQUÊTE PAR MR. CHAND:

12 **MR. CHAND:** As I understand it, Mr. Leroux
13 has been a patient of Dr. Nadler for some many years and
14 accordingly has a therapeutic relationship with him.

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

16 **MR. CHAND:** To the extent that the various
17 letters disclose information as they do in the context of
18 the therapeutic relationship and disclose personal health
19 information, any disclosure gives rise to serious issues
20 under the *Personal Information Protection Act*.

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

22 **MR. CHAND:** I will be referring to specific
23 sections.

24 Without further information and on such
25 short notice, it is almost impossible to provide any

1 intelligible submission on that basis which with that
2 information could be lawfully disclosed. Certainly, there
3 are serious issues with respect to Mr. Leroux's consent or
4 implied consent to the release of that information.

5 There are exceptions in the Act that may
6 apply which would allow disclosure but the basis upon which
7 those exemptions are relied upon and whether that reliance
8 is appropriate are not known at this time.

9 However, until a full and appropriate
10 analysis is undertaken, submissions made by persons that
11 made the disclosure and those that receive the information,
12 any further disclosure or dissemination would compound what
13 may already be a violation of the above-mentioned
14 legislation.

15 Accordingly, until a proper hearing, or at
16 least the full submissions are received by you on this
17 issue, there should be no further dissemination of the
18 information contained in Dr. Nadler's letters. Without
19 being able to intensively debrief Mr. Leroux on these
20 issues again on such short notice, it is difficult to have
21 a clear picture of what has occurred.

22 Based on the information received to date,
23 it is clear that Mr. Leroux considered his discussions with
24 Dr. Nadler to be in the context of a private therapeutic
25 relationship.

1 **THE COMMISSIONER:** And how do I know that?

2 **MR. CHAND:** Well, I can only say that based
3 on my own conversations with Dr. Nadler and with Mr.
4 Leroux, that's from what I understand because ---

5 **THE COMMISSIONER:** Well, there is a limit to
6 what we can do here.

7 **MR. CHAND:** Of course.

8 **THE COMMISSIONER:** I mean, you're not going
9 to take the stand and testify.

10 **MR. CHAND:** I'm not, fine, I am not.

11 **THE COMMISSIONER:** I don't have an
12 affidavit. I don't have anything.

13 So are you saying you want an adjournment?
14 I mean, I thought you had argued fully as to what you
15 thought how the *Personal Health and Information Act* dealt
16 with it. You see, you speak of letters. Mr. Engelmann
17 speaks -- oh, no. Mr. Engelmann speaks of red letters.
18 You talk about reports.

19 **MR. CHAND:** Well, I guess you can consider
20 them letters but there is medical information in there. I
21 consider them reports as well. I mean, it doesn't really -
22 - at this point in my view it doesn't really make a
23 difference how you refer to them.

24 But all I can say is, Mr. Commissioner,
25 there is obviously section 18 of the *Personal Health and*

1 *Information Act* that makes reference to elements of
2 consent. And I read under section 18:

3 "If this Act or any other Act requires
4 the consent of an individual for the
5 collection, use or disclosure of
6 personal health information by a health
7 information custodian the consent:
8 (a) must be consent of the individual,
9 (b) must be knowledgeable,
10 (c) must relate to the information and
11 must not be obtained through deception
12 or coercion."

13 The Act also makes reference to implied
14 consent but in my view that's not relevant.

15 My submissions then, Mr. Commissioner, is
16 that the consent in this particular case has not been
17 obtained by the very individual, Mr. Ron Leroux.

18 So, Mr. Commissioner, based on the
19 information received today, it is clear that Mr. Leroux
20 considered his discussions with Dr. Nadler to be in the
21 context of the private therapeutic relationship which he
22 has enjoyed.

23 He did not consider that this information
24 would be disclosed, let alone broadly disclosed to the
25 parties at the Inquiry. His continuation with Dr. Nadler

1 during the course of the Inquiry has been on the basis that
2 he wanted to promote his own psychological wellbeing and
3 support his continued attendance as a witness before the
4 Inquiry.

5 Subject to any questions that you may have,
6 those are my submissions on this issue.

7 **THE COMMISSIONER:** All right. Thank you.

8 **MR. CHAND:** Thank you.

9 **THE COMMISSIONER:** Mr. Engelmann.

10 ---**SUBMISSIONS BY/REPRÉSENTATIONS PAR MR. PETER ENGELMANN:**

11 **MR. ENGELMANN:** I am a little confused, sir.
12 I thought an occasion had been given to make submissions on
13 the disclosure issue.

14 **THE COMMISSIONER:** Okay. But there is the
15 issue of consent.

16 **MR. ENGELMANN:** Now, the issue of consent is
17 one between Mr. Leroux and Dr. Nadler. We have had no
18 evidence to suggest that there was no consent. In fact, I
19 don't want to say it's presumed but we received the
20 correspondence. This is why we are beyond section 41. I
21 think we're beyond section 18. Section 49 talks about the
22 disclosure by the Public Health Custodian to another person
23 or body and that is the Commission.

24 We have received disclosure from Dr. Nadler.
25 We assumed, rightly or wrongly, that there was consent.

1 This is the first I have heard that there might not have
2 been consent and we have no evidence of that other than the
3 submission made by counsel.

4 **THE COMMISSIONER:** I know, but, you know,
5 just because you received the information -- let's assume
6 for a minute Dr. Nadler had no right to do this. Does that
7 mean that since we've got -- since you have the "tainted"
8 material that I should condone it being dispersed?

9 **MR. ENGELMANN:** No. No, I'm not saying
10 that. It's unfortunate we had the argument, this argument
11 wasn't made.

12 **THE COMMISSIONER:** I know.

13 **MR. ENGELMANN:** You made a decision.

14 **THE COMMISSIONER:** Well, I haven't quite
15 made a decision.

16 **MR. ENGELMANN:** Okay. All right.

17 Now we're in a situation where there is a
18 suggestion that there may not have been consent.

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

20 **MR. ENGELMANN:** There's a submission.
21 There's no evidence.

22 **THE COMMISSIONER:** Right.

23 **MR. ENGELMANN:** If this argument is going
24 further we may have to call Mr. Leroux to confirm whether
25 or not there was consent if we want to go here.

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

2 **MR. ENGELMANN:** I wasn't sure what arguments
3 were going to be made this morning, as you can appreciate,
4 sir.

