

**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

Wednesday, February 21, 2007

**Tenue à:**

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

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

**Table of Contents / Table des matières**

	<b>Page</b>
List of Exhibits :	v
Opening Remarks by/Remarques d'ouverture par Mr. Peter Engelmann	1
Statement by/Déclaration par Mr. Clint Culic	2
Submission by/Représentation par Mr. Joe Neuberger	6
Submission by/Représentation par Mr. Neil Kozloff	9
Submission by/Représentation par Mr. Mark Wallace	13
Submission by/Représentation par Ms. Jennifer Birrell	16
Submission by/Représentation par Mr. Peter Manderville	17
Submission by/Représentation par Mr. Allan Manson	22
Submission by/Représentation par Ms. Judie Im	25
Submission by/Représentation par Mr. Peter Chisholm	26
Submission by/Représentation par Mr. David Sherriff-Scott	28
Submission by/Représentation par Mr. Peter Engelmann	31
Statement by the Commissioner/Déclaration par le Commissaire	33
Submission by/Représentation par Mr. Allan Manson	37
Submission by/Représentation par Mr. Dallas Lee	37
Submission by/Représentation par Mr. Joe Neuberger	37
Submission by/Représentation par Mr. Neil Kozloff	41
Submission by/Représentation par Mr. Mark Wallace	45
Submission by/Représentation par Mr. Peter Manderville	46

**Table of Contents / Table des matières**

	<b>Page</b>
Submission by/Représentation par Mr. David Sherriff-Scott	46
Submission by/Représentation par Mr. Dallas Lee	48
Submission by/Représentation par Me Pierre Dumais	56
Statement by the Commissioner/Déclaration par le Commissaire	54
Submission re : scheduling by/Représentation sur la Tenue des audiences par Me Pierre Dumais	55

**LIST OF EXHIBITS/LISTE D'EXHIBITS**

<b>NO.</b>	<b>DESCRIPTION</b>	<b>PAGE NO</b>
------------	--------------------	----------------

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 26<sup>th</sup>  
22 but the 27<sup>th</sup>, 28<sup>th</sup> or 29<sup>th</sup>. 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 26<sup>th</sup>, 27<sup>th</sup>  
19                  and 28<sup>th</sup>, 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. Silmsler 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 26<sup>th</sup> and of course not the 26<sup>th</sup> 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 26<sup>th</sup>. 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 26<sup>th</sup>, 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 26<sup>th</sup>. 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  
26<sup>th</sup> 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*

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Jamie Savard, CR