

**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 95

Held at :

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

Tenue à:

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

Wednesday, February 21, 2007

Mercredi, le 21 février 2007

Appearances/Comparutions

Mr. Peter Engelmann	Lead Commission Counsel
Ms. Lise Kosloski	Registrar
Mr. Pierre R. Dumais	Commission Counsel
Mr. Peter Manderville	Cornwall Police Service Board
Mr. Neil Kozloff	Ontario Provincial Police
Mr. Joe Neuberger	Ontario Ministry of Community and Correctional Services and Adult Community Corrections
Ms. Judie Im	Attorney General for Ontario
Mr. Peter Chisholm	The Children's Aid Society of the United Counties
Mr. Allan Manson	Citizens for Community Renewal
Mr. Dallas Lee	Victims Group
Mr. David Sherriff-Scott	Diocese of Alexandria-Cornwall and Bishop Eugene LaRocque
Ms. Jill Makepeace	Mr. Jacques Leduc
Mr. Mark Wallace	Ontario Provincial Police Association
Ms. Jennifer Birrell	Catholic District School Board
Mr. Clint Culic	Mr. David Silmser

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1 --- Upon commencing at 9:32 a.m./

2 L'audience débute à 9h32

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

5 This hearing of the Cornwall Public Inquiry
6 is now in session. The Honourable Mr. Justice Normand
7 Glaude presiding.

8 Please be seated. Veuillez vous asseoir.

9 **THE COMMISSIONER:** Good morning all.

10 Mr. Engelmann, how are you today?

11 **MR. ENGELMANN:** Good. Thank you. Good
12 morning Mr. Commissioner.

13 We were here scheduled to proceed with the
14 continued cross-examination of Mr. David Silmsler. I
15 received a call yesterday afternoon from Mr. Silmsler's
16 counsel, Mr. Culic, who indicated to me that Mr. Silmsler
17 would not be able to attend today. Mr. Culic is here and
18 wishes to address you on that subject.

19 I should say I have spoken to counsel for
20 parties who have not had an opportunity to cross-examine
21 Mr. Silmsler just in the event that this might happen. And
22 I am sure they have some comments to make after Mr. Culic
23 fills us in and in any event, parties are here. So if I
24 can just maybe turn things over to Mr. Culic.

25 **THE COMMISSIONER:** Thank you.

1 Mr. Culic?

2 --- STATEMENT BY/DÉCLARATION PAR MR. CLINT CULIC:

3 MR. CULIC: Good morning, Mr. Commissioner.

4 THE COMMISSIONER: Good morning, sir.

5 MR. CULIC: Essentially, it seems to be the
6 conclusion that for medical reasons, it would not be fair
7 at this stage for David Silmsler to continue his testimony.
8 The quandary that we find ourselves in is counsel for Mr.
9 Silmsler is in order for him to endure cross-examination, he
10 has to be tranquilized and significantly tranquilized.

11 The side effect of that, of course, is it
12 makes it difficult for him to deal with the questions and
13 to provide proper coherent answers. That puts Mr. Silmsler
14 in a situation, where in order to control his rage, he has
15 to be so heavily damped down that it becomes tritely easy
16 to spin him around with any proper or adequate cross-
17 examination.

18 And we've already seen that in the last time
19 he was on the witness stand; how difficult it was for him
20 to deal with the parade of transcripts that were being put
21 forward to him; and how difficult it was for him to
22 coordinate his answers and to even hold in his memory
23 enough information to assess the vast amount of material
24 that's being put to him. I can't see any hope for any
25 change of that in the future.

1 I am attempting to obtain a thorough medical
2 certificate to put in writing the medical opinions with
3 regard to the problem faced by Mr. Silmser which would be
4 the problems faced by any witness in that situation. And
5 as soon as I have them I expect to be able to provide them
6 to you, Mr. Commissioner.

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

8 **MR. CULIC:** In terms of other areas I've
9 been asked to deal with, which is the possibility of
10 written answers, I am not happy with that for a number of
11 reasons. The main reason is, I doubt very much if anyone
12 would ever believe that Mr. Silmser actually wrote the
13 answers and I am not all that keen on exposing myself to
14 that sort of allegation. Notwithstanding the fact that it
15 wouldn't happen, they would always be those who would
16 believe that I wrote those answers. And I don't think
17 there would be anything that we can do to prevent that.

18 In terms of other techniques to attempt to
19 mitigate the stress of testifying in particular in cross-
20 examination and in particular the type of close cross-
21 examination that I anticipate will be the remainder of the
22 testimony if it was given, I canvassed a number of
23 possibilities with Mr. Engelmann and I don't frankly see
24 any of them as having any reasonable likelihood of being
25 successful in the future. It is not my purpose here to

1 hold out false hope Mr. Commissioner.

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

3 **MR. CULIC:** I think it is my obligation to
4 be as frank, which is by nature in any event, as required
5 and in my frank opinion, the likelihood of Mr. Silmsler
6 retaking the witness stand and completing his testimony in
7 any format is extremely unlikely.

8 Now, if you have any questions, Mr.
9 Commissioner?

10 **THE COMMISSIONER:** Well, first of all, I
11 want to relate to Mr. Silmsler that I do wish him well.

12 **MR. CULIC:** Thank you.

13 **THE COMMISSIONER:** That I do look forward to
14 a medical report, endorsing the position that for medical
15 reasons that he cannot return, and other than that, while I
16 am not prepared to close the door completely on Mr. Silmsler
17 returning, I can understand the situation. And what I am
18 going to do is maybe canvass counsel now to see, especially
19 those who have not had an opportunity to cross-examine,
20 what their views are on what we should be doing at this
21 point.

22 So, I suppose -- in the medical report, if
23 you could get the attending physician to also cover the
24 likelihood of him, in the reasonably near future, being
25 able to testify then that would cover it off and we could

1 close that door forever if need be.

2 So, thank you for your attendance sir and --

3 -

4 **MR. CULIC:** Thank you.

5 **THE COMMISSIONER:** --- again, wish him well.

6 **MR. CULIC:** I will. And if I could in
7 closing, I'd like to express both David's and mine's
8 personal sincere thanks for the tremendous assistance of
9 all the staff have been here, in particular, Peter
10 Engelmann and a number of the others who have helped David
11 through these difficult and trying times and this
12 testimony.

13 I cannot stress enough how every effort was
14 canvassed, every effort was made. I commend all of them,
15 they did a fabulous job and I don't want anyone of them or
16 collectively as a group for them to feel that they have in
17 any way failed. They've done an exemplary job. There are,
18 however, circumstances that can arise in life that one
19 simply cannot rise above. And when you're dealing with
20 medical problems, sometimes they get the best of you.

21 Thank you.

22 **THE COMMISSIONER:** Thank you for that Mr.
23 Culic. Thank you.

24 Mr. Engelmann, did you wish to -- or should
25 I canvass ---

1 **MR. ENGELMANN:** I just want to say, Mr.
2 Commissioner, I too wish Mr. Silmser well and hope that's
3 passed back to him.

4 I think it might be appropriate to hear from
5 the parties who have not had the opportunity to cross-
6 examine and then from any other parties who wish to comment
7 as well.

8 **THE COMMISSIONER:** All right. Thank you.
9 So where were we ---

10 **MR. ENGELMANN:** I believe the order was Mr.
11 Neuberger ---

12 **THE COMMISSIONER:** Right.

13 **MR. ENGELMANN:** --- for Corrections; then
14 Mr. Kozloff for the OPP; Mr. Wallace for the OPPA and Mr.
15 Manderville for the Cornwall Police and Ms. Burrell for the
16 School Board.

17 **THE COMMISSIONER:** Thank you.

18 --- SUBMISSIONS BY/REPRÉSENTATIONS PAR MR. NEUBERGER:

19 **MR. NEUBERGER:** Good morning, Mr.
20 Commissioner.

21 **THE COMMISSIONER:** Good morning.

22 **MR. NEUBERGER:** Thank you. On behalf of my
23 client, we hope that Mr. Silmser will experience the health
24 in a short while and be able to overcome the stress and
25 anxiety as experienced as a result of his participation

1 here.

