

**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 12

Held at :

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

Tuesday, March 28, 2006

Tenue à:

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

Mardi, le 28 mars 2006

Appearances/Comparutions

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Mr. Joe Neuberger	Ontario Ministry of Community
Mr. Mike Lawless	and Correctional Services and Adult Community Corrections
Ms. Leslie McIntosh	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 Bennett	The Men's Project
Mr. David Sherriff-Scott	Diocese of Alexandria-Cornwall
M ^e André Ducasse	and Bishop Eugene LaRocque
Mr. Giuseppe Cipriano	The Estate of Ken Seguin and Scott Seguin and Father Charles MacDonald
Mr. Mark Wallace	Ontario Provincial Police Association

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DESCRIPTION

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1 --- Upon commencing at 10:05 a.m./

2 L'audience débute à 10h05

3 **THE REGISTRAR:** This hearing of the Cornwall
4 Public Inquiry is now in session. The Honourable Monsieur
5 Justice Normand Glaude, Commissioner, presiding.

6 Please be seated. Veuillez vous asseoir.

7 **THE COMMISSIONER:** Thank you.

8 Good morning all.

9 Mr. Engelmann.

10 **MR. ENGELMANN:** Mr. Commissioner, just
11 before we get started this morning, I was remiss yesterday
12 in not introducing some counsel who have not been here
13 regularly appearing before for you. I just want to do that
14 before we start this morning.

15 **THE COMMISSIONER:** All right.

16 **MR. ENGELMANN:** Leslie McIntosh is here for
17 the Attorney General of Ontario.

18 **THE COMMISSIONER:** Good morning.

19 **MR. ENGELMANN:** Mark Wallace is here for the
20 Ontario Police Association.

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

22 **MR. ENGELMANN:** And André Ducasse who is
23 here with David Sherriff-Scott for the Diocese.

24 **THE COMMISSIONER:** Thank you.

25 Good morning, sir.

1 **MR. ENGELMANN:** I understand that Mr.
2 Sherriff-Scott is prepared now to proceed with his
3 response.

4 **THE COMMISSIONER:** All right.
5 Mr. Sherriff-Scott.

6 I think I have to start on one little note,
7 an administrative note, that we were given a bunch of cases
8 that you were going to refer to today and it's a little bit
9 of a -- well, not a little inconvenience, it's a big
10 inconvenience, I suppose, that our staff has to do 20
11 copies and then try to get it on the computer. So in the
12 future, I think, and I think it's in most courts that you
13 have to bring your material. So if you bring one, bring 20
14 copies.

15 **MR. SHERRIFF-SCOTT:** I did, actually.

16 **THE COMMISSIONER:** You did? Oh, okay.

17 **MR. SHERRIFF-SCOTT:** They copied them and I
18 didn't know they were copying them. Mr. Ducasse had the
19 extra copies and I didn't anticipate your staff would have
20 to copy them. I just asked them to scan them so that ---

21 **THE COMMISSIONER:** Oh, okay. Well, there
22 you go.

23 **MR. SHERRIFF-SCOTT:** My apologies.

24 **THE COMMISSIONER:** No problem; all right.
25 Well, there we go. Now, we're really off on a good start.

1 (LAUGHTER/RIRE)

2 THE COMMISSIONER: All right.

3 Let me get set up here. Your material is
4 E3?

5 MR. SHERRIFF-SCOTT: Yes. The first thing
6 you'll need, I'm going to sort of do most of the reply
7 first before I get into my submissions on the main. So
8 you'll need Mr. Manson's book which is his Authorities, A3.

9 THE COMMISSIONER: All right.

10 MR. SHERRIFF-SCOTT: And his Factum, A.1.

11 THE COMMISSIONER: Okay. Let me just get
12 yours all set up here. All right.

13 (SHORT PAUSE/COURTE PAUSE)

14 THE COMMISSIONER: Okay.

15 MR. SHERRIFF-SCOTT: And the only other
16 thing is that I will refer to -- you'll need the *Rizzo*
17 case, but I understand that's been scanned in. So I can
18 direct the technology people to call it up when we need it.
19 So are we ready?

20 THE COMMISSIONER: I am.

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

22 MR. SHERRIFF-SCOTT: Okay. Thank you.

23 My first objective, Mr. Commissioner, is to
24 identify what I consider to be what I could call the proper
25 or orthodox approach to the interpretation of these Terms

1 of Reference, and to do that I'll start a bit out of the
2 ordinary by first reviewing some law which establishes what
3 I consider to be the proper approach and then use that as a
4 backdrop against which to measure the submissions that you
5 heard yesterday. And it will be my contention that the
6 arguments that you heard yesterday do not follow the proper
7 approach. They often gave lip service to it but departed
8 from it in what I consider to be a very substantial way.

9 In that context, I want to review each of
10 the authorities of my friend, Mr. Manson, particularly
11 since they are relied upon by each and everyone of my
12 friends opposite and my contention as well will be that
13 they have very little to do with the job we have here in
14 terms of interpretation of the statute and the Terms of
15 Reference.

16 Following that, I will briefly touch on some
17 facts, some that have been emphasized. I just want to
18 contrast a few diocesan facts with the facts that have been
19 tendered.

20 And finally, I intend to review in some
21 detail the law that I have submitted for your benefit
22 hopefully to shed some light on how this thing should be
23 handled.

24 So if I can turn to the proper approach, as
25 I describe it?

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

2 **MR. SHERRIFF-SCOTT:** A couple of preliminary
3 comments about yesterday, and I hope to solve these
4 conundrums. No one yesterday, in my submission, gave you
5 the law on the applicable canons of interpretation with the
6 exception of mentioning context and urging you to place a
7 broad interpretation on the Terms of Reference.

8 I didn't hear any coherent identification,
9 really, of what context means in a detailed statutory
10 interpretation way and I submit no one gave you a principal
11 statutory interpretation or attempted to identify the
12 characteristics of the phrase "the institutional response
13 of the justice system and other public institutions" and
14 how that may be different from public and community
15 sectors.

16 That debate really only arose when you
17 started asking questions, I submit, and no one offered as
18 well an interpretation on how you were to analyze the
19 interaction of those groups and, very importantly, what the
20 implications would be for your jurisdiction if you do not
21 find those phrases to be different and have different
22 meanings.

23 And so the nub of the matter is no one, I
24 believe, in a serious way analyzed how the phrase "the
25 institutional response of the justice system and other

1 public institutions" has to be wide enough to have public
2 institutions mean things other than the justice system but
3 narrow enough to exclude community sectors.

4 And finally, on what we didn't hear
5 yesterday, of course we heard nothing at all from my friend
6 Ms. McIntosh for the Attorney General.

7 Now, what is the proper approach? First, I
8 submit, I agree with my friend Mr. Manson at paragraph 36
9 of his Factum that the Terms of Reference are subordinate
10 legislation and therefore the traditional canons of
11 statutory interpretation apply. And so, what are those
12 principles?

13 If you turn to my Brief of Authorities at
14 Volume 1, which is E5, Tab 11 -- Tab 11 is the excerpts
15 from the text of Sullivan and Driedger on the *Construction*
16 *of Statutes* and, in particular page 259, which is excerpted
17 there towards the back of the tab under ---

18 **THE COMMISSIONER:** The second last page?

19 **MR. SHERRIFF-SCOTT:** Yes, Chapter 10, "Words
20 and Context".

21 **THE COMMISSIONER:** Yes.

22 **MR. SHERRIFF-SCOTT:** Let me just read from
23 that.

24 "Driedger's modern principle is
25 sometimes referred to as the words in

1 total context approach, a
2 characterization that is apt and there
3 are two ideas implicit in this
4 characterization, both of which are
5 fundamental. The meaning of the text
6 depends on its context and the statute
7 book is comprised of a coherent,
8 internally consistent set of rules."

9 And under the contextual principle, starting
10 with the bold words, "Meaning depends on context," it says:

11 "In an earlier edition, Driedger
12 pointed out that words in isolation are
13 virtually meaningless. The meaning of
14 a word depends on the context in which
15 it is used. The basic principle of
16 communication applies to all texts,
17 including legislation, repeatedly
18 confirmed by linguists..."

19 Et cetera, and then is citing a number of
20 quotations which are the imperatives here to look at the
21 whole of the statute and to reconcile it as an internally
22 consistent document.

23 "To arrive at the correct
24 interpretation of statutory
25 interpretations..."

1 This is over at page 260 at the top.

2 "...that are susceptible of different
3 meanings, they must be examined in the
4 setting in which they appear..."

5 Et cetera.

6 This is the statutory interpretation
7 imperative and as a general principle it was thrown around
8 yesterday in a way that I don't consider reflects what the
9 law is.

10 Mr. Manson referred to a case, the Montreal
11 case with a numbered company, in his Book of Authorities
12 and that is at Tab 3, A3, Tab -- sorry; it's Book A3, Mr.
13 Commissioner, at Tab 3.

14 And before I get to the specific page, the
15 case dealt with the interpretation of the noise bylaw as
16 it's applied to a business and whether the bylaw offended
17 the Charter principles of freedom of expression.

18 It wasn't a statutory interpretation case of
19 the kind we find here but it has comments about the word
20 "public" that were relied on by my friend, and those
21 comments begin at paragraph 9 and following, of the case
22 which begins under article 3.1.1, "Scope of Article," 9.1.

23 **THE COMMISSIONER:** Yes.

24 **MR. SHERRIFF-SCOTT:** This is the segment
25 that my friend relies on and the important paragraph I want

1 to draw your attention to because I want to dissect this
2 proper approach:

3 "As this Court has reiterated on
4 numerous occasions, today there is only
5 one principle or approach; namely, the
6 words of an act are to be read in their
7 entire context in a grammatical and
8 ordinary sense harmoniously with the
9 scheme of the act, the object of the
10 act and the intention of Parliament.
11 Statutory interpretation cannot be
12 founded on the legislation alone."

13 There's a question there.

14 It must be a broader approach but what is
15 the broader approach and is it the approach that was urged
16 on you yesterday, all kinds of contextual evidence outside
17 of the legislative history, the statutory interpretation
18 principles, et cetera? I submit, no.

19 Now, that case adopts the approach based on
20 the *Rizzo* case which is cited at paragraph 9 as the
21 principle encapsulating this imperative for the
22 interpretation of statutes which is why I handed up *Rizzo*.
23 And the *Rizzo* case, the nub of the matter on the principle
24 that applies that is adopted in the Montreal case, is at
25 page 41.

1 **THE COMMISSIONER:** Okay.

2 **MR. SHERRIFF-SCOTT:** Actually, Mr.

3 Commissioner, it starts at the bottom of page 40, at
4 marginal note 21:

5 "Although much has been written about
6 the interpretation of legislation (see
7 e.g., Ruth Sullivan...)"

8 Et cetera, over to the top.

9 "...Elmer Driedger in the Construction
10 of Statutes (2nd ed.)..."

11 Which is an earlier edition of the text that I referred you
12 to earlier:

13 "...best encapsulates the approach upon
14 which I prefer to rely. He recognizes
15 that statutory interpretation cannot be
16 founded on the wording of the
17 legislation alone."

18 Which are the concluding remarks in the Montreal paragraph
19 that I read:

20 "Today, there is only one principle or
21 approach; namely, the words of the act
22 are to be read in their entire context
23 in a grammatical and ordinary sense
24 harmoniously with the scheme of the act
25 and the object and intention of

1 Parliament."

2 Nowhere in these cases are you importune to
3 go outside of the legislative matrix because the
4 legislative matrix, as Mr. Callaghan put to you in the
5 *Consortium* case, encapsulates the public context.

6 The public context is reflected by the
7 legislators' actions and it is the legislators' actions
8 that we must interpret by looking at the scheme of the Act,
9 the Act as a whole, perhaps competing statutes and other
10 legislative instruments, but not context such as a roving
11 public opinion poll or one person's perception of what's
12 important or another person's. I mean, we would have an
13 impossible job to reconcile these things and that's why the
14 public perception is the legislators' perception. And in
15 fact, in the Montreal case, that's precisely what the Court
16 did.

17 And it went on, which is back to my friend's
18 brief A3, Tab 3, at paragraph 17.

19 On that page you'll see:

20 "When the Court adopts this principle
21 that the word 'public' doesn't have any
22 intuitive meaning or it's a broad
23 provision, the Court goes on and
24 embarks on a process of
25 interpretation."

1 So what does it do?

2 You'll see at page 8, under paragraph 15, it
3 looks at the wording of the bylaw. Down at paragraph 17,
4 the context of the article, but what it considers in the
5 context over at the top of the page:

6 "The provision can be adopted and
7 determined by reviewing its legislative
8 history and enquiring into its
9 purposes. The immediate context can be
10 determined by analyzing the bylaw
11 itself. This review will enable us to
12 determine whether the city has the
13 power to adopt the impugn provision.
14 We will accordingly address each of
15 these issues; the contextual history
16 and purpose..."

17 They go on then to review the history of the
18 bylaw as it was incorporated, and the constating power of
19 the municipality is referred to as an interpretive tool
20 over at page 11, paragraph 36.

21 So what is the jurisdictional authority of
22 the body making the decision and promulgating the bylaw, so
23 the bylaw itself, the history of the bylaw, the
24 jurisdictional authority of the body in question.

25 These are the factors the Montreal case

1 considered. It did not go beyond those considerations and
2 consider some broad, undefined, contextual arguments or
3 evidence to determine the nature of the Terms of Reference
4 as it is urged on you here.

5 I submit that what Mr. Manson attempts to do
6 in his argument using the Montreal case, is to submit that
7 the word "public" is to be taken in isolation. And in
8 isolation, he refers to the fact that it's given an
9 extremely broad meaning. He cites a dictionary authority
10 for this proposition and he urges you to accept that, as a
11 proposition to be interpolated into the Terms of Reference,
12 without regard to the context of the Terms of Reference, as
13 if the Terms of Reference cannot shed light themselves on
14 the meaning of that term. In other words, let's go outside
15 the context, look at a dictionary, "Gee, it's a broad term;
16 let's forget about what's there." Does that limit the
17 concept or does it not? I submit it does.

18 Now, the argument that he's urging on you
19 starts at paragraph 51 of his factum, which is document A1.

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

21 **MR. SHERRIFF-SCOTT:** From this point, I'll
22 refer to his factum A1 and his authorities, A3.

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

24 **MR. SHERRIFF-SCOTT:** Paragraph 51 of his
25 factum is where he uses the definition from the dictionary

1 of the word "public". And over at the next page, at
2 paragraph 52 he cites the *Berg* case for the proposition
3 that "public" has a broad meaning and therefore you should
4 use it in the same way.

5 So the argument as it basically goes is, in
6 other contexts including the dictionary and in another
7 case, the Court has said it's a general term and therefore
8 you should consider it to be general and without meaning
9 and broadly applicable so that your Terms of Reference
10 should be construed in the widest possible sense. I submit
11 that's the wrong approach and that's not what happened in
12 the *Berg* case, which is where I now want to turn.

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

14 **MR. SHERRIFF-SCOTT:** I submit also that if
15 you just treat these words in isolation, you end up
16 ignoring the grammatical imperatives and whether or not the
17 grammar of the sentence and the structure of it limits or
18 modifies or pours meaning into particular expressions.

19 Now your counsel asked people to comment on
20 the *Berg* case and, in a particular, on some passages in it.
21 I've reviewed it in detail and I want to make some
22 submissions about it. I submit it helps my case immensely,
23 because it demonstrates again the real approach and proper
24 approach to which courts go, in interpreting documents.

25 The *Berg* case is at Tab 6 of Mr. Manson's A3

1 brief.

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

3 **MR. SHERRIFF-SCOTT:** Now ---

4 **THE COMMISSIONER:** Just a second, there.

5 Okay.

6 **MR. SHERRIFF-SCOTT:** I'll just summarize the
7 facts which are found at paragraphs 1 to 8 of the decision.

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

9 **MR. SHERRIFF-SCOTT:** The case dealt with a
10 graduate medical student who had a history of depressive
11 disorders but performed academically well above average.
12 She was facing a requirement for entering the Canadian
13 Dietetic Association Hospital Internship Program. As a
14 condition precedent to that, the school had to submit a
15 rating sheet, evaluating her. The faculty refused to do
16 that because of its experience with her aberrant behaviours
17 because of her depressive disorder. And graduate students
18 were also given keys for access to the graduate facilities
19 to further their studies in off-hours and she was refused a
20 key because of her difficult behaviours.

21 So she filed a human rights complaint under
22 section 3 of the British Columbia Human Rights Act. That
23 complaint was accepted by the first instance decision-
24 maker. The Judicial Review Court above overturned the
25 decision and that was confirmed by the Court of Appeal

1 before it arrived here at the Supreme Court of Canada.

2 The rationale for the decision -- and if we
3 can just turn to paragraph 9 of the case, you'll see that
4 the Court was struggling with the definition of section 3:

5 "No person shall deny to a person or
6 class of persons, any communications
7 service or facility customarily
8 available to the public or discriminate
9 in respect of a service or facility
10 customarily available to the public."

11 So the first instance decision-maker found
12 that she was a member of the public and therefore there was
13 discrimination.

14 The Court of Appeal found that the public --
15 the word "public" was so broad that it meant everybody and
16 therefore when she entered into a contractual relationship
17 with the university she no longer was a member of the
18 public because now the contractual matrix made her a
19 private person in a private relationship. And because the
20 Court of Appeal's view of the word "public" was so broad,
21 it felt therefore that the decision-maker in the first
22 instance had lost jurisdiction because she had ceased to be
23 a member of the public, properly interpreted by the Court.

24 In other words, the Court used essentially
25 the dictionary meaning of the public as meaning everybody.

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

2 **MR. SHERRIFF-SCOTT:** And so it did not
3 analyze the subsets of relationships which may be
4 considered to be aspects of the public but said, "No, no;
5 it's so broad." Once you enter into those relationships,
6 you cease to be a member and therefore you have no remedy
7 and the tribunal had no jurisdiction.

8 So the Court cast the problem on this issue
9 at paragraph 25 of the case, and having done that, it said,
10 "Well, how do we approach the problem?" The first thing it
11 did is look at the statutory principles of interpretation
12 applicable to Human Rights Legislation at paragraphs 25 and
13 following.

14 Then you'll see at paragraph 28 on the next
15 page, in order to assist it in analyzing the statute it
16 looked at analogous legislative provisions. Do these cast
17 meaning on the statute, staying within the context of the
18 legislative matrix, as I've defined it?

19 And then at paragraph 34, it describes the
20 word "public" and how the Courts have treated the
21 interpretation of this statute before.

22 At paragraph 50, it gets to the
23 interpretation problem and how the overly broad
24 interpretation has produced a problem in this case. At
25 paragraph 50, the Court begins:

1 "As should be clear from these cases, I
2 find the distinction between
3 discrimination and the admission
4 process and discrimination in the
5 provision of accommodation services and
6 facilities to those already admitted,
7 unconvincing and subversive of the
8 purpose of the legislation."

9 It refers to a line of cases called *Gay*
10 *Alliance* and *Beattie*:

11 "admit that institutions like the
12 school cannot engage in
13 discrimination in the former
14 situation but then seek to
15 maintain the human rights
16 legislation does not protect
17 students who have been admitted."

18 In other words, once the contractual matrix
19 is engaged, you're not a member of the public.

20 The Court expresses its concern at paragraph
21 51:

22 "This cannot be maintained. As I
23 noted in *Heerspink*, such a
24 distinction would allow
25 institutions to frustrate the

1 purpose of the legislation by
2 admitting students without
3 discrimination and then denying
4 them access after they have been
5 admitted."

6 So over at the next page are the provisions
7 of how this word is dealt with that I particularly want to
8 urge on you is applicable to your case.

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

10 **MR. SHERRIFF-SCOTT:** Paragraph 52:

11 "Such is the danger of applying a
12 purely quantitative analysis to the
13 problem to decide that as soon as the
14 public as a whole is reduced to a
15 subset through an admissions
16 eligibility process, the admitted few
17 lose their identities as members of the
18 public."

19 In other words, the over-broad use of the
20 word excludes these people. It appears to me that the
21 attention in the prior cases to the quantitative
22 characteristics of the group to whom the service or
23 facility is available does not focus adequately on the
24 relevant factors.

25 If the focus is purely quantitative, that is

1 overly broad, it is indeed hard to see how anything less
2 than all citizens can be said to be public of a given
3 municipality, province or country.

4 And then, the quotation of the Prince Edward
5 Island Court is opposite. He says:

6 "I would construe the word public to
7 mean public-at-large as opposed to
8 selected or restricted segments."

9 Which is the approach the court ends up rejecting.

10 And at paragraph 54, the Court says:

11 "This cannot be the correct approach.
12 The passage quoted ignores the
13 significant problem of defining the
14 community for the purposes of the test
15 as anything other than a subset of the
16 larger community or public. This is
17 obviously a crucial and determinative
18 definition in the approach.

19 Furthermore, no services or facility is
20 absolutely available to everyone who
21 desires it. Most of the services and
22 facilities listed in Gay Alliance would
23 be insulated from scrutiny on this test
24 alone."

25 And so over the next page, paragraph 58, the

1 Court gets to how it is going to solve the problem.

2 "This is not to say..."

3 At paragraph 58.

4 "that all of the activities of an
5 accommodation, service or facility
6 provider are necessarily subject to
7 scrutiny under the Act just because
8 some are. But a quantitative approach
9 does not help to define what smaller
10 segment of the entire population might
11 suffice. As long as the debate remains
12 centred on a number of people who can
13 use the service, it will be difficult
14 to draw lines of exclusion and
15 inclusion on a principled basis."

16 And then, he adopts the approach by a
17 professor who deals with human rights, Greschner, at the
18 bottom of the page and the quotation is:

19 "A purpose of interpretation of section
20 12 would define public not in terms of
21 quantity..."

22 **THE COMMISSIONER:** I'm sorry. I've lost you
23 there.

24 **MR. SHERRIFF-SCOTT:** I'm sorry. I'm down at
25 the bottom of that page, which is paragraph 60 and there is

1 a ---

2 THE COMMISSIONER: Yes.

3 MR. SHERRIFF-SCOTT: --- quotation.

4 THE COMMISSIONER: Yes.

5 MR. SHERRIFF-SCOTT: Greschner, supra,
6 criticized this decision.

7

8 THE COMMISSIONER: Yes.

9 MR. SHERRIFF-SCOTT: And then the quotation
10 reads:

11 "A purpose of interpretation of section
12 12 would define public not in terms of
13 quantity..."

14 In other words, overly broad, as the Chambers Board did:

15 "...but in relational terms."

16 What section 12 is about is -- its purpose
17 is the regulation of particular relationships between
18 members of the Saskatchewan community and the government.

19 Now, at paragraph 61 ---

20 THE COMMISSIONER: M'hm.

21 MR. SHERRIFF-SCOTT: --- there is a
22 quotation from the Saskatchewan Court of Appeal:

23 "The fact that a service is offered to
24 the public does not mean that it must
25 be offered to all members of the

1 public. The government can impose
2 eligibility requirements to ensure the
3 program or service reaches the intended
4 client group. The only restriction is
5 the government cannot discriminate
6 among the client group."

7 And then the Court says, and this is where I
8 want to end:

9 "The idea of a client group for a
10 particular service or facility focuses
11 the enquiry on the appropriate factors
12 of the nature of the accommodation,
13 service or facility and the
14 relationship it establishes between the
15 accommodation, service or facility
16 provider and the accommodation, service
17 or facility user and avoids the
18 anomalous results of a purely numerical
19 approach to the definition of the
20 public. Under the relational approach,
21 the public may turn out to contain a
22 very large or a very small number of
23 people."

24 So if you look at this case and how the
25 Court struggled with such a general term, my friend only

1 started you at the beginning, which is the proposition the
2 Court was faced with dealing with. How do we grapple with
3 this term? And it ended up rejecting a line of authority
4 that had been established that the use of the public in the
5 fashion my friend contends for, was not appropriate for the
6 context of this case and this statute because it actually
7 frustrated the terms of the statute.

8 So the job, in my submission, is a little
9 more subtle than was urged on you yesterday.

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

11 **MR. SHERRIFF-SCOTT:** Those are my comments
12 on the *Berg* case.

13 **THE COMMISSIONER:** Can you just hold on a
14 minute? I just want to read this over again.

15 **MR. SHERRIFF-SCOTT:** Yes.

16 (SHORT PAUSE)

17 **THE COMMISSIONER:** Okay.

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

19 And so if we use the *Berg* case, we have to
20 struggle to identify what I submit are the constituent
21 elements of the institutional response of the justice
22 system and other public institutions and if we just say in
23 a gloss or sweeping statement that it's very broad, we
24 ignore the job we are really faced with, which is analyzing
25 the statute in accordance with the traditional canons of

1 interpretation, which yesterday, you were not given.

2 That brings me now to my friend's argument
3 as it continues in his Brief of Authorities at Tab 7, which
4 is the Figueroa case, I'm sure I got that right.

5 **THE COMMISSIONER:** Page 15, paragraph 54?

6 **MR. SHERRIFF-SCOTT:** Yes, and it's A3, Tab 7
7 of his factum. He cited it at that section in his factum
8 that you just identified.

9 **THE COMMISSIONER:** Okay.

10 **MR. SHERRIFF-SCOTT:** Now, the argument
11 continues in paragraph 54 using this case as a lever for
12 the generality argument. This case, I submit, is not a
13 case where the principles of statutory interpretation that
14 we are faced with were used. This is a charter case, which
15 examined the limits found in the *Elections Act* to see if
16 the number of candidates specified in a section of the Act
17 to qualify as a registered political party were arbitrary
18 and, therefore, offended provisions in the Charter. There
19 was no debate about the interpretation of a statute in the
20 fashion that we are addressing. That case was not designed
21 to show how you deal with terms in general, and I submit it
22 raises a context, which is devoid of similarity to the job
23 we have to do here. If you look at the case at paragraph
24 143, which is towards the back of the judgement, it talks
25 about political parties having a great deal of importance

1 to society, which is almost self-evident, and paragraph 143
2 reads,

3 "Parties are such important actors in our
4 political system that although they are private
5 and voluntary, they also possess characteristics
6 of a public institution."

7 And that is really the only segment of the case that you
8 referred to, but the Court here doesn't define what a
9 public institution is. The phrase that appears in this
10 case is devoid of any statutory context in this passage. I
11 submit that this phrase that you are referred to and is
12 urged on you is taken out of context entirely and urged on
13 you for the broad proposition again. You are basically
14 invited to take that language and interpolate it into the
15 Terms of Reference without regard to what the modifying
16 language is around the phrase that we are concerned about.
17 And so the argument goes, the word "public" is broadly
18 defined. Public institutions have a broad meaning,
19 therefore, it is a circle. I submit to you it's a straw
20 man. Therefore, you must do the same thing here by
21 ignoring all of the law, which is clear; how do you treat
22 these Terms of Reference in their context; how do the rules
23 of grammar apply and how do the canons of interpretation
24 deal with these issues.

25 Those are my comments on that case.

1 The next case is Aeric, which is at Tab 8 of A3.

2 **THE COMMISSIONER:** Yes.

3 **MR. SHERRIFF-SCOTT:** Now, I handed up a little
4 provision of the *Assessment Act* and in this case the Court
5 was considering a definition in the *Assessment Act*, which
6 is at paragraph 14 of that hand-up, and that is the
7 property of every public library and other public
8 institution literary or scientific, et cetera. I think the
9 proposition was urged on you yesterday that the Church
10 would fall under that, but I wanted to hand this up to you
11 when I went and looked at it last night because you will
12 see at the beginning of this document and the exemptions,
13 that the Church is actually separately defined and that is
14 at page 183, at 3(3). So if you look at this statute in
15 context, you couldn't consider public institution in the
16 other exception that is referred to in Aeric to mean
17 Church, but maybe someone will say in reply, "they
18 specifically said it; therefore, it couldn't, so your
19 context argument is turning on yourself". But that's not
20 so because if you consider this case, the Aeric case, and
21 you look at the statute in context and the provision that
22 is under consideration, even if, for example, Church was
23 not separately defined here, and you looked at the
24 provision that is impuned, would it include a church as a
25 public institution? I think not, and the answer lies in

1 the case and how it treated this issue, which is at page 2
2 -- I've jumped to another brief, I had to harmonize two
3 briefs, as I got Mr. Manson's authorities yesterday, I had
4 to create my own brief first. The provision is sub (14) up
5 above.

6 Now, the phrase "other public institution" is
7 grammatically modified in this case.

8 **THE COMMISSIONER:** I am sorry. Where are you
9 now?

10 **MR. SHERRIFF-SCOTT:** I am at page 2 of the
11 decision under the sub (14), 3(14).

12 **THE COMMISSIONER:** Yes.

13 **MR. SHERRIFF-SCOTT:** If you look at the phrase
14 "public institution", it is public institution literary or
15 scientific. And then the reason that this debate was
16 engaged at all about the Conference Board, if you look at
17 the paragraph, which starts just two down with "it is
18 conceded".

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

20 **MR. SHERRIFF-SCOTT:**

21 "It is conceded that the respondent is a
22 scientific institution".

23 So the only question left for the court was
24 whether it was public or private.

25 **THE COMMISSIONER:** Right.

1 **MR. SHERRIFF-SCOTT:** So because it was a
2 scientific institution, if it were not -- the point is
3 scientific modifies public institution here. It's a
4 literary or scientific institution, which is the public
5 institution. That is the phrase, which in context modifies
6 and limits public institution. A standard drafting
7 technique is to couple a general word with a specific word.
8 So the phrase "public institution" here means those that
9 are in the public domain that are literary or scientific or
10 perhaps akin to a public library, which precedes it as an
11 antecedent. That is why this debate was engaged in the
12 first instance because the Conference Board or the
13 organization whatever it was, was a scientific institution
14 already. So all the Court had to do was consider it public
15 or private. The public institution argument only arose
16 because in context it was scientific and, therefore, the
17 debate was engaged not because it was generally in a vacuum
18 a public institution.

19 Over at the next page, there is referred to the
20 case of the Jewish Library Association in the City of
21 Toronto, the same thing applies. If you look at the
22 language of the excerpt, this approach was taken by Stewart
23 J, in the Corporation of the City of Toronto and Toronto
24 Jewish Library Association considered that a library
25 containing 5,000 books was a public institution, and he

1 considered public access to the facilities in the extent to
2 which it was actually used by persons beyond the Jewish
3 community. The point here is the Jewish Community
4 Association Library wasn't a public institution at large
5 because of the phrase "other public institution" but only
6 because of that phrase as modified and informed by the
7 expression of the antecedent public library and those
8 things that followed it, literary and scientific. In other
9 words, it's a repository of knowledge, it has library-like
10 facilities. The things that are in there are probably
11 literary or scientific, et cetera. You don't take this
12 thing in a vacuum, which is urged on you by my friends.

13 This case, I submit, was not considered in a
14 vacuum and if you look really at the reasoning here, that
15 is what is at the nub of it.

16 Now the next case, which runs at a site at
17 paragraph 56 in my friend's cases, the Western Canadian
18 Case at Tab 9, and I need to say very little about this
19 case. This is a particular zoning bylaw from Nanaimo,
20 which had an exhaustive definition, which included the word
21 "Church" and so if you want a context argument, you have it
22 here. It has specifically encompassed it, so there was no
23 debate that public institution was informed as a church
24 because it was so defined specifically. We don't have the
25 benefit of any definitions in our Terms of Reference. This

1 doesn't help us at all. This is trying to treat a zoning
2 bylaw as if you should apply it because it used a
3 definition specifically for municipal taxing purposes and
4 apply it to our Terms of Reference. I think that the
5 problem is more difficult and subtle than that.

6 Now the next case is a college case at Tab 10.
7 First of all, I think it is the Arnott case and there is
8 urged on you the idea for generality reasons that a
9 governing body of a profession, the College of Physicians
10 and Surgeons, is quasi public. The Court doesn't even
11 define it as a public institution in a full sense, it
12 defines it as a quasi public institution. Not surprisingly
13 because a college of physicians and surgeons is a statutory
14 body. It is created by a statute. It is not incorporated
15 by a statute like many charities are, but it's a true
16 preacher of statute. Every single one of its powers and
17 its entire governing structure and authority are created by
18 a statute. And so it is delegated the authority to govern
19 the profession on behalf of the government for the public
20 and in the public interest and as well as on behalf of
21 members. It is a true statutory licensing body and I am
22 not surprised that the Court considered that in the
23 circumstances to be quasi public institution, but that
24 doesn't help us here. This isn't a statutory
25 interpretation case. This is another general reference to

1 a phrase out of context, I submit.

2 And finally, my friends rely on The Struthers
3 case at Tab 11, for the general proposition that just
4 because something is private, it doesn't mean it can't have
5 public characteristics. I submit you hardly need authority
6 for that proposition and as I have conceded in my factum
7 and said many times to all of counsel, the Diocese is an
8 important part of the voluntary sector in Cornwall and has
9 always been. That is not under contention, but that
10 doesn't assist us in determining whether or not the Terms
11 of Reference encompass the Diocese as another public
12 institution in the context of that sentence and phrase,
13 particularly contrasting with public and community sectors
14 and why it wouldn't be one of those.

15 Now, if I can turn up my friend's factum, if I
16 can find my copy, this is Mr. Manson's factum.

17 **THE COMMISSIONER:** Yes.

18 **MR. SHERRIFF-SCOTT:** He has set out for you at
19 paragraph 60, page 18, a list of factors that he urges on
20 you to consider in the interpretation of these Terms of
21 Reference. I submit that few if any of these are in
22 accordance with the law. The context within which the
23 question is posed, I don't know what that context is. Is
24 it legislative or is it some broader, more amorphous
25 context that was urged on you yesterday? If it is the

1 latter, I submit the authority, including my friend, Mr.
2 Callaghan's case, this consortium case clearly says you are
3 not allowed to do that. Moreover, how would you do that?
4 You can't do this by way of public opinion poll or
5 affidavit. There is no way to capture the public context
6 other than through what the legislator did.

7 The history and background of the Order in
8 Council, my submissions are the same. To the extent that
9 you are looking at history, you are looking at the Order in
10 Council and you are looking at the Act and possibly its
11 historical iterations but not people standing up saying
12 they want this or the other thing and other people standing
13 up and saying they want something different in Cornwall or
14 elsewhere.

15 For example, Mr. Guzzo disagreed with what's
16 being asserted now or earlier and all kinds of people have
17 different views on this.

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

19 **MR. SHERRIFF-SCOTT:** The expectations of the
20 public, I say, are encapsulated in the legislative
21 activities and we cannot do this by way of a "he said, she
22 said" analysis. That would be an absurd delegation of the
23 legislative power.

24 And the last factors, I submit, are putting
25 the cart before the horse. You don't consider the nature

1 and scope of the institution historically until you have
2 defined what your terms of reference mean.

3 Once those terms of reference have meaning
4 and you decide what they mean and what the constituent
5 elements are, then we get to the evidentiary debate about
6 whether the Diocese fits. You don't use it the other way
7 around.

8 And so those are my comments on the
9 authorities that were contended for yesterday, and I might
10 just turn to the facts at this moment if you don't consider
11 it an appropriate time to break? I'm in your hands. It's
12 10 to 11:00, but I'm happy to go on.

13 **THE COMMISSIONER:** Yes, time flies.

14 No, let's go on for a little more.

15 **MR. SHERRIFF-SCOTT:** Oh, sure. I can finish
16 the facts fairly rapidly, I think.

17 **THE COMMISSIONER:** So where are we now?
18 Which document are you ---

19 **MR. SHERRIFF-SCOTT:** The facts I will be
20 looking at, the affidavit of Neal Ferguson, which is E2 and
21 I will also refer to the Choquette affidavit, A1, and E4
22 and E3, which are the affidavits of Morrissey and Bishop
23 Durocher.

24 Just if you have those things handy in one
25 pile it will be easier to follow.

1 **THE COMMISSIONER:** Yes.

2 **(SHORT PAUSE/COURTE PAUSE)**

3 **MR. SHERRIFF-SCOTT:** Now, on the legislative
4 history, I've set out in brief E2, we had our librarian do
5 the legislative search and attach the results. I've set
6 out the first two bills that were contended for by Mr.
7 Guzzo; Bill 103, as it came to be known and Bill 48, which
8 was identical and was his second pass at getting this
9 inquiry off the ground.

10 Those are at Exhibits (sic) Y and Z of the
11 affidavit.

12 **THE COMMISSIONER:** Yes.

13 **MR. SHERRIFF-SCOTT:** And I don't want to
14 spend -- really labour any time. The explanatory note of
15 each is all you may look at to assure yourself that what
16 was contended for by Mr. Guzzo, which is the first page in
17 after the Bill 103 sheet behind the exhibit stamp;
18 explanatory note at Tab Y.

19 And if you look at that list of factors, Mr.
20 Commissioner, you'll see that what is contended for here is
21 not an investigation into the Diocese but an investigation
22 into the alleged incompetence of police in the handling of
23 Project Truth, which is what Mr. Guzzo said time and time
24 again in the public domain. The same explanatory note is
25 at the next tab at Bill 48, which you needed not turn up.

1 I attached these only for the point that if
2 there's any legislative history at all to these Terms of
3 Reference, I suppose, you could loosely consider these, but
4 I don't consider this to be of huge weight. I think the
5 main task is looking at the document as informed by the
6 Act. And so I put them there for your reference.

7 I have also referred to in this material
8 some of the public utterances of Mr. Guzzo confirming his
9 position on what this thing was intended to be and the
10 adoption of that position by my friend's clients who now
11 contend for a different position today. But that is not of
12 great moment. I put that there for background only.

13 So then if I can now go on to more important
14 matters, the Diocese and facts relating to it?

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

16 **MR. SHERRIFF-SCOTT:** I'm sure you've read
17 already the materials in 10.5 and I don't need to take you
18 there to establish the proposition that the Diocese was
19 incorporated in the 1890s by a special act of the
20 Legislative Assembly of Ontario, as was the practice in
21 many cases of churches and other institutions at the time.
22 Non-share corporations are incorporated either by a special
23 act, by letters patent and they are still corporations.

24 The Diocese structure is described by Mr.
25 Morrissey as a "corporation sole" and that means that the

1 sole officer/director -- and because it's a non-share
2 company; there is no shareholder -- is the Bishop of the
3 Diocese, and he is the directing mind and influence of the
4 corporation.

5 So the affidavit of Frank Morrissey which is
6 E4 deals with this at page 2 under the heading "(b) The
7 Status of Diocesan Corporations in Canada". And you'll see
8 at the beginning of that paragraph, Professor Morrissey
9 says that the federal, provincial and territorial
10 governments ---

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

12 It's page 2, Madam Clerk. Go on.

13 **MR. SHERRIFF-SCOTT:** Under -- no, no,
14 further. Just back a bit now. A little further. That's
15 it right there.

16 **THE COMMISSIONER:** "The Status..." There you
17 go.

18 **MR. SHERRIFF-SCOTT:** Canadian governments of
19 all kinds don't recognize the Catholic Church and it's only
20 legal existence is through diocesan corporations.
21 Professor Morrissey says in the second paragraph:

22 "They are 'corporation sole'. The
23 diocese and the bishop is the sole
24 member. He is the sole officer and
25 director in controlling of the affairs

1 at his discretion. They are private,
2 autonomous corporate entities. They
3 are not crown corporations and with the
4 exception of corporate reporting tax
5 laws and applicable laws relating to
6 charities [some of which I tendered in
7 the standing hearings]. They do not
8 report to Parliament or any other
9 government agency. They do not depend
10 on government departments for all their
11 activities. They are not subject to
12 control, influence, monitoring or
13 regulation in any way by government
14 departments or agencies."

15 And then he goes on at the next paragraph,

16 (c):

17 "They have regulations relating to
18 registration and taxes and charities
19 but that doesn't make them government
20 agencies. They don't report about
21 their pastoral or apostolic activities
22 to any particular government; are
23 autonomous."

24 And then the next paragraph:

25 "There is no funding by government of

1 the diocesan corporation."

2 And for that matter in any church in Canada
3 there is a separation of the church and state, which he
4 says has its origins many years ago.

5 He refers at "E" to the no-public mandate,
6 which feeds my argument that the Diocese does not engage on
7 behalf of public to react or deal with in a public way or
8 on behalf of the public allegations of abuse.

9 Now ---

10 **THE COMMISSIONER:** Say that over again.

11 **MR. SHERRIFF-SCOTT:** What I want to give you
12 here is there is no public mandate reposed in any diocesan
13 corporation by any governmental organization to handle
14 allegations of criminal conduct.

15 So the Diocese doesn't have a governmental
16 mandate on behalf of the public to react. It may have its
17 own internal processes, which it does, but that's quite
18 distinctive from public institutions as I see them in the
19 Terms of Reference, which are engaged to react on the
20 public, for the public and as a mandate given to them by
21 public governmental organizations.

22 **THE COMMISSIONER:** Okay.

23 **MR. SHERRIFF-SCOTT:** Yes.

24 **THE COMMISSIONER:** Can I ask you this?

25 **MR. SHERRIFF-SCOTT:** Please.

1 **THE COMMISSIONER:** What happens if you hold
2 yourself out to be historically an institution that goes
3 out and holds itself out to the public through the
4 charitable work, through everything that they do?

5 **MR. SHERRIFF-SCOTT:** Hold yourself out in
6 what connection? Does that make you a public institution?

7 **THE COMMISSIONER:** Does that make -- well,
8 no, what you're saying is that they don't -- and there's no
9 public mandate from the government to the Diocese?

10 **MR. SHERRIFF-SCOTT:** Yes.

11 **THE COMMISSIONER:** And I understand that,
12 but at some point the Diocese goes out to the -- reaches
13 out to the community.

14 **MR. SHERRIFF-SCOTT:** I would put the Diocese
15 -- I would describe the Diocese in two fashions.

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

17 **MR. SHERRIFF-SCOTT:** It's a religious
18 organization, which fosters the religious spirit
19 enlightenment of those who are adherents to its dictates
20 and, secondly, it is an organization, which provides
21 charitable services to assist the community in accordance
22 with biblical dictates, to assist the poor and the
23 downtrodden, et cetera. That's its mandate and, yes, it
24 reaches out to the public in connection. There's no debate
25 about that.

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

2 **MR. SHERRIFF-SCOTT:** But I submit it does
3 not -- I raise this point because my thesis in this
4 argument is that public institutions as informed by, and
5 modified by the expression "the justice system" in the
6 Terms of Reference ---

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

8 **MR. SHERRIFF-SCOTT:** --- and it means those
9 organizations, which are governmental in nature or public
10 in nature or are given a public mandate to deal with issues
11 like this or have an issue and mandate given to them by a
12 public authority sufficient so that they would react in
13 some fashion or they're in the charge of some issue that
14 would put them squarely within that rubric; the Diocese is
15 not one of that because it engages in providing services to
16 the public. It doesn't get -- its mandate is not fed by a
17 public institution. It's not fed by the government. It's
18 not directed by the government to do that. It's not
19 reacting on behalf of the public.

20 **THE COMMISSIONER:** No, I understand that,
21 and I understand what you're saying there. But at some
22 point if someone holds themselves out, can they not -- I
23 guess the old Hedley Burn matter. You know, if you hold
24 yourself out to be in the public domain on matters such as
25 the care of people do not -- how can you then turn around

1 and say, "Oh, no, I'll draw back and draw the corporate
2 veil and I'm just a sole corporation here?"

3 I think one of the difficulties that the
4 people, the citizens of Cornwall might have, is that very
5 thing -- it is wait a minute here. You know, you act and
6 you try to act as a community leader, as someone who
7 affects the dictates of how we're going to order our lives
8 and, yet, when it comes to this situation, some might say
9 that the church is trying to hide.

10 **MR. SHERRIFF-SCOTT:** Well, they might say.
11 I can't answer for what people say on the streets and I
12 don't think that kind of evidence has any place in the
13 interpretation of the Terms of Reference.

14 My submission, the Diocese in its public
15 character in reaching out to the public as you've described
16 it serves the religious minds of its constituents, and it
17 provides community services to those in need, and in that
18 regard, it is captured by the Terms of Reference as a
19 community sector organization.

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

21 **MR. SHERRIFF-SCOTT:** And that's the premise
22 on which we came here and that's what we believe we are.
23 We believe the Terms of Reference are structured so that
24 the governmental machinery that is at play here is able to
25 be analyzed by you and recommendations made for the better

1 order of it so that in the future it responds in a better
2 way.

3 I don't mean to -- I don't want to be
4 cheeky. My submission is you wouldn't have jurisdiction to
5 make recommendations to the Diocese. You would have
6 recommendation power to recommend to the Attorney General
7 or the government on how good government might affect the
8 Diocese.

9 Moreover, if I were to -- let me put you a
10 higher case. If I interpreted every charitable
11 organization that held itself out in the public domain as
12 providing services on behalf of the public; Big Brothers,
13 Big Sisters, athletic organizations, health charities, et
14 cetera, everyone of them would be in, on that argument, a
15 public institution within the terms of your mandate, and I
16 don't think that's right. I think that your mandate has a
17 proposition which is clear in the first part of that
18 sentence and which is general in the last sentence to
19 capture all of those organizations like my client which are
20 not governmental in nature.

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

22 **MR. SHERRIFF-SCOTT:** And I have concerns
23 that the mandate of the Commission may be treated too
24 broadly and, as your counsel knows, I have been operating
25 on a premise until recently informed that others had a

1 contrary view.

2 So I don't think we're here to say we're --
3 I don't think it's fair to say the church is hiding from
4 anything. We are here to participate and we're anxious to
5 further the objectives of the Commission.

6 **THE COMMISSIONER:** In that breadth, what's
7 the difference? What's the difference if you are held to
8 be a public institution as opposed to be a community
9 sector? What will be the difference?

10 **MR. SHERRIFF-SCOTT:** Well, I don't know.
11 We'll have to cross that bridge when we come to it. There
12 may be differences as we go down the line from an
13 evidentiary point of view, from the point of view of
14 questioning. My concern is the protection of private
15 rights, which is how this legislation, *The Public Inquiries*
16 *Act* was designed. I'm concerned that the Diocese may be
17 exposed to allegations and to assertions that are unfounded
18 and that the Diocese may be treated unfairly; not by you.
19 Not by you, Mr. Commissioner, but that the opportunity to
20 do that is greater if it is taken out of context and the
21 mandate of the Commission is misinterpreted.

22 My client will participate and is
23 participating as a community sector organization and I
24 think that gives you fairly broad jurisdiction. I'm not
25 concerned about the ability to determine what should be

1 rightly done and how things were handled based on that
2 footing, but I am not clear and do have concerns about
3 potential issues that may develop if we are not a community
4 sector. I don't know how that would play out. I have
5 concerns about it because of my client's individual and
6 private rights and I submit that's what's feeding this
7 issue.

8 So what it means down the line, we'll have
9 to determine that, but I'm not prepared to concede that the
10 Diocese is a public institution at this point because the
11 ramifications of that are unknown to me and I don't think
12 it's fair that we be considered a public institution when
13 that's not what was intended.

14 I don't think, moreover, that that answers
15 your question about what's before you today. That's a PR
16 question, not by you but it's a PR question that's being
17 asked and people are concerned about.

18 **THE COMMISSIONER:** PR meaning?

19 **MR. SHERRIFF-SCOTT:** A public relations
20 issue.

21 **THE COMMISSIONER:** Right.

22 **MR. SHERRIFF-SCOTT:** And the job that we're
23 faced with is to interpret this document in accordance with
24 the principles and not to say the Diocese is doing that or
25 the other thing.

1 **THE COMMISSIONER:** Okay. Carry on.

2 **MR. SHERRIFF-SCOTT:** I just want to -- if
3 you've read -- had an opportunity to read the affidavits of
4 these two gentlemen.

5 **THE COMMISSIONER:** Yes, I did.

6 **MR. SHERRIFF-SCOTT:** I would submit that
7 what flows from them when you measure them against the
8 Choquette material is that although the Diocese is involved
9 in providing services to people it is not an organization
10 which administers or runs hospitals. It doesn't administer
11 or run school boards. It provides services to them and may
12 have had influence in the past but that's the highest you
13 can take from the combination of those three affidavits.

14 The other thing is that there are
15 propositions in the Choquette affidavit that trace what he
16 calls the "client of importance and influence of the
17 church". I think that responds to some of my friend's
18 contentions and he mentions a couple of points which he
19 uses as illustrations of public activities like speaking
20 out on equality rights. Well, I don't think that's an
21 illustration of being a public institution. Many lawyers,
22 doctors or leaders of institutions of many kinds spoke out
23 on French rights at the applicable time.

24 So I think very little turns on that and the
25 real job is the law as it applies to the public institution

1 -- the *Public Inquiries Act* and the Terms of Reference.

2 I might, before I leave the facts, spend two
3 minutes on the affidavit of Ledroit Beckett. I've handed
4 up some cases. I just leave them for you and this is by
5 way of what weight I say should be placed on that material;
6 in a word, little to none.

7 First, it is a lawyer's affidavit. It is
8 not the best evidence available to you and if that's what
9 was available, it should've been available to the
10 Commission. I submit this is a sensitive inquiry where
11 private rights are going to be affected and so we should
12 not have a lawyer's affidavit on controversial subjects.

13 Second, the affidavit doesn't conform to the
14 dictates of how affidavits should be drafted. For example,
15 in paragraph 18, there are important matters where there is
16 no information or belief source identified ---

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

18 **MR. SHERRIFF-SCOTT:** Yes; I'm sorry.

19 **THE COMMISSIONER:** There's someone who wants
20 to speak.

21 **MR. LEE:** Mr. Commissioner, we, as you know,
22 spent a fair amount of time yesterday morning when Mr.
23 Talach was here who swore the affidavit, speaking with Mr.
24 Sherriff-Scott. We made concessions. There were
25 redactions made. We spent half of the morning going over

1 the affidavit.

2 My understanding was that the purpose of
3 that was so that we wouldn't have an argument. If Mr.
4 Sherriff-Scott wants to talk about weight, that's one
5 thing, but if he wants to get into the propriety of the
6 affidavit or anything, that should've been properly argued
7 before any of this argument took place.

8 So I object to this. Weight is one thing
9 but dealing with the propriety of the affidavit, whether it
10 should have been sworn by a lawyer, things like that,
11 should've been argued yesterday if it was going to be
12 argued.

13 **THE COMMISSIONER:** Thank you.

14 Mr. Sherriff-Scott.

15 **MR. SHERRIFF-SCOTT:** I prefaced my comments
16 by saying these are submissions on weight ---

17 **THE COMMISSIONER:** Okay.

18 **MR. SHERRIFF-SCOTT:** --- and that's what my
19 comments are designed to focus on. I said what weight
20 should be given to it; in a word, none, or little, and the
21 reasons for that I started to outline and I'm concerned
22 that weight be given to a lawyer's affidavit in this
23 context.

24 I'm concerned that if you look at some of
25 the paragraphs, for example 18, no source of the

1 information and belief is identified. Paragraph 20 and
2 following sets out what I contend to be expert evidence by
3 the lawyer on canon law where there is no contention that
4 he is such an expert, and I don't think that it should be
5 given any weight at all.

6 Those are my simple submissions.

7 **THE COMMISSIONER:** That's fine.

8 **MR. SHERRIFF-SCOTT:** Now, I'm about to turn
9 to the law in my Factum.

10 **THE COMMISSIONER:** Well, before you turn to
11 the law I think we should take a break ---

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

13 **THE COMMISSIONER:** --- at this point and
14 we'll come back in 15 minutes.

15 **THE REGISTRAR:** Order. A l'ordre. All
16 rise. Veuillez vous levez.

17 The hearing will reconvene at 11:30.

18 --- Upon recessing at 11:10 a.m./

19 L'audience est suspendue à 11h10

20 --- Upon resuming at 11:33 a.m./

21 L'audience est reprise à 11h33

22 **THE REGISTRAR:** This hearing of the Cornwall
23 Public Inquiry is now in session. Please be seated.
24 Veuillez vous asseoir.

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

1 --- REPLY BY/RÉPLIQUE PAR MR. SHERRIFF-SCOTT

2 (Continued/Suite):

3 MR. SHERRIFF-SCOTT: Thank you, Mr.
4 Commissioner.

5 At this point I'll only be referring to
6 three things; E1, E5 and E6 which are my written
7 submissions and two volumes of cases. So that's all you'll
8 need at this juncture.

9 THE COMMISSIONER: E1, E3 and E5.

10 MR. SHERRIFF-SCOTT: Yes.

11 THE COMMISSIONER: All right.

12 MR. SHERRIFF-SCOTT: I'm sorry; E5 and E6,
13 Mr. Commissioner, which are two volumes of cases.

14 THE COMMISSIONER: Yes.

15 MR. SHERRIFF-SCOTT: Thank you.

16 THE COMMISSIONER: Let it go.

17 MR. SHERRIFF-SCOTT: Okay.

18 What I intend to do first, Mr. Commissioner,
19 is spend some time on the *Public Inquiries Act* and its
20 purpose and structure and then I'll deal with the
21 conditions precedent issue that I've identified. Third, I
22 will deal with the question of clarity and precision in the
23 drafting of the orders of council and the implications for
24 us here. Then I will turn to the canons of interpretation
25 that I've identified in the Factum and emphasize some

1 points, and finally, a number of cases in other statutory
2 contexts just to refer briefly to them and the implications
3 that may or may not flow from them.

4 And so then first to the *Public Inquiries*
5 *Act*, and here I would like to just briefly look at some
6 historical iterations of the Act in the context of the
7 McRuer Report and then the Law Reform Commission and some
8 cases.

9 I submit that looking at the *Inquiries Act*
10 as distinct from the Terms of Reference is very critical
11 for our purpose; first, because always using as our guiding
12 star of statutory context the *Public Inquiries Act* and its
13 requirements provide an understanding of the context in
14 which the Terms of Reference are written; second, because
15 that context includes the purpose of the Act and how it is
16 reflected in the Terms of Reference themselves; third,
17 because, as I say, the *Public Inquiries Act* imposes
18 significant requirements, both before the Commission can be
19 called, how it exercises its power and what restrictions on
20 its jurisdiction flow from it.

21 So if I can start with the historical
22 iterations of the Act, they're at my Tab 1 of E5, which is
23 the first Book of Authorities and that is the 1960 Act at
24 the front of that tab and you'll see there absent from it
25 the declaratory issue.

1 So the Lieutenant Governor in Council deems
2 it expedient to:

3 "...cause inquiry to be made concerning
4 any matter connected with or affecting
5 the good government of Ontario or the
6 conduct of any part of the public
7 business thereof or of the
8 administration of justice therein. He
9 may, by commission, appoint one or more
10 persons."

11 So there is no declaratory power in the
12 Lieutenant Governor as there is the current version of the
13 Act and the reasons for that, I submit, flow from the
14 McRuer Report which is at Tab 2.

15 And if, when you get to that tab, you could
16 turn to page 386, which is the fourth or fifth page in, the
17 Chief Justice at that time starts talking about individual
18 rights because most, if not all of the recommendations and
19 discussions which follow in his report on the *Public*
20 *Inquiries Act* emanate from his clear concerns about
21 individual rights because commissions of inquiry have wide
22 and coercive powers and, therefore, he sets the stage for
23 his discussion by talking about how they can be affected.
24 He says at the bottom of that page:

25 "The main individual rights affected by

1 the exercise of investigatory powers
2 are the right to privacy, the right to
3 enjoyment of one's property, the right
4 to be left alone and the right to keep
5 one's information and one's ideas to
6 oneself; in other words, the freedom
7 not to speak.

8 The right to the enjoyment of one's
9 property involves freedom from trespass
10 to one's land, buildings, personal
11 property, the wide ambit of the tort
12 trespass is well known. These rights
13 are not absolute. They may be
14 interfered with or qualified but they
15 are nevertheless personal rights
16 affected when power to investigate is
17 given and they are contracted as
18 investigatory powers are expanded.

19 They are rights and interests that are
20 fundamental and should be safeguarded
21 against any unjustified encroachment.
22 Their protection requires vigilance."

23 This is the touchstone for his report, I
24 submit, and what follows from it.

25 And if you flip to the next page, we come to

1 the question of the conditions precedent issue. You will
2 see that I summarized the issue at paragraph 46 of my
3 Factum, at page 11, which is document E1, where I say that:

4 "He concluded that before any
5 commission of inquiry could be
6 appointed, conditions precedent for the
7 appointment would need to be satisfied
8 and that his main thesis was the
9 purpose of these conditions precedent
10 was to force the government to clearly
11 delineate the scope of an inquiry
12 before doing it so that individual
13 rights would be the least affected and
14 the public could be satisfied that the
15 government had undertaken a complete
16 and exhaustive analysis so that
17 individual rights would not be
18 unnecessarily truncated."

19 And so these conditions precedent, I submit,
20 are safeguards to individual rights and a mechanism to
21 force the government to delineate a commission's mandate
22 and they require not only the identification in clear terms
23 of the subject at issue but also, as will appear, I submit,
24 precisely how the jurisdiction is to be expressed.

25 And so what are they? They are at the next

1 page of the McRuer Report that I asked you to turn to,
2 which is page 388 of Volume 1, E5, and he talks about them.

3 "Broadly-speaking [he says] there are
4 two types. The first defines the
5 authority under which investigative
6 bodies or persons commenced the
7 investigation; that is, under the
8 direction or with the authority of a
9 superior governmental body such as the
10 Lieutenant Governor in Council.

11 The second proscribes the conditions
12 under which persons to whom the
13 conduct of the investigation may act
14 on their own volition and without
15 direction or guidance of any superior
16 body or authority. Not our case, I
17 would submit."

18 He talks about the *Police Act* and how the
19 *Police Act*, once that the commission is appointed, has the
20 authority to define the scope of its own inquiry, as
21 opposed to a condition precedent to the Lieutenant Governor
22 setting the Terms of Reference as we have here.

23 He says:

24 "A commission has no general or
25 continuing authority to conduct the

1 type of investigation referred to in
2 the section that requires the direction
3 of the Lieutenant Governor in Council
4 before any Act."

5 And then over to the next page, referring to
6 the quotation in the Registrar of Collection Agencies where
7 it starts, the textual portion after the quotation:

8 "May investigate without the
9 authorization or direction of any
10 superior body but only after it has
11 received a complaint. The power to
12 authorize an investigation to commence,
13 an investigation may itself be subject
14 to conditions precedent."

15 And then he goes on.

16 So he's talking there about bodies that
17 don't have -- that may have more delegated authority in
18 defining their own mandate than a commission of inquiry
19 such as this one which is handed its Terms of Reference and
20 may not stray beyond its jurisdiction. In other words, it
21 cannot assume delegation to define its own mandate as it
22 goes, but only to interpret the mandate granted to it.

23 He refers to the types of conditions at the
24 bottom of the next page which I've turned to, which is 389,
25 as conditions which are subjective or objective, and those

1 which are subjective are the ones that eventually ended up
2 in the *Public Inquiries Act*; that is, the Lieutenant
3 Governor satisfies himself and then issues a declaration.
4 There's no criteria on which he must follow, which was
5 originally urged, but he makes an important statement at
6 page 390, preceding the recommendations list which is the
7 paragraph right above the heading "Recommendations":

8 "Wherever possible, conditions
9 precedent should be drawn in the
10 objective form and this is dictated by
11 two considerations. The first is the
12 validity of the investigation would be
13 based on facts capable of objective
14 verification. The second, which is
15 related to the first, is that the
16 exercise of non-existence of conditions
17 precedent would be open to judicial
18 review while a condition precedent
19 stated in its objective terms would be
20 subject only to limited review."

21 And then he makes these recommendations
22 which I have excerpted into my Factum and you've no doubt
23 already read, and I wanted to stress number three (3):

24 "Conditions precedent should be
25 expressed with precision and where

1 powers in number two (2) are conferred
2 these should be subject to conditions
3 precedent which must be satisfied
4 before an investigation can be validly
5 commenced."

6 Over at 391, in the bottom textual portion
7 of the page starting with the word "since" he says:

8 "Since the proper fulfillment of the
9 condition precedent is not subject to
10 review by the Court; that is, the
11 subjective one that we have, it is
12 preferable to provide the Treasurer of
13 Ontario, a member of the Provincial
14 Cabinet, be the person who is not
15 satisfied before an investigation is
16 set in motion rather than to confer the
17 power on an inspector or other person.
18 In short, he emphasizes that this
19 prevents sub-delegation. It prevents
20 commissions of inquiry from assuming
21 jurisdiction as they go but being
22 rather confined to those granted to
23 them."

24 This was what was reflected in the 1971
25 amendment which follows at the next tab. This is the

1 *Public Inquiries Act* (1971) which came to produce the current
2 iteration, and if you look at the explanatory note:

3 "The purpose of this bill..."

4 Which is the first page in:

5 "...is to give effect to the
6 recommendations of the McRuer Report,
7 number one [which is what I have just
8 read from] with respect to the
9 redrafting of this very old statute."

10 So McRuer's thesis was that individual
11 rights must be vigilantly protected and, therefore,
12 conditions precedent to investigation, which may stray
13 beyond the good government of Ontario, the administration
14 of justice therein or any part of the public business and
15 the matter, which the Lieutenant Governor must satisfy
16 himself is a matter of public interest. He must make a
17 declaration to that effect and if he does not do so, the
18 matters are left to the plenary jurisdiction of
19 governmental matters, which he does not need to issue a
20 declaration for.

21 So what the 71 amendments, I submit, is that
22 you do not have authority to decide what jurisdiction you
23 will assume but to interpret what you are given, which
24 because we know that McRuer's recommendations were adopted
25 which contradicts the assertions made by Mr. Bennett and

1 Mr. Lee that you should just, what they describe as "do the
2 right thing" in advocacy terms and assume jurisdiction
3 *holus bolus* because it's something that they think is in
4 the interests of the community.

5 The other thing that this section means is
6 that the clear condition must be satisfied. The
7 satisfaction of it is driven, as I said, by McRuer's
8 concerns.

9 Now, I say that this condition precedent is
10 important not only to see if your constituent elements --
11 that constituent elements are necessary to the proper
12 exercise of your power are satisfied, but also because I
13 submit it reveals the structure of the Act and, therefore,
14 how Terms of Reference must be interpreted.

15 The Lieutenant Governor has two powers in
16 this section now. He has the power to cause an inquiry on
17 any matter of the good government of Ontario; the conduct
18 of the public business or the administration of justice;
19 and that's a plenary power and he doesn't have to satisfy
20 anybody that he can do that, but the separate powers then
21 given to him to cause the inquiry on a matter of public
22 concern but not to do so unless there is a declaration.

23 Now, my submission is that this
24 fundamentally informs the Terms of Reference because if you
25 look at the structure of the Terms of Reference and my

1 submissions are correct and there is no declaration, the
2 structure of the Terms of Reference, number one, focus on
3 what I submit are those governmental agencies which could
4 be considered to be affecting the good government of
5 Ontario, the administration of justice and the public
6 business thereof.

7 And then you have ancillary but not plenary
8 -- ancillary or incidental jurisdiction over community
9 sector organizations who are people with private rights.

10 **THE COMMISSIONER:** But you are limiting in
11 the first -- you are limiting the public institutions to
12 governmental institutions.

13 **MR. SHERRIFF-SCOTT:** Correct. My submission
14 is if you examine the structure of the Act ---

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

16 **MR. SHERRIFF-SCOTT:** --- and you look at the
17 condition precedent requirement, the condition precedent
18 requirement was drafted and interpolated in the statute
19 because of McRuer is saying, "Look, we have to be vigilant
20 about the protection of individual rights here" when the
21 statute already had the mandate in the Lieutenant Governor
22 to call an inquiry on matters of public governmental
23 affairs.

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

25 **MR. SHERRIFF-SCOTT:** So then, McRuer's

1 thesis is if there's going to be any question of straying
2 beyond what is defined that you could do with plenary power
3 to call an inquiry, you must declare it in the first
4 instance to be a matter of public interest.

5 And the structure of the Act; that is, the
6 plenary power, and then the discrete jurisdiction to issue
7 a declaration, I submit, mirrors the Terms of Reference in
8 our case. If you read the Terms of Reference, the
9 institutional or public, or on behalf of the public,
10 response of the justice system and other public
11 institutions like it, or governmental, that's your plenary.
12 That's your primary; that's your pith and substance
13 jurisdiction. Then you have incidental power only to
14 examine interaction of those institutions with private
15 organizations such as my client.

16 So what I'm urging you to consider is the
17 structure of the Act is reflected in the drafting of the
18 Terms of Reference.

19 **THE COMMISSIONER:** One moment; just a minute
20 now. Just trying to get a hold of the Terms of Reference
21 here.

22 **MR. SHERRIFF-SCOTT:** They are in the Victims
23 Group, Tab 1.

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

25 **THE COMMISSIONER:** Isn't -- let me just.

1 **MR. SHERRIFF-SCOTT:** Sorry, B1. It's 1(a).

2 That's what I have.

3 Yes, B1 is the document. It's 1(a) tab.

4 **THE COMMISSIONER:** Okay. Now, just a
5 second.

6 You see, my problem is -- and if I'm
7 following you correctly, is you're saying that the report
8 on "Institutional Response of the Justice System and Other
9 Public Institutions" you want me to read in there "and
10 other governmental public institutions"?

11 **MR. SHERRIFF-SCOTT:** Well, if you look at
12 the canons of interpretation, what I suggest is that public
13 institution is a general term and it is informed and
14 modified by its specific antecedent, which is the justice
15 system which is a governmental organization, and that based
16 on the canons of interpretation the other public community
17 sectors cannot be included in that phrase because those
18 organizations, based on the rule against tetology and other
19 rules must have a separate meaning. And if they have a
20 separate meaning you're obliged to measure the interaction
21 between those two groups, having discrete characteristics
22 as they must; the rules of the canons of interpretation.

23 And I say that the reason that the
24 legislation or the Terms of Reference is drafted in the way
25 it is, is because it mirrors the statute imperatives. In

1 other words, your plenary or primary jurisdiction; the good
2 government, et cetera; the administration of justice is
3 captured in the institutional response of the justice
4 system and other public institutions but that you -- and my
5 friends say there isn't a declaration, except for Mr.
6 Callaghan, and that you don't need one. Well ---

7 **THE COMMISSIONER:** There is no declaration.

8 **MR. SHERRIFF-SCOTT:** No, there is no
9 declaration, and if there's no declaration, you're left
10 with governmental -- an analysis of the government. That
11 doesn't mean you don't have incidental authority to review
12 organizations when they are being interacted with by the
13 subject of your plenary power. That is consistent with my
14 interpretation.

15 **THE COMMISSIONER:** Well, you're assuming,
16 though, if I'm correct, that there are only two types of --
17 there is government institutions and there are community
18 sector players. Can there not be three? Can there not be
19 the justice system? Can there not be public institutions
20 and other public and community sectors?

21 **MR. SHERRIFF-SCOTT:** Well, what I say is
22 that the justice system is a public institution. It's an
23 illustration to couple that general term with a specific
24 and, therefore, to essentially define it in the draftsmen's
25 pen. He is saying -- he is using the coupling of the

1 general word with the specific to give you meaning to the
2 general.

3 So the justice system, I would submit,
4 includes the things that were identified yesterday; the
5 Crown law office, the Attorney General, the courts, the
6 police, et cetera.

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

8 **MR. SHERRIFF-SCOTT:** The phrase "public
9 institutions" here has to be wider than the justice system.

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

11 **MR. SHERRIFF-SCOTT:** But narrower than
12 public and community sector organizations within it because
13 of the canons of interpretation.

14 So public and community sector
15 organizations; well, first of all, what other public
16 institutions may there be? Well, there'd be the Children's
17 Aid Society. There would be, perhaps, public and separate
18 school boards; hospitals. There would be the Ministry of
19 Community and Social Services and its agencies; perhaps the
20 municipality and its agencies and how they interface with
21 the community. Then there would be community sector
22 organizations, which would be privately-based charities;
23 Big Sisters, Big Brothers, churches, athletic organizations
24 and any other non-governmental charitable organization
25 perhaps -- that's not necessary, but it's a good

1 illustration -- that provides services to the public at
2 large or to the community in specific instances, like the
3 community of the Catholic faith; the community of boys for
4 Big Brothers, et cetera.

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

6 **MR. SHERRIFF-SCOTT:** So just coming back to
7 the point about the interpretive imperative, the structure
8 of the Act is that you're confined to the governmental
9 analysis, and I say that's reflected in the Terms of
10 Reference because the plenary -- the main jurisdiction
11 given to you is, in my submission, governmental in
12 orientation whereas the incidental or ancillary is to
13 examine only those things which are private, which only and
14 then in their interaction with the public as it is defined.

15 I say that looking at the Act and its
16 iterations is good to inform this purpose.

17 In fact, and no declaration being issued and
18 my friends saying no declaration being necessary, I submit
19 that makes that interpretation almost compulsory because
20 then you would essentially be confined to the public issues
21 of good government, the public business thereof; the
22 administration of justice.

23 I do concede you would have incidental and
24 ancillary powers and that's why it's drafted in that
25 fashion.

1 **THE COMMISSIONER:** I'm sorry, what about in
2 the preamble to the mandate, paragraph 2, and we're dealing
3 with "or any matter of public concern"?

4 **MR. SHERRIFF-SCOTT:** Yes, but he's -- that
5 doesn't mirror the statute.

6 **THE COMMISSIONER:** Pardon me?

7 **MR. SHERRIFF-SCOTT:** Look at the statute.

8 **THE COMMISSIONER:** No, I understand. I
9 understand.

10 **MR. SHERRIFF-SCOTT:** The statute -- he's
11 saying, whereas -- this is a recitation of the statute.

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

13 **MR. SHERRIFF-SCOTT:** Lieutenant Governor by
14 commission may appoint, may appoint one. This is not the
15 appointment. The appointment follows, one or more persons
16 to inquire into what the Act says, and then there is
17 deficient drafting which says ---

18 **THE COMMISSIONER:** There is what?

19 **MR. SHERRIFF-SCOTT:** Deficient drafting. He
20 doesn't say there is a declaration here. The statute says
21 he must so declare.

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

23 **MR. SHERRIFF-SCOTT:** But this is not a
24 declaration. This is a recital of the statutory matrix
25 which he refers to in the opening line:

1 "Under the *Public Inquiries Act* this is
2 what may happen but the drafter did not
3 say "or which he declares to be a
4 matter of public concern"

5 Which is what the Act says.

6 **THE COMMISSIONER:** Right.

7 **MR. SHERRIFF-SCOTT:** And so ---

8 **THE COMMISSIONER:** I'm not saying that
9 that's what it says.

10 **MR. SHERRIFF-SCOTT:** Okay.

11 **THE COMMISSIONER:** What I'm saying is that
12 they indicated in here -- they added that:

13 "...if you were to look into the
14 conduct of any part of the public
15 business thereof or the administration
16 of justice therein, or any matter of
17 public concern."

18 **MR. SHERRIFF-SCOTT:** No, I don't agree with
19 you, Commissioner. It says -- this is a recital which
20 says:

21 "Whereas, under the *Public Inquiries*
22 *Act...*"

23 **THE COMMISSIONER:** Yes.

24 **MR. SHERRIFF-SCOTT:**

25 "...the Lieutenant Governor may..."

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

2 **MR. SHERRIFF-SCOTT:**

3 "...by commission appoint one or more
4 persons to do the following things."

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

6 **MR. SHERRIFF-SCOTT:** This is not your power
7 of appointment.

8 **THE COMMISSIONER:** No, I know that.

9 **MR. SHERRIFF-SCOTT:** And I'm not being
10 condescending. I just disagree with the point you made.

11 And then it says:

12 "Whereas he considers it desirable
13 you can inquire under the matters
14 that follow in one and following."

15 So I'm not clear. Maybe I'm not clear on
16 the question you are asking me. I interpreted your
17 question to mean the fact of this recital indicates that
18 it's a public matter.

19 **THE COMMISSIONER:** No.

20 **MR. SHERRIFF-SCOTT:** Okay. Well, I'm not
21 with you then. I'm sorry. What is it that you are
22 directing me to answer?

23 **THE COMMISSIONER:** Well, I'm just trying to
24 understand your argument. If I understand your argument
25 correctly it's, "Look it. We look at McRuer's Report and

1 we get an indication of what the new *Public Inquiries Act*
2 is all about" and so in the Part 1 of the Act it says,
3 "Look it. You have your plenary powers" or we can go if he
4 declares to be a matter of public concern.

5 **MR. SHERRIFF-SCOTT:** Yes.

6 **THE COMMISSIONER:** All right. That's if
7 they do that.

8 **MR. SHERRIFF-SCOTT:** Yes.

9 **THE COMMISSIONER:** All I'm looking in here
10 is I'm saying that there is something that doesn't ring
11 true here in the sense that they also threw in the matter
12 of any matter of public concern, which does not collate
13 very well with paragraph 2 of the Act, but nonetheless it's
14 there in this preamble.

15 **MR. SHERRIFF-SCOTT:** Okay, my answer to that
16 is as follows.

17 This is a recital which purports to
18 regurgitate the authority under the *Public Authorities Act*
19 and nothing further, and it doesn't do it right because the
20 statute, which is the mother ship here and the governing
21 instrument cannot be departed from by this subordinate
22 piece of legislation. So in my respectful submission, you
23 should not be concerned that the drafter didn't say or that
24 he may declare it to be a matter of public concern because
25 the drafter didn't say it right, and the statute is what

1 governs our discussion.

2 And that is why I'm saying the statute
3 informs. I hope that addresses that.

4 **THE COMMISSIONER:** Somewhat.

5 **MR. SHERRIFF-SCOTT:** Okay.

6 Now I just want to turn back to my Factum at page 13,
7 paragraph 50, and my submission based on paragraph 50 and
8 what follows is that, again, because the '71 legislation
9 specifically says in its explanatory note that it is
10 incorporating McRuer's recommendations, then we must be
11 satisfied that a declaration has to be precise; not only
12 precise but it has to be, in my submission, explicit,
13 because McRuer says time and time again that individual
14 rights require vigilant protection and therefore a specific
15 and precise declaration must be issued before you can get
16 into individual rights. And I have cited the Supreme Court
17 of Canada in the *St. John and Quebec Railway* case for this
18 proposition.

19 Now if I can turn you to that case, I just
20 want to highlight the discussion that occurred there. It
21 is at Tab 4 of my Brief of Authorities, Volume 1, marked
22 E.5.

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

24 **MR. SHERRIFF-SCOTT:** And I would like to
25 prevail on you, Commissioner, to turn to page 3 where

1 Idington, J. starts talking about what this case is about,
2 and you will no doubt know if you have looked at it that it
3 was a constitutional case on the division of powers. What
4 happened here is that in the paragraph, which is, first,
5 the New Brunswick government appoints this railway company,
6 and it appoints five directors. They're doing a bad job,
7 so it basically fires them and puts in some interim people
8 and, as a result of its step to do that there was a lawsuit
9 where the displaced directors said, "You can't do this
10 because you've lost your authority to regulate this company
11 because by entering into these comprehensive leasing
12 arrangements with the federal government, the federal
13 government has declared this railway company and its
14 property to be a work for the general advantage of Canada",
15 thereby making the jurisdiction of the federals paramount
16 and the province no longer existent and therefore they say
17 that vitiated the firing of the directors.

18 In the second paragraph down, you will see
19 -- the second paragraph starts with:

20 "The Appellant moved by some
21 parties..."

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

23 **MR. SHERRIFF-SCOTT:** But a little lower,
24 about five lines in, it starts with:

25 "The pretention is set up..."

1 THE COMMISSIONER: Yes.

2 MR. SHERRIFF-SCOTT:

3 "The pretention is set up that what was
4 done by the legislature of the province
5 of New Brunswick as above recited was
6 *ultra vires* and, hence, that the old
7 original directors had never been
8 displaced. The colour of the
9 pretention [like the language] for this
10 is alleged to be the leasing or
11 arrangement of lease to His Majesty the
12 King; it is not pretended that there
13 was any declaration such as required by
14 the *BNA Act* or the Dominion parliament
15 declaring the work in question to be
16 for the general advantage of Canada or
17 for the advantage of two or more
18 provinces. It merely pretended that
19 such is to be implied from the fact
20 that the leasing arrangement above
21 referred to. In my opinion, there is
22 no foundation in fact or law upon which
23 to rest such an allegation, the
24 implication..."

25 Et cetera.

1 Now, this is a constitutional case, and it
2 deals with the importance of these weighty division of
3 powers issues, but I say, basically, given the imperative
4 of protection of individual rights, we require the same
5 specificity. Over at the last page, which is then the
6 judgement of Duff, J. he says, at the first full
7 paragraph:

8 "It is common ground that there never
9 was any formal federal enactment
10 declaring the railway in question to be
11 work for the general advantage of
12 Canada under the provisions of sub-
13 section 10, Item C, of 1992 *BNA Act*.
14 The Appellant contends that such is to
15 be implied and found that some federal
16 statutes authorized the Dominion
17 government to lease the railway..."

18 Et cetera.

19 And then in a second paragraph, he dismisses
20 this argument.

21 "I am of the view that the declaration,
22 which the *BNA Act* authorizes the
23 federal parliament to make concerning a
24 provincial work should be made in
25 expressed terms. It should be done in

1 such a way there should be no doubt of
2 the will of federal government to
3 assume the legislative control over the
4 provincial work."

5 And interestingly refers to an earlier decision
6 where they adopt the descent in that case of Justice Davies
7 who says in the third last line:

8 "A declaration by the Federal
9 Government to assume jurisdiction
10 should not be inferred from its terms
11 or deduced from recitals of the
12 promoters in the preamble but should be
13 substantially enacted by Parliament."

14 Now, in my submission, this is a posit here and a
15 specific declaration should be issued if the meaning
16 contended for by my friends is the one that is to be placed
17 in the Terms of Reference, and it hasn't been done and
18 therefore you cannot, in my submission, interpret the Terms
19 of Reference in the fashion urged on you.

20 **THE COMMISSIONER:** Well, on that part of
21 that.

22 **MR. SHERRIFF-SCOTT:** On that part.

23 **THE COMMISSIONER:** On that part of the
24 argument.

25 **MR. SHERRIFF-SCOTT:** On that branch of the

1 argument, yes.

2 **THE COMMISSIONER:** Yes.

3 **MR. SHERRIFF-SCOTT:** Now, at page 13,
4 paragraph 51 of my Factum, I basically said the same thing
5 about the absence of a declaration. My friend, Mr. Manson,
6 concedes that there is none although Mr. Callaghan tried to
7 resuscitate that position in his submissions. So my
8 friends are divided on their points.

9 **THE COMMISSIONER:** We can't expect too many
10 lawyers to agree on too many things.

11 **MR. SHERRIFF-SCOTT:** No, a true enough
12 proposition there.

13 **THE COMMISSIONER:** That wouldn't leave
14 enough work for us judges.

15 **(LAUGHTER/RIRES)**

16 **MR. SHERRIFF-SCOTT:** Now, if I might turn to
17 the second sort of imperative that I say flows out of
18 McRuer, which is the precision point in the drafting or
19 clarity, and I just want to emphasise some provisions in
20 the McRuer report again. I have quoted from a portion of
21 394 about the scope of powers being no wider than necessary
22 and expressed in precise language. Again, McRuer's
23 watchword is the protection of individual rights; don't
24 create a roving commission of inquiry which may
25 inadvertently trench on rights that are not intended be

1 trenched on. Do it in a precise way.

2 And I submit that the Attorney General did
3 exactly that in drafting this subordinate instrument, and
4 they knew precisely what they were doing. McRuer then
5 issues ---

6 **THE COMMISSIONER:** You wanted me to decide
7 whether or not the Church ---

8 **MR. SHERRIFF-SCOTT:** Oh, I think they do. I
9 think they do.

10 **THE COMMISSIONER:** Yes.

11 **MR. SHERRIFF-SCOTT:** And I think they do for
12 a good reason from their point of view and it's a very
13 political one. What reason would they have to say -- why
14 wouldn't they say the Diocese is a public institution?
15 Because it's wrong, I submit. Why wouldn't they say
16 something different, in other words that it's not? Because
17 they would be very seriously criticized. They take their
18 instructions from their political arm, and my submission is
19 they have left it to you.

20 **THE COMMISSIONER:** So I guess I opened the
21 door, but aren't you doing what you're saying the others
22 can't -- we can't look into why they did or didn't do that?

23 **MR. SHERRIFF-SCOTT:** I don't know why they
24 didn't do it, but I say -- and Ms. McIntosh is not here to
25 shed any light on that.

1 **THE COMMISSIONER:** Well, she is here.

2 **MR. SHERRIFF-SCOTT:** She is here, but
3 they've made no submissions and they're taking no position,
4 and my submission it would be wrong for them to say that
5 it's included because that is not consistent and the
6 document clearly reflects it from my point of view. And
7 they would have been far more articulate if that's what
8 they intended, and I don't think there is any want of skill
9 down there.

10 The point on precision that I was about to complete
11 was that because of McRuer's concerns about individual
12 rights, he issued the recommendations that I have excerpted
13 and (b) and (c) are, in my submission, the watch words for
14 the interpretation of the Terms of Reference. No broader
15 than necessary to achieve the purposes and they should be
16 stated in clear language. In other words, when you are
17 going to affect people's rights, you do it clearly; you
18 don't do it with the risk that the inquiry goes off track.

19 Those are the comments I wanted to make
20 about McRuer. There are a number of paragraphs that I
21 haven't cited that you can read, but basically they are to
22 the same effect.

23 I next wanted to emphasize the Law Reform
24 Commission doing what I consider to be an echoing of the
25 McRuer concerns, and I have excerpted the quotation at

1 paragraph 54 about the need for care:

2 "...to define the mandate of a
3 commission, to provide...narrow and clear
4 limits of the authority of the commission.
5 The commission should not be placed in a
6 position where it has the ability to
7 construe its mandate in any manner as it
8 pleases, or forced to construe it as the
9 pressure directs..."

10 Et cetera.

11 In other words, the document when it's not
12 clear creates problems and overbroad mandates create
13 problems, and this document is not to be interpreted in
14 that fashion.

15 I wanted to emphasize one other thing out of
16 that report, which is at page 29 of it, and that is in my
17 Brief of Authorities, E5, Tab 5, page 29. If you have that
18 turned up, it says at the second full paragraph:

19 "Objective limits in a constitutive
20 order in council can be enforced in
21 courts and are subject to judicial
22 interpretation. The Order in Council
23 in establishing an inquiry by Mr.
24 Justice Grange into the deaths of
25 infants at the Hospital for Sick

1 Children contained wording that he was
2 to conduct his investigation without
3 expressing any conclusions..."

4 Et cetera.

5 "The Ontario Court of Appeal stressed
6 the importance of this limitation and
7 interpreted broadly to mean the inquiry
8 is prohibited from naming the person
9 responsible for deliberate or
10 accidental administration of a lethal
11 overdose. For it to do so would amount
12 to stating an inclusion of civil
13 criminal reliability. This
14 interpretation was no doubt made in
15 light of the concerns about
16 constitutional limits under the
17 division of powers. It also shows how
18 the Order in Council establishing a
19 commission's terms of reference can
20 place limits on the inquiry that the
21 commission cannot alter."

22 **THE COMMISSIONER:** Right, but the first
23 paragraph says, in fairness:

24 "In practice most Orders in Council
25 establishing an inquiry leave some room

1 for the commissioners to expand the
2 scope of their investigation".

3 **MR. SHERRIFF-SCOTT:** I think that's covered
4 by the Terms of Reference that deals with what your
5 ancillary powers are, but I don't think that you have the
6 authority to assume jurisdiction as you go; interpret your
7 jurisdictions, what you have the power to do. In other
8 words, you can't create your own jurisdiction. It's given
9 to you.

10 **THE COMMISSIONER:** The jurisdiction is
11 given.

12 **MR. SHERRIFF-SCOTT:** Yes.

13 **THE COMMISSIONER:** It's subject to the
14 interpretation that we viewed today.

15 **MR. SHERRIFF-SCOTT:** Of course. That's what
16 I'm urging.

17 **THE COMMISSIONER:** Okay.

18 **MR. SHERRIFF-SCOTT:** All right. Now, the
19 precision point is echoed in a number of cases and
20 interestingly, these are older cases; *Black Diamond Fields*
21 referred to in paragraph 55 and following in my Factum.
22 They are cases where the declaratory power is not present
23 in the constituent *Public Inquiries Act* of those provinces
24 historically. So in those Acts, the Governor, the
25 Lieutenant Governor in Council was only able to use the

1 plenary power to order inquiries into the good government
2 of the province, and so they are distinguishable on that
3 basis, but considering the debate and the absence of a
4 declaration, I thought they would be useful. They again --
5 both of them stress the need for clarity and precision, and
6 I want to just review a brief point in the first of the
7 cases, which is *Black Diamond Oil Fields* at Tab 6 of E5.

8 You will see at the first page after the
9 Style of Cause, page 2, I'm sorry, under Harvey,
10 C.J., it refers to the constituent statute there
11 where:

12 "The Lieutenant Governor can only order
13 the inquiry made into any manner within
14 the jurisdiction of the assembly and
15 connected with the good government of
16 the province or the conduct of the
17 public's business thereof, which is
18 similar to ours but narrower."

19 The Court here at page 4, paragraph 10 and
20 11. Starting at paragraph 10, it says:

21 "And even if the words are wide enough
22 to support Mr. Ford's contention, it
23 may be that the general scope of the
24 Act and other considerations require
25 them to be restricted as was pointed

1 out somewhere in a similar case. In
2 Maxwell on Interpretations, it is
3 stated general words and phrases,
4 however wide and comprehensive in their
5 literal sense, must usually be
6 construed as limited to their actual
7 objects of the Act and as not altering
8 the law beyond."

9 And then he goes on to talk about the
10 quotation that I have excerpted and then he says here:

11 "The title of the Act indicates it is
12 public matters that are to be inquired
13 into. How can it be said that the
14 private affairs of a company is a
15 public matter?"

16 In that case, the essential structure of the
17 commission was to look at private affairs and they say that
18 was a mismatch and the terms of reference were not
19 sufficient in their drafting to say how those private
20 affairs affected the public interest or the good government
21 sufficient to give the commissioner jurisdiction.

22 And *Sargent v. McPhee* at the next tab is
23 essentially to the same effect.

24 Now, the next couple of cases are the Hydro
25 Electric Commission, the Mississauga case, and the case

1 from the Privy Council that I've cited at Tabs 8 and 9.
2 These cases went so far as to indicate that the need for
3 precision in drafting resulted in the commissions of
4 inquiry there appointed to be set aside.

5 The first one was a municipal inquiry which
6 gives to the municipality all of the powers of a public
7 inquiry commissioner and the legislative matrix intertwines
8 with the *Public Inquiries Act* and the jurisdiction is
9 similar.

10 The other case is a commission of inquiry
11 that was called so broadly that the court, the Privy
12 Council said that that was unacceptable and that the
13 absence of precision vitiated the appointment.

14 Now, I don't offer these for that
15 proposition. I offer them to buttress the argument that a
16 level of specificity here is required before individual
17 rights can be trenched on to the extent contended for by my
18 friends and the interpretation urged on you. I offer them
19 to show that these Terms of Reference are to be interpreted
20 in a context and that they have a limit and that these
21 types of cases show that the need for clarity in drafting,
22 when you're going to be looking at these kinds of issues,
23 is a very paramount consideration.

24 So I have summarized the points at paragraph
25 58 in my factum that flow from these authorities. Having

1 regard to what I say at paragraph -- subparagraph (a), I
2 say that:

3 "Nobody can credibly say that these
4 Terms of Reference clearly or with the
5 required degree of specificity or
6 precision that is indicated here when
7 individual rights are contemplated,
8 that they contemplate an investigation
9 of the Diocese as if it were a public
10 institution. They do not support
11 clearly such an interpretation."

12 My submission is that, absent that, you
13 cannot interpret them as such.

14 Now, this is the argument that I took you
15 through earlier, B, C, D and E, about how there is harmony
16 between the Act and the structure of the paragraph in issue
17 here, the Terms of Reference, and how your plenary power is
18 governmental in nature and incidental power only is what
19 comes out of the community sector organization and that's
20 how I wrap that section.

21 **THE COMMISSIONER:** Can I stop you here?

22 **MR. SHERRIFF-SCOTT:** Yes, please.

23 **THE COMMISSIONER:** So we have talked about -
24 - well, we've talked about -- I have heard submissions
25 about the interaction and the non-interaction. So, I

1 suppose, how do I deal with that? Because you're saying
2 that Terms of Reference go on -- I'm reading from 58(d):
3 "...but the Commissioner may
4 investigate the interaction of the
5 response of the justice system and
6 other public institutions with what it
7 describes as other public community
8 sectors."

9 So how can we do that if we don't know if there are any
10 acts or omissions from the church's point of view?

11 **MR. SHERRIFF-SCOTT:** Well, the fact that the
12 church is a community -- in my submission the church is a
13 community sector and that gives you jurisdiction to
14 investigate. It's when the justice system or other
15 governmental-type organizations interfaced with it, what
16 happened. So you may well be able to analyze that issue
17 under that heading.

18 But what I am saying is, if you -- you can't
19 assume we're a public institution unless there's clear
20 drafting. You may have an incidental, ancillary power to
21 visit on us; what happened, I suppose, when Mr. Callaghan
22 says, if there's a precise issue, should we have an
23 omission, should we have interfaced with a public
24 institution, that you may have wide enough jurisdiction
25 under the ancillary power. But you don't have the

1 authority to investigate the Diocese as if it were a public
2 institution. That's what my point is.

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

4 **MR. SHERRIFF-SCOTT:** So my submission on the
5 interpretive imperative is that the community sector
6 organization power -- those are contemplated to be the
7 private organizations in that it's ancillary power only.

8 Here I get to the points of tautology. I
9 don't know how you want to structure the day. I'll
10 probably be about another half an hour or thereabouts and
11 I'm sure you want to finish, so I'm in your hands. If you
12 want me to press on, I will do that. If you want to take a
13 break at some point soon ---

14 **THE COMMISSIONER:** Well, we will want to
15 take the lunch break. I have other meetings to do while
16 I'm lunching, mostly phase II matters, but those matters
17 are still within my responsibilities, and people have to
18 eat.

19 **MR. SHERRIFF-SCOTT:** Yes.

20 **THE COMMISSIONER:** So why don't you forge on
21 until 12:30 ---

22 **MR. SHERRIFF-SCOTT:** Okay.

23 **THE COMMISSIONER:** --- and then we'll take
24 it from there.

25 **MR. SHERRIFF-SCOTT:** Okay. Well, I can

1 probably easily cover the next section, which is what I
2 call the rule against tautology.

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

4 **MR. SHERRIFF-SCOTT:** These three sections
5 that follow are driven -- are attempting to drive the point
6 that the two phrases in question must have different
7 meanings attributed to them.

8 You can see here what the rule of tautology
9 is. It's easily stated that everything has to have its own
10 meaning and you don't treat language as superfluous. So
11 when the phrases are used and they're different, they are
12 expected to have discreet identification and discreet
13 characteristics.

14 And I just want to pause to emphasize what
15 Sullivan had to say on this, who now has carriage of the
16 Driedger book. Her comments are at page 158 and following
17 of Tab 11 of E5. And at the bottom of the page on the
18 presumption against tautology governing principle:

19 "It is presumed that the legislature
20 avoids superfluous or meaningless
21 words, that it does not pointlessly
22 repeat itself or speak in vain. Every
23 word in the statute is presumed to make
24 sense and have specific role."

25 And the quotation from the House of Lords:

1 "Although a parliamentary enactment
2 like eloquence is capable of saying the
3 same thing twice over without adding
4 anything to what has been said once,
5 this repetition in the case of an Act
6 of Parliament is not to be assumed.
7 When the legislature enacts a
8 particular phrase in a statute, the
9 presumption is that it is saying
10 something which has not been said
11 immediately before."

12 And I emphasize "immediately before".

13 "The rule that a meaning should, if
14 possible, be given to every word in a
15 statute implies that unless there is
16 good reason to the contrary..."

17 Or an absurdity interpretation that flows, I would
18 interject.

19 "... the words add something to which was
20 not there before."

21 She goes over to refer to the *Proulx* case in the Supreme
22 Court of Canada which talks about the imperative not to
23 render provisions in a document as mere surplussage. She
24 says again at the textual portion:

25 "And these passages indicate every word

1 and provision found in the statute is
2 supposed to have a meaning and a
3 function."

4 And a function.

5 "For this reason courts should avoid,
6 as much as possible, adopting
7 interpretations that would render any
8 portion of a statute meaningless or
9 pointless or redundant."

10 And in my submission, if you don't find that
11 these two phrases have different constituent elements,
12 that's what would happen.

13 "It is invoked frequently for a variety
14 of purposes, to reveal ambiguity,
15 resolve it and further purpose, to
16 determine the scope of general powers,
17 conditions [et cetera] and to clarify
18 the relation between provisions of one
19 or more Acts. It applies to both
20 individual words and phrases and to
21 larger units. It applies to the
22 Charter..."

23 Et cetera."

24 Then she refers to the *Kelly* case, which I
25 put in the brief, an interesting analysis here and the

1 quotation in the middle of page 160 is apt:

2 "The interpretation of the word
3 "corruptly" must take place within the
4 meaning and context of the Act. It is
5 trite rule of...interpretation that
6 every word in the statute must be given
7 meaning. It would be superfluous to
8 include corruptly in this section, if
9 the offence were complete upon the
10 taking of a benefit in the
11 circumstances. The word must add
12 something to the offence."

13 That was the taking of a benefit by a public
14 official and so unless you did it corruptly, there would be
15 no *mens rea* so they said, some people were arguing that the
16 mere taking of any benefit would suffice to satisfy the
17 statutory requirements and the Court said, "No, no, no.
18 Let's look at the Act. This word has to have a meaning."
19 And there are a number of other illustrations.

20 So that is the rule against tautology and,
21 in my submission, you would apply it here and if you look
22 at the two phrases, they are clearly cast in different
23 language. They clearly must indicate different things.
24 Therefore, they must have different constituent elements.
25 And I submit no one has told you why the Diocese wouldn't

1 be a community sector organization. Those organizations,
2 in my view, are any community, private organizations which
3 may have interfaced with the other organizations intended
4 to be captured in the first part of the sentence in the
5 Terms of Reference that we're concerned with.

6 When you accept the challenge of giving
7 different meaning to these two phrases, I submit my
8 interpretation flows automatically.

9 The thing that I wanted to emphasize on page
10 19 when I sort of recapitulate the list of conclusions that
11 flow out of this is another site here in the middle of
12 paragraph C:

13 "When the legislation enacts a
14 particular phrase, the presumption is
15 that it is saying something it has not
16 said immediately before."

17 So I say that the symmetry and harmony with
18 the Act, the mother act of the *Inquiries Act* and the
19 symmetry of the section would be destroyed if you did not
20 give different meanings to these two different phrases.

21 That finishes that section.

22 The next one is a similar proposition which
23 is that different meanings have to have different words --
24 or, excuse me; is a presumption against absurdity and I've
25 outlined here why I think it would actually frustrate your

1 jurisdiction and cause it to be absurdly interpreted if
2 they didn't have different meanings. It may actually
3 result in your jurisdiction being frustrated because nobody
4 would know who anybody was under the statute and the
5 result; you might be prevented from investigating the
6 interaction between what, I submit, are governmental public
7 institutions and other organizations.

8 The rule against absurdity doesn't require
9 any real elaboration. I'm sure you have heard it a zillion
10 times. The Supreme Court authority is there and the
11 Sullivan passages are there. They support that. Nothing
12 is in contention, as I understand it, from my friends on
13 that.

14 I did want to spend a few more minutes on
15 the third presumption which is at paragraph 66 and I can
16 probably finish that before 12:30.

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

18 **MR. SHERRIFF-SCOTT:** This is what I describe
19 as a reasonably self-evident proposition that different
20 words convey different meanings. The Peach Hill Management
21 case, the court there said, at paragraph 66 of my factum:

22 "When an Act uses different words in
23 relation to the same subject, such a
24 choice by parliament must be considered
25 intentional and indicative of a change

1 in meaning or a different meaning."

2 Now I just wanted to go to these two cases,
3 Peach Hill and Frank and as well to Sullivan. I'll start
4 with Sullivan at Tab 11 of E5, page 164 ---

5 **THE COMMISSIONER:** I'm sorry, Tab?

6 **MR. SHERRIFF-SCOTT:** Tab 11.

7 **THE COMMISSIONER:** Yes.

8 **MR. SHERRIFF-SCOTT:** One-sixty-four (164).

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

10 **MR. SHERRIFF-SCOTT:** She says here under
11 "Different Words, Different Meanings":

12 "Given the presumption of consistent
13 expression it is possible to infer an
14 intended difference in meaning from the
15 use of different words."

16 Then she refers to the *Jabel Image* case:

17 "When an Act uses different words in
18 relation to the same subject, such a
19 choice must be considered intentional
20 and indicative of the change in
21 meaning. This reason was relied on in
22 several Supreme Court of Canada
23 decisions. Interpreting the insanity
24 defence provisions of the Code, section
25 16(1) provides that a person is insane

1 only if she is incapable of
2 appreciating the nature and quality of
3 the Act or omission or of knowing that
4 it was wrong."

5 And the *Schwartz* decision of Dickson J.,
6 argued:

7 "The word "wrong" must mean morally
8 wrong and not illegal because elsewhere
9 in the Code the term unlawful was used
10 to express the idea of illegality.
11 Therefore, by using the word wrong, the
12 legislature must have meant to express
13 a different idea."

14 And *R. v. Barnier*, the issue is whether the
15 trial judge erred in the instruction of the jury in the
16 words, "appreciating" and "knowing" and Estey wrote there,
17 "One must, of course, commence the
18 analysis of a statutory provision by
19 seeking to attribute meaning to all the
20 words used therein."

21 Here Parliament has employed two different
22 words in a critical portion of the definition, which words
23 in effect establish two sets of standards in determining
24 the presence of insanity under the primary canon of
25 construction which I have referred to; appreciating and

1 knowing must be different. Otherwise, the legislature
2 would have employed one and only one.

3 "The presumption of consistent
4 expression applies not only within
5 statutes but across statutes as well
6 as..."

7 It goes on, et cetera.

8 Now, the *Peach Hill* case is at Tab 14 of the
9 same brief. It's a Tax Court decision of the Federal Court
10 of Appeal and the neat argument, you'll see from page 1, is
11 that:

12 "The Tax Court had determined that
13 certain fee revenues received by Peach
14 Hill and others from contract students
15 sponsored by one or more government
16 agencies did not qualify for a goods
17 and services tax rebate under the
18 *Excise Act*. Peach Hill and others were
19 all post-secondary educational
20 institutions which carried on a
21 business for profit. All would have
22 qualified for GST rebates for the claim
23 periods prior to April 6, '96 provided
24 they brought themselves within the
25 definition of a public college in the

1 Act. Peach Hill and others did not
2 receive money during the relevant claim
3 periods from any government or
4 municipality in the form of grants.
5 The Tax Court concluded Peach Hill and
6 others were not public colleges because
7 they were not 'funded by a government'
8 as evidenced by the receipt of grants
9 and subsidies but were instead
10 supported by fees."

11 Now, the statutory issues follow. If you
12 turn to page 2 you'll see under the footnote 2 under
13 paragraph 2 there is reference to public college included
14 in the expression "selected public service body" as defined
15 in 259; the latter being "amongst the persons permitted to
16 apply for a rebate".

17 And so this private college was trying to
18 drive itself into the public definition and define as an
19 organization or part of an organization that operates as a
20 post-secondary college that is funded by government or a
21 municipality -- funded by a government or a municipality
22 and the primary purpose of which is to provide programs and
23 instruction in one or more fields.

24 At paragraph 3 the Court says:

25 "Bowie, TCJ concluded the appellants

1 were not public colleges because they
2 were not funded by a government; that
3 phrase requiring that the recipients
4 receive funds from the government in a
5 form of grants or subsidies rather than
6 as fees for services rendered."

7 And over at paragraph 5:

8 "An error in law is alleged in the
9 interpretation of the relevant
10 provisions of the Act. It is argued
11 that the definition of government
12 funding contained in section 2 of the
13 Public Service Rebate Regulations was
14 ignored. That definition includes
15 money paid by the government as a
16 consideration for making property or
17 services available where the supplies
18 or property services are exempt
19 subsidies."

20 So the Court goes down here at paragraph 7:

21 "The primary argument being advanced
22 by the appellants is the words 'funded
23 by a government is equivalent to
24 government funding'. The appellants
25 argue that since they clearly fit

1 within (2)(a)(ii) of the...[regs] they
2 are consequently recipients of
3 government funding and therefore are
4 public colleges."

5 So you see how they've taken slightly
6 different words and attempted to put themselves under the
7 rebate category.

8 So then the Court gets into the issue, the
9 general scheme of the Act at paragraph 8, "Persons making
10 taxable supplies of goods or services must collect GST" and
11 "generally, persons registered under the Act are entitled
12 to a rebate". It goes over at the bottom of the page 4,
13 paragraph 12:

14 "I reject the appellant's argument that
15 the phrases 'funded by a government'
16 and 'government funding' are equivalent
17 and that as a result a definition of
18 government funding assists in the
19 determination of the meaning funded by
20 a government. When an act uses
21 different words in relation to the same
22 subject such a choice by Parliament
23 must be considered intentional and
24 indicative of a change in meaning or a
25 different meaning. For the purpose of

1 delineating the eligibility of GST
2 rebates, Parliament has chosen to make
3 a distinction between 'government
4 funded' and 'funding and funded by a
5 government'. It follows the terms of
6 "funded by a government" and
7 "government funding" are not
8 equivalent."

9 So that's a fairly severe illustration of
10 the principle of different words and different meanings. I
11 submit it's apposite here because you have very different
12 phrases.

13 The last case under this section is the
14 *Frank* case, and if you can bear with me for a few minutes
15 we can get through that and finish this section.

16 **THE COMMISSIONER:** Yes.

17 **MR. SHERRIFF-SCOTT:** This is an interesting
18 case on a number of points of interpretation.

19 **THE COMMISSIONER:** Tab 15?

20 **MR. SHERRIFF-SCOTT:** It's Tab 15, yes.

21 Sorry, 5; Tab 15.

22 And the nub of the argument that the court
23 was faced with was -- you'll see from the head note --
24 whether a Treaty Indian resident in Saskatchewan who has
25 found a moose, dead, no doubt, had his treaty rights when

1 he was doing the hunting of the moose in Alberta. He was
2 charged with unlawfully having moose meat contrary to the
3 *Wildlife Act* and the charge was dismissed by the provincial
4 court. And down in the second paragraph:

5 "The appellant was hunting on Treaty
6 No. 6 lands. The treaty was concluded
7 in 1876. The tract covers land one-
8 third of the present province of
9 Alberta and Saskatchewan and has
10 secured to Indians the right to pursue
11 their avocations of hunting... [Et
12 cetera]. There was then the Alberta
13 Natural Resources Transfer Agreement
14 transferring from Canada to Alberta the
15 interests of the Crown in all lands,
16 mines, et cetera, in order to secure
17 the Indians of the province the [the
18 Indians of the province] continuance of
19 the supply of game and fish for their
20 support and subsidy. Canada agrees
21 that the laws respecting game
22 and...[force] in the province from time
23 to time shall apply to the Indians
24 within the boundaries thereof."

25 So these are the two expressions that were

1 used, the "Indians in the province" and the "Indians within
2 the boundaries thereof" which meant Alberta. So the
3 Attorney General in the submission the conviction should
4 remain said -- well, it meant -- it didn't mean what was
5 contended for and, therefore, the two expressions were the
6 same essentially, whereas the court found them to be
7 different. The analysis is at page 100.

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

9 **MR. SHERRIFF-SCOTT:** At the last paragraph
10 in the left-hand margin:

11 "The debate in the courts below centred
12 on the interpretation of paragraph 12
13 of the agreement. The Crown contended
14 the phrases 'Indians of the province'
15 and 'Indians within the boundaries
16 thereof meant one and the same thing;
17 namely, Indians resident in the
18 province of Alberta."

19 And so this Indian who captured the moose
20 was a Saskatchewan resident and therefore they charged him.
21 "For whom" according to the words of the paragraph, "It was
22 sought to secure a continuance of the supply of fish and
23 game", et cetera. It was contended that the words 'the
24 said Indians' related to resident Indians only and that it
25 was to such Indians the rights of hunting were accorded.

1 The provincial court judge rejected that argument and held
2 the Indians within the boundary should not be restricted to
3 Alberta Indians but must extend to any Indian physically
4 within the boundaries of Alberta no matter where his
5 residence was. So he was better in his interpretation than
6 the Court of Appeal.

7 The Appellate Division in reversing held --
8 paragraph 12 did two things. It enlarged the areas in
9 which Alberta and Saskatchewan Indians could respectively
10 hunt; it limited their rights to hunt other than through
11 provincial game laws. In other words, they had to be
12 within their own provinces.

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

14 **MR. SHERRIFF-SCOTT:** So he says at the
15 bottom of that page:

16 "I do not think Indians of the province
17 and Indians within the boundaries
18 thereof refer to the same group. The
19 use of different language suggests
20 different groups. In my view, the
21 "Indians of the province" means Alberta
22 Indians. The words "Indians within the
23 boundaries" on the other hand refer to
24 a larger group; namely, Indians who at
25 any particular moment happen to be

1 found within the boundaries of the
2 province of Alberta."

3 And then over, the next page 102, he deals
4 with the statutory interpretation imperatives at the middle
5 paragraph:

6 "One of the rules of grammar, one
7 learns at an early age, is that a
8 relative should refer to the last
9 antecedent. Such a rule, of course,
10 must yield if the result makes
11 nonsense, but I find no such result
12 when one relates back to the relative,
13 the said Indians, to the last
14 antecedents 'Indians within the
15 boundaries'. There is no need to place
16 the clause of reference out of
17 juxtaposition by jumping over the
18 nearest antecedent."

19 And he goes on to read the case from
20 England:

21 "In following, you read it to mean any
22 document when you come upon a word such
23 as 'said' or 'such' containing a
24 reference to an earlier part of the
25 document and to the same person or

1 thing already mentioned. You do not
2 begin by reading the document from the
3 beginning. You look backwards. You
4 take the nearest sensible antecedent as
5 an appropriate antecedent for the word
6 of reference."

7 And down at the bottom:

8 "The Court resumes. It seems to me
9 that the construction I support avoids
10 the situation in which a non-resident
11 Indian entering Alberta would be
12 subjected to the application of the
13 game laws but denied the rights
14 supported by the proviso.

15 It was also suggested during argument
16 that if the application of the
17 paragraph is confined to resident
18 Indians then non-resident Treaty
19 Indians would not be subjected thereto
20 and be free to exercise in Alberta, et
21 cetera. This would place non-resident
22 Indians in a more favoured position."

23 So the court here not only talks about
24 different meanings for different words but it uses the
25 antecedent or words in context analysis by saying you

1 interpret this language. You look at a general expression
2 and it's going to have a grammatical antecedent that
3 modifies it and pours meaning into it, thereby limiting it.

4 Those are my submissions on that section.
5 It would be a good, logical breakpoint. I'm on the second-
6 last segment of the argument.

7 **THE COMMISSIONER:** All right.

8 And how much time do you think you'll need
9 to finish your argument, just so we can ---

10 **MR. SHERRIFF-SCOTT:** Half an hour, 25
11 minutes.

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

13 **MR. MANSON:** Before we break, Mr.
14 Commissioner, I have one brief, brief question. I've got
15 to call my colleague, Peter Wardle. I was just concerned
16 about the plans for tomorrow. I understand -- is there any
17 clear indication of when you'll be starting?

18 **THE COMMISSIONER:** We'll start at 10:00.

19 **MR. MANSON:** Start at 10:00.

20 **THE COMMISSIONER:** From 10:00 until 1:00.
21 We'll see how it goes. I'll be able to give you further --
22 we're starting tomorrow, no doubt about it, all right,
23 unless this argument spills over into tomorrow, but I doubt
24 that. All right?

25 **MR. MANSON:** Excellent. Thank you, Mr.

1 Commissioner.

2 **THE REGISTRAR:** Order. All rise. À
3 l'ordre. Veuillez vous levez.

4 The hearing will reconvene at 2:00.

5 --- Upon recessing at 12:38 p.m./

6 L'audience est suspendue à 12h38

7 --- Upon resuming at 2:05 p.m./

8 L'audience est reprise à 1405

9 **THE REGISTRAR:** This hearing of the Cornwall
10 Public Inquiry is now in session. Please be seated.
11 Veuillez vous asseoir.

12 **THE COMMISSIONER:** Mr. Scott, can I just
13 refocus here a little bit?

14 **MR. SHERRIFF-SCOTT:** Yes, of course.

15 **THE COMMISSIONER:** A couple questions.

16 **MR. SHERRIFF-SCOTT:** Yes, sir.

17 **THE COMMISSIONER:** When we're dealing with
18 the preamble to the *Public Inquiries Act* which is your Tab

19 ---

20 **MR. SHERRIFF-SCOTT:** Is this in the Terms of
21 Reference, Commissioner?

22 **THE COMMISSIONER:** No.

23 **MR. SHERRIFF-SCOTT:** Okay.

24 **THE COMMISSIONER:** Hang on, let me see. The
25 last Act was 1971, the *Public Inquiries Act*, right?

1 **MR. SHERRIFF-SCOTT:** That brought it into
2 its current form. In my Tab 1 at the last couple of pages
3 is the current version, 1990 RSO.

4 **THE COMMISSIONER:** Where is it?

5 **MR. SHERRIFF-SCOTT:** It's at the -- you'll
6 see. There should be a couple of blue sheets separating
7 the materials at Tab 1.

8 You don't have blue sheets. Well, that's
9 very helpful. The blue sheets are just where they are
10 supposed to be then.

11 Sorry, there should have been the separating
12 pages. So if you ---

13 **THE COMMISSIONER:** Okay, I've got it here.

14 **MR. SHERRIFF-SCOTT:** Okay.

15 **THE COMMISSIONER:** Yes, it's 1 of 9?

16 **MR. SHERRIFF-SCOTT:** Yes.

17 **THE COMMISSIONER:** So really it's in Tab 1,
18 Madam Clerk, about two, four, six -- she has got it right
19 there but I don't know that that is the current one.

20 In any event, part of it says "the
21 appointment of commission" in part 1 -- yes, okay.

22 "Whenever the Lieutenant Governor in
23 Council considers expedience to cause
24 an inquiry to be made concerning any
25 matter connected with or affecting the

1 good government of Ontario..."

2 **MR. SHERRIFF-SCOTT:** Yes.

3 **THE COMMISSIONER:** "The good government of
4 Ontario."

5 That's a little different than in your Tab
6 6, I think, the *Black Diamond* case because if I read that
7 correctly I don't think that the Alberta *Inquiries Act*
8 talked about "or affecting the good government". Now, am I
9 right?

10 **MR. SHERRIFF-SCOTT:** The Alberta -- this is
11 an old piece of -- I don't know what the current Act says
12 but in 1908, which is the date of this ---

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

14 **MR. SHERRIFF-SCOTT:** It says, "Lieutenant
15 Governor in Council may when he desires it expedient to
16 cause a public inquiry to be made into and concerning any
17 matter within the jurisdiction of the legislative assembly
18 and connected with the good government of the Province of
19 Ontario or the conduct of the public business thereof."

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

21 So I guess my question is, with the current
22 reading of the appointment of Commission in Part I of the
23 *Public Inquiries Act*, would it not give the Lieutenant
24 Governor in Council a wider perspective if we're dealing
25 not only with matters connected to the good government of

1 Ontario but affecting the good government of Ontario?

2 MR. SHERRIFF-SCOTT: Then the Alberta
3 legislation?

4 THE COMMISSIONER: M'hm.

5 MR. SHERRIFF-SCOTT: I think that's probably
6 a fair observation, Commissioner.

7 THE COMMISSIONER: Okay.

8 MR. SHERRIFF-SCOTT: I think that any matter
9 -- inquiry to be made concerning any matter connected with
10 or affecting -- well, and there's a great deal of
11 similarity between the two pieces but there is that
12 difference in language and I guess, on my argument, it
13 should have some meaning.

14 (LAUGHTER/RIRE)

15 THE COMMISSIONER: Well, while we're on that
16 subject ---

17 MR. SHERRIFF-SCOTT: Yes.

18 THE COMMISSIONER: -- can we just -- the
19 difference between -- well, you say that in the mandate
20 it's a public institution.

21 If the government would've wanted to say
22 that they should be government institutions, why wouldn't
23 they just have said "government institutions?"

24 MR. SHERRIFF-SCOTT: Good question. My
25 retort to that is I don't know. The Attorney General

1 hasn't told us ---

2 **THE COMMISSIONER:** No, but what I'm saying,
3 though, is that using your -- if I have your argument
4 correctly on statute interpretation ---

5 **MR. SHERRIFF-SCOTT:** Yes.

6 **THE COMMISSIONER:** --- the fact that they
7 use "public" instead of "government," would not the use of
8 the word "public" be wider than "government?"

9 **MR. SHERRIFF-SCOTT:** I don't think one --
10 no, I don't agree with that proposition.

11 My proposition is that in context the public
12 institutions, having regard to the language in that phrase
13 as modified by the judicial system, means governmental in
14 nature and that's what gives meaning to the generality of
15 the term.

16 And it's true; the government could've been
17 more precise and used "government". It's true; the
18 government could've been more precise and used "diocese,"
19 but I think what they did do is use a general word, couple
20 it with a specific word, which as I submit, is a standard
21 drafting technique to give meaning to the general term.

22 And the phrase "justice system and institutional response"
23 in my submission means on behalf of the public by
24 organizations which are governmental-like organizations.

25 **THE COMMISSIONER:** I suppose, and I don't

1 want to speak for Mr. Manson, but can -- well, first of
2 all, do we agree, and you need not, obviously, that your
3 client is an institution?

4 **MR. SHERRIFF-SCOTT:** An institution? Well,
5 I suppose, loosely considered -- not within the context of
6 these Terms of Reference, but an institution in general
7 terms, any ---

8 **THE COMMISSIONER:** No.

9 **MR. SHERRIFF-SCOTT:** It depends on how you
10 define it.

11 **THE COMMISSIONER:** No, no. Let's be fair,
12 let's be fair; an institution within the meaning of the
13 mandate.

14 **MR. SHERRIFF-SCOTT:** In the Terms of
15 Reference?

16 **THE COMMISSIONER:** Yes.

17 **MR. SHERRIFF-SCOTT:** No.

18 **THE COMMISSIONER:** It's not an institution?

19 **MR. SHERRIFF-SCOTT:** No. In my submission,
20 it is not. You cannot take the phrase and parse it like
21 that.

22 A public -- I'm not prepared to accede to
23 the proposition that you can say "public," park it and give
24 meaning to it; "institution," park it and give meaning to
25 it.

1 **THE COMMISSIONER:** Okay.

2 **MR. SHERRIFF-SCOTT:** That is a phrase and,
3 in my submission, it's got symmetry and overall coherence.

4 **THE COMMISSIONER:** So I take it, then, that
5 if I were to ask you, can you see an organization, an
6 entity, I suppose, being both a community sector -- well,
7 can they be one or the other or both, in different
8 circumstances within the mandate of this inquiry?

9 **MR. SHERRIFF-SCOTT:** No, I don't think so.
10 I think that that would -- first of all, in my submission,
11 the justice system and other public institutions has the
12 meaning I've attributed to it and to measure the
13 interaction between them and others they have to be
14 different, and for the principles I've identified they have
15 to have different meanings because the legislature has
16 chosen different words to define them. And so we have to
17 identify what their constituent characteristics are.

18 In my submission, I went through a list of
19 what I considered to be community sector-like organizations
20 and they would not have the feature of governmental origin
21 or mandate given to them by the government than, say, those
22 institutions that I identified also in the list would, such
23 as the Children's Aid Society, et cetera. And for that
24 reason, they wouldn't be community sector organizations.

25 I think community sector organizations has

1 to be distinguished from the other term to have a separate
2 meaning and it has to be narrow enough to exclude public
3 institutions to give meaningful context and jurisdiction to
4 you.

5 I don't know how you would exercise your
6 jurisdiction to measure the interaction between the two if
7 there was a total blur; in other words, if they were all
8 one and the same. I mean, how would you decide who you're
9 going to measure, what organization was which and what was
10 which and sort of like the Dr. Seuss questions, you know?
11 It would be impossible for you and I think it would
12 unfairly truncate your jurisdiction because it would make
13 it completely unclear and may remove your authority to do
14 that analysis.

15 **THE COMMISSIONER:** Okay. Last question for
16 now, I suppose, is we talked about public character
17 yesterday with Mr. Manson ---

18 **MR. SHERRIFF-SCOTT:** Yes.

19 **THE COMMISSIONER:** --- and, I suppose,
20 whether or not there's a general public concern that the
21 role of the Diocese should be examined within the framework
22 of this inquiry.

23 So do you think that, first of all, your
24 client is a public character?

25 **MR. SHERRIFF-SCOTT:** It operates -- yes. I

1 can see -- as I said yesterday, it's an important part of
2 the voluntary sector and it performs functions and reaches
3 out to the public in its services to them.

4 **THE COMMISSIONER:** All right. Okay. Thank
5 you.

6 And then are you in a position to agree or
7 disagree or concede, whatever word you want, that the
8 general public of Cornwall has a concern and would wish to
9 have the role of the Diocese examined?

10 **MR. SHERRIFF-SCOTT:** Absolutely not, and I
11 don't think that would be an appropriate factual finding
12 for you to make. Moreover, I ---

13 **THE COMMISSIONER:** I didn't ask you whether
14 or not I was going to make that factual finding.

15 **MR. SHERRIFF-SCOTT:** No, no, but I don't
16 think that would be a fair analysis for this reason.
17 There's no way to measure that.

18 **THE COMMISSIONER:** Right.

19 **MR. SHERRIFF-SCOTT:** I'm sure there are some
20 people who have a concern and maybe there are other people
21 who don't, and it's impossible for us to say who on the
22 scale of weight would be more weighty than another or --
23 moreover, even if we could conclude that one group was
24 preponderant in the expression of its concern, what would
25 that mean for the legislation?

1 I don't think that's a fair way to analyse
2 the issue and I think that the import of the case, as I
3 gave you at the outset, focused -- and I think my friend
4 Mr. Callaghan agreed yesterday in his submissions on the
5 *Consortium* case that the thrust here of the analysis is on
6 the legislation and that legislation reflects the public
7 concern and so we must be taken to interpret what's before
8 us as the expression of that concern.

9 **THE COMMISSIONER:** No, I understand your
10 argument that way. I just wanted to know what your
11 comments were with respect to the public character of your
12 client, which you've answered, and the issue about the
13 public concern.

14 **MR. SHERRIFF-SCOTT:** Yes.

15 **THE COMMISSIONER:** Thank you.

16 **MR. SHERRIFF-SCOTT:** I've made -- in Bishop
17 Durocher's affidavit, I made the comment about -- there is
18 a comment by him about the subject of the public character
19 of the organization which addresses that issue as well.

20 On the last leg of the statutory
21 interpretation argument, at paragraph 21 -- page 21 and
22 following of my Factum, we get to, at the bottom, what I
23 call the textual analysis, *noscitur a sociis*, which is a
24 principle of statutory interpretation, which is what I've
25 referred to a number of times; the coupling of words so as

1 to give meaning to a general one.

2 I understand there was some amusement in the
3 gallery about the moose meat cases and I'm sorry I don't
4 have any more intriguing cases like that to entertain
5 people. These are a little on the dry side ---

6 (LAUGHTER/RIRES)

7 MR. SHERRIFF-SCOTT: --- but I think they're
8 important for our purpose. And if I can prevail on you,
9 Commissioner, to turn up Tab 11 of E5, which is the Volume
10 1, Brief of Authorities, the Sullivan text again.

11 THE COMMISSIONER: Tab 5?

12 MR. SHERRIFF-SCOTT: Yes -- Tab 11, E5;
13 sorry.

14 THE COMMISSIONER: E5, Tab 11.

15 MR. SHERRIFF-SCOTT: Yes.

16 THE COMMISSIONER: That's the Sullivan and
17 Driedger ---

18 MR. SHERRIFF-SCOTT: Yes.

19 THE COMMISSIONER: --- text?

20 MR. SHERRIFF-SCOTT: And it's page 173.

21 At the top of the page, the author starts
22 the discussion of this.

23 "The associated words rule is properly
24 invoked when two or more terms linked
25 by 'and' or 'or' serve an analogous

1 grammatical function and logical
2 function within a provision. The
3 parallelism invites the reader to look
4 for a common feature among them. This
5 feature is then relied on to resolve
6 ambiguity or limit the scope of the
7 terms. Often the terms are restricted
8 to the scope of their broadest common
9 denominator."

10 As Martin J.A. said:

11 "When two or more terms which are
12 susceptible of analogous meanings are
13 coupled together, they are understood
14 to be used in their cognate sense.
15 They take their colour from each other,
16 the meaning of the more general being
17 restricted to a sense analogous to the
18 less general."

19 Then it refers to this Court of Appeal case
20 which I have in the brief which was a bankruptcy issue
21 under the *Criminal Code* and the provision there cited was:

22 "Every one who,
23 (a) with intent to defraud his
24 creditors,
25 (i) makes or causes to be made a gift,

1 conveyance, assignment, sale, transfer
2 or delivery of his property, or
3 (ii) removes, conceals or disposes of
4 any of his property
5 is guilty of an indictable offence."

6 And so the Court and Sullivan says:

7 "Although the term 'conceals' in
8 subparagraph (ii) could be understood
9 broadly to include failure to disclose,
10 Martin J.A. relied on the associated
11 word principle to justify his adoption
12 of a narrower meaning.

13 Citing the Court of Appeal, the author
14 quotes:

15 "In this case, the words which lend
16 colour to the word 'conceals' are first
17 the word 'removes' which clearly refers
18 to the physical removal of the property
19 and, second, the word 'disposes of'
20 which standing in contrast to the kind
21 of disposition which is expressly dealt
22 with subparagraph (i) of the same
23 paragraph; namely, one which is made by
24 gift conveyance, et cetera, strongly
25 suggests the kind of disposition which

1 results from a positive act taken by a
2 person to be physically part of his
3 property. In my view, the association
4 of 'conceals' with the word 'removes'
5 or 'disposes of' shows the word
6 'conceals' is there used by Parliament
7 in a sense which contemplates a
8 positive act of concealment."

9 And over at the top of the next page, she
10 says:

11 "Having identified the shared feature
12 of the three linked words as a physical
13 act of some sort, Martin J.A. then used
14 the speech to narrow the range of
15 possible meanings of 'conceal'."

16 And there is then the recitation of some
17 other case law to this effect.

18 If we can just turn up the *Goulis* case at
19 Tab 16 of E5, the Court of Appeal decision there, at page 5

20 ---

21 **THE COMMISSIONER:** Can I stop you for a
22 second?

23 **MR. SHERRIFF-SCOTT:** Yes.

24 **THE COMMISSIONER:** In that case, we're
25 looking at a criminal statute.

1 **MR. SHERRIFF-SCOTT:** Yes.

2 **THE COMMISSIONER:** Right. And should you
3 not be interpreting matters differently depending on the
4 act that you're dealing with?

5 **MR. SHERRIFF-SCOTT:** Well, there's a
6 traditional rule about criminal statutes being strictly
7 construed, but this principles crosses all boundaries. As
8 you'll see, I've given you the Court of Appeal case here
9 and the context of a criminal statute and then there are a
10 number of other cases which run from agreements, minutes of
11 settlement to standard legislation.

12 So I wouldn't accept that proposition for
13 the purpose of the application of this principle.

14 **THE COMMISSIONER:** Okay.

15 **MR. SHERRIFF-SCOTT:** And at Tab 16, on the
16 *Goulis* case, at page 5, I think the Court of Appeal
17 describes it at the bottom of the page in the larger
18 paragraph:

19 "It is an ancient rule of statutory
20 construction that the meaning of a
21 doubtful word may be ascertained by
22 reference to the meaning of words
23 associated with it. When two or more
24 words which are susceptible of
25 analogous meanings are coupled together

1 they are understood to be used in their
2 cognate sense. They take their colour
3 from each other, the meaning of the
4 more general being restricted to a
5 sense analogous to the less general.
6 In this case, the words which lend
7 colour to the word 'conceals' are
8 first..."

9 Et cetera, and he goes on, which we've
10 already identified.

11 So I don't think the imperative in this case
12 was the criminal law statutory interpretation of
13 restricting to a narrow function and, moreover, if you see
14 at *Warren and Chapman* which follows, it's a human rights
15 piece of legislation which is in fact under the imperative
16 to be treated just the opposite in terms of the principle
17 of expansive and broad interpretation.

18 The principle is here applied and,
19 therefore, my submission is it crosses boundaries and would
20 apply to your terms of reference just as it would to a
21 human rights statute.

22 In this case, if you see over at page 2,
23 there is the legislation of the *Human Rights Act*:

24 "No person shall publish, display,
25 transmit or broadcast or cause to be

1 published, displayed or transmitted or
2 broadcast or permit to be published,
3 displayed or broadcast or transmitted
4 to the public on lands or premises, in
5 a newspaper..."

6 Et cetera.

7 And then it goes:

8 "Any notice, signs, symbol, emblem or
9 other representation."

10 And here the Court confines the meaning of
11 representation. It doesn't give it an expansive meaning.
12 It applies the traditional maxims of statutory
13 interpretation reflected by this textual analysis.

14 And you'll see over at page 3, under the
15 Latin heading of the rule, the Court cites the rule and
16 towards the bottom of the page, just before paragraph 9,
17 it's citing:

18 "The rule is known from its associate.
19 The meaning of a word may be known from
20 the accompanying words. Under the
21 doctrine, the meaning of questionable
22 words and phrases may be
23 ascertained..."

24 Et cetera.

25 And then here the Court says, at paragraph

1 9:

2 "The issue here is to determine the
3 true meaning and intent of the Act. At
4 first glance, the words "notice",
5 "sign", "symbol", "emblem" or
6 "representation" suggest a briefly
7 worded or graphic form of communication
8 such as an advertisement.

9 "However, it is the Commission's
10 position..."

11 Arguing for the broadest interpretation, I
12 might interject:

13 "...that the clear intent of the
14 legislature, having regard to the
15 language used in s. 2(1), was to
16 prohibit all forms of communication,
17 whether symbolic or emblematic, whether
18 the communication to be in a form of a
19 newspaper article..."

20 Beyond a mere sort of advertising "sign",
21 "symbol" or "emblem":

22 "...whether the long or short, whether a
23 complex or simple..."

24 Et cetera, and the Court does not agree
25 applying this principle, in the sense the Commission argues

1 representation clearly includes an article or an editorial.

2 And then, down at page 4, under paragraph
3 14, the Court answers the question based on the principle
4 that I am urging you to adopt.

5 "I agree with Morse J. that the words
6 'notice, sign, symbol, emblem', as used
7 in s. 2(1) constitute a genus or
8 specific class. The word
9 "representation" is, in its sense as an
10 image, likeness or reproduction, is
11 consistent with the genus or specific
12 class."

13 It is a common and ordinary, perhaps a
14 common ordinary meaning of the word.

15 "In my view, the rule noscitur a sociis
16 can be invoked to confirm the intention
17 of the legislature. In implying the
18 rule, I conclude the intent was to
19 limit the word "representation" to its
20 meaning as an image, likeness or
21 reproduction.

22 So, I think that answers your question on
23 two footings. It shows the application in context where
24 the Courts are always urged to adopt the most broad --
25 possibly broad interpretation consistent in the public

1 interest and that is Charter or Human Rights legislation.

2 The *Lavérendry* case, at the next tab, is the
3 use of the word, in the context of the minutes of a
4 settlement agreement, and I show this case only for the
5 point of view of demonstrating the breadth of the
6 application of the principle. It applies across all
7 boundaries even to private contractual matrix and it is
8 there and the relevant passages are at page 6 and page 8,
9 paragraphs 24 and 32, which is essentially how they confine
10 the interpretation of what the expression is 'annual, union
11 and like dues' confining them to mandatory dues to be
12 deducted from the husband's income as opposed to more
13 broadly discretionary deductions which he might make in the
14 advancement of his own RSP contributions.

15 The *Jmaiff*, in the Grand Forks case, is
16 another case that I wanted to briefly refer to -- is
17 another case that I wanted to briefly refer to and in this
18 case, the interpretation of the *Municipal Act* and at page
19 2, the Court cites both principles as they apply. At the
20 bottom of the page: the *noscitur a sociis* rule sets out
21 the meaning of a doubtful word may be ascertained by
22 reference to the meaning of the words associated with it.
23 In this way, also, the meaning of the more general is
24 restricted to a sense analogous to the less general, except
25 where it would be contrary to the intention of a statute as

1 a whole to do so.

2 And finally, and I would emphasize this
3 again, there is a general presumption, the same expression
4 in the statute is presumed to be used in the same sense.
5 Therefore, where the wording is changed, the change to the
6 meaning is also presumed. Another principle that is
7 applicable here, I submit.

8 And so the Court used that to confine the
9 meaning of words in the sense that it is a standard
10 drafting technique in the fashion that I urged you to
11 consider it.

12 And the last case is the Brampton case and
13 that is simply a repetition of the principle in another
14 setting and it is a *Criminal Code* case, but it is there, to
15 repeat, and I put it in to demonstrate that this is a point
16 accepted by the Supreme Court and the Court of Appeal on
17 various trial level decisions.

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

19 **MR. SHERRIFF-SCOTT:** And so that is the end
20 of that issue and I would sum up on this principle to say
21 where we've come on the canons of interpretation: one,
22 each phrase in this Terms of Reference under consideration
23 here has to be assigned its own discrete meaning, but the
24 two phrases are different and it has to have those
25 different meanings because of the rule against tautology to

1 make sense of it. Different words are given different
2 meanings in accordance with the dictates of the statutory
3 interpretation principles.

4 They cannot adopt an absurd interpretation
5 which would nullify or otherwise make it difficult for your
6 jurisdiction.

7 And I submit the clear structure of the
8 Terms of Reference, when measured against the *Public*
9 *Inquiries Act*, also lends credence to my argument and that
10 the institutional response here referred to as the formal
11 or response on behalf of the public by those organizations
12 like the justice system which have that public mandate or a
13 public mandate to engage in an analysis or are
14 governmental-sufficient to satisfy that test.

15 Now, the public institution section of my
16 factum, which I have put in here -- I put this in really to
17 demonstrate how the Courts have considered the sort of
18 private characteristics of organizations.

19 I don't want to dwell on this overly, but
20 there are a couple of cases that I do want to just touch on
21 before I leave the argument and sit down.

22 And the first is the case, *McKinney*, which
23 is the sort of one of the seminal cases on the Charter
24 issue of government action, but it makes a lot of
25 interesting observations about this debate of public versus

1 private character and some of them are important because
2 they, in my submission, neutralize some concerns and
3 comments raised yesterday and I will just refer to them
4 briefly.

5 In the factum at page 24, at the top of the
6 factum, the Court says:

7 "The mere fact that an entity is a
8 creature of statute and has been given
9 legal attributes of a natural person is
10 no way sufficient to make its actions
11 subject to the Charter. Such an entity
12 may be established to facilitate the
13 performance of the task that those
14 seeking incorporation wish to undertake
15 and to control, not to facilitate the
16 performance of tasks assigned to
17 government. It would significantly
18 undermine the obvious purpose of s. 32
19 to apply to a private corporation."

20 And I submit here, notwithstanding the fact
21 the Diocese is a Special Act Corporation, that is a, I
22 would say, an anachronistic vehicle to facilitate an
23 incorporation, and I suppose, historically, in older times,
24 it probably was one of the only ways to incorporate and
25 then as incorporation statutes became more in vogue, these

1 things happened more administratively, but, historically,
2 many organizations that are charities, that are private,
3 but perform functions in the public domain, were
4 incorporated by virtue of a statute. But I say nothing
5 turns on that in terms of the analysis.

6 Over to the next page, at paragraph 25, the
7 Court says:

8 "Universities are not..."

9 In the middle of the page:

10 "...governmental, public institutions
11 because of... the mere fact they are
12 incorporated and perform an important
13 public service. Many institutions in
14 our society perform functions that are
15 undeniably of an important public
16 nature, but are undoubtedly not part of
17 the government. These can include
18 railroads and airlines, as well as
19 symphonies, institutions of learning.
20 And this may be so even though they are
21 subject to extensive government
22 regulations and even assistance from
23 the public purse."

24 And just over to paragraph -- to page 26, I
25 would suggest this comment is a posit:

1 "The government thus has no legal
2 power...

3 This is near the top of the page:

4 "...to control the universities even if
5 it wish to do so. Though the
6 universities, like other private
7 organizations, are subject to
8 government regulations and in a large
9 measure depend on government funds,
10 they manage their own affairs and
11 allocate those funds as they see fit.
12 The fact that universities are
13 autonomous and have boards of
14 governors, or governing Council, the
15 majority of whose members are elected
16 or appointed. They pursue their own
17 goals within legislative limitations."

18 Et cetera.

19 And here I would say that the Diocese is a
20 private organization. It is totally self-contained and
21 controlled. Beyond complying with corporation statutes and
22 charity law, it has no regulation applied to it. The
23 government has no influence or control over its affairs.
24 It doesn't report to anybody and the government is not
25 permitted to intervene in its affairs. It is private in

1 that sense.

2 The *Peg-Win Real Estate* case -- which is
3 referred to at paragraph 78 of my factum -- I put that case
4 in the brief to illustrate the point that the *Peg-Win Real*
5 *Estate* case -- the Real Estate Board in question was a
6 Special Act Corporation, and unlike a college which has a
7 statutory professional regulation function delegated to by
8 the government, this is a special act to facilitate the
9 goals of the group. So, it is like the Institute of
10 Actuaries, another Special Act Corporation. These
11 organizations are private. That is what the Court says,
12 notwithstanding the fact that they were created by a
13 special act. That is really just to facilitate their own
14 membership activities.

15 Et cetera.

16 The *Blainy Hockey Association* case is a non-
17 profit corporation case, obviously, a very public-minded
18 institution which promotes sport for young people and the
19 only relationship it had, notwithstanding that it was a
20 non-share corporation devoted to the public interest and
21 the promotion of sport, was that it got grants and funding
22 from the government, but otherwise was self-contained and
23 private in all of its characteristics and, thus, not
24 considered to be a government institution or to be public
25 sufficiently to warrant the application of the Charter.

1 The case I really wanted to spend a little
2 more time on was the *Anderson and United Church of Canada*
3 case, which I refer to and quote from, at paragraph 80 of
4 my factum.

5 The United Church of Canada is an
6 interesting organization. First of all, unlike the
7 Diocese, it is one corporation. It doesn't have the
8 separate Diocese and things that we are faced with here.
9 And it has a number of statutory instruments applicable to
10 it and *Anderson*, which is at Tab 24 of the brief which is
11 E6. There is a dispute about the ---

12 **THE COMMISSIONER:** E6 where?

13 **MR. SHERRIFF-SCOTT:** E6, Tab 24, that is
14 Volume II of my Authorities.

15 **THE COMMISSIONER:** I have it.

16 **MR. SHERRIFF-SCOTT:** The dispute here was
17 about the division of property and a fight that arose as a
18 result of it and the Court, here, was urged to adopt the
19 proposition that the United Church, because it was created
20 by a special act and had other legislation applicable to
21 it, was sufficiently public to warrant the application in
22 the Charter and it is important from the point of view of
23 the characteristics ---

24 Sorry. Does the Commission have something -
25 - I was just -- were you -- did you have something to say?

1 MR. ENGELMANN: No. I was just speaking.

2 MR. SHERRIFF-SCOTT: Oh, I'm sorry. I
3 though you were wanting to say something.

4 Thank you.

5 The relevant passages, Mr. Commissioner, at
6 page 3, and you will see at the bottom of the page, Roman
7 numeral III, they look at the formation of the Church
8 passed by a special act in 1925, and then there are other
9 statutory provisions that are uniquely applicable to this
10 United Church. For example, at page 4, under the Church --
11 or "Denominational Property" there is provincial
12 legislation applicable to it distinct from the federal
13 special act incorporating it, the Ontario *United Church of*
14 *Canada Act* provides by Section 3:

15 "Property belonging to the Church,
16 negotiating Churches..."

17 Et cetera.

18 And then they deal with the various terms
19 here.

20 So this organization which is national
21 structure as the special act company it has various
22 provincial pieces of legislation dealing with it.

23 But notwithstanding that and its public
24 activities, the Court deals with its conclusions over at
25 page 9. Actually, at the top of page 10, the salient

1 portion is what I have excerpted in the factum:

2 "Although Churches..."

3 A couple of lines -- paragraphs down from
4 the top of page 10:

5 "...may be created by statute,
6 nonetheless, they are, in law, private
7 bodies like universities and trade
8 unions, the government legislation
9 which creates them only facilitates
10 their legal existence. They remain
11 private bodies and McKinney has cited
12 that the statutory creation only
13 facilitates the performance of the task
14 of those seeking incorporation who wish
15 to undertake, and does not facilitate
16 governmental tasks..."

17 Et cetera.

18 I suggest this case is a useful case
19 demonstrating the issue.

20 The *Lindenberger* case, which the Commission
21 referred to ---

22 **THE COMMISSIONER:** I don't know that we
23 referred, but ---

24 **MR. SHERRIFF-SCOTT:** Well, I got a letter
25 from Commission counsel -- I'm sorry not yourself, Mr.

1 Commissioner, but Commission counsel sent a letter Friday
2 last asking that counsel may comment on Lindenberger.

3 So I came prepared to do that, but I submit,
4 and I don't know if it has been handed up to you. I don't
5 have it with me. It is a Court of Appeal and Divisional
6 Court case ---

7 **THE COMMISSIONER:** Where are the Santi
8 (phonetic) -- where would we have that, Mr. Engelmann?

9 **MR. ENGELMANN:** It might be loose, sir.
10 What we did was when we examined some of the materials that
11 had been filed, we thought there were two cases that might
12 be relevant that had not been commented on and, in fact,
13 the *Berg* case was in the Authorities already.

14 **THE COMMISSIONER:** Right.

15 **MR. ENGELMANN:** So we sent that
16 unnecessarily. This was another case that perhaps touched
17 on the matter and we invited counsel to comment. That's
18 all.

19 **THE COMMISSIONER:** All right.

20 **MR. ENGELMANN:** I don't know if you have a
21 copy.

22 **THE COMMISSIONER:** It's okay. I don't know
23 that you want ---

24 **MR. SHERRIFF-SCOTT:** I'm only going to make
25 general observations without going to the text of the case.

1 **THE COMMISSIONER:** All right.

2 **MR. SHERRIFF-SCOTT:** My observations really
3 are as follows; that the *Lindenberger* case, which deals
4 with the question of the applicability of judicial review
5 remedies to the United Church of Canada, the court says
6 that it might have public characteristics sufficient to
7 warrant the use of prerogative remedies because of the
8 Common Law, which was not foreclosed by the *Judicial Review*
9 *Procedure Act* requiring a statutory power of decision.

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

11 **MR. SHERRIFF-SCOTT:** And so the court says,
12 "While churches may have sufficiently public character to
13 warrant the attraction of *certiorari* or other remedies.

14 In my submission, the case is of no
15 assistance because it doesn't deal with the statutory
16 interpretation points that I have raised. Moreover,
17 judicial review is widely available in Ontario based on the
18 Common Law and the courts have interpreted, I submit, their
19 mandate to apply judicial review remedies to all kinds of
20 bodies, including private schools, hockey associations, any
21 kind of organization, which may have a public character at
22 all, but they confine their intervention to ensure
23 conformance of those organizations with their own internal
24 processes. So if they publish a code of conduct and they
25 abrogate it in the discipline of a member, *certiorari* may

1 be applicable to quash the decision and direct them to
2 follow their code. The court can't adjudicate the merits
3 of the matter obviously, because it's a judicial review.

4 And so the *Lindenberger* case, in my
5 submission, doesn't offer anything in terms of legal
6 developments or the characteristics of the Church. It
7 simply says that prerogative remedies may apply to it and I
8 don't think that's a development of any significance.
9 Other cases have commented on this issue and have applied
10 judicial review to all kinds of bodies, including the types
11 that I have mentioned.

12 So in my submission it doesn't advance the
13 issue that we're faced with dealing with.

14 The last case that I really want to --
15 second last case that I really want to -- I didn't want to
16 get your hopes up there too high, Mr. Commissioner -- to
17 deal with was the religious-based issue in the *Canadian*
18 *Jewish Congress and Chosen People's Minorities Court of*
19 *Appeal* Decision under the heading *Trademarks Act* in my
20 *Factum*. This is just another statutory context and I
21 appreciate -- no doubt you've read this, these portions of
22 the *Factum*, Mr. Commissioner. I just want to emphasize a
23 few general comments. In that case, based on the
24 *Trademarks Act*, section 9, which prohibits people from
25 appropriating a public mark that is used by a public

1 authority, the Chosen People's Minorities Inc., which is a
2 Jewish religious organization, got into a fight with the
3 Jewish Congress of Canada because the Chosen People's
4 Minority's organization said, the menorah, the candle
5 symbol "is not available to the Canadian Jewish Congress
6 for their use and adoption as a mark because we already
7 have used it and we're a public authority and therefore you
8 can't have it". So they got into a fight about access to
9 this and therefore there flowed from these cases, the
10 question of the characteristics of these entities and
11 whether they were sufficiently public to warrant the
12 application of the *Trademarks Act* protection to that
13 organization, which had possessed the mark but not
14 registered it.

15 And the court disagreed at the trial
16 division and interestingly I cite the case because, number
17 one, it's a religious authority issue; number two, it talks
18 about the fact that special act incorporation is irrelevant
19 to the consideration of private characteristics; number
20 three, it talks about the issue of this charitable status
21 of the organization, which it also says is equally
22 unimportant to the determination. It specifically talks
23 about the absence of funding and government control and so
24 forth, all of which dovetail with my submissions and the
25 trial division case was adopted by and affirmed by the

1 Court of Appeal, which I have cited at Tab 26, which you
2 need not go to. The relevant quotation is at paragraph 84,
3 "There is no government control over
4 the carrying out of CPM's activities
5 and pursuant of these objects or on the
6 way they conduct their affairs. The
7 fact that CPM is a charity is obliged
8 to comply as all other charities with
9 law generally relating to charities
10 including the *Income Tax Act* does not
11 in our view give rise to sufficient
12 government control to qualify it as a
13 public authority."

14 So that case and the *Anderson* case, I
15 submit, give you a flavour of the private nature of these
16 organizations, notwithstanding that they're created by
17 special acts and perform functions within the community.
18 In my submission, they remain the activities of private
19 organizations.

20 The *Balderson and Good Shepherd's* case is to
21 the same effect and that is a prerogative remedies case of
22 the British Columbia Court of Appeal, which refers to the
23 private nature of a church. But they still intervene and
24 will intervene in circumstances; there the Good Shepherd's
25 Shelter Foundation, which is a charitable foundation. They

1 only intervene however, to force the organization, which
2 may carry on activities as a charity, to conform with its
3 own internally promulgated guidelines, codes of discipline,
4 et cetera. Other than that, they give deference because of
5 the private characteristics of these organizations.

6 And I think that brings my submissions to a
7 close. Thank you very much for your patience.

8 **THE COMMISSIONER:** Thank you.

9 So we now are in a position to hear some
10 brief reply from the parties, those who wish to reply.

11 Mr. Manson?

12 **--- REPLY BY/RÉPLIQUE PAR MR. MANSON:**

13 **MR. MANSON:** Yes, Mr. Commissioner.

14 Just give me one second. I'll see what I
15 need to refer to.

16 I was hoping that Mr. Sherriff-Scott would
17 provide me with an easy opening to commence a brief reply
18 and he has. I don't know whether he said this
19 intentionally or not, but I have to correct a mistake that
20 he made a few minutes ago, when he referred to the Canadian
21 Jewish Congress v. Chosen People Ministries, the latter is
22 not a Jewish organization. As it says, it is a non-profit
23 Christian organization.

24 **THE COMMISSIONER:** There we go.

25 **MR. SHERRIFF-SCOTT:** Thank you, Mr.

1 Commissioner. I stand corrected.

2 **MR. MANSON:** Well, we're here today to talk
3 about the Archdiocese. I just wanted to make one point for
4 my side.

5 I'm only going to address three aspects of
6 that very comprehensive and very interesting set of
7 submissions that we've just heard.
8 The first is; I want to say a few words about the *Public*
9 *Inquiries Act*.

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

11 **MR. MANSON:** So I'm looking at Tab 1 of
12 Volume 1 of Mr. Sherriff-Scott's book of authorities.

13 **THE COMMISSIONER:** E5, Tab 1.

14 **MR. MANSON:** Yes. Behind the blue pages, so
15 we've got the RSL1991 version.

16 Before I look at the structure of section 2 -- while
17 it's coming up, I'll make this remark. Mr. Sherriff-Scott
18 made a very creative argument that your Terms of Reference
19 mirrors the structure of section 2 in terms of a
20 relationship between what he called plenary and ancillary
21 powers. I don't see any support for that argument other
22 than it supports his view as to how your Terms of Reference
23 ought to be interpreted.

24 But if we look just at section 2, I think
25 it's clear that there is ample authority for this

1 Commission's mandate under the first any one or a
2 combination of the three sub-headings -- the first three
3 categories,

4 "any manner connected with or affecting
5 the good government of Ontario,"

6 number one,

7 "the conduct of any part of the public
8 business",

9 number two,

10 "or of the administration of justice
11 therein."

12 Those three, and I know Mr. Callaghan is going to speak to
13 whether there is a need for a declaration of public
14 concern, but those three are separate from that and
15 certainly don't require any declaration. Your Terms of
16 Reference deal clearly with three matters that I would
17 submit, uncontroversially fit within those three sub-
18 headings; policing, administration of justice and the
19 health and welfare of children in Ontario.

20 If that's not part of the public business,
21 I'm not sure what the public business is. It's certainly
22 not just the business of government because that's included
23 in affecting the good government of Ontario.

24 So I don't think there's any doubt about the
25 source of your mandate and I believe Mr. Sherriff-Scott

1 agreed that if there is pith and substance -- if in pith
2 and substance your mandate is properly created, there is
3 ancillary scope to it. I don't accept his views of the
4 relationship between plenary and ancillary, but clearly the
5 ancillary scope would extend to a non-governmental
6 institution, and it's our position obviously that public
7 institution extends beyond non-governmental institution.

8 The second point I want to make is perhaps
9 more difficult. I think Mr. Sherriff-Scott was unfair to
10 my submissions yesterday about context.

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

12 **MR. MANSON:** And I don't mean unfair in a
13 malicious sense, but I don't think he did justice to them.
14 Put it that way.

15 First, a number of the cases that we
16 referred to were simply examples of the various ways in
17 which other courts -- courts rather, have interpreted
18 phrases like "public institution" or similar to public
19 institution simply to show, not that any of those cases
20 provide a magical key to yourself to figure this out, but
21 that there's various interpretations and that context does
22 matter.

23 I do agree with Mr. Sherriff-Scott that you
24 just can't stand up here and say that, say it's all about
25 context and then bring in a giant shopping cart and taking

1 out my pen, marking "context" on it, and I can put any
2 factor in there. But I think if you look at City of
3 Montreal in detail, which I didn't do yesterday, but I
4 think I'm compelled to do for a few minutes now, this is
5 the *Noise Bylaw* case.

6 It's in our material, at Tab 3. No one
7 disputes the importance of the -- I'm starting at Tab 3 and
8 it's paragraph 9, page 7.

9 **THE COMMISSIONER:** Okay, hang on.

10 **MR. MANSON:** Of my Book of Authorities,
11 which I believe was ---

12 **THE COMMISSIONER:** "A" something.

13 **MR. MANSON:** "A" something, yes.

14 A2, no, that's the record.

15 **THE COMMISSIONER:** No, that's the record.

16 **MR. MANSON:** Probably A3.

17 **THE COMMISSIONER:** A3, okay.

18 Okay, for some reason, I can't find A3. Oh,
19 here I have it. Sorry.

20 Okay, A3 and we're going to the *Montreal*
21 case.

22 **MR. MANSON:** Paragraph 9, *City of Montreal*.

23 **THE COMMISSIONER:** *City of Montreal* and
24 that's under ---

25 **MR. MANSON:** Tab 3.

1 **THE COMMISSIONER:** Three (3), sorry. All
2 right, page 9?

3 **MR. MANSON:** Paragraph 9.

4 **THE COMMISSIONER:** Paragraph 9. Okay.

5 **MR. MANSON:** Yes.

6 **THE COMMISSIONER:** Okay.

7 **MR. MANSON:** Much of the material that Mr.
8 Sherriff-Scott referred to under the general rubric of
9 statutory construction.

10 These are -- he's absolutely right. These
11 are the traditional canons of interpretation, but they have
12 to some extent, been subordinated by the quotation from
13 Driedger that was accepted by the Supreme Court in *Rizzo*
14 *Shoes* and we see it repeated all the time. But it is a lot
15 richer than just saying, "Look at the context".

16 If we look carefully, because this is
17 exactly what Mr. Justice Binnie does in this case which I'm
18 going to refer to in a second, there is only one principle
19 or approach and it's of course a principle that has many
20 elements to it:

21 "...the words of an Act are to be read
22 in their entire context and in their
23 grammatical and ordinary sense..."

24 So it's context, number one; grammatical and
25 ordinary sense, number two.

1 "...harmoniously with the scheme of the
2 Act, the object of the Act and the
3 intention of Parliament."

4 There are three layers of elements there.

5 I think Mr. Sherriff-Scott is being unfair
6 to that principle when saying context means legislative
7 history; end of story. I say that because in the case
8 itself when they talk about the contextual indicia,
9 history, purpose and the bylaw themselves, they talk about
10 more than legislative history. In fact, the very first
11 sentence in paragraph 18, "We will begin our contextual
12 analysis" -- and this is in the McLachlin and Dechamps
13 judgment. I'm going to refer to Binnie in a second.

14 But at paragraph 18:

15 "We will begin our contextual analysis
16 with the history of the By-law. Noise
17 affects city dwellers in their everyday
18 lives and was one of the earliest
19 concerns of municipal governments."

20 This is historical, this is contextual and
21 it also brings us to the important point: What was the
22 concern, what was the mischief that underlay the intention
23 to bring about this enactment? And that's where they move
24 into the question of nuisance and how that adds to the
25 contextual analysis.

1 If you look at paragraph 22:

2 "The underlying objective of all these
3 by-laws..."

4 That's looking at a history of them.

5 "...has been to preserve the peaceful
6 nature of public space."

7 If we move quickly to Justice Binnie who
8 dissented, but dissented on the section 1 Charter analysis
9 but wrote a separate judgment, you'll see after he accepts
10 ---

11 **THE COMMISSIONER:** What page?

12 **MR. MANSON:** I believe 24, but I was just
13 going to say something about he accepts the Driedger
14 contextual approach at paragraph 114 to 115, but then
15 starting in front of 116, he goes through every element;
16 grammatical and ordinary sense. I'm not going to tell you
17 what he does. I'm just going to show the things he looked
18 at; grammatical and ordinary sense, paragraph 116.

19 His next category is called "The Broader
20 Context" and here he subdivides that by looking at the
21 environmental law context, in front of paragraph 123, the
22 civil liberties context, the legislative context, and
23 eventually the context of the legal environment.

24 All of this is because in paragraph 122, he
25 says:

1 "Ambiguity is a conclusion that may be
2 arrived at after looking at the broader
3 context."

4 I raise those matters, Mr. Commissioner,
5 simply to show that in the City of Montreal there was no
6 suggestion that context means legislative history and
7 nothing else.

8 Secondly, if we were going to move beyond
9 the question of context and look at the specific elements
10 in *Rizzo and Rizzo* like scheme of the Act, object of the
11 Act, entire context, broader context, I would submit that
12 we would have to look, as sources, at the following.

13 Since your mandate -- your mandate is
14 affected by an Order in Council emanating from the *Public*
15 *Inquiries Act*. So you have to look at the role of the
16 *Public Inquiries Act*.

17 And here -- I didn't circulate this case but
18 someone did. It's the Krever Commission, the blood case
19 from the Supreme Court of Canada and the only reason I'm
20 referring to it is because everyone has it but in fact I
21 want to refer to the Supreme Court's quotation from *Westray*
22 and this is at paragraph 30:

23 "It may be of assistance to set out
24 what was said regarding the history and
25 role of commissions of inquiry."

1 The City of Montreal may have looked at the
2 history and role of noise bylaws.

3 Mr. Commissioner, it's important for you to
4 look at the history and role of commissions of inquiry.

5 "As *ad hoc* bodies, commissions of
6 inquiry are free of many of the
7 institutional impediments which at
8 times constrain the operation of the
9 various branches of government. They
10 are created as needed, although it is
11 an unfortunate reality that their
12 establishment is often prompted by
13 tragedies such as industrial disasters,
14 plane crashes, unexplained infant
15 deaths, allegations of widespread child
16 sexual abuse, or grave miscarriages of
17 justice."

18 But what I'm concerned to refer to is the
19 end of the next paragraph of the quotation:

20 "Yet, these inquiries can and do
21 fulfill an important function in
22 Canadian society. In times of public
23 questioning, stress and concern they
24 provide the means for Canadians to be
25 apprised of the conditions pertaining

1 to a worrisome community problem and to
2 be a part of the recommendations that
3 are aimed at resolving the problem.
4 Both the status and high public respect
5 for the commissioner and the open and
6 public nature of the hearing help to
7 restore public confidence not only in
8 the institution or situation
9 investigated but also in the process of
10 government as a whole. They are an
11 excellent means of informing and
12 educating concerned members of the
13 public."

14 I don't raise this, Mr. Commissioner, to say
15 your job is to do the right thing, whatever the right thing
16 is. I'm saying part of the context is the source of your
17 power including the general role of public inquiries in the
18 modern Canadian environment.

19 If I can also just quickly look at some of
20 my friend's material from McRuer, which of course with all
21 due respect to Chief Justice McRuer who is one of the
22 leading Canadian jurists of the last century, the McRuer
23 Commission did its work in the mid to late sixties and as
24 Mr. Sherriff-Scott pointed out, it culminated in the 1971
25 *Public Inquiries Act*.

1 But when we look at some of the comments in
2 the McRuer excerpts ---

3 **THE COMMISSIONER:** So now we're back to E5.

4 **MR. MANSON:** And I'm looking at Tab 2.

5 **THE COMMISSIONER:** Yes.

6 **MR. MANSON:** And I'm looking at page 398. I
7 think that there's a very interesting paragraph under
8 "Permissible Areas of Investigation." I want to raise this
9 because, while it is offered by Chief Justice McRuer in the
10 abstract, I think it to some extent answers the very
11 absolutist position that Mr. Sherriff-Scott took about
12 commissions of inquiry and the diocese or an entity like
13 the diocese.

14 "Some question has been raised as to
15 whether there are areas of human
16 activity that should not be open to
17 investigation at the instance of the
18 government. We do not think that areas
19 within which the powers of
20 investigation may be exercised can be
21 discussed in the abstract or
22 dissociated from the purpose of the
23 investigation. It may be that there
24 are some areas from which investigation
25 should be excluded; for example,

1 religious beliefs and domestic
2 relations. But one cannot make
3 dogmatic statements about even these.
4 The latter and even the former might be
5 very relevant to an investigation being
6 carried out and for the purpose of
7 determining what assessment should be
8 made under taxation statute."

9 That's simply an example. I'm only
10 suggesting that confronting the idea of a religious
11 institution -- over 30 years ago, Chief Justice McRuer was
12 saying, "Let's not be dogmatic. Depending on the context,
13 again, the reason, the purpose, there may be a legitimate
14 scope for inquiry."

15 Going back to the City of Montreal, I would
16 submit that as well as looking at the role of public
17 inquiries and the *Public Inquiries Act*, entire context,
18 broader context and object of the scheme includes how did
19 this Commission come to be; what was the mischief that the
20 Government of Ontario was concerned about; what did it want
21 you to inquire into. Allegations of -- historical
22 allegations of abuse of young people in the Cornwall area,
23 yes, but principally institutional responses to them.

24 And that whole history of pushing for a
25 public inquiry is what gets us to the preamble to your

1 Terms of Reference which I don't have a hardcopy of but
2 surely it reflects -- if we could just put the Terms of
3 Reference up on the screen.

4 "Whereas allegations of abuse of young
5 people have surrounded the City of
6 Cornwall and its citizen for many
7 years. The police investigations,
8 criminal prosecutions relating to these
9 allegations have concluded. Community
10 members have indicated that a public
11 inquiry will encourage individual and
12 community healing."

13 That is why the history of the creation of
14 this Commission is relevant to interpreting your mandate;
15 that is, a recognition of the public concern.

16 And so again, it was just unfair of Mr.
17 Sherriff-Scott to say, "Legislative history, legislative
18 history and that's it," especially with an institution like
19 this. What is your legislative history? It's one
20 instrument; it's the Order in Council and the *Public*
21 *Inquiries Act* that generate it. There is nothing else.

22 I want to make one reference to the *Berg*
23 case. I had referred to it. It's, again, in our A3 Book
24 of Authorities and it should be Tab 6.

25 I referred to it only briefly yesterday to

1 use the quotation about how the public and private
2 distinction aren't self-evidently clear and then my friend,
3 Mr. Sherriff-Scott, looked at it extensively this morning
4 to say that it proved his point about how arid our
5 submissions on statutory interpretation were. And I think
6 if we look carefully -- and I don't mean that with any
7 disrespect. He said we didn't get very far down the road
8 by using *Berg* but it took him far down the road, and I
9 dispute that.

10 If we look at it carefully, what you see is
11 the Supreme Court of Canada saying, "We've got to interpret
12 this phrase 'customarily available to the public'." And
13 Mr. Sherriff-Schott is right; that doesn't mean that you
14 look at each word separately. It's a phrase. You have to
15 look at the whole phrase.

16 What they do is they ask a very simple
17 question. How can it be interpreted in the context of
18 human rights legislation? There are many cases that the
19 Court needed to reject because they offered a quantitative
20 analysis, and by that they meant somewhere for each purpose
21 there is a numerical threshold and you get enough people,
22 you become the public, and the Courts said that can't be
23 right. Conversely, the public can't mean everyone on the
24 world.

25 What is the right mode of analysis that fits

1 the context of using human rights legislation?

2 They say, for example, at paragraph 54 that
3 my friend referred to when he was showing how they rejected
4 the quantitative approach. At the end of it, they say:

5 "Such an absolute position requiring
6 the public to include every member of
7 the community cannot be maintained if
8 human rights legislation is to have any
9 impact."

10 In other words, what is driving this is the
11 context of human rights legislation generally,
12 and it is for that reason that later on at
13 paragraphs 58 and 59, they adopt the relational
14 approach, which makes enormous sense. What the
15 case is all about is the argument that
16 universities and schools can't discriminate when
17 they admit people, but once you are admitted and
18 you pay us your tuition, we now have a
19 contractual relationship and you are beyond the
20 scope of human rights legislation. Therefore, we
21 can act in a discriminatory manner. That is
22 antithetical to much of the idea, much of the
23 purpose, the object of human rights legislation.

24 So, in my submission, Berg is doing exactly
25 what we are asking you to do. It is sensitive to

1 its own broader context.

2 I want to quickly refer to the Terms of
3 Reference again and make the same point that I don't think
4 I did a very good job with yesterday and that being the two
5 streams, the response and the interaction stream. But when
6 we look carefully at the word, if I can call institutional
7 response the "A" stream, and interaction of that response
8 with other public and community sectors the "B" stream, it
9 seems clear to me that your principal mandate is to pursue
10 the "A" stream, but the Terms of Reference don't say "...and
11 also the interaction" but they say "The "A" stream includes
12 the interaction." It says "including". My concern is --

13 **THE COMMISSIONER:** Madam Clerk, can you roll
14 it up a little?

15 Madam Clerk, roll it up a little bit more.

16 There you go.

17 **MR. MANSON:** A little bit more. Got it.

18 That's good. Perfect.

19 The "A" stream, the institutional responses
20 that you are required to look at are the justice system and
21 other public institutions. Your mandate includes looking
22 at the interaction of that response, those responses, with
23 these other public community sector entities -- I'll use
24 that phrase -- but my concern is that whole secondary
25 aspect requires an interaction.

1 If there is no interaction, my concern is
2 that Mr. Sherriff-Scott will quite legitimately stand up
3 and dispute relevance of any inquiries where no one else
4 can show how the justice system interacted in respect of
5 that specific allegation.

6 So if the allegation was kept internal, for
7 whatever reason, it will be insulated. And if that's the
8 case, Mr. Commissioner, this is why we come back to the --
9 maybe I was wrong when I said "half an inquiry," but it's
10 less than a full inquiry if this Commission can't examine
11 allegations of misconduct about the Diocese that never went
12 outside the Diocese; historical allegations of abuse of
13 young people.

14 My last point -- and again, coming back to
15 the Terms of Reference -- I want to repeat that the test
16 that I would submit is appropriate for determining what is
17 a public institution for the purposes of this inquiry.

18 It certainly includes, number one, all
19 governmental institutions that are not included in the
20 justice system. So as Mr. Sherriff-Scott says there is the
21 CAS.

22 But it also includes -- and this was the
23 submission that we made yesterday -- other institutions.
24 And I would submit the Diocese is an institution, it is
25 organized, it has structure, it has permanence; it meets

1 all the tests of an institution, but it is a public
2 institution for these purposes for the two reasons I gave
3 yesterday. It plays a major role in the public life of the
4 community and did or should have responded to historical
5 allegations of abuse. Those two characteristics make it a
6 public institution for the purpose of this mandate.

7 There may be other institutions or
8 individuals which will fit into community sector, but you
9 would have to either be governmental or a public
10 institution in this two-pronged way.

11 If you have any questions, Mr. Commissioner,
12 I would be happy -- but without going through every element
13 of Mr. Sherriff-Scott's, those are my submissions as a
14 reply.

15 Thank you.

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

17 Mr. Lee?

18 **MR. LEE:** I just have two very brief points,
19 Mr. Commissioner.

20 **THE COMMISSIONER:** Yes.

21 **MR. LEE:** First again, and I won't go
22 through it in any detail because I think we've all heard
23 enough, but when we look at Section 2 of the *Public*
24 *Inquiries Act*, Mr. Manson was just alluding to it and you
25 alluded to it earlier in a question: what to do with the

1 word "affecting" in that section?

2 It is not just that -- Section 2 does not
3 limit public inquiries to examine good government itself or
4 public business itself, it extends the authority to also
5 include those matters that affect or are connected to a
6 good government or public business.

7 Now, I would like to briefly draw your
8 attention to Rizzo and Rizzo Shoes decision that
9 was handed up earlier today.

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

11 **MR. LEE:** On page 41 of that decision.

12 **THE COMMISSIONER:** Do we have it on -- oh,
13 we have got it there.

14 Okay.

15 **MR. LEE:** I am not sure if you had a hard
16 copy or not.

17 **THE COMMISSIONER:** That's okay.

18 Where do I go?

19 **MR. LEE:** At the end of page 40 and the
20 beginning of page 41, we have from Driedger, we have set
21 out the principle that has been read over and over again
22 about the one principal approach. Mr. Sherriff-Scott
23 argued that, he read that. So if we can go down to the top
24 of page 41, please. Mr. Sherriff-Scott stopped reading at
25 the end of the quote set out there. The Court goes on to

1 say recent cases have cited the above passage and the Court
2 relies on those.

3 The next paragraph is the one I would like
4 to draw your attention to where the court writes:

5 "I also rely upon s. 10 of the
6 *Interpretation Act*, which provides that
7 every Act 'shall be deemed to be
8 remedial' and directs that every Act
9 shall 'receive such fair, large and
10 liberal construction and interpretation
11 as will best ensure the attainment of
12 the object of the Act according to its
13 true intent, meaning and spirit."

14 Now that section of the *Interpretation Act*
15 still reads that way today. And I would submit to you that
16 not only is that the proper approach to take in
17 interpreting an Act, but it is a good approach to take
18 interpreting subordinate legislation as well.

19 The true intent, spirit and meaning of the
20 *Public Inquiries Act*, I would submit to you, is to permit
21 the Lieutenant Governor to call an inquiry based on any of
22 the grounds that are set out in Section 2, that again has
23 been gone through at length.

24 Again, as I've suggested yesterday to you,
25 Mr. Commissioner, we don't need to consider the latter part

1 being the matter of public concern that may or may not
2 require a declaration depending on which argument you go
3 with, unless the only way we would have to consider that is
4 if the subject matter of the inquiry cannot be properly
5 considered as affecting the good government or whatever it
6 may be. And as we submitted yesterday, and our position
7 remains that the Diocese can properly be seen as affecting
8 the community or affecting the good government rather or
9 the public business.

10 The only other very brief point that I
11 wanted to bring up relates to page 26 of the Diocese
12 submissions.

13 **THE COMMISSIONER:** Hang on. Yes.

14 What page; 24?

15 **MR. LEE:** Twenty-six (26).

16 **THE COMMISSIONER:** Twenty-six (26).

17 **MR. LEE:** Are you there, Mr. Commissioner?

18 **THE COMMISSIONER:** I'm there, yes.

19 **MR. LEE:** So most of this is an excerpt from
20 the Canadian University of Guelph that Mr. Sherriff-Scott
21 discussed at some length. The first full paragraph set out
22 on that page, which is the quote from McKinney, reads:

23 "The government thus has no legal power
24 to control the universities even if it
25 wished to do so".

1 Mr. Sherriff-Scott elaborated on that a little bit and
2 throughout his submissions on a couple of different points,
3 as I understood it, he suggested that there is no
4 jurisdiction to control a private institution, which he
5 submits the Diocese is.

6 I would submit that this is quite separate
7 and distinct from the government's ability to inquire into
8 the Diocese affairs. Inquiring into its affairs and
9 controlling it are two separate things, and I think that
10 distinction needs to be made that clearly, in my
11 submission, the government has a power to inquire into its
12 affairs and I have no comment on whether or not it would
13 have the ability to control the organization, presumably
14 not, but they're not the same thing, Mr. Commissioner.

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

16 **MR. LEE:** And those are my submissions in
17 reply.

18 **THE COMMISSIONER:** Thank you.

19 Mr. Manson, you are getting up again?

20 **MR. MANSON:** I want to point, I'm sorry.

21 **MR. SHERRIFF-SCOTT:** You can't keep a good
22 man down, Mr. Commissioner.

23 **MR. MANSON:** Mr. Sherriff-Scott points out a
24 mistake I made, and I just want to correct it.

1 **THE COMMISSIONER:** He is steeling your gold

2 ---

3 **MR. MANSON:** I think I lost them yesterday
4 but ---

5 **THE COMMISSIONER:** So what mistake did you
6 commit?

7 **MR. MANSON:** I said that Justice Binney
8 dissented in the City of Montreal, he did, I said on
9 Section 1 grounds; he also dissented on the interpretative
10 conclusions. He dissented on both grounds.

11 **THE COMMISSIONER:** Okay.

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

13 **THE COMMISSIONER:** Thank you.

14 So where are we now?

15 It's almost time for a break and how many
16 people have we got left?

17 **MR. ENGELMANN:** We have Mr. Callaghan and
18 Mr. Bennett if he -- he doesn't have comments.

19 So it's Mr. Callaghan.

20 **THE COMMISSIONER:** So, Mr. Callaghan, how
21 long are you going to be?

22 **MR. CALLAGHAN:** Fifteen (15) to 20 minutes.

23 **THE COMMISSIONER:** All right.

24 Let's take the break and then we'll finish
25 off.

1 Thank you.

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

4 This hearing will reconvene in 15 minutes.

5 --- Upon recessing at 3:21 p.m. /

6 L'audience est suspendue à 15h21

7 --- Upon resuming at 3:40 p.m. /

8 L'audience est reprise à 15h40

9 **THE REGISTRAR:** This hearing of the Cornwall
10 Public Inquiry is now in session. Please be seated;
11 veuillez vous asseoir.

12 **THE COMMISSIONER:** Mr. Callaghan.

13 --- **REPLY BY / RÉPLIQUE PAR MR. CALLAGHAN:**

14 **MR. CALLAGHAN:** Yes, Mr. Commissioner.

15 I want to start by addressing our position
16 with respect to Section 2 of the *Public Inquiries Act*. I
17 think, and I don't think it was intended by Mr. Sherriff-
18 Scott, but I wondered whether my position had been too
19 narrowly focused or attended to by others.

20 And that is I do -- am of the view that
21 there is a declaration of public concern in your Order-in-
22 Council, and that is something that you can take into
23 consideration.

24 However, I think that the pith and substance
25 of this inquiry meets the rest of section 2, and I am not

1 sure if that position of ours has been improperly
2 articulated, having heard Mr. Sherriff-Scott, as you point
3 out, connected with or affecting the good government or the
4 public business is as broad as one can imagine.

5 And so, as I said earlier, this is not about
6 the administration of justice alone. It's about children
7 and the pith and substance regarding the responsibility for
8 children lies with the province.

9 As I understood Mr. Sherriff-Scott's
10 argument is that you need something more to go to attach
11 the inquiry into what may be ascribed as non-government
12 actors, and I don't believe that to be the case. I think
13 the case law is replete with circumstances where the court
14 addresses its attention to the pith and substance of an
15 Order in Council over the calling of a commission and in
16 doing so brings in those actors necessary, having regard to
17 the Order in Council, to meet its mandate. That's the key
18 genesis as to why public inquiries are required.

19 I had sent up the *Westray Mining* case which
20 I would like to address briefly. It's in the material for
21 tomorrow so I brought a copy, a hard copy for you. The
22 others have it.

23 **THE COMMISSIONER:** Do I have it up here,
24 Madam Clerk?

25 **MR. CALLAGHAN:** And I see they've already

1 got it on the screen.

2 **THE COMMISSIONER:** Thank you.

3 **MR. CALLAGHAN:** Now, once you remember the
4 *Westray Mining* case, the pith and substance was mining and
5 the Nova Scotia Court of Appeal determined that the pith
6 and substance was within provincial jurisdiction. It
7 brought in all of the private actors including the *Westray*
8 Mine.

9 And if you go to paragraph 60 this is a
10 concurring judgment with a majority by Mr. Justice Cory and
11 others and it's really important to -- you know, Mr.
12 Sherriff-Scott reminded me of my grade 8 grammar teacher
13 the way he was breaking things down, and I liked my grade 8
14 grammar teacher but you've got to keep the big picture
15 here. You can't just -- the minutia -- and I'm going to
16 take you to *Consortium* when I say you can't
17 compartmentalize these too badly. You've got important
18 work here to do.

19 And if you go to paragraph 60 -- and this is
20 a terrific case if you're looking for background on the
21 commissions of inquiry, and in that Mr. Justice Cory says:

22 "Commissions of inquiry have a long
23 history in Canada. This Court has
24 already noted the significant role that
25 they have played in our country and the

1 diverse functions which they serve. As
2 ad hoc bodies, commissions of inquiry
3 are free of many of the institutional
4 impediments which at times constrain
5 the operation of the various branches
6 of government. They are created as
7 needed, although it is an unfortunate
8 reality that their establishment is
9 often prompted by tragedies such as
10 industrial disasters, plane crashes,
11 unexplained infant deaths; allegations
12 of widespread child sexual abuse or
13 grave miscarriage of justice."

14 And I think -- you know, these types of
15 comments whilst not directed at this case, it's important
16 that Justice Cory makes the distinction "widespread child
17 sexual abuse" or "grave miscarriage of justice" and I've
18 urged upon you to say it's not just the administration of
19 justice. It's that element of it that seems to drive part
20 of Mr. Sherriff-Scott's argument to government actors if
21 one takes the widespread sexual abuse element, which is
22 what has occurred when one looks at the preamble of the
23 expression of concern, as I say, to the Order in Council.

24 But Mr. Justice Cory goes on, and I think
25 it's important that we reflect when we try to analyze the

1 Order in Council. He says:

2 "At least three major studies on the
3 topic have stressed the utility of
4 public inquiries and recommended their
5 retention."

6 I might add they don't mention Mr. Justice
7 McRuer's report but I also might add that every Canadian
8 should read his report if you want to know how to be a
9 proper citizen.

10 But anyway, it goes on to say:

11 "They have identified many benefits
12 flowing from commissions of inquiry,
13 although the particular advantages of
14 any given inquiry will depend upon the
15 circumstances in which it is recreated
16 and the powers it is given. It may be
17 helpful to review some of the most
18 common functions of commissions of
19 inquiry.

20 One of the primary functions of public
21 inquiries is fact finding. They are
22 often convened in the wake of public
23 shock or disillusionment or scepticism
24 in order to uncover 'the truth'.

25 Inquiries are like the judiciary,

1 independent. Unlike the judiciary they
2 are often endowed with wide-ranging,
3 investigative powers and following
4 their mandates commissions of inquiry
5 are ideally free from partisan
6 loyalties and better able than
7 parliament or the legislature to take a
8 long term view of the problem
9 presented.

10 Cynics decry public inquiries as a
11 means used by the government to
12 postpone acting in the circumstances
13 which often call for speedy action.
14 Yet, these inquiries can and do fulfil
15 an important function in Canadian
16 society. In times of public
17 questioning, stress and concern, they
18 provide the means for Canadians to be
19 apprised of the conditions pertaining
20 to a worrisome community problem and to
21 be a part of the recommendations that
22 are aimed at resolving the problem.

23 Both the status and high public respect
24 for the Commissioner and the open and
25 public nature of hearings help to

1 restore public confidence not only in
2 the institution or situation
3 investigated but also in the process of
4 government as a whole."

5 And I note, to pause, we are talking
6 institutions or government in making a clear distinction to
7 the Supreme Court of Canada. They're an excellent means of
8 informing, educating concerned members of the public.

9 And I think you've got to keep that larger
10 picture in mind. You just can't be -- you can't be driven
11 into a "*Drieger*". I mean, *Drieger* is a very helpful
12 document and I can "*Drieger*" this to death, and I think we
13 did in terms of giving it their proper context, but you've
14 got to keep the big picture in play.

15 There's another point which I think I was
16 slightly misquoted on, and that's in respect of how we use
17 the interests of the public.

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

19 **MR. CALLAHAN:** My reading, and my quote, I
20 think it was from *Consortium*, that we don't look at the
21 individual statements of individual Members of Parliament
22 or that to ascertain what the meaning is, is one thing, but
23 here in this case it makes it clear that the public concern
24 for the -- giving rise to the inquiry is a matter that can
25 be somewhat considered, and it's not a popularity contest.

1 It's not a public poll. It is, rather, a sober reflection
2 as to what has happened. And if one goes to paragraph 71
3 of this case you'll see how Mr. Justice Cory articulates
4 that point.

5 If we just take it down just a little bit,
6 because I'm going to read the last sentence of paragraph
7 70:

8 "The appellant Commissioner suggested
9 in oral argument that the long
10 histories of inquiries in Nova Scotia
11 has created an expectation in the
12 industry that any mining disaster will
13 be followed by an inquiry."

14 What had happened in Nova Scotia, they
15 repeat the fact that in the 1800s when there was a disaster
16 there was an inquiry. But Mr. Justice Cory goes on and
17 says:

18 "Equally important are the expectations
19 of the public. Many Nova Scotians have
20 friends or family who are or have been
21 affiliated with the mining industry.
22 Those who do not are at least very much
23 aware of its historic and economic
24 importance. The concerns of the
25 Westray families, which arose in the

1 wake of May 9th explosion, were shared
2 by the whole of the province, the loss
3 of faith in the practices of the mining
4 industry and in the government and
5 regulatory process relating to it has
6 not been limited to the residents of
7 Pictou County. The Westray disaster
8 and the lack of progress of the inquiry
9 must be matters of concern for all
10 caring Nova Scotians.

11 The appellant Commissioner estimated
12 that since the time of the explosion
13 about 860 articles relating to the
14 incident have appeared in two leading
15 Halifax papers alone. This is evidence
16 of the strong community interest in the
17 Westray disaster. There is clear and
18 pressing public interest in having as
19 soon as possible a broad and open
20 investigation of the events leading up
21 to the deaths of the miners. This is
22 essential in order to reduce the fear
23 that the same thing might happen again
24 to other miners; to identify
25 preventative measures and to relieve

1 the frustrations and concerns of the
2 families or the victims. The longer
3 this public inquiry is postponed the
4 greater the likelihood of increasing
5 public disillusionment, frustration and
6 mistrust."

7 The point of that, of course, is that the
8 public expectation is important and it isn't important in
9 the sense of who says what, when, how, where but; rather,
10 the collective as to how we get here. It's those things
11 that I think you take to inform yourself as to where you
12 start.

13 Now, I go back to, for example, if I may, go
14 to paragraph 118 of the quote. But if you back to the
15 Council of Catholic Bishops, you'll recall that they called
16 upon us all to deal with the matter to shatter the
17 conspiracy of silence.

18 Well, interestingly enough, Mr. Justice Cory
19 in respect of the purpose of these inquiries cites
20 *Brandeis*, and he says:

21 "*Brandeis*, writing extra-judicially of
22 the need of openness, put it very
23 succinctly and well when he said that
24 'sunlight is the most powerful of
25 disinfectants and it's the kind of

1 thing that should inform the wide
2 breadth of what you're doing.'"
3 Which is to say that the Order in Council requires you to
4 consider the wider ambit. It doesn't require you to parse
5 it to death.

6 If I could then refer, then, to the
7 *Consortium* case; again, the *Consortium* case dealt with the
8 interactions ---

9 **THE COMMISSIONER:** I'm sorry, where are we
10 now?

11 **MR. CALLAGHAN:** *Consortium* is a case I
12 handed up.

13 **THE COMMISSIONER:** You handed up. Yes, I
14 have it.

15 **MR. CALLAGHAN:** And *Consortium* is a case
16 that deals with -- now, it's a municipal resolution for a
17 public inquiry and the municipal resolution -- and I will
18 just sort of highlight a little bit of it. It provides --
19 or at least, not the resolution but the underlying
20 legislation for it provides that -- and it can be found at
21 paragraph 17. I won't read the whole thing but I will
22 highlight. It says in the middle of it that they could:

23 "...to inquire into or concerning any
24 matter connected with the good
25 government of the municipality or any

1 conduct of its public business."

2 Which surprise, surprise, is not dissimilar to language we
3 have in the *Public Inquiries Act* for the province

4 And then if you go over to paragraph 36 what
5 is being suggested -- and these are private actors
6 interacting in that case, arguably, with the municipality,
7 but argue that, you know, you have to sort of get into the
8 governing Order in Council or regulation in that case or
9 resolution, I should say.

10 And they say this in the Supreme Court of
11 Canada:

12 "The appellants argue that the
13 connection between good government and
14 the subject land transactions should be
15 spelled out in the section 100
16 resolution, but the resolution taken as
17 a whole makes it clear to a mind
18 willing to understand that the City
19 believes that as a result of public
20 business that may have involved
21 relationships between public officials
22 and private developers, the City is now
23 stuck with an under-performing mortgage
24 for an over-priced park which have
25 generated delegations of petitions and

1 the City believes it would benefit from
2 the Commissioner's recommendations for
3 the future conduct of the public
4 business of the municipality.
5 It is evident that an inquiry under the
6 second branch of section 100 into an
7 item of public business may disclose
8 misconduct. Equally, inquiry under the
9 first branch may look into supposed
10 malfeasance and discover the conduct
11 was entirely innocent but ought
12 nevertheless to result in
13 recommendations for a good government
14 and municipality. While it may
15 therefore be useful for some purposes
16 to think of section 100 as having two
17 branches, it is but a single power and
18 the pre-conditions for the valid
19 exercise to establish a judicial
20 inquiry do not vary with the subject
21 matter."

22 And then here it is:

23 "A more compartmentalized
24 interpretation would undermine the
25 utility of the power and contradict the

1 broad legislative intent evident on the
2 face of section 100, a concern which I
3 believe is a legitimate concern about
4 the need for greater particularity in
5 cases where misconduct may be found can
6 be best handled in my view within the
7 framework of procedural fairness at the
8 inquiry stage."

9 Again, here we have a situation where after
10 identifying the ill; that is, the issue to be addressed in
11 the public inquiry, we are not here to compartmentalize and
12 break it down. We're here to get on with it, to put the
13 sunlight, to disinfect.

14 And so you get onto the issue of the Order
15 in Council, and I reiterate what I said before. If the
16 proviso were as allegations of abuse of young people have
17 surrounded the City of Cornwall and its citizens for many
18 years, the police investigations and criminal prosecutions
19 relating to these allegations have concluded. Committee
20 members have indicated that a public inquiry will encourage
21 individual and community healing. If that's not a
22 declaration of public concern I honestly don't know what
23 is.

24 I don't think it much matters because I
25 think this is within your pith and substance equally as a

1 matter dealing with children or as dealing with
2 administration of justice. The fact that the Diocese plays
3 a role doesn't change things and it ought not to be
4 compartmentalized to the point where they slide out of
5 this.

6 I think one of the great juxtapositions is
7 in fact those cases that my friend referred to called
8 *McKinney v. University of Guelph*, for example. And I know
9 in your prior life that you deal with the Charter probably
10 more than anybody in this room. So you know, the
11 interpretation of the Charter is not something foreign to
12 you. If I could get *McKinney* it's in the Volume 2 of Mr.
13 Sheriff-Scott's material; E6, I'm told.

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

15 **MR. CALLAGHAN:** And I'm at paragraph 22.

16 **THE COMMISSIONER:** E6, Tab?

17 **MR. CALLAGHAN:** Tab 21, page 26 of 142. I
18 just want to highlight something. And at paragraph 22.
19 Right in the middle of the paragraph, and this will be of
20 no surprise to you.

21 The Supreme Court of Canada says:

22 "Government is the body that can enact
23 and enforce rules and authoritatively
24 impinge on individual freedom. Only
25 government requires to be

1 constitutionally shackled to preserve
2 the rights of the individual".

3 The word "government" it is nowhere in this
4 Order-in-Council in the sense of the operative paragraph.
5 And had using the reverse of construction, deconstruction I
6 might say, then Mr. Sherriff-Scott eloquently said "Here it
7 is, well-recognized word "government".' Whose government?
8 The Ministry Attorney General, government; OPP, government;
9 Corrections, government; Children's Aid Society,
10 government; Cornwall police, government subject to the
11 Charter.

12 There it is. That's the word. It isn't
13 there. It's public institutions. It's broader and it's
14 public character that drives it. I gave you those
15 submissions, but that that's what drives it.

16 It may be, I gave you construction of this,
17 and this one of the thing that Mr. Sherriff-Scott said,
18 that no one actually went through a word-by-word
19 construction. I actually did.

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

21 **MR. CALLAGHAN:** And I take a little
22 different view than my friend, Mr. Manson. Other public
23 and community sectors is as in Berg ---

24 **THE COMMISSIONER:** It's in what?

25 **MR. CALLAGHAN:** Is as in the *Berg* decision.

1 **THE COMMISSIONER:** Okay.

2 **MR. CALLAGHAN:** It is talking about people.
3 It is not talking about institutions. It is talking about
4 the people whether the public at large or the collective of
5 people in a community group such as Catholics, such as
6 Altar Boys, such as Boy Scouts. It's not talking about the
7 organization itself, it's the interaction between the
8 public institutions and all those other groups as
9 individuals.

10 I won't go through it, but if you read the
11 transcript over what I said, I did go through a complete
12 construction of what I believe. Now, I think -- a last
13 word of caution -- I think one has to be somewhat careful.
14 You are being asked to address the Order-in-Council in
15 respect of a very specific request. This isn't the last
16 time, I suspect, you will be asked to address the Order-in-
17 Council, and so I suspect you have to sort of deal with the
18 issue at hand, but these are wider principles. I don't
19 think you can be fooled into doing it in a complete
20 compartmentalized way.

21 Those would be my submissions, sir.

22 **THE COMMISSIONER:** Thank you.

23 So thus ends your participation, I suppose,
24 in determining the issue for the time being.

25 I can tell you that given that there will be

1 a second motion tomorrow, I suppose, that we will hear
2 starting at 10:00, that I foresee having a decision within
3 the next 30 days on both motions. It is an ambitious plan
4 given the fact that it is also my intention to continue
5 with the hearings. The evidence that we will hear is not,
6 in my view, the least dependent on any or on my decisions
7 on these motions. Mr. Engelmann will be advising you as to
8 what the disclosure and who the witnesses will be.

9 The other thing I should tell you that I
10 have been able to change my arrangements a little bit and
11 that I will be available until the end of the day tomorrow.
12 So we will be able to canvass as much as we can of the
13 motion for tomorrow.

14 Subject to any questions, Mr. Engelmann, is
15 there anything else I should be covering?

16 **MR. ENGELMANN:** No, I think that covers it.

17 **THE COMMISSIONER:** Terrific.

18 **MR. ENGELMANN:** Unless something is resolved
19 this afternoon, we will be dealing with the *Cipriano* motion
20 in the morning.

21 **THE COMMISSIONER:** Fine.

22 All right. Let's close her up.

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

25 The hearing is now adjourned. L'audience

1 est ajournée.

2 --- Upon adjourning at 4:02 p.m. /

3 L'audience est ajournée à 16h02

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

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



Sean Prouse, CVR-CM