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

6 **MR. ENGELMANN:** I knew there were issues on
7 disclosure. I knew there was an issue about continuing
8 with evidence. I didn't realize there was a possibility of
9 a lack of consent argument being made. Perhaps -- in any
10 event, you have no evidence, you simply have a submission,
11 and if you wish -- I think my friend wishes to maintain
12 this argument.

13 Again, we're talking about, as you know and
14 as you've repeated and as I've tried to indicate to my
15 friend as well, disclosure to parties -- to counsel for
16 parties on a strict undertaking, and I thought we were well
17 in compliance given our role as a recipient pursuant to
18 section 49.

19 I don't want to give evidence about what may
20 have been said to me either, I think that would be
21 inappropriate, about the consent issue, but I'm surprised
22 that this submission is being made.

23 **THE COMMISSIONER:** All right.

24 Well, I think we're going to have to go
25 through another round of submissions and we'll see where we

1 go.

2 Ms. Daley.

3 ---SUBMISSIONS BY/REPRÉSENTATIONS PAR MS. DALEY:

4 MS. DALEY: I was -- I had not thought about
5 section 18. I was just looking at the introducing language
6 which says -- it's a conditional. It says:

7 "If this Act requires the consent of an
8 individual to disclosure by a health
9 information custodian..."

10 So, number one, I think the circumstance
11 that we've got here is a health professional, Dr. Nadler,
12 writing to third parties.

13 THE COMMISSIONER: M'hm.

14 MS. DALEY: I'm led to believe that he
15 discloses health information about Mr. Leroux within that
16 correspondence.

17 I think that the operation of section 18 in
18 the context of this Act must be subject to the over-arching
19 provisions that we spoke about earlier, and that's section
20 9, that says that the Act does not in any manner detract
21 from the ability in judicial proceedings or proceedings of
22 this nature, to require the disclosure of information
23 that's relevant to those proceedings.

24 So I guess I'm sort of standing on two
25 stools here. One part of me is saying, as with Mr.

1 Engelmann, it absolutely -- he has to be able to operate on
2 the assumption that if Mr. Leroux's consent was required
3 before the letter was written by Dr. Nadler, Dr. Nadler had
4 that consent. I don't know how we can operate on any other
5 basis.

6 If it's otherwise, what is he doing? He's
7 an officious intermeddler in these proceedings? He is
8 offering information that, you know, we can't access? That
9 doesn't seem right. He absolutely must have written those
10 letters with the consent of Mr. Leroux. The suggestion by
11 Mr. Chand that it's otherwise is just a suggestion. It's
12 unsupported.

13 Unfortunately, there is no evidence here to
14 suggest that there was not consent. And if you think
15 logically about where this is going, if this communication
16 is in aid of the witness' continued attendance or
17 involvement in these proceedings, then I think it
18 absolutely must have been disclosed with Mr. Leroux's
19 consent.

20 And I don't think that you should be
21 troubled, at this stage of things, by section 18. There is
22 no evidence before you that Mr. Leroux didn't consent. And
23 everything we've been led to believe about this
24 communication and its purpose suggests that he did consent
25 to it being sent to Mr. Engelmann. I just don't know how

1 you could draw the opposite conclusion. There's no
2 evidence to support the opposite conclusion.

3 And I guess my final point would be to
4 suggest that all of these provisions are subject to the
5 proviso in this Act that says it all must yield if an order
6 is properly made with jurisdiction that information be
7 disclosed.

8 This Act, it's a lengthy Act. I don't
9 pretend to have read it all, but it's dealing with matters
10 between health institutions. It's dealing with the
11 transmission of patients' medical records, things of that
12 nature. It was never, ever meant or intended to abrogate
13 in any fashion the availability of medical information if
14 relevant to legal proceedings.

15 So I would be suggesting that the over
16 arching intent of the Act is not to prevent you or this
17 Inquiry from having to resort to this information if it is
18 considered relevant, as it quite obviously is.

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

20 Mr. Engelmann.

21 **MR. ENGELMANN:** If I could just have a
22 minute, sir.

23 **THE COMMISSIONER:** Thank you.

24 **(SHORT PAUSE/COURTE PAUSE)**

25 **THE COMMISSIONER:** Let me get this straight

1 though. Maybe we can put this in context.

2 If Mr. Chand is saying that the parties
3 can't see it because of this Act, then he plans to turn
4 around and say that he wants to use these documents to
5 exclude or excuse Mr. Leroux from continuing to testify.

6 Is that correct? That's what you're going
7 to want to do with these documents?

8 **MR. CHAND:** That would form part of my
9 argument, yes, Mr. Commissioner, yes.

10 **THE COMMISSIONER:** Okay. Thank you.

11 I don't think I need to hear any further
12 submissions, but you're going to tell me anyways.

13 **MR. ENGELMANN:** That's fine. I'll sit down.

14 **---RULING BY THE COMMISSIONER/DÉCISION PAR LE COMMISSAIRE:**

15 **THE COMMISSIONER:** Thank you.

16 I think that this can all be resolved rather
17 expeditiously. First of all, if the *Personal Health*
18 *Information Protection Act* was being brought forward to
19 stop something and it would end there, that would be one
20 matter that I would have to consider.

21 However, if Mr. Leroux, through his
22 solicitor, is intent on bringing a motion that he be
23 excused from testifying and using these documents and for
24 the purposes of advancing his situation, I think it makes
25 the provisions of the *Health Information Protection Act*

1 secondary to the issue of disclosure with respect of this
2 matter.

3 And I would think that if Mr. -- you cannot
4 get a second blow at the same time, in the sense that you
5 have given me an opening I suppose that these documents
6 will be used in furtherance of his application, and so I
7 think the Act does not apply.

8 And even if it did, I find that the
9 circumstances are such that the sections that Mr. Engelmann
10 and others have pointed out would exempt us from applying
11 this Act to these circumstances.

12 Finally, again, this disclosure is not to
13 the public. It is under the provisions of the Inquiry and
14 under my directions under strict undertakings, and
15 accordingly that is a different circumstance that dictates
16 that disclosure should occur.

17 So, I'm going to order that the letters of
18 April 19th, June 27th, July 30th, August 11th and August 12th
19 be disclosed to the parties on the understanding that this
20 is going to form part of the basis for Mr. Leroux's
21 application to be excused from any further testimony.

22 So then what I intend to do is come back and
23 hear submissions as to where we should go from here on the
24 application and whether it should be held in camera or not,
25 I should be viewing these documents or not and such other

1 and further suggestions that the innovative counsel that
2 are here today will be able to suggest, so that two ends
3 can be met.