2 Nevertheless, it leaves us in a bit of a
3 quandary. We did have a meeting yesterday anticipating
4 that this may be one of the possibilities. Counsel have
5 discussed several options and I am prepared to give you at
6 least one option which Mr. Kozloff actually had articulated
7 and I think a couple of the parties are favourable to. And
8 I am as well. But if there is a chance that sometime down
9 the road, Mr. Silmsler could return to continue cross-
10 examination, I would not want to pursue any of these
11 options and then somehow affect or taint that cross-
12 examination.

13 One of the options we had looked at was
14 addressing Your Honour by way of submissions at an early
15 opportunity which would essentially provide you with a
16 narrative of the cross-examination of each party.

17 So, for example, I would provide you with a
18 narrative of my cross-examination, essentially providing
19 you the area of questioning, the assertion and then the
20 source documents that would support that assertion. And
21 provide that to you in a manner to try and structure what
22 our reply would be to that portion of evidence that we
23 sought to cross-examine on.

24 And then at a later date, submissions, I
25 would assume, we could address the issue of weight to be

1 attached to various portions of evidence both in chief and
2 cross. In some respects, it's better than cross-examining
3 myself which might be more successful but it wouldn't be a
4 good option.

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

6 **MR. NEUBERGER:** But I do say that I would
7 need time because the cross-examination as it is structured
8 now is based upon answers that I would anticipate the way I
9 set it up. So I would have to re-revamp it and put it into
10 some coherent narrative for your consideration.

11 So I'd need essentially the break that we
12 have during the March period of time to do that.

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

14 **MR. NEUBERGER:** I think it's important that
15 at some point, we make a decision because over time we may
16 lose the context of our narrative. And so that if we want
17 to go down this path, I think it's important for us to make
18 a decision whether we will hold out hope that Mr. Silmsen
19 will come back or we'll just advance this.

20 And I could do this the week of the -- we're
21 back at the week March 26-27; I'd ask not to do it the 26th
22 but the 27th, 28th or 29th. I anticipate it would take me
23 about an hour to an hour and a half at most, it may even be
24 shorter once I have time to work on it.

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

1 **MR. NEUBERGER:** That would be my suggestion
2 and I invite any questions or comments but thank you.

3 **THE COMMISSIONER:** Thank you.

4 Mr. Kozloff?

5 **--- SUBMISSIONS BY/REPRÉSENTATIONS PAR MR. KOZLOFF:**

6 **MR. KOZLOFF:** Good morning sir.

7 **THE COMMISSIONER:** Good morning sir.

8 **MR. KOZLOFF:** On behalf of my client, I
9 express our concern for Mr. Silmsers' welfare and hope that
10 he gets through this difficult period.

11 Mr. Neuberger has accurately set out the
12 substance of what I suggested yesterday in the meeting that
13 we had with Mr. Engelmann. Again, I think -- the conundrum
14 now is that if I hear you correctly, Mr. Commissioner,
15 you're holding out some, perhaps remote hope that Mr.
16 Silmsers will return. If that's the case then what I have
17 to say is premature.

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

19 **MR. KOZLOFF:** And the conundrum is that
20 given the nature of this process, which, amongst other
21 things, is very public, it's in the interest of the --
22 particularly the four parties who -- or five parties -- beg
23 your pardon, Ms. Burrell -- who have yet to cross-examine
24 that the response to the evidence of Mr. Silmsers be brought
25 as quickly as possible.

1 There are obviously a number of
2 alternatives, they're at various extremes. The one extreme
3 is to simply expunge his evidence.

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

5 **MR. KOZLOFF:** The other extreme I think is
6 to follow the process that Mr. Neuberger has suggested and
7 which I articulated yesterday. The problem with -- and I
8 know Mr. Manderville may well speak to these issues as well
9 -- the problem as I see it with expunging the evidence is
10 multifold.

11 First of all, he has now testified fully in-
12 chief and has been cross-examined by seven parties
13 including three public institutions. It may well be that
14 some of those parties and, indeed, Commission counsel, take
15 the position that they are perfectly satisfied with the
16 evidence as it exists in the record now.

17 So it's not simply an issue of my client's
18 interests in isolation or the interest of those who have
19 yet to cross-examine in isolation being considered and I
20 appreciate that.

21 And the second reality is that the horse
22 left the barn a considerable period of time ago. In other
23 words, this is a public inquiry. Mr. Silmsen's evidence
24 went out both on the website and through the cable system
25 and through the media to the community at large as well as

1 in this room and what he has had to say has been said and,
2 in my submission, to pretend that it hasn't been said is
3 not realistic or practical or appropriate for a public
4 inquiry. Very different considerations might apply in a
5 criminal trial; for instance in the *Duong* case where the
6 matter was basically at an end than at this proceeding.

7 So I think we need to come up with a
8 solution that addresses the issues that I've raised and I
9 think we need to come up with it as quickly as possible.

10 **THE COMMISSIONER:** Right.

11 **MR. KOZLOFF:** I'm alive to Mr. Neuberger's
12 desire to obtain a little bit of time. I think, if
13 pressed, we could have done what we had to do today, but it
14 would have been, obviously, far less effective and probably
15 not entirely fair to us to be put to the test of doing it
16 today.

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

18 **MR. KOZLOFF:** There are a couple of other
19 things that we discussed yesterday that I'll raise now.
20 One is if Mr. Silmsen is not going to return, and that
21 seems to be the likelihood ---

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

23 **MR. KOZLOFF:** --- one of the consequences of
24 that, in my submission, is that it would be procedurally
25 unfair for you to rely on his evidence insofar as issuing,

1 for instance, a section 5(2) notice.

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

3 **MR. KOZLOFF:** And that's something that I
4 would ask the parties to consider in perhaps being asked
5 for their submissions, because I think after those of us
6 who haven't cross-examined are asked for their views, that
7 it would probably be appropriate to ask those who have
8 already cross-examined for their views because, to some
9 extent, reliance would have been placed by them on some of
10 the cross-examination that we were going to do.

11 We were very mindful of the point that there
12 shouldn't be duplication in cross-examination. So I would
13 -- you know, in the same way that I may have relied on some
14 of the answers Mr. Sherriff-Scott obtained in his cross-
15 examination, he may rely on something that Mr. Neuberger
16 raises.

17 Those are some of the thoughts that I have.

18 Thank you, sir.

19 **THE COMMISSIONER:** Just ---

20 **MR. KOZLOFF:** Yes?

21 **THE COMMISSIONER:** What I intend to do, I
22 think, is ask Mr. Culic to expedite the medical report and
23 hopefully have something, an update, by next Wednesday,
24 which was the other day that we had set aside ---

25 **MR. KOZLOFF:** Yes, sir.

1 **THE COMMISSIONER:** --- for Mr. Silmser's
2 evidence.

3 So what I want to do is if we have to close
4 doors, close them quickly, and that's what I would like to
5 do for that part and deal with this matter.

6 I know that next week we have a full week of
7 hearings, and so I don't want to interrupt that
8 unnecessarily, but on the 26th -- but I want to decide this
9 issue next week.

10 **MR. KOZLOFF:** I appreciate that.

11 **THE COMMISSIONER:** All right.

12 And so while I certainly won't make a
13 decision today about how we are going to do this because I
14 see -- well, actually, a lot of the counsel are here today,
15 but we'll see. You might need time to reflect on this a
16 little more, and I don't want this to be the final word.
17 So by next Wednesday, however, I intend to have some kind
18 of framework set up and so that if we do it on the 26th, 27th
19 and 28th, we'll get it done.

20 **MR. KOZLOFF:** Thank you, sir.

21 **THE COMMISSIONER:** All right.

22 Thank you.

23 Mr. Wallace.

24 --- **SUBMISSIONS BY/REPRÉSENTATIONS PAR MR. WALLACE:**

25 **MR. WALLACE:** Good morning, sir.

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

2 **MR. WALLACE:** This situation that we are in
3 and the solution that we have to come up with collectively,
4 I guess, really boils down to a balancing of different
5 factors. You can't ignore the fact that Mr. Silmsler has
6 already testified. So you have to balance that fact. You
7 have to balance it against the rights of those parties that
8 haven't had an opportunity to cross-examine him, but you
9 also have to balance that with the rights of those parties
10 that have had an opportunity to cross-examine him as well.
11 As Mr. Kozloff alluded to in his submissions to you, that
12 those parties may be perfectly happy with the state of the
13 evidence as a result of their own particular efforts.

