

**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 68

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709 Cotton Mill Street
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K6H 7K7

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709, rue de la Fabrique
Cornwall, Ontario
K6H 7K7

Wednesday, November 15, 2006

Mercredi, le 15 novembre 2006

Appearances/Comparutions

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Ms. Louise Mongeon	Registrar
Ms. Reena Lalji	Cornwall Police Service Board
Mr. Neil Kozloff Actg.Det.Supt.Colleen McQuade Ms. Gina Saccoccio Brannan, Q.C. Dect.Staff Sgt.Colin Groskopf	Ontario Provincial Police
Mr. David Rose Mr. Mike Lawless	Ontario Ministry of Community and Correctional Services and Adult Community Corrections
Mr. Christopher Thompson	Attorney General for Ontario
Mr. Peter Chisholm	The Children's Aid Society of the United Counties
Mr. Peter Wardle	Citizens for Community Renewal
Mr. Dallas Lee Ms. Lauren Schellenberger	Victims Group
Mr. David Sherriff-Scott M ^e André Ducasse	Diocese of Alexandria-Cornwall and Bishop Eugene LaRocque
Mr. Giuseppe Cipriano Mr. James Foord	The Estate of Ken Seguin and Scott Seguin and Father Charles MacDonald
Ms. Jill Makepeace	Mr. Jacques Leduc
Mr. William Carroll	Ontario Provincial Police Association
Mr. Colin S. Baxter	Canadian Broadcasting Corporation

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1 --- Upon commencing at 11:34 a.m./

2 L'audience débute à 11h34

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

6 Please be seated. Veuillez vous asseoir.

7 **THE COMMISSIONER:** Thank you. Good morning
8 all.

9 **MR. RUEL:** Good morning, Mr. Commissioner.

10 **THE COMMISSIONER:** Yes sir.

11 --- OPENING STATEMENT BY/DÉCLARATION D'OUVERTURE PAR MR.
12 RUEL:

13 **MR. RUEL:** Today, the first order of
14 business would be the replies to the submissions made by
15 CBC with respect to the confidentiality of the names of
16 victims and alleged victims in exhibits marked as "C", just
17 to put that into context and to give you a little
18 background so that everybody understands what we are
19 talking about.

20 Just for the record, we have a new friend
21 here today for the CBC, Mr. Colin Baxter who is going to be
22 representing the CBC.

23 **THE COMMISSIONER:** Thank you.

24 **MR. RUEL:** So on October 31st, you issued
25 some direction on process for dealing with confidentiality

1 requests for the identities of victims or alleged victims.
2 Then you heard submissions on specific requests made by
3 Commission counsel and others on November 2nd, 2006. On
4 that date, CBC counsel could not attend and you allowed
5 them to make a response or to give a response to the
6 submissions made by other parties, so that response or
7 those submissions were made on November 7th. Then counsel
8 for parties expressed the desire to reply to those
9 submissions, so this was supposed to take place yesterday.
10 For the reasons that were provided to parties, it was not
11 possible to hear the matter today, ---

12 **THE COMMISSIONER:** Yesterday.

13 **MR. RUEL:** --- so these matters -- I mean,
14 the replies would be heard today; so I just want to point
15 out that we are talking about replies to submissions made
16 in response. So this should be limited to issues raised by
17 counsel for the CBC at the hearing of November 7th.

18 I am informed that Mr. Baxter may ask
19 permission to address some issues that may be raised by
20 counsel here today in reply. So he will make his request
21 and I guess you will decide if you grant the request or
22 not.

23 As to Commission counsel submission in reply
24 to the submissions of the CBC, very briefly, Mr.
25 Commissioner, we would -- there are two cases we would want

1 to put on the record for your consideration and the
2 consideration of parties. The first one is *R. v. Adam*.
3 This is on the issue of waiver. So the CBC, you will
4 remember, argued that your orders, confidentiality orders
5 for the -- applicable to the names of victims and alleged
6 victims should be waivable at the sole request of -- at the
7 request of those persons, for example, if they go and see
8 the CBC journalist and ask to testify -- ask to be
9 identified in public and they wouldn't need to come back to
10 you to make a request to have the ban to be lifted.

11 So I just wanted to point to you this case,
12 which dealt with section 486 of the Criminal Code, which
13 you know under that section, that the Crown or a witness or
14 a complainant may ask the issuance of a publication ban on
15 his or her name in cases of dealing with sexual offences.
16 So that case established that the revocation of a
17 publication ban is not automatic. There has to be an
18 application made; consent of the Crown must be given and
19 consent of the person, of the complainant, must be given as
20 well. There is a paragraph, paragraph 30, that deals with
21 the circumstances or the test that should be followed when
22 a person wishes to have a publication ban revoked. So
23 there has to be a material change of circumstances. So
24 that is the first case.

25 The second case is a case that everybody

1 knows quite well. It's the *Phillips v. Nova Scotia* case.
2 This dealt with the Westray Mine inquiry. This is with
3 respect to the issue of identifying information. Counsel
4 for the CBC proposed a test for the protection of
5 information, an objective test, and suggested that the
6 information or the protection should be ordered only to
7 protect information that could identify a person in the
8 eyes of a reasonable member of the public. And in their
9 view, a reasonable member of the public is not a member of
10 the community of Cornwall it's a member of the public at
11 large.

12 So in that case, the Supreme Court and
13 Justice Cory discussed the issue of pre-trial publicity in
14 the context of a public inquiry and potential issuance of a
15 publication ban. He indicated that in taking into account
16 the effect of publicity when determining if a ban should be
17 issued, the court should take into account geographical
18 factors and local factors. So this would be at paragraph
19 126.

20 So I believe the CCR has submissions to make
21 in response and Children's Aid Society and Victims' Group.

22 **THE COMMISSIONER:** I will canvass.

23 **MR. RUEL:** Yes, okay.

24 **THE COMMISSIONER:** Great, thank you.

25 Just so the public can be advised that the

1 reason why the Inquiry could not proceed yesterday is
2 because I was fogged in, in Sudbury, and we tried to take
3 the plane on Monday night and we were fogged in then and we
4 were fogged in yesterday morning, so we ended up driving.
5 So for those of you who really want to know all about that,
6 there it is.

7 The other thing I would like to point out is
8 that the decision with respect to these exhibits has been
9 drawn out somewhat and I'm sure that members of the public
10 and the media are anxious to look at these documents and be
11 able to report on them. I have indicated I thought time
12 and time again that the documents were filed as interim "C"
13 documents, which means that they would be confidential
14 until such time as we were able to issue the decision. I
15 think it will come as no surprise to anyone that many of
16 the documents will be made public, in fact the large
17 majority of them, but what we did is out of an abundance of
18 caution, that I've made them "C" exhibits at this time.

19 In any event, Me Ruel has indicated quite
20 correctly what all the steps have been that have put back
21 my ability to complete that and hopefully today, we will be
22 able to complete the submissions on this and then I will be
23 able to consider the issue and render a decision on these
24 issues very quickly and then be in the position to release
25 those documents for public consumption inasmuch as

1 possible.

2 All right. That having been said, Mr.
3 Wardle, did you want to reply at this point on the CBC
4 Motion on those previous documents?

5 **MR. WARDLE:** Commissioner, we've agreed that
6 Mr. Sherriff-Scott would take the lead role on this.

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

8 --- REPLY TO SUBMISSIONS BY/RÉPLIQUE PAR MR. SHERRIFF-
9 SCOTT:

10 **MR. SHERRIFF-SCOTT:** Good morning,
11 Commissioner.

12 **THE COMMISSIONER:** Good morning.

13 **MR. SHERRIFF-SCOTT:** I filed a document
14 called "Factum and Authorities" in response to the CBC.

15 **THE COMMISSIONER:** Yes.

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

17 **MR. SHERRIFF-SCOTT:** I rise today because I
18 take issue with five points raised by the CBC on Tuesday
19 last, which I contend are either incorrect or inconsistent
20 with authority. Those are summarized at the first and
21 second page of my written submissions. I won't orally deal
22 with the fifth point, which is "E" the reputational and
23 privacy interests, which is dealt with in the Factum in
24 writing and many cases. I will just focus on the first few
25 points.

1 "A" and "B" are tied together. This is the
2 relevance of a victim's name, which the CBC contended is
3 not a factor to be considered or which would encourage or
4 discourage you to issue or maintain a ban. The corollary
5 to that is "B" the contention of the CBC that essentially
6 all of the victims' names in this proceeding that will be
7 identified will, in fact, be relevant. We contend of
8 course that relevance is a very real consideration in the
9 question of issuing a ban and that with some exceptions the
10 victims' names will largely be irrelevant to your
11 jurisdictional mandate.

12 The last two points or the third point is
13 the consent issue, which I will address briefly; then the
14 question of the extent of the publication ban unacquainted
15 with the victim identifiers. Those are the submissions I
16 will make.

17 So turning to the question of relevance very
18 briefly, which is starting at page 2(a) in the middle of
19 the page in the Factum, as you know, we start with the
20 *Dagenais/Mentuck* test, which is a flexible and contextual
21 one not to be mechanistically applied according to the
22 Supreme Court of Canada. It is my submission that the
23 context here is this Inquiry and its Terms of Reference,
24 which makes the question of the relevance of the name
25 directly square in issue. In other words, you should be

1 analyzing that in the question of whether or not that
2 information ought to be released.

3 The Court of Appeal, I submit, agrees with
4 that proposition, over at the top of page 3 and following
5 in the *Morin* Case, and the quotation excerpted at page 3,
6 paragraph 7, starting four lines down:

7 "The right of the public to be fully
8 informed about the criminal prosecution
9 of Mr. Morin on the ongoing proceedings
10 of the Commission is full, save only
11 for the identity of Mr. X. It must be
12 remembered the focus of the Commission
13 at least insofar as the subject matter
14 relevant to this application is
15 concerned relates to the role of
16 jailhouse informants in the
17 administration of justice."

18 et cetera.

19 "The focus is not on the identity of
20 Mr. X nor on the civil or criminal
21 responsibility on his part."

22 I submit that that statement is even more
23 compelling vis-à-vis victims and that the Court of Appeal
24 has specifically acknowledged relevance as an important
25 consideration in the assessment of issuing or maintaining a

1 ban. And I submit moreover that if something is irrelevant
2 to the terms of your mandate, then the public interest
3 argument in disclosure does not get off the ground since
4 there is no public interest in the dissemination of
5 confidential, personal irrelevant information. Curiosity
6 is not enough.

7 I would add to this that relevance is also
8 germane in the assessment of the deleterious effects versus
9 the salutary effects; something may be marginally relevant;
10 it may be very relevant or it may be relevant. All those
11 factors will go into the balancing act in the question of
12 the weighing of a publication ban.

13 I included a case, which I have referred to
14 at paragraph 9, and it is a case where a publication ban
15 and the enforcement of it was reviewed by the Court of
16 Appeal of Ontario; that's Tab 380, *R. v. M.L.* case. The
17 judgment of Rosenberg starts at page 1. The original
18 criminal proceeding in that case was on a number of counts
19 of living off the avails as well as aiding prostitution and
20 there was a conviction. The second ground of appeal is
21 referred to in the last sentence on the bottom of the page
22 in paragraph 2:

23 "The second ground of appeal concerns
24 the trial judge's failure to enforce a
25 ban on publication."

1 Over at page 5 of the judgment of the Court
2 of Appeal, which is paragraph 25, and following:

3 "The Court reviewed the publication ban
4 in the first instance on witness names
5 and identities under 486 of the Code."

6 And over to the next page, page 6, there was
7 debate during the assessment of the publication ban
8 referred to in paragraphs 26, 27 and 28 of the judgment.
9 And then the relevant portion that I wish to call to your
10 attention is paragraph 29:

11 "Following argument [that is to say on
12 the appropriate scope] the trial judge
13 ordered the publication ban would apply
14 to the identity of both the escorts
15 named in the indictment and escorts who
16 were not named. He found all the
17 escorts to be considered complainants
18 entitled to the protection of the ban
19 under 46. Accordingly, he ordered the
20 ban cover all personal information..."

21 et cetera.

22 And finally,

23 "Although he did not order a
24 publication ban on client names, he
25 ruled inadmissible all information

1 tending to disclose the identities of
2 the client to the escort service. The
3 trial judge reasoned that such
4 information would be hearsay and
5 irrelevant. He therefore ordered all
6 the information identifying clients be
7 blacked out in the documents admitted
8 into evidence. The Court of Appeal did
9 not look askance at this. The trial
10 judge completely removed from the
11 public record any irrelevant names or
12 identifying information as an
13 alternative to a publication ban. The
14 information was not germane and part of
15 the proceedings, so he ruled it out."

16 Just finishing on that point, the *Public*
17 *Inquiries Act*, of course, in section 7, which you don't
18 need to turn up, deals with the authority of your
19 Commission to summons documents, which are referred to as
20 relevant, obviously. So I say that relevance, contrary to
21 what the CBC contends is no basis for an assertion that a
22 ban ought to be more readily granted is simply inconsistent
23 with authority and common sense I would add.

24 The second submission on imputed consent,
25 which starts at page 4, paragraphs 11 and following in my

1 factum, there are two facets to the argument contended for
2 by the CBC. First, that there is a waiver, which is
3 implicit, from either earlier proceedings or the identity
4 of a victim or his or her victimization coming to the
5 public in media articles or archive material; then there is
6 the question of the CBC ought to be able to infer or get
7 consent from a particular person without the consent or
8 further input of the court to augment or release the ban.

9 I submit both those things are incorrect and
10 inconsistent. The first argument on the imputed waiver, I
11 submit, rests on their statutory interpretation of explicit
12 consents focused on by the legislation that they refer to.
13 None of those arguments deal with imputed consent. And I
14 say when that is not forthcoming consent should not be
15 inferred.

16 I've referred to the *Vickery* case over at
17 page 5, starting, "For the proposition that..." I've been
18 through this case with you once before, so I know you know
19 the case. Even though the materials were court archived,
20 which is one of the points the CBC raised, there were
21 considerations, post-proceedings, that made access to those
22 archives unacceptable. And so consent or waiver from the
23 fact of the earlier proceeding ought not to be imputed.

24 Now, the one case that I sent to counsel
25 out, they all have, and for their convenience it's at Tab 4

1 of the main record for this afternoon, which they have
2 hardcopies of, it's *B.G. v. The Queen*. I also sent it
3 separately in support of these submissions.

4 **THE COMMISSIONER:** Okay. I don't -- do you
5 have an extra copy?

6 **MR. SHERRIFF-SCOTT:** Yes, I do. There's a
7 pile there.

8 **(SHORT PAUSE/COURTE PAUSE)**

9 **MR. SHERRIFF-SCOTT:** This is a case,
10 Commissioner, of the British Columbia Court of Appeal that
11 dealt with the question of the propriety of lifting a ban
12 that had already been imposed in the context of civil
13 lawsuits. The facts briefly; the plaintiffs had sued
14 employees of what was called the Brannan Lake School for
15 Boys, a reform school or what used to be called a reform
16 school. The allegations were sexual abuse and assault and
17 they sued them for damages in the civil proceeding. A
18 publication ban had been issued in that proceeding banning
19 publication of the names not only of the plaintiffs, the
20 alleged victims of abuse, but also of the defendants. At
21 page 3 of the judgment, paragraphs 2 and 3:

22 "The original ban imposed by the civil
23 trial judge are referred to as
24 'paragraph 2'."

25 Which has a marginal note in square

1 brackets:

2 "[There shall be no publication of the
3 names nor of any information that could
4 disclose the identity of any of the
5 plaintiffs or the former inmates.]"

6 Paragraph 3:

7 "There shall be no publication of
8 identities of former employees, i.e.
9 the accused, of physical or sexual
10 abuse of residents of the school until
11 judgment is rendered by the court."

12 Now, what happened that stimulated the
13 appeal was the trial judge released his reasons, which is
14 referred to in the next paragraph, and in his reasons
15 referred to everybody explicitly. That stimulated an
16 immediate request for submissions and an appeal. The trial
17 judge refused the request to reinstate the ban. It was
18 appealed to the Court of Appeal. The Court of Appeal
19 overturned the trial judge's reasons. And importantly for
20 our purpose, with that background, paragraph 12 at page 4
21 was the submission of the Attorney General in support of
22 the trial judge's order.

23 **THE COMMISSIONER:** I'm sorry; do you mean
24 counsel for the defendant Crown?

25 **MR. SHERRIFF-SCOTT:** They call him the

1 Crown, but I'm assuming it's the Attorney General
2 responding.

3 **THE COMMISSIONER:** Okay.

4 **MR. SHERRIFF-SCOTT:** You'll see there at
5 paragraph 12:

6 "The Crown argues effectively that the
7 plaintiff victims have waived their
8 right to a ban. Counsel for the
9 defendant Crown says 'The principle of
10 openness in the judicial system is
11 paramount and that any ban on
12 publication should be as minimally
13 restrictive..."

14 Et cetera.

15 The second sentence is what I want to draw
16 you to:

17 "The Crown says that the parties and
18 witnesses in this case had no
19 reasonable expectation of privacy
20 because some had previously granted
21 media interviews. Some had not sought
22 publication bans in their own lawsuits
23 and all had participated in advancing
24 claims that were fraudulent or tainted
25 by collusion."

1 In other words, the trial judge found their
2 allegations were not credible and so the Crown asserted
3 this amounted to fraud or collusion.

4 The Court of Appeal using -- rejecting that
5 argument in part as a basis to lift the ban, said at one
6 point, you'll see at page 6, paragraph 23, this is the
7 point that my colleague just made, your counsel, that first
8 of all, nobody is going to waive a ban or lift a ban
9 without a full hearing, which is the *Adams* case. You have
10 to justify to the court, as the supervisor of the
11 interests, which it has balanced that the ban should be
12 lifted and that requires an assessment of the facts, not an
13 assumption of waiver.

14 Then over at paragraphs 25 and 26 of the
15 judgment starting at the bottom of page 7 and over to the
16 top of page 8:

17 "Although *Dagenais, supra,* and *Mentuck*
18 both deal with principles that govern
19 the making of a discretionary ban in
20 specific context of criminal
21 proceedings, I consider the general
22 approach and discretionary publication
23 bans in the specific context of
24 criminal proceedings, I consider the
25 general approach and some of the

1 factors mentioned in those cases to be
2 relevant to civil actions involving
3 claims of historical abuse. In
4 particular, circumstances of the
5 present case, the judge should have
6 considered the effects of ending the
7 ban that would have been had on the
8 plaintiffs, their witnesses and the
9 former inmates. Perhaps of equal
10 importance the judge should also have
11 considered the chilling effect of the
12 prospect of the termination which might
13 result on those pursuing similar claims
14 of historical abuse.

15 And then 26:

16 "The judge should also have considered
17 that the courts have frequently
18 recognized replacing names of certain
19 parties with initials which relates
20 only to a sliver of information and
21 minimally impairs the openness."

22 So in this case, the argument of the Crown,
23 which is a waiver argument, was rejected. The Court is the
24 supervisory authority. And I say that's an important
25 point. In the first instance, the court balances the

1 rights and interests at stake, and it ensures those
2 interests are protected when it identifies them. If there
3 is no court order subsequent releasing the ban, the court
4 essentially is being forced to surrender its jurisdiction,
5 its supervisory role, and others assume it whose interests
6 may not be neutral, I submit. Moreover, what about the
7 validity of the consent that is contented for, for example,
8 by the CBC, the health of the person allegedly giving it;
9 the advice that person may be receiving from whom, their
10 interests, et cetera. All of these things are important
11 for the court to know in its role. And moreover, I submit
12 there is no inconvenience to require the CBC to get an
13 order to ensure the interests are balanced.

14 So on the question of waiver those are my
15 submissions.

16 The identifying scope, which is paragraph 18
17 and following, Commissioner. I refer to a case here which,
18 in addition to my colleague's case, is at Tab 7, and I'll
19 briefly just take you to the passage of importance at page
20 5, paragraph 14. That case is the *R. and Binns* case. This
21 I submit is an example of the real play of the locality.

22 **THE COMMISSIONER:** Sorry; what page?

23 **MR. SHERRIFF-SCOTT:** Page 6 of 7 or page 5
24 of the judgment. Sorry, there are two numbers on the
25 report.

1 THE COMMISSIONER: Okay.

2 MR. SHERRIFF-SCOTT: At paragraph 14.

3 THE COMMISSIONER: Yes.

4 MR. SHERRIFF-SCOTT: The trial judge refers
5 to the *Bernardo* decision. But in the second sentence
6 starting:

7 "In the case at bar, we are addressing
8 the victimization of young people of a
9 very tender age who are still alive and
10 attending school in a very small town
11 in rural Ontario where the Toronto Sun
12 is readily available to the public. I
13 accept the submission of the Crown that
14 it would be generally likely that the
15 public reading details of the
16 photographs and videos and evidence
17 related thereto would readily be able
18 to identify not only the accused but
19 likely victims of his conduct. The
20 court accepts the submission of the
21 Crown counsel that the public in that
22 area would be very likely to be able to
23 point the finger at those innocent
24 victims who would be victimized by such
25 reports."

1 I submit that CBC's submission turns the
2 test on its head, and that it is those acquainted with a
3 person who is a victim who are -- with which a publication
4 ban is essentially primarily concerned, although others as
5 well. It would be cold comfort to a victim that someone in
6 a remote village in Northern Ontario could not identify him
7 -- or excuse me, could not identify him, but someone in his
8 community of peers could, and I don't think there is any
9 authority or reason to adopt a test, as is urged on you by
10 the CBC in that regard. I think the test makes no sense
11 and I've made some points of practical concern in terms of
12 virtually impossibility of enforcing it or understanding it
13 to how it would play out.

14 That brings me to the last point of
15 reputational interests. You'll hear a lot about that this
16 afternoon. I submit that your own mandate and the *Public*
17 *Inquiries Act* and all of the cases identify these as
18 important points to consider, and they should not be
19 ignored, and there is essentially an assumption of harm to
20 victims in this context, which would militate against
21 disclosure.

22 So those are my submissions, Commissioner,
23 in response to the CBC. Thank you.

24 **THE COMMISSIONER:** Thank you.

25 All right. So have you -- we've picked out

1 an order or Mr. Lee, are you making submissions or is there
2 a pre-described order? Oh, I'm sorry; Mr. Manson.

3 **MR. LEE:** I think what we did was we
4 essentially moved Mr. Sherriff-Scott to the front of the
5 line and everything else will stay consistent.

6 **THE COMMISSIONER:** Okay. Then I'll go down
7 the line?

8 **MR. LEE:** Yes.

9 **THE COMMISSIONER:** Terrific. Sorry.
10 Mr. Wardle.

11 **MR. WARDLE:** Mr. Commissioner, Mr. Manson
12 has filed a written submission on our behalf. In the
13 interest of time and given that we have other issues to
14 deal with today, I'd simply reiterate what's in the written
15 material and commend it to you.

16 **THE COMMISSIONER:** Thank you.
17 Mr. Lee.

18 ---REPLY TO SUBMISSION BY/RÉPLIQUÉ SUR REPRÉSENTATION PAR
19 **MR. LEE:**

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

21 **THE COMMISSIONER:** Good morning.

22 **MR. LEE:** There are just a few distinct
23 issues I'd like to touch on briefly. It is the position of
24 the Victims Group that the CBC position on this issue
25 disregards the rights of any victim who has not

1 communicated his or her wishes with the Inquiry.

2 The parties at this Inquiry, Commission
3 counsel and you yourself, Mr. Commissioner, have gone to
4 great lengths to consider how best to deal with these
5 situations when we don't know where a person might be and
6 we don't know what their wishes might be in terms of
7 victims. We all seem to agree that we cannot risk outing
8 victims of abuse to their family, to their friends, to
9 their co-workers, to the community, and frankly the media's
10 assurances that they do not intend to do this if given a
11 right to publish these names is not good enough.

12 We need to not forget for a second that there is a very
13 real risk of harm being done to somebody whose name comes
14 up at this Inquiry whose name is published and who
15 otherwise had no idea it was coming, who hasn't disclosed
16 the fact to his family and friends that he was a victim of
17 abuse.

18 But for the diligence of the parties here
19 names of victims and of alleged victims could be made
20 public on a daily basis and we cannot know the ruin that
21 the release of those names could potentially cause. We
22 are, therefore, left to balance a couple of considerations.
23 The first one being the potential harm of banning
24 publication and infringing the interests of openness and
25 public access, and on the other hand, the potential harm of

1 doing great damage to people and potentially ruining lives
2 on the other.

3 My submission is that the public's interest
4 in those names cannot prevail when those interests are
5 balanced. If we endeavour to only protect those persons
6 who expressly request protection, I am absolutely certain
7 that during the course of this Inquiry somebody is going to
8 be harmed at some stage. I have no doubt of that at all.
9 And my submission is that to date, we've been doing our
10 best to protect the identity of these people and their best
11 interests and that we should continue to do so.

12 Assuming that you agree with the various
13 submissions and you do decide to order a publication ban
14 with respect to the names of victims, the CBC proposes that
15 the ban should be one that can be waived by the victim
16 without further order from you. Essentially, my
17 understanding is that if a victim of abuse covered by the
18 ban decided that he did not wish to be covered by it and
19 went to a media outlet and explained that to them and asked
20 them to give them something they wanted to publish, they
21 would be free to do so without coming back here. I have a
22 few concerns about that. The main one I suppose is that a
23 victim theoretically could end up waiving his protections
24 under the ban without a full understanding of what the ban
25 means, why it was imposed, what his rights are and without

1 speaking to somebody beforehand to have that explained to
2 him.

3 I can tell you from my own experience in
4 dealing with my clients that everyone of them, without
5 exception, has told me or has expressed to me that this
6 process isn't easy. They're happy this Inquiry is
7 happening for the most part; that they are happy something
8 is being done. They're happy these questions are being
9 asked. I advise all my clients who are going to testify at
10 this Inquiry of the rules of the Inquiry and the provisions
11 that are in place relating to in camera hearings and the
12 use of confidentiality measures and "C" exhibits and all of
13 those kinds of things, and I can tell you that most of them
14 expressed to me the fact that they feel a strong desire to
15 request confidentiality measures and they feel a strong
16 desire to take advantage of the opportunity to not have
17 their name in the paper and to not be interviewed and to
18 not have their picture in the paper and to not be on the
19 web-cast.

20 Again, most of my clients who are going to
21 testify have had that conversation with me. The majority
22 of them, sir, however, tell me that they would feel too
23 guilty -- and guilty is always the word that seems to be
24 used -- they would feel too guilty about not doing this
25 publicly. Many of them feel they owe some kind of debt to

1 society or to fellow victims or to the community to show
2 everyone what a victim of abuse sounds like and what a
3 victim of abuse looks like.

4 Others, I would submit, are not able to make
5 that sacrifice and they request confidentiality measures
6 and they feel guilty, many of them, about doing so, but
7 they feel that it's in their best interest.

8 The reason I'm raising these issues is that
9 I am concerned that it may not be particularly difficult
10 for anyone to convince a victim feeling these conflicted
11 emotions and feeling this guilt that he is doing something
12 wrong by seeking to protect himself and by relying on the
13 ban.

14 If we adopt a system where that victim is
15 able to waive that protection on his own, I am concerned
16 that there's a possibility that people could be hurt and
17 that people could have their arms twisted, so to speak,
18 into waiving protections.

19 Ordering a ban, on the other hand, that must
20 be lifted prior to publication would permit these people a
21 fair opportunity to at least reflect on their decision and
22 to have these effects explained to them, if they wish.

23 The CBC has suggested that this system isn't
24 fair, requiring them to come back here and to, as the CBC
25 put it, retain a lawyer is not fair. My submission is that

1 that is not necessary. As the Citizens for Community
2 Renewal submit in their written materials, the media outlet
3 could easily ask that the ban be lifted or, I would submit,
4 it would take a little more than a phone call from the
5 victim covered by the ban to Commission counsel to put in
6 motion the efforts. Likely, I would imagine that they
7 could execute a consent and that would be the end of it,
8 and we could bring that to you. I would submit that is not
9 a hardship.

10 Finally, sir, I don't understand, and I
11 truly don't understand for a second why any of the
12 information that we need at this Inquiry hinges on the
13 names of victims.

14 To give you a concrete example of what has
15 happened at this Inquiry so far, it may well be relevant,
16 and I would submit it is relevant to this Inquiry to know
17 that two brothers and their sister were abused by Jean-Luc
18 Leblanc, but I do not understand for a second why we would
19 have to know that their last name is Burgess if they wish
20 to keep that fact confidential. I don't understand it.