4 First of all, that Mr. Leroux's interests be
5 adequately protected.

6 Secondly, that the public be kept advised of
7 all the elements in this Inquiry to the extent that that's
8 possible.

9 So Mr. Engelmann, would half-an-hour be
10 sufficient time?

11 **MR. ENGELMANN:** Yes, sir.

12 **THE COMMISSIONER:** Thank you. If you need
13 further time, Mr. Engelmann, you can contact me.
14 Otherwise, we're coming back in 30 minutes.

15 **MR. ENGELMANN:** Thank you.

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

18 The hearing will resume at 11:20 a.m.

19 --- Upon recessing at 10:52 a.m. /

20 L'audience est suspendue à 10h52

21 --- Upon resuming at 11:28 a.m. /

22 L'audience est reprise à 11h28

23 **THE REGISTRAR:** The hearing is now resumed.
24 Please be seated. Veuillez vous asseoir.

25 **THE COMMISSIONER:** Thank you.

1 Again, Mr. Engelmann.

2 **MR. ENGELMANN:** Mr. Commissioner, could I
3 just have one more minute to discuss the matter with Mr.
4 Chand?

5 **THE COMMISSIONER:** Sure.

6 **(SHORT PAUSE/COURTE PAUSE)**

7 **--- SUBMISSIONS BY/REPRÉSENTATIONS PAR MR. ENGELMANN:**

8 **MR. ENGELMANN:** Sir, we are now at the
9 portion of the morning, I believe, where there is the whole
10 issue about Mr. Leroux's ability to continue with cross-
11 examination.

12 There are five letters. I think one of them
13 is an email. In any event, there is five documents and the
14 question will be, for the purposes of making the
15 submissions, how we go about using these documents if at
16 all and how we go about getting them before you if you are
17 to make a decision on Mr. Leroux's ability to continue with
18 his cross-examination?

19 I just took a moment because I was advised
20 by Mr. Chand that there is yet another letter that I
21 haven't seen that Dr. Nadler, I think, provided to Mr.
22 Chand this morning and he is in a difficult situation
23 because he is of course opposed to disclosure of these
24 types of letters. I haven't received this letter so I am
25 not in a position where I can disclose it. This is an

1 unusual situation.

2 I said that if he wished to rely upon the
3 letter in making submissions to you with respect to Mr.
4 Leroux's ability to continue testifying, then he can't have
5 it both ways.

6 So that's where I'm at and that's the
7 situation I find myself in.

8 So I'm going to leave it to Mr. Chand to
9 tell you whether he wishes to rely on yet another letter,
10 or whether he wishes to make his submissions with respect
11 to his client simply on the basis of the correspondence
12 that has already been provided to the Commission by Dr.
13 Nadler.

14 **THE COMMISSIONER:** Well, there are a couple
15 of other issues; whether or not now that parties have these
16 documents ---

17 **MR. ENGELMANN:** Yes.

18 **THE COMMISSIONER:** --- should I be reading
19 them.

20 **MR. ENGELMANN:** Yes. No, no, I think that's
21 clearly -- aside from this letter now.

22 We are going to have to make a decision as
23 to the approach you take, sir, and I don't know what
24 counsel's submissions will be on this with respect to how,
25 if at all, we get the documents before you.

1 I think there are a couple of ways to do
2 this. One is submissions are made and you don't have the
3 documents at all. Another way is we can enter the
4 documents as exhibits for the purpose of the motion and
5 then there will be issues about whether or not they should
6 be treated confidentially. That could be another option
7 for dealing with this, or exhibits for identification
8 purposes which we have done before.

9 My own preference, sir, if I can state it at
10 the beginning, would be that we -- I think it's important
11 that you have this information if you are going to make a
12 decision what to do about Mr. Leroux's ongoing ability to
13 testify, and I would suggest that the documents go in as
14 exhibits to the motion and I would suggest -- I'm not sure
15 what my friend will say on this but that they should be
16 give a "C" for confidentiality given the personal, intimate
17 medical information that's contained therein.

18 So I'll leave that suggestion. I don't know
19 the position of counsel with respect to those documents.

20 ---MOTION BY/REQUÊTE PAR MR. CHAND:

21 MR. CHAND: Yes, Mr. Commissioner. I was
22 approached about five minutes after we broke by Mr. [sic]
23 Nadler who indicated to me that there is one further letter
24 that he has not disclosed and I had the opportunity during
25 the break to review it. My position is the same as it is

1 with the other letters, that it should not be disclosed.

2 However, having said that, there is
3 information in here that definitely speaks to the issue of
4 Mr. Leroux's ability to continue on as a witness.

5 **THE COMMISSIONER:** Mr. Chand, you are
6 bringing a motion that you don't want your client to
7 continue to testify?

8 **MR. CHAND:** That's correct.

9 **THE COMMISSIONER:** What documents are you
10 going to be filing in aid of that?

11 **MR. CHAND:** I will be referring to the five
12 letters that have been disclosed to Mr. Engelmann.

13 **THE COMMISSIONER:** M'hm, and what about the
14 last letter?

15 **MR. CHAND:** Well, again, I don't want it to
16 appear that I am somehow giving any legal advice to Dr.
17 Nadler. I brought this letter to the attention of the
18 Commissioner -- sorry -- to Commission counsel and I take
19 it that your position will be that this letter ought to be
20 disclosed.

21 **THE COMMISSIONER:** If you want to use it for
22 the motion, unless you have any cogent evidence to show me
23 why I shouldn't disclose it other than the argument you
24 gave me and if it falls with the rest of the documents, it
25 will be disclosed; your choice.

1 Now, what documents are you going to rely
2 on?

3 **MR. CHAND:** I will be referring to those
4 five letters as well as this particular letter recently
5 received.

6 **THE COMMISSIONER:** All right.

7 Do you want me -- do you think I should be
8 reading all of this documentation before I hear the motion?

9 **MR. CHAND:** I do.

10 **THE COMMISSIONER:** All right. Should this
11 thing be in camera?

12 **MR. CHAND:** I do.

13 **THE COMMISSIONER:** Why?

14 **MR. CHAND:** Because of the personal and
15 privacy interests affecting Mr. Leroux by disclosure of
16 this information.

17 **THE COMMISSIONER:** Do you have anything else
18 to say now?

19 **MR. CHAND:** No, that is ---

20 **THE COMMISSIONER:** Thank you.