14 So I don't think that there is any perfect
15 solution in this particular case, and when we turned our
16 minds to this issue yesterday, what Mr. Neuberger offered
17 up to you for your consideration seemed like sort of
18 essentially making the best of a difficult situation. I
19 would endorse that view as well.

20 I leave for your consideration a point that
21 Mr. Kozloff dealt with briefly, and that is the question of
22 issuing notices.

23 I think you have to remember too that
24 because of the fact that his examination is incomplete, you
25 don't know what his answers would have been. I expect at

1 some point in time, if Mr. Silmsler does not appear to be
2 involved in a process with some modifications perhaps, as
3 Mr. Neuberger outlined, and essentially I will be outlining
4 for you what the shape of my cross-examination would have
5 been, what the point was I was trying to make and whatever.
6 But I don't know nor do you know what his answers would
7 have been.

8 So I don't think it would be fair to simply
9 take his answers that he gave in his examination in-chief
10 perhaps or later in a cross-examination and weigh it
11 against the evidence of a witness down the road when you
12 don't know on that particular issue what his answer would
13 have been.

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

15 **MR. WALLACE:** So this is not really a
16 submission, it's just really at this stage because we don't
17 even know if we are going to be doing this, it's just an
18 area that I would like you to bear in mind.

19 I, as well, think it's very prudent on you
20 to try and move the medical aspect along, so that we do
21 know. We have to make a decision one way or the other, and
22 the sooner, the better. I think that would make the best
23 use of the time that we have.

24 Thank you.

25 **THE COMMISSIONER:** Thank you very much, Mr.

1 Wallace.

2 Ms. Birrell.

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

4 MS. BIRRELL: Good morning, Mr.
5 Commissioner.

6 THE COMMISSIONER: Good morning.

7 MS. BIRRELL: On behalf of the Catholic
8 District School Board of Eastern Ontario, I would like to
9 echo my friends' sentiments with respect to Mr. Silmser,
10 and best wishes for his quick recovery.

11 I think, in my submission, would be our
12 discussions on the role of cross-examination that occurred
13 on Monday, were very timely. You heard on Monday how
14 cross-examination was essential to discover the truth --
15 that was one of the concepts, the principles of cross-
16 examination -- and it was also essential for ensuring a
17 fair hearing. The test in *Wigmore* or the comments in
18 *Wigmore* were echoed to you on several occasions, how cross-
19 examination was the most effective way of reaching those
20 very essential goals.

21 With that in mind, I'm also cognizant that
22 we did have an ordering of presentations of cross-
23 examination, and there was a request by my friend, Mr.
24 Culic, to re-order it. And so the parties that are left to
25 cross-examine were deemed to be the more contentious

1 parties and that's the conundrum we are faced in.

2 And unfortunately, I wasn't part of the
3 counsel meeting yesterday. So I haven't had an opportunity
4 to fully think through all the various options to us.

5 I can tell you when I first heard the news
6 that Mr. Silmsler wouldn't be here this morning, my
7 immediate reaction was just simply expunge his evidence. I
8 have heard my friends' suggestions in terms of a summary,
9 and I will give consideration to that, but it would also,
10 in my submission, have to extend to all parties, not simply
11 those parties who have yet to cross-examine.

12 For example, I heard my friend, Mr. Lamb,
13 look to enter an area of cross-examination; ultimately, he
14 decided to defer that cross-examination in view that Mr.
15 Neuberger would be covering it. That was simply one of the
16 occasions that was expressed in this room. I am certain
17 that there were other occasions. I don't purport to speak
18 for other parties, but I think that should be kept in mind.

19 And those would be my submissions.

20 **THE COMMISSIONER:** Thank you.

21 All right.

22 Mr. Manderville, yes.

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

24 **MR. MANDERVILLE:** Good morning, Mr.

25 Commissioner.

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

2 **MR. MANDERVILLE:** At the outset, I would
3 express the hope that the medical treatment Mr. Silmser is
4 seeking will assist him in calming or, indeed, exorcizing
5 the demons he appears to have within him.

6 I think this Commission is faced with a
7 unique situation that may call for a unique response. I
8 would go further and observe that it better be a unique
9 situation lest this Commission would be viewed by some as a
10 sham.

11 And the issue for the Commission today is
12 how to make some form of a purse out of the sow's ear in
13 which we find ourselves, and it will not be a silk purse,
14 no matter what you do.

15 Mr. Culic adverted to this a few weeks ago,
16 and he knows what the remedy is here, and that is that the
17 evidence should be expunged.

18 Our Court of Appeal earlier this year in the
19 case of *HMQ v. Duong* ---

20 **THE COMMISSIONER:** How do you spell that?

21 Do you know?

22 **MR. MANDERVILLE:** D-U-O-N-G.

23 **THE COMMISSIONER:** Okay.

24 **MR. MANDERVILLE:** --- dealt with precisely
25 the same situation where a witness refused to answer

1 questions in cross-examination and the cross-examination
2 could not be completed. And the court noted the importance
3 -- the critical importance of cross-examination to the
4 judicial process and held that in that case the evidence
5 had to be expunged.

6 It considered three issues: the reason for
7 the unresponsiveness of the witness and if the reason was
8 -- I won't say fault -- if the reason could be laid at the
9 feet of the witness, that militated in favour of expunging
10 the evidence; the impact of the unresponsiveness was also
11 to be considered; and the possibilities of ameliorative
12 action was to be considered.

13 Mr. Silmsers, as all would concede, is a very
14 important central witness in this Inquiry, which makes the
15 ability to take ameliorative action much more difficult.

16 The court in the *Duong* case noted that Mr.
17 Chu, who was the witness who would not permit himself to be
18 cross-examined, noted that he was a key witness; that his
19 credibility was vulnerable in a variety of angles; and his
20 silence deprived the appellant of any right to cross-
21 examine him. I submit that's what we have here. The
22 reasons for that may well be unfortunate, but that is the
23 situation we have.

24 So I would submit, unfortunately, Mr.
25 Silmsers's evidence must be expunged as a matter of law.

1 If his evidence is not expunged, and this is
2 an alternative submission, on Monday afternoon, I spoke to
3 you of the Supreme Court of Canada's decision in what has
4 been called the Blood Inquiry, the Krever Commission, and I
5 outlined on Monday for you the circumstances where the
6 Commissioner had issued the federal equivalent of section
7 5(2) notices on the last day of that inquiry.

8 A number of those notices were quashed.
9 Those which were allowed to stand were permitted to stand
10 on the basis that those parties affected by those notices
11 had had full rights of cross-examination throughout and,
12 therefore, procedural fairness had been accorded to them.

13 Here, with respect to Mr. Silmsler's
14 evidence, procedural fairness has not been accorded to my
15 client, to Mr. Neuberger's client, Mr. Kozloff's client
16 and, as Ms. Birrell has accurately pointed out,
17 peripherally to some others who have had an opportunity to
18 cross-examine him.

19 At the very least, whatever process is
20 followed here or imposed, it must be made clear, I submit,
21 that no findings of misconduct can be made against my
22 clients, particularly the individuals, on the basis of Mr.
23 Silmsler's untested evidence. Indeed, I would submit, that
24 no section 5(2) notices should be issued to my clients on
25 the basis of Mr. Silmsler's evidence alone.

1 Moreover, whatever process is directed by
2 you, I would submit Mr. Silmsler should not be then at
3 liberty to having observed whatever alternate processes
4 followed, to then come forward and say "I've decided to
5 return". His chance is between now and next Wednesday, I
6 submit, and you've adverted to that accurately, I suggest.

7 It would be a travesty if Mr. Silmsler were
8 permitted to return after observing the process that is
9 imposed on the OPP, my clients, the OPPA and Mr.
10 Neuberger's client.

11 If you are not minded to accept my
12 submission that his evidence be expunged, we would need
13 time to put together materials for the process, whatever
14 process is directed. And as you know, Mr. Silmsler was Mr.
15 Callaghan's witness and it would be he who would be
16 responding. The timeframes suggested by Mr. Neuberger with
17 some possible tweaking could well work.

18 **THE COMMISSIONER:** All right.

19 I'm not going to -- should I take this as
20 your full submission on the record being expunged? Or do
21 you want -- we're just canvassing now, and so if you're
22 intent on doing that -- the choice is yours, I suppose.