21 How would anybody, in any way, be prohibited
22 from collecting the information listed in the CBC's
23 materials, for example, because they didn't know the names?
24 It just doesn't make any sense. The names of victims are
25 generally not relevant to this Inquiry.

1 We're dealing with allegations, in part, of
2 a ring of pedophiles and abusers at this Inquiry. There
3 are many reasons why we need to know the names or you'll
4 hear more that we may need to know the names of alleged
5 abusers, including that we require the names in order to
6 establish links and things of that nature. We need to know
7 that information for a variety of reasons. That
8 information is not the same. The requirement is not the
9 same when it comes to the names of victims. Where a name
10 is relevant or becomes relevant, the issue of a publication
11 ban can be revisited.

12 Until then, we should not and must not risk
13 re-victimizing these people by permitting the publication
14 of their names. This is especially so when the names
15 themselves do not contribute anything to the work of this
16 Inquiry or its goals.

17 Finally, the publication of these names
18 would do no more than satisfy the curiosities of the public
19 in most cases in knowing every sordid detail related in any
20 way to this Inquiry. Neither the public nor the media is
21 entitled to information that is irrelevant and potentially
22 so very damaging to these victims.

23 Finally, my last submission is in the
24 Citizens for Community Renewal's submissions, the last part
25 of their written submissions are -- they set out

1 submissions with respect to CBC's template for a
2 publication ban. The Victims Group fully adopts the CCR's
3 written submissions in that regard.

4 Subject to any questions you have, those are
5 my submissions.

6 **THE COMMISSIONER:** Thank you.

7 Mr. Cipriano or Foord.

8 **MR. CIPRIANO:** We have no submissions.

9 **THE COMMISSIONER:** Mr. Chisholm.

10 --- REPLY TP SUBMISSIONS BY/RÉPLIQUÉ SUR REPRÉSENTATION PAR

11 **MR. CHISHOLM:**

12 **MR. CHISHOLM:** Good morning, Mr.

13 Commissioner.

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

15 **MR. CHISHOLM:** My client agrees with the
16 protection afforded by a publication ban, with the CBC's
17 position that the protection is that of the victim. Should
18 a victim or an alleged victim expressly indicate that they
19 do not wish to be protected by a publication ban, then the
20 wishes should be respected and no such order should be
21 made.

22 However, the express waiver does not cover
23 the victim who, to borrow Mr. Callaghan's expression, the
24 person is on the train but doesn't know it.

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

1 **MR. CHISHOLM:** As Mr. Lee indicated, there's
2 a real potential here for people to suffer harm, tremendous
3 harm if their name is exposed to the public.

4 My client, Mr. Commissioner, would rather
5 see 10 victims have to come before the Commission and apply
6 to rescind the publication ban with respect to their
7 identity than to see even one victim's name exposed when
8 that victim would have preferred the protection of a
9 publication ban had they been given the choice.

10 I submit, Mr. Commissioner, that when you
11 weigh the desirability of avoiding disclosure of a victim's
12 identity where that person's choice, if asked, would be to
13 favour anonymity against the principle that hearings be
14 open to the public, the result favours protecting the
15 victim.

16 Mr. Wong, in his submissions, drew your
17 attention to various provisions in the Criminal Code and
18 the *Youth Criminal Justice Act*. However, I submit that
19 your focus, Mr. Commissioner, should be in clause 4(b) of
20 the *Public Inquiries Act* and that is what you have to focus
21 on in addressing this issue.

22 During Mr. Wong's submissions, Mr.
23 Commissioner, you asked him if you had a duty to protect
24 people. My answer to your question that you posed to Mr.
25 Wong would be that you certainly do have a duty to protect

1 people who may be at risk of suffering harm.

2 In Mr. Wong's submissions he stated an
3 embarrassment is not enough to impose a publication ban and
4 that economic harm is not a basis for imposing a
5 publication ban.

6 I would submit, Mr. Commissioner, that
7 clause 4(b) of the *Public Inquiries Act* would suggest
8 otherwise. I believe Mr. Wong may have been referring to
9 Mr. Justice LaForest's comments in *Canadian Broadcasting*
10 *Corporation v. New Brunswick (Attorney General)*, which was
11 one of the cases that Mr. Wong had provided to the
12 Commission. In that case Mr. Justice LaForest, after
13 noting that a criminal trial often involves the production
14 of highly offensive evidence, stated that mere offence or
15 embarrassment will not likely suffice for the exclusion of
16 the public from the courtroom.

17 What was under consideration in that case,
18 in the New Brunswick case was an order restricting public
19 access to the courtroom during a sentencing hearing, and
20 that order was made pursuant to subsection 46(1) of the
21 Criminal Code. Again, clause 4(b) -- when you look at
22 clause 4(b) of the *Public Inquiries Act*, if you consider
23 that aspect of the legislation that governs, I submit you
24 can arrive at a different conclusion.

25 Mr. Wong submitted that the names of victims

1 are very relevant to this Inquiry. My client would be of
2 the view that that statement is overly broad. While it may
3 be that with respect to some victims, their names may be
4 relevant to the mandate of this Inquiry, for the most part,
5 I would submit that nothing will turn on the name of a
6 victim or an alleged victim.

7 **THE COMMISSIONER:** Well, hold on a minute
8 now. That's a broad statement. I am dealing with specific
9 names on specific exhibits, and so I think we should focus
10 on the names and the people that we have today.

11 It may well be that tomorrow another
12 document will come with a different name that may well be a
13 different consideration.

14 **MR. CHISHOLM:** That's true.

15 And I'm simply responding to Mr. Wong's
16 statement. I'm replying to that where he says -- he takes
17 the broad statement that the names are relevant. My
18 client's position would be on the other end of that
19 spectrum.

20 But you're right, Mr. Commissioner; let's
21 deal with it on a case-by-case basis, one document at a
22 time.

23 **THE COMMISSIONER:** Yes.

24 **MR. CHISHOLM:** Mr. Wong's submissions were
25 premised on the basis that an order to determine the

1 neighbourhoods in which victims lived, the socioeconomic
2 background and the religious affiliation, it was necessary
3 to know the victims' names. My client would disagree with
4 that point, Mr. Commissioner.

5 Should you wish to determine such facts in
6 relation to victims, you can easily do so without naming
7 the victim.

8 Mr. Wong used the example of John Smith
9 being empowered to come forward as a result of finding out
10 that his old friend Mike Jones had testified, and that was
11 one of the possible benefits cited by Chief Justice Lamer
12 in *Dagenais* that could be achieved by not ordering a
13 publication ban. The Chief Justice in *Dagenais* also noted
14 a number of benefits that could come along with a
15 publication ban, and they would be that they could maximize
16 the chances that witnesses will testify because they will
17 not be fearful of the consequences of publicity.

18 The second point would be that it would
19 protect vulnerable witnesses, for example, child witnesses,
20 police informants and victims of sexual offences.

21 The third advantage cited by the Chief
22 Justice was it would preserve the privacy of individuals
23 involved in the criminal process; for example, the accused
24 and his or her family as well as the victims and the
25 witnesses and their families.

1 Lastly, there were more advantages set out
2 by Chief Justice Lamer, but the last one I would draw your
3 attention to was that it would encourage the reporting of
4 sexual offences.

5 Going back to Mr. Wong's example, I would
6 submit that it may be possible that John Smith may say, "Oh
7 my God, look what happened to Mike Jones when he came
8 forward." John Smith would then say that there was no way
9 that he wants to be thrust into the spotlight and will
10 decide that this Inquiry will have to get along without
11 him.

12 **THE COMMISSIONER:** So we're going to hide --
13 I guess it's like having children; you never know what
14 you're getting into until you get there. Is that what you
15 ---

16 **MR. CHISHOLM:** I can speak firsthand of
17 that, and that's correct, Mr. Commissioner.

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

19 **MR. CHISHOLM:** But again, this is the other
20 end of the spectrum that Mr. Wong addressed.

21 Going back to the *CBC v. New Brunswick* case,
22 Justice LaForest noted that privacy interests are more
23 likely to be protected when where failure to protect will
24 cause significant harm to the victim or to witnesses. Mr.
25 Justice LaForest -- that's at paragraph 42 -- noted that

1 this is particularly so of sexual assault cases.

2 The last issue I would like to address in
3 reply to Mr. Wong's submissions deals with who is the
4 public? Mr. Sherriff-Scott addressed this issue. Mr. Wong
5 submitted that the appropriate test was would the
6 information enable a reasonable member of the public,
7 unacquainted with the victim, to identify him or her as a
8 victim of sexual abuse? The question to be asked is what
9 about the reasonable members of the public who are
10 acquainted with the victim or the alleged victim?

11 Cornwall is not a large city, Mr.
12 Commissioner. Should members of the public who are
13 acquainted with the victim be able to determine the
14 identity of the victim? I submit that the appropriate test
15 would include protecting information from members of the
16 public who are acquainted with the victim. It is the
17 people who are acquainted with the victim that likely
18 matter more to the victim than a person that he or she does
19 not know. Therefore, it is that segment of the public that
20 the victim would want to avoid disclosing their intimate,
21 personal matters to.

22 Subject to your questions, Mr. Commissioner,
23 those would be my reply submissions.

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

25 Mr. Rose.

1 --- REPLY TO SUBMISSIONS BY/RÉPLIQUÉ SUR REPRÉSENTATION PAR
2 MR. ROSE:

3 MR. ROSE: Good morning, Commissioner.

4 THE COMMISSIONER: Good morning.

5 MR. ROSE: It was my argument originally
6 which starting this rolling. However, in reply to Mr.
7 Wong's submissions, I believe, Mr. Commissioner, you are
8 fully provided with reply argument. I would adopt and
9 strongly support everything you have heard today.

10 I have reviewed Mr. Sherriff-Scott's factum.
11 I find it excellent and I think it addresses every point of
12 this positively.

13 So those are my submissions.

14 THE COMMISSIONER: Thank you.

15 Mr. Thompson.

16 MR. THOMPSON: No submissions to make on
17 this matter.

18 THE COMMISSIONER: Thank you.

19 Ms. Makepeace?

20 MS. MAKEPEACE: Nothing to add. Thank you.

21 THE COMMISSIONER: Thank you.

22 Ms. Lalji?

23 MS. LALJI: Nothing to add. Thank you.

24 THE COMMISSIONER: Thank you.

25 Mr. Kozloff?

1 **MR. KOZLOFF:** Nothing to add. Thank you.

2 **THE COMMISSIONER:** Thank you.

3 Mr. Carroll?

4 **MR. CARROLL:** Nothing to add. Thank you.

5 **THE COMMISSIONER:** All right.

6 Mr. Baxter? Come forward. Rule number one,
7 you have to come forward.

8 **MR. BAXTER:** Thank you, Mr. Commissioner --

9 -

10 **THE COMMISSIONER:** I haven't decided yet.

11 **MR. BAXTER:** I understand. I would ask for
12 a brief right to address some of the points made by Mr. Lee
13 and Mr. Sherriff-Scott today. I do not intend to repeat
14 anything said by Mr. Wong, nor do I intend to reiterate
15 what's in the written materials.

16 **THE COMMISSIONER:** So what are you going to
17 do? You want to re-argue the issue?

18 **MR. BAXTER:** Not at all, sir. I'd like to
19 address certain new points brought up in oral argument
20 today.

21 **THE COMMISSIONER:** They were new points?

22 **MR. BAXTER:** They were, yes, sir.

23 **THE COMMISSIONER:** As opposed to reply?

24 **MR. BAXTER:** They were new points. In my
25 view, for instance, Mr. Lee advised certain of his victims

1 -- the position of certain of his victims.

2 **THE COMMISSIONER:** Okay. Go ahead.

3 --- REPLY TO SUBMISSIONS BY/RÉPLIQUE SUR REPRÉSENTATION PAR

4 **MR. BAXTER:**

5 **MR. BAXTER:** Very briefly.

6 For example, when Mr. Lee said the majority
7 of his clients wanted a non publication ban, that is not
8 what the proposal from CBC is about. If they come to you,
9 as I understand it, and ask for that ban, that's a
10 different matter.

11 **THE COMMISSIONER:** That doesn't mean that it
12 would necessarily be granted.

13 **MR. BAXTER:** I understand that ---

14 **THE COMMISSIONER:** We have to meet the test
15 after all.

16 **MR. BAXTER:** Exactly, Mr. Commissioner.

17 **THE COMMISSIONER:** Okay. Go ahead.

18 **MR. BAXTER:** When Mr. Chisholm talks about a
19 case-by-case approach -- pardon me, that was your response
20 to the question of relevance. We agree with that.
21 Relevance of the names of the victims has to be determined
22 on a case-by-by case approach and it may be relevant in
23 some and not in others. And I took your response to be
24 that's how you would be proceeding.

25 In short, the CBC order empowers the

1 victims. It gives them control over their stories and it
2 contemplates responsible reporting from the media, the
3 media going back, re-verifying the consent of the victim
4 and publishing. It is not contemplating willy-nilly
5 reporting.

6 And the fears of CBC are that as it's
7 currently structured, the order would, for instance,
8 prohibit the CBC from reporting on an old media story. So,
9 for example, it couldn't say, "In 1999, Mr. X approached
10 the Globe and Mail and said why."

11 **THE COMMISSIONER:** Yes, but the publication
12 ban that is being sought now are on individuals that, from
13 what I can understand, have never come forward, that are
14 probably just a byline in some police officer's notes or,
15 for example, a list of someone saying "Well, I was abused.
16 Let me look at the yearbook and I'll just jot down a few
17 names."

18 So I guess it would be incumbent -- not
19 incumbent on you because the onus is not on you; it's on
20 those seeking the ban, but I would have thought in reply
21 you'd say, "Well, wait a minute now. This person here has
22 already come forward publicly" and we'd have that argument.

23 But from what I understand, in all the
24 documents that we have, they are all people that have never
25 seen the light of day. Their names have never seen the

1 light of day.

2 MR. BAXTER: People that don't know they're
3 on the train is the metaphor.

4 THE COMMISSIONER: Right. Yes.

5 MR. BAXTER: Exactly.

6 And if that person comes forward now to a
7 media outlet and says "I want to tell my story" to a
8 Toronto radio station ---

9 THE COMMISSIONER: M'hm

10 MR. BAXTER: --- and the Toronto radio
11 station publishes it because the Toronto radio station
12 hasn't gone through each of the exhibits, and says "Is Mr.
13 Y's name in any exhibit?", that Toronto station is in
14 danger of being in breach of your publication ban.

15 THE COMMISSIONER: The onus is on them to --
16 ignorance of the law is no excuse kind of thing.

17 MR. BAXTER: They would certainly -- they
18 may be ignorant -- they may not be ignorant of your ban,
19 but if Mr. Y has come to them, given them an interview, has
20 said "In 2006, I am giving you this interview. I know
21 you'll be publishing it" ---

22 THE COMMISSIONER: M'hm.

23 MR. BAXTER: --- they may not be aware that
24 Mr. Y is in fact mentioned in some page deep in some
25 exhibit.

1 **THE COMMISSIONER:** No, but the publication
2 ban would be there on that -- on those names.

3 **MR. BAXTER:** But Mr. Y may not be aware that
4 he is mentioned. So Mr. Y may not tell the Toronto radio
5 station that "I am in an exhibit".

6 **THE COMMISSIONER:** Exactly. Except that
7 being the responsible media outlet that you are, anyone who
8 is covering "The Cornwall Public Inquiry" is on notice that
9 privacy concerns are very important here. And so that I
10 would say that the red flag -- I am not supposed to use
11 that expression but -- the red flag would come up and say
12 "I better check because I am the one who is affected by the
13 ban".

14 **MR. BAXTER:** And the logistics of that then
15 present certainly a challenge for us all, I imagine
16 everyone in this room. But imagine for a victim who wants
17 to respond during a news cycle to some evidence that was
18 heard here ---

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

20 **MR. BAXTER:** --- he hears Mr. Y give
21 evidence about something and he says "That's not true. I
22 want to go" -- and it's a Thursday afternoon. The evidence
23 comes in Thursday afternoon.

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

25 **MR. BAXTER:** "I want to tell CBC my side of

1 the story." He calls CBC, and under the proposed ban as I
2 understand it, Mr. Commissioner, the CBC would then have to
3 wait until Monday or Tuesday next, come back to you.

4 Now, I heard an interesting suggestion here
5 about a telephone call to Commission counsel. That is the
6 first idea of sort of expedited renewed consent and that
7 may have some viability. But on a proposal of coming back
8 in a full context like this, arguing whether the ban should
9 be lifted for Mr. Y who wants to get his story out on a
10 Thursday afternoon for the weekend papers ---

11 **THE COMMISSIONER:** Well, wait a minute now.
12 Wait a minute now. That doesn't fly very high with me in
13 the sense that if his story is so profound and so
14 meaningful, it could wait until Monday. I mean, just
15 because a few newspapers won't be sold or won't be able to
16 make the -- what's -- the scoop.

17 **MR. BAXTER:** I ---

18 **THE COMMISSIONER:** Do you agree with me that
19 whether or not a newspaper gets a scoop or gets it out on
20 Friday or Monday should fall second to the concerns of an
21 individual who may or may not be a victim in a proper
22 process of this Inquiry?

23 **MR. BAXTER:** You are absolutely right to
24 consider the -- pardon me, if I may nuance that?

25 **THE COMMISSIONER:** Yes.

1 **MR. BAXTER:** You're absolutely right to
2 consider that possibility. Might I also say though, not
3 the question of a scoop or not, but fair and accurate
4 reporting, balanced reporting requiring both sides of a
5 story might well ---

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

7 **MR. BAXTER:** --- involve a media seeking out
8 the response to evidence given in a public forum like this
9 from a Mr. Y who is mentioned, who wants his response out
10 there as part of the story about this Inquiry. And that is
11 the problem, it's that this Inquiry is public and when a
12 story comes, fair and balanced reporting requires getting
13 both sides of that. And if a victim wants his story as
14 part of "The Story", he or she should not be forced to wait
15 for four or six days, whatever it takes.

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

17 **MR. BAXTER:** So that's a practical response
18 to one of Mr. Sherriff-Scott's suggestions.

19 I've already spoken to you about the
20 restrictions as they are currently proposed -- restrictions
21 as Mr. Sherriff-Scott argues would put a media outlet in
22 jeopardy of unwittingly violating the ban, and you said
23 that the media outlet should have this present to mind.

24 **THE COMMISSIONER:** Don't you agree?

25 **MR. BAXTER:** Well, I certainly think they

1 will have it present to mind just because of this
2 discussion.

3 But then when we come back to the issue
4 about the past notoriety of these events and the importance
5 of being able to report on the past events, for example, in
6 1999, Mr. X filed a Statement of Claim with defendants Y
7 and Z alleging ABC ---

8 **THE COMMISSIONER:** I am sorry, but you're
9 speaking in a vacuum in the sense that if you look at the
10 names of the people that are named in the -- that are the
11 subject matter of this application, point to me to one of
12 them that has done that and we can talk about it. But as
13 far as I can see, there is nothing in those names that
14 would jump up at me and I guess -- have you had a copy of
15 these exhibits?

16 **MR. BAXTER:** I have not as yet, Mr.
17 Commissioner, had an occasion to review them all.

18 Mr. Commissioner, the point is an omnibus
19 ban going forward is very different from a case-by-case
20 consideration, as I understood you to be considering ---

21 **THE COMMISSIONER:** That's what I'm doing.

22 **MR. BAXTER:** --- with Mr. Lee.

23 **THE COMMISSIONER:** No, no, no. Maybe I am
24 not explaining myself correctly. All of this started where
25 we're trying to establish a procedure ---

1 **MR. BAXTER:** Understood.

2 **THE COMMISSIONER:** --- whereby if someone
3 was coming up with a notebook to put to the witness, if
4 there were any names in there that were there and maybe
5 there should be a ban or an editing, so I've looked at them
6 all, and what we did, and maybe unfortunately, is that we
7 kept putting them in a pile until we can hear all of the
8 submissions. And so I have looked at every single one of
9 those names and counsel have given me submissions about
10 these names very specifically. So I am not making any
11 ruling, maybe in general principles, outlining the general
12 principles, but that has to go to every single name on
13 everything.

14 Now, I know that puts you in a disadvantage,
15 and that's one of the concerns I have, is that if the media
16 want to be involved in a meaningful way in these
17 discussions, you're going to have to be here pretty well
18 every day because unfortunately on the Friday, the minute
19 the fellow -- someone else left -- there was another
20 confidentiality issue that I would have welcomed the CBC
21 intervention in.

22 **MR. BAXTER:** Well, I will certainly take
23 instructions with respect to getting a more permanent seat
24 in this room, Mr. Commissioner, but ---

25 **THE COMMISSIONER:** No, but just -- the media

1 is here and has a right to make submissions. All right.
2 What I said otherwise was you also have some
3 responsibilities to make sure that you're here.

4 **MR. BAXTER:** Obviously, that's a bigger
5 issue in terms of our ongoing participation.

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

7 **MR. BAXTER:** In terms of the proposal that's
8 before you today, just to close out, in our view, this
9 empowers the victims. It gives them back control of their
10 stories and it allows for responsible re-verification of
11 the consent of the victim before re-publication and it
12 eliminates having to come back into this complicated and
13 time-consuming proceeding on a case- by-case basis to lift
14 a ban.

15 **THE COMMISSIONER:** Well, just a minute now.
16 You see, you can't come up and say it's going to be time
17 consuming. We haven't even done one yet. And so you know,
18 at some point the CBC was saying he's going to have to hire
19 a lawyer and do all these things. Well, says who?

20 **MR. BAXTER:** Perhaps an expedited forum such
21 as telephone conversation or something like that is an
22 appropriate middle ground for you to strike in the exercise
23 of your discretion. I would leave that, of course, to you,
24 Mr. Commissioner.

25 **THE COMMISSIONER:** Thank you.

1 All right. So it is 12:30, which is fairly
2 timely. I take it that closes all of the issues now and
3 submissions that we have with respect to those matters
4 which I want to render a decision on, and I would suggest
5 that we break now until two o'clock and we begin the
6 submissions on the application from Mr. Cipriano with
7 respect to Father MacDonald's matter.

8 Mr. Wardle?

9 **MR. WARDLE:** Mr. Commissioner, I wonder if
10 before we break for lunch I could raise a delicate subject
11 which is the question of time limits.

12 **THE COMMISSIONER:** Time limits?

13 **MR. WARDLE:** There are a large number of
14 parties who wish to make submissions in connection with
15 Father MacDonald's motion and my suggestion is that all
16 counsel think about, over the lunch hour, some division and
17 some time limits on the argument. Otherwise, I very much
18 fear that we will be into tomorrow no matter how late we
19 sit tonight.

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

21 **MR. WARDLE:** And I understand that we have
22 witnesses on deck.

23 **THE COMMISSIONER:** For Thursday.

24 **MR. WARDLE:** For Thursday.

25 **THE COMMISSIONER:** Yes. All right.

1 Well, I don't know -- I'm leery on imposing
2 time limits, but I think it might be a good idea for
3 Commission counsel to canvas and to make it very clear to
4 parties that we do want to have all the hearings -- the
5 submissions done by today.

6 Mr. Foord?

7 **MR. FOORD:** Mr. Commissioner, before we
8 break, with respect to the procedure for the Application, I
9 would submit -- I know Mr. Sherriff-Scott's office sent an
10 e-mail around, I think it was yesterday, about this, that
11 the argument -- the way the Application is argued, there
12 should be a temporary publication ban. Otherwise, of
13 course, it would be moot when we're talking about those
14 issues. I suppose we could have an application for that
15 temporary publication ban and we could ---

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

17 **MR. FOORD:** I think that's what happened
18 with respect to the victims' application. That's the way
19 it was done. There was a temporary publication ban with
20 respect to the names of the victims. In fact, I think the
21 procedure was that you went in camera first ---

22 **THE COMMISSIONER:** To identify the names?

23 **MR. FOORD:** Right.

24 Wasn't that the procedure that took place?
25 I wasn't here, but I know when Mr. Rose raised it -- is

1 that -- am I correct in that?

2 **THE COMMISSIONER:** I don't know exactly what
3 you're talking about.

4 **MR. FOORD:** When this issue of the
5 publication ban with respect to the victims arose, right?

6 **THE COMMISSIONER:** Right.

7 **MR. FOORD:** Victims not necessarily on the
8 train, I understood that there was some discussion in
9 camera about the procedure and then arguments have been
10 made. I suppose that -- I don't know if some of the
11 victims' names are out there or not. I don't know that,
12 but ---

13 **THE COMMISSIONER:** They're not.

14 **MR. FOORD:** But certainly what I would be
15 saying is that we would -- there should be a temporary ban
16 if we're going to be mentioning throughout the argument the
17 applicant's name, for example because that is the very
18 issue.

19 If we're talking about -- some people are
20 going to be arguing about relevance.

21 **THE COMMISSIONER:** Well, just a minute.

22 Quite frankly, this takes me somewhat by
23 surprise and I think it might other counsel as well.

24 I am not prepared to rule on that at this
25 point. We might want to start with how are we going to

1 start this application after lunch, although part of the
2 application, I would have thought, if that's what you
3 really wanted, should have been on the table long before
4 this.

5 **MR. FOORD:** I had understood that that was
6 the procedure adopted with respect to the application in
7 relation to victims.

8 **THE COMMISSIONER:** Well, Mr. Wardle will
9 refresh our memory after lunch.

10 **MR. FOORD:** All right. Thank you.

11 **THE COMMISSIONER:** Thank you.

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

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

15 --- Upon recessing at 12:35 p.m./

16 L'audience est suspendue à 12h35

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

18 L'audience est reprise à 14h05

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

21 This hearing of the Cornwall Public Inquiry
22 is now in session. Please be seated. Veuillez vous
23 asseoir.

24 **THE COMMISSIONER:** Thank you.

25 **MR. DUMAIS:** Good afternoon, Commissioner.

1 **THE COMMISSIONER:** Good afternoon.

2 **MR. DUMAIS:** Before we get on with
3 arguments, Commissioner, if I can just set things up for
4 this afternoon?

5 If I can firstly start with filing the
6 different documents that were provided to us by different
7 parties? I do have the exhibit numbers identified.

8 So the first document is the Application
9 Record of Giuseppe Cipriano, and that should be Exhibit M5-
10 A1.

11 **THE COMMISSIONER:** A1, I think?

12 **MR. DUMAIS:** Correct.

13 **THE COMMISSIONER:** I thought you said 8.

14 **--- EXHIBIT NO/PIÈCE NO. M5-A1:**

15 Application Record - Father Charles
16 MacDonald and the Cornwall Public Inquiry

17 **MR. DUMAIS:** And there is as well -- and
18 just one thing with the Application Record, Mr. Cipriano
19 has identified at Tab 2, Schedule "L", as a rule, provides
20 the different pieces of correspondence that he intends to
21 rely on in his argument. Our Rules provide that
22 correspondence does not have to be produced since we do
23 have access to it on the computer, but we will add the
24 paper copies of the five pieces of correspondence to the
25 Application Record so that the paper copy reflects the

1 electronic copy.

2 The Joint Book of Authorities that was filed
3 should be Exhibit M5-A2.

4 --- EXHIBIT NO./PIÈCE NO. M5-A2:

5 Joint Book of Authorities - Father Charles
6 MacDonald and the Cornwall Public Inquiry

7 MR. DUMAIS: Submissions by counsel for
8 Jacques Leduc should be Exhibit M5-B1.

9 --- EXHIBIT NO./PIÈCE NO. M5-B1:

10 Factum on behalf of Jacques Leduc - Father
11 Charles MacDonald and the Cornwall Public
12 Inquiry

13 MR. DUMAIS: The Diocese has filed
14 submissions and authorities. That should be M5-C1.

15 --- EXHIBIT NO./PIÈCE NO. M5-C1:

16 Submissions and Authorities of the Episcopal
17 Corporation of the Diocese of Alexandria-
18 Cornwall in support of the Motion filed by
19 Michael Neville

20 MR. DUMAIS: As well, there is an affidavit
21 of Roxanne Landry. That should be Exhibit M5-C2.

22 --- EXHIBIT NO./PIÈCE NO. M5-C2:

23 Affidavit of Roxanne Landry

24 MR. DUMAIS: The Citizens for Community
25 Renewal has filed submissions. That should be M5-D1 and

1 their Book of Authorities should be M5-D2.

2 --- EXHIBIT NO./PIÈCE NO. M5-D1:

3 Submissions in response to the Application
4 of Father Charles MacDonald of the Citizens
5 for Community Renewal

6 --- EXHIBIT NO./PIÈCE NO. M5-D2:

7 Brief of Authorities of Citizens for
8 Community Renewal

9 MR. DUMAIS: Cornwall Police Services have
10 filed submissions only. That should be M5-E1.

11 --- EXHIBIT NO./PIÈCE NO. M5-E1:

12 Factum of the Cornwall Police Services Board
13 and the Cornwall Community Police Service

14 MR. DUMAIS: The Children's Aid Society has
15 filed submissions as well, and that should be M5-F1.

16 --- EXHIBIT NO./PIÈCE NO. M5-F1:

17 Factum of the Children's Aid Society of the
18 United Counties of Stormont, Dundas and
19 Glengarry in Response to Father Charles
20 MacDonald's Motion Seeking a Publication Ban

21 MR. DUMAIS: And their Book of Authorities,
22 the Children's Aid Society's, should be M5-F2.

23 --- EXHIBIT NO./PIÈCE NO. M5-F2:

24 Book of Authorities of the Children's Aid
25 Society of the United Counties of Stormont,

1 Dundas and Glengarry in Response to Father
2 Charles MacDonald's Motion Seeking a
3 Publication Ban

4 **MR. DUMAIS:** The OPPA have filed
5 submissions, and they should be marked as M5-G1.

6 **--- EXHIBIT NO./PIÈCE NO. M5-G1:**

7 Submissions on behalf of the Ontario
8 Provincial Police Association

9 **MR. DUMAIS:** And the OPP submissions should
10 be marked as M5-H1.

11 **--- EXHIBIT NO./PIÈCE NO. M5-H1:**

12 Submissions in Response to the Application
13 of Father Charles MacDonald of the Ontario
14 Provincial Police - Motion Date November 15,
15 2006

16 **MR. DUMAIS:** The Victims Group are filing
17 submissions and authorities which should be marked as M5-
18 I1.

19 **--- EXHIBIT NO./PIÈCE NO. M5-I1:**

20 Submissions and Authorities - Victims Group

21 **MR. DUMAIS:** And they filed as well two
22 affidavits which are enclosed in one volume. They are the
23 affidavits of Terry Saunders and Rob Talach, and they
24 should be marked as M5-I2.

25 **--- EXHIBIT NO./PIÈCE NO. M5-I2:**

1 Affidavit of Terry Saunders and Robert
2 Talach

3 **MR. DUMAIS:** And the CBC has filed
4 submissions and an Affidavit of Mark Blackburn. They
5 should be marked as M5-J1.

6 **--- EXHIBIT NO./PIÈCE NO. M5-J1:**

7 Submissions and Affidavit of Mark Blackburn
8 of the CBC

9 **MR. DUMAIS:** And their Book of Authorities
10 should be filed as M5-J2.

11 **--- EXHIBIT NO./PIÈCE NO. M5-J2:**

12 Book of Authorities - Responding Party -
13 CBC

14 **THE COMMISSIONER:** All right.

15 **MR. DUMAIS:** So essentially, Commissioner,
16 there is one moving party which is, I believe, Mr. James
17 Foord who will be arguing the Motion on behalf of Father
18 Charlie. There are two parties that are joining him, the
19 Diocese and Jacques Leduc. The opposing parties are the
20 CCR, the OPP, the OPPA, the Victims Group, the Children's
21 Aid Society and, finally, the CBC. All other parties have
22 indicated that they were not taking a position on the
23 motions, are not participating.

24 We did go around as well, Commissioner, to
25 get a sense of how long each party will be. It's expected

1 that the moving party and the two parties joining them will
2 take approximately an hour and a half. I'm advised that
3 the opposing parties will take approximately two hours, and
4 then the moving party would be entitled to reply. Given
5 that timeframe, I'm suggesting perhaps they should be given
6 30 minutes to reply. That way, each side has two hours to
7 present its arguments, and we should, as much as possible,
8 try to respect that timeframe.

9 **THE COMMISSIONER:** All right.

10 **MR. DUMAIS:** So these are my submissions for
11 now, Commissioner. I will invite Mr. Foord to the stand.

12 **THE COMMISSIONER:** Thank you.

13 **MR. FOORD:** Good afternoon, Mr.
14 Commissioner.

15 **THE COMMISSIONER:** Good afternoon, Mr.
16 Foord. How are you doing?

17 **---MOTION PRESENTED BY MR. FOORD ON BEHALF OF FATHER**
18 **CHARLES MACDONALD/REQUÈTE PRÉSENTÉE PAR M. JAMES FOORD AU**
19 **NOM DU PÈRE CHARLES MACDONALD:**

20 **MR. FOORD:** As you know, the Application
21 today that the Applicant brings is for a publication ban,
22 and the primary issue is whether the Applicant's rights and
23 interests ought to be protected by minimally restricting
24 information available for publication that has little or
25 nothing to do with the efficiency of the institutional

1 response.

2 In particular, Mr. Commissioner, we are
3 seeking to have a publication ban of the name of the
4 Applicant and any details tending to identify him.

5 And what that would entail, in my
6 submission, is that the webcast would have to be turned off
7 when such evidence was being led. The transcripts would
8 have to be redacted to remove such reference to details and
9 name and that, therefore, the relief sought is with respect
10 to publication only -- it's a traditional publication ban -
11 - but the publication would have access both to the Inquiry
12 here and to the documents which would be filed. They
13 simply would be subject to a publication ban.

14 **THE COMMISSIONER:** I'm sorry, I missed that.
15 The transcripts would be redacted?

16 **MR. FOORD:** Right.

17 **THE COMMISSIONER:** In a traditional
18 publication ban the transcripts are not redacted, are they?

19 **MR. FOORD:** I would take the view that in
20 this particular case, given that transcripts are available
21 online on a website, that it would be tantamount to a
22 publication, and in order to respect the public spirit of a
23 publication ban, the transcripts would have to be redacted
24 with respect to the issues covered by the publication ban.
25 That's the argument.

1 **THE COMMISSIONER:** Okay.

2 **MR. FOORD:** Unlike some other motions you
3 may have heard, this motion is brought with respect to a
4 very particular and specific context.

5 **THE COMMISSIONER:** I'm sorry to bother you,
6 and I promise I won't for a while anyways, you have two
7 other alternatives. So what you're saying is you want --
8 the relief sought is you want the name and any details --
9 well, wait a minute here. It says:

10 "To make confidential any details and
11 statements containing criminal
12 allegations against the Applicant."

13 **MR. FOORD:** Right.

14 As well, that's correct; you're quite right.
15 It would be our position that although primarily a
16 relevance matter, that the specific details of the actual
17 allegation of misconduct should also be subject to a
18 publication ban on the basis, twofold, that it's simply not
19 relevant to the Inquiry and, secondly, that it may have a
20 significant prejudicial effect.

21 **THE COMMISSIONER:** Okay. I'm just wondering
22 -- I thought we were going to do that on an individual
23 basis so that when it came time to -- let's assume for a
24 minute -- and what we're looking at is a witness coming up
25 and saying, "Father, your client sexually assaulted me and

1 I..." and they go into the details of what that was all
2 about. I thought we were going to wait and evaluate each
3 statement and see how it goes.

4 **MR. FOORD:** I think that's what we would
5 have to do practically. If we're successful in this motion
6 and in principle, we would have to look at the specific
7 details then. That's right.

8 **THE COMMISSIONER:** Yes, but I don't know
9 that I can rule on that without having the specific
10 document in front of me so I can deal with relevancy and
11 those things.

12 **MR. FOORD:** Okay.

13 **THE COMMISSIONER:** I'm just throwing that
14 out to you.

15 **MR. FOORD:** Right.

16 I suppose -- we have the anticipated
17 evidence of the particular witness in question. We are
18 focused on that particular person, not anyone else. That's
19 John MacDonald.

20 **THE COMMISSIONER:** John MacDonald, right.

21 **MR. FOORD:** Right.

22 And so I think from his proposed Will Say,
23 this wouldn't be an issue, but with respect to the
24 documents that are going to be relied on by the Commission
25 counsel, the issue will arise when there's specific details

1 of the allegation.

2 **THE COMMISSIONER:** So isn't that when we
3 should be dealing with this, because we're doing it in a
4 vacuum then if we're doing it this way.

5 **MR. FOORD:** I don't know. I think that
6 there has to be -- there has to be some lead time of making
7 your argument before you're actually into the problem. It
8 seems to me it's only prudent. I think that's why we
9 brought the Application, upon receiving the anticipated
10 evidence. Certainly, it's not an issue with respect to the
11 name, the name of the Applicant.

12 I don't think it should be an issue with
13 respect to the name of the complainant in this particular
14 instance because those are matters that would obviously
15 tend to identify him.

16 Where there may be some room for debate, I
17 suppose, is with respect to the issue of the actual
18 allegations, and the issue I would say is how could those
19 be relevant to the mandate of the Inquiry? How could
20 specific allegations tell us anything about the
21 institutional response to complainants' information? So
22 that is the issue.

23 I think it's important as you mentioned
24 "vacuum", that we are focused on a very particular
25 contextual circumstance, the evidence of John MacDonald

1 alone. In circumstances where the Inquiry is not focused
2 on determining the guilt or the merit of the allegations,
3 and that therefore the cross-examination is going to be
4 restricted in that regard ---

5 **THE COMMISSIONER:** Who says that?

6 **MR. FOORD:** Well, that is our understanding
7 from Commission counsel; there is correspondence. It's at
8 Tab 7 of the -- it's the seventh letter from Mr. Engelmann,
9 Commission counsel, to Mr. Cipriano.

10 **THE COMMISSIONER:** I'm sorry; where is that?

11 **MR. FOORD:** Schedule L. It will be the
12 seventh letter in Schedule L.

13 **THE REGISTRAR:** This is all public?

14 **THE COMMISSIONER:** I don't know.

15 **THE REGISTRAR:** Can I put it on the public
16 screens?

17 **THE COMMISSIONER:** Sure.

18 **MR. FOORD:** It's dated November 8th.

19 **THE COMMISSIONER:** Okay. So what's it say?
20 Do I have a copy of that, Madam Clerk?

21 **THE REGISTRAR:** Yes.

22 **THE COMMISSIONER:** Okay.

23 **MR. FOORD:** Mr. Commissioner, the letter
24 reads, responding to Mr. Cipriano regarding cross-
25 examination of John MacDonald:

1 "Further to your letter of earlier
2 today, we are writing to respond. The
3 Commissioner's decision on your Motion
4 and on a number of occasions has said
5 that statements from the alleged
6 victims would not be tendered for the
7 truth of their contents. We provided
8 you just yesterday with excerpts from
9 the Commissioner's ruling in the
10 divisional court's decision confirming
11 this."

12 Now, ---

13 **THE COMMISSIONER:** But it's the last
14 paragraph:

15 "Yes, of course we will object to your
16 proposal."

17 No ---

18 **MR. FOORD:** Right. Right. Into effective
19 cross-examination of the credibility of the complainant --
20 of the merits, right? So it is quite clear, Commissioner,
21 Commission counsel's view is that that's not the issue and
22 that's not going to be allowed. They'll be objecting to
23 that.

24 **THE COMMISSIONER:** That's what they're
25 objecting to.

1 **MR. FOORD:** All right.

2 **THE COMMISSIONER:** But I'd have to rule on
3 it, right?

4 **MR. FOORD:** Right.

5 Well, we take a position taken by Commission
6 counsel seriously, deciding ---

7 **THE COMMISSIONER:** Oh, absolutely, but ---

8 **MR. FOORD:** --- how we're going to approach
9 things.

10 If it is the case that there is no cross-
11 examination as to the merit, then there's an absence of the
12 procedural safeguards you would find in a trial when we
13 seek to protect the reputation of our client, the
14 Applicant, if you're unable to challenge the veracity of
15 the claims, which taint his reputation.

16 **THE COMMISSIONER:** Well, I'm not saying one
17 way or the other. All I'm saying is that you've got a
18 letter from Commission counsel ---

19 **MR. FOORD:** Right.

20 **THE COMMISSIONER:** --- and if you're saying
21 that they speak for me on a ruling on a specific issue, I
22 don't think that's correct.

23 **MR. FOORD:** All right.

24 Well, taking that under advisement and
25 considering that that is one possible situation ---

1 **THE COMMISSIONER:** Yes.

2 **MR. FOORD:** --- we may face, and we
3 recognize that because we've been told that, ---

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

5 **MR. FOORD:** --- but it may not be, to the
6 extent that you've indicated, we do know that the Inquiry
7 will not be focused on determining, of course, the issue of
8 guilt or innocence, and I take it in the spirit that that's
9 what Mr. Engelmann meant and why the merits weren't going
10 to be allowed to be examined by us.

11 **THE COMMISSIONER:** And I'm not saying that
12 the merits will be permitted.

13 **MR. FOORD:** Right.

14 **THE COMMISSIONER:** I don't know. We haven't
15 come to that bridge yet.

16 **MR. FOORD:** Yes. Except to say I think the
17 position all along has been, I understand, from the rulings
18 and Divisional Court and everything else and from the Order
19 -- the Terms of Reference that certainly the Inquiry is not
20 looking into determining findings of guilt or innocence.

21 **THE COMMISSIONER:** Absolutely.

22 **MR. FOORD:** Right.

23 **THE COMMISSIONER:** And we've been preaching
24 that from the beginning.

25 **MR. FOORD:** We have.

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

2 **MR. FOORD:** So we have a situation in this
3 context. There may be a serious concern about the ability
4 of the Applicant to defend himself against allegations when
5 he is innocent of those allegations.

6 We have a situation where there is a
7 complaint made. If we look at the anticipated evidence of
8 John MacDonald, there's a complaint made; there's a charge
9 laid; there's a trial, and there's a stay.

10 The issues of undercharging or not charging
11 do not seem to arise as relevant factors whatsoever with
12 respect to the anticipated evidence of Mr. MacDonald.

13 So it would appear that the relevance of Mr.
14 MacDonald's evidence in relationship to naming or
15 identifying the Applicant is not significant.

16 What is clear, in my submission, Mr.
17 Commissioner, is that as referenced in the *Mentuck* test,
18 the *Dagenais/Mentuck* test, there is a significant risk to
19 the administration of justice here in the form of the
20 rights and interests of the Applicant, his reputation, his
21 privacy, his innocence. And that has to be weighed
22 ultimately against the openness principle in the context of
23 how relevant the information is and how important it is
24 that it be published.

25 It's important to remember that what we're

1 proposing is that the Commission and counsel would have --
2 all the parties would have available all the evidence and
3 be able to make determinations upon all the evidence.
4 We're talking about a balancing of the innocence of the
5 Applicant, his reputation and privacy, his security
6 interest against the limited restriction of a publication
7 ban of just those -- just that information that would tend
8 to identify him and thereby hurt him.

9 I think that everyone would agree that the
10 approach taken by this Commission, this Inquiry, should be
11 one where the least harmful and prejudicial approach to
12 people's reputations is taken. That applies to everyone.
13 And I would submit that the less probative value and the
14 less relevance the evidence at issue has, the greater the
15 risk of unnecessary prejudice and harm to the Applicant.

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

17 **MR. FOORD:** I'd ask the Commissioner to
18 consider that the Applicant is very much himself a victim.
19 He is 73 years of age. He has been under scrutiny,
20 sometimes intense scrutiny of the media for 14 years. He
21 has had all criminal proceedings against him stayed, which
22 is a final determination of the matter tantamount to an
23 acquittal. He has had the claim made against him in the
24 civil context, criminal injuries compensation context,
25 dismissed on a balance of probabilities, and all civil

1 claims, certainly arising out of John MacDonald have been
2 dismissed as abandoned.

3 That is a very, very significant contextual
4 fact. He is innocent. There is no effective way of any
5 forum ever revisiting the issue of his innocence. His
6 innocence is an irrebuttable presumption, and that is a
7 factor to be considered in assessing what we do to his
8 reputation, his privacy interest, his security interest and
9 his innocence.

10 The *Public Inquiries Act* and Section 39 of
11 the rule governing the application that we make today
12 contemplates that there is a necessity to balance these
13 interests because public inquiries implicitly risk damage
14 to reputation and people get hurt by them. We've seen that
15 in the *Krever Inquiry* and in many other cases.

16 If I can turn you to page 17 of my Factum at
17 paragraph 52:

18 "The privacy interest of the innocent
19 person and the stigma associated with
20 allegations of child sexual assault
21 make it necessary to protect the
22 identity of the Applicant. Only a
23 publication ban on identity and
24 information that tends to identify him
25 can preserve these interests of the

1 Applicant."

2 And I read from Re CBC 2005. That's located at Tab 14 in
3 the Joint Case Book.

4 **THE COMMISSIONER:** But they were talking
5 about an unnamed person. Is that correct?

6 **THE REGISTRAR:** Which, counsel?

7 **MR. FOORD:** Sorry, it's Re CBC 2005, 2005
8 CCC third, 435, at paragraph 29.

9 I refer to that case, if we're at the right
10 part here, which is paragraph 29.

11 **THE COMMISSIONER:** Yes. Oh, the unnamed
12 person.

13 **MR. FOORD:** Yes, yes.

14 "There is no effective means of
15 protecting the privacy interests of the
16 unnamed person, in this case, short of
17 banning the publication of his name or
18 information by which he might be
19 identified. The stigma associated with
20 the charge of sexual assault or related
21 charges is obvious, and especially in
22 the case of a professional in a
23 sensitive career such as medicine."

24 If we go to the next paragraph, which is 31,
25 starting with "The harm...", and I'll just read it:

1 "The harm to the unnamed person's
2 family of allegations of sexual assault
3 are also obvious and require no real
4 proof. In a small town such as this
5 one in which the unnamed person
6 practiced, the stigma attached to
7 allegations of sexual assault against a
8 physician would be difficult, if not
9 impossible, to erase, even if they were
10 later proved to be untrue. It cannot
11 be presumed that every person who heard
12 of the initial charges would hear of
13 the later exoneration. And despite the
14 constitutional right to the presumption
15 of innocence, in my respectful view, it
16 is human nature for some people to
17 believe that there must be some element
18 of truth to such allegations or they
19 would not have been made. The damage
20 to one's reputation is incalculable.
21 One cannot unscramble an egg."

22 So the important contextual backdrop, which
23 I've described as having four elements here, starts with
24 the fact that this Applicant is innocent, and it's his
25 innocence and his privacy in the context of his innocence

1 which is at stake.

2 If I can just have one moment?

3 (SHORT PAUSE/COURTE PAUSE)

4 MR. FOORD: If I can turn you at page 37 of
5 my Factum, or better put, Tab 3, of the Joint Book of
6 Authorities, referring, Mr. Commissioner, to the case of
7 *MacIntyre*.

8 THE COMMISSIONER: I'm sorry; page?

9 MR. FOORD: Tab 3.

10 THE COMMISSIONER: Yes.

11 MR. FOORD: The case of *MacIntyre*.

12 THE COMMISSIONER: I have it.

13 MR. FOORD: At paragraph 37.

14 THE COMMISSIONER: Are the paragraphs
15 numbered?

16 What page?

17 MR. FOORD: It should be page 186 to 187.

18 If I can just have a moment please?

19 (SHORT PAUSE/COURTE PAUSE)

20 MR. FOORD: I'd ask just to put the page
21 from the Factum up and that way, we can reference the
22 quotes since it is there, page 10 -- page 11 actually.
23 Sorry.

24 And there, we write:

25 "The Supreme Court of Canada stated

1 that the protection of the innocence is
2 a value of super ordinate importance,
3 which outweighs the presumption of
4 openness in judicial proceedings."

5 In *MacIntyre and Nova Scotia* the Supreme
6 Court held as follows:

7 "In my view, curtailment of public
8 accessibility can only be justified
9 whether is present the need to protect
10 social values of super ordinate
11 importance. One of these is the
12 protection of the innocent. Many
13 search warrants are issued and
14 executed, and nothing is found. In
15 these circumstances, does the interest
16 served by giving access to the public
17 outweigh that served to protecting
18 those persons whose premises have been
19 searched and nothing has been found?
20 Must they endure the stigmatization to
21 name and reputation which would follow
22 publication of the search? Protection
23 of the innocent from unnecessary harm
24 is a valid and important policy
25 consideration. In my view, that

1 consideration overrides the public
2 access interest in those cases where a
3 search is made and nothing is found.
4 The public right to know must yield to
5 the protection of the innocent. If a
6 warrant is executed and something is
7 seized other considerations come to
8 bear."

9 Well, here, we have by analogy an individual
10 who has his innocence intact and undisturbable. And we
11 have an individual whose claims against him have been
12 determined on the balance of probability not to have merit.
13 That's a significant, a very, very significant fact.

14 **THE COMMISSIONER:** By an administrative
15 tribunal.

16 **MR. FOORD:** That's right; on the civil
17 standard. Right.

18 **THE COMMISSIONER:** Can I ask you a question
19 then?

20 **MR. FOORD:** Sure, you can.

21 **THE COMMISSIONER:** In this case, it's a
22 search warrant, which means that the person whose home is
23 searched is not known to the public.

24 **MR. FOORD:** Yes.

25 **THE COMMISSIONER:** Is there a difference

1 with Father MacDonald because everybody knows that his
2 house has been searched, and I use that figuratively
3 speaking, of course.

4 **MR. FOORD:** Right. So the issue becomes, in
5 my submission, and it's a good one, does the fact that
6 someone has endured irrevocable prejudice in the past mean
7 that the Tribunal ---

8 **THE COMMISSIONER:** But that's a conclusion
9 you're making there, irrevocable.

10 **MR. FOORD:** Yes, oh, I can refer to the
11 affidavit, which is in our application record.

12 **THE COMMISSIONER:** We can get to that
13 whenever you want to. It doesn't have to be now.

14 **MR. FOORD:** Okay. Perhaps it is useful to
15 refer to it now.

16 **THE COMMISSIONER:** Sure.

17 **MR. FOORD:** That's at Tab 3.

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

19 **MR. FOORD:** I mean, we can start at page 2
20 of that affidavit:

21 "Since 1992, when the allegations first
22 surfaced, my life was forever altered.
23 The allegations have affected and
24 continue to affect every aspect of my
25 life in adverse ways."

1 And if I turn you to Tab 7:

2 "I have spent thousands..."

3 Paragraph 7:

4 "I have spent thousands of dollars on
5 legal fees. I continue to live under
6 the poverty line."

7 **THE COMMISSIONER:** Okay, well ---

8 **MR. FOORD:** Eight.

9 **THE COMMISSIONER:** Just a minute, just a
10 minute.

11 **MR. FOORD:** Okay.

12 **THE COMMISSIONER:** I don't know if Mr.
13 Sherriff-Scott has left the room but -- Oh, I'm sorry, I'm
14 sorry.

15 I don't know but I thought in the back of my
16 mind that at the beginning it was that the Diocese had
17 incurred all of these legal fees and that it really wasn't
18 coming out of his pocket. And then if he continues to live
19 under the poverty line, well, like I don't know what
20 happens to a priest after they retire.

21 **MR. FOORD:** Right.

22 **THE COMMISSIONER:** And so maybe he would be
23 living under the poverty line in any event because priests
24 normally don't enjoy lavish lifestyles. Do you see what I
25 mean?

1 **MR. FOORD:** Okay. Well, the uncontradicted
2 evidence is that he spent that money and I take that point.

3 Let's turn to paragraph 8:

4 "The allegations have caused me the
5 loss of dignity and respect among those
6 in my community. Due to the intense
7 media scrutiny, my reputation and
8 dignity have been torn to shreds and
9 damaged in an irreparable way."

10 He then references news articles that have
11 characterized him as being a member of a clan of
12 pedophiles.

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

14 **MR. FOORD:** At paragraph 12 on page 3 of his
15 affidavit:

16 "As a result of the charges and harmful
17 stigma associated to them, my health
18 has deteriorated and continues to do
19 so. I have suffered from depression
20 and intense stress and anxiety having
21 serious allegations hanging over my
22 head. Many dollars have been spent on
23 medications to deal with my nerves and
24 stress, which has increased a
25 hundredfold."

1 That is the uncontradicted evidence of the
2 Applicant, and that is borne out by the case law which if I
3 can just take one moment here. In *Mills*, which is Tab 12
4 of the case book at paragraph 146 ---

5 **THE COMMISSIONER:** *R. v. Mills.*

6 **MR. FOORD:** Yes, thank you.

7 **THE COMMISSIONER:** Paragraph 146?

8 **MR. FOORD:** Yes, paragraph 146, where the
9 Supreme Court has held that:

10 "The security of the person is deprived
11 when a decision stigmatizes the person.
12 There is a loss of privacy, disruption
13 of private life, uncertainty of outcome
14 to the overlong subjection to the
15 vicissitudes of criminal accusations."

16 So the Applicant's position that he states
17 in his affidavit is borne out by the case law. I
18 think the courts understand that someone
19 subjected to these matters over long periods of
20 time do suffer, and it does affect the security
21 of that person. And of course the psychological
22 integrity of the individual is part of that
23 security of the person.

24 **THE COMMISSIONER:** I'm sorry. That's under
25 section 11(b). That would be delay, right?

1 **MR. FOORD:** Well, it is actually under
2 section 7 as a security interest. It would also be under
3 11(b) as a prejudicial factor. That's right.

4 **THE COMMISSIONER:** No, but you're siding for
5 additionally under 11(b), "The security of the person...",
6 and that's when they're talking about that ---

7 **MR. FOORD:** Right.

8 **THE COMMISSIONER:** And that's in the case of
9 a criminal prosecution

10 **MR. FOORD:** Yes.

11 **THE COMMISSIONER:** --- where he is very much
12 at risk.

13 **MR. FOORD:** Right, but also it's the stigma;
14 how he is branded and perceived by the public which
15 compromises his dignity, destructs his private life. And
16 it's not just the risk that he is going to go to jail, it's
17 the whole package, and that package, if it is continued to
18 be visited upon him, the prejudice continues. And it would
19 be my submission, getting to the end of this, that this
20 Commission should do everything that it can not to visit
21 the prejudice on him and not to re-victimize him because he
22 very much has been victimized by the process.

23 If I can just have one moment there?

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

25 **MR. FOORD:** Thank you.

1 At page 13 of my Factum, I refer to *Vickery*
2 *v. Nova Scotia*, which you will find at Tab 7 of the case
3 book at paragraph 36 through 38.

4 **THE COMMISSIONER:** I'm sorry, 37?

5 **MR. FOORD:** Yes, 36 through 38, Mr.
6 Commissioner.

7 **THE COMMISSIONER:** Thank you.

8 **MR. FOORD:** This is in reference that:

9 "A person who is declared innocent
10 should not have his innocence attacked
11 and diminished in future legal
12 proceedings."

13 And I read from that case.

14 "The appellant would have us interpret
15 the expression 'innocent person'
16 extremely narrowly. Dickson Jay did
17 not claim to define exhaustively the
18 limitation of rights of access. He
19 said this:..."

20 That's actually not directly relevant. It's
21 the next paragraph:

22 "He also spoke of innocent persons who
23 are the subject of search warrants as
24 entitled to protection from the
25 stigmatization to name and reputation,

1 which would follow publication of the
2 search. I find it difficult to fathom
3 how Nugent could be considered anything
4 other than an innocent person within
5 MacIntyre. Someone who has been
6 accused and convicted of a serious
7 crime on the basis of self-
8 incriminating evidence obtained in
9 violation of his Charter of Rights
10 should not be made to bear the stigma
11 resulting from unrestricted repetition
12 of the very same illegally obtained
13 evidence."

14 And in that case, Mr. Commissioner, you have
15 an individual who made a confession that was
16 unconstitutionally obtained, and he has the protection of
17 his innocence.

18 In this case, there's been a stay of
19 proceedings. Civil actions have been dismissed as
20 abandoned and the voracity of the claim has been dismissed
21 on the balance of probabilities in the context of the
22 Criminal Injuries Compensation Board.

23 The Applicant is simply most deserving of
24 the protection of his innocence and reputation.

25 Getting to the issue of the balancing of the

1 relevance to the harm that is occasioned or is at risk for
2 Mr. Applicant, this isn't a case where if you have -- if
3 you get chickenpox, for example, and you build up an
4 immunity, you don't suffer anymore if you're visited with
5 the harm. It's not the same thing. It would be, in my
6 submission, unconscionable to try to measure the re-
7 victimization as being less than victimization. The whole
8 purpose of the publication ban is in the Criminal Code and
9 the expert evidence you contextually heard about victims
10 talked about that. That's why they have publication bans
11 in the Criminal Code to protect victims from being
12 revictimized. And the same principle applies here, in my
13 submission, to the Applicant.

14 Unless it is absolutely necessary to the
15 advancement of the interests of the Public Inquiry to
16 identify him and name him, it is unconscionable to do so,
17 given that it will have the prejudicial effects outlined.
18 And as I have indicated, the relevance of his name, the
19 relevance of anything that would tend to identify him is
20 either absent or very speculative at best. But what is not
21 speculative is the incredible prejudice to his privacy
22 interests, to his security interests, to his reputation and
23 to his innocence, which is unassailable.

24 I would urge, therefore, this Commission to
25 consider that the Applicant who has been victimized for 14

1 years in the media to some extent by the process, that this
2 Commission should not unnecessarily facilitate any further
3 victimization by it. Anything at all, any harm to him at
4 all is not justified given the absence of significant,
5 relevant purpose.

6 Remember that the Commission will hear the
7 evidence, counsel will deal with the evidence. It is
8 access to the public, will be available. The only matter
9 here is restricting the harm through a limited publication
10 ban, and that is what we are asking.

11 The Commission can still carry on its work,
12 it can still carry out its mandate. We are not suggesting
13 anything that would interfere with that, and I would submit
14 what we are suggesting is a minimal impairment to the
15 aspect of publication only. That, in my view, strikes an
16 appropriate balance. The public has access. They don't
17 have everything published when it's not relevant, and that
18 lack of relevance is dwarfed by the significant prejudice.

19 So in my submission it is a question on the
20 balancing aspect of the test in *Dagenais/Mentuck* that the
21 significant prejudice clearly is outweighing the relevant
22 information and that justifies the publication ban as
23 suggested. The name, information tending to identify him
24 and I realize that, as you mentioned earlier, there may be
25 issues that are harder to deal with until we address them,

1 but if the spirit of these submissions is accepted as
2 reasonable and correct in law, then we must cross that
3 bridge as we deal with the specific information. Perhaps
4 it should be let in and I think the fact that we don't have
5 all the details before us is not something that can stop us
6 from dealing with it.

7 So I think that those are my submissions,
8 subject to any questions you might have. I'll just speak
9 to Mr. Cipriano.

10 **THE COMMISSIONER:** Thank you.

11 **MR. FOORD:** In summation then, not the
12 computer program but summation of my submissions, the
13 restrictions -- and I can turn I suppose to *Re v. CBC*;
14 again. That's at Tab -- Mr. Cipriano, Tab 14 -- at page
15 665, sorry, at paragraphs 39 and 44. I appreciate that.
16 That's re CBC:

17 "Restrictions on the publication of a
18 person's name and information which
19 tends to identify him are seen as a
20 reasonable compromise and considerably
21 less restrictive than an outright ban
22 of publication of the evidence.

23 Restrictions on the publication of a
24 person's name..."

25 I just repeated that.

1 "In appropriate cases, litigants are
2 permitted to commence actions under
3 pseudonyms for example in the case of
4 actions for damages for sexual assault.
5 The banning of the publication of the
6 name of the unnamed person or evidence
7 by which he could be identified while
8 allowing other evidence to be published
9 is a reasonable compromise to full
10 disclosure in this case. And that's
11 what we're suggesting; it is a
12 reasonable compromise and balancing of
13 the interest.

14 So subject to your comments, those are mine.

15 **THE COMMISSIONER:** Thank you.

16 **MR. FOORD:** Thank you.

17 **THE COMMISSIONER:** It is Mr. Sherriff-Scott
18 next then?

19 --- REPLY ON MOTION BY/RÉPLIQUE SUR REQUÊTE PAR MR.

20 **SHERRIFF-SCOTT:**

21 **MR. SHERRIFF-SCOTT:** Yes, Mr. Commissioner.
22 I didn't expect to be called upon so soon.

23 Let me address the question you posed to my
24 friend right out of the gate, Commissioner, as I think it's
25 obviously on your mind and it's referred to in the factums

1 of many of my colleagues. "Is there a difference here
2 because Charles MacDonald has been the subject of many
3 media articles arising out of the criminal proceedings
4 which took place in the late 1990s and up until the charges
5 were dismissed in 2002?"

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

7 **MR. SHERRIFF-SCOTT:** And I submit the fact
8 of that having happened is not dispositive of him securing
9 the benefit of a publication ban. That would be sort of a
10 waiver argument or, if not, waiver by virtue of what's
11 happened out in the public domain. And I say it's re-
12 identification in concert with this, what will be, no
13 doubt, indiscriminate republication of details which is at
14 issue, and the authority I want to point you to there ---

15 **THE COMMISSIONER:** Sir, the indiscriminate?

16 **MR. SHERRIFF-SCOTT:** Well, there will be
17 wide publication, no doubt.

18 **THE COMMISSIONER:** Of?

19 **MR. SHERRIFF-SCOTT:** Of the allegations that
20 ensue in this Inquiry pursuant to the testimony of
21 individuals who are proposed to take the stand.

22 **THE COMMISSIONER:** Allegations. You mean
23 the details of the allegations?

24 **MR. SHERRIFF-SCOTT:** Well, your Commission
25 counsel has filed a list of materials, which include that

1 individual's statements.

2 **THE COMMISSIONER:** Right.

3 **MR. SHERRIFF-SCOTT:** So that assuming those
4 documents are made exhibits, then it poses the risk the
5 allegations are identified with the Applicant, which is
6 what I understand he is contending should not happen; in
7 other words, his identity should be protected vis-à-vis the
8 ---

9 **THE COMMISSIONER:** All right.

10 And what I am saying though is as we have in
11 other affidavits, not affidavits -- if at some point the
12 argument is "Wait a minute; it's not relevant as to what
13 the allegations are," would there not be a time for Mr.
14 Cipriano to get up or Mr. Foord and say "Hold it now, this
15 goes over the line. He is not being retried. This is not
16 about what or did or did not happen. It's about
17 institutional response and therefore why don't we black out
18 these documents of these things or make them "C" exhibits?"

19 **MR. SHERRIFF-SCOTT:** Absolutely. That
20 argument can be made.

21 **THE COMMISSIONER:** Right.

22 **MR. SHERRIFF-SCOTT:** And I am not prejudging
23 it one way or another.

24 **THE COMMISSIONER:** No.

25 **MR. SHERRIFF-SCOTT:** I'm saying the

1 Anticipated Summary of Evidence poses the risk of
2 publication and thus they are making the application in
3 anticipation that this may happen.

4 I hear what you're saying about a potential
5 prematurity, that the document may be ruled inadmissible,
6 and I can't respond to that because that won't be my
7 objection. That will be theirs.

8 I am responding to the fact that we have
9 this said summary of materials in which Commission counsel
10 tends to put them to the witness subject to such objections
11 as may arise, but I think we have to assume for the purpose
12 of this exercise that there's a risk that they may be put
13 into the record in the public domain and I think that's
14 what they're responding to.

15 **THE COMMISSIONER:** All right.

16 But just to make sure, and I don't want to
17 curb your argument ---

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

19 **THE COMMISSIONER:** But I want is we do have
20 a procedure put in in a sense that when parties get the
21 documents, for example, then Mr. Cipriano could say "Oh my
22 God, there is a statement from Mr. MacDonald", and here are
23 his allegations. He can notify Commission counsel and
24 before anybody tries to put in the affidavit, we break and
25 we have a discussion. I make a ruling as to whether or not

1 it goes in or out or whether things are edited.

2 **MR. SHERRIFF-SCOTT:** I agree with you. That
3 would be one potential route which obviates the harm which
4 is contended will happen if those statements, assuming
5 that's all that they are complaining about. If the
6 statements and the allegations are not published as being
7 relevant in the public record, then, you know, that
8 presumably will answer some of the objections.

9 **THE COMMISSIONER:** What I am saying is that
10 that's the time to bring up the argument and then we would
11 invite others to say why they think that those allegations
12 must be out there. We would had that argument as to why it
13 is -- should be out there in public. And there would be
14 the argument saying "Well, the prejudicial value" and
15 things like that.

16 **MR. SHERRIFF-SCOTT:** That's true. You can
17 take that approach. I think that the subject of whether
18 his name will be specifically germane to the issues of the
19 Inquiry would probably require some factual foundations by
20 those contending for that. In other words, I think it
21 would not be presumptably so, and unless there could be
22 some linkage to the institutional response which really
23 puts his name in the spotlight ---

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

25 **MR. SHERRIFF-SCOTT:** --- then it may well be

1 that contending for his name to be part of the public
2 record here at the Inquiry would not succeed. I can't
3 prejudge that. My friends no doubt will make objections at
4 the appropriate time. I am responding in terms of what is
5 contended for here.

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

7 **MR. SHERRIFF-SCOTT:** I take your caution,
8 and it may be that it's more appropriate to await the
9 objection and submissions can be made at that time, if
10 that's your choice then.

11 **THE COMMISSIONER:** Well, it's just I don't
12 know how we can do it otherwise in the sense that somebody
13 -- let's assume we have the complaint of Mr. MacDonald.

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

15 **THE COMMISSIONER:** And in there it says all
16 kinds of things. Well, there may be a sentence here or a
17 sentence there that people say is relevant. Other people
18 say it's not relevant and, you know, there might be some
19 dispute as to whether any, if not all, of a paragraph is to
20 be edited.

21 **MR. SHERRIFF-SCOTT:** Well, it also sort of
22 raises the question that you put to my friend earlier about
23 the subject of process rights.

24 **THE COMMISSIONER:** Process rights?

25 **MR. SHERRIFF-SCOTT:** Process rights, cross-

1 examination as an indicia of prejudice.

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

3 **MR. SHERRIFF-SCOTT:** For example, in Mr.
4 MacDonald's case, the institutional response of the police
5 and the investigation matrix, that went forward and he was
6 -- Mr. -- the Applicant was required to stand trial after a
7 preliminary inquiry in connection with the MacDonald
8 allegations.

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

10 **MR. SHERRIFF-SCOTT:** And so, unlike some
11 other cases in connection with the same Applicant which
12 were withdrawn by the Crown or the police for absence of
13 merit, process rights may be available in those
14 circumstances because the reason for the withdrawal will
15 tend to reflect on the merits. In other words, the Crown
16 will say "Well, we don't think there's a prospect of
17 conviction" thus putting the merits of the reasoning for
18 the withdrawal squarely in the headlights for your
19 jurisdictional mandate to investigate, "Was that the right
20 call? Was it not?" Arguably, that might be relevant.

21 This is not such a case. Mr. MacDonald was
22 -- the Applicant was ordered to stand trial in connection
23 with these allegations. They were not withdrawn. So they
24 were put forward and they're out there. The question of
25 whether or not you allow them to be measured is another

1 thing.

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

3 **MR. SHERRIFF-SCOTT:** But If I could come
4 back to a response to your specific question that you put
5 to Mr. Foord about the notoriety feature of this, does that
6 militate against a publication ban now in this Inquiry?

7 If I could ask you to turn to the *Vickery*
8 decision, I think the Court answers this question at least
9 in part at Tab 3 of my book.

10 **THE COMMISSIONER:** Just a second here. Yes.

11 **MR. SHERRIFF-SCOTT:** Did you get my hard
12 copy brief, Commissioner?

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

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

15 It's Tab 3, page 10 of 28, commencing at
16 paragraph 30.

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

18 **MR. SHERRIFF-SCOTT:** So there's this
19 discussion in the cases, Commissioner, even in the
20 *Dagenais/Mentuck* case about the toughness of the criminal
21 forum and that you have to sort of take your licks if you
22 are an accused, both in the context of the hearing as well
23 as in the public domain, which is adverted hereto by the
24 Court:

25 "Those subjected to judicial

1 proceedings must undergo public
2 scrutiny of what is said at the trial
3 or on appeal and contemporaneous
4 discussion is protected, but different
5 considerations may govern when the
6 process is at an end and the discussion
7 removed from the hearing context."

8 And when the Court says hearing context, I
9 would interlineate hearing context in a fashion where the
10 court can adjudicate on guilt and innocence.

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

12 **MR. SHERRIFF-SCOTT:** "Nugent's privacy was
13 surrounded to the judicial process."

14 In other words, at the trial and appeal
15 level, he had no choice but to put up with public
16 reporting.

17 "Public access to and reporting at
18 those proceedings is a price he and
19 other accused must pay in the interest
20 of ensuring accountability of those
21 engaged in the administration of
22 justice.

23 The principles reflected in the special
24 privilege that our law has
25 traditionally accorded to those who

1 report on judicial proceedings, yet
2 modern defamation statutes restrict
3 that privilege to contemporaneous
4 reporting. A fair and accurate report
5 under defamation statutes require that
6 it be contemporaneous, both sides be
7 presented and that it be without
8 comment."

9 The reason I suggest this is obvious. He
10 says fair and accurate reports are likely to be balanced to
11 display full context, et cetera.

12 "The subsequent release and publication
13 of selected exhibits is fraught with
14 risk of partiality, with a lack of
15 fairness. Those policy considerations
16 which form our attitude towards
17 openness of administration of justice
18 and I would again interlineate, during
19 the trial or appeal process where guilt
20 or innocence are up for disposition are
21 relevant to an application such as
22 this. Nugent cannot escape from the
23 proceedings in which he was involved
24 nor from the fair and accurate
25 reporting of them, but the courts must

1 be careful not to become the unwitting
2 parties to his harassment by
3 facilitating the broadcasting of
4 material which was found to have been
5 obtained in violation of his rights."

6 In other words, the republication at later
7 dates. That is, I submit, what the interest of the Court
8 is. And so the original reporting is part of the fact that
9 he was charged and the proceedings were reported upon, but
10 different considerations apply here, particularly since you
11 can't adjudicate his guilt or innocence.

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

13 **MR. SHERRIFF-SCOTT:** And so if the
14 allegations, assuming that debate goes in favour or is
15 disposed of in favour of letting the allegations stand in
16 the public record, then the allegations stand.

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

18 **MR. SHERRIFF-SCOTT:** Assuming cross-
19 examination is not permitted, then they stand bare and this
20 consideration, I would submit, is directly on point.
21 Originally he had to put up with it. Now different
22 considerations apply and the contention that I have is that
23 he is an innocent person within the meaning of these cases
24 for the reasons I've listed in the factum and, in
25 particular, the Criminal Injuries Compensation Board.

1 I assumed that this was about both David
2 Silmsler and John MacDonald. That's why my factum refers to
3 both.

4 The Notice of Motion wasn't clear and so I
5 wrote it on that basis. I understand it's about John
6 MacDonald. His case in terms of disposition of proceedings
7 is more compelling. It was the Compensation Board hearing
8 which is a full trial process with procedural protections,
9 cross-examinations, et cetera which disposed of his
10 complaint saying it was not merited. And then he allowed
11 his civil case against the Applicant to fall and the
12 charges were stayed.

13 So I -- he is, in my view, right in the zone
14 of these innocent person cases. And for that reason,
15 presumptively, the Court says his innocence is of super
16 ordinate importance to protect.

17 **THE COMMISSIONER:** M'hm. Can I send you
18 back though?

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

20 **THE COMMISSIONER:** You said the publicity
21 and the notoriety should be forgiven -- not forgiven --
22 laid to rest. He has standing. Father MacDonald has
23 standing in this forum. Father MacDonald has been very
24 vocal all through this without asking for any bans on his
25 name or anything like that. I mean, he's been claiming his

1 innocence throughout, benefiting, if you want, or not
2 benefiting from the publicity that this has generated.

3 So help me out on how do I take his
4 participation in this forum as maybe a waiver of his
5 confidentiality?

6 **MR. SHERRIFF-SCOTT:** I wouldn't agree to
7 that at all.

8 The question is how do you balance the
9 interests here?

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

11 **MR. SHERRIFF-SCOTT:** If when you start this,
12 he is presumptively -- and there is a nice expression --
13 irrebuttively presumptively which, when you look at it, is
14 so. No one can adjudicate his guilt, not in a civil
15 context, not in a compensation context, not in a criminal
16 context. He is forever presumed innocent as a matter of
17 law.

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

19 **MR. SHERRIFF-SCOTT:** If you start from that
20 premise, then in this Inquiry, just because he has
21 standing, because his interests may be affected, he is here
22 to protect his interests, number one. Number two, you
23 can't adjudicate on his guilt or innocence.

24 **THE COMMISSIONER:** No.

25 **MR. SHERRIFF-SCOTT:** Thus, in the context

1 where he knows to a moral certainty, I would submit, that
2 his name and information is going to come up, that just
3 engages the question. In other words, it begs the question
4 should the interests be balanced to prevent publication in
5 this proceeding?

6 This isn't a criminal proceeding. This
7 isn't a case where, for example, the Court in *Vickery*
8 refers to the sort of -- and the *Dagenais* test, the
9 toughness of the criminal arena that you've got to put up
10 with as an accused. This in an Inquiry where you don't
11 have that jurisdiction. And the jurisdiction would be
12 curative from his point of view and he would have to
13 participate if you did have it. If you could say he was
14 innocent or guilty, then he would be here with process
15 rights and arguing for his disposition, but he can't.

16 And so I submit that just simply the
17 existence of this proceeding begs the question and his
18 participation in it should not be tantamount to a waiver.
19 He is here to protect his interests and rights, as every
20 other party is.

21 **THE COMMISSIONER:** Right.

22 But in one of these cases, the doctor who
23 was looking for anonymity, no one knew him. I mean, for
24 all intents and purposes -- I mean, let's assume for a
25 minute that I dispose of this one way of the other ---

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

2 **THE COMMISSIONER:** --- well, with the
3 publication ban. John MacDonald is going to be called.
4 Everyone knows now that John MacDonald made a complaint
5 against Father MacDonald.

6 **MR. SHERRIFF-SCOTT:** Well, I guess that
7 might be so and the rationale here is this process and this
8 Inquiry shouldn't be the instrument of his harm. It may be
9 that John MacDonald is called. I am not suggesting you
10 want that to happen. I am saying as a matter of law, his
11 presence here shouldn't be the instrument of the harm to
12 the Applicant by continuing to allow what he says in this
13 domain; that is to say the Complainant, about the Applicant
14 to be published.

15 That has nothing to do with what went
16 before. The participation here I don't think is tantamount
17 to a waiver. It's virtually imperative for some people.

18 **THE COMMISSIONER:** Not about the
19 circumstances. We're talking about him being named. The
20 application is we don't want Father MacDonald's name to be
21 published.

22 **MR. SHERRIFF-SCOTT:** Yes, the information
23 tending to identify and link ---

24 **THE COMMISSIONER:** Right.

25 **MR. SHERRIFF-SCOTT:** That's linking him with

1 the allegation specifically.

2 **THE COMMISSIONER:** Exactly.

3 So we know that John MacDonald is going to
4 testify and we know that he's going to say who his
5 assailant -- his alleged assailant was, right? So ---

6 **MR. SHERRIFF-SCOTT:** Well, if we're having
7 this discussion now, it may be that people have memory of
8 what allegations were -- there are a number of -- if the
9 record will show, probably a number of counts and a number
10 of complainants.

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

12 **MR. SHERRIFF-SCOTT:** The public may not
13 necessarily link all of them together. I don't know what
14 the public will do.

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

16 **MR. SHERRIFF-SCOTT:** But my submission is
17 the fact of what came before in the media is not a reason
18 to conclude there's effectively a waiver. I mean, the
19 media -- the danger in that argument is the media could go
20 out and publish repeatedly and bootstrap itself up and say,
21 "Sorry the cat's out of the bag." The interests still must
22 be balanced, I submit.

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

24 **MR. SHERRIFF-SCOTT:** I would like to turn
25 you to a case, Commissioner, because it's not in my

1 friend's material. It's a French case, and you'll bear
2 with me if I sort of laboriously plot through it, but it is
3 important. It is the case at Tab 6 of my hard copy brief.

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

5 **MR. SHERRIFF-SCOTT:** It's the *Southam v.*
6 *Gagnon* case. Now, this case is important, I submit, for a
7 number of reasons, not the least of which it arises out of
8 a public inquiry in Quebec, and in that inquiry the
9 Commissioner issued a publication ban protecting the names
10 not only of potential victim children but also of accused.
11 The inquiry was mandated -- and I'll get to it in more
12 detail ---

13 **THE COMMISSIONER:** I just can't help but
14 note that it was Justice Gomery's decision.

15 **MR. SHERRIFF-SCOTT:** No, in fact, he was
16 reversed.

17 **THE COMMISSIONER:** No, no, I know, but it
18 was his original decision.

19 **MR. SHERRIFF-SCOTT:** He was the judicial
20 review from the Commissioner's publication ban and the
21 Court of Appeal reversed him.

22 **THE COMMISSIONER:** Yes.

23 **MR. SHERRIFF-SCOTT:** So the Court of Appeal,
24 just coming back to this sort of overview of the thing in
25 terms of why it's important to your consideration ---

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

2 **MR. SHERRIFF-SCOTT:** --- the interesting
3 thing about the public inquiry in this case -- and I will
4 take you to the specific mandate -- is that the Terms of
5 Reference were to inquire into allegations of sexual abuse
6 of minors at a home or a young children's home, a foster
7 home or something of that nature. Criminal trials had
8 taken place of the accused in which there was either
9 withdrawal of charges or some dismissals, and then the
10 Commissioner published and promulgated rules, and the rule
11 -- one of the rules was that neither the children nor
12 accused persons in the subsequent inquiry should be
13 identified in order to protect the presumptive innocence of
14 those accused as well as the victimization of the children
15 or potential victims. And so the Court of Appeal upheld a
16 specific publication ban issued by the Commissioner which
17 Justice Gomery had refused to uphold.

18 And just so that you're clear here in terms
19 of what went on, if you look at the Gomery decision, which
20 is at the back of the tab, Commissioner -- I put the
21 judicial review decision at the back, behind the Court of
22 Appeal -- and the Gomery decision, I would like to refer
23 you to pages 2 and 3. So you'll have to work your way
24 backwards.

25 **THE COMMISSIONER:** I've got it.

1 **MR. SHERRIFF-SCOTT:** The mandate here, you
2 will see the recitals and the middle mandates or the middle
3 recitals, third, fourth and fifth -- you'll see that the
4 Order in Council referred to criminal proceedings which had
5 been initiated against employees of the foster home and
6 referred to the fact that charges against a number of the
7 accused had been dismissed subsequent to the preliminary
8 inquiry and in other cases the charges had been withdrawn
9 by the Crown ---

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

11 **MR. SHERRIFF-SCOTT:** --- in view of no
12 prospects of conviction, at least insofar as the Crown's
13 submission.

14 But also, the Commission was then to
15 endeavour to determine if children had suffered abuse while
16 at the home with a view to recommending preventative
17 measures. In other words, the government, frustrated by
18 the criminal process, turned to the inquiry process to
19 specifically make an inquiry because the criminal process
20 could not be determinative of what had happened.

21 And then you'll see, if we can flip to the
22 Gomery decision at page 4 ---

23 **THE REGISTRAR:** I'm sorry, what tab are you
24 in?

25 **MR. SHERRIFF-SCOTT:** I'm sorry; I'm at Tab

1 6. There are two decisions there. There's one by Justice
2 Gomery, which is a short decision.

3 **THE COMMISSIONER:** It's at the back.

4 **MR. SHERRIFF-SCOTT:** At the back of the tab.

5 **THE COMMISSIONER:** Keep going.

6 **MR. SHERRIFF-SCOTT:** Page 4.

7 **THE COMMISSIONER:** Not page 4 of yours
8 though.

9 **MR. SHERRIFF-SCOTT:** It has page -- hang on,
10 page -- let me just find it here. The Gomery decision is
11 page 4, subparagraph 5(3). So it's not page 5 of 10. It's
12 page 4. There should be two -- so the next page and down
13 to paragraph 5. Right.

14 Here, Commissioner, you'll see that the
15 Commissioner in that inquiry, in (6), in paragraph 5, he
16 adopted a rule of practice which I roughly translate to be
17 that the names of the employees of the foster home, as well
18 as any other persons against whom allegations of sexual
19 abuse involving the children would not be published in the
20 hearing.

21 So the solution to the problem that
22 Commission faced was what these people of the criminal
23 proceedings against them failed for one reason or another.
24 We're not going to identify them in order to protect their
25 innocence.

1 The decision -- the impugned decision was an
2 April 11th ban issued by the Commissioner where he banned
3 the name of children as well as adults who had been
4 identified by them as abusers.

5 So that went to the Court of Appeal and the
6 disposition I would like to refer you to now, the Court of
7 Appeal decision ---

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

9 **MR. SHERRIFF-SCOTT:** --- which is at the
10 front of that tab, paragraph 50. There are marginal notes
11 for the paragraphs on the left-hand side. And here,
12 adverting to the reasons for supporting the ban, which
13 included a ban on the accused' names, the Court said -- and
14 I will roughly give my version here, Commissioner. You can
15 read it.

16 "It's not necessary to enumerate all
17 the legislative exceptions to the
18 principle of public access to the
19 courts. There are many of them. It's
20 sufficient to refer to the study which
21 was conducted by the Law Reform
22 Commission on the issue and to mention,
23 by way of example, exceptions provided
24 for under article 13 of the CPC..."

25 Then in 51:

1 "Superior courts have, on a number of
2 occasions, reiterated the imposition by
3 the court of first instance of certain
4 restrictions to the right of public
5 access and its corollary freedom of the
6 press is justified in certain
7 circumstances to safeguard more
8 important values such as the right of
9 an accused to a fair trial but
10 protection of the innocent..."

11 In other words, the *Vickery* and *MacIntyre* principle.

12 "...and more particularly, the
13 innocence of children, et cetera."

14 So the Court here upheld the ban in
15 virtually -- I wouldn't say virtually the same environment
16 but in a similar circumstance where there had been, in that
17 case, a withdrawal of charges, here a stay of charges and,
18 I would say, similar for the reason as well that the
19 Criminal Injuries Compensation Board dismissed the
20 complaint, thus making the individual here presumptively
21 innocent beyond challenge.

22 The same judgment, paragraph 72, the Court
23 of Appeal refers to the fact of the innocence of adults who
24 were accused, 72. In the present case, the concern with
25 respect to the protection of children and that of the

1 innocence of adults is very present, omnipresent in the
2 Commissioner's mandate and there is reference to that
3 again.

4 And paragraph 82 is an important paragraph
5 to consider on the same issue. And after the reference in
6 paragraph 82 to the date of April 13th, I think my rough
7 translation is:

8 "In light of the previous trials which
9 were aborted because of the weaknesses,
10 contradictions in the testimony during
11 various steps, the Commissioner, in his
12 efforts to uncover the truth, had to be
13 particularly vigilant..."

14 In other words, about which was published, and so he
15 adopted these rules. And in the section 1 analysis, the
16 objection of *Southam* was overcome.

17 In paragraph 77, backing up:

18 "In the present case, the protection of
19 innocent persons, i.e. those accused
20 here, the children and their physical
21 and moral well being, as well as that
22 of adults and their reputation is an
23 objective which appears to me to be
24 eminently important and more than
25 sufficient to impose restrictions on

1 the liberty of the press."

2 And the result, the publication ban was
3 upheld, which had been issued in the first instance by the
4 Commissioner.

5 So my argument is that on the facts, he
6 falls within this exception and the case law applies, and
7 he should have the benefit of it. The *Vickery* comments
8 pertain to what has come before and that different
9 considerations apply now. The criminal process is over.
10 What he had to put up with there is quite different with
11 what he has to put up with here, considering that he will
12 not have an adjudication of guilt or innocence one way or
13 another.

14 You have had my factum and I assume you've
15 read it.

16 **THE COMMISSIONER:** Yes, I have.

17 **MR. SHERRIFF-SCOTT:** So the process
18 arguments there may be premature. They may not be. I
19 would submit that in later cases they may be more germane
20 from the point of view of withdrawn charges, but they are
21 certainly an issue from the point of view of the
22 jurisdiction of the Commission to entertain a cross-
23 examination on the merits considering that the
24 institutional response here was not -- did not pertain to
25 an assessment of the merits. The merits were put forward

1 and they were stayed for other reasons, and so that will be
2 in your hands to respond to and my arguments are otherwise
3 identified.

4 Those are my submissions. Thank you.

5 **THE COMMISSIONER:** Thank you.

6 **MR. SHERRIFF-SCOTT:** Just parenthetically,
7 Commissioner, on the subject of the dismissal of the civil
8 proceedings, there is the Affidavit of Madame Landry which
9 has the correspondence.

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

11 **MR. SHERRIFF-SCOTT:** We couldn't access the
12 orders which weren't in our files and we didn't have time
13 to get them from the court, but the correspondence refers
14 to the fact that the orders were issued and sent out, thus
15 disposing of the lawsuit. Thank you.

16 **THE COMMISSIONER:** Thank you.

17 Ms. Makepeace.

18 --- REPLY ON MOTION BY/RÉPLIQUE SUR REQUÊTE PAR MS.

19 **MAKEPEACE:**

20 **MS. MAKEPEACE:** Good afternoon, Mr.

21 Commissioner. I do intend to be very brief.

22 You have before you an application for
23 confidentiality measures in relation to the evidence to be
24 given by John MacDonald and, as we see it, there are
25 essentially two requests put forward by Mr. Foord and Mr.

1 Cipriano, the first being with respect to the identity of
2 Father MacDonald and the second being with respect to the
3 details of the criminal allegations made by John MacDonald.

4 As you can see from the materials that we
5 filed, sir, we take no position with respect to the first
6 issue, that being identity.

7 And I therefore will direct my submissions
8 to the issue of whether confidentiality measures are
9 necessary for evidence pertaining to the details of the
10 allegations of sexual abuse made by John MacDonald.

11 Sir, it's our position that should these
12 details be made public, that there will be a serious risk
13 to Father MacDonald's reputation, privacy and security
14 interests, and I submit to you that this has been
15 thoroughly demonstrated both in the Applicant's factum, as
16 well as in his oral submissions before you today, and I
17 certainly have nothing to add in that regard.

18 It's therefore my respectful submission that
19 the confidentiality measures are indeed necessary in this
20 case, should it be the intention to adduce the details of
21 the allegations in evidence.

22 I was going to make some comments about
23 relevance, sir, but I suspect that these will be premature
24 in light of the comments that you've made and in light of
25 the absence of specific documents before you. So I will

1 just simply echo the comments of Mr. Foord and Mr.
2 Sherriff-Scott regarding the importance of relevance in the
3 *Dagenais/Mentuck* test and that it's our position that the
4 details with respect to John MacDonald, those are in fact
5 irrelevant to the Commission's mandate.

6 What I would like to quickly do though is
7 make a brief comment about the necessary measures that you
8 may consider, and it may be down the road that you're
9 considering these, but it's our submission that a
10 publication ban would not go far enough. This is because
11 although it protects against media broadcast, the
12 information would remain in the public domain and,
13 therefore, it does not protect against dissemination among
14 members of the public. And this, I submit, in a small
15 tight-knit community such as Cornwall can be far-reaching.
16 Word can travel very fast, such that the news might as well
17 be printed on the front page of the local paper and
18 undoubtedly the prejudicial effect of public dissemination
19 on Father MacDonald could be substantial, in my submission,
20 and this would be particularly so should his counsel be
21 afforded no opportunity to challenge John MacDonald's
22 credibility so as to expose the full picture for the
23 public.

24 Instead, sir, it's our position that the
25 details of the allegations, again, should they be intended

1 to go into evidence, which I submit are irrelevant, it's
2 our proposal that these ought to be edited from the
3 documents. We made a comment earlier in that regard, that
4 that proposal could be put to you at a later time. And
5 this proposal is having regard to the principle of openness
6 as well as the interests of Father MacDonald.

7 So what we would be left with is the public
8 having full access to all relevant information before this
9 honourable Commission.

10 It also did occur to us that there is an
11 alternative way of essentially achieving the same end
12 result as editing the documents, and that would be simply
13 for Commission counsel to summarize the relevant
14 information contained in a particular document and file
15 that. And of course this is provided for in paragraph 5(b)
16 of the Order in Council that being Factual Overviews. So
17 that was something that occurred to us as an alternate
18 measure, and I don't believe that that had been mentioned
19 thus far as a possibility.

20 Those are my submissions, sir, in support
21 the application.

22 Thank you.

23 **THE COMMISSIONER:** Thank you.

24 All right. Well, we are right on schedule,
25 so why don't we take the afternoon break and then we will

1 come back with other.

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

4 The hearing will resume at 3:30 p.m.

5 --- Upon recessing at 3:17 p.m./

6 L'audience est suspendue à 15h17

7 --- Upon resuming at 3:36 p.m./

8 L'audience est reprise à 15h36

9 **THE REGISTRAR:** This hearing of the Cornwall
10 Public Inquiry is now in session.

11 Please be seated. Veuillez vous asseoir.

12 **THE COMMISSIONER:** Okay. Yes, sir.

13 --- **REPLY ON MOTION/RÉPLIQUE SUR REQUÊTE PAR MR. PETER**
14 **WARDLE:**

15 **MR. WARDLE:** Mr. Commissioner.

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

17 **MR. WARDLE:** Let me start, if I may, by
18 outlining what I understand to be on the table and what may
19 be off the table.

20 **THE COMMISSIONER:** All right.

21 **MR. WARDLE:** What I understand to be still
22 on the table is an application by Father MacDonald to have
23 a publication ban over his name which would extend to
24 turning off the web-cast for any portion of the evidence
25 where his name is mentioned. That's what I understood my

1 friend, Mr. Foord, to say earlier and to redact any
2 reference to his name in the transcripts.

3 As you know, Mr. Commissioner, from your
4 prior ruling, that is your ruling or perhaps I should say
5 your directions on the process to be followed with respect
6 to requests for confidentiality of victims' or alleged
7 victims' identities, that proposal in and of itself creates
8 some difficulties.

9 If I take you back quickly to that ruling on
10 October 31st because you will recall, we had quite a
11 discussion about how to deal with the issue in the context
12 of victims' names, one of the things you said was and I'm
13 quoting from your ruling on page 8:

14 "If the name is to be referred to before the Inquiry, the
15 issuance of a publication ban..."

16 I'm sorry, I'll just let it come up on the
17 public screen.

18 **THE REGISTRAR:** Page 8:

19 **MR. WARDLE:** Page 8, "...name is to be
20 referred to before the Inquiry".

21 And you will see:

22 "If a name is to be referred to
23 before the Inquiry, the issuance
24 of a publication ban as we know it
25 raises questions as to whether the

1 Inquiry web-cast, the broadcast by
2 Cogeco and the posting of
3 transcripts of the proceedings on
4 the Commission website constitute
5 publication and broadcasting. If
6 not the airing or posting of the
7 names of victims or alleged
8 victims could defeat the purposes
9 of confidentiality. On the other
10 hand, shutting down the web-cast
11 for the portion of the evidence
12 where the name of the person may
13 be mentioned and marking
14 transcripts as confidential may
15 not minimally impair the freedom
16 of expression and freedom of the
17 press."

18 And of course in this case -- in that case,
19 you propose that monikers be used.

20 So we have a choice with respect to Father
21 Macdonald's proposal. As I understood it, his counsel was
22 suggesting that every time his name is mentioned -- and
23 I'll come in a moment how many times his name could be
24 potentially mentioned in the context of this Inquiry --
25 that we shut down the web-cast, and we take out our pencils

1 and we start redacting portions of the transcripts or
2 alternatively, we call him Father X, and we refer to him
3 from now on whenever his name is mentioned in these
4 proceedings as Father X.

5 That is the proposal that is really on the
6 table and you will see it's outlined in my friend's Notice
7 of Motion. That is what I will be dealing with in my
8 submissions today.

9 If you look at my friend's Notice of Motion,
10 which I must say is somewhat less than clear, but you'll
11 see in paragraphs 2 and 3 essentially those are the two
12 alternatives. Either we take out his name all together, so
13 whenever it's mentioned we shut down the web-cast, we get
14 out our pens and we take it out of the transcript or we
15 call him Father X or we call him C-8 or C-25 or something
16 like that.

17 Now, that's what's on the table today.
18 What, in my submission, is not on the table today is what
19 we are going to do about documents that may mention Father
20 MacDonald. And the reason for that is exactly the reason
21 identified by you earlier, sir, we are not there yet. We
22 don't have those documents in front of us. We would be
23 making those decisions in a vacuum. We have no evidentiary
24 context.

25 So I am simply going to address my remarks

1 to what I understand to be the primary position taken by
2 Mr. Cipriano and Mr. Foord.

3 Let me say at the outset and I'll be blunt
4 about this, the people of this community expect this
5 proceeding to take place in public. In the *MacIntyre* case,
6 there's a quote from Jeremy Bentham, and I am going to
7 repeat just one sentence from that quote:

8 "Where there is no publicity, there is no justice."

9 It would be an affront to the proper
10 administration of justice in the context of this Inquiry to
11 clothe a central figure with anonymity. It would defeat
12 the purposes of openness and it would hamper your ability
13 to find the facts and report on those facts.

14 In my submission, it would defeat the
15 objectives that this Inquiry was set up to meet.

16 Now, I have four submissions, which I will
17 outline for you briefly: First, Father MacDonald is a
18 central figure to the context which led to this Inquiry.
19 His identity is not irrelevant or collateral. It is
20 important and central.

21 Secondly, the Commission cannot fulfil its
22 mandate if he is clothed in anonymity. You can't find the
23 facts and you can't report on those facts in any meaningful
24 way.

25 Thirdly, Father MacDonald does have

1 important interests that are worthy of protection. You
2 said so already in the context of your earlier ruling of
3 May the 1st. He has the presumption of innocence and his
4 right to privacy and to his reputation. And you will see
5 later I will allude to this briefly, we disagree with the
6 submission that he is innocent in fact, but that's a
7 nuance, a legal nuance.

8 But fourth, there are reasonably alternative
9 measures to protect the risks -- sorry, to protect the risk
10 to his interests in the calling of evidence before this
11 Inquiry.

12 So we say on the first prong of the
13 *Dagenais/Mentuck* test this motion fails.

14 Now, let me start with my first submission,
15 which is that Father MacDonald is a central figure to the
16 context of this Inquiry. And I start with the Terms of
17 Reference because the Terms of Reference say very clearly
18 and I'll just quote the first two lines from the preamble:
19 "Whereas allegations of abuse of young people have
20 surrounded the City of Cornwall for many years, the police
21 investigations and criminal prosecutions relating to these
22 allegations have concluded."

23 I have a feeling, Mr. Commissioner, that
24 you've probably memorized those words by now. But clearly,
25 one of the police investigations and criminal prosecutions

1 that's being referred to in that preamble is the
2 investigation and prosecution of Father MacDonald. It's
3 one of a chain of events which is well known in this
4 community and started when an individual then known as D.S.
5 went into the Cornwall police in December of 1992, and that
6 chain of events, and I've described it in some detail in
7 the factum, can be traced right down to the establishment
8 of Project Truth in 1997, the criminal prosecution of
9 Father MacDonald, the stay of proceedings for delay and
10 ultimately the commencement of this Inquiry.

11 Father MacDonald has always been publicly
12 associated with all of these events, not just the
13 allegations made directly against him but all of the
14 events; the allegations of a conspiracy, of a cover-up of
15 flawed investigations; all of those events, he is
16 intertwined and inextricably linked. And he has been
17 identified by the media and by the public at large as the
18 central or one of the central figures for over 10 years.

19 For the last four years, there has been no
20 publication ban in place that would prevent the media from
21 reporting on evidence that took place at his preliminary
22 inquiry.

23 **THE COMMISSIONER:** Well, some would argue
24 that that's not the case.

25 **MR. WARDLE:** Well, his own counsel doesn't

1 appear to be taking that position, Mr. Commissioner.

2 **THE COMMISSIONER:** Right, but I think ---

3 **MR. WARDLE:** I note Mr. Sherriff-Scott is.

4 **THE COMMISSIONER:** Yes, but -- okay. I
5 think I disagree with him though but ---

6 **MR. WARDLE:** I do as well, but for the
7 moment ---

8 **THE COMMISSIONER:** Okay.

9 **MR. WARDLE:** --- I am satisfied with the
10 concession made by Father MacDonald through his counsel
11 that there's no publication ban in effect.

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

13 **MR. WARDLE:** So this case, Father MacDonald
14 is not like the cases relied upon by Mr. Foord and Mr.
15 Sherriff-Scott.

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

17 **MR. WARDLE:** And if I just take you through
18 three of them quickly, the *MacIntyre* case. Everyone in
19 this room knows the *MacIntyre* case. It's about a search
20 warrant and the implications of releasing information when
21 the search warrant is not successful and there are people
22 whose names never become public.

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

24 **MR. WARDLE:** In that very case, Justice
25 Dickson, I believe it was, said that "the implications are

1 different once the search warrant has been executed and
2 there is a successful return". So that is not anything
3 like this case.

4 The *B.G.* case, which Mr. Sherriff-Scott
5 referred to and Mr. Foord referred to is a case, a civil
6 case where there was a publication ban at the commencement
7 of a trial and the issue was whether or not it should have
8 been lifted after the trial was over. It involved
9 individuals who had never been in the public domain.
10 Easily distinguishable, in my submission.

11 The *CBC* case, this is the *CBC* -- there's a
12 number of *CBC* decisions -- this is the one that comes from
13 the Newfoundland and Labrador Supreme Court, the case
14 involving a doctor, a criminal prosecution after a number
15 of false steps. Again, an individual who had never been in
16 the public domain.

17 And just stopping there, all of those cases
18 are about one particular prosecution or civil process.
19 None of those cases involve the interaction of that process
20 with a later public inquiry, which is what we have here.

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

22 **MR. WARDLE:** I do want to mention briefly
23 the *Gagnon and Sutton* case because Mr. Sherriff-Scott spent
24 some time with you on it, and I simply want to note my
25 French is not as good as Mr. Sherriff-Scott's, but I have

1 read the English version ---

2 **THE COMMISSIONER:** Ah, hah!

3 **MR. WARDLE:** --- of Justice Gomery's
4 decision. And I may be wrong but from my reading of the
5 English language, which is my native tongue, my
6 understanding of that case was that the decisions at issue
7 were two decisions made by the Commissioner with respect to
8 children who were going to testify in private and whether
9 or not the media could be present when those children
10 testified. The issue in that case and on appeal was not
11 about alleged perpetrators.

12 As Mr. Sherriff-Scott has indicated, there
13 were rules in place which prevented the naming of those
14 individuals and that wasn't an issue in the case. So I say
15 very simply, all of these cases are easily distinguishable
16 on their facts.

17 Now, Mr. Sherriff-Scott does have a point.
18 It's not that Father MacDonald's name has been in the
19 public domain. The fact that an individual who seeks
20 confidentiality measures has had their name in the public
21 domain may be a factor, but I agree with him that it
22 shouldn't be a predominant factor and that the media can't
23 use it to bootstrap. Here, the issue is different because
24 Father Charles MacDonald is identified publicly with the
25 very issues that are central to the mandate of the

1 Commission and that's what makes him different.

2 The public has, in my submission, a
3 reasonable expectation that you will find facts and you
4 will report and make recommendations on institutional
5 responses dealing with him, dealing with the investigation,
6 dealing with the failure at certain points to take steps,
7 dealing with the police response, dealing with the response
8 of the Crown, right up to and including the prosecution and
9 the stay.

10 So to say to this Tribunal "Well, wait a
11 minute, we'll now call him Father X or we'll call him C-8
12 or C-25, and we'll have you proceed down the road of making
13 findings of fact relating to the Diocese response to the
14 allegations involving C-8; or the police investigation of a
15 witness relating to C-8; or how the Crown dealt with
16 allegations involving C-8"; it would turn this Commission,
17 in my submission, into a charade, a laughing stock.

18 This is not like the *Morin* Inquiry. In the
19 *Morin* Inquiry, the identity of the jailhouse informer was
20 completely irrelevant to the issues before the inquiry.
21 Here, Father MacDonald is -- you can't separate him. He is
22 inextricably linked with the central issues in the case.
23 So his identity is not only relevant, it's central.

24 Let me take you to a case, if I may, just
25 for a moment, and it's one of the cases filed by Mr.

1 Sherriff-Scott, for which I'm grateful. It's Tab 9 of his
2 Authorities. It is called *Robertson v. Edmonton (City)*
3 *Police Service*.

4 **THE COMMISSIONER:** What Tab? I'm sorry.
5 What Tab, Mr. Wardle?

6 **MR. WARDLE:** It's Tab 9.

7 **THE COMMISSIONER:** All right.

8 **MR. WARDLE:** Now, in this case, you can see
9 from the head note, "involves a police officer subject to
10 discipline proceedings", and he had made various
11 allegations about other members of his own police force,
12 which eventually led to him being disciplined.

13 At some point along the way, there had been
14 an internal investigation of those allegations and there
15 had been a report prepared, and the report is referred to
16 in the material as the Gagnon Report, and the issue is
17 whether the Gagnon Report should be subject to a
18 publication ban.

19 But if you have a look at the decision, and
20 I'm just going to go -- I'm going to go to paragraph 31, if
21 I may. There's a discussion in this case about the
22 relevance of the information found in the report in the
23 context of the *Dagenais/Mentuck* test. And you'll see this
24 starts by:

25 "An interesting aspect of this

1 application is that the evidence which
2 is to be suppressed is collateral to
3 the issues to be decided by the court.
4 On the judicial review application..."

5 This is because by this time, the discipline process had
6 led to a judicial review.

7 "...the court is to decide whether the
8 discipline proceeding against the
9 Applicant are tainted by bias, whether
10 the process is being used for a
11 collateral purpose and whether certain
12 statutory provisions are
13 unconstitutional, the names of the
14 persons mentioned in the Gagnon Report
15 are completely irrelevant and
16 collateral to these issues."

17 And then a couple of lines down:

18 "Even the factual matrix set out in the
19 report is largely irrelevant."

20 But then the court goes on to discuss the
21 issue of relevance, and you'll see in paragraph 32, and
22 this is referring to a series of Supreme Court of Canada
23 cases:

24 "I note that in New Brunswick the
25 information being shielded from the

1 public was at the very heart of the
2 litigation. In New Brunswick, it was
3 the *actus reus* of the offence. In
4 *Sierra Club*, the information was
5 technical information about
6 environmental assessments conducted by
7 the Chinese government. *Dagenais*
8 involved the fictional account of
9 events that were very similar to the
10 *actus reus* pending in a criminal
11 trial."

12 And then he refers, you'll see, to *Mentuck*.

13 In paragraph 33:

14 "These cases show that shielding orders
15 can arise in varied situations." In
16 *Mentuck*, a case involving merely
17 collateral information, the shielding
18 order was not granted. In *Sierra Club*,
19 where the information was central to
20 the litigation, it was granted. In New
21 Brunswick, where the information was
22 central, it was not. These cases
23 demonstrate that the categorization of
24 the information is not conclusive.
25 However, in my view, this is a relevant

1 factor in the balancing process."

2 And in the last sentence of the paragraph:

3 "A shielding order will therefore have
4 a lesser impact on the openness of the
5 court process."

6 In that case, the information was collateral
7 and, therefore, confidentiality measures would have a
8 lesser impact on openness.

9 Here, in my submission, we have exactly the
10 reverse. We have a central figure to Project Truth. His
11 name is identified in the public mind with that set of
12 events, which preceded the establishment of this Commission
13 and which are referred to directly in the Terms of
14 Reference and which you have an obligation to explore, make
15 factual findings about, and report upon. So his name in
16 that context, in my submission, is very relevant, and as a
17 result, in the context of the *Dagenais/Mentuck* test, that's
18 a factor which, in my submission, suggests that
19 confidentiality measures should not be employed unless
20 there is no real other alternative.

21 And I would say this as well, we're going to
22 come to this issue -- we're going to return to this issue
23 again and again. We're going to return to it because
24 Father MacDonald is not the only person who is publicly
25 identified with these events. There are a number of other

1 individuals; Perry Dunlop, for example. Are we to impose
2 confidentiality measures on Perry Dunlop if he asks for
3 them? Are we to say that because he has privacy rights and
4 reputational rights, that we should clothe his name with
5 anonymity? Well, you know, my reaction, and I suspect
6 yours would be well, we can't do that. Well, why can't we
7 do that? We can't do that -- one reason we can't do that
8 is because Perry Dunlop has become central to the story,
9 and there are a number of other individuals, including
10 Father MacDonald whose names have become central to the
11 story.

12 Put another way, one of these cases, and Mr.
13 Foord referred to it, talks about not unscrambling -- not
14 being able to unscramble the egg. We have an egg. We have
15 an omelet, you know, that was cooked a long time ago. Our
16 job is to dissect the omelet. We can't put things back.
17 We can't put Father MacDonald back to 1991. Maybe that's
18 unfortunate, but that's not your job. Your job is to look
19 at all of those events and make some findings.

20 And I would say as well not only can't you
21 unscramble the egg but the public will lose faith in this
22 process if it ascertains that the Commission is reluctant
23 to identify those at the heart of the story. The public
24 will see us as being gutless and you'll be left, in my
25 submission, with factual findings and a report that to the

1 person on the street will be completely meaningless.

2 Now, I want to refer briefly in passing, if
3 I may, to *Vickery* because my friends made much of *Vickery*.
4 *Vickery* has nothing to do with this Motion, absolutely
5 nothing to do with this Motion. *Vickery* is a case where
6 someone was accused of a crime, evidence was gathered by
7 unconstitutional and unfair means and, at the end of the
8 day, that person was acquitted, and the media wanted that
9 evidence to publish it. That's not our case. That's got
10 nothing to do with this case.

11 And my friend suggests that, well, openness
12 has already been satisfied because we've had one criminal
13 process involving Father MacDonald. This Inquiry is not
14 engaged in examining his criminal trial. We're here in a
15 different process. The openness that we need to examine is
16 the openness of these proceedings not the prior
17 proceedings.

18 In my submission, you've already said it
19 best. You said it in your prior ruling, and I've set it
20 out, and I'm going to just repeat it. It's in my Factum at
21 paragraph 21. In your ruling, you said -- this is your
22 ruling of October 31st -- you've got my Factum up on the
23 screen:

24 "Openness is particularly important in
25 the context of this Inquiry, which is

1 expected to dispel rumours and
2 innuendos and ascertain allegations of
3 cover-up and conspiracy theories."

4 Well, how on earth do we do that if every
5 time Father MacDonald's name is going to be mentioned, we
6 turn off the screens? It's ridiculous. It makes no sense.
7 Or we call him -- we turn him into a moniker. It makes
8 absolutely no sense.

9 In my submission, and I say this with
10 respect to my friends because I know the difficult position
11 they're in, but it would turn this process into an Alice in
12 Wonderland scenario. We would be going down the rabbit
13 hole and the public would be looking at us and saying, what
14 on earth is happening here. One day, we had Father
15 MacDonald, he was represented by Mr. Cipriano, and now we
16 have Mr. C-8. It makes no sense.

17 Now, let me deal briefly with Father
18 MacDonald's legitimate interest because I want to make it
19 clear my clients believe he has legitimate interests, which
20 deserve to be protected by you. The first is he has the
21 presumption of innocence. Now, I'm not going to take you
22 through the cases, but you'll see in our written materials,
23 Mr. Manson -- I think I can speak on his behalf -- was a
24 little taken aback at the assertion by Mr. Cipriano and Mr.
25 Foord that the stay of proceedings was, in fact, a

1 declaration of innocence. In our submission, if you look
2 carefully at those cases, which start with *Jewitt, Potvin*,
3 a case called *Hince*, which we've referred to in our
4 material, and particularly a decision of the Court of
5 Appeal called *Rulli*. There is a distinction, it may be a
6 subtle distinction, but there is a distinction between the
7 presumption of innocence and a declaration of innocence.
8 But we agree Father MacDonald is entitled to the
9 presumption of innocence, and that's an important stake
10 here.

11 We don't agree that his Section 7 rights
12 will be engaged by hearing testimony, for example, from
13 John MacDonald, and we've cited a couple of cases that deal
14 with that issue, the *Cameron Trucking* case, which is in our
15 material.

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

17 **MR. WARDLE:** I want to note very briefly in
18 passing that my friends made reference to an Alberta case,
19 *Alberta v. T.M.* That case is easily distinguishable. It
20 deals with the section 7 Rights of the Applicants in
21 connection with an individual, their natural son, who was
22 going to be traumatized by the events that were going to
23 take place at this inquiry, which were very, very narrowly
24 focused.

25 But we acknowledge that Father MacDonald has

1 the presumption of innocence and he has a right to his
2 privacy and to his reputation. That brings me to the
3 question of reasonably alternative measures.

4 Let me make a number of suggestions, and I
5 throw them out for what they're worth. First of all,
6 Father MacDonald is entitled to reassert his innocence.
7 He's done that a number of times already in this proceeding
8 and he's entitled to do it in the future.

9 **THE COMMISSIONER:** Well ---

10 **MR. WARDLE:** He can do that in ---

11 **THE COMMISSIONER:** Why?

12 **MR. WARDLE:** He can do that in submissions
13 to you.

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

15 His innocence is really irrelevant, isn't
16 it?

17 **MR. WARDLE:** Well, no. His innocence -- his
18 presumption of innocence, in my submission, is important
19 for you to keep into -- take into account.

20 **THE COMMISSIONER:** Absolutely.

21 **MR. WARDLE:** And if Father MacDonald is
22 concerned about the effect that evidence before the Inquiry
23 has on how he is perceived in the eyes of the public, he's
24 entitled to reaffirm his innocence. He could do that, for
25 example, by testifying before this Commission.

1 **THE COMMISSIONER:** He could come forward --
2 you're saying he could come forward, take the stand and
3 say, "The allegations that no one has heard, because they
4 are irrelevant, aren't true."

5 **MR. WARDLE:** He could get before this
6 Commission, and I believe we have already heard from your
7 counsel that alleged perpetrators have been invited to
8 participate in this Commission.

9 **THE COMMISSIONER:** Yes, but I think that has
10 to do with how not on the truth of the allegations, but
11 with respect to their comments and how they've been treated
12 by the institutional response.

13 So I don't know. I have trouble with that
14 submission that he can come and -- I mean, it would almost
15 sound unfair that he can come and proclaim his innocence
16 and yet the alleged victims aren't able to -- I mean, it's
17 not a trial.

18 **MR. WARDLE:** No, it's not a trial and I'm
19 not trying to suggest it's a trial.

20 All I'm saying is that it may be appropriate
21 to remind the public that he has the presumption of
22 innocence and there are a number of ways that can be done.

23 **THE COMMISSIONER:** Well, with the greatest
24 of respect, I think it's been done time and time ---

25 **MR. WARDLE:** I agree with that.

1 **THE COMMISSIONER:** --- and time again, and
2 the only person who doesn't seem to get it, I think, is
3 Father MacDonald.

4 **MR. WARDLE:** I guess what I'm saying, Mr.
5 Commissioner is that whether he gets it or not, you may
6 have an obligation to continue to remind the public.

7 **THE COMMISSIONER:** Of that, I've been doing.
8 Okay.

9 **MR. WARDLE:** And he has the opportunity to
10 make submissions at an appropriate time.

11 **THE COMMISSIONER:** Well ---

12 **MR. WARDLE:** He made his opening statement
13 and in his opening statement he made it clear to everyone
14 that he's an innocent person, and that's all I'm really
15 saying.

16 **THE COMMISSIONER:** All right.

17 Well, innocent. He has the presumption of
18 innocence. There is no doubt about that.

19 **MR. WARDLE:** And it may be advisable, in my
20 submission, for you to remind the public about that before
21 an alleged victim takes the stand.

22 **THE COMMISSIONER:** All right.

23 **MR. WARDLE:** And at the same time it may be
24 appropriate for you to make the same reminder that you've
25 just reminded me, which is that this Commission is not a

1 place to determine the truth of particular allegations.

2 **THE COMMISSIONER:** I think it's been a
3 constant thing.

4 **MR. WARDLE:** Those are protections that have
5 been made already and can be made again at the time
6 particular witnesses take the stand.

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

8 But one question I have, this morning you
9 were arguing for a ban for victims or alleged victims and
10 now there's an alleged perpetrator and now are we
11 vacillating, giving different treatment to victims as
12 opposed to alleged abusers?

13 **MR. WARDLE:** Well, there are a number of
14 obvious differences between the categories. One is that
15 with the individuals this morning, we were dealing with a
16 category who had never come forward and never been named
17 publicly in any sort of process.

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

19 **MR. WARDLE:** That's a primary distinction.

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

21 **MR. WARDLE:** I draw a distinction between
22 individuals like Father MacDonald and there may be other
23 individuals who have been accused of crimes or suspected of
24 crimes who are not central to the work of the Commission.

25 **THE COMMISSIONER:** So not all victims or

1 alleged victims would be entitled to a publication ban and
2 not all alleged abusers would necessarily be -- not given a
3 publication ban?

4 **MR. WARDLE:** You have to engage in a very
5 difficult line drawing process.

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

7 **MR. WARDLE:** And that's one of the reasons
8 why I think you've already wisely said we'll do this on a
9 case-by-case basis.

10 But there is an element to this to say, "You
11 know what? It's unfortunate but, Father MacDonald, you're
12 central to the mandate. We can't explore the mandate in
13 any other way. We have to protect you. So we have to take
14 some measures to try to make sure that the interference
15 with your rights is as minimal as possible, but we can't
16 guarantee you that that won't happen."

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

18 **MR. WARDLE:** But that's just a necessary
19 part of the mandate.

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

21 **MR. WARDLE:** Now, may I make one last
22 suggestion on the question of reasonable alternate
23 measures? It may be useful for your counsel to consider
24 how the evidence of alleged victims involving Father
25 MacDonald -- how questions are put to those victims.

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

2 **MR. WARDLE:** To date, we have been dealing
3 with victims where there is a perpetrator who has been
4 convicted, and for those victims it has been in some ways a
5 very straightforward process. It may be important that the
6 questions get asked in a particular way, and that takes us
7 back, I think, to the point you made to my colleagues
8 earlier, which is in some ways this application is
9 premature.

10 But it may be very important how you ask the
11 question. If the question is, you know, who did the person
12 complain to? What did they complain about and what was the
13 response? That's a different question from asking whether
14 those allegations were true, for example.

15 **THE COMMISSIONER:** But I think I've
16 indicated that before as well ---

17 **MR. WARDLE:** I know you have, sir.

18 **THE COMMISSIONER:** --- in that at the
19 beginning, the first witnesses that we had is "What did
20 this person do to you?" But with respect to people where
21 there is alleged perpetrators, it will be "What complaint
22 did you make to the police?"

23 **MR. WARDLE:** Then you and I are on the same
24 page, Mr. Commissioner. It seems to me if that is the way
25 -- if that is the way that evidence is handled, many of my

1 friends' objections disappear, provided that you continue
2 to remind the public from time to time about the issues
3 we've just discussed.

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

5 **MR. WARDLE:** Those are my submissions.
6 Thank you very much.

7 **THE COMMISSIONER:** Thank you, sir.
8 Mr. Lee.

9 --- REPLY ON MOTION BY/RÉPLIQUE SUR REQUÊTE PAR MR. LEE:

10 **MR. LEE:** Good afternoon, Mr. Commissioner.

11 **THE COMMISSIONER:** Good afternoon, sir.

12 **MR. LEE:** What I have to say has been
13 shortened significantly following Mr. Wardle's excellent
14 presentation. He covered a lot of the ground that I would
15 have covered and likely more eloquently. So I am grateful
16 for that.

17 As you know, the Victims Group opposes this
18 Application brought by Father MacDonald. It is our
19 position and kind of our jumping off point that any
20 censoring of information is contrary to the general
21 principle of openness and requires Father MacDonald to
22 satisfy the legal requirements that are set out in the case
23 law.

24 My factum sets out the law in some detail
25 and it's been covered here in the past, and I don't intend

1 to go to it today. You can refer to the factum for that.

2 I would like to take you very briefly to one
3 of the sections of my factum at page 3, paragraph 9, in
4 which Father MacDonald's stay of proceedings are discussed,
5 and I've set out a lengthy quote there from the decision of
6 Justice Chilcott staying the proceedings, and I think it's
7 important that I read some of this to you, sir. I would
8 like to begin at the end of the third line where it begins,
9 "Some".

10 "Some of the unusual aspects of the
11 evidence which the transcripts will
12 disclose are the charge of obstruction
13 against Malcolm MacDonald; the
14 extraordinary amount and extent of
15 media coverage; the untimely death of
16 Mr. Seguin, the probation officer; the
17 continuing and extensive investigation
18 by Mr. Dunlop; the succession of Crown
19 Attorneys on this prosecution; the
20 numerous civil actions commenced by
21 some of the complainants; the civil
22 action for millions commenced by Dunlop
23 against the police chief of Cornwall,
24 the Cornwall Police Services Board, the
25 Roman Catholic Diocese of Alexandria-

1 Cornwall and numerous others; the
2 allegations of death threats against
3 Mr. Dunlop and his family; the delivery
4 to Chief Fantino by Mr. Dunlop of a
5 brief alleging a clan of pedophiles;
6 the Samuels trial being delayed; the
7 Leduc proceedings being stayed; the
8 continued delays of Mr. Dunlop in
9 handing over the notes and documents
10 from his investigation and the fact
11 that there were three police
12 investigations carried out and;
13 finally, the unusual security with
14 respect to people in the courtroom and
15 so on."

16 And he notes at the end that:

17 "I'm sure that there are other aspects
18 which I have not noted here."

19 It is my submission that many of the unusual
20 aspects of the evidence enumerated by Justice Chilcott
21 relate directly to the institutional response to the
22 allegations made against Charles MacDonald and others.
23 These are wholly relevant to this Inquiry, and as Mr.
24 Wardle emphatically stated, Father MacDonald is one of the
25 very key players in the Cornwall story.

1 And as I will touch on briefly in a moment,
2 given the nature of the process resulting in the judicial
3 stay of proceedings, the charges against Father MacDonald
4 were disposed of without the case being decided on its
5 merits.

6 Consequently, there's a lack of reliable
7 information available to the public that relates to the
8 allegations against the Applicant. The public knows
9 generally that allegations were made and they know that
10 they were disposed of, but the details of what happened and
11 the understanding of that process does not appear to be
12 generally available to the public.

13 I, again, will not go into the law when it
14 comes to the principle of openness. It's been well
15 considered at this Inquiry. It's set out again at length
16 in our factum. Suffice it to say that it's clear that the
17 open court principle is a hallmark of a democratic society
18 and applies to all judicial proceedings, as was enunciated
19 in the *Vancouver Sun* case.

20 Also, I set out in our factum *Atomic Energy*
21 and *Sierra Club of Canada* in which the open court principle
22 is described as the very soul of justice. This is not a
23 principle that is thrown around loosely. It's not
24 something unimportant. This is a key cornerstone of the
25 judicial process.

1 I would like to briefly comment on -- and
2 this is found at paragraph 22 of my factum on page 7 -- of
3 the Supreme Court's comments on the importance of the media
4 and the importance of news of judicial proceedings being
5 disseminated to the public when it comes to public access.
6 The quote that I've set out there essentially says that
7 it's exceedingly difficult for many people to attend court,
8 and it gives examples of people who work, mothers and
9 fathers who take care of small children, things along those
10 lines. At the end it says:

11 "Discussion of court cases and
12 constructive criticism of court
13 proceedings is dependent upon the
14 receipt by the public of information as
15 to what transpired in court.
16 Practically speaking, this information
17 can only be obtained from the
18 newspapers or other media."

19 And this would include, to drive home the
20 point a little bit, former residents of Cornwall who are no
21 longer living in the area. We've already heard from a
22 number of victims of abuse who have testified at this
23 Inquiry and many of them have told us of the fact that they
24 needed to move away from Cornwall to get away from their
25 past, to escape the trauma of what occurred to them.

1 We heard from Benoit Brisson who was living
2 in Montreal at the time that he disclosed his allegations.
3 We heard from Scott Burgess who moved to near London,
4 Ontario and continues to live there; Cindy Lebrun, who
5 lives in Prescott. Alain Seguin has told us that he's now
6 living in Ottawa, and it goes on and on, and I can tell you
7 I have other clients who have told similar stories and I
8 expect there will be others, simply of the idea of people
9 having moved away. It's clear that there are people ---

10 **THE COMMISSIONER:** Well, Mr. Burgess, for
11 example, sir, he moved away because his adoptive mom, her
12 husband lost work.

13 **MR. LEE:** Absolutely.

14 **THE COMMISSIONER:** So ---

15 **MR. LEE:** Her husband was transferred to
16 Mitchell, Ontario.

17 **THE COMMISSIONER:** Right.

18 **MR. LEE:** I believe Scott Burgess did tell
19 us, sir, however, that he continues to have a difficult
20 time with this and finds it difficult to be in Cornwall.

21 **THE COMMISSIONER:** Absolutely.

22 But you've got to be careful because you
23 said, "Well, look at these people; they left to get away
24 and we know of that." That wasn't really the reason for
25 him leaving in the first place.

1 MR. LEE: Fair enough.

2 THE COMMISSIONER: So be careful about that.

3 MR. LEE: Certainly.

4 The principle of openness, as I said, is
5 important and it's, I would suggest, particularly important
6 at public inquiries.

7 As someone today stated -- we're all
8 familiar with the case of *Phillips v. Nova Scotia*, and at
9 paragraph 29 of my factum on page 10, I have set out the
10 Supreme Court's comments in that case relating to an
11 inquiry in particular.

12 And about halfway through that quote there's
13 a sentence that begins with the word "Yet", and the Court
14 wrote:

15 "Yet these inquiries can and do fulfill
16 an important function in Canadian
17 society. In time of public
18 questioning, stress and concern, they
19 provide the means for Canadians to be
20 apprised of the conditions pertaining
21 to a worrisome community problem and to
22 be a part of the recommendations that
23 are aimed at resolving the problem.
24 Both the status and high respect for
25 the Commissioner and the open and

1 public nature of the hearing help to
2 restore public confidence not only in
3 the institution or situation
4 investigated but also in the process of
5 government as a whole. They're an
6 excellent means of informing and
7 educating concerned members of the
8 public."

9 And so we have the general principle that
10 openness is important. It's especially important at a
11 public inquiry, and I would submit it's doubly important at
12 the Cornwall Public Inquiry given the context of what has
13 gone on in this community and what has led to the calling
14 of this Inquiry.

15 So we move then -- we understand that
16 openness is important and we understand that there is an
17 application here to limit openness in some way, and so we
18 need to rely on the law as it relates to publication bans.
19 Again, that has been set out in detail and it's set out in
20 my factum as well, being the *Dagenais/Mentuck* test and some
21 of the other decisions that inform that.

22 I would like to comment briefly on a couple
23 of the important factors to keep in mind in applying the
24 test, and the first is that the burden of displacing the
25 general rule of openness in judicial proceedings lies with

1 the party seeking to limit the openness of the process,
2 being the Applicant Charles MacDonald in this case, and
3 also that there is an evidentiary requirement in that
4 evidence of irreparable harm must be clear and not
5 speculative and it must be serious enough to justify a
6 departure from the general principles of openness.

7 And finally, as you've heard repeatedly at
8 these hearings, a decision to order a publication ban must
9 be based on strong evidence.

10 So the question that's left to be answered
11 is how does all of this apply to the facts of what we're
12 considering now?

13 My understanding of what the Applicant
14 argues is that he requires the relief to protect -- to
15 preserve his rights under the Charter, to preserve the
16 integrity of the administration of justice at this Inquiry
17 and to ensure that he's not re-victimized. That's set out
18 in their materials and, I believe, again today by Mr.
19 Foord.

20 The Applicant also suggests that in relation
21 to John MacDonald in particular, we've all received an
22 Anticipated Evidence Summary that was prepared by
23 Commission counsel presumably in concert with the witness,
24 and Mr. Foord suggests that there's no suggestion there
25 that charges laid were inadequate or inappropriate and, as

1 such, he argues there's no reason to require the
2 publication of the details of the allegations or of the
3 Applicant's name.

4 The evidence filed in support of this
5 Application was an affidavit by Charles MacDonald. He
6 concedes in that affidavit that there has been intense
7 media scrutiny and a media frenzy, and I don't intend to
8 say any more than that.

9 He also tells us that he has lost his
10 vocation and salary, that he's not free to travel to the
11 United States without some hassle and that he must endure,
12 and I quote, "remarks, insults, stares and glances" and he
13 must also suffer awkwardness around his friends.

14 I would submit that the affidavit does not
15 explain to us how further publication of his identity or
16 the allegations will in any way further impact his life.
17 He has told us the impact it's had on his life. I'm not
18 sure it tells us how it's going to affect him any more.

19 The question I was left with after reading
20 the affidavit was how Father MacDonald's reputation in this
21 community could be further tarnished, how it's going to --
22 he's going to be affected -- his reputational interests are
23 going to be affected any more by anything that could come
24 out here. He concedes, in fact, that his reputation has
25 been torn to shreds.

1 Now, as we've heard, the Applicant's
2 argument hinges in large part on the fact that he is an
3 innocent person, as that phrase is understood in the law.
4 He argues that he is an innocent person based on the fact
5 that his charges were stayed on Charter grounds and because
6 the Criminal Injuries Compensation Board declined John
7 MacDonald's application for compensation.

8 He argues at various times that there's no
9 real distinction between a stay and an acquittal and that
10 in law they are considered to be the same.

11 He also argues at one point that I think I
12 should draw your attention to, that people who are
13 investigated and never charged and those who are charged
14 and awaiting trial and those who have been acquitted are
15 all more than presumed innocent, they have been found not
16 guilty.

17 I would argue that that is not the state of
18 the law and that is inaccurate.

19 So that sets out what the Applicant has told
20 us that he's seeking and what evidence he's supported.

21 I would like to turn to my response to what
22 he has said, and although it's been alluded to and you have
23 made some comment on it as well, I think I do need to touch
24 on the submissions made in relation to John MacDonald's
25 criminal injuries claim.

1 I would submit that the Applicant, in his
2 materials, has misrepresented the nature of the Board's
3 decision and, for that matter, the effects of that decision
4 on the Applicant.

5 The Applicant argued that the Board found on
6 a balance of probabilities that John MacDonald was not a
7 victim of sexual assault. I would argue that that is not
8 accurate, and instead the Board simply found that it had
9 insufficient evidence to conclude that John MacDonald was a
10 victim of a crime of violence. It did not, by any stretch
11 of the imagination, issue a declaration with respect to the
12 innocence of Charles MacDonald.

13 It must also be noted, I think, in fairness
14 and in response to a suggestion in the Diocese materials
15 that it conducted a full trial, that John MacDonald
16 represented himself at the hearings before the Board, that
17 according to the reasons of the Board, he declined the
18 opportunity to review all the documentation that was
19 available and also the fact that the only witness to appear
20 at the hearing was a retired -- other than the two
21 MacDonalds -- was a retired police officer who had not had
22 any contact with John MacDonald as a complainant. This was
23 a decision of an administrative board asked to answer a
24 specific question and is not akin to a civil court's
25 determination of liability.

1 And again, just to sort of clearly say what
2 I mean here, the record is clear that John MacDonald's
3 allegations against the Applicant have never been
4 considered on their merits by a court of law. He has not
5 been declared innocent, nor has he been found guilty. We
6 agree and we concede that he does enjoy the presumption of
7 innocence. That is not the same thing.

8 While this Commission can't do anything
9 about the fact that he hasn't been found guilty, that's not
10 the role here.

11 It is the role of this Commission to look
12 into the failure of public institutions to ensure that a
13 proper consideration of the allegations took place. We
14 submit it was a failure of certain public institutions to
15 ensure that charges proceed, that a trial occurred, that it
16 wasn't stayed on Charter grounds, and that is something
17 that the Inquiry can look into.

18 We submit that there are a number of
19 concerns that we have that the relief sought is going to
20 negatively impact the administration of justice at this
21 Inquiry, and that's an important risk to this publication
22 ban that we need to consider.

23 The first heading, I suppose, that I want to
24 discuss is the necessity of the evidence being heard openly
25 and being subject to publication.

1 We would submit that if it is not possible
2 at the time that a victim testifies or as the Commission
3 counsel is preparing the witness for testimony to fully
4 appreciate what may or may not be relevant to the mandate
5 of the Inquiry, the Commission is entitled to and must hear
6 all potentially relevant information that each witness can
7 provide.

8 In the case of John MacDonald, we would
9 submit that you need to hear sufficient details of his
10 allegations to permit you to determine whether the
11 allegation should have appeared credible to those receiving
12 them and whether those persons responded appropriately. We
13 can't make that determination in a vacuum. We need some
14 facts.

15 **THE COMMISSIONER:** Well, wait a minute now.
16 I mean, again, we're looking into specifics.
17 All right?

18 With respect to -- we won't use Father
19 MacDonald, just an example.

20 **MR. LEE:** Sure.

21 **THE COMMISSIONER:** If someone comes to the
22 police and files a complaint, the police take the complaint
23 and goes to the Crown Attorney and lays charges. Well,
24 they took action. I mean, we could maybe find some
25 relevance in looking at the complaint to see if all the

1 charges that could have been laid were laid or was it the
2 proper charge, et cetera, but other than that, I mean,
3 we've gone further than looking at why the police didn't
4 lay charges.

5 Do you agree with me there?

6 **MR. LEE:** I do.

7 **THE COMMISSIONER:** Okay. So we don't
8 necessarily -- I mean, it's going to be on a case-by-case
9 basis that we decide whether or not it's necessary to go
10 into any detail or to a lot of detail with respect to
11 allegations.

12 **MR. LEE:** Absolutely.

13 **THE COMMISSIONER:** Okay.

14 **MR. LEE:** What I'm saying is it's not the
15 role of Commission counsel to make that determination on
16 its own in isolation.

17 **THE COMMISSIONER:** No.

18 **MR. LEE:** Speaking hypothetically again,
19 there could be a situation where a complainant made
20 allegations to the police. The police pressed charges.
21 The Crown prosecuted and something happened. It seems to
22 me that that doesn't foreclose the possibility that, as you
23 said, the proper charges weren't laid in the first place.
24 He was charged with one thing and you may decide he should
25 have been charged with eight things. It doesn't -- we need

1 to know if that -- if the allegation was, "I was abused by
2 X, as were A, B, C and D, and we learned that the police
3 didn't bother speaking to A, B, C and D until four years
4 after the fact; spoke to A, delayed the proceedings for a
5 year; then spoke to B, delayed the proceedings for a year,"
6 and at the end of the eight-year period there's a stay of
7 proceedings. That's relevant. We need to hear about that.

8 As you said, we don't know now. It's on a
9 case-by-case basis. I'm saying that there is at least a
10 possibility that there's potentially relevant information
11 that we need to be able to probe somewhat into the
12 allegations if there's some indication that there's
13 something relevant there.

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

15 **MR. LEE:** Now ---

16 **THE COMMISSIONER:** And I think we've found
17 last Thursday that there are things that are going to crop
18 up every day in the sense that Mr. ---

19 **MR. LEE:** Roy.

20 **THE COMMISSIONER:** Pardon me?

21 **MR. LEE:** Mr. Roy.

22 **THE COMMISSIONER:** Mr. Roy, yes, but ---

23 **MR. LEE:** Callaghan?

24 **THE COMMISSIONER:** Mr. Callaghan, thank you.

25 **MR. LEE:** I'll just keep on naming people.

1 **THE COMMISSIONER:** Exactly.

2 Came up with an issue that no one could have
3 foreseen. It wasn't until the evidence came out and we saw
4 the name on an account that that issue came up. Now, how
5 far are we going to go with that issue? I don't know, but
6 I think it serves to illustrate your point that it's not up
7 to Commission counsel totally. I mean, they can't see the
8 whole picture, and that's why we have 14 other parties to
9 help us find the whole picture.

10 **MR. LEE:** And, frankly, last Thursday it
11 took 14 parties for one of them to hit on that issue, and I
12 agree.

13 The reason I raise these issues is that, I
14 mean, we have to be cognizant of the fact that this is a
15 public inquiry, and I would submit that it's necessary for
16 the public to be able to hear these same details in order
17 to form a couple of opinions.

18 The first one, I think it's the right of the
19 public to be able to draw its own conclusions as to the
20 sufficiency of the public institutional response.

21 **THE COMMISSIONER:** All right.

22 **MR. LEE:** And also, I think it's the right
23 of the public to be able to assess your recommendations and
24 the work of this Commission.

25 **THE COMMISSIONER:** Right.

1 But, Mr. -- now you're getting into --
2 you're saying all of the -- and we're talking
3 hypothetically, but you, for one, advocate very strongly
4 that parts of some of your clients' statements to the
5 police be edited.

6 **MR. LEE:** I do. And I don't for a second
7 support some kind of global position on this or some kind
8 of blanket ruling that you're in category A or you're in
9 category B and there's no in between.

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

11 **MR. LEE:** I fully appreciate the fact this
12 needs to be case by case.

13 I don't have documents in front of me. I
14 don't have a document that I'm talking to you about right
15 now, and that's a problem and you've acknowledged that
16 problem and other parties have acknowledged that problem.

17 But it seems to me, as a general principle,
18 we need to be cognizant of the fact that there's a real
19 public interest here in seeing this information and be able
20 to draw their own conclusions and to be able to assess the
21 work of this Inquiry.

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

23 **MR. LEE:** And it may happen. It's entirely
24 possible that a document will come up and everybody will
25 concede that, you know what, that right has to be trumped

1 here. There's something -- there's an interest here. We
2 don't have that document in front of us. I'm skeptical in
3 this particular case that we're going to find that
4 document.

5 I have to admit that it looks a little bit -
6 - it carries a little bit of punch on the page of my factum
7 here -- I have a heading that secrecy is the enemy of
8 truth, and I have to admit that I stole that one from one
9 of our contextual experts.

10 Dr. Peter Jaffe, in his testimony at the
11 Inquiry, spoke to us about the fact that when you're
12 dealing with bullying in school or domestic violence or
13 child sexual abuse, you have to name the problem. He said
14 that you have to be able to talk about it out loud and you
15 have to be able to talk about it in public, and he later on
16 said that in general, secrecy is the enemy of child sexual
17 abuse. You want open dialogue discussion and you want
18 people to be able to come forward and feel support. He
19 concluded:

20 "In general, secrecy is not helpful as
21 a concept in eradicating sexual abuse."

22 We would submit that secrecy is the enemy of
23 truth and public inquiries as well, but especially so when
24 the subject matter of the inquiry is dealing with child
25 sexual abuse.

1 The public is already hesitant to discuss
2 these issues, as we heard from Dr. Jaffe, and he told us,
3 in fact, that he is generally not engaged in very many
4 conversations at a party because people don't want to talk
5 about what he does for a living. They don't want to talk
6 about these issues.

7 Given that one of the objectives of this
8 Inquiry is to promote healing, it should play no part in
9 encouraging silence and secret keeping and publication bans
10 should be only issued when absolutely necessary.

11 Another concern we have that could impact
12 the administration of justice is that we submit that this
13 Commission must play a significant role in encouraging
14 witnesses to come forward by eliciting and allowing the
15 publication of any and all evidence that could potentially
16 establish links between members of the community alleged to
17 be involved in a rumoured cover-up or conspiracy or other
18 behaviour that may have influenced the institutional
19 response.

20 It may well be only through the publication
21 of allegations and the names of those accused that the
22 evidence of persons having information in this regard can
23 become available.

24 I would submit to you that the Supreme Court
25 in *Dagenais* has recognized that this is an effect of not

1 ordering a publication ban, and I can take you to the
2 decision if you wish.

3 **THE COMMISSIONER:** No, no, no. What I'm
4 concerned about is you are always coming back to
5 "publishing of allegations". Right.

6 Are you saying that you do not want -- well,
7 that allegations should be published?

8 **MR. LEE:** Where relevant.

9 **THE COMMISSIONER:** Where relevant.

10 **MR. LEE:** The relevant details need to --
11 there is always going to be this test of relevance; there's
12 always going to be information that has nothing to do with
13 such thing as institutional response.

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

15 **MR. LEE:** What I am suggesting is that we
16 need to limit the -- we need to limit as little as possible
17 the flow of information coming from this Inquiry. If it is
18 relevant to this Inquiry and it is relevant in this room,
19 the general principle should be that it's relevant for the
20 public to know that information as well. Again, where
21 possible. There's always that weighing, and there's that
22 balance. If I had a document in front of you, I could make
23 specific submissions on that; whether those allegations --
24 I don't have that.

25 I have provided the Commission and the

1 parties with two affidavits that I would like to very
2 briefly point you to, and the reason that I'm pointing you
3 to these at this point is that one is filed by Terry
4 Saunders who, I think everybody in this room knows is a
5 journalist with the Cornwall Standard Freeholder; and the
6 other one is filed by my colleague, Rob Talach, who has a
7 vast amount of experience dealing with victims of abuse.
8 And both those affidavits attest to the fact that the
9 publication of names and details is what often permits
10 additional victims and witnesses to be identified.

11 If I can take you briefly to the affidavit
12 of Ms. Saunders first, it's found -- I have a separate
13 volume for the two affidavits that I provided and hers is
14 found at Tab 2. It is on the screen as well.

15 Ms. Saunders states in her affidavit at
16 paragraph 4 that -- and I'll just read it:

17 "It has been my experience and I
18 invariably believe that victims of
19 sexual abuse are often hesitant to come
20 forward with their stories for a number
21 of different reasons."

22 She explains that her experience is formed
23 from years of experience interviewing victims of abuse and
24 their families. It is further her experience in paragraph
25 5 that many victims of abuse have come forward with

1 allegations only after learning that the perpetrator has
2 been publicly accused of wrong doing.

3 As part of swearing her affidavit in support
4 of my position on this Motion, Ms. Saunders conducted a
5 search of published media reports that explicitly describe
6 where a victim of abuse came forward only after hearing the
7 media that his or her perpetrator had been accused by
8 somebody else, and she provided me with 10 such examples of
9 newspaper articles from across the province. Those are all
10 attached as Tab A to her affidavit. I don't intend to
11 bring you to those; I will, however, draw your attention to
12 the fact that these are taken from all areas of the
13 province, from Cornwall, from Ottawa, from Windsor, from
14 Peterborough, from Sault Ste Marie. And these are, as I
15 understand it, just the first ten that she came across and
16 spoke to the issue and those are the ones she provided me
17 with.

18 Similarly, we have the affidavit of Rob
19 Talach who, beginning at paragraph 16 of his affidavit,
20 sets out that not only can additional victims be identified
21 following public disclosure but so too can evidence on the
22 institutional response. He gives us a very specific
23 example of a case that he was involved in or is involved in
24 where the local media ran a story which named the defendant
25 priest by name and, following media exposure, Mr. Talach

1 was contacted by a woman who had information that goes
2 directly to the institutional response.

3 Clearly, it doesn't go to the Cornwall
4 Public Inquiry institutional response but were there a
5 Sault Ste Marie public inquiry, it certainly would, and it
6 involved this woman having found a letter from the Diocese
7 -- from the Bishop rather to the priest setting out the
8 fact that he was to have no further contact with young boys
9 and that there had been allegations made and, as Mr. Talach
10 states in paragraph 19:

11 "I believe that this valuable
12 information, as the institutional
13 response, would never have been known
14 had the public disclosure of the
15 allegations, including the priest's
16 name not been made.

17 I simply point to that in support of my
18 argument that there is a role to be played that openness
19 and media reporting is critical to fostering an environment
20 that is as likely as possible to promote witnesses coming
21 forward.

22 I would submit that it is very likely that
23 there are people in this community and elsewhere with
24 valuable information concerning the institutional response
25 that we are dealing with and we need as much information

1 disseminated as possible in the hopes that they will
2 recognize the important information they have and come
3 forward.

4 Finally, the last area that I say goes to
5 the -- that is a possible negative impact of a ban on the
6 administration of justice is a negative impact on victim
7 witnesses that appear here.

8 Again, Dr. Jaffe stated during his testimony
9 at the Inquiry that psychologically I think it's important
10 for victims as part of a healing process to tell their
11 stories and to tell their stories openly and frankly.
12 That's the bottom line.

13 Dr. Wolfe also testified that even minor
14 influences on a victim during the judicial process can
15 potentially be devastating outcomes, and this is at
16 paragraph 79 on page 25 of my Factum. He told us here that
17 because we always have to consider is that living under the
18 pressure and the pain that goes along with that lead some
19 people to kill themselves. Serious substance abuse
20 incidents. We have had many cases of overdoses, self-
21 destructive behaviours, cutting themselves, harming their
22 family, any of that can happen.

23 So it just takes a little bit added pressure
24 on that person's life, and they may tip.

25 **THE COMMISSIONER:** Should they not be

1 concerned with Father MacDonald's condition? I mean, you
2 know, he is taking medication; he's depressed; he's under
3 stress. Aren't those all valid considerations as well?

4 **MR. LEE:** They are. And they go into the
5 balancing. That's part of what you need to balance, and
6 I'll come to that of what I consider to be the factors for
7 and against our salutary deleterious effects.

8 I agree with Mr. Wardle that there are
9 concerns that Father MacDonald has legitimate interests
10 worth protecting. The question is whether or not those
11 interests outweigh the interests I'm talking about.

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

13 **MR. LEE:** It is also clear from the evidence
14 of Dr. Jaffe and Wolfe and what we've seen here in the
15 witness box that victims are having -- it is not an easy
16 process to come here to the Inquiry. We can look at our
17 most recent witness, Albert Roy, this obviously hasn't been
18 an easy process for him.

19 It is my submission that the Commission must
20 do everything in its power to ensure that the process is as
21 natural, easy and stress-free as possible for victims who
22 have the courage to testify here.

23 We submit that the relief requested by the
24 Applicant would have serious detrimental effects on the
25 victim/witness forced to abide by the terms of its order

1 and specifically what I mean by that is that we can presume
2 that a victim testifying here is under great stress and
3 that it's a difficult time. An order that would prevent
4 that witness from calling his alleged abuser by name and
5 instead forcing him to refer to him as Mr. C-4 or Mr. C-8
6 or Mr. C-25 as Mr. Wardle said, is unfair to that witness
7 and can serve only to complicate his experience and likely
8 impact his ability to accurately present his evidence.

9 It is my submission that victims of abuse
10 should be entitled to testify here with as few impediments
11 to their testimony as possible and that this goes directly
12 to the administration of justice.

13 The final point that I would like to make is
14 beginning at paragraph 86 of my Factum on page 26 where I
15 list a summary of what I see as the salutary and
16 deleterious effects of the ban that you need to weigh.

17 **THE COMMISSIONER:** Can I just turn you back,
18 I'm a little concerned with your comment.

19 So let's assume for a minute that there's a
20 valid reason for an alleged perpetrator to have his
21 identification a publication ban and that because we want
22 to use the web-cast that we use a moniker. So are we to be
23 -- not held -- hostage to the needs of a witness when if
24 the *Mentuck* test is met, all right, and there's a valid
25 reason for doing that, I mean, do you think that's a valid

1 consideration of what the other witnesses will think?

2 **MR. LEE:** I think the potential impact of
3 such an order and the use of monikers on a witness is
4 absolutely a valid consideration, but it's exactly that,
5 it's a consideration.

6 **THE COMMISSIONER:** Yes.

7 **MR. LEE:** It is not an overriding principle
8 that, okay, hold on a second, the victim might be
9 uncomfortable. It doesn't matter what any of the other
10 arguments are. It doesn't matter if the alleged
11 perpetrator has rights. It's part of the balance. It's
12 part of the weight that you need to accord to, to what you
13 are going to do here in balancing these interests. I say
14 it is a valid consideration and that's my position.

15 So as I said, beginning at paragraph 86, my
16 understanding of the Applicant and the parties supporting
17 him of their concerns re the salutary effects of the ban
18 are that it will protect the rights of Charles MacDonald,
19 an innocent person, as defined in the law. It will
20 preserve the fairness of outstanding matters, and I'm
21 presuming here that this refers to civil actions that are
22 outstanding against MacDonald. It will prevent re-
23 victimizing Charles MacDonald. It will prevent irreparable
24 prejudice to him being damage to his privacy, reputational
25 and security interests. And it will contribute to the

1 maintenance of the integrity of the Inquiry process.

2 I have also listed at the beginning of
3 paragraph 87 what I say are the deleterious effects of a
4 ban. These include, as I was just discussing, my opinion
5 that the -- or my submission rather that physical and
6 psychological health of the victims may be jeopardized.
7 The chances of individuals with relevant information
8 hearing about the case and coming forward with new
9 information will be greatly reduced; the testimony of
10 witnesses will be sheltered from public scrutiny, thereby
11 producing examination process, which is much less conducive
12 to ascertaining the truth; the full and candid disclosure
13 by witnesses will be compromised.

14 **THE COMMISSIONER:** Explain that one for me.

15 **MR. LEE:** Which one?

16 **THE COMMISSIONER:** "Full and candid
17 disclosure by witnesses will be compromised".

18 **MR. LEE:** As I said, I think the order as it
19 stands and if granted with using the use of monikers and
20 other confidentiality measures, I think it results in the
21 witnesses giving their evidence in an unnatural way. I
22 think it makes them uncomfortable and I'm concerned that it
23 could lead to the evidence not coming out as fully as it
24 might, and it might lead to some confusion on the witness'
25 part.

1 I have a concern that -- and it's happened
2 here, it happened with Lise Brisson -- when we attached the
3 moniker, and it wasn't to an alleged perpetrator, it was to
4 a victim, and she was doing her best to make sure -- I
5 believe it was Mr. C-4, and she had to call him Mr. C-4,
6 and a couple of times she slipped, and I saw her quite
7 visibly put her hand to her mouth. I mean, it wasn't a
8 natural way to give a testimony. It is not a natural way
9 of speaking. It affects the testimony.

10 Does that answer your question?

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

12 **MR. LEE:** Moving on, it will further shelter
13 information from the public with respect to sexual abuse
14 thereby contributing to a harmful public tendency to not
15 discuss these issues openly and freely.

16 The public's ability to scrutinize and make
17 an informed assessment of the efficacy of the actions of
18 the public institutions being examined and ultimately the
19 recommendations put forth by the Commission will be
20 severely impaired.

21 It will impair the public's ability to judge
22 the functioning of the system, rate the government's
23 performance and call for change. The restoration of the
24 public confidence in the various institutions involved in
25 the administration of justice will be negatively impacted.

1 The integrity of the Commission process
2 itself will be called into question. And again, the
3 further rumours of secrecy and cover-up pointed at this
4 Inquiry will be ignited.

5 The public information with respect to ---

6 **THE COMMISSIONER:** What "further rumours of
7 secrecy and cover-up pointed at the Inquiry itself will be
8 ignited"?

9 **MR. LEE:** There are -- I frankly didn't
10 think to include documentation or anything. I assume that
11 it is at least fairly well known that there are people in
12 this community, there are websites up in this community
13 that suggest that this Inquiry is not fair; it suggests
14 that it is not doing what it was supposed to do; it
15 suggests that the mandate is not proper. It suggests that
16 this Inquiry is part of the cover-up, that it is a
17 government tool designed to further the silencing of the
18 truth. My suggestion is that if there's a risk that if the
19 relief sought is granted, that it is going to further those
20 calls for -- those calls that the Inquiry is unfair and is
21 a further part of the cover-up.

22 **THE COMMISSIONER:** Again, I have trouble
23 with that one. So are we going to be held ransom in colour
24 or judgment because we are pleasing some other audience?

25 **MR. LEE:** No, and I don't think we need to

1 cater specifically to a segment of the community and I
2 don't think we need to cater specifically to individuals or
3 small groups of individuals, but I think it is a relevant
4 consideration at this Inquiry that it is seen as doing the
5 work it was intended to do.

6 I am not suggesting that we have to go to or
7 that you have to rather go to extremes to please everyone
8 and clearly that's not proper. But I'm suggesting it is a
9 consideration that needs to be taken into account. You may
10 disagree.

11 **THE COMMISSIONER:** I might.

12 **MR. LEE:** I get the feeling you may
13 disagree.

14 The second last point is that the public
15 information with respect to evidence received by the
16 Commission will be the result of rumour and innuendo rather
17 than of legitimate balance of media accounts and that the
18 healing of the victims in the community of Cornwall will be
19 stifled.

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

21 **MR. LEE:** What I mean by -- if you're
22 looking at the second last point, what I mean by that is
23 the fact that if there is no publication ban imposed, the
24 reporters in attendance are able to publish the account of
25 what happened at this Inquiry and they are entitled to

1 provide full details of what is newsworthy, that is going
2 to be the source of information that comes out. If there
3 is a publication ban, the information that comes out is
4 going to be -- people are going to talk, people are going
5 to discuss what they think happened; they are going to
6 discuss what must have happened; who C-8 must be, things
7 along those lines. It is not the same as having newspaper
8 reports.

9 **THE COMMISSIONER:** Well, no, all we are
10 talking about right now, I think, is a publication ban on
11 Father MacDonald's name.

12 **MR. LEE:** Yes.

13 **THE COMMISSIONER:** So people might have
14 questions about who C-8 is, but the rest will all be the
15 same. It will all be ---

16 **MR. LEE:** As an example, when we go into an
17 in camera hearing ---

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

19 **MR. LEE:** --- I don't think the public says
20 "Oh, they went in camera; I'm not going to turn my mind to
21 it anymore". The obvious question is "I wonder what they
22 were talking about?"

23 **THE COMMISSIONER:** Right.

24 **MR. LEE:** And the obvious response is going
25 to be "Well, I'll tell you what they were talking about".

1 Somebody is going to have an opinion. Somebody else is
2 going to have an opinion. There are going to be rumours.
3 There's going to be speculation.

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

5 **MR. LEE:** That doesn't occur when the
6 hearings are done publicly. Nobody is going to be
7 speculating about my submissions today. They were made
8 openly. They were made publicly. They're subject to
9 review on the website, if they wish. That's my only point
10 there.

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

12 **MR. LEE:** So those are essentially my lists
13 of what I see the salutary effects being and what I see the
14 deleterious effects being.

15 In closing, my position is that clearly the
16 deleterious effects outweigh the salutary effects and that
17 the ban should not be ordered and the application should be
18 dismissed.

19 Subject to any questions you have, those are
20 my submissions.

21 **THE COMMISSIONER:** Thank you.

22 **MR. LEE:** Thank you, sir.

23 **THE COMMISSIONER:** Mr. Chisholm?

24 --- REPLY ON MOTION BY/RÉPLIQUE SUR REQUÊTE PAR MR.

25 **CHISHOLM:**

1 **MR. CHISHOLM:** Good afternoon, Mr.
2 Commissioner.

3 **THE COMMISSIONER:** Good afternoon.

4 **MR. CHISHOLM:** As you know, Mr.
5 Commissioner, the CAS opposes the application brought by
6 the Applicant.

7 Some of the facts that are relevant to the
8 consideration of this Application would be that in March of
9 1996, the Applicant found himself first charged with
10 various offenses including -- well, by the time -- by the
11 end of the three sets of charges that were laid, there was
12 some 19 counts on the indictment, including indecent
13 assault and gross indecency.

14 And some 73 months later, Mr. Justice
15 Chilcott, as you know, issued of stay of proceedings in
16 respect to the remaining charges. Some had been withdrawn
17 by the Crown, but those that had not yet been withdrawn
18 were stayed by Mr. Justice Chilcott on the basis of the
19 right to a trial within a reasonable period of time being
20 infringed.

21 The Applicant has quite rightly set out the
22 fact that he has been the subject of intense media scrutiny
23 over the last decade. I would submit that it's widely
24 known throughout the Cornwall area that Father MacDonald
25 had faced these criminal charges alleging sexual

1 misconduct.

2 I was up here this morning, Mr.
3 Commissioner, arguing the other side of the coin with
4 respect to -- in favour of a publication ban generally with
5 respect to those victims and alleged victims who don't
6 necessarily know that their names are in our documents.

7 I would submit that Father MacDonald's
8 situation is quite distinct and different from those
9 individuals that we were discussing this morning; the large
10 difference being that those victims or alleged victims have
11 never been thrust into the public spotlight and been the
12 subject of media attention and talk in coffee shops, on the
13 streets and anywhere else where people gather in the
14 Cornwall area. The victims and alleged victims that we
15 were discussing this morning do not generally -- their
16 actions do not touch upon the mandate of this Commission.

17 I heard what Mr. Wardle said this afternoon
18 with respect to -- with the Applicant being, whether he
19 likes it or not, quite closely attached to the
20 institutional response of a variety of public institutions.
21 I would agree with what Mr. Wardle had to say.

22 So those are the reasons that we're able to
23 distinguish the Applicant's position from people -- the
24 victims and alleged victims that we were discussing this
25 morning.

1 In the future, we may be faced with other
2 applications by alleged perpetrators, and at that point,
3 each of the institutions will have to seek instructions and
4 determine what position they take with respect to those
5 applications, factors that will come to bear, and those
6 decisions will include whether or not these alleged
7 perpetrators had any involvement with the public
8 institutions who are parties before this Inquiry.

9 I would submit, Mr. Commissioner, that the
10 public institutions, some of which, it has been suggested,
11 have been part of a plan to sweep these issues under the
12 rug, would certainly want to clear the air by this
13 Commission doing its job and releasing its recommendations.

14 The easiest way to do that is to have a full
15 and public hearing of the evidence as it relates to the
16 interaction with the public institutions and, in this case,
17 the Applicant.

18 The mandate of this Inquiry is -- I don't
19 need to tell you what it is. It's set out in section 2 and
20 3 of the Order in Council, but for the purposes of
21 addressing the Applicant, it would certainly not be your
22 role and the mandate is not to examine whether or not the
23 Applicant was involved in criminal offences of a sexual
24 nature. We know that's not the mandate and I would submit
25 the Applicant can be comforted in what we've seen so far

1 with respect to the victims and alleged victims who have
2 testified already.

3 At this point in time, we've been able to
4 see a number of examinations in-chief and cross-
5 examinations of those witnesses. I would submit that in
6 none of those cases have we delved into the issue of the
7 specific allegations of the criminal acts. The focus of
8 the examinations in-chief by your counsel have been aimed
9 at the institutional response. I don't see anything that
10 would cause me to think that when we get to the witnesses
11 that will touch upon the Applicant why that would change.

12 I would fully anticipate that your counsel
13 will examine the witnesses in the same fashion that they
14 have in the past and the cross-examinations will be in the
15 -- carried out in the same fashion that they have been by
16 the parties who have cross-examined.

17 The issue in this Application is whether or
18 not the Applicant is entitled to rely upon a Rule 39 Order.
19 The starting point with respect to that issue, Mr.
20 Commissioner, would be the general principle of openness
21 that, as we know from reviewing the jurisprudence and
22 indeed section 4 of the *Public Inquiries Act* tells us the
23 process is -- the starting point of the process is an open
24 hearing, an open public hearing.

25 If I could take you, please, to my Book of

1 Authorities to the *McIntyre* case? That's Tab 1, Madam
2 Clerk, and it would be page 20 of the -- if you look on the
3 top right portion of page 20, paragraph 59, and you'll see
4 there -- and I am actually looking at the quotation at the
5 bottom of the page. Mr. Justice Dickson, as he then was,
6 in *McIntyre* cited the comment that Justice Lawrence in *R.*
7 *v. Wright*, a 1799 decision:

8 "Though the publication of such
9 proceedings may be to the disadvantage
10 of the particular individual concerned,
11 yet it is of vast importance to the
12 public that the proceedings of the
13 courts of justice should be universally
14 known. The general advantage to the
15 country in having these proceedings
16 made public more than counterbalances
17 the inconveniences to the private
18 persons whose conduct may be the
19 subject of such proceedings."

20 I am sure, Mr. Commissioner, that the
21 Applicant is not alone with respect to his concerns of --
22 the uncomfortable feelings he may have in contemplating
23 what's coming up in the weeks to follow with witnesses
24 talking about him. I would submit that is no different
25 from any other party to the proceedings or perhaps any of

1 the witnesses who have testified. It's not always
2 comfortable or easy to do, but sometimes that's what has to
3 be done to allow this Commission to achieve its goals and
4 to carry out its work.

5 Again, going to Tab 2, Madam Clerk, the
6 *Toronto Star Newspaper* decision on page 4, please. In
7 paragraph 1 you'll see the decision -- in paragraph 1 of
8 Mr. Justice Fish, he states that:

9 "In any constitutional climate, the
10 administration of justice thrives on
11 exposure to light and withers under a
12 cloud of secrecy."

13 And again from the public institutional
14 perspective, Mr. Commissioner, certainly the CAS wants to
15 have this Inquiry conducted in an open fashion whenever it
16 can unless the merits of any particular situation dictate
17 otherwise.

18 We are submitting that the Applicant has not
19 met the onus that is cast upon him in seeking the order
20 that he seeks and for that reason, the Application should
21 be dismissed.

22 Subject to your questions, Mr. Commissioner,
23 those would be my submissions.

24 **THE COMMISSIONER:** Thank you.

25 We might take a break now for 15 and then

1 come back and carry on. Thank you.

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

4 The hearing will resume in 15 minutes.

5 --- Upon recessing at 5:02 p.m./

6 L'audience est suspendue à 17h02

7 --- Upon resuming at 5 :18 p.m./

8 L'audience est reprise à 17h18

9 **THE REGISTRAR:** This hearing of the Cornwall
10 Public Inquiry is now in session.

11 Please be seated. Veuillez vous asseoir.

12 **THE COMMISSIONER:** Yes. We're going to hear
13 from Mr. Rose now.

14 --- **REPLY ON MOTION BY/RÉPLIQUE SUR REQUÊTE PAR MR. ROSE:**

15 **MR. ROSE:** Good afternoon, Mr. Commissioner.

16 **THE COMMISSIONER:** Good evening. No? Or
17 after 6:00, is that the idea?

18 **MR. ROSE:** Anyway ---

19 **THE COMMISSIONER:** All right.

20 **MR. ROSE:** --- I'll make it brief.

21 **(LAUGHTER/RIRE)**

22 **MR. ROSE:** Mr. Commissioner, I had not
23 expected to make any submissions on this part or this
24 Motion today, but one of the questions which you asked, and
25 I wonder whether it was rhetorically if Mr. Wardle has

1 prompted my rising, and that is the question of is there
2 some -- why is it that we're taking this position vis-à-vis
3 Father Charles MacDonald versus the other victims in the
4 Motion that effectively completed this morning.

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

6 **MR. ROSE:** And since the first Motion that
7 was completed this morning was effectively of my
8 initiation, that's the only issue I wanted to address
9 before you. And I'm going to suggest that there is a very
10 important -- a number of very important distinctions, which
11 draw any publication ban editing issue with respect to
12 victims of crime in that sense quite different than Father
13 Charles MacDonald. And I just want to make sure that my
14 position in that regard is on the record.

15 Certainly with respect to the victims of
16 crime that I have been advocating on behalf, those, in my
17 respectful submission, are at least with the individual
18 that was named in camera ---

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

20 **MR. ROSE:** --- it was a proven fact.

21 **THE COMMISSIONER:** It was a proven fact?

22 **MR. ROSE:** A proven fact.

23 In other words, this is an individual who
24 testified and where there was a finding of guilt.

25 **THE COMMISSIONER:** Right.

1 **MR. ROSE:** In that sense at law and in fact
2 the complaint was proven.

3 **THE COMMISSIONER:** Right.

4 **MR. ROSE:** So with respect to others, and I
5 also argued in the first Motion that others who were named
6 as victims ought also to be protected. In my respectful
7 submission, it's enough that they have been named in police
8 reports even if we don't have to go through sorting out
9 whether their complaint was the subject of a finding of
10 guilt.

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

12 **MR. ROSE:** In my respectful submission,
13 their victimization is completely different than any claim
14 of victimization by Father Charles MacDonald. Here's why.

15 **THE COMMISSIONER:** Okay.

16 **MR. ROSE:** They're victims of crime because
17 they are the recipients of violence.

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

19 **MR. ROSE:** They have been the victims of
20 sexual abuse. They're bodily integrity has been violated.
21 And without going over the expert evidence, Mr.
22 Commissioner, that you've heard, that is a special category
23 of victimization, and the subject is stigmatization,
24 psychological damage, et cetera, et cetera.

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

1 **MR. ROSE:** That is a special category of
2 victim, and it is, as we have argued before, one of the
3 main reasons why we're here.

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

5 **MR. ROSE:** So in that sense, on the other
6 hand, Father Charles MacDonald is a victim, as I understand
7 his claim, a victim of an unproven allegation.

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

9 **MR. ROSE:** So he's not a victim of violence,
10 as I understand his claim, he has been a participant in
11 process in a very different way. So quay victim, they are
12 very different.

13 **THE COMMISSIONER:** Yes, but -- well,
14 wouldn't the hurt, the stress -- I mean, to be called a
15 pedophile is -- I mean, how are we going to colour hurt?

16 **MR. ROSE:** I am not for one second
17 diminishing that claim. All I'm saying is that they're
18 claim to being a victim is quite different. And it may be
19 -- we haven't heard any evidence that I can recall about
20 the true nature of being the subject of an unproven
21 allegation, and I have no doubt that the evidence is
22 available. We don't have it right now but, Mr.
23 Commissioner, you have ample evidence to determine about
24 the nature of victimization of victims of the recipients of
25 violence. So that's important.

1 **THE COMMISSIONER:** Well, are you making an
2 argument for your number one ---

3 **MR. ROSE:** Yes.

4 **THE COMMISSIONER:** Oh, I don't -- that's all
5 done.

6 **MR. ROSE:** Well, it is except that, as I
7 say, you're -- Mr. Commissioner, you asked this question of
8 Mr. Wardle and he responded, and I want to make sure that
9 there is no sense that there is hypocrisy going on here.

10 **THE COMMISSIONER:** Well.

11 **MR. ROSE:** The last thing -- and it may be
12 that I'm making too much of your question. Perhaps it was
13 only rhetorical.

14 **THE COMMISSIONER:** No, no. Well, first of
15 all, sir, I don't think it's fair for you to continue to
16 argue the Motion that we've all done, and that we've had
17 reply evidence and everything else.

18 I was asking with respect to Father
19 MacDonald, and your focus is on -- I don't want to hear you
20 trying to convince me that the victims are different.

21 **MR. ROSE:** I don't. I don't. I simply want
22 to dispel any sense that anyone perhaps making a claim
23 against the publication ban proposed by Father Charles
24 MacDonald is in some way perhaps implicitly being
25 incoherent or taking a different position.

1 I don't see that and I don't want any claim
2 that any of the parties have made this afternoon, this
3 evening depending on how you see it, to diminish the
4 argument that was made and concluded this morning.

5 **THE COMMISSIONER:** I guess what I wanted to
6 do was to have someone discuss with me the issue of -- and
7 I think I've mentioned it before, that alleged perpetrators
8 who have had their charges stayed, I think we have to be
9 careful not to say "Oh, well, it doesn't matter because
10 they're alleged perpetrators."

11 **MR. ROSE:** I tend to agree with you. This
12 is all -- these are all things that one must take
13 carefully.

14 As I say, my concern is diminishing any
15 argument that was made earlier, and if you're saying, Mr.
16 Commissioner, that that won't be the subject of your ruling
17 this afternoon, then I will sit down and leave you to the
18 rest of the afternoon.

19 **THE COMMISSIONER:** Thank you.

20 Mr. Thompson.

21 **MR. THOMPSON:** No submission today, Mr.
22 Commissioner.

23 **THE COMMISSIONER:** Thank you.

24 Is it Ms. Lalji?

25 ---REPLY ON MOTION BY/RÉPLIQUE SUR REQUÊTE PAR MS. LALJI:

1 **MS. LALJI:** Yes, Ms. Lalji.

2 Good afternoon, Mr. Commissioner.

3 **THE COMMISSIONER:** Good afternoon.

4 **MS. LALJI:** As you know from our written
5 submissions, the Cornwall Police opposes this application.
6 You will be happy to know that my submissions have already
7 been covered by the parties who have preceded me and rather
8 than repeat them, I adopt Mr. Wardle's submissions and have
9 nothing further to add.

10 Thank you.

11 **THE COMMISSIONER:** Thank you.

12 All right. Mr. Kozloff.

13 ---REPLY ON MOTION BY/RÉPLIQUE SUR REQUÊTE PAR MR. KOZLOFF:

14 **MR. KOZLOFF:** Good afternoon, sir.

15 **THE COMMISSIONER:** Good afternoon, sir.

16 **MR. KOZLOFF:** Mr. Commissioner, at 3:35
17 p.m., I had a lot of things to say. Fortunately, Mr.
18 Wardle, in his eloquent way, preceded me and has covered
19 virtually everything that I wanted to say in opposition to
20 the Motion brought by Father Charles MacDonald.

21 I just want to emphasize a couple of things.
22 Mr. Wardle argued before you that Father Charles MacDonald
23 is a central role in these proceedings. The matters before
24 you really had their genesis when David Silmser walked into
25 the Diocese of Alexandria Cornwall and reported to the

1 Cornwall Police on December the 9th, 1992. At that time,
2 Father Charles MacDonald assumed a role. That was the
3 seminal event that set off the chain of events that bring
4 us to today. The matter became public in this community
5 when Charlie Greenwell at radio station CJOH broke the big
6 story on the 6th of January 1994. On that day, Father
7 Charles MacDonald became a public figure associated with
8 the matters before this Inquiry.

9 Last Thursday, the Standard Freeholder
10 reported that an application would be made by Father
11 Charles MacDonald for an order banning publication of his
12 name in these proceedings. The chain continues. You
13 cannot unscramble the egg, to use the words of Mr. Justice
14 Adam. This egg was scrambled a long time ago. And in my
15 respectful submission, to pretend otherwise, to impose an
16 order would, to use my friend's expression, bring the
17 administration of this Inquiry into public disrepute. The
18 public would be entitled to think and to say, "What are
19 those people doing?" And in my respectful submission, Mr.
20 Lee pointed out that you have, aside from your role to look
21 into these matters and to report and to make
22 recommendations, this particular process has a public
23 educational function, and in my submission, "public" is the
24 operative word.

25 **THE COMMISSIONER:** I'm concerned about that,

1 and I'm sure it's because I'm misunderstanding -- not
2 misunderstanding, but I don't know that my decision should
3 try to satisfy the whim of the public.

4 **MR. KOZLOFF:** I don't say that for a minute,
5 sir.

6 **THE COMMISSIONER:** All right. As long as
7 we're clear that ---

8 **MR. KOZLOFF:** Oh, no.

9 **THE COMMISSIONER:** Because some people out
10 there think that maybe some alleged abusers whose actions
11 were stayed are really guilty, and that cannot enter into
12 my decision-making process.

13 **MR. KOZLOFF:** I agree.

14 **THE COMMISSIONER:** And so the public has to
15 understand that any decision that is made by me as
16 Commissioner and a judicial officer is made on the basis of
17 law, and that we try to educate the public as much as
18 possible, but to do otherwise than decide matters according
19 to the law would really put the administration of justice
20 in disrepair.

21 **MR. KOZLOFF:** I agree.

22 **THE COMMISSIONER:** All right.

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

24 **THE COMMISSIONER:** Thank you.

25 Mr. Carroll.

1 **---REPLY ON MOTION BY/RÉPLIQUE SUR REQUÊTE PAR MR. CARROLL:**

2 **MR. CARROLL:** Good afternoon.

3 The Ontario Provincial Police Association
4 opposes the Motion and supports both the written and oral
5 submissions and adopts them from the Ontario Provincial
6 Police.

7 I would suggest, sir, that Father MacDonald
8 and other parties' interests in this proceeding can best be
9 protected as set out in paragraph 6 according to the
10 Divisional Court in the OPP submissions that refers to the
11 right to cross-examine witnesses on matters relevant to the
12 basis upon which standing was granted. That is a safeguard
13 that the court has acknowledged and that is one that will
14 protect Father MacDonald's interests as well as the other
15 parties if the interests arise.

16 Thank you.

17 **THE COMMISSIONER:** Thank you.

18 Okay. Mr. Baxter.

19 **---REPLY ON MOTION BY/RÉPLIQUE SUR REQUÊTE PAR MR. BAXTER:**

20 **MR. BAXTER:** Thank you, Mr. Commissioner.

21 We've filed two documents with you, M5-J1
22 and M5-J2.

23 **THE COMMISSIONER:** Just give me a moment.

24 **MR. BAXTER:** They're both beige coloured.

25 **THE COMMISSIONER:** I have one. I'm just

1 trying to -- do they both have white ---

2 **MR. BAXTER:** Yes. White spines, yes, they
3 do, Mr. Commissioner.

4 **THE COMMISSIONER:** I will just take -- all
5 right. Yes, sir.

6 **MR. BAXTER:** On behalf of the CBC, we have
7 the happy fortune of being able to argue the same sides of
8 both Motions today. So I make that remark first. As well
9 as say that we adopt the submissions of Messrs. Wardle and
10 Lee before us. So I don't intend to recover that ground.

11 Essentially though, there will be two main
12 themes that we would like to address. The first is that on
13 this Motion before you today, on the record before you
14 today, Father MacDonald has not met the evidentiary
15 threshold required by the Supreme Court of Canada and he
16 has not given you the basis that you would require to make
17 a discretionary order, such as he seeks.

18 The second is that during your weighing of
19 interests, Father MacDonald's Section 7 writes:

20 "...cannot be defined as broadly as he
21 would seek to eliminate the public's
22 right to hear the evidence before this
23 Public Inquiry."

24 That is, of course, defined in the Order in
25 Council and it's the corollary of the CBC's Section 2

1 rights.

2 If you could turn to paragraph 5 of the
3 Brief first, this is what you've expressed in your
4 preliminary ruling, your decision that you need this
5 evidence. You say:

6 "The nature of the evidence sought from
7 the victims would be the following:
8 When they complained, to whom they
9 complained, about whom they complained
10 and some brief details about the nature
11 of the complaint and the resulting
12 actions."

13 The Divisional Court has expressly approved
14 your view of the relevance of this evidence. And that
15 quote is at paragraph 7 of the Brief, just below it.

16 "First, we agree with the Commissioner
17 that the evidence of the alleged
18 victims is essential to properly assess
19 the response of the justice system and
20 other public institutions to the
21 allegations they made. Second, the
22 Commissioner was clear that he was
23 alive to the fact that in certain cases
24 it may be possible to introduce the
25 evidence without calling the alleged

1 have on the proper mandate.

2 So those are some preliminary remarks.

3 As to the evidence before you today, sir, as
4 we have submitted, there is no evidence that can warrant
5 the discretionary order that is being sought. Father
6 MacDonald needs to show that the incremental airing, the
7 incremental effects of further airing of evidence will have
8 a serious adverse effect on his rights that would amount to
9 a Charter violation, and not just any Charter violation but
10 one sufficient to override the open court's principle.

11 He cannot rely, it is submitted, on past
12 publicity, the past publicity that his affidavit basically
13 speaks to again and again; and indeed, some of the
14 affidavit evidence, which we have entered, we'll take you
15 to that and the issue of Mr. John MacDonald's testimony.
16 But just the point before you is there is nothing in the
17 affidavit speaking to the likely future harm, if any.
18 There is no affidavit evidence from a medical professional,
19 there's not from his treating physician or other people.

20 So at an evidentiary level, the narrow point
21 before you today, you don't have the tools, the evidentiary
22 basis on which to make the order that is sought. And I'm
23 going to take you in a second to the case where the
24 evidentiary sufficiency is set out.

25 Also, Father MacDonald's Motion contains an

1 assumption that the public will automatically come to
2 adverse conclusions. This is an assumption before any
3 evidence has been heard. You're not proposing an
4 unbalanced process. We've seen your preliminary ruling.
5 We've seen the Divisional Court's ruling on that. Your
6 counsel will lead Mr. MacDonald's evidence fairly and
7 carefully. The public will or certainly can hear from
8 Father MacDonald if he's concerned that his rights -- that
9 his side of the story is not being heard. The public won't
10 jump to a conclusion. We have to have faith in the public
11 to hear the evidence, to let your process work, and to let
12 the fairness of what you're so conscious work.

13 **THE COMMISSIONER:** I don't know that I would
14 permit Father MacDonald to come and testify and say "I
15 didn't do it." I don't think that would be relevant.

16 **MR. BAXTER:** That's because of your focus on
17 your mandate, which is not the underlying allegations, but,
18 indeed, the institutional responses.

19 **THE COMMISSIONER:** M'hm. But you just said
20 that he could come and testify and -- I forget your exact
21 words there.

22 **MR. BAXTER:** His story will or could be
23 told. But I'm not suggesting that you would allow
24 Commission counsel to adduce that evidence from John
25 MacDonald either.

1 **THE COMMISSIONER:** Right.

2 **MR. BAXTER:** The underlying allegation, as I
3 understand it in the correspondence between counsel, is
4 simply there in context, not for the truth of its content,
5 and to assess the institutional response.

6 **THE COMMISSIONER:** Right.

7 **MR. BAXTER:** So that is a protection that
8 Father MacDonald's counsel have right away.

9 Your counsel and all the counsel in this
10 room are aware of your awareness of a mandate, if I can put
11 it that way.

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

13 **MR. BAXTER:** And it's all of our jobs to
14 protect your mandate and not to lead to an unfair process.

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

16 **MR. BAXTER:** So he is asking in this Motion
17 for a presumption, before any evidence has been heard, that
18 we will all fail effectively.

19 So if I can take you to the test.

20 **THE COMMISSIONER:** Yes.

21 **MR. BAXTER:** It's the first Authority of
22 two, the *CBC v. New Brunswick* case.

23 **THE COMMISSIONER:** Yes.

24 **MR. BAXTER:** And I'd probably start at page
25 24 of 29, the reported version. The facts here, I think

1 one of my friends has referred to them. The trial judge
2 had excluded the public and the media from a sentencing
3 hearing on a sex assault case and the exclusion order came
4 up and the Supreme Court of Canada was asked to consider --
5 -

6 **THE REGISTRAR:** What paragraph?

7 **MR. BAXTER:** I will probably start at 72 or
8 73, around there. Thank you.

9 The Supreme Court was asked to weigh the
10 discretionary ruling that is, in all necessary aspects,
11 analogous to what you're being asked to do today, sir.

12 Of course, the principle, which is well
13 known, is that the onus is on Father MacDonald to show the
14 necessity of such an order. Anyone who wants to infringe
15 upon the open court's principle has to -- bears the onus.

16 That's the evidentiary basis as set out in
17 paragraph 72. And then at 73, we have an interesting
18 comment, if I might just read it:

19 "A sufficient evidentiary basis permits
20 a reviewing court to determine whether
21 the evidence is capable of supporting
22 the decision."

23 In this regard, he refers to concurring
24 reasons of Kaufman J.A.

25 "Public trials are the order and any

1 exceptions must be substantiated on a
2 case-by-case basis. In my respectful
3 view, it is not good enough to say the
4 nature of this case is sexual and an in
5 camera hearing should therefore be
6 imposed. Nor, with respect, is it
7 sufficient to say to the judge that he
8 or she should follow the 'current
9 practice'. Discretion is an important
10 element of our law that can only be
11 exercised judiciously when all the
12 facts are known."

13 So again, he's coming to a consideration of
14 a sufficiency of evidence before the trial judge in that
15 case, and this is an important sort of guiding principle.

16 If I could ask that you turn over to
17 paragraph 78. This is effectively just setting out the
18 proposal known to us all, that it's very rare when there's
19 an appropriate factual basis to overturn a trial judge's
20 exercise of discretion. And we needn't read this, but the
21 last couple of lines are important. It presupposes the
22 trial judge has a sufficient evidentiary or factual basis.
23 And our submission is that here today on the issue of
24 future harm to Father MacDonald there is no such basis.

25 Paragraph 80, and I think Mr. Wardle

1 referred to this or others, clearly embarrassment is not of
2 itself a sufficient ground to grant an order restricting
3 the open court's principle.

4 And paragraph 82 and 83 are when he really
5 considers the evidence that was before the trial judge in
6 that case. So 82 is where I will start:

7 "I will deal first with the concerns of
8 undue hardship to the victims. Neither
9 the record nor the reasons provided by
10 the Crown support a finding that proper
11 administration of justice required the
12 exclusion of the public from part of
13 the sentencing proceedings. Provincial
14 Court judge Rice had the benefit of
15 victim impact statements and pre-
16 sentence reports."

17 The next line:

18 "The victim impact statements did not
19 disclose evidence of undue hardship
20 that would ensue as a result of public
21 attendance during a sentencing
22 proceedings, nor did they disclose the
23 circumstances of the sexual offences
24 that were ultimately divulged during
25 sentencing."

1 Now, if I could pause there, Mr.
2 Commissioner. The closest thing we have to a victim impact
3 statement on the question before you today, which is the
4 impact on Father MacDonald, is the affidavit, the short
5 affidavit of Father MacDonald, which speaks about the
6 effect of the publicity and the 12 years of trials, et
7 cetera, that he's lived. It doesn't speak to the future,
8 and as I've said earlier, it asks you to presume further
9 adverse effects.

10 In paragraph 83, the Crown gave the
11 following submission in support. It says:

12 "The nature of the evidence of which
13 the court hasn't heard that constitutes
14 the offence is very delicate. It
15 involves young persons, female persons.
16 I will just ask if maybe the court
17 could consider invoking Section 486."

18 And then Justice LaForest comments at the
19 top of the next page:

20 "Most sexual assault cases involve
21 evidence that may be characterized as
22 very delicate. The evidence did not
23 establish that this case is elevated
24 above other sexual assaults. The point
25 was conceded by the Crown during oral

1 involved a Presbyterian minister
2 charged with sexually assaulting a
3 teenage boy. The provincial court
4 judge made an order prohibiting the
5 publication of broadcast of the accused
6 identity and any information that could
7 disclose his identity thereafter. The
8 Respondent was subsequently acquitted
9 after a trial on the merits and various
10 media groups moved to set aside the
11 non-publication order."

12 Then in paragraph 15, we excerpted a part of
13 the case, but I think I'll actually take you there because
14 there's a little bit more that may be of interest to you,
15 and it's at page 508 of the reported version, Mr.
16 Commissioner.

17 **THE COMMISSIONER:** I'm sorry, what page?

18 **MR. BAXTER:** At 508, at little (f) on the
19 right-hand side.

20 So the court -- it's Justice Finlayson for
21 Unanimous Court, summarizes the position of the Respondent
22 doctor. He goes through it at some length and then he says
23 the following:

24 "The position of the Respondent must
25 come down to an assertion that a public

1 trial is a right of the accused person
2 and therefore being for his protection
3 it is a right that he can waive. The
4 right to a public trial is
5 constitutionally enshrined in Section
6 11(d) of the Charter..."

7 And he repeats it. Then he says:

8 "In my opinion, the assertion that such
9 a right can be waived is untenable.
10 The public has as much of an interest
11 in the conduct of the trial as does the
12 accused and the accused is no more
13 entitled to waive a public hearing than
14 he is a fair hearing."

15 And if I could ask you to turn over, Mr.
16 Commissioner, to 509:

17 "The proposition that a particular
18 accused can waive any portion of his
19 right to a public hearing is
20 antithetical to the right of every
21 person to be satisfied that no person
22 has received special treatment,
23 favourable or unfavourable, and that
24 the institutions are all in place to
25 ensure the principles of fundamental

1 justice to us all."

2 And he goes on and cites Madam Justice
3 Wilson's remarks in the Edmonton Journal. And then if I
4 can, just below the quote, the third line:

5 "The proposition advanced here by
6 counsel is the..."

7 I'm going to say this wrong:

8 "...apotheosis of individualism. The
9 right to a fair and public hearing is
10 for my protection and it's for me to
11 assert. It follows therefore that the
12 right is mine to give away, that is for
13 me to invoke for my protection, and
14 it's my prerogative not to assert it if
15 it's to my advantage not to do so.
16 However, the accused person is not
17 simply giving up something which is his
18 when he purports to waive his right to
19 a public hearing. To make an effective
20 waiver he must assert that he has the
21 right to a private hearing, which is
22 the antithesis of that constitutional
23 right."

24 So here, in our submission, when the court
25 is called upon in very similar facts, in fact, arguably a

1 trial on the merits, an acquittal after a trial on the
2 merits may be a distinguishing fact as opposed to a
3 judicial stay, but I'm not going to enter into that fray.
4 This is what the court said, when you're weighing an
5 individual Section 7 rights against free speech rights, you
6 have to weigh the public's right to a public trial. And I
7 would submit that in this case, Mr. Commissioner, the terms
8 of this Public Inquiry would weigh even heavier in terms of
9 a public nature of this evidence.

10 Now, very briefly, I'd just like to take
11 you, if I could, to some of the other material that we
12 filed, and it's in the affidavit of Mr. Blackburn who's a
13 CBC reporter, and that's the second tab of our submissions.

14 You've heard from other counsel that the
15 matters in which Father MacDonald have played a part have
16 been notorious since the beginning of the early '90's
17 anyway.

18 The affidavit of Mr. Blackburn attaches
19 three sets of press clippings. The first is ones that date
20 from '95 -- pardon me; the first are transcripts of CBC
21 reports. So that's at Tab A, and just the first page of
22 the first report on Tab A:

23 "Father Charles MacDonald is now
24 accused of sexually abusing a total of
25 nine young men, including altar boys in

1 the 1970s and 1980s."

2 I'm not going to go through all of these.

3 The second tab are media reports in the same time period,
4 and they stem from May '95 to the end of '99.

5 I do want to call your attention, if I
6 might, to one particular page -- and Madam Clerk, it looks
7 like this; it has number 133 on the top of it -- because it
8 deals with the particular witness that is of concern, I
9 think. That looks like the page. This is a report, as I
10 read it, from the 27th of February 1996. It's in the
11 Standard Freeholder and it deals with the evidence of this
12 witness. The second paragraph says:

13 "So last week, MacDonald, 37, went
14 public with his allegations against the
15 priest on a CBC television newscast and
16 for the first time has agreed to be
17 identified by the Standard Freeholder,
18 which had previously withheld his
19 identity at his request."

20 I won't read the rest of the article, but it
21 goes on in some detail about the allegations that are being
22 made and that form the basis for the reasons that this
23 Inquiry has been called, in our submission.

24 So the public is aware and has been aware
25 since 1996 that Mr. MacDonald and Father MacDonald had some

1 dealings. Just leave it at that.

2 I believe they are Plaintiff and Defendant
3 in lawsuits and countersuits, et cetera.

4 The public is aware then of the intimate
5 link between these two individuals. The public cannot
6 follow this Inquiry in a vacuum. It needs to relate the
7 evidence to people and individuals and characters that it
8 knows and has known for the past 10 years in its media and
9 in its day-to-day life.

10 Quite simply, Mr. Commissioner, too much
11 information, at least in this case of Father MacDonald, is
12 out of the bottle. The genie is out of the bottle. We
13 can't put it back in.

14 And I agree with the submissions of other
15 counsel that the very credibility of this Commission is at
16 stake. We cannot have the public lose faith in the
17 conclusions of this Inquiry and in the process of the
18 Inquiry.

19 So, in short, we oppose the ban obviously.
20 We think that this Public Inquiry will complete the public
21 record. It has an important function, bigger than any
22 individuals. It is a community-based Inquiry and we urge
23 you to dismiss the motion.

24 **THE COMMISSIONER:** Thank you.

25 All right. Right of reply. Mr. Foord.

1 **MR. FOORD:** Yes, Your Honour.

2 **--- REPLY ON MOTION BY/RÉPLIQUE SUR REQUÊTE PAR MR. FOORD:**

3 **MR. FOORD:** Just a couple of points in
4 response, Mr. Commissioner.

5 I think it's important that there's been
6 mention of the evidentiary vacuum concept and we very much
7 brought this application, actually, at the request of Mr.
8 Engelmann who said it was the appropriate time to do it.

9 **THE COMMISSIONER:** Well, certainly with
10 respect to whether or not Father MacDonald's name should be
11 edited, of course.

12 **MR. FOORD:** Yes.

13 And I would indicate that in the anticipated
14 evidence of Mr. MacDonald, he points to two concerns, and
15 that is that Mr. MacDonald; that is, John MacDonald, is
16 concerned about the way the Crown Attorney handled the case
17 and he's obviously concerned that the Criminal Injuries
18 Compensation Board decision was dismissed.

19 The opposite of an evidentiary vacuum, that
20 does not support at that point how the name would be
21 relevant or identifying would be relevant, and I hear you
22 and I've heard what everybody has been saying. It's clear
23 that we have to look at it on a case-by-case, look at the
24 actual details, and that's what we want to do.

25 I feel that I need to mention this issue of

1 a nuance. The presumption of innocence, when it is a
2 rebuttable presumption, is not simply a nuance. A stay is
3 tantamount to acquittal in *Jewitt*. That's reproduced in
4 our materials. I don't think it's controversial, and we
5 could turn to it, but a stay is tantamount to an acquittal
6 and an acquittal is, in law, a declaration of innocence.

7 So it may be that in a pub, it may be that
8 on the street, the public opinion may be that, "Well, we
9 think he might have actually done it." As a matter of law,
10 the Applicant is innocent.

11 **THE COMMISSIONER:** Well, I don't know. In
12 Ireland or in England someplace, they have this thing where
13 ---

14 **MR. FOORD:** If not proven ---

15 **THE COMMISSIONER:** --- you can say guilty,
16 not guilty or he didn't do it. In Canada we don't have
17 that.

18 And so he is presumed innocent, and I don't
19 see why you have to go any further than that. I mean,
20 that's the presumption.

21 **MR. FOORD:** All right.

22 Well, it perhaps might be a nuance that when
23 that presumption, which is a legal one, cannot be rebutted,
24 it might be an important one, in my submission, the fact
25 that he is innocent. That has to raise the significance of

1 his interest.

2 **THE COMMISSIONER:** Well, then you better
3 argue -- then let me have it.

4 **MR. FOORD:** Okay. If we turn to the factum
5 at page 12 ---

6 **THE COMMISSIONER:** Hang on a second.

7 **MR. FOORD:** Paragraph 39.

8 **THE COMMISSIONER:** Okay. Factum, what
9 paragraph?

10 **MR. FOORD:** Thirty-nine (39).

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

12 **MR. FOORD:** And there at paragraph 39 the
13 Supreme Court of Canada indicates:

14 "I would conclude that the
15 administration of criminal justice
16 would be better served by determination
17 that a stay of proceedings is
18 tantamount to a judgment or a verdict
19 of acquittal and subject to appeal by
20 the Crown."

21 So if it's tantamount to an acquittal, an
22 acquittal is a declaration of innocence. I don't see how
23 there can be launched any distinction on that basis. I
24 don't see how that proposition can be assailed, as a matter
25 of legal innocence.

1 **THE COMMISSIONER:** Okay. And what's the
2 difference between legal innocence and a presumption of
3 innocence?

4 **MR. FOORD:** Well, I suppose -- well, I'm not
5 sure that they're -- legal innocence as opposed to what
6 someone's opinion might be as to factual innocence, whether
7 that would be the distinction someone draw, but presumption
8 of innocence is something that applies, in my view, prior
9 to a conclusion of proceedings in the criminal context, and
10 if there can never be a disturbance of that presumption,
11 the presumption is secure. It is innocence.

12 **THE COMMISSIONER:** Okay. And how does that
13 affect the argument?

14 **MR. FOORD:** Well, it's just that there might
15 be an attempt, subtly or otherwise, to derive the innocence
16 of the Applicant by suggesting that it may or may not be.
17 It's a presumption of innocence but it's not innocence,
18 right? And it may be perceived to be semantics, simply.

19 **THE COMMISSIONER:** Okay. But you're saying
20 that somebody is going to try to slip something underneath
21 here.

22 **MR. FOORD:** No. It may be that -- if I'm
23 correct in what I'm submitting to you and he's innocent, to
24 suggest that the presumption of innocence is something
25 lower, and that's what he is opposed to, is wrong, in my

1 view. That's all.

2 **THE COMMISSIONER:** But does it really matter
3 in this case?

4 **MR. FOORD:** You may find that it doesn't
5 matter. You may find it doesn't matter.

6 **THE COMMISSIONER:** Presumption of innocence
7 is a presumption of innocence.

8 **MR. FOORD:** Okay.

9 **THE COMMISSIONER:** All right?

10 **MR. FOORD:** And in this case it's
11 irrebuttable. That point has been made. No forum can ever
12 disturb it. There can never be a concept ---

13 **THE COMMISSIONER:** Mr. Foord, you are
14 presumed innocent equally to Father MacDonald. There is no
15 lesser right. You could be charged, but you can't be
16 charged of the accounts of Father MacDonald. Your
17 presumption is as good -- I don't -- maybe it's because
18 it's warm in here ---

19 **MR. FOORD:** I don't know. I suppose I could
20 be charged -- that hasn't been determined yet -- and I
21 would get the presumption.

22 **THE COMMISSIONER:** With your age, you're too
23 young.

24 **MR. FOORD:** The other point I would like to
25 -- I've already made the point with respect to the vacuum.

1 The other aspect of that vacuum point is
2 that while it's true until we address the details we can't
3 -- perhaps it can be said that we can't assert that there
4 is clearly not relevance, although we look to the
5 anticipated evidence to make that proposition a reasonable
6 one.

7 Clearly, also, it cannot be said just
8 because attention has centred around the Applicant, that
9 there will be relevance. It's something that will have to
10 be determined. And it's not clear to me how the
11 institutional response necessarily engages the
12 identification of the Applicant. That's not clear to me.
13 That's something I think that the parties will have to make
14 clear if they want to rely on the argument that it is
15 relevant.

16 **THE COMMISSIONER:** Just a minute. Just a
17 minute now.

18 I am going to rule on Friday whether or not
19 there will be a ban on publication of the name of Father
20 Charles MacDonald as it relates to the testimony of John
21 MacDonald.

22 **MR. FOORD:** Okay.

23 **THE COMMISSIONER:** I'm going to do that.

24 **MR. FOORD:** Okay.

25 **THE COMMISSIONER:** All right? Because he's

1 being called, one of the next witnesses. And so that will
2 be determined.

3 I think the issue of whether or not we edit
4 documents is going to have to come on a case-by-case basis
5 with respect to John MacDonald, and then if there are any
6 other alleged victims of Father MacDonald, I guess we'll
7 have to go through the exercise every time.

8 **MR. FOORD:** Right.

9 So you have our position that at this point
10 ---

11 **THE COMMISSIONER:** Yes.

12 **MR. FOORD:** --- based on the anticipated
13 evidence, that it's not relevant and it does not justify or
14 offset the significant prejudice. You have that.

15 Some mention has been made of the fact that
16 there is evidence being led not for the truth of its
17 contents. I would submit that that's of no benefit to the
18 Applicant because the proceeding isn't about determining
19 the truth or falsehood of the allegations. So it's not
20 like he's at risk at the end of the day, as in a criminal
21 trial, of being found guilty because something is led for
22 its truth. It's led. The public will view it. It hurts
23 him, and that's the prejudice.

24 So if it's not led for its truth, how is it
25 relevant? In the context of the -- I'm going to need some

1 water. In the context of the victims -- and I use that
2 word explicitly, the victims who have testified so far, who
3 are the subject matter of a complaint that resulted in a
4 conviction -- that's one thing, but if the Inquiry is not
5 going to look into whether or not the claims are true or
6 not, why is the allegation relevant and how does that
7 relevance outweigh the damage it does to the reputation of
8 the Applicant?

9 **THE COMMISSIONER:** Well, because I'm telling
10 you now that I don't know until we get to those statements.
11 So, frankly, it's premature to argue this at this time.

12 **MR. FOORD:** And lastly, I suppose, with
13 respect to whether or not it's a charade or not to try to
14 institute measures to protect the innocence of the
15 Applicant and try to protect his privacy and his reputation
16 and his security, it's only a charade if his innocence is
17 not taken seriously. Otherwise, all efforts should be made
18 to protect him from harm.

19 **THE COMMISSIONER:** You're not suggesting
20 that I'm not taking this seriously?

21 **MR. FOORD:** I absolutely know you're taking
22 it seriously. I'm responding to Mr. Wardle's comment.
23 That's all.

24 **THE COMMISSIONER:** Okay.

25 **MR. FOORD:** I made the point before, but

1 we're not trying to keep anything secret. The public will
2 have access to the courtroom and to the documents. We're
3 not trying to interfere with the work of this -- the good
4 work of this Inquiry.

5 Thank you.

6 **THE COMMISSIONER:** All right.

7 Mr. Dumais.

8 **MR. DUMAIS:** We're done, Commissioner.

9 **MR. SHERRIFF-SCOTT:** No, we're not. I
10 assumed I had a right of reply, or perhaps not?

11 **THE COMMISSIONER:** Do you or don't you?

12 **MR. SHERRIFF-SCOTT:** I was supporting the
13 motion, so I ---

14 **THE COMMISSIONER:** I thought it was the
15 moving party that had the right to reply.

16 **MR. SHERRIFF-SCOTT:** That's fine,
17 Commissioner.

18 **THE COMMISSIONER:** No, no, I wouldn't want
19 to curb any -- how long are you going to be?

20 **MR. SHERRIFF-SCOTT:** I was going to say I
21 would be five minutes -- not brief, but five minutes.

22 **THE COMMISSIONER:** Come on over.

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

24 **THE COMMISSIONER:** Mr. Wardle, are you
25 objecting?

1 **MR. WARDLE:** If he doesn't say it now, Mr.
2 Commissioner, you know he's going to say it on another
3 occasion. So I think we should let him say it.

4 **THE COMMISSIONER:** All right.

5 **(LAUGHTER/RIRES)**

6 **---** SUBMISSION IN SUPPORT BY/REPRÉSENTATION EN SUPPORT PAR
7 **MR. SHERRIFF-SCOTT:**

8 **MR. SHERRIFF-SCOTT:** Well, I wouldn't want
9 to disappoint you that I'm always at a loss for words.

10 **THE COMMISSIONER:** You will not be accused
11 of that, sir.

12 **MR. SHERRIFF-SCOTT:** I only rise in response
13 to the submissions of my friend at the CBC. He referred
14 you to the *Regina v. Dalzell* case.

15 **THE COMMISSIONER:** Yes.

16 **MR. SHERRIFF-SCOTT:** My comment to that
17 would be, number one, it predates *Dagenais/Mentuck*.

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

19 **MR. SHERRIFF-SCOTT:** Number two, it does not
20 advert to or refer to the *MacIntyre/Vickery* line of cases
21 and, number three, and I just make the point here, you
22 needn't call up the case, but the point is hugely
23 underscored at page 513 of the judgment. The Court of
24 Appeal was performing a test which, at the time, was only
25 trial rights were prejudiced when prejudice could be

1 considered to be sufficient reason for the publication ban
2 and the Court of Appeal says:

3 "Where these two rights compete there
4 must be a weighing of them and an
5 exercise of judgment and discretion as
6 to which right is to prevail. However,
7 there were no such competing rights.
8 The accused trial was over in the issue
9 of prejudice with respect to the
10 conduct of the trial or any appeal
11 there from was no longer a genuine
12 concern."

13 They didn't do the balancing test.

14 Moreover, they don't have section 4(b) of the *Public*
15 *Inquiries Act*. It's not the right analysis to apply.

16 I would say, I was reminded, hearing the
17 interorum arguments about what the public might think if
18 you reach the wrong decision, of a play by Robert Bolton,
19 which Thomas Moore is being cross-examined by the Lord
20 Chief Justice, Mr. Cromwell, and he says in response to a
21 question, "The public must construe according to its wits.
22 The court must construe according to the law."

23 That is what you have to do as you well
24 know, and these interorum arguments should not be subject
25 of argument here.

1 I would only say in closing that there was
2 an elaborate submission with great rhetorical flourish, I
3 might add, of Mr. Wardle in which he used the expression
4 "Alice in Wonderland", which is what the public might
5 think. "What is on the table", he said. Father MacDonald
6 is a central figure. What's on the table is what you've
7 just referred to, the evidence of one witness and the
8 question they posed in relation to it, not the central
9 figure scenario that has been proposed to sort of an
10 advocacy point that this will disrupt the entire Inquiry.
11 There should not be confusion between fact-finding and
12 publication.

13 Thank you.

14 **THE COMMISSIONER:** Thank you.

15 Ms. Makepeace, did you wish to reply?

16 **MS. MAKEPEACE:** No.

17 **THE COMMISSIONER:** All right.

18 Maître Dumais.

19 **MR. DUMAIS:** Now we're done, Commissioner.

20 **THE COMMISSIONER:** All right.

21 And so what do we have to look forward to
22 tomorrow?

23 **MR. DUMAIS:** We are calling Roberta
24 Archambault.

25 **THE COMMISSIONER:** Yes.

1 **MR. DUMAIS:** At 9:30, Commissioner?

2 **THE COMMISSIONER:** Sure.

3 **MR. DUMAIS:** She is the only witness that is
4 being called tomorrow. We are continuing with Albert Roy
5 on Friday.

6 **THE COMMISSIONER:** Yes.

7 **MR. DUMAIS:** And it is hoped that we can
8 complete Mr. Roy and call his spouse as well, Vicki Roy.

9 **THE COMMISSIONER:** All right.

10 Well then let's call it a day.

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

13 The hearing will adjourn. L'audience est
14 ajournée.

15 --- Upon adjourning at 6:05 p.m./

16 L'audience est ajournée à 18h05

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

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

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



Sean Prouse, CVR-CM