

**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 57**

**Held at :**

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

Monday, October 16, 2006

**Tenue à:**

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

Lundi, le 16 octobre 2006

**Appearances/Comparutions**

M <sup>e</sup> Pierre R. Dumais	Commission Counsel
Ms. Louise Mongeon	Registrar
Mr. John E. Callaghan	Cornwall Police Service Board
Mr. Neil Kozloff	Ontario Provincial Police
Actg.Det.Supt.Colleen McQuade	
Ms. Diane Lahaie	
Dect.Staff Sgt.Colin Groskopf	
Mr. David Rose	Ontario Ministry of Community
Mr. Mike Lawless	and Correctional Services and
	Adult Community Corrections
Mr. Stephen Scharbach	Attorney General for Ontario
Mr. Peter Chisholm	The Children's Aid Society of
	the United Counties
Mr. Peter Wardle	Citizens for Community Renewal
Mr. Steven Canto	
Mr. Dallas Lee	Victims Group
Mr. Guiseppe Cipriano	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
Ms. Nadya Tymochenka	Upper Canada District School
Ms. Nicola Simmons	Board
Ms. Terri Saunders	Cornwall Standard Freeholder
Mr. Tony S.K. Wong	Canadian Broadcasting
	Corporation

**Table of Contents / Table des matières**

	<b>Page</b>
List of Exhibits :	v
Opening Remarks	1
Submission on Publication Ban by/Représentation sur l'ordonnance de non-publication par Mr. David Rose	4
Submission on Publication Ban by/Représentation sur l'ordonnance de non-publication par Mr. Peter Wardle	13
Submission on Publication Ban by/Représentation sur l'ordonnance de non-publication par Mr. Dallas Lee	22
Submission on Publication Ban by/Représentation sur l'ordonnance de non-publication par Mr. Peter Chisholm	24
Submission on Publication Ban by/Représentation sur l'ordonnance de non-publication par Mr. Stephen Scharbach	25
Submission on Publication Ban by/Représentation sur l'ordonnance de non-publication par Ms. Jill Makepeace	26
Submission on Publication Ban by/Représentation sur l'ordonnance de non-publication par Mr. John Callaghan	27
Submission on Publication Ban by/Représentation sur l'ordonnance de non-publication par Mr. Neil Kozloff	32
Submission on Publication Ban by/Représentation sur l'ordonnance de non-publication par Mr. William Carroll	38
Submission on Publication Ban by/Représentation sur l'ordonnance de non-publication par Ms. Terri Saunders	41
Submission on Publication Ban by/Représentation sur l'ordonnance de non-publication par Mr. Tony Wong	48

**Table of Contents / Table des matières**

	<b>Page</b>
Rebuttal on Publication Ban by/Réfutation sur L'ordonnance de non-publication par Mr. Dallas Lee	86
Rebuttal on Publication Ban by/Réfutation sur L'ordonnance de non-publication par Mr. David Rose	87
Rebuttal on Publication Ban by/Réfutation sur L'ordonnance de non-publication par Mr. John Callaghan	88

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

<b>NO.</b>	<b>DESCRIPTION</b>	<b>PAGE NO</b>
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1 --- Upon commencing at 2:09 p.m./

2 L'audience débute à 14h09

3 **THE REGISTRAR:** Order. All Rise.

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

7 Please be seated. Veuillez vous asseoir.

8 **THE COMMISSIONER:** Thank you.

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

10 **THE COMMISSIONER:** Good afternoon, Me  
11 Dumais.

12 **Me DUMAIS:** If I can just for a few minutes,  
13 Commissioner, this is a continuation on an issue on  
14 publication ban that first arose two Thursdays ago with  
15 Madame Lise Brisson being called as a witness and us  
16 intending to file as an exhibit two documents: One, which  
17 was a transcript of a preliminary inquiry that had a  
18 publication ban ordered by Justice Paris attached to it.

19 The second document was a transcript of the  
20 Ad Hoc Committee, which was a Committee that was set up by  
21 the Diocese in response to allegation against Father  
22 Deslauriers.

23 I made some submissions on that day.  
24 Parties gave their opinion and indicated that they had an  
25 interest to make further submissions on the matter. The

1 matter was put over to last Thursday for further  
2 submissions because we had two witnesses scheduled on that  
3 day and the first two submissions took up 30 or 45 minutes.  
4 The matter was put over to this day, so that we could spend  
5 the afternoon having everyone's views on this.

6 Out of fairness, although both the Victims  
7 Group and the CCR made their submissions last week, I am  
8 proposing that they be granted a right to readdress this  
9 issue this afternoon, Commissioner.

10 **THE COMMISSIONER:** There are a couple of  
11 things. They are not the only documents. I thought we got  
12 on a roll there and we put in a couple more exhibits that  
13 were subject to confidentiality.

14 **Me DUMAIS:** That is correct, Commissioner.  
15 Actually, there are a number of other documents that were  
16 put in through the cross-examination of parties.

17 **THE COMMISSIONER:** Right.

18 **Me DUMAIS:** That made reference to the same  
19 names essentially that had previously been identified in  
20 those two documents.

21 We do have two additional parties that wish  
22 to make submissions today; not parties per se, perhaps  
23 intervenors would be more appropriate.

24 **THE COMMISSIONER:** Yes.

25 **Me DUMAIS:** One is represented by Tony S.K.

1 Wong of Blake, Cassels, Mr. Tony Wong and he is acting on  
2 behalf of the CBC.

3 **THE COMMISSIONER:** Right.

4 **Me DUMAIS:** And as well Terri Saunders is  
5 here on behalf of the Standard Freeholder.

6 **THE COMMISSIONER:** Thank you.

7 **Me DUMAIS:** So subject to comments that my  
8 friends may have, what I am suggesting, Commissioner, is  
9 that we start off with perhaps David Rose who took a more  
10 direct and specific position since he was acting  
11 specifically for one of those victims and that then we just  
12 go around and let each party make submissions and then we  
13 can hear submissions from Ms. Saunders and then Mr. Wong  
14 and I did advise some of the parties that they would be  
15 able or permitted to respond afterwards.

16 **THE COMMISSIONER:** Thank you.

17 Mr. Rose, are you prepared to address me  
18 now?

19 **Me DUMAIS:** Sorry, Commissioner. Just one  
20 last comment with respect to someone who is not hear, Mr.  
21 David Sherriff-Scott could not be here for personal  
22 reasons, and he did ask that he be permitted at one point  
23 in time to make submissions and he indicated that he could  
24 do so either in writing or orally and so perhaps one of the  
25 options would be to permit him to make submissions before

1 we start tomorrow morning.

2 **THE COMMISSIONER:** Right.

3 **Me DUMAIS:** Thank you.

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

5 **MR. ROSE:** Thank you, Mr. Commissioner, for  
6 hearing us on this issue.

7 As I have indicated previously, my position  
8 and the position of the Ministry of Community Safety is  
9 that I as counsel have been approached by an individual.  
10 Now, that individual is named in C-76, C-71, and C-72,  
11 those exhibits, which as I think you will recall, Mr.  
12 Commissioner, names a number of individuals.

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

14 **MR. ROSE:** Now, these people are all victims  
15 in the truest sense by any definition. These people who  
16 have given their position to the police, to the  
17 authorities, my understanding is 20 years ago about abuse  
18 that happened to them; abuse which is the subject of this  
19 Inquiry; abuse that happened in Cornwall; abuse that  
20 happened at the hands of a person in a position of trust.  
21 The question which is raised now properly framed, in my  
22 respectful submission is what does this Commission do with  
23 the identity of those individuals that have requested  
24 anonymity in that regard and whose name appears in  
25 documents such as C-71, C-72 and C-76?

1                   **THE COMMISSIONER:** I'm sorry, and one of  
2 those is, of course, the transcript ---

3                   **MR. ROSE:** Yes.

4                   **THE COMMISSIONER:** --- of the preliminary  
5 inquiry?

6                   **MR. ROSE:** C-71 comes in three volumes, A,  
7 B, and C, which has the testimony of various individuals;  
8 proceedings before your brother, Judge Paris.

9                   **THE COMMISSIONER:** Right.

10                  **MR. ROSE:** There is a second category, which  
11 is not lost to everyone here and I'm sure it's not lost to  
12 yourself, Mr. Commissioner, which is what about those  
13 victims who have not approached counsel and yet their names  
14 still appear in those documents that I've just named?

15                   They would fall into the same category as  
16 the first that I've described; in other words, an  
17 individual who has approached either myself or as you have  
18 already heard in the case of C-1, Mr. Sherriff-Scott.

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

20                  **MR. ROSE:** The only difference is that there  
21 are two individuals thus far who have approached counsel  
22 and it would appear several at this early stage of the  
23 Inquiry that have not. And it would be my submission that  
24 the second category of people, in other words victims who  
25 have not specifically requested through counsel or through

1 the Commission, anonymity in regards to their evidence and  
2 their statements 20 years ago. However, it would be my  
3 respectful submission that they deserve nothing less than  
4 the same protection, which the first category of people are  
5 owed as well.

6 What I am going to suggest to you, Mr.  
7 Commissioner, is the following procedure and then I intend  
8 to elaborate to the extent that you require in terms of the  
9 legal basis, but what I'm going to suggest is that as  
10 counsel identify documents, such as C-71, C72, C-76, that  
11 counsel raise that through Commission counsel or directly  
12 with yourself and that this proceeding go in camera to  
13 identify those individuals who are victims. Be they  
14 identified through counsel or be they victims who are known  
15 but have not identified themselves through counsel, that we  
16 alert you to that possibility. I am going to suggest that  
17 we go in camera at that point and seek an order from you,  
18 Mr. Commissioner, that replaces the name of a victim with a  
19 moniker whether they be an initial or as I would suggest  
20 and prefer a "C" designation as we have commenced -- C-1  
21 through whatever. At that point, for purposes of  
22 continuing the proceedings, any reference either *viva voce*  
23 or in a document publicly available would be replaced with  
24 that moniker. This only applies to *viva voce* testimony,  
25 documents available on screen through the course of the

1 Inquiry and documents available at the Commission office.  
2 As I understand it, the actual record of the Commission,  
3 which is not available publicly forms a different set of  
4 documents does not require that form of editing.

5 In other words, to ensure the protection  
6 most specifically of the individual who has approached me,  
7 that individual during an in camera proceeding I would ask  
8 to be named C-2.

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

10 **MR. ROSE:** Mr. Commissioner, you will be  
11 identified, you will be told that name during the in camera  
12 proceeding. At that point, if you agree with us, that  
13 order can be made, and we will make efforts to have the  
14 document available publicly, which names that individual or  
15 anything ancillary, which would tend to name that  
16 individual would then be so edited. So that is what I am  
17 asking from my informal canvassing of my friends down here,  
18 it would appear that I have yet to disclose any opposition  
19 to that procedure.

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

21 **MR. ROSE:** But I don't think that's the end  
22 of it. I think it may be of assistance to you, Mr.  
23 Commissioner, to explain why I think this is the  
24 appropriate method.

25 First of all, the *Public Inquiries Act*,

1       which has been the subject of much discussion in previous  
2       rulings, section 4 of the *Public Inquiries Act*, creates  
3       effectively a presumption of openness and public nature of  
4       the proceedings. Section 4 of the *Public Inquiries Act*  
5       says:

6                        "All hearings on an inquiry are open to  
7                        the public except where the commission  
8                        conducting the inquiry is of the  
9                        opinion that..."

10                      And I don't think a) is engaged here, which  
11       is "public security", but b), which I believe is, says:

12                      "Intimate financial or personal matters  
13                      or other matters may be disclosed at  
14                      the hearing that are such in nature  
15                      having regard to the circumstances,  
16                      that the desirability of avoiding  
17                      disclosure thereof in the interests of  
18                      any person affected or in the public  
19                      interest outweighs the desirability of  
20                      adhering to the principle that hearings  
21                      be open to the public, in which case  
22                      the commission may hold the hearing  
23                      concerning any such matters in the  
24                      absence of the public."

25                      Section 4 of the *Public Inquiries Act* is

1 very broadly framed and as I understand the rules of  
2 procedure, I would hazard a guess that that is the legal  
3 basis upon which Rules 39 and 40 were handed down by  
4 yourself.

5 For instance, Rule 39 refers specifically  
6 saying:

7 "Without limiting the application of s.  
8 4 of the *Public Inquiries Act* the  
9 Commissioner may, in his discretion and  
10 in appropriate circumstances, conduct  
11 hearings in private, and/or issues  
12 prohibiting the disclosure,  
13 publication, broadcast or communication  
14 of any testimony, document or evidence,  
15 when he is of the opinion that intimate  
16 medical or personal matters, or other  
17 matters, are such a nature, having  
18 regard to the circumstances, that the  
19 desirability of avoiding disclosure  
20 outweighs the desirability of adhering  
21 to the general principle that the  
22 hearings should be open to the public."

23 Of course, the word "disclosure" turns up in  
24 the *Public Inquiries Act* and Rule 39. Rule 39 allows  
25 yourself, Mr. Commissioner, to really calibrate surgically

1 as it were the degree to which a disclosure can be kept  
2 from being publicized.

3 Now carrying on, Rule 40 says:

4 "A witness may apply to the  
5 Commissioner for measures aimed at  
6 protecting his or her identity for  
7 compelling reason as determined in the  
8 sole discretion of the Commissioner.  
9 Upon a successful application with the  
10 commissioner, the witness may be  
11 granted the status of  
12 "Confidentiality"."

13 Now, we haven't had that yet with the  
14 witness who has appeared, and it would be my submission  
15 that coming back to what I said earlier about the two  
16 categories of victims; those who have come forward through  
17 counsel and those who have not, it would be my respectful  
18 submission that Rule 40 extends to any person appearing and  
19 testifying *viva voce* considerable powers to protect their  
20 identity. And it would be my respectful submission that in  
21 order to make sense of Rule 40 in the context of section 4  
22 of the *Public Inquiries Act*, Rule 39, there is no reason  
23 why this protection ought not to extend to victims who have  
24 not specifically identified themselves through counsel,  
25 either Commission counsel or counsel for a party.

1           In other words, just because someone takes  
2           the stand to testify it does not mean that they should be  
3           afforded a greater degree of anonymity than someone who has  
4           had effectively the same thing happen to them at the same  
5           time.

6           So it would be my respectful submission that  
7           the Commission, with the greatest respect, those  
8           responsibilities to those victims who have not come forward  
9           to grant them the same degree of anonymity simply with  
10          respect to their identity for purposes of disclosure.

11                   **THE COMMISSIONER:** For purpose of  
12          disclosure; what do you mean by that?

13                   **MR. ROSE:** Disclosure meaning a document  
14          available publicly at the Commission office.

15                   **THE COMMISSIONER:** All right.

16                   **MR. ROSE:** And that's simply what I am  
17          trying to limit this to. So as I think you've heard, Mr.  
18          Commissioner, there are considerable technical difficulties  
19          with editing and redacting both what's on the hard drive  
20          and what's on the Commission's official record. The  
21          solution that I'm proposing doesn't affect either the  
22          Commission record or the disclosure made available to  
23          parties. It simply affects the disclosure made available  
24          publicly.

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

1                   **MR. ROSE:** I'm going to suggest that it's  
2 almost trite that having a victim of physical or sexual  
3 abuse 20 years ago now be exposed to having their name  
4 available publicly is a matter of the most personal,  
5 intimate nature, especially given the passage of time, and  
6 that the benefit in having such a redaction far outweighs  
7 any public interest in knowing a specific name.

8                   So I can go further, Your Honour. Looking  
9 at the various orders that the Commission has made with  
10 respect to the reason why we're here, for instance, we are  
11 not here as, Mr. Commissioner, you pointed out time and  
12 again, we are not here to find the truth of who did what to  
13 whom. That's simply a contextual background to the  
14 institutional response, which is the focus of the Inquiry.

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

16                   **MR. ROSE:** I take that to mean that naming  
17 individuals is not central to your Inquiry; all the more  
18 reason why we don't need to name individuals. So balancing  
19 out what is to be gained, what is to be lost, it would be  
20 my respectful submission that in the case of all victims as  
21 we alert, Mr. Commissioner, you to them, they should as a  
22 result of an in camera proceeding be named as a monogram.  
23 I would suggest the easiest administrative method is to  
24 name them as a "C" going forward as opposed to an initial.  
25 However, I can tell you, Mr. Commissioner, that having

1 reviewed this with the individual who has approached me  
2 that initials would be satisfactory. I simply suggest as  
3 counsel that it might be easier going forward into the  
4 weeks and months -- that carrying a list of "C" numbers  
5 might be easier.

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

7 **MR. ROSE:** Those are my submissions, Mr.  
8 Commissioner.

9 **THE COMMISSIONER:** Thank you.

10 So do we go back to the same batting order?

11 Mr. Wardle, do you have any comments to add?

12 --- **SUBMISSIONS BY/REPRÉSENTATIONS PAR MR. WARDLE:**

13 **MR. WARDLE:** Mr. Commissioner, given that  
14 this issue will come up again and again, I wanted to  
15 elaborate on some of the principles that my colleague, Mr.  
16 Manson, addressed briefly last week.

17 **THE COMMISSIONER:** Yes.

18 **MR. WARDLE:** And I'd like to begin by just  
19 setting out what in my submission are some general  
20 principles that should apply in the exercise of your  
21 discretion.

22 The first one is, in my submission, that  
23 every application for confidentiality measures should meet  
24 the general test set out by the Supreme Court of Canada in  
25 *Dagenais* and *Mentuck*, which are cases which you have been

1 referred to already, and without going through them I'll  
2 just outline the criteria.

3 First, the order must be necessary to  
4 prevent a serious risk to the proper administration of  
5 justice -- and I would suggest as it applies in the context  
6 of this Commission -- because reasonable alternative  
7 measures will not prevent the harm. Second, the salutary  
8 effects of the measures outweigh the deleterious effects of  
9 them on the rights and interests of the parties and the  
10 public, including obviously the right to freedom of  
11 expression. And finally, and this is not referred to as  
12 the *Dagenais/Mentuck* test, but it's one of the principles  
13 outlined in those cases, the burden is on those proposing  
14 to displace the presumption of openness. And I would  
15 suggest that openness is even more important in this  
16 Commission given the background that gave rise to the  
17 Commission and the fact that this Commission has, as part  
18 of its mandate, the obligation to uncover the truth for  
19 public scrutiny.

20 So that's sort of the background, and I  
21 don't believe that any of my colleagues really object to  
22 these principles.

23 Let me go further, though, to suggest the  
24 second principle and that is that at first instance it  
25 should be the Commission itself, through its counsel, that

1 has the obligation to consider and, if necessary, to  
2 propose measures of confidentiality. And I say this  
3 because it is the role of Commission counsel to consider  
4 the public interest broadly and, secondly, because it is  
5 Commission counsel who in many cases will be leading the  
6 evidence that gives rise to the need for confidentiality  
7 measures.

8 And I would also suggest that if the  
9 Commission, through its counsel, decides that no  
10 confidentiality measures are necessary, there may be  
11 circumstances where Commission counsel should put that on  
12 the record before other parties are required to respond.

13 The third principle, I would suggest to you,  
14 is that there must be an evidentiary record in each case to  
15 support an application for confidentiality measures. I  
16 agree with Mr. Rose that in this case certain facts can be  
17 assumed without formal proof. For example, the fact that  
18 certain individuals who have been named in documents have  
19 not provided their consent to having their names disclosed  
20 in public is something that can be provided simply by  
21 having Commission counsel advise us of that fact.

22 Similarly, I agree with Mr. Rose that it can  
23 be assumed that for victims of sexual abuse whose names  
24 have never been in the public domain, the publication of  
25 those names in the context of these proceedings would do

1 great harm. There may be cases, however, where it is  
2 appropriate to lay an evidentiary foundation. For example,  
3 in dealing with one of the documents that was in evidence  
4 last week, and I believe it is C-72, it may have been  
5 useful had an evidentiary basis been put before you with  
6 respect to the document in terms of the names that are  
7 disclosed in the document whether any of those names have  
8 ever been disclosed in public before, et cetera. And that  
9 may be something that all of us can think of as these  
10 proceedings move forward.

11 My fourth general submission is that, as Mr.  
12 Manson said last week, publication includes the website and  
13 any rebroadcast. We take the position that while the  
14 Commissioner has control over the hearing room and can take  
15 appropriate measures to ensure that all who participate  
16 including the media are apprised of confidentiality  
17 measures, you can't do that with the web cast. It's pretty  
18 difficult to control somebody who may be tuning in and  
19 tuning out at a particular point in time and may or may not  
20 know that you've made an order at an earlier point in time.

21 **THE COMMISSIONER:** What happens if some  
22 media outlet just wanders in right now and we've put a ban  
23 on publication half an hour ago or yesterday and the  
24 witness is continuing? How would that person be ---

25 **MR. WARDLE:** Well, with respect, Mr.

1 Commissioner, it is a little different -- the media, one  
2 can assume a certain degree of sophistication on the part  
3 of the media that they're following these proceedings and  
4 they're not going to simply barge in and say, "Oops, we  
5 didn't know." It's a lot different for a member of the  
6 public.

7 I think the point I'm making is that the web  
8 cast is at a level removed from your hearing room. Now, it  
9 may not matter in any event whether you call it publication  
10 or simply whether under your rules you're adopting a  
11 measure that goes further than publication.

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

13 **MR. WARDLE:** And I would say this about the  
14 web cast. It's different than print or broadcast in an  
15 important respect. It allows individuals who cannot attend  
16 to participate directly without any filter and make up  
17 their own minds on what they see and hear. And so to that  
18 extent, it furthers the principle of openness in a  
19 different way than media coverage. So any restrictions on  
20 the web cast, in my submission, have to be proportionate  
21 and limited. And that's why I think Mr. Rose's proposal is  
22 a good proposal and I'll come back to that in a moment.

23 Now, there's also the issue of the  
24 transcripts because the transcripts, which are posted on  
25 the web cast, in our submission, are also being published

1 or at least disseminated to the public. So this is not the  
2 same as a transcript, which is only available by going to  
3 the court office and paying to get a copy of it.

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

5 **MR. WARDLE:** You know, you can download it  
6 and I downloaded last week's transcripts this morning on  
7 the train. Easy access. So in my submission, transcripts  
8 must be considered in the same basis as the website  
9 broadcast. The only difference between them is that the  
10 web cast is live and includes video images while the  
11 transcript is limited to the audio feed.

12 And then finally, in my submission, you have  
13 to consider documents. Now, I'm not sure where we are on  
14 this, but initially your staff were posting exhibits on the  
15 website and, for example, we have exhibits posted from  
16 certain of the expert evidence that was given back in  
17 April.

18 **THE COMMISSIONER:** That's the standing  
19 evidence.

20 **MR. WARDLE:** That's correct.

21 **THE COMMISSIONER:** The context evidence.

22 **MR. WARDLE:** Now, if it was proposed, and I  
23 don't know whether it is proposed, to have public exhibits  
24 on the website, then those exhibits would have to be  
25 considered in the same context as transcripts and the live

1 web cast.

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

3 **MR. WARDLE:** All right. Well, that deals  
4 with that issue.

5 And then my next comment as a general  
6 principle is that this Commission should avoid in camera  
7 hearings except where absolutely necessary. As long as  
8 members of the public can attend the hearings and  
9 participate, the hearing is a public process regardless of  
10 what restrictions are placed on publication or even access  
11 to exhibits and transcripts in the Commission office. Once  
12 the hearing takes place in camera, we are no longer a part  
13 of the public process. In the context of this Commission,  
14 that could be extremely dangerous. It could lead to a loss  
15 of confidence of the work of this Commission or perhaps  
16 even further rumour and innuendo in the community.

17 **THE COMMISSIONER:** Except for the fact I  
18 hope that because we have 15 parties now that represent the  
19 broad section of pretty well all of the interests in this  
20 community that I would hope that members of the community  
21 would think that whatever happened in camera, there was  
22 somebody there looking out for their interests.

23 **MR. WARDLE:** I agree with that comment, Mr.  
24 Commissioner, and all I'm really saying is that we will  
25 have to go in camera, there's no question about it, but it

1 should be as minimal as possible.

2 **THE COMMISSIONER:** Okay.

3 **MR. WARDLE:** So it really brings me to Mr.  
4 Rose's proposal because, in my submission, non-identifying  
5 initials, however you want to characterize them, and I'm  
6 not going to get caught up in the logistics, but it's a  
7 better solution than hearing all of that evidence in camera  
8 because it minimizes the amount of time that has to be  
9 spent in the absence of the public and it accomplishes the  
10 same objectives. And I agree with Mr. Rose's comment about  
11 the rules. The rules specifically contemplate the use of  
12 non-identifying initials in the context of Rule 40, and  
13 there's no reason why you can't do the same in the context  
14 of Rule 39.

15 So with respect to these specific documents,  
16 I agree with Mr. Rose's proposal. It seems to me that the  
17 best way to deal with it is exactly as he has outlined it  
18 and that the protocol he has suggested makes sense for us  
19 to use in future, subject only to these comments that there  
20 needs to be some sort of evidentiary foundation in each  
21 case.

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

23 **MR. WARDLE:** There may be situations where  
24 the use of non-identifying initials at an early stage  
25 becomes subject to an argument later that that should

1 change because of a twist or a turn in the evidence. And  
2 obviously that's something that you would want to allow  
3 for.

4 And I would also say that, as in this case,  
5 my recollection is that with respect to the first of these  
6 exhibits, C-72, it was Mr. Dumais who rose and made the  
7 proposal that as a general rule it should be Commission  
8 counsel who has the first pass at this, if I can put it  
9 that way, subject to the rest of us having the ability to  
10 chime in.

11 **THE COMMISSIONER:** I would hope, as well,  
12 that before -- that there is some consultation before we  
13 ask Commission counsel to rise. I mean, we would never  
14 have known of Mr. Rose's situation ---

15 **MR. WARDLE:** Of course.

16 **THE COMMISSIONER:** So I think an element of  
17 cooperation all along and then if there is a disagreement,  
18 Maître Dumais would get up and say "We don't see any  
19 problems" and somebody else would have an opportunity to  
20 say "Yes."

21 **MR. WARDLE:** No, I agree with that.

22 **THE COMMISSIONER:** Okay.

23 **MR. WARDLE:** Thank you. Those are all my  
24 submissions.

25 **THE COMMISSIONER:** Thank you.

1 Mr. Lee.

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

3 MR. LEE: Good afternoon.

4 THE COMMISSIONER: Good afternoon, sir.

5 MR. LEE: I am happy to tell you that I  
6 agree that Mr. Rose's proposal is a good one and I agree  
7 almost entirely with what Mr. Wardle had to say just now.

8 I especially would like to stress the fact  
9 that it could well happen where it would arise that  
10 somebody who we don't see as relevant now, somebody who we  
11 have no way of knowing now that their name needs to be --  
12 down the line, it could arise that we realize, based on  
13 testimony or new documents or whatever it is, that we need  
14 to reconsider that position, and I too would ask that that  
15 be left open to us.

16 The only other comment I really want to make  
17 is I'm not entirely clear on, given Mr. Rose's proposal,  
18 why we really need to consider issues with the web cast or  
19 the transcript. I'm at a bit of a loss to understand why  
20 that's relevant if we're going to go in camera to name the  
21 person to have this hearing. We're going to come back out  
22 of camera and we're going to refer to them by initials or  
23 by C-1 or whatever it may be. As you I believe pointed out  
24 to me when I was on my feet last week, it's not going to be  
25 therefore an issue in the transcript or on the web cast

1           because we're not going to be referring to those people  
2           anyways.

3                       **THE COMMISSIONER:** So far, it's a good way  
4           of skirting the issue, no doubt about it. What happens if  
5           somebody names the person like it happened three times last  
6           week?

7                       **MR. LEE:** Well, I'm not sure there is  
8           anything we can do about the web cast in that situation,  
9           unless we have the technology maybe to offer some kind of  
10          delay or whatever it is but I'm not sure that's practical.  
11          I see nothing wrong with the approach you adopted last week  
12          in saying to the court reporters, "Okay, we've had a little  
13          slip here. There's been a problem. That person should  
14          have been referred to as C-2 and let's have the transcript  
15          reflect that rather than the name that was actually  
16          uttered." I don't see any problem with that and I have no  
17          problem.

18                      **THE COMMISSIONER:** So long as we all  
19          understand, though, that the web cast, people who are  
20          watching the web cast and people who are watching  
21          television may have caught that name.

22                      **MR. LEE:** I think we can all agree to do our  
23          best to not have that happen. We can explain it to the  
24          witnesses, but slips are going to happen. It's a Public  
25          Inquiry. I don't see what we can do about that. I don't

1 have a brilliant idea for how we avoid that. We can all do  
2 our best and we can hope it doesn't happen, but beyond  
3 that, I'm not sure what we can do. It certainly doesn't  
4 justify shutting down the web cast on the off chance that  
5 somebody makes a slip.

6 **THE COMMISSIONER:** Thank you.

7 Mr. Bennett is not here.

8 Mr. Cipriano.

9 **MR. CIPRIANO:** I have nothing to add,  
10 Commissioner.

11 **THE COMMISSIONER:** Thank you.

12 Mr. Chisholm.

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

14 **MR. CHISHOLM:** Good afternoon, Mr.  
15 Commissioner.

16 The comments made by Mr. Rose, Mr. Wardle  
17 and Mr. Lee, I find myself to be in agreement with. It  
18 seems that it's a workable solution advanced by My Rose.

19 I would submit that it bears keeping in mind  
20 one of the purposes of this Public Inquiry is to promote  
21 healing, and disclosing a name of a victim or an alleged  
22 victim who does not want to be disclosed and who has never  
23 made disclosure to his family or friends or co-workers can  
24 have the potential to do a great amount of harm. The  
25 solution proposed by Mr. Rose is a workable solution. I

1 would submit it's one that can be adopted by the  
2 Commission.

3 Subject to your questions or comments, Mr.  
4 Commissioner, those would be my comments. Thank you.

5 **THE COMMISSIONER:** Thank you.

6 For the Attorney General, is it Scharbach?

7 **MR. SCHARBACH:** Scharbach.

8 **THE COMMISSIONER:** Scharbach.

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

10 **MR. SCHARBACH:** Good afternoon, Mr.  
11 Commissioner.

12 The Ministry of the Attorney General, of  
13 course, is concerned about the rights of victims in  
14 maintaining their confidentiality in these circumstances.  
15 There is obviously a tension in these proceedings between  
16 the principle of ensuring that the proceedings are held in  
17 public and maintaining the confidentiality of alleged  
18 victims and it appears that Mr. Rose's proposal seems to  
19 come up with a solution that minimally affects the  
20 principle of open hearings.

21 So the Ministry of the Attorney General is  
22 in agreement with his submissions and is in agreement with  
23 his proposal. At least, we can't think of a better way of  
24 dealing with it at the moment.

25 **THE COMMISSIONER:** Thank you.

1                   **MR. SCHARBACH:** Thank you, Mr. Commissioner.

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

3                   **--- SUBMISSIONS BY/REPRÉSENTATIONS PAR MS. MAKEPEACE:**

4                   **MS. MAKEPEACE:** Sir, I can indicate that we  
5 too are in agreement with the proposal advanced by Mr.  
6 Rose. I do have one submission, though, that occurred to  
7 Ms. Henein actually when we were discussing this issue.  
8 Certainly as the procedure that we've currently adopted has  
9 been working, the transcripts of the in camera hearings are  
10 considered confidential and not available to the public.

11                   It's our submission, sir, that in terms of  
12 maintaining the presumption of openness for these hearings  
13 that only the sensitive information that bring the identity  
14 of the individuals to light should be redacted perhaps from  
15 the transcripts and replaced with the moniker that we are  
16 using. So we're suggesting that perhaps making those  
17 transcripts later available to the public, redacting the  
18 name of the individual and replacing with the moniker might  
19 be something that you may want to consider. That way,  
20 everybody is aware of what's going on when the public is  
21 excluded.

22                   That is the only submission I can advance.

23                   **THE COMMISSIONER:** Thank you.

24                   Mr. Callaghan. Let me begin by  
25 congratulating your spouse on all the hard work and you

1 claiming the credit.

2 **MR. CALLAGHAN:** That's indeed the case and I  
3 have sad news to report, sir, that I voted for Normand as a  
4 name but ---

5 (LAUGHTER/RIRES)

6 **MR. CALLAGHAN:** Apparently only two people  
7 voted and it was a landslide for another name. I  
8 apologize, sir. I did what I could.

9 **THE COMMISSIONER:** We wouldn't want to --  
10 let's put it this way, there are no juniors in my  
11 household. There you go.

12 **MR. CALLAGHAN:** Now, now, Mrs. Glaude,  
13 Grandma Glaude may not be happy to hear that.

14 **THE COMMISSIONER:** All right.

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

16 **MR. CALLAGHAN:** Mr. Commissioner, I come  
17 forward troubled like I was the last time that I gave a  
18 submission on this issue. It relates to those, as Mr. Rose  
19 indicated, who are not here. You know, Mr. Rose, because  
20 of contact with an individual, was able to raise the  
21 concern.

22 I do think it bears some consideration on  
23 whether there is an amicus curiae role to be had, because I  
24 am concerned that certain people who have access into this  
25 Inquiry are going to have their rights protected. I think

1 I used the phrase, you know, "This train is coming. People  
2 may not know there're on it." I am concerned that in the  
3 context of the documents that are going to be produced that  
4 it will become public. There will be names, many names  
5 that may not even be mentioned in the course of the  
6 discussion today, an exhibit will be made, et cetera, and  
7 that there will be people out there who have no idea that  
8 they are involved.

9 I was to see Mr. Engelmann today about one  
10 in an upcoming case where a person sought anonymity which  
11 you've given us specific instructions to advise of. But  
12 there is the general issue such as Mr. Rose's situation,  
13 and it has me a little concerned that none of us can  
14 actually do justice either because we're not thinking about  
15 it or alternatively because we can't stand in their shoes.

16 The Cornwall Police have said in the past,  
17 "We wouldn't have produced the documents that we did  
18 produce but for the lawful summons." It will not be lost  
19 on anybody here that one of the reasons why this Inquiry  
20 started was because of the unauthorized release of a  
21 document from a police force. It's kind of ironic we're  
22 here talking about it.

23 So I'm very sensitive to make comments with  
24 respect to any one individual in the absence of others  
25 because I think all of them are entitled to the same

1 consideration.

2 In terms of the comments regarding the law,  
3 I agree obviously that the submission -- general  
4 submissions on *Dagenais* are correct. I do point out that  
5 *Dagenais* referred to a common law test.

6 There's something more in this case insofar  
7 as the Order in Council operates as subordinate  
8 legislation, and paragraph 6 of the Order in Council  
9 directs you to ensure that disclosure of evidence and other  
10 materials balance the public interest, the principle of  
11 open hearings and the privacy interests of the persons  
12 affected, taking into account any legal requirements. And  
13 I said -- I am not suggesting *Dagenais* turns much on that,  
14 but it is something more than the ordinary case.

15 And moreover, there are legal requirements  
16 we've touched on. There are legal requirements that your  
17 summons gets around such as the Freedom of Information  
18 which protects the information in the hands of our  
19 institution -- all the public institutions, frankly, so  
20 that those subordinate -- not subordinate, but those  
21 documents ought to be considered as a little bit more  
22 heightened than, say, *Dagenais'* situation.

23 I will take exception to one thing that Mr.  
24 Wardle said. I don't think that the demarcation line is  
25 between people who have been in the public domain and

1 people who have not. Somebody came forward on an event 20  
2 years ago and dealt with it. Then, you know, perhaps they  
3 went to court, perhaps there was a publication ban and  
4 maybe we've got to deal with that as well. But I don't  
5 think that that person deserves less consideration because  
6 they may well have put this matter behind them. They may  
7 not have dealt with it in a full psychological situation so  
8 that they may relive it if they are brought into this  
9 domain. I think we've heard enough from contextual  
10 witnesses that that's a possibility. So I don't think that  
11 can be a demarcation line. And again, I'm making more  
12 generalities but I think they are important to make.

13 In terms of the issue of the web cast, I  
14 think the suggestion that the mainstream media is the only  
15 concern and the issue of knowing of a publication ban, I  
16 think misses the mark. This case, the swirl of innuendo I  
17 referred to when I was here last, much of that happened off  
18 line of the mainstream media and was on the internet on  
19 blogs, on internet websites, et cetera. And I think you  
20 got to be very sensitive that the publication on the web  
21 cast, and I think from your comments you are, goes beyond  
22 the mainstream publications in this case. And we have to  
23 be very sensitive to that, so it may be we have to go off  
24 line.

25 Lastly, in the comment with respect to the

1 identification issue that Mr. Leduc's counsel mentioned, I  
2 take you back to Mr. Wallace's submissions regarding the  
3 confidential informant. As you recall, and I recognize  
4 this is not what we are talking about and we've dealt with  
5 that as a separate category, but I think the principle is  
6 somewhat the same; it's the identification of the  
7 individual. And the case law from the Supreme Court of  
8 Canada had indicated that you've got to be very careful  
9 because what we hear without the benefit of that person may  
10 see as identifying characteristic, their name for example,  
11 may not be the only identifying characteristic. And it  
12 leaves us in a very difficult position, if we are going to  
13 sit here and purport to protect their interest, to actually  
14 parse out that portion which is identifiable and not  
15 identifiable.

16 I think the objective of Mr. Rose's  
17 recommendation is laudable and I think in many cases it can  
18 work. I can think of a number of cases where people are  
19 mentioned in passing, et cetera, and there isn't a massive  
20 content issue to it. But I think we have to ask the people  
21 -- and I don't want to detract. We all have a full answer  
22 in defense if that's the proper phrase for a public  
23 inquiry, but we have to ask whether it's necessary to put  
24 their names in the public domain for the purpose of this  
25 Inquiry at all. And even their story, even to the extent

1       that we redact their names, I'm not sure in a community  
2       like Cornwall, there may be identifiers. And it's not just  
3       identifiers to the people at large, it's identifiers in  
4       many cases to people who know them. Like it's to their  
5       neighbours, to people whom may never -- you could look at  
6       it and we'd never figure it out from the 50,000 people in  
7       Cornwall, but the person next door might, the mother might  
8       and that's the sensitive issue that I'm not sure the  
9       substitution for initials will be entirely satisfactory in  
10      all cases. And I'm afraid I can give no more assistance  
11      but I'd be happy to think about it further.

12                   **THE COMMISSIONER:** Thank you.

13                   Who is addressing for the OPP? Mr. Kozloff?

14                   **MR. KOZLOFF:** Good afternoon, sir.

15                   **THE COMMISSIONER:** Good afternoon, sir.

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

17                   **MR. KOZLOFF:** One of the perquisites of  
18      being called on at this stage of the proceedings is that  
19      much of the wisdom has already been imparted.

20                   **THE COMMISSIONER:** You can always suggest  
21      that you suggested to them -- that you're the one that came  
22      up with the idea.

23                   **MR. KOZLOFF:** I would never lie to you, sir.

24                   **(LAUGHTER)**

25                   **MR. KOZLOFF:** We start from the position

1           that the last thing that the Cornwall Public Inquiry wants  
2           to do is to revictimize victims.

3                       The Commission has the authority and indeed  
4           the obligation by virtue of section 6 of the Order in  
5           Council, to balance the public interest, the principle of  
6           open hearings and the privacy interests of the persons  
7           affected. Section 4 of the *Public Inquiry Act* then informs  
8           the application of section 6.

9                       The application of a publication ban depends  
10          to a great extent, Mr. Commissioner, on your definition of  
11          publication. We have, at one point or another during the  
12          course of these discussions, heard reference to daily  
13          newspapers, to the national television networks, to cable  
14          television stations, to the internet, to the web cast, to  
15          the website of the CPI, transcripts and indeed, there is  
16          the hearing room itself.

17                      One of the issues, in my respectful  
18          submission is, how do we make a valid distinction between  
19          any of the various means or vehicles or avenues of  
20          publication. Looking at those from the point of view of a  
21          victim who does not wish to have that fact made known; what  
22          difference does it make to victim A, who may have been 12  
23          years old when he was victimized, who is now in his forties  
24          or fifties? He's married, he has children. Neither his  
25          wife nor children know about his victimization. And he

1 happens to be mentioned in a document, such as the document  
2 that was filed last week, from the Diocese. And I ask  
3 myself, does it make any difference to him whether his name  
4 is repeated in this room or on the web cast or on the front  
5 page of the Globe and Mail? It's out, when it's out. And  
6 from that person's point of view, in my respectful  
7 submission, there is no real distinction between  
8 publication, perhaps in the sense that we use it in a  
9 courtroom and publication in the sense of the matter being  
10 aired; the matter being made public. And when you say a  
11 name in this room, you are making that name public.

12 **THE COMMISSIONER:** I agree. But the --  
13 historically, under the *Criminal Code*, 46(3), whatever it  
14 is now, we would order the public ban on publication so  
15 that the name, or any identifiers, not be broadcast or  
16 published in any way. And we would traditionally go on and  
17 name the person.

18 So what you're asking -- what we're talking  
19 about, is something heightened than what we -- a more  
20 stringent application of that, for this inquiry.

21 **MR. KOZLOFF:** I know.

22 Well, there are a number of issues that  
23 arise. The ones that come to mind at this moment are:  
24 first of all, in the courtroom situation, the individual  
25 who's being named is actually coming forward as a witness.

1 One hopes that that individual is coming forward, having  
2 made an informed choice.

3 Before one reports their victimization, one  
4 is in a position -- they don't necessarily do it, but they  
5 are in a position or somebody on their behalf, depending on  
6 their age, is in a position to consider, "Do I want to  
7 expose myself; do I want to expose my child to the  
8 consequences of reporting it -- to the consequences of  
9 coming to court?" Even with the protections.

10 The other thing that comes to mind is that  
11 the ban on publication of a name is a pretty late  
12 development. Your Honour probably remembers before that  
13 publication existed. I do. There used to be a ban on  
14 publication of the proceedings or preliminary hearing.  
15 That's always been the case, for my lifetime ---

16 **THE COMMISSIONER:** Yes.

17 **MR. KOZLOFF:** --- but the name ban only came  
18 in in the 1980s.

19 **THE COMMISSIONER:** Yes.

20 **MR. KOZLOFF:** And before that, people's  
21 names were subject to the publication ban on the  
22 preliminary hearing were publicized.

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

24 **MR. KOZLOFF:** I simply raise it as a  
25 concern.

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

2                   **MR. KOZLOFF:** How do we make a valid  
3                   distinction between informed victims -- and this is  
4                   something that Mr. Rose, I was gratified to hear him raise  
5                   it -- between informed victims, like the one who made an  
6                   express request for anonymity or protection from  
7                   publication versus the uninformed victim, whether that  
8                   person be in Cornwall or Cochrane or Cowansville or  
9                   Connecticut. They may not know that the train has come in,  
10                  to use Mr. Callaghan's phrase and that they're on it.

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

12                  **MR. KOZLOFF:** It struck me, as I was sitting  
13                  in this room last week, when the Diocese document was put  
14                  up on the screen and all of a sudden we saw names with  
15                  which we were completely unfamiliar, including the name of  
16                  C-1, but other names. And I said to myself, "Well, what  
17                  about those people?" Do they know that their names are  
18                  being put up on a screen in this hearing room? Do they  
19                  know that their names are about to be publicized unless  
20                  they make a specific request, so ---

21                  **THE COMMISSIONER:** The names were not put on  
22                  the public screens.

23                  **MR. KOZLOFF:** No, no, I appreciate that.

24                  **THE COMMISSIONER:** Okay.

25                  **MR. KOZLOFF:** They were put on the counsel's

1 screen.

2 **THE COMMISSIONER:** Right.

3 **MR. KOZLOFF:** But the potential existed.

4 For instance, had that individual not made the request of  
5 Mr. Rose, it may be that they were -- they would have been  
6 put up on the big screen and they may have been the subject  
7 matter of repetition in the courtroom.

8 **THE COMMISSIONER:** Well, in fairness ---

9 **MR. KOZLOFF:** Yes.

10 **THE COMMISSIONER:** --- I don't think so  
11 because Maître Dumais rose and talked about the preliminary  
12 inquiry transcript on which there is a publication ban and  
13 invited discussion about how we were going to go about  
14 doing that. Then Mr. Rose, if I remember ---

15 **MR. KOZLOFF:** Right.

16 **THE COMMISSIONER:** So give us a little bit  
17 of credit.

18 **MR. KOZLOFF:** No, I don't stand here in any  
19 way being critical of the way in which we've approached  
20 this, in fact, very much to the contrary. I think it's a  
21 very healthy situation that we've all been asked for our  
22 input. I'm simply trying to ---

23 **THE COMMISSIONER:** I understand.

24 **MR. KOZLOFF:** --- achieve something.

25 **THE COMMISSIONER:** Yes.

1                   **MR. KOZLOFF:** The OPP position is that which  
2 we have espoused from the outset, that a principled  
3 approach is required when the Commission is confronted with  
4 confidentiality issues, that there is a consistency in the  
5 resolution thereof.

6                   Those are my respectful submissions.

7                   **THE COMMISSIONER:** Thank you very much, sir.  
8 Mr. Carroll? Wrong pew?

9                   **MR. CARROLL:** I just thanked Mr. Manderville  
10 for his plug.

11                   **THE COMMISSIONER:** For his what?

12                   **MR. CARROLL:** He referred to Mr. Wallace as  
13 making his submissions with respect to the confidential  
14 informant.

15                   **MR. MANDERVILLE:** I didn't get much sleep.

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

17                   **MR. CARROLL:** Good afternoon.

18                   **THE COMMISSIONER:** Good afternoon, sir.

19                   **MR. CARROLL:** I echo Mr. Kozloff's comments  
20 about coming towards the end of the proceedings. In short,  
21 I find favour with Mr. Rose's position. I was reviewing  
22 your ruling of the 30<sup>th</sup> and note that in your ruling, you  
23 cited Justice Trafford on the issue of confidential  
24 informants or confidential privileged status and cite again  
25 the comment that you referred to on page 13:

1 "One need not give information to the  
2 police but if the privilege attaches to  
3 the relationship a right of  
4 confidentiality in the confidential  
5 informant is created and must be  
6 recognized by everyone."

7 Obviously including this Commission.

8 No one's addressed the delay in the web cast  
9 issue and I might just speak to that, if I may for a  
10 moment. Because we have the concern -- there seems to be  
11 general acknowledgement from counsel that there will be  
12 slips. I don't know that we need to just throw up our  
13 hands on that, but I confess an absolute absence of  
14 knowledge when it comes to things technological.

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

16 **MR. CARROLL:** But if there is any form of --  
17 I saw you shaking your head earlier and I assumed you were  
18 telling me there is no way of a delay being effective.

19 **THE COMMISSIONER:** My understanding that  
20 there's not.

21 **MR. CARROLL:** All right.

22 **THE COMMISSIONER:** This isn't Coaches Corner  
23 and CBC where we have ---

24 **MR. CARROLL:** One would think if you could  
25 stop Cherry for seven seconds, you could stop this thing

1 for 30 seconds or whatever it would take.

2 **THE COMMISSIONER:** I don't know that we have  
3 the -- we'll check, I'll ask somebody ---

4 **MR. CARROLL:** Well, sir, I think it's worth  
5 exploring because it's fine to say, "A slip is a slip" but  
6 if it's so inevitable then maybe we should be at least  
7 attempting to address it.

8 **THE COMMISSIONER:** Yes. I don't know --  
9 well, I'm sure that the Ontario Provincial Police  
10 Association would be willing to subsidize the extra person  
11 it will take to take the delay out. I'm sure that would be  
12 ---

13 **MR. CARROLL:** We'd be willing to take any  
14 reasonable steps to ensure that victims are protected.

15 **THE COMMISSIONER:** Touché.

16 **MR. CARROLL:** And perhaps that's a good note  
17 to end on. When one reflects -- because sometimes the  
18 forest and the tree's position were here to accomplish a  
19 number of named objectives.

20 **THE COMMISSIONER:** Yes.

21 **MR. CARROLL:** And surely, one of them, as  
22 other counsel have said, is to provide protection to  
23 victims so they're not revictimized.

24 **THE COMMISSIONER:** To the best of our  
25 capabilities. I appreciate that, sir.

1                   **MR. CARROLL:** Thank you.

2                   **THE COMMISSIONER:** Thank you.

3                   Upper Canada District School Board?

4                   **MS. TYMOCHENKA:** We have nothing further.

5                   **THE COMMISSIONER:** Thank you.

6                   Catholic District School Board?

7                   No one here. All right.

8                   So the Freeholder? Did you wish to come  
9 first?

10                  --- SUBMISSIONS BY/REPRÉSENTATIONS PAR MS. SAUNDERS:

11                   **MS. SAUNDERS:** First of all, thank you for  
12 the opportunity ---

13                   **THE COMMISSIONER:** No problem.

14                   **MS. SAUNDERS:** --- to come and speak to this  
15 matter this afternoon.

16                   My name is Terri Saunders and I am a  
17 reporter at Standard Freeholder. The Standard Freeholder  
18 is a daily newspaper publishing in Cornwall, Ontario. As  
19 an accredited media outlet, we recognize we are under a  
20 legal obligation to uphold any existing publication bans  
21 put in place by any court.

22                   Our concerns rest with the marking of any  
23 documents as confidential or with portions of documents  
24 being blacked out. Kinds of restrictions like this on  
25 access to information, which is otherwise available to the

1 public, seems an unnecessary and excessive cautionary  
2 measure.

3 In any other courtroom, this information  
4 would be available to any members of the public who choose  
5 to attend the hearings as well as members of the media, who  
6 are obliged to report on such matters in as complete and  
7 fair a fashion as possible.

8 This is, after all, the Cornwall Public  
9 Inquiry. The more information which gets filed under the  
10 heading confidential, the further away you get from this  
11 being a truly public inquiry. This Commission is here to  
12 conduct these hearings as fairly as possible, while  
13 ensuring the public interest is met.

14 It is our position, the interests of the  
15 community as a whole must be weighed against individual  
16 privacy rights outside of a publication ban.

17 These documents, while perhaps subject to an  
18 appropriate ban on publication, must not be hidden entirely  
19 from public view. We recognize that this Commission could  
20 not bring out the real stories of harm if it did not, in  
21 appropriate cases, promise confidentiality to innocent  
22 victims of wrongdoing, whose names have not already been  
23 made public. We accept the need for such confidentiality  
24 and would not ask that it be lifted.

25 With respect to other victims, whose names

1       come out in the Commission's proceedings, we have two  
2       points to make.

3                   First of all, in relation to identities  
4       which are already public; if the names have been made  
5       public previously, we urge the Commission not to try and  
6       put the genie back in the bottle. The main reason is one  
7       of accountability. Once the public knows of a dilemma  
8       faced by a member of the community, a natural and  
9       honourable awareness and conscience about that person  
10      develops. The community needs closure in such cases. What  
11      happened? How did the system help the individual  
12      concerned?

13                   Therefore, we would be pleased to assist the  
14      Commission when a publication ban is sought, in informing  
15      it, if the names of the persons seeking the order have  
16      previously been made public.

17                   Second, maintaining public scrutiny through  
18      the media. Even if the Commission decides to issue a  
19      publication ban or takes some other step to protect the  
20      identity of a victim who has not made confidentiality a  
21      term of coming forward to the Commission, we urge the  
22      Commission to take steps to ensure that the proper balance  
23      of personal and public issues is respected. We ask that  
24      the Commission consider that the identities of such persons  
25      should at least be given or made known to members of the

1 media attending the proceedings. This is a common  
2 arrangement which has been found to be satisfactory in such  
3 situations.

4 **THE COMMISSIONER:** Well, have we not -- in  
5 the in camera hearings that we've had so far, you have been  
6 permitted to stay.

7 **MS. SAUNDERS:** Correct.

8 **THE COMMISSIONER:** So for example, you as a  
9 member of the media know the name of Mr. C.

10 **MS. SAUNDERS:** Correct.

11 **THE COMMISSIONER:** That's what you're trying  
12 to do -- that's what you're telling me is what you want  
13 here?

14 **MS. SAUNDERS:** Yes. However, we have not  
15 seen either of the documents in question in their entirety  
16 to see all of the names so that we could determine whether  
17 or not their identity is even an issue for us or whether  
18 it's something that we feel should not be protected. So we  
19 are only subject -- we only hear what happens in the in  
20 camera hearings.

21 **THE COMMISSIONER:** Right, but the "C"  
22 documents are "C" until I've made my ruling.

23 **MS. SAUNDERS:** M'hm.

24 **THE COMMISSIONER:** So you are going to get  
25 the vast majority of those documents.

1                   **MS. SAUNDERS:** Right.

2                   **THE COMMISSIONER:** But what you're saying is  
3 there are some other names there that might be blacked out  
4 and you want to see those names.

5                   **MS. SAUNDERS:** We believe that as a member  
6 of the media we should be permitted to at least view them  
7 under -- you know, if there is a publication ban that  
8 restricts that, that's fine, but to allow us to represent  
9 the interests of the public to whom we report and to ensure  
10 that we are able to see what's happening ---

11                   **THE COMMISSIONER:** I understand.

12                   **MS. SAUNDERS:** --- in the entirety.

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

14                   **MS. SAUNDERS:** We ask that you consider the  
15 following. In Ontario Family Court proceedings regarding  
16 the custody of children, the Ontario statute governing such  
17 proceedings makes a specific provision directing that the  
18 proceedings will be conducted in the absence of the public  
19 but that two members of the media may attend subject to the  
20 overriding publication ban contained in the same statute.

21                   Also, in criminal proceedings, whether it's  
22 bail hearings, preliminary inquiries or even in trials,  
23 courts issue publication bans so that the public cannot  
24 learn through the media of certain specific information  
25 arising in the court that should be kept out of the

1 public's attention. However, the media attending the  
2 proceeding can witness the proceedings and give to the  
3 process the public element.

4 The media understand the process and will be  
5 in a position of having to respect the orders of the court  
6 or commission. Through this approach, judges, lawyers and  
7 witnesses know that their conduct is being watched  
8 carefully by those who want to see how the process is being  
9 carried out under the mandate of the administration of  
10 justice.

11 Letting the public witness the proceedings  
12 in such a guarded way is a prophylactic against the harm  
13 that might otherwise arise or be suspected in the  
14 community. The public needs assurances that the Commission  
15 conducts fair and effective hearings, the questions that  
16 have to be asked are asked, the victims are respected  
17 appropriately and the perpetrators are likewise handled  
18 with due regard. Public scrutiny is essential.

19 Knowing the names of the victims can give to  
20 the media a sense of the information and the persons  
21 concerned, whether the Commission follows up on such  
22 persons or leaves stories, complaints or concerns  
23 unaddressed. Therefore, we urge the Commission to allow  
24 the media to be made aware of the names and identities of  
25 all persons referred to in the proceedings except those

1 victims who have come forward on a strict promise by the  
2 Commission of confidentiality.

3 And finally on one point that is not  
4 specific to these documents but is an issue regarding  
5 identity protection, we'd like to speak briefly to the  
6 names of perpetrators. We believe that persons identified  
7 by complainants as being perpetrators should not be  
8 protected by publication bans or any other step to keep  
9 their identities secret. The Commission presents the  
10 opportunity for fair and balanced testimony and persons  
11 whose testimony is unreliable will be dealt with  
12 accordingly.

13 Obviously the Commission is concerned with  
14 unfounded allegations against innocent persons. The fair  
15 and accurate reporting by the media of the proceedings of  
16 the Commission and its findings will allow the Commission  
17 itself to deal with the issue of unfair allegations in its  
18 own way. The potential harm in not airing out the serious  
19 complaints merely because the Crown has not charged the  
20 alleged perpetrator and a court has not convicted him or  
21 her of a crime, is that the Commission process may not be  
22 working for those who have serious complaints of abuse.

23 Mr. Commissioner, you and your staff are  
24 familiar and experienced with handling false allegations  
25 and do not need to put a blanket over the process that is

1           only effective if it is public. If a publication ban is  
2           issued it should cease to have effect when either the  
3           person protected by it consents to publication of his or  
4           her identity or when the identity is disclosed in a court  
5           proceeding.

6                           And that is my submission.

7                           **THE COMMISSIONER:** Thank you.

8                           I should tell you, though, that with respect  
9           to alleged perpetrators or perpetrators that we're not  
10          discussing that issue today.

11                          **MS. SAUNDERS:** Correct.

12                          **THE COMMISSIONER:** And that may come later.

13                          **MS. SAUNDERS:** Thank you.

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

15                          Mr. Wong.

16                          **MR. WONG:** Yes, Commissioner, thank you.

17                          **THE COMMISSIONER:** So now you're here on  
18          behalf of the CBC?

19                          **MR. WONG:** Yes, I am. I'm here on behalf of  
20          Radio-Canada and the Canadian Broadcasting Corporation.

21                          **THE COMMISSIONER:** Thank you.

22          --- SUBMISSIONS BY/REPRÉSENTATIONS PAR MR. WONG:

23                          **MR. WONG:** First of all, the CBC wishes to  
24          thank this Commission for hearing our submissions today.  
25          The subject matter of this Public Inquiry is one that our

1 clients have followed very intensely between 1999 to the  
2 present and it's a matter which our clients feel very  
3 strongly should be as open and available to the public as  
4 possible.

5 Now, I'm here today to oppose to the  
6 greatest extent possible any limits on openness of these  
7 proceedings. But to be clear, the onus is not on me today  
8 to justify openness, to justify access to a document, to  
9 justify the right to be present in these proceedings or to  
10 be able to report fully on what transpires here today. The  
11 presumption is on openness and what openness obviously  
12 means, Mr. Commissioner, is the full right to report on  
13 everything that takes place at this hearing. Openness also  
14 means the full right to access documents, exhibits that are  
15 filed in the course of these proceedings, and openness of  
16 course means the ability to be present and to observe fully  
17 what happens at every stage of these proceedings.

18 What I propose to do today is break my  
19 argument down into three parts.

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

21 **MR. WONG:** First I want to deal briefly with  
22 openness and why it's important to the administration of  
23 justice and why openness is vital, I submit, to the  
24 legitimacy of this process and to the decision ultimately  
25 that's reached by this Commission.

1                   Then I want to deal with the  
2           *Dagenais/Mentuck* test. There is a presumption of openness.  
3           There is a discretion on your part under the *Public*  
4           *Inquiries Act* and under your rules to limit that  
5           presumption of openness. What I want to do in the second  
6           part of my submissions is to outline the legal test set out  
7           by the Supreme Court of Canada in *Dagenais/Mentuck* and more  
8           recently *Vancouver Sun*, the legal test governing your  
9           exercise of discretion.

10                   One of my friends mentioned that Section 4  
11           of the *Public Inquiries Act* and Rule 39 and Rule 40 give  
12           you broad discretion to control which occupants are  
13           designated as confidential, what information can be  
14           published and who can be present. In fact, as I'll submit,  
15           the *Dagenais/Mentuck* test imposes a very stringent test on  
16           your exercise of discretion. Only in the clearest cases on  
17           the clearest of evidence is this Commission permitted to  
18           either seal a document, i.e. designate it as confidential,  
19           exclude the public or impose a publication ban.

20                   And then the third part of my submissions  
21           will be to examine the presumption of openness and the test  
22           for limiting openness in the context of court proceedings  
23           which involve allegations or claims of sexual assault. And  
24           as I'll outline, in fact, with very few exceptions, the  
25           same principles apply even though the court proceeding

1 deals with a sexual assault complainant. The presumption  
2 of openness prevails and the stringent test for limiting  
3 openness continues to apply.

4 **THE COMMISSIONER:** Before you start that,  
5 sir ---

6 **MR. WONG:** Yes.

7 **THE COMMISSIONER:** --- how long do you think  
8 your arguments will be?

9 **MR. WONG:** I imagine 35 to 40 minutes.

10 **THE COMMISSIONER:** Great. Then why don't we  
11 take the afternoon break?

12 **MR. WONG:** Sure.

13 **THE COMMISSIONER:** All right.

14 **MR. WONG:** Thank you.

15 **THE COMMISSIONER:** Thank you.

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

18 The hearing will reconvene at 3:35.

19 --- Upon recessing at 3:18 p.m./

20 L'audience est suspendue à 15h18

21 --- Upon resuming at 3:45 p.m./

22 L'audience est reprise à 15h45

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

1                   **THE COMMISSIONER:** Hi, Mr. Wong.

2                   **--- SUBMISSIONS BY/REPRÉSENTATIONS PAR MR. WONG**  
3                   **(CONT'D/SUITE):**

4                   **MR. WONG:** Mr. Commissioner, let me start  
5 with the first part of my submissions which is a brief  
6 review of the importance of openness and I know no one  
7 disputes the importance or the value of openness  
8 particularly to a public inquiry, but I believe it's  
9 important to stress the principles underlying why we have a  
10 presumption of openness for the court proceedings and of  
11 course for this Public Inquiry. And I could find no better  
12 -- actually before I start, Mr. Commissioner, I did hand up  
13 a package of materials.

14                   **THE COMMISSIONER:** Yes.

15                   **MR. WONG:** One is submissions of the CBC.  
16 It's more of an aid to argument. I intend to follow those  
17 pretty closely in making my submissions here today.

18                   **THE COMMISSIONER:** Right.

19                   **MR. WONG:** But I could find no better  
20 description of the purpose and principles of openness than  
21 in Justice LaForest's description of it at paragraph 1 of  
22 my written submissions.

23                   **THE REGISTRAR:** We only have eight copies.

24                   **MR. WARDLE:** Sorry, my friends and I were  
25 just -- and it's not Mr. Wong's fault but because he hasn't

1       been here before.

2                   **THE COMMISSIONER:** That's true.

3                   **MR. WARDLE:** I gather he has made some  
4       copies. Perhaps ---

5                   **THE COMMISSIONER:** It's okay. What I'll ask  
6       is I'll ask Madam Clerk to go out with a copy, give out  
7       whatever we have. Do we have more copies?

8                   **MR. WONG:** I've brought eight copies.

9                   **THE REGISTRAR:** He brought eight.

10                  **THE COMMISSIONER:** Yes, well we're up to 17  
11       or something.

12                                   **(LAUGHTER/RIRES)**

13                  **THE COMMISSIONER:** We are publishing the  
14       document and I hope you don't mind.

15                  **MR. WONG:** I'm not seeking a publication ban  
16       on it.

17                  **THE COMMISSIONER:** So grab a copy from  
18       somebody and make a few more copies.

19                                   It is 25 cents a copy in a page on the area  
20       of openness.

21                  **MR. WONG:** Yes.

22                  **THE COMMISSIONER:** CBC is a federal  
23       institution and therefore we can send you a bill.

24                                   **(LAUGHTER/RIRES)**

25                  **MR. WONG:** You can send the CBC a bill. You

1 can't send me a bill.

2 **THE COMMISSIONER:** All right. So there you  
3 go.

4 **MR. WONG:** But the first point to note is  
5 that we have openness not only to protect the right of the  
6 media to report on court proceedings and proceedings at  
7 public inquiries, it's very much a right of the public and  
8 that point is made by Justice LaForest in the *CBC v. New*  
9 *Brunswick* case which is that openness permits the public to  
10 access information about the courts which in turn permits  
11 the public to discuss and put forward opinion and criticism  
12 of court practices and proceedings.

13 The media comes in because, practically  
14 speaking, most members of the public, working mothers,  
15 businesspeople, teenagers who go to school, don't have the  
16 time to attend court proceedings or public inquiries and  
17 they really rely on the media to keep them informed on what  
18 transpires in a court or in the Inquiry today.

19 I think it's important to emphasize the  
20 right as being that of the public because in this case  
21 we're talking about limits on access to information on the  
22 website and I would submit that any such limits ought to be  
23 considered in the same way as limit through a publication  
24 ban or a sealing order because effectively when you're  
25 placing a limit on access to the website, that's a limit on

1 the ability of the public to access this hearing. The  
2 website is made available, transcripts are made available,  
3 web casts are made available so that members of the public,  
4 if they choose, can follow along in the hearings either  
5 live or through review of transcripts.

6 So in effect when you discuss limits on the  
7 website, either not putting documents on the website,  
8 blacking out documents that appear on the website, blacking  
9 out transcripts, those are all limits on the ability of the  
10 public to access these proceedings. Those are, in other  
11 words, a limit on the presumption of openness and as I'll  
12 submit later, any limits, be it a redaction of a  
13 transcript, not including an exhibit on the website, any  
14 such limit has to be justified in accordance with the  
15 *Dagenais/Mentuck* test.

16 Perhaps we can pause there also. There is a  
17 provision under the rules which allows you, Mr.  
18 Commissioner, to designate a document as confidential and  
19 as I understand it, once so designated, members of the  
20 public cannot access that document ---

21 **THE COMMISSIONER:** Without my prior  
22 approval.

23 **MR. WONG:** Without your prior approval.

24 I would submit that that designation is in  
25 effect the same as a sealing order that you would see in a

1 court proceeding. We call it a confidentiality designation  
2 but in a court proceeding it would be called a sealing  
3 order and, as you know, if such an order were sought it  
4 would have to be justified through evidence and through  
5 satisfying of the *Dagenais/Mentuck* test.

6 So it's very much a right of the public and  
7 not on the media.

8 The second point I'd like to make on the  
9 presumption of openness is how we balance on the one hand  
10 the right of the public to have access to information about  
11 these proceedings versus the equally important right of  
12 protecting victims and the privacy of victims, and as you  
13 see in paragraph 2 of my submissions, what the Supreme  
14 Court of Canada made clear in *Dagenais* is that there is no  
15 hierarchy of rights as between fair trial interests and  
16 openness and I would submit the same applies in this case.  
17 There is no hierarchy of rights between openness and the  
18 protection of the privacy of victims.

19 Both, I submit, are Charter rights and under  
20 the Charter all rights are given equal protection and equal  
21 value. That point is made clear in *Dagenais* because Chief  
22 Justice Lamer noted that prior to the *Dagenais* decision, it  
23 was a situation where fair trial interests were  
24 consistently given priority over openness or freedom of  
25 expression; that merely a defence counsel standing up and

1 saying, "Well, I believe that we need a publication ban to  
2 protect my client's right to a fair trial", that results in  
3 a publication ban.

4 What Justice Lamer made clear in *Dagenais* is  
5 that that's not an approach that can continue in the  
6 Charter era because there is in fact equal -- equally  
7 respected Charter rights have to be balanced. So the  
8 response is that as between openness and protection of the  
9 victims of sexual assault, both rights deserve equal  
10 protection and both rights have to be balanced equally.  
11 There is no priority or paramouncy given, I submit, and as  
12 is clear from *Dagenais* to the protection of the identity of  
13 victims -- sorry, the protection of the privacy of victims.

14 **THE COMMISSIONER:** Well, can I just stop you  
15 there?

16 **MR. WONG:** Yes.

17 **THE COMMISSIONER:** Parliament has recognized  
18 in the Criminal Code under -- and I use the old section  
19 46(3) or whatever.

20 **MR. WONG:** Yes.

21 **THE COMMISSIONER:** That in certain  
22 circumstances, victims of sexual abuse are routinely  
23 protected. So that is an infringement then.

24 **MR. WONG:** Yes, absolutely. That is one  
25 example of how sexual assault cases are not exactly on par

1 in all cases.

2 **THE COMMISSIONER:** And you are going to come  
3 to that, right?

4 **MR. WONG:** Yes. However, if I touch on that  
5 case ---

6 **THE COMMISSIONER:** Yes.

7 **MR. WONG:** Parliament has protected the  
8 identity of victims but it hasn't legislated that the  
9 trials, sexual assault trials, occur in camera. It hasn't  
10 legislated that exhibits filed in sexual assault trials are  
11 sealed or that there's a heightened justification for  
12 sealing it. They are public trials; exhibits are  
13 presumptively public. It could have arguably done that.  
14 There is a publication ban identity. Also we hold sexual  
15 assault trials in camera. It chose not to do so. But  
16 that's correct and that is one example. It's a very  
17 limited incursion into presumption of openness.

18 **THE COMMISSIONER:** Okay. And I guess I  
19 understand your principles but how does that apply to what  
20 we are doing -- the issue that I have to decide here today  
21 about a procedure to use?

22 **MR. WONG:** Yes. Well, I submit that the  
23 procedure has to start with the presumption that everything  
24 is open, everything is public and ---

25 **THE COMMISSIONER:** Agreed.

1                   **MR. WONG:** --- then my friends have to  
2                   justify any limits on that presumption in accordance with  
3                   *Dagenais/Mentuck* and let me now jump into *Dagenais/Mentuck*.

4                   **THE COMMISSIONER:** Sure.

5                   **MR. WONG:** The test, I submit, is the  
6                   governing test on the exercise of discretion in limiting  
7                   public access to court proceedings and to this Inquiry.

8                   One of my friends, I believe, has submitted  
9                   that there might be a different standard that applies to  
10                  this Public Inquiry and you will see at paragraph 6 of my  
11                  submissions, and I won't go there but there is some attempt  
12                  made by the Attorney General in the *Toronto Star* case to  
13                  argue that, you know, if we are trying just to seal an  
14                  information to obtain a search warrant, this is something  
15                  that takes place at the investigative stage. Surely there  
16                  has to be a less stringent test for sealing. This is only  
17                  an investigation. No charges have been laid. A lot of  
18                  people are referred to in an information to obtain a search  
19                  warrant who are completely innocent. Let's apply a less  
20                  stringent test. And as you will see in paragraph 6, the  
21                  Supreme Court of Canada upholding what Justice Doherty held  
22                  stated clearly that, "No, *Dagenais/Mentuck* governs that you  
23                  exercise a discretion in limiting the presumption of  
24                  openness."

25                  It doesn't matter if this is the

1       investigative stage or it's an information to obtain a  
2       search warrant. The test applies and it refers to an  
3       unbroken line of cases over the past two decades.

4               So what does the *Dagenais/Mentuck* test  
5       state, and my friends have referred to parts of it, but  
6       I've actually set out the precise test for the Commission  
7       at paragraph 9 of my written submissions. It is a two-  
8       prong test and I submit it's a very stringent test for  
9       limiting the presumption of openness.

10              The first requirement, of course, is a proof  
11       that a publication ban, a sealing order, an in camera  
12       order, all three are limited in the presumption of  
13       openness. I guess they go in levels of severity from, I  
14       submit, the least of there being a publication ban to a  
15       sealing order, to an in camera order, where effectively the  
16       public is excluded from the hearing.

17              The first part of the test is a requirement  
18       that the parties seeking the limit prove that it is  
19       necessary to prevent a serious risk to the proper  
20       administration of justice because reasonably alternative  
21       measures will not prevent the risk. That test has to be  
22       satisfied first. If and only if you get beyond this first  
23       test, you get to the second part, which is proof that the  
24       salutary effects of a publication ban, the benefits of a  
25       publication ban outweigh the deleterious effects on the

1 rights and interests of the parties and the public,  
2 including the effect on the right of free expression, the  
3 right of the accused to a fair trial and the efficacy to  
4 the administration of justice.

5 Stopping at the second test, I think it is  
6 important to note how the Supreme Court of Canada set this  
7 out. You can imagine the scenario where not granting a  
8 publication ban could have a deleterious effect, a harmful  
9 effect on the innocent, but where a publication ban is  
10 still denied. That would occur of course where the harm is  
11 outweighed by the harm that arises by imposing a  
12 publication ban. I would submit that this is the very  
13 case. This is a Public Inquiry designed to look into how  
14 public officials responded to serious allegations of abuse  
15 by the most vulnerable members of society. I would submit  
16 that this is a case where the imposition of a limit on  
17 openness, be it through a publication ban, a sealing order  
18 or an in camera order, could have a very serious effect on  
19 public faith and confidence in this process and in decision  
20 reached.

21 On the flipside, what are the salutary  
22 effects or the benefits of sealing an entire record, for  
23 example -- if the goal, for example, is protect the victim,  
24 the identity of the victim, what is the benefit of denying  
25 access to the entire record?

1                   But let me go back to the first part of the  
2                   test and look at the requirement that there has to be proof  
3                   that a limit on openness is necessary. If you go on to  
4                   paragraph 10 of my submissions, it is clear that the proof  
5                   of necessity requires more than a bold assertion or an  
6                   assertion through counsel that a publication ban is  
7                   necessary. What the Supreme Court of Canada stated in  
8                   *Mentuck* is that the applicant must lead specific evidence  
9                   of the risk to the proper administration of justice. And  
10                  as you'll see down the quote, the Court states that the  
11                  risk has to be:

12                                   "...a risk, the reality of which is well  
13                                   grounded in the evidence."

14                  And that you, as the Commissioner, must have  
15                  a convincing evidentiary basis for issuing a ban.

16                  This I suppose goes back to the submission  
17                  that one of my friends or I guess my friends made about  
18                  imposing publication bans on all the victims and not only  
19                  those who have specifically requested a publication ban.

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

21                                   **MR. WONG:** And I submit that while that may  
22                  appear at first instance to be an attractive option, the  
23                  concern though is that we don't know what these victims'  
24                  position would be. What my friend at the Standard pointed  
25                  out of course is that some victims have come forward and

1        have very publicly discussed their abuse and have done so  
2        willingly and voluntarily. Now, presumably, those persons  
3        would not come forward and ask for a publication ban. They  
4        are victims obviously, but I would submit that in their  
5        case it would make no sense whatsoever to impose  
6        publication ban.

7                    The same could apply to others. I'm not  
8        saying that there are other people who are referred to in  
9        the documents who have no interest whatsoever in imposing  
10       or in seeking a publication ban, but the problem is we  
11       don't know. And if the presumption is openness, which it  
12       is and I believe no one disputes, then we don't know means  
13       that there isn't an evidentiary basis, a convincing  
14       evidentiary basis before you to justify a sealing or a  
15       denial of access to that information.

16                   Now, from a practical standpoint, I guess  
17       the concern is well, how do we know? There are people  
18       referred to in the documents, some of them, that no one in  
19       this room may know anything about. How do we make sure  
20       that their interests are protected? How do we even make  
21       sure that they know that this proceeding is taking place?

22                   And perhaps that is a case where we do have  
23       to attempt to balance the competing interest. So if Ms.  
24       Saunders, for example, reviews the documents, has access to  
25       the documents and says, "I've looked at it. I believe I

1 would like to do a story on Mr. X, who is referred to in  
2 the documents", brings that to the attention of this  
3 Commission and then at that point, I submit, that you can  
4 make a decision as to whether we give notice to the person  
5 and give them the opportunity to come forward and make  
6 submissions, if that's practical. And they may very well  
7 say, "Oh, that, that's fine. I don't care. In fact, I  
8 want you to tell my story because I believe that will help  
9 other victims."

10 That, I submit, represents a better balance  
11 between openness and the protection of victims, as opposed  
12 to simply assuming without evidence that because they are a  
13 victim, that we should impose a publication ban. I submit  
14 that the proposal I put forward is more consistent with the  
15 first part of the *Dagenais*, proof through a convincing  
16 evidentiary basis that a publication ban is required.

17 But I go on to the second part of  
18 *Dagenais/Mentuck* which is the requirement that my friends  
19 prove that reasonable alternative measures will not prevent  
20 the risk. So it is not enough to say well, we need a  
21 publication ban. My friends also have to demonstrate that  
22 a publication ban is the only means to protect the victims.  
23 Here is where the courts have said that this is --  
24 essentially this is the minimal impairment part of *Oakes*.  
25 You recall that when legislation is challenged, one of the

1 factors they look at is does the legislation limit the  
2 right and issue as little as possible?

3 That is the objective of this part of  
4 *Dagenais/Mentuck*. If you are going to impose a limit on  
5 openness, that limit has to be narrowly tailored. It has  
6 to be as little limit as possible to achieve the objective  
7 and I respectfully submit that Mr. Rose's proposals don't  
8 meet that objective.

9 He states for example that counsel should go  
10 in camera to review the documents and then identify the  
11 names of victims who appear in the documents and then agree  
12 in camera that their names should be replaced by moniker, a  
13 "C" identification. And I submit that that is not a  
14 procedure that ought to take place in camera. It is  
15 routine that, for example, in freedom of information cases,  
16 which we argue at divisional court where you have  
17 information in possession of government which parties  
18 dispute or the government disputes producing, people refer  
19 to the information issue by saying, "Please look at page 5,  
20 there is a name which appears at line 6 of paragraph 6.  
21 That's a victim. Let's replace it with C-1. Going on,  
22 page 8, line 5 contains another name of a victim. That  
23 victim wants protection. Let's impose a publication ban."

24 **THE COMMISSIONER:** But the lawyer has to go  
25 further and say, "This is the name of the person and this

1 is why we feel that there should be a publication ban."

2 So how can you say the why in open court?

3 **MR. WONG:** You say why by -- I mean  
4 obviously you can't provide the description as inasmuch  
5 detail as you would if it was a fully open proceeding, but  
6 you could make that submission without, I submit,  
7 disclosing identifying information. For example, if you  
8 have confidential informants in Justice Trafford case, I  
9 believe that was -- such discussion of confidential  
10 informants who appeared in information to obtain, I mean,  
11 you -- just because a confidential informant is listed in  
12 the information to obtain doesn't mean you seal the entire  
13 information.

14 **THE COMMISSIONER:** No.

15 **MR. WONG:** You black out that portion that  
16 names the CI or any information that would tend name the  
17 CI.

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

19 **MR. WONG:** I submit that counsel could do  
20 the same in terms of explaining why a publication ban is  
21 necessary to protect the name of the victim. You don't  
22 need to say, "Well that's name of the victim who lives in  
23 123 Elm Street and who went to school during this period of  
24 time and met up with this person."  
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I submit that's not the level of detail that would be required and again, in order to balance the presumption of openness with the protection of victims, what I propose -- I submit, is an alternative. It's not a perfect alternative and you can never, of course, have a perfect system when you're trying to balance competing interests.

**THE COMMISSIONER:** So what is your suggestion?

**MR. WONG:** I mean, this suggestion is only directed at the suggestion that the initial identification of victims occur in camera.

**THE COMMISSIONER:** M'hm.

**MR. WONG:** That isn't the least stringent limit on openness available. The alternative, which is readily available, is for counsel to simply refer to the persons who they want protected by page number, by line number, paragraph number and then to make submissions as to why protection is necessary through use of non-identifying information.

I suppose the issue of minimal impairment applies with equal force when we talk about the confidential making -- the making of documents confidential. I submit that that is not the means that

1 violates openness as little as possible.

2 If in fact, there are names of sexual  
3 assault victims disclosed in records, the means of  
4 protecting them that limits openness as little as possible,  
5 is not denying access to the records. It is blacking out  
6 specifically their name or information tending to identify  
7 the name. For that reason, there ought to be full access  
8 to the records in issue, with redacting.

9 If I could even take a step back; in a court  
10 proceeding for example, there may be a publication ban on  
11 the name of a victim but the victim, of course, quite often  
12 testifies in person.

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

14 **MR. WONG:** So everyone sitting in the  
15 courtroom gets to see who that victim is.

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

17 **MR. WONG:** Exhibits, documents that are  
18 filed, I mean, with the exception of medical reports, those  
19 records are available to journalists who want them. You go  
20 up to the counter and say, "There was a sexual assault  
21 trial that took place two months ago. I'd like to have  
22 access to those exhibits." Those exhibits are provided and  
23 quite often not redacted. It's known of course, that  
24 there's a publication ban, but it doesn't mean that, in  
25 addition, you black out the names.

1                   So I guess I should have taken a step back  
2                   and say well, why do we even start with redactions?

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

4                   **MR. WONG:** Merely because there's a  
5                   publication ban on information does not mean that every  
6                   record or document filed in a court proceeding is redacted  
7                   to black out the information that's subject to a  
8                   publication ban. That would effectively make a publication  
9                   ban a sealing order, I submit. It's just not how it's  
10                  done. You have court proceedings and you have publication  
11                  bans, but that doesn't mean it's in camera and it certainly  
12                  doesn't mean the documents that reflect that information is  
13                  sealed.

14                  I guess that takes me to the submissions  
15                  about the website and access to the website. It raises  
16                  concern, as I said at the outset, because the website is a  
17                  vehicle, I submit through which the public accesses this  
18                  hearing.

19                  I'm looking at the body of the hearing room  
20                  today and there aren't that many members of the public  
21                  here, but what ---

22                  **THE COMMISSIONER:** They didn't know you were  
23                  coming.

24                  **MR. WONG:** But what they do have available  
25                  to them is an excellent website, with an abundance of

1 information, which they can come to on a daily basis, if  
2 they choose, to fully learn about what's happening at this  
3 Public Inquiry. And I keep saying it's a public inquiry,  
4 but we can't lose sight of that.

5 I submit that the website is nothing more  
6 than an extension of this hearing room. It's a web cast.  
7 It's a transcript of what is said. No one would suggest  
8 that members of the public, for example, ought not to be  
9 outside of in camera hearings; ought not to be allowed to  
10 hear certain information because it may be subject to a  
11 publication ban. That's not the same as an in camera  
12 hearing order. They are two different orders. The mere  
13 fact that it's a publication ban doesn't mean you clear  
14 this courtroom.

15 I submit, the effect of redacting  
16 transcripts, of turning off the web cast when you get to  
17 publication ban information is, in effect, to change a  
18 publication ban order to an in camera order.

19 **THE COMMISSIONER:** We're not doing that,  
20 though.

21 **MR. WONG:** Well, except I guess, if we start  
22 redacting transcripts.

23 **THE COMMISSIONER:** Redacting ---

24 **MR. WONG:** Or editing transcripts.

25 **THE COMMISSIONER:** No.

1                   **MR. WONG:** So that's not -- there's no  
2 attempt to black out information in transcripts to the  
3 extent that they reflect publication banned information?

4                   **THE COMMISSIONER:** No.

5                   **MR. WONG:** All right.

6                   **THE COMMISSIONER:** Am I correct in that,  
7 gentlemen, ladies? I don't think we've said anything like  
8 that.

9                   **MR. WONG:** Okay.

10                  **Me DUMAIS:** Sorry, Commissioner.

11                   I think what Mr. Rose was proposing is that  
12 we go in camera to make the determination and if you,  
13 Commissioner, decide that you accept his argument that a  
14 moniker or non-identifying initials are used, which would  
15 then mean that when we go back in the public domain that  
16 that individual victim is referred to ---

17                  **THE COMMISSIONER:** Right.

18                  **Me DUMAIS:** --- by those initials.

19                  **THE COMMISSIONER:** But we're not amending  
20 the transcript. It's going to be Mr. C-2 all along.

21                  **Me DUMAIS:** Correct.

22                  **THE COMMISSIONER:** I think Mr. Wong was  
23 talking about redacting transcripts, and I had no intention  
24 of redacting transcripts except to remedy, like we did last  
25 week, when the name slipped. I asked -- I instructed the

1 transcript to erase that and put in the moniker.

2 **MR. WONG:** But again, I guess that raises  
3 the question about -- yes, on the one hand if we publish a  
4 story. We do a story on a victim, that victim has to be  
5 referred to as C-1 or C-2.

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

7 **MR. WONG:** But if you're dealing with a  
8 sexual assault case involving Jane Doe, for example, in a  
9 courtroom, I submit that what happens in a courtroom is,  
10 they say, "Ms. Doe, what happened on an evening?"

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

12 **MR. WONG:** "And Ms. Doe, that happened,  
13 didn't it? Ms. Doe, that person hit you, didn't he?" Even  
14 though Ms. Doe's identity may be fully protected by a  
15 publication ban, you don't refer to Ms. Doe as C-1 or C-2.

16 **THE COMMISSIONER:** No. But the problem is  
17 and what was nice about the suggestion is that, what we  
18 have, is we have not only the web cast, but Cogeco airing  
19 this live. And so as a compromise to, if we keep using the  
20 name, right, then we pretty well have to turn off the TV  
21 with Cogeco. So one of the compromises is that we use Mr.  
22 C, but we stay live throughout the whole thing. Isn't that  
23 a kind of a compromise -- a thing that we should encourage?

24 **MR. WONG:** I guess it really goes back to  
25 the question of whether that is a broadcast. Because

1 obviously if we look at the Cogeco coverage, like the web  
2 cast coverage is simply enlarging the courtroom.

3 **THE COMMISSIONER:** Right. But aren't we --  
4 when Cogeco is a cable television. Right? So it's  
5 available to anybody who is flicking -- wouldn't that be?  
6 Let me put it to you, an even more difficult situation.

7 **MR. WONG:** Yes.

8 **THE COMMISSIONER:** We have a ban on  
9 publication from preliminary inquiry. So we have the  
10 transcript here. So I, theoretically, should be precluded  
11 from publishing it or broadcasting it in any way. So by  
12 going to Cogeco, am I not broadcasting it? Do I not have  
13 an obligation to obey that ban on publication?

14 **MR. WONG:** I'm not -- my understanding is  
15 that publication bans at preliminary hearings expire the  
16 earlier of the discharge of the accused ---

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

18 **MR. WONG:** --- or, is it conviction? So I'm  
19 not sure whether the ban still continues.

20 **THE COMMISSIONER:** Well, we're of the view  
21 that it does. I'm told.

22 **MR. WONG:** Sorry, I don't ---

23 **THE COMMISSIONER:** You're right. You're  
24 right on one point. I guess we'd have to ---

25 **MR. WONG:** I mean, certainly in the cases

1 I've acted for, on criminal matters, it's been my  
2 understanding that yes, there's a publication ban, but it's  
3 a time-limited one.

4 **THE COMMISSIONER:** Until such time as the  
5 accused is discharged ---

6 **MR. WONG:** Or ---

7 **THE COMMISSIONER:** No. No. No. That's --  
8 you're right. I'm sorry. There's two bans of publication.  
9 Thank you. There's one ban on the preliminary inquiry ---

10 **MR. WONG:** Yes.

11 **THE COMMISSIONER:** --- until such time as  
12 the accused is discharged or the trial is completed.

13 **MR. WONG:** That's correct.

14 **THE COMMISSIONER:** Right. What I am talking  
15 about is 46(3), which is there to protect victims of sexual  
16 assault, and that is continuing regardless of whether or  
17 not the preliminary inquiry is completed or not.

18 **MR. WONG:** Yes, I mean -- that's right. If  
19 there was in fact a ban made, to protect the identity of a  
20 specific victim ---

21 **THE COMMISSIONER:** That's what we're talking  
22 about. So we have preliminary inquiry transcript and it  
23 says, there's a ban on publication.

24 **MR. WONG:** Right.

25 **THE COMMISSIONER:** All right. So we are

1 limited -- and that's how this whole thing began, is we're  
2 limited because that is still in existence.

3 **MR. WONG:** Right. I mean, we're limited in  
4 publishing it. The ban under the Criminal Code, there's a  
5 ban on publication. We're not limited in this hearing room  
6 today, in stating the name of the victim. So the question  
7 really is, whether the effect of a web cast to expand the  
8 hearing room or a cable transmission, which expands the  
9 hearing room is a publication ---

10 **THE COMMISSIONER:** Or a broadcast.

11 **MR. WONG:** Or a broadcast.

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

13 **MR. WONG:** It's a novel issue. I would  
14 submit, it's a novel issue.

15 **THE COMMISSIONER:** No kidding. That's why  
16 we're here.

17 **(LAUGHTER/RIRES)**

18 **MR. WONG:** I would submit that if it's not a  
19 broadcast, you'd have to make that preliminary  
20 determination, but if it's not a broadcast and it's not a  
21 publication, then that publication ban would not apply.

22 And I don't have all my notes on what a  
23 broadcast is -- I'm not sure about a web cast. Maybe the  
24 Cogeco dissemination is probably closer to what you would  
25 view as a traditional broadcast.

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

2                   **MR. WONG:** But I can't be of further  
3 assistance.

4                   **THE COMMISSIONER:** So then though, the issue  
5 becomes, if it's a decision of using monikers or C1's or  
6 whatever and unplugging Cogeco and maybe unplugging the web  
7 cast, therefore reducing our opportunities to let the  
8 public hear, what about, as a compromise, that we put in  
9 monikers, and we let the greater numbers of the public  
10 available to see this thing.

11                   **MR. WONG:** Yes. Absolutely, I would say  
12 that the more public access, the better. I suppose on that  
13 point, that is a consideration that I didn't specifically  
14 factor in. But assuming that it is a broadcast and that we  
15 can't disclose the names of victims who are protected by  
16 section 486(3) publication ban, but that that's a concern,  
17 and the use of a moniker would overcome that.

18                   But I guess, I go back to my original point,  
19 why do we have to go in camera to make that initial  
20 determination as to who the victims are and whether they  
21 need to be protected by a moniker. You can do it, as I  
22 said, by pointing to the page, pointing to the paragraph.  
23 And that way, you avoid going in camera.

24                   I submit that when you're dealing with a  
25 public inquiry that's directed at examining the conduct of

1 public officials, that anytime you go in camera; any time  
2 you exclude the government -- the public, you raise the  
3 possibility or you raise the risk of undermining the  
4 legitimacy of the proceeding.

5 **THE COMMISSIONER:** Even if the press is  
6 permitted to stay in the in camera hearing?

7 **MR. WONG:** I would submit, yes. The reason  
8 why we have openness is because it allows each member of  
9 the public, if they choose to, to come in and know for  
10 themselves, that what is happening in the court proceedings  
11 is fully consistent with what they understand these  
12 proceedings to be, and I would submit that's why we have  
13 web cast.

14 I mean, I submit the presumption of openness  
15 is perhaps even greater for a public inquiry because this  
16 is really an inquiry for the public. And the public ought  
17 to be able to satisfy itself that what's happening on a  
18 daily basis at this hearing is consistent with their belief  
19 that this is a hearing that is fully examining all issues  
20 and all parties.

21 **THE COMMISSIONER:** Right. Except I suppose  
22 I draw comfort in, as I've indicated to Mr. Wardle, that we  
23 have 17 or 15 parties -- 16 with you today ---

24 **MR. WONG:** Yes.

25 **THE COMMISSIONER:** --- all here in the in

1 camera hearing -- all right -- making sure that everything  
2 that is going on in there, is aboveboard. So for example,  
3 by having the media here and in camera, that they are  
4 another safety valve. That if they see that there's  
5 something going wrong here, that they can blow the whistle  
6 on us. So isn't that kind of a counter measure, in the  
7 sense of being able to say -- I agree with you that the in  
8 camera hearings will be few and far -- well, not few and  
9 far between, but as few as possible. And in the few that  
10 we will have, we have 15 different parties here, with all  
11 different interests. All right? And the media.

12 So if anything goes wrong, well, then the  
13 public will know about it. Because the media will say --  
14 publish an article saying "I was in there and what happened  
15 in there was wrong. I can't talk about it but I'm telling  
16 you this has got to change."

17 **MR. WONG:** Right, the media is here but the  
18 media can't do a story on what transpires in the in camera  
19 hearing without putting itself at risk of contempt.

20 **THE COMMISSIONER:** No, they could say that  
21 without blowing the story, you know. There is a remedy.  
22 They can go to court, they can appeal my order, they can  
23 publish the fact that there are too many in camera  
24 hearings, whatever, but they're there listening and are  
25 part of the whole thing. They know the names of the

1 people, they know and if they can come up with an  
2 articulable cause, well then, they can appeal.

3 **MR. WONG:** Right, except that that then  
4 really puts the situation where the media who's a surrogate  
5 to the public ---

6 **THE COMMISSIONER:** Well, you know, you keep  
7 saying that the media is a surrogate of the public. I  
8 mean, Commission counsel and I have a responsibility to the  
9 public as well. So you are not the only watchdog to the  
10 public here.

11 **MR. WONG:** Well, I say the surrogate of the  
12 public in that -- what Justice LaForest noted in *CBC v. New*  
13 *Brunswick* is that they're the surrogate of the public in  
14 that they provide an account, an unedited account of what  
15 happens in a courtroom and also in that they have no direct  
16 interest or no direct role in the proceedings. They are an  
17 observer, they report on what happens in the courtroom and  
18 the public is then allowed to draw their own conclusions as  
19 to the day's events. That's a unique role and a role that  
20 no other individual present here today is expected to  
21 fulfill and to carry out, and that by limiting -- by simply  
22 allowing the media to be in the courtroom or the hearing  
23 room but subjecting them to a publication ban, doesn't, I  
24 submit, allow them to carry out that role and that  
25 function.

1                   I have already dealt with the second part of  
2           *Dagenais/Mentuck* that the salutary effects, the benefits of  
3           any ban must outweigh the negative effects that result from  
4           limiting openness, and I submit that this is important to  
5           look at in this case. This is a public inquiry. We are  
6           looking into how public officials responded to a very  
7           serious allegation of abuse and this is a situation where  
8           public faith and confidence, not only in the ultimate  
9           findings of this Commission but also in the process used to  
10          reach those findings, is essential. And secrecy, any  
11          secrecy can only undermine, I submit, public faith and  
12          confidence. And Justice Fish noted in the *Toronto Star*  
13          case, which is one of the cases I have provided to you,  
14          that:

15                                    "In any constitutional climate, the  
16                                    administration of justice thrives on  
17                                    exposure to light - and withers under a  
18                                    cloud of secrecy."

19                   And Justice -- Lord Howding also noted that  
20           what is done in secret is forever suspect. And I submit  
21           that, in this context, where we're dealing with the public  
22           inquiry into the conduct or alleged conduct of public  
23           officials, there would be significant deleterious effects  
24           to any limit on openness.

25                   Balance that against the benefits of a

1 sealing order, for example, or a publication ban order, I  
2 would submit that if there is any limit that can be  
3 justified in this case, the only limit is one that protects  
4 the identity of the names of victims of sexual assault to  
5 the extent that those names are not already public.

6 That objective, I submit, can be reached  
7 through the imposition of a publication ban on the names of  
8 victims and the information tending to identify them.  
9 There is no need, I submit, to seal or designate documents  
10 as confidential. There is no need to exclude the public  
11 from a portion of the hearing where a decision may be made  
12 as to whether to protect their identity or not. That is  
13 the extent, I submit, that openness ought to be limited in  
14 this case; a very limited publication ban on the names of  
15 victims other than those who have already been identified  
16 publicly.

17 And I guess, just two brief words on why you  
18 don't protect those who have already been identified, who  
19 have come forward.

20 I guess the first response of that is, well,  
21 if they have already come forward and self-identified,  
22 either talked to the Standard or talked to the Canadian  
23 Broadcasting Corporation, I submit that, in those cases,  
24 you would be undermining or hurting their interest by  
25 denying their ability to continue coming forward and

1 telling their story.

2 I am reminded of the Mount Cashel case out  
3 in the Maritimes where there were allegations of sexual  
4 abuse by a number of young boys and a number of those boys  
5 testified in open court and then came on to the CBC  
6 thereafter to give interviews as to their experience.

7 Secondly, you don't impose a publication ban  
8 on those who are already public because any such ban, I  
9 submit, has limited efficacy. To the extent that these  
10 people have identified themselves in newspapers, in  
11 broadcast, anyone wanting to find out about them, I submit,  
12 can easily retrieve those newspapers, seek out those  
13 broadcasts. If they've commenced civil proceedings, look  
14 at those court files. A publication ban in this  
15 circumstance would have limited efficacy in protecting the  
16 confidentiality of any of the victims because that  
17 information is already in the public domain.

18 **THE COMMISSIONER:** So let's assume for a  
19 minute though that somebody comes forward and says, "Yes, I  
20 went public last year or two years ago, but I got this  
21 letter from my doctor, my psychiatrist, in saying that I am  
22 very fragile right now and if I don't get a publication ban  
23 on my name, I might do something drastic." Would that  
24 change your opinion a little bit?

25 **MR. WONG:** I submit that we go back to how

1 we started. It's a discretion on your part under Section 4  
2 to decide whether to limit openness or not. And I submit  
3 that that's why blanket orders are so ineffective; you  
4 can't make a blanket order apply to every circumstance.  
5 You have to look at that specific case and decide whether  
6 the evidence is sufficient.

7 Let me conclude then on one case which deals  
8 specifically on openness in the context of sexual assault  
9 cases. It's the case of *S.(P.) v. C.(D.)*. It's the last  
10 case in my package of materials and that was a case which  
11 is part of *Dagenais*. It was a decision of Justice Smith of  
12 the High Court of Justice.

13 It involved a civil case brought by the  
14 victim of a sexual assault against his attacker who had  
15 been found guilty. Other named defendants were the Bishop  
16 and Roman Catholic Episcopal Corporation of Ottawa. This  
17 victim obtained an order *ex parte* to have all documents in  
18 the court file sealed.

19 A newspaper, the Ottawa Citizen, applied to  
20 set aside the sealing order on the basis that it infringed  
21 the presumption of openness and freedom of expression. The  
22 application was brought before Justice Smith and the order  
23 of Justice Smith is set out at page 231 of the decision.  
24 But what Justice Smith was saying, even back in 1987, prior  
25 to *Dagenais*, is that this provision of the *Courts of*

1       *Justice Act* which allows the sealing of documents, Section  
2       147(2), Justice Smith said that:

3                       " Suffice it to say that it ought to be  
4                       resorted to sparingly in the clearest  
5                       of cases and on the clearest of  
6                       material where, as one instance, the  
7                       interest of justice would be subverted  
8                       and/or totally innocent would unduly  
9                       suffer without any significant  
10                      compensating public interest being  
11                      served. The material before me is  
12                      insufficient to support an exception  
13                      being made to the rule of public access  
14                      embodied in section 147(2)."

15                     So first of all, you see there echoes of the  
16       *Dagenais/Mentuck* test. So in answer to your question, if a  
17       victim came forward and said, "Here's a letter from my  
18       psychiatrist, he says that I would be seriously harmed", I  
19       submit that may provide you with the adequate evidentiary  
20       basis to decide that this victim ought to be protected.  
21       But as Justice Smith noted, you can't do it based on a  
22       record that doesn't disclose the harm that would arise if a  
23       publication ban is not issued.

24                     And this case really also demonstrates that  
25       there are no special rules. The presumption of openness in

1 all respects applies equally to sexual assault case. No  
2 different rules apply. And if there is to be any limit on  
3 openness, be it in designating a document as confidential,  
4 having a part of this hearing held in camera or imposing a  
5 publication ban, the same test applies, *Dagenais/Mentuck*  
6 has to apply, and unless that certain test is met on a  
7 clear evidentiary basis, there ought to be no limit on  
8 openness.

9 **THE COMMISSIONER:** Thank you.

10 **MR. WONG:** Thank you.

11 **THE COMMISSIONER:** I'll give this matter  
12 some thought and I will advise parties as to when my  
13 decision will be available. You have left us a card or a  
14 number?

15 **MR. WONG:** Yes, I have.

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

17 **MR. WONG:** Thank you.

18 **Me DUMAIS:** Commissioner, I had advised my  
19 friends that they would have a right of rebuttal. So I  
20 don't know if it should be canvassed by the parties whether  
21 or not anyone wishes to ---

22 **THE COMMISSIONER:** Yes, let's do that.

23 Mr. Wardle, any comments?

24 **MR. WARDLE:** I have no comments, Mr.

25 Commissioner.

1                   **THE COMMISSIONER:** Thank you.

2                   Mr. Lee?

3                   **--- REBUTTAL BY/RÉFUTATION PAR MR. LEE:**

4                   **MR. LEE:** The only comment I really have to  
5                   make is that I think there is some confusion. Mr. Rose's  
6                   proposal doesn't call for making these exhibits "C" as in  
7                   Confidential. It calls for an order being applied to "P"  
8                   exhibits that would limit certain information, being the  
9                   names. As far as I am concerned, it's a completely  
10                  different ball of wax. These aren't "C" exhibits and ---

11                  **THE COMMISSIONER:** Well, they are. They are  
12                  now.

13                  **MR. LEE:** They are now but they won't be  
14                  according to Mr. Rose's proposal.

15                  **THE COMMISSIONER:** Right. And I have ruled  
16                  that they were "C" exhibits until we got to the bottom of  
17                  this issue and, of course, unless I hear something very  
18                  drastic, those will not be "C" exhibits for very long.

19                  **MR. LEE:** Right. And at the very least, my  
20                  understanding of the proposals is from here on out they  
21                  wouldn't be made "C" exhibits.

22                  **THE COMMISSIONER:** Exactly.

23                  **MR. LEE:** Thanks.

24                  **THE COMMISSIONER:** All right.

25                  Mr. Cipriano?

1                   **MR. CIPRIANO:** I have no comments.

2                   **THE COMMISSIONER:** Thank you.

3                   Mr. Chisholm?

4                   **MR. CHISHOLM:** No, sir, thank you.

5                   **THE COMMISSIONER:** Thank you.

6                   Mr. Rose?

7                   **--- REBUTTAL BY/RÉFUTATION PAR MR. ROSE:**

8                   **MR. ROSE:** I do want to reply to a couple of  
9 things that Mr. Wong said on behalf of the CBC. The first  
10 is this. With respect to the media's role in reporting and  
11 the openness that we've heard so much about this afternoon,  
12 it's my respectful submission that it's a little different  
13 here because the media has a certain role which is  
14 established under *Dagenais* and the jurisprudence when we're  
15 dealing with a court proceeding, be it a preliminary  
16 hearing or a jury trial where there are no cameras. This  
17 is unique, Mr. Commissioner, because as also we pointed  
18 out, everything is being broadcast worldwide on the web.

19                   So in terms of the media's responsibility to  
20 report on, on behalf of the public, in my respectful  
21 submission, it's open for you, Mr. Commissioner, to find  
22 that it's a little different here because of this openness  
23 which permeates every moment of the public nature of this  
24 Inquiry. That's the first thing.

25                   The second thing is that the mandate by

1       which you are executing your role as Commissioner to  
2       inquire into these issues and not name names because that  
3       is not central to your mandate is what the public, the  
4       people of Ontario, have asked you to do. And so in terms  
5       of the Order in Council and Section 6 which asks you to  
6       balance out these various interests, that is what the  
7       people of Ontario have asked you to do. And so that's  
8       another thing that I think, Mr. Commissioner, you should  
9       consider in assessing any claim by the media to represent  
10      the public because the public had told you very  
11      specifically what to do. The rules of procedure of this  
12      Inquiry also tell you what to do as an expression of the  
13      public will. In that sense, I am going to respectfully  
14      suggest that Mr. Wong has missed that aspect of this  
15      Inquiry which might normally apply to a criminal trial.

16                   Those are my submissions.

17                   **THE COMMISSIONER:** Thank you.

18                   Ms. Makepeace, any comments?

19                   **MS MAKEPEACE:** Nothing, thank you, sir.

20                   **THE COMMISSIONER:** Thank you.

21                   Mr. Callaghan?

22      --- **REBUTTAL BY/RÉFUTATION PAR MR. CALLAGHAN:**

23                   **MR. CALLAGHAN:** I just would like to echo  
24      Mr. Rose's last point. He pointed out that not all public  
25      inquiries involve hearings. There are public inquiries in

1           this province that don't involve hearings and reports are  
2           issued. And I say, and I said at the time, but I reiterate  
3           that that makes it substantially different and I agree with  
4           Mr. Rose that you ought to be dictated by the legislation,  
5           and *Dagenais* while helpful is not the -- of what an open  
6           judicial is because this is not a judicial proceeding as  
7           we've discussed in previous attendances. Thank you.

8                           **THE COMMISSIONER:** Thank you.

9                           OPP?

10                          **MR. KOZLOFF:** Nothing further. Thank you.

11                          **THE COMMISSIONER:** Thank you.

12                          OPPA?

13                          **MR. CARROLL:** Nothing. Thank you.

14                          **THE COMMISSIONER:** Thank you.

15                          Upper Canada School Board?

16                          **MS. TYMOCHENKO:** Nothing, thank you.

17                          **THE COMMISSIONER:** Thank you.

18                          And the Catholic District School Board is  
19           not here.

20                          Is that everybody? All right.

21                          So I will advise in due course as to when I  
22           will render a decision on this part. We can continue  
23           tomorrow at 9:30 with another witness, I take it?

24                          **MR. DUMAIS:** That's correct, Commissioner.

25                          **THE COMMISSIONER