21 Mr. -- one of you -- Ms. Daley, sorry.

22 ---SUBMISSIONS BY/REPRÉSENTATIONS PAR MS. DALEY:

23 **MS. DALEY:** On my friend's last point,
24 first, there is no question but that these materials do
25 contain medical information. That's not disputable. I

1 think it's imperative that you see them.

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

3 **MS. DALEY:** I think it's -- I think a
4 compromise position might well be this.

5 I think Mr. Engelmann's suggestion was
6 sound. I think for the purpose of the motion, our clients
7 are content that they be treated confidentially but subject
8 to this thought, sir, at the end of the motion you'll make
9 a ruling one way or the other. When you make your ruling,
10 if your ruling were in accordance with what Mr. Chand is
11 going to ask for, which is, I guess, a termination of the
12 cross-examination of this witness, I would think should you
13 rule in that manner or otherwise, it's very important that
14 the community understand why.

15 And in that circumstance, we would be
16 certainly suggesting that although they can be treated as
17 confidential documents for the purpose of argument, if you
18 have made a decision based upon them that, should be
19 disclosed to the community so that your decision can be
20 understood, and so that the factual premise for it can be
21 clear to everyone.

22 But for the purpose of the motion, our
23 clients have no difficulty if we preserve confidentiality
24 on these records.

25 **THE COMMISSIONER:** Thank you.

1 And in camera hearing or not? Any comments?

2 **MS. DALEY:** I think I would prefer that the
3 hearing -- well, I guess our overarching preference is for
4 things to be on the public record, and we would like the
5 hearing to be on the public record, but we understand that
6 in that circumstance reference will be made to the contents
7 of these documents.

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

9 **MS. DALEY:** And that in turn, you know,
10 trenches on personal information applicable to Mr. Leroux.

11 On that point though, I would simply say and
12 remind Your Honour that Mr. Leroux himself has spoken about
13 his diagnosis and his treatment, both of which are pretty
14 well consistent with what these letters refer to. If it
15 would be inevitable that should the motion be argued
16 publicly, these matters be disclosed, then perhaps an in
17 camera hearing would be appropriate simply because we want
18 to protect the man's privacy.

19 **THE COMMISSIONER:** Thank you.

20 Mr. Lee.

21 --- **SUBMISSIONS BY/REPRÉSENTATIONS PAR MR. LEE:**

22 **MR. LEE:** I agree that you definitely need
23 to read these letters. As far as an in camera hearing and
24 the confidentiality of the documents, they go beyond
25 touching on medical or personal issues. They are extremely

1 personal. They deal with intimate affairs for Mr. Leroux,
2 and my position is that they need to be treated
3 confidentially.

4 **THE COMMISSIONER:** An in camera hearing or
5 not?

6 **MR. LEE:** Yes, in camera.

7 **THE COMMISSIONER:** Thank you.

8 **MR. LEE:** Just because I don't think we can
9 go into -- have any kind of meaningful discussion without
10 referring directly to the letters and the information in
11 the letters is all of an intimate and personal nature.

12 **THE COMMISSIONER:** Thank you.

13 Mr. Chisholm.

14 --- **SUBMISSIONS BY/REPRÉSENTATIONS PAR MR. CHISHOLM:**

15 **MR. CHISHOLM:** Good morning, sir.

16 I would adopt what Ms. Daley and Mr.
17 Engelmann had to say with respect to this proposal
18 concerning the marking of the letters as exhibits for the
19 purpose of a motion.

20 With respect to an in camera hearing, I am
21 wondering if it might be possible to deal with it in the
22 public forum and, perhaps, once the documents are marked as
23 exhibits, refer to the paragraph or sentence without having
24 to actually set out on the record what is contained in the
25 document. That may get around the concerns that we have

1 concerning Mr. Leroux's privacy interests and would allow
2 us to proceed in a public fashion.

3 Except for your questions, those would be my
4 submissions. Thank you.

5 **THE COMMISSIONER:** Thank you.

6 Mr. Rouleau.

7 --- SUBMISSIONS BY/REPRÉSENTATIONS PAR MR. ROULEAU:

8 **MR. ROULEAU:** I agree with Mr. Chisholm that
9 we should try as far as possible to stay in the public
10 domain. I think it would be doable if we are careful. In
11 terms of the documents, I have no problems that they be
12 marked confidential documents.

13 I am a bit worried about the contents of the
14 documents being seen by you because it relates to a lot of
15 the evidence that was heard, and I will let my other
16 friends address the situation, but that is something that
17 is worried -- I believe you will have to keep in mind the
18 evidence that was heard here.

19 **THE COMMISSIONER:** Yes.

20 **MR. ROULEAU:** And what is related in the
21 letters in terms of the same evidence.

22 **THE COMMISSIONER:** Right.

23 **MR. ROULEAU:** It may not always be the same
24 or may not -- so those are my comments.

25 **THE COMMISSIONER:** Thank you.

1 Mr. Scharbach.

2 --- SUBMISSIONS BY/REPRÉSENTATIONS PAR MR. SCHARBACH:

3 MR. SCHARBACH: Mr. Commissioner, I have no
4 difficulty with you seeing these letters right now. In
5 fact, I would recommend that you do look at them right now
6 because I think that is the only way in which you will get
7 a flavour of the extent and the nature of the information,
8 the personal information, that concerns Mr. Leroux.

9 THE COMMISSIONER: M'hm.

10 MR. SCHARBACH: With respect to an in camera
11 hearing, I think you will be in a much better position to
12 make that decision once you see the letters, because after
13 all you are going to have to balance the public interest
14 and having a public hearing with Mr. Leroux's interest in
15 protecting his personal information.

16 But I agree with Ms. Daley with her
17 suggestion to the effect that an in camera hearing would go
18 some ways to protect Mr. Leroux's personal information, but
19 with that same suggestion that when your decision is
20 ultimately made, if it contained enough detail so that the
21 public was -- the public interest in understanding the
22 nature of the issue before you and the manner in which you
23 came to your decision, the reasons for those decisions, I
24 think that would make a compromise that would be useful in
25 this case. Thank you.

1 **THE COMMISSIONER:** Thank you.

2 Ms. Robitaille.

3 **MS. ROBITAILLE:** No submissions.

4 **THE COMMISSIONER:** Thank you. Mr. Sherriff-
5 Scott.

6 --- **SUBMISSIONS BY/REPRÉSENTATIONS PAR MR. SHERRIFF-SCOTT:**

7 **MR. SHERRIFF-SCOTT:** I don't have any
8 instructions, Commissioner, and frankly still reeling from
9 reading all this.

10 I would suggest that Mr. Scharbach, who
11 gives wise counsel, that at least on an interim basis the
12 matter be in camera and that should you choose to read
13 them, then later on during a motion or at your decision
14 stage, you can revisit the subject of confidentiality.

15 But at this interim moment, if I can use the
16 sort-of civil expression, I think that the matter should be
17 kept in confidence, and that will become apparent to you
18 when you do see them.

19 **THE COMMISSIONER:** Thank you.

20 Mr. Callaghan.

21 --- **SUBMISSIONS BY/REPRÉSENTATIONS PAR MR. CALLAGHAN:**

22 **MR. CALLAGHAN:** I have not got instructions.

23 You should understand that these letters do
24 not just talk about medical opinions. There is some
25 explosive, frankly, stuff about the conduct of the Inquiry

1 in this, and you don't know what I am talking about, but I
2 am not sure that you should be seeing them and I need time
3 to reflect. I haven't had the time to reflect on it.

4 I don't know what is going to be made of
5 these. I think that if you are going to see them, I
6 suspect there is going to be a strong argument, and I might
7 well take it that the public should see it. But I am not
8 sure I have had a considerable enough time in the last
9 half-an-hour to consider a position.

10 So I am afraid I would ask for more time,
11 and it may take a bit of time, and I think that what Mr.
12 Sherriff-Scott is saying is he is trying to sort of convey
13 to you that he is in the same boat, but this is not a
14 straight line.

15 These are not medical opinions that I have
16 otherwise sort-of seen, and they are not in a medical
17 format. They are, as I say, they go a lot farther. In
18 fact, it could be argued that what he talks about in terms
19 of medical conditions is not a whole lot more than the
20 witness spoke about, which you wonder why we need
21 confidentiality at all on that part. It's the rest of it
22 that I am not sure you should be seeing.

23 **THE COMMISSIONER:** How much time do you
24 need?

25 **MR. CALLAGHAN:** I would like to consult my

1 client and I haven't. He just arrived. I have asked him
2 to come down, so I would like to speak to him. I would
3 like to consult with Mr. Manderville who is in Cornwall. I
4 would like to have a discussion about the ramifications of
5 it. I would like to see if I could do it over the lunch
6 period, but this is not -- you know, ordinarily, we would
7 have had our friend file an affidavit.

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

9 **MR. CALLAGHAN:** We would have had a proper
10 medical report. This stuff should have come out.

11 **THE COMMISSIONER:** Should ---

12 **MR. CALLAGHAN:** Which should come out -- it
13 would have come out presumably in some of that material.
14 In other words, you couldn't actually file an affidavit of
15 Dr. Nadler without this.

16 **THE COMMISSIONER:** Right.

17 **MR. CALLAGHAN:** We may, once you get this,
18 we may still need all that. We may still need Dr. Nadler
19 in the box. We may need all that.

20 **THE COMMISSIONER:** One step at a time.

21 **MR. CALLAGHAN:** Oh, I know, but what the
22 problem is, is we are jumping the cart because they have
23 not come with proper material. And we've got a bunch of
24 letters.

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

1 **MR. CALLAGHAN:** And I think we need to
2 reflect as to whether you should see the letters, and I am
3 just wondering that we are all jumping a little too quick.

4 **THE COMMISSIONER:** So what you are
5 suggesting is that the matter be deferred?

6 **MR. CALLAGHAN:** Well, I think that -- I
7 think -- I can tell you there was discussion while you
8 weren't in the room amongst counsel trying to hem and haw
9 as to what the proper response would be. And not everybody
10 was going to take the same response as you've probably
11 seen, but I think there is a group -- and I am not certain
12 what response I am going to take -- that thinks this is
13 pretty important stuff. There is a lot of allegations in
14 here that have nothing to do with his medical state, but I
15 am not sure you should be seeing it, but I need to reflect
16 on that.

17 **THE COMMISSIONER:** Okay.

18 Ms. Lahaie.

19 --- **SUBMISSIONS BY/REPRÉSENTATIONS PAR MS. LAHAIE:**

20 **MS. LAHAIE:** Thank you, Mr. Commissioner. I
21 agree with Mr. Callaghan that the matter should be
22 deferred, and I agree with his characterization that the
23 contents of the letters are explosive.

24 I think there are a number of issues raised,
25 a number of issues that we could not have anticipated until

1 we saw the letters and that I am certain that, Mr.
2 Commissioner, you have not anticipated, and we would
3 require further time in order to formulate more
4 comprehensive submissions with respect to those issues.

5 I would have some difficulty with you seeing
6 the letters, Mr. Commissioner, without assurances that Dr.
7 Nadler would, in fact, testify and that the parties would
8 be given the opportunity to cross-examine him.

9 The other immediate response that I had was
10 that I was wondering about, Mr. Commissioner, your
11 authority to order an independent assessment of Mr. Leroux
12 prior to seeing the letters. There are -- there would be,
13 in my respectful submission, a benefit to having an
14 independent individual assess Mr. Leroux for his
15 suitability to continue in his cross-examination on some of
16 the issues that are raised in the letters, perhaps with
17 some guidance there from the parties as to what he should
18 be assessed for. But I think we're ahead of ourselves.

19 And if, Your Honour -- if, Mr. Commissioner,
20 you are so inclined to give us some further time in order
21 to formulate those issues for you and put them down in a
22 more comprehensive format.

23 **THE COMMISSIONER:** Well, I can tell you one
24 thing; I'm not going to undertake to call anybody. I don't
25 attach any conditions to me reading letters. So, you know,

1 your comment about "Well, you can read it so long as you
2 promise to call Dr. Nadler," I don't work that way.

3 **MS. LAHAIE:** I understand. It's just that
4 there are -- and I have complete faith, Mr. Commissioner,
5 that you would not treat necessarily -- that you would not
6 treat the content of the letter for the truth of their
7 content, but there are some assertions that are made in
8 that letter which are explosive on a number of different
9 fronts, a number of issues that are raised and that should
10 be -- that the parties should be given an opportunity to
11 challenge that and that it should not just be submitted for
12 the truth of its content, similar to a *voir dire* type of
13 situation, that Your Honour would look at those documents
14 for the purpose of determining whether they should be
15 marked as a "C" exhibit, be admitted within the contents of
16 the Inquiry, but ---

17 **THE COMMISSIONER:** No, just a second ---

18 **MS. LAHAIE:** --- there are some ---

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

20 **MS. LAHAIE:** --- very dangerous allegations
21 that are made within those letters that should be -- that
22 the parties should be given an opportunity to challenge.

23 **THE COMMISSIONER:** First of all, let's make
24 sure we're -- these letters are being filed on a motion to
25 have Mr. Leroux excused. They are not part of the Inquiry,

1 not for the truth of the contents, not for -- this is just
2 -- I'm going to say an ancillary motion. It has nothing to
3 do with the rest of the Inquiry, so be careful about that.
4 It's not for the truth of its contents.

5 I don't know; if later someone wants to
6 bring them and say, "I want to file this as part of the
7 Inquiry proper," then that's a whole different ball game,
8 but no, no, no, this is just for the motion. Be careful
9 with that. Okay?

10 **MS. LAHAIE:** I have nothing further. Thank
11 you.

12 **THE COMMISSIONER:** Thank you.

13 Mr. Carroll?

14 **MR. CARROLL:** May I have one moment, Mr.
15 Commissioner?

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

17 **(SHORT PAUSE)**

18 **THE COMMISSIONER:** Yes, sir.

19 **--- SUBMISSIONS BY/REPRÉSENTATIONS PAR MR. CARROLL:**

20 **MR. CARROLL:** Ms. Lahaie made reference to a
21 *voir dire* and in circumstances that you're well familiar
22 with, where you receive material and ultimately reject it
23 in terms of your decision, and I think that's an
24 appropriate way to proceed. I don't have particular
25 concerns, sir, about you seeing the letters that I have and

1 that proper use would be made of them.

2 The reason I asked for a moment, because I
3 wasn't sure that I heard my friend who is counsel for the
4 witness properly, but apparently I did.

5 I can't say that I don't have a problem with
6 you seeing the other letter, because I haven't seen the
7 other letter, so I don't know what's in there. The ones
8 I've seen, I think you can look at and make proper use of,
9 but he's just now confirmed to me that he is intending to
10 rely on the letter which we haven't seen yet. So I assume
11 that there will be some disclosure order with respect to
12 that, if he intends to rely on it.

13 As far as the material itself is concerned,
14 quite frankly, my training is as a lawyer and I'm going to
15 have to consult an expert to decipher quite a bit of what's
16 in here myself before I can assist you with intelligent
17 submissions or cross-examination of the doctor, if that's
18 what lies down the road.

19 With respect to the proceedings themselves,
20 I would say, as Mr. Sherriff-Scott has said, they should be
21 in camera, I think, on an interim basis at least.

22 I thank you, sir.

23 **THE COMMISSIONER:** Thank you.

24 Mr. Engelmann.

25 ---SUBMISSIONS BY/REPRÉSENTATIONS PAR MR. ENGELMANN:

1 **MR. ENGELMANN:** Sir, I was just going to say
2 something similar to what you said about the use of these
3 documents for the purpose of this motion and whether or not
4 this witness should continue to testify. I don't have
5 anything to add.

6 **THE COMMISSIONER:** Okay. So there is a
7 request for an adjournment until two o'clock, and I'll
8 grant that. So I won't read the documents over the lunch
9 hour, and so I'll be expecting further submissions with
10 respect to those matters, as to whether I should read it or
11 not.

12 I believe that while I'm leaning towards an
13 interim in camera hearing, I think I should wait to read
14 the material at least to see what we're talking about
15 before I decide.

16 So let's take a break until two o'clock.
17 We'll hear submissions afterwards as to whether or not I
18 should read the material.

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

21 The hearing will resume at 2:00 p.m.

22 --- Upon recessing at 11:52 a.m./

23 L'audience est suspendue à 11h52

24 --- Upon resuming at 2:03 p.m. /

25 L'audience est reprise à 14h03

1 **THE REGISTRAR:** The hearing is now resumed.

2 Please be seated. Veuillez vous asseoir.

3 **THE COMMISSIONER:** Thank you.

4 Mr. Engelmann.

5 **MR. ENGELMANN:** Good afternoon, Mr.

6 Commissioner.

7 **THE COMMISSIONER:** Good afternoon.

8 **MR. ENGELMANN:** Just before the lunch break,
9 some counsel for two-or-three of the parties had asked for
10 an opportunity to seek instructions on the issue of whether
11 or not you should be allowed to read the letters that we
12 have received from Dr. Nadler, so I'll turn it over to
13 counsel who asked for that time.

14 **THE COMMISSIONER:** All right.

15 Mr. Callaghan.

16 ---SUBMISSIONS BY/REPRÉSENTATIONS PAR MR. CALLAGHAN:

17 **MR. CALLAGHAN:** Thank you. Thank you, Mr.
18 Commissioner, for the indulgence.

19 We have taken the recess to consider and we
20 see no problem with you viewing the matter for this portion
21 of the motion.

22 Thank you.

23 **THE COMMISSIONER:** Thank you.

24 Who else? Ms. Lahaie, you had opposed --
25 you had voiced some concerns and wanted some time, right?

1 ---SUBMISSIONS BY/REPRÉSENTATIONS PAR MS. LAHAIE:

2 MS. LAHAIE: I would echo Mr. Callaghan's
3 submissions.

4 THE COMMISSIONER: Thank you. So that's --
5 Mr. Rouleau, I know. I know, okay, just a second.

6 (LAUGHTER/RIRES)

7 ---SUBMISSIONS BY/REPRÉSENTATIONS PAR MR. ROULEAU:

8 MR. ROULEAU: If I may, Mr. Commissioner ---

9 THE COMMISSIONER: Certainly.

10 MR. ROULEAU: --- propose maybe a solution
11 that would settle the matter.

12 If you were to get, at the end of the day or
13 if you were to decide to get a second opinion in terms of
14 Mr. Leroux's ability to testify, I think you could postpone
15 you taking cognizance of the documents while waiting for
16 the second opinion and maybe at the end of the day once we
17 get the second opinion, parties are going to be in
18 agreement in terms of Mr. Leroux not being able to testify
19 anymore or not. That would alleviate the concerns some
20 parties have that allegations in the documents or factual
21 stuff in the documents would come into play somehow.

22 THE COMMISSIONER: Somehow.

23 MR. ROULEAU: M'hm.

24 THE COMMISSIONER: M'hm.

25 Thank you.

1 Mr. Sherriff-Scott.

2 ---SUBMISSIONS BY/REPRÉSENTATIONS PAR MR. SHERRIFF-SCOTT:

3 MR. SHERRIFF-SCOTT: Yes, sir, I would
4 object to the -- now, in terms of you seeing them, I
5 suppose there is an ancillary or preliminary matter you'd
6 have -- my view is that a number of the letters with the
7 exception of the last two, the last one of which is, I
8 guess, yesterday's date or this morning's date -- I just
9 got it now -- are not relevant to this issue on this motion
10 and I can't argue that unless you have them because then
11 you can't decide if they are relevant or not. So I don't
12 have -- I am unable to get instructions.

13 My provisional view is that the first
14 letters with the exception of the last two should not be
15 seen because only the last two offer the opinion which is
16 germane to today's date.

17 If you do take cognizance of them then I
18 wish to be able to argue that they are not relevant to the
19 motion should you decide to view them.

20 THE COMMISSIONER: Okay, thank you.

21 Anyone else any comments? All right.

22 --- RULING BY THE COMMISSIONER/DÉCISION PAR LE COMMISSAIRE:

23 THE COMMISSIONER: And this is more for the
24 benefit of the public than it is for the lawyers.

25 Oftentimes, judges in the middle of any kind

1 of proceedings are asked to look at material to decide an
2 ancillary point which may not be relevant to the main issue
3 at hand, and what we use is the expression "to disabuse
4 yourself of that information". So judges are well trained
5 and understand the necessity of doing that. Accordingly, I
6 see really no problems in reading this material. It will
7 be compartmentalized so that it deals strictly with the
8 issue of whether or not the gentleman should be cross-
9 examined.

10 So I think what we should do now is have
11 them filed, the documents filed, and put as exhibits and
12 marked as "C" as confidential for the time being in any
13 event, and then it will give me a short period of time to
14 read the documents.

15 **MR. ENGELMANN:** Sir, can I make some
16 suggestions for exhibit numbers then?

17 **THE COMMISSIONER:** Certainly.

18 **MR. ENGELMANN:** The April 19th letter, April
19 19th, 2007, might that be M8-C1? M8, motion 8, "C" for
20 confidentiality, number one; June 27th, 2007 M8-C2; July
21 30th, 2007 M8-C3; August 11th, 2007 M8-C4; August 12th, 2007
22 M8-C5; and lastly, sir, August 15th, 2007 M8-C6.

23 All of the parties have copies. C6 of
24 course is the letter of this morning and that was talked
25 about before lunch.

1 --- EXHIBIT NO./PIÈCE No. M8-C1:

2 Letter from Dr. Nadler to Mr. Engelmann re:
3 Ron Leroux - Dated 19 April 2007

4 --- EXHIBIT NO./PIÈCE No. M8-C2:

5 Letter from Dr. Nadler re: Ron Leroux -
6 Dated 27 June 2007

7 --- EXHIBIT NO./PIÈCE No. M8-C3:

8 Letter from Dr. Nadler re: Ron Leroux -
9 Dated 30 July 2007

10 --- EXHIBIT NO./PIÈCE No. M8-C4:

11 Letter from Dr. Nadler to CPI Commissioner
12 re: Ron Leroux - Dated 11 August 2007

13 --- EXHIBIT NO./PIÈCE No. M8-C5:

14 Letter from Dr. Nadler to CPI Commissioner
15 re: Ron Leroux - Dated 12 August 2007

16 --- EXHIBIT NO./PIÈCE No. M8-C6:

17 Letter from Dr. Nadler to CPI Commissioner
18 re: Ron Leroux - Dated 15 August 2007

19 **MR. ENGELMANN:** How long would you like,
20 sir?

21 **THE COMMISSIONER:** How long would it take
22 everyone, 15 to 20 minutes?

23 **MR. ENGELMANN:** You'll need 20 to 30
24 minutes.

25 **THE COMMISSIONER:** Take half-an-hour then.

1 Thank you. So we'll come back at twenty-
2 to-three.

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

5 The hearing will resume at twenty-to- three.

6 --- Upon recessing at 2:09 p.m./

7 L'audience est suspendue à 14h09

8 --- Upon resuming at 2:36 p.m./

9 L'audience est reprise à 14h36

10 **THE REGISTRAR:** The hearing is now resumed.

11 Please be seated. Veuillez vous asseoir.

12 **THE COMMISSIONER:** Thank you.

13 Well, are we missing some players?

14 **(SHORT PAUSE/COURTE PAUSE)**

15 **---REMARKS ON MOTION BY THE COMMISSIONER/COMMENTAIRES SUR**

16 **REQUÊTE PAR LE COMMISSAIRE:**

17 **THE COMMISSIONER:** All right.

18 I can tell you that I have read the
19 documents in question. The only comment I have before we
20 resume is that I would like to urge some caution upon those
21 who are appearing before me here on the use of language and
22 rhetoric. It may well make good headline news, but words,
23 especially with documents that are marked as confidential,
24 I would hope that we would err on the side of caution
25 rather than tantalize unfairly the public with documents

1 that have certain things in there obviously that should be
2 kept confidential, but it certainly doesn't help the
3 Inquiry to inflame matters in any way.

4 All right, so I have read the documents.

5 Mr. Chand, the next issue is whether or not
6 we go in camera, is that right? That's where we are at?

7 Is there anyone opposed now that we've read
8 this, to go in camera? No?

9 I can tell you that I feel in the
10 circumstances, and using as precedent the other times when
11 we've used in camera sessions to deal with delicate health
12 issues, that the test in *Dagenais-Mentuck* is met in the
13 sense that while I certainly have been defending the right
14 of the public to know and to be aware of everything that is
15 going on during this Inquiry, there are times where the
16 potential harmful effect to a person, to an individual
17 person especially dealing with mental health issues, must
18 take precedence over the public's right to know.

19 I am taking into consideration as well what
20 some have indicated and suggested that I do; is that I can
21 assure you that when we finish hearing this matter and go
22 back into the public forum, I will do my best to give as
23 much information to the public in my decision so that they
24 will be as fully informed as reasonably possible given the
25 circumstances.

1 Accordingly, I will rise now and we will
2 resume in 10 minutes in an in camera session.

3 Thank you.

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

6 The hearing will resume at 3:50 p.m.
7 --- Upon adjourning in public at 2:40 p.m. to resume in
8 camera/

9 L'audience publique est ajournée à 14h40 pour reprendre à
10 huis-clos

11 --- Upon resuming in public 4:53 p.m./

12 L'audience public est reprise à 16h53

13 **THE REGISTRAR:** Order; all rise. À l'ordre.
14 Veuillez vous lever.

15 The hearing is now resumed. Please be
16 seated. Veuillez vous asseoir.

17 ---**REMARKS TO GENERAL PUBLIC REGARDING MOTIONS PRESENTED IN**
18 **CAMERA AND OTHER MATTERS BY THE COMMISSIONER/COMMENTAIRES**
19 **AU PUBLIQUE GÉNÉRAL CONCERNANT LA REQUÊTE PRÉSENTÉ À HUIS**
20 **CLOS ET AUTRE MATIÈRES PAR LE COMMISSAIRE:**

21 **THE COMMISSIONER:** Thank you.

22 We are back in the public forum. I can
23 advise you that we have been very busy. There are several
24 steps to go through when dealing with such a motion.

25 First of all, I can tell you, it was an oral

1 motion and normally I have required folks to prepare
2 records so that people know what is going on. That wasn't
3 possible in this case and, as I have said, we deal with
4 matters on a case-by-case basis, and I agreed to the oral
5 motion for several reasons.

6 First of all, because there is a need to
7 move forward. We have to deal with the health of a
8 witness, which is very important. And of course material
9 came to light as recently as this morning with the last
10 report from Dr. Nadler.

11 I made the decision to go in camera because
12 the submissions dealt with the letters, and the letters
13 were an integral part of this application. And so it was a
14 more efficient use of time and it was, in my view,
15 absolutely necessary that we do so.

16 During the in-camera matter, I heard
17 submissions as to whether or not I should read the
18 material. There were several opinions raised and concerns
19 raised, and having had the benefit of the advice of all
20 counsel, I decided that it was for me necessary to read the
21 documentation.

22 After I had done that, we then moved on to
23 hearing the arguments, and the position of Mr. Leroux's
24 counsel is that Mr. Leroux should be excused from further
25 cross-examination and, in doing so, he referred me to

1 several references in the different letters that Dr. Nadler
2 had produced.

3 Some of those letters referred to his
4 failing health and possible serious adverse effects if he
5 continued to be cross-examined. The counsel, while he
6 noted that there were some inconsistencies in Dr. Nadler's
7 reports and offered that Dr. Nadler be cross-examined, he
8 still feels that Dr. Nadler is the best suited to decide
9 this matter.

10 Several counsels say that I needed further
11 medical information before we could continue and for me to
12 decide this issue. I can tell you that I am of the view
13 that such a further assessment would greatly assist me in
14 determining this issue. I say that and I want to save my
15 comments with respect to Dr. Nadler's reports, but it is
16 clear in his reports that he sometimes -- and he has
17 indicated at one point that he should not continue to
18 testify; in another letter, certain ways in which to
19 minimize the risks for him. And so we do not have, I
20 think, a clear view at this point in time and so it would
21 assist me in determining this issue.

22 It is clear that I do not believe that I
23 have the authority to order that type of a report.
24 However, having said that it would assist me, I am making
25 the following. I would like, if that report is to be

1 prepared and an opinion rendered, that opinion should, in
2 my view, first of all answer these following questions:

3 (1) Is Mr. Leroux fit to continue in his
4 cross-examination?

5 (2) What harm, if any, would he sustain
6 should he be cross-examined?

7 (3) What, if any, accommodation can we make
8 for Mr. Leroux to ensure that he can complete his testimony
9 without suffering serious and long-term consequences?

10 I would provide the p[sychiatrist with the
11 exhibits on this motion and if a report is prepared, I
12 would want to see the letter of instructions to him and a
13 list of the material that was provided to that psychiatrist
14 to provide his opinion.

15 As well, I would instruct counsel,
16 Commission counsel, that if there is any logistics in this
17 matter to be worked out, that they assist in whatever way
18 they can.

19 Now, a psychiatrist has been suggested by
20 Commission counsel, and that psychiatrist can see this
21 gentleman as early as tomorrow and a report produced by
22 next week.

23 And so if -- I know that counsel had
24 indicated that for three reasons or in his three points
25 that he doesn't know whether his client can consent. He

1 feels that Mr.[sic] Nadler is the most qualified to render
2 that opinion.

3 And what was your other point, Mr. Chand?

4 **MR. CHAND:** That at this particular point in
5 time -- that -- we do not have sufficient information about
6 Dr. Dimock.

7 **THE COMMISSIONER:** Right. Well, that's
8 neither here nor there as far as I'm concerned with respect
9 to the rendering of the opinion.

10 And so I would think that Mr. Leroux's
11 counsel, and he may well want to review those thoughts, I'm
12 prepared to adjourn this matter to August 23rd at which time
13 I will render a decision, a final decision based on the
14 information that I have.

15 Again, I would hope that my suggestions
16 might be considered. In any event, should my decision be
17 rendered, depending -- I will render a decision on August
18 23rd and I'm prepared to hear further arguments following
19 the filing of the report if that is to be.

20 I can advise you that if on August 23rd I
21 decide that the cross-examination is to continue, that Mr.
22 Leroux and his counsel and all the parties should be
23 prepared to continue on that day or shortly thereafter.
24 Accordingly, Mr. Leroux is ordered to return here on August
25 23rd at 10:00 a.m.

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In the meantime, should he continue to see Dr. Nadler, I believe there has been -- Commission counsel will be communicating with Dr. Nadler directly to reinforce the fact that he should not be speaking with this witness on matters that are related to the cross-examination into his evidence that he is giving today.

Mr. Engelmann, is there anything else?

---REMARKS BY/COMMENTAIRES PAR MR. PETER ENGELMANN:

MR. ENGELMANN: Not that I know of, sir.

I can advise you and other counsel I did just that last Friday but I will do so again with Dr. Nadler.

Sir, if that's the case then Mr. Leroux is excused until the 23rd of August?

THE COMMISSIONER: That's right. M'hm.

MR. ENGELMANN: I believe the parties are aware that we're starting next Monday at 2:00 p.m. with the evidence of -- I believe there's no monikers.

THE COMMISSIONER: Well, of a witness ---

MR. ENGELMANN: There's a publication ban.

With our next witness, and counsel are aware of who that is.

THE COMMISSIONER: Mr. Chand, do you have any questions about what I've just said?

1 **MR. CHAND:** Not at this time.

2 **THE COMMISSIONER:** Thank you.

3 Anybody else?

4 No. Good. Thank you.

5 So we'll see you back on Monday at 2:00 p.m.

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

8 The hearing is adjourned until August 20th at
9 2:00 p.m.

10 --- Upon adjourning at 5:02 p.m./

11 L'audience est ajournée à 17:02 p.m.

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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-hauts sont une transcription conforme de mes notes/enregistrements au meilleur de mes capacités, et je le jure.



Sean Prouse, CVR-CM