23 **MR. MANDERVILLE:** I suggest, Mr.
24 Commissioner, I would take instructions on that and advise
25 Mr. Engelmann at the earliest possible opportunity.

1 **THE COMMISSIONER:** All right.

2 **MR. MANDERVILLE:** And if -- I hear you. If we
3 want to formally advance that we'll schedule a motion.

4 **THE COMMISSIONER:** All right. But again I'm
5 looking at timeliness because you -- all right.

6 **MR. MANDERVILLE:** We'll schedule it quickly.

7 **THE COMMISSIONER:** So by next Wednesday, you
8 would know by then ---

9 **MR. MANDERVILLE:** Yes.

10 **THE COMMISSIONER:** --- what your
11 instructions are? Okay.

12 Thank you very much.

13 **MR. MANDERVILLE:** Thank you.

14 **THE COMMISSIONER:** Any of the other parties
15 wish to address me at this point?

16 Mr. Manson?

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

18 **MR. MANSON:** Yes, Mr. Commissioner. If I
19 could just address some of the comments my friends have
20 made.

21 First, if we look at the expungement -- I'm
22 not sure if that's the proper noun, but -- that question --
23 it's our position that while this is an unfortunate
24 situation and to some extent perhaps unique, that is not an
25 option that we would support. All forensic processes are

1 attempts to piece together the past and sometimes when a
2 trier of fact has more pieces than on other occasions, it's
3 rarely a perfect and clear picture. Obviously, this will
4 have impact on your ability to make findings of fact, but I
5 would hope that by following the option that was proposed
6 by Mr. Neuberger and supported by Mr. Kozloff and Mr.
7 Wallis, that that would go some way.

8 Again I'd like to repeat the comments I made
9 earlier about subjective perceptions of past events. It
10 seems to me that the first issue is whether the witness is
11 giving you an accurate account of their perception, their
12 feeling, or whether what they're telling you today has been
13 coloured by intervening events, or just the passage of
14 time.

15 But, even if you, as the finder of fact, are
16 satisfied that you have a good sense of how the witness
17 responded emotionally, personally, to an event, that still
18 raises the question of what's the objective basis for that
19 response? Is it blameworthy? Could it have been avoided?
20 Those are all questions that may be assisted by the
21 narrative approach that Mr. Neuberger suggested.

22 If I could just give you one simple example,
23 Mr. Commissioner, and I certainly don't mean anything
24 pejorative by this, but I could stand here and say I find
25 it intimidating appearing in front of you. You would

1 immediately say to me, this is completely -- you would
2 immediately say to me, "But what have I said? What have I
3 done?" I still have that perception.

4 **THE COMMISSIONER:** Do you?

5 **MR. MANSON:** No. So, the narrative approach
6 would go some way to addressing the question of yes, that
7 was your feeling, but was there an objective basis for it,
8 et cetera.

9 On the timing question -- and I'd go further
10 to say that I disagree with Mr. Manderville's submission
11 about *Duong* and I would hope that if that issue was on the
12 table, the expungement, that we have an opportunity to
13 address that.

14 **THE COMMISSIONER:** Oh yes.

15 **MR. MANSON:** I think the *Duong* case is
16 distinguishable. It's a criminal case and there are other
17 issues going on there and we would need to pursue that
18 here. So I appreciate that, Mr. Commissioner.

19 The timing question I agree with Mr.
20 Neuberger. I don't think it would be appropriate to say
21 all these matters can be addressed in institutional
22 responses, months and months down the road. If there is an
23 option it ought to be pursued in close proximity to where
24 we are now so that -- just for the benefit of your own
25 fact-finding ability, Mr. Commissioner, that everything is

1 fresh.

2 I would -- on the same grounds, I'm sure it
3 is self evident, but earlier this week we heard Mr. Kozloff
4 talking about the so-called rule of *Browne v. Dunn*, I would
5 hope that no party would be prejudiced by their -- by the
6 inability to cross-examine, in terms of their later
7 presentation of institutional responses.

8 If I just check my notes quickly, the
9 question of 5(2) notices, I think is premature at this
10 point, but it's -- I heard what people were saying and
11 would welcome an opportunity to address that after we see
12 where we're going.

13 Thank you, Mr. Commissioner.

14 **THE COMMISSIONER:** Thank you, Mr. Manson.

15 **--- SUBMISSIONS BY / REPRÉSENTATIONS PAR MS. IM:**

16 **MS. IM:** Thank you.

17 The Ministry is in a unique position,
18 because we have had the opportunity to cross-examine Mr.
19 Silmsler, as you're very well aware.

20 However, I wanted to note a couple of things
21 for the record and you've heard these comments from Mr.
22 Kozloff and Ms. Birrell. Parties were encouraged to have
23 cross-examined -- were encouraged to limit the duplications
24 of the cross-examination. And as well, the Ministry is in
25 the position of their institutional response being informed

1 by the institutional response of other parties given the
2 nature of their relationship -- the Crown's relationship
3 with the OPP and the Cornwall Police Service.

4 So, to that extent, the Ministry's
5 institutional response and position is informed by the
6 evidence that may arise out of the cross-examination of
7 parties who haven't been given an opportunity to cross-
8 examine yet.

9 So, with those two things in mind, the
10 Ministry would like to -- and may at some further time take
11 a position with respect to expungement, with respect to the
12 weight which is given to Mr. Silsmer's evidence and would
13 like to reserve its right to make such submissions.

14 **THE COMMISSIONER:** Thank you.

15 **MS. IM:** Thank you.

16 **THE COMMISSIONER:** Mr. Chisholm we skipped
17 over you.

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

19 **CHISHOLM:** Morning, Mr. Commissioner. My client and I
20 would also extend best wishes to Mr. Silmsmer in dealing
21 with his medical issues to the best that he can.

22 The issue that you have before you, sir, is
23 the -- is what do you do with Mr. Silmsmer's evidence?
24 You've heard Mr. Kozloff set out the -- I believe it was
25 Mr. Kozloff -- set out the alternatives on the spectrum

1 from expungement to following the process set out by Mr.
2 Neuberger. I stand up here also as a party -- as counsel
3 for a party that has completed its cross-examination of Mr.
4 Silmser. My concern today is more with respect to what
5 could happen down the road if we find ourselves in -- if my
6 client finds himself in a circumstance whereby another
7 witness has testified in chief, but I have not been given
8 the opportunity to cross-examine. Hopefully we won't see
9 that happen, but my concern is with respect to any
10 precedent that this may set with respect to future
11 witnesses. I have not as large an interest in this issue
12 as the five parties who have not yet cross-examined.

13 My friends have all alluded to the issue of
14 procedural fairness and how it would be unfair to not allow
15 cross-examination, but that may be beyond our control given
16 Mr. Silmser's medical circumstances. I would simply put
17 out another possibility that falls within the spectrum
18 discussed already, but it's, I suppose, a modification of
19 Mr. Manderville's position of expungement.

20 Some of the parties, as has been mentioned,
21 may be perfectly happy with the state of the record, those
22 who have cross-examined already. But one issue that you
23 can consider, Mr. Commissioner, is considering -- and this
24 may be for submissions down the road, but giving no weight
25 to any areas of the evidence that Mr. Silmser provided, and

1 that those five parties would take exception to. That
2 would probably be something for further submissions down
3 the road at the conclusion of the evidence, but that would
4 be a modification to the complete and total expungement of
5 the evidence that was proposed by Mr. Manderville.

6 Subject to your question, sir, those would
7 be my comments.

8 **THE COMMISSIONER:** Thank you very much.

9 **MR. CHISHOLM:** Thank you.

10 **THE COMMISSIONER:** Ms. Makepeace?

11 **MS. MAKEPEACE:** Nothing, thank you.

12 **THE COMMISSIONER:** Thank you.

13 Mr. Sherriff-Scott?

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

16 **MR. SHERRIFF-SCOTT:** Good morning,
17 Commissioner.

18 The Diocese hopes Mr. Silmsler will have a
19 full recovery in the shortest possible time. I wasn't
20 alive to the issue until I was nearly here this morning in
21 Cornwall, when I got an email from Mr. Dumais, and so I
22 haven't had time to obtain instructions.

23 Without prejudice to that point I do have
24 three concerns. First, these are sort of some points that
25 have been raised in part. I did defer part of my cross-

1 examination to Mr. Neuberger as it related to Mr. Seguin,
2 and how that affected the Diocese and its institutional
3 response.

4 Second, the cross-examinations by Mr.
5 Neuberger, the CPS, and possibly the OPP, I would submit
6 may well serve to support, buttress, or further illuminate
7 the points that I made, or sought to make, in cross-
8 examination -- and you should know that there were fairly
9 extensive discussions about the division of cross-
10 examination on a variety of issues between myself and other
11 institutional litigants in order to achieve efficiency in
12 other matters.

13 I suppose the third concern of equal or
14 greater importance that I have is the medical issue that
15 Mr. Culic raised -- and he can rise and correct me if I
16 misstate this or put it too highly -- but what I heard him
17 say this morning is perhaps that during cross-examination,
18 Mr. Silmsler in the past was either on medication to such a
19 significant degree that it may well have resulted in him
20 being easily manipulated or controlled or in some fashion
21 affected his evidence. I'm very concerned by that
22 submission. I don't know whether or not Mr. Culic intended
23 to apply that submission to what has come before; in other
24 words, my cross-examination.

25 But I would suggest, therefore, in view of

1 that, the implications on my cross-examination that that
2 may have should be part of the medical evidence that you
3 receive. In other words, I would submit that Mr. Culic's
4 client be directed and that he consult with the physician
5 to determine whether or not that in fact happened, so that
6 we know the purity of the evidence, in effect whether it
7 was the real evidence or whether it was so profoundly
8 affected, because that's what I heard. I don't want to
9 overstate it. But if that was an issue that further
10 exacerbates my concerns.

11 I would just suggest that in terms of any
12 motion, I just preserve my rights, but the scheduling of a
13 motion on the variety of extremes should await the medical
14 evidence. In other words, if we get the medical evidence
15 next week, then we should schedule it because then, for
16 example, I'll know whether this is an issue on my cross-
17 examination, whether my cross-examination is affected by
18 medication-related issues. Or whether -- I think that's a
19 concern based on what I heard.

20 **THE COMMISSIONER:** Okay. I am intent on
21 moving on.

22 **MR. SHERRIFF-SCOTT:** Yes, I fully support
23 that.

24 **THE COMMISSIONER:** No, I know, I understand
25 what you're saying. I'm just looking at logistically,

1 thinking out loud, that -- your third point, dealing with
2 whether or not your cross-examination may or may not have
3 been affected by whatever medication he may or may not have
4 been on, does not preclude us from going on with the other
5 parties that have not cross-examined. Is that fair?

6 **MR. SHERRIFF-SCOTT:** That's fair. I just
7 think if there's going to be medical evidence directed that
8 should be part of it.

9 **THE COMMISSIONER:** All right. Okay.

10 **MR. SHERRIFF-SCOTT:** Thank you.

11 **THE COMMISSIONER:** I think as well, Mr.
12 Culic, you might want to have the medical officer -- if he
13 can, he or she can comment on that, with the knowledge of
14 what medication we're talking about, if he or she can make
15 any comments on that, that would be appreciated as well.

16 **MR. SHERRIFF-SCOTT:** Thank you, sir.

17 **THE COMMISSIONER:** Thank you.

18 Anyone else?

19 All right. Mr. Engelmann.

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

21 **MR. ENGELMANN:** I've listened intently to my
22 colleagues. I apologize to those who only received notice
23 this morning. My Blackberry wasn't functioning last
24 evening so I was able to notify those parties that I had
25 met with but everyone else got a notice from my colleague,

1 Mr. Dumais, early this morning.

2 With respect to this issue, I'm hearing the
3 word motion and I'm not sure if that's actually necessary.
4 We're going to have to hear from the parties as to what to
5 do on this. I'm not sure who would be bringing the motion,
6 but certainly it's a question of import to the inquiry and
7 we've heard some of the extremes mentioned today.

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

9 **MR. ENGELMANN:** If the extreme of
10 expungement is not your choice, it seems clear what we need
11 to do is put the parties back into the position they would
12 have been in if the opportunity to fully cross-examine Mr.
13 Silmsler had taken place in the normal course. And it is a
14 unique situation and a difficult one, so I certainly look
15 forward to working with counsel to come up with solutions.

16 I share your view, Mr. Commissioner, that
17 this should be done quickly and I would hope that parties
18 with views on this would be in a position to argue it some
19 time next week, so that if in fact -- if in fact, your
20 choice is an option similar to the one Mr. Neuberger
21 suggested that this inquiry could hear those submissions or
22 those narratives the first week we're back after the March
23 break.

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

25 **MR. ENGELMANN:** Those are just some brief

1 comments.

2 **--- STATEMENT BY THE COMMISSIONER/DÉCLARATION PAR LE**
3 **COMMISSAIRE:**

4 **THE COMMISSIONER:** All right. I think it's
5 important that we make a decision and move on and that's
6 why I'm asking that the medical report be expedited and
7 that we return to address this matter on Wednesday morning.

8 I am disinclined at this point -- I would
9 not want to expunge the evidence. However, if Mr.
10 Manderville is correct that in law that that is what has to
11 be done, well then we'll interpret that law and deal with
12 it. And if that is what must happen, that's what must
13 happen. However, I'm hopeful that we can -- and subject to
14 Mr. Callaghan and Mr. Manderville bringing the application
15 for expunging of the evidence, I would urge counsel to work
16 together and work out an alternative plan, one that -- and
17 I guess it need not be the same plan for everyone. I want
18 to be sensitive to the needs of all of the parties and that
19 might necessitate different approaches, but if we can
20 streamline it as much as possible, that's what I would like
21 to do.

22 And I agree with counsel that even for
23 myself I need to get this matter dealt with quickly so that
24 we can keep everything with respect to Mr. Silmsler in one
25 box so to speak. And so I would suggest that we set some

1 time aside given if we go that route for the week of March
2 26th and of course not the 26th itself to be able to deal
3 with that.

4 As I've indicated to you, these were our
5 initial comments and I know that a lot of you just received
6 this news. So on Wednesday morning at 9:30, we will re-
7 open and if there are any further comments to be made, I'll
8 accept those at that time. Alright.

9 Are we going to break?

10 **MR. ENGELMANN:** Sir, there's just one other
11 matter. We have a full week next week, as you know, and we
12 are -- Commission counsel is prepared to start with the
13 evidence of Mr. Robert Renshaw on Monday afternoon.

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

15 **MR. ENGELMANN:** Some counsel have approached
16 me after you issued your directions with respect to process
17 and issues of cross-examination and things that counsel for
18 parties should be doing, things that Commission counsel
19 should be doing, et cetera. With respect to how that
20 evidence might be heard, whether there should be a delay
21 between the examination in-chief and the cross-examination,
22 and I know that some parties want to speak to that.

23 **THE COMMISSIONER:** All right.

24 **MR. ENGELMANN:** My colleague Mr. Dumais is
25 leading that evidence. If it would be appropriate, sir,

1 perhaps we could take a 15-minute break and then have Mr.
2 Dumais present and those counsel that want to speak to
3 scheduling issues could do so.

4 **THE COMMISSIONER:** Fine.

5 **MR. ENGELMANN:** If that's satisfactory.

6 **THE COMMISSIONER:** Certainly.

7 Mr. Manson?

8 **MR. MANSON:** Could I just go back to the
9 previous issue, Mr. Commissioner?

10 **THE COMMISSIONER:** Yes.

11 **MR. MANSON:** My notes are that if the issue
12 of expungement is going to be raised with you as a possible
13 alternative, that that argument will be next Wednesday at
14 9:30. I raise that simply because we have a scheduling
15 problem and I want to make sure that we have -- that's what
16 I took you to say.

17 Perhaps we can talk about this and see how
18 it works out but I ---

19 **THE COMMISSIONER:** Why don't you people try
20 to figure that out and ---

21 **MR. MANSON:** Thank you.

22 **THE COMMISSIONER:** --- right our minds and I
23 can come to a good solution?

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

25 **THE COMMISSIONER:** Thank you.

1 All right. Let's come back at a quarter to.

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

4 This hearing will resume at 10:45.

5 --- Upon recessing at 10:24 a.m. /

6 L'audience est suspendue à 10h24

7 --- Upon resuming at 10:51 a.m. /

8 L'audience est reprise à 10h51

9 **THE REGISTRAR:** This hearing is now resumed.
10 Please be seated.

11 **THE COMMISSIONER:** Maître Dumais?

12 **MR. DUMAIS:** Good morning, Commissioner.

13 I guess I was called in. I understand that
14 some of the parties have submissions about the next
15 witness, which is -- or the next two witnesses, Mr. Robert
16 Renshaw and Ms. Clair Renshaw. They are scheduled to be
17 called to give their evidence on Monday, Tuesday, and I
18 expect to be done mid-day Wednesday, and by that I mean
19 chief and cross.

20 I understand some of the parties want to
21 address you in light of the direction that was issued
22 yesterday. Perhaps we can just do a round table and I can
23 address the issues afterwards. Thank you.

24 **THE COMMISSIONER:** Thank you.

25 Mr. Manson, do you have any comments?

1 **--- SUBMISSION BY/REPRÉSENTATION PAR MR. ALLAN MANSON:**

2 **MR. MANSON:** Only going back to the
3 expungement, if it's going to be argued, the only time I
4 could be here next week is Wednesday morning. I have no
5 other comments on the scheduling for next week.

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

7 **MR. MANSON:** And we'll have other counsel
8 here the rest of the time.

9 **THE COMMISSIONER:** Mr. Lee, is there an
10 issue?

11 **--- SUBMISSION BY/REPRÉSENTATION PAR MR. DALLAS LEE:**

12 **MR. LEE:** I suspect it's going to be turned
13 into my issue but I don't know -- I don't know what's
14 coming here in terms of arguments or what anybody is asking
15 for. My understanding was, as Mr. Dumais said, that they
16 would be called Monday through Wednesday, but I understand
17 there may be some issue with that now.

18 **THE COMMISSIONER:** Thank you.

19 Well, who wants to -- Mr. Neuberger? Thank
20 you.

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

22 **MR. NEUBERGER:** Thank you, Mr. Commissioner.

23 It's essentially me at the outset of this
24 issue. If I can just indicate, in our review of the
25 materials and of course knowledge of what's upcoming as far

1 as evidence is concerned, there are some witnesses which
2 are more involving than others, from my client's
3 perspective.

4 Mr. Renshaw is one of those witnesses which
5 is more involving than others, and given the recent events,
6 I understand why last Monday or this Monday past we really
7 had the notice that Mr. Renshaw would be testifying on the
8 following Monday being the 26th. So it's essentially a
9 week.

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

11 **MR. NEUBERGER:** We are in need of a little
12 extra time to have an efficient cross-examination of Mr.
13 Renshaw. There is a transcript which we have today by way
14 of a disk which we received, which is the cross-examination
15 at the discovery for the Diocese. The little bird in my
16 ear is telling me that there may be much material in there
17 that I need to read carefully and I want to pay careful
18 attention to.

19 In addition, I have to coalesce this with
20 other material which we're still going through right now
21 and we have to provide the Rule 38 Notice later today or
22 tomorrow.

23 So my difficulty in -- and also, I want to
24 keep to the direction which Your Honour has given us
25 yesterday. We take this very seriously and I think it

1 bears worth noting that counsel have generally with some of
2 the more involved witnesses attempted to speak among
3 ourselves, to talk about dividing areas so that we were as
4 least repetitive as possible.

5 I want to keep to the direction and
6 essentially the witness was originally to be mine. Mr.
7 Rose will probably be doing a cross on it now, but I really
8 do need a little extra time and ---

9 **THE COMMISSIONER:** What does that mean?

10 **MR. NEUBERGER:** Well, if he testifies Monday
11 or Tuesday, we are -- unfortunately, we have our three-week
12 break at the end of next week. So, if it were to be the
13 week afterward, I would ask for essentially a week to be
14 able to prepare. In that we're not coming back until the
15 week of the 26th, I would then request that that week we
16 would conduct our cross-examination.

17 It's a long break, I understand that, but
18 the problem is that I don't think we'll be in a better
19 position by Wednesday or Thursday. Given the allegations,
20 we'd probably be one of the last to cross-examine anyways,
21 but I just don't think we'll be ---

22 **THE COMMISSIONER:** Well, how long is this
23 transcript that you got a CD from?

24 **MR. NEUBERGER:** I don't know. It's on disk
25 today. So I understand it's short of a 100 pages I guess.

1 **THE COMMISSIONER:** I'm sorry.

2 **MR. SHERRIFF-SCOTT:** Approximately 300
3 pages.

4 **MR. NEUBERGER:** A couple of hours.

5 **THE COMMISSIONER:** Pardon me?

6 **MR. NEUBERGER:** A couple of hours of
7 reading, but I have a process by which we have to go
8 through to do everything. The other thing is I took from
9 your direction yesterday that the idea is to provide more
10 time to a witness to be acclimated with the documents that
11 we're going to cross on and I want to be a little bit more
12 precise with our Rule 38 Notice than just listing one
13 through 50 documents.

14 I would want to try and keep to the
15 direction. So my situation is I'm asking for the
16 adjournment. I understand what the difficulties are. I'm
17 asking that his evidence would be called in-chief and maybe
18 some other cross-examinations could go ahead but our cross-
19 examination would be adjourned to the next available week.
20 And if that's the first -- or the last week in March, then
21 that would be my request.

22 **THE COMMISSIONER:** Well, you understand that
23 to have a witness waiting three weeks is a heavy burden for
24 him and as well memory wise.

25 **MR. NEUBERGER:** Sure.

1 **THE COMMISSIONER:** It's a difficulty.

2 **MR. NEUBERGER:** I appreciate. It's one of
3 those difficulties, to be fair, is that we try and
4 anticipate the timing of witnesses.

5 **THE COMMISSIONER:** Oh, I understand that.

6 **MR. NEUBERGER:** And we try very hard to do
7 that and I understand why the order is juggled quite a bit,
8 but it does work a bit of a hardship for us in trying to
9 schedule and then fit in other people at the same time.

10 The other two witnesses who are scheduled
11 for next week are more discrete, much more focussed, easy
12 for us handle. This just involves a little bit more and I
13 can tell you that beyond Mr. Robert Renshaw there's only
14 one or two other, from our perspective, that are more
15 involved witnesses and we've tried to dialogue with
16 Commission counsel as to try to get an eyeball as to when
17 these witnesses are coming so that we can be ready at the
18 right time for. This was one that because of unforeseen
19 events turned out this way. So that's why I'm making the
20 request. Thank you.

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

22 Anybody else wish to comment? Mr. Kozloff?

23 **--- SUBMISSIONS BY/REPRÉSENTATIONS PAR MR. KOZLOFF:**

24 **MR. KOZLOFF:** I don't know why Mr. Neuberger
25 thinks he has to appropriate issues to himself? This is my

1 issue as well.

2 (LAUGHTER/RIRES)

3 MR. KOZLOFF: Good morning, Mr. Commissioner
4 again.

5 THE COMMISSIONER: Good morning, sir.

6 MR. KOZLOFF: We're in a similar situation.
7 Mr. Renshaw's Summary of Anticipated Evidence was received
8 this week on Monday at 5:00. The documents were provided
9 yesterday around noon and I just received the disk this
10 morning, which I have not yet seen but which I gathered
11 from what Mr. Sherriff-Scott says is 300 pages of
12 transcript.

13 So I am in the position of asking you to
14 consider the option of hearing Mr. Renshaw's evidence in-
15 chief and Mrs. Renshaw's evidence in-chief next week and
16 then putting over their cross-examination. The fact that
17 it goes over to the last week of March I agree is not
18 optimal, but it's the schedule that we're working with and
19 it just so happens that Mr. Renshaw's evidence is being
20 called during the last week of February and that we don't
21 return again until the last week of March. That's the
22 reality.

23 The other matter I wanted to address is the
24 issue of the notice.

25 THE COMMISSIONER: What notice?

1 **MR. KOZLOFF:** The Section 38 Notice.

2 **THE COMMISSIONER:** Right, m'hm.

3 **MR. KOZLOFF:** I would ask you to consider in
4 the particular circumstances of Mr. Renshaw's case and Mrs.
5 Renshaw's case giving us a little more flexibility than
6 tomorrow. Now, that will obviously impact on their
7 preparation but I'm mindful of some of the comments made in
8 your direction yesterday. And we did have this discussion
9 with Mr. Engelmann yesterday and it may well be that
10 Commission counsel will want to spend a lot more time with
11 those witnesses both in preparing them for their evidence
12 in-chief and in taking them through their evidence in-
13 chief. So.

14 **THE COMMISSIONER:** How long do you think
15 your cross-examination would be?

16 **MR. KOZLOFF:** Of Mr. Renshaw?

17 **THE COMMISSIONER:** Renshaw.

18 **MR. KOZLOFF:** I would love to be able to
19 answer the question but I -- the documents are being
20 processed now. If I can just explain, our process of
21 preparation involves absorbing all of the documents that
22 are identified by the Commission; going through our own due
23 diligence in terms of documents; going through the due
24 diligence process followed by the other parties; going
25 through the notes of our officers, insofar as their

1 dealings with the individual in question, in order to be
2 able to respond to some of the contents in the summary of
3 anticipated evidence, which I can tell you frankly we're
4 hearing for the first time.

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

6 **MR. KOZLOFF:** And there is also the process,
7 sir, when officer's conduct is called into question of
8 having the opportunity to consult with that individual
9 prior to cross-examination. And we are dealing, as you
10 know, with a situation where the time period being covered
11 in 10, 15, 20 years ago, and some of the officers are
12 retired, and not in the area, and have to be reached where
13 they are now residing or whether vacationing during the
14 winter.

15 These are some of the practical problems
16 that we face in trying to address the issues of the mandate
17 and our client's interest insofar as it relates to the
18 mandate. So.

19 That's a long answer, reminiscent of Premier
20 Davis, you don't know any more now than when I started
21 speaking about how long I'll be, I would say probably no
22 more than a couple of hours.

23 **THE COMMISSIONER:** Thank you.

24 **MR. KOZLOFF:** Thank you, sir.

25 **THE COMMISSIONER:** Mr. Neuberger, can I ask

1 you off the cuff, how much time you think you would require
2 without holding to -- is it three days, one day, hours?

3 **MR. NEUBERGER:** It could be between 2 hours
4 and 15 minutes.

5 **THE COMMISSIONER:** Okay.

6 **MR. NEUBERGER:** It really depends on the
7 timing that I have to work with to prepare it.

8 **THE COMMISSIONER:** All right.

9 Anyone else wish to address this issue?

10 **--- SUBMISSIONS BY/REPRÉSENTATIONS PAR MR. WALLACE:**

11 **MR. WALLACE:** I am in the same position, Mr.
12 Commissioner. I'd be requesting that the matter of the
13 evidence of the Renshaw's be split up, but I know it's not
14 an ideal situation. I think it would be easier managed if
15 we had back to back weeks, but that's not the case; it's
16 just the way it's fallen. I, as well, am in the situation
17 where I'm trying to track down officers that, as far as I
18 know, aren't even in the country right now. And ---

19 **THE COMMISSIONER:** This problem has come up
20 before. I mean, you know about Mr. Renshaw.

21 **MR. WALLACE:** Yes. But the anticipated
22 evidence is a different thing because -- maybe fine tuned
23 to this one, but one of the issues that we discussed on
24 Monday was the inclusion of subjective things in the
25 anticipated evidence. That, of course, you can't glean

1 from looking at a file.

2 And it's these issues that I have to
3 discuss with the officers, impressions, these sorts of
4 things, that -- you can't look at an occurrence report and
5 say "Oh! Well, I bet this person was really upset," or
6 whatever or felt intimidated or along these lines. They
7 are -- as I have said, they are subjective things and if
8 the evidence is led, it has to be dealt with.

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

10 **MR. WALLACE:** Thank you.

11 **THE COMMISSIONER:** Thank you.

12 Anyone else?

13 Mr. Manderville.

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

15 **MR. MANDERVILLE:** Mr. Commissioner, our
16 client is similarly-situated to Mr. Kozloff's -- Mr.
17 Neuberger's, in that we are seeing documents for the first
18 time. The disc with the transcript is in my briefcase and
19 has not been downloaded to see what's on it. I understand
20 what's on it. We would need some extra time to prepare a
21 proper cross. The cross-examination would, I anticipate,
22 be in the range of two hours.

23 **THE COMMISSIONER:** Thank you.

24 Anyone else wish to wander in here?

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

1 **MR. SHERRIFF-SCOTT:** My only comment,
2 Commissioner, is pertaining to the notice period because we
3 got the AE on a business hours analysis yesterday and the
4 list of documents yesterday. It makes it practically
5 difficult to isolate what I want to cross-examine with by
6 tomorrow morning. So if there is any flexibility to be had
7 on that issue, it would be of assistance.

8 I've had the advantage of cross-examining
9 this individual before. So I have a better idea of where
10 I'm going to go. I may not have any questions for him
11 depending on his evidence because of how it relates to
12 institutional response. But in terms of notice, that's my
13 issue.

14 Thank you.

15 **THE COMMISSIONER:** So notice Messrs. Dumais
16 and Engelmann, if we put it over -- is the notice 38(2) is
17 supposed to be done by Thursday?

18 **MR. DUMAIS:** Correct.

19 **THE COMMISSIONER:** At what time?

20 **MR. DUMAIS:** Two (2) p.m.

21 **THE COMMISSIONER:** All right.

22 So we'll put it to Friday at 2:00 p.m. It
23 won't give you that much more time but we'll go that way.

24 Is there any problems with -- sorry.

25 Mr. Lee?

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

2 MR. LEE: Sir, I am on for Robert Renshaw --
3 -

4 THE COMMISSIONER: Yes.

5 MR. LEE: --- and his wife Clair. I have
6 grave concerns with what has been suggested here on pretty
7 much every level. It is completely unreasonable and
8 unfair, in my submission, to even consider having his
9 evidence in-chief heard three weeks before his cross-
10 examination will begin. I fail to see how that's even
11 being considered as a reasonable option here.

12 As far as the 48-hour notice goes,
13 Commission counsel has been at pains throughout this
14 process, as has your -- I don't know, to have a Sherri
15 McArthur or document management person to explain how
16 difficult it is for them to work with a true 48-hour
17 notice, let alone an abbreviated notice period, and there
18 are major concerns on my end as well.

19 Coming here today, I had been scheduled to
20 meet with the Renshaws on Friday, assuming that by that
21 point I would have a full understanding of all of the
22 documents that would be identified for cross-examination.
23 And I too took your words, yesterday, to heart and I know
24 Commission counsel has in a sense that we're working
25 together in some ways to try to identify what to go to in-

1 chief, what's appropriate, what's not, and I need to
2 obviously seek instructions and meet with my client in that
3 regard. That's going to be extremely difficult to do if I
4 don't know what the documents for cross are.

5 We've had tight time lines at this Inquiry
6 from the outset sir. We've all done our best. There've
7 been times when motions have been brought; for example, I
8 remember one time being told by you, sir, that you had no
9 problem with us burning the midnight oil and that's we did
10 and we got it done. And it wasn't fun, but that's the way
11 it is, and this thing needs to move along.

12 My clients have insisted, from the very
13 beginning and from their first meeting with Commission
14 counsel, that their only real request for this Inquiry was
15 that they be given advance notice of when they're going to
16 be testifying, and that it be as certain as possible to
17 accommodate Mrs. Renshaw's work schedule.

18 Mrs. Renshaw has taken the entire week off
19 work next week to, not only for her evidence, and to
20 properly prepare, and to ensure that she is here, but to
21 support her husband who -- any one of these institutions
22 that has ever dealt with the Renshaws knows very well that
23 Mrs. Renshaw goes where Mr. Renshaw goes. And there is
24 absolutely no doubt about that. It is not an option to say
25 that it's no big deal if Mrs. Renshaw needs to be at work

1 and we'll just have Mr. Renshaw back up here. That doesn't
2 work.

3 If what we're hearing today and what you
4 find is that it is completely unreasonable to force these
5 parties to do what they need to do on such short notice.

6 My first submission is let's start Tuesday
7 with these people and let's get them done. That's give
8 them -- we were going to start Monday afternoon; that gives
9 them an extra day; they don't need to be here. Otherwise,
10 I have absolutely no idea how scheduling works for my
11 clients. I haven't canvassed with them whether they are
12 available March 26th. I don't have any idea on that. But
13 if we can't do all of their evidence this coming week, then
14 I propose we do none of their evidence this coming week.

15 **THE COMMISSIONER:** What about if we do their
16 evidence in-chief and some of the cross-examination this
17 week and we finish it off next Tuesday?

18 **MR. LEE:** Next?

19 **THE COMMISSIONER:** Tuesday.

20 **MR. LEE:** So the following Tuesday of ---

21 **THE COMMISSIONER:** Yes.

22 **MR. LEE:** It's certainly better. I again
23 have -- I frankly have absolutely no clue what my schedule
24 is that week. I know we were off. I don't have my diary
25 memorized and I have no clue what my client's schedule is,

1 but I certainly prefer that to the alternative option. But
2 I would still prefer to do it all next week if possible.

3 **THE COMMISSIONER:** Oh! I know that. I know
4 and so would I.

5 **MR. LEE:** Is that all, sir?
6 Do you have any questions for me?

7 **THE COMMISSIONER:** No.

8 **MR. LEE:** Thank you.

9 **THE COMMISSIONER:** Anybody else?
10 Maître Dumais?

11 --- SUBMISSIONS BY/REPRÉSENTATIONS PAR MR. DUMAIS:

12 **MR. DUMAIS:** I'll just, so that,
13 Commissioner, you know exactly what the facts are, I guess,
14 firstly, Robert and Clair Renshaw have been identified as
15 witnesses for a number of months now. And it is true that
16 the summary of anticipated evidence only went out this
17 week. I believe we sent out a preliminary list of
18 documents last week, but we were waiting to finalize the
19 final list, and identify the documents that I intend to
20 file in evidence as a result of the recent disclosure.

21 So as we are clear as what we're talking
22 about here, one of those documents is a transcript of an
23 examination for discovery that was conducted last April; so
24 April 2006. So it's a more recent document I guess from
25 Mr. Renshaw. I haven't gone through the transcript yet. I

1 am led to believe that 85 to 90 per cent of the transcript
2 deals with damages. So this was some civil litigation.

3 So I expect most of the information that's
4 in that transcript and just so that -- correct that for the
5 record as well, the transcript is less than 200 pages, I
6 believe it's 195 pages. So that's one of the documents we
7 are dealing with.

8 The second document is correspondence that
9 was provided to us at the end of last week from MAG. It is
10 essentially correspondence and, in my view, it deals
11 essentially with institutional response. So those are some
12 of the documents that were provided to the parties as well.

13 And I guess the third category is our
14 documents that were produced by Probations and Corrections
15 and there's just a few of them. And, in my view, only one
16 or two of them are relevant. It's not a whole lot of new
17 information, but I do understand that the parties have a
18 right to review newly disclosed documents and I appreciate
19 that.

20 Given the fact that the rest of this week
21 has opened up, certainly, we should take that into account.
22 So we have the rest of the day today and all day tomorrow.

23 And, actually, I was a little surprised of
24 the submissions I was hearing from the parties. I was sort
25 of hoping that they would say "Well, no, we want to meet

1 with Commission counsel, go through some of the issues so
2 that we can determine if there are matters or areas that
3 Commission counsel can lead rather than having us ask in
4 cross-examination." But it's not what I was hearing.

5 What I was hearing is "We require more time
6 for cross-examination." I heard your comments,
7 Commissioner, about perhaps leading the evidence on Monday
8 and Tuesday and perhaps opening up a day or two the
9 following week. Certainly, we are available. And as Mr.
10 Lee indicated, clearly, I believe that splitting the lead
11 and the cross with a three-week break is certainly unfair
12 to the witnesses.

13 **THE COMMISSIONER:** It's off the table.

14 **MR. DUMAIS:** Thank you.

15 **THE COMMISSIONER:** It's off the table.

16 **MR. DUMAIS:** And just on the issue of
17 evidence that we may -- that the parties may wish us to
18 lead, certainly, I am available both today and tomorrow to
19 meet with any of the parties if they so wish.

20 **THE COMMISSIONER:** All right.

21 So what do we have on Thursday?

22 **MR. DUMAIS:** Next Thursday Commissioner?

23 **THE COMMISSIONER:** Yes.

24 **MR. DUMAIS:** We are expecting to call C-10.

25 **THE COMMISSIONER:** Oh! Yes.

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Okay.

Well, the different options are -- is this:
I do not think it fair to anyone to have to wait till March 26th to complete their examination. I am intent on moving forward and I am intent on doing it as best we can. So the best offer I had is this, is we start the testimony on Monday and Tuesday. On Wednesday, we deal briefly with the issues with respect to Mr. Silmser, and I don't think that will be very lengthy, and we give the rest of Wednesday to prepare for cross-examination or whatever. And then we can either sit on Friday to finish your cross-examination or on Tuesday. I will come in on holidays and we'll -- so you've got Friday, Monday and Tuesday.

So I'm going to just is take a short break and maybe you people can work that out and come up with some solutions. Otherwise, I'll name the dates.

All right?

MR. DUMAIS: All right.

Thank you.

THE REGISTRAR: Order. All rise. À l'ordre. Veuillez vous lever.

--- Upon recessing at 11:15 a.m./

--- L'audience est suspendue à 11h15

THE REGISTRAR: This hearing will now

1 resume. Please be seated.

2 **THE COMMISSIONER:** Thank you.

3 Yes, Maître Dumais.

4 --- SUBMISSION RE SCHEDULING BY/REPRÉSENTATION SUR LA TENUE
5 DES AUDIENCES PAR MR. PIERRE DUMAIS :

6 **MR. DUMAIS:** Mr. Commissioner, I think on
7 the first issue of the section 38 notice for Robert and
8 Clair Renshaw, if that can be pushed over to Friday at
9 noon, I think the parties can live with that. That will
10 also permit Mr. Lee to meet with his clients on/or at least
11 identify the cross documents.

12 **THE COMMISSIONER:** Right.

13 **MR. DUMAIS:** We did canvass two separate
14 scenarios for next week, and I think the parties express a
15 preference to have a bit of lead time before we start
16 anything. So the plan would be to start with Clair Renshaw
17 Tuesday morning to finish up her cross, and then do Mr.
18 Robert Renshaw and then keep going until we are done with
19 the cross.

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

21 **MR. DUMAIS:** So it is expected that we are
22 going to be done -- we have three days: Tuesday, Wednesday
23 and Thursday. We should be done with both the chief and
24 the cross. Mr. Lee is going to canvass whether or not Mr.
25 Renshaw is available on Friday if it goes over ---

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

2 **MR. DUMAIS:** --- but I don't expect that
3 that will be necessary.

4 **THE COMMISSIONER:** All right.

5 So what are we doing on Monday?

6 **MR. DUMAIS:** We could try to move forward
7 the David Silmsler issue on Monday. I don't know if that's
8 enough time for Mr. Culic to get the medical evidence or we
9 can just not sit at all.

10 The other scenario that we looked at was
11 starting with Clair Renshaw on the Monday; and starting the
12 chief of Robert Renshaw on the Tuesday; and stopping on the
13 Wednesday and only starting the cross on Thursday with
14 Robert Renshaw. Two issues with that: We weren't sure
15 whether or not Thursday would be enough for the cross; and,
16 secondly, the parties essentially prefer the lead time to
17 starting anything rather than breaking in between the two.

18 **THE COMMISSIONER:** Okay.

19 And what about C-10?

20 **MR. DUMAIS:** Well, he was supposed to
21 testify on Thursday. Giving the rescheduling,
22 Commissioner, ---

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

24 **MR. DUMAIS:** --- I believe we should advise
25 him that we would call him the week following the March

1 break.

2 **THE COMMISSIONER:** All right.

3 Well, then let's start on Tuesday morning at
4 9:30. We will sit later to make up the time, and I think
5 it is best that we finish off those two witnesses next
6 week.

7 **MR. DUMAIS:** All right.

8 **THE COMMISSIONER:** Thank you.

9 **THE REGISTRAR:** Order. All rise. À
10 l'ordre. Veuillez vous lever.

11 This hearing is now adjourned. L'audience
12 est ajournée.

13 --- Upon adjourning at 12:07 p.m./

14 L'audience est ajournée à 12h07

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

I, Jamie Savard 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, Jamie Savard, 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.

Jamie Savard

Jamie Savard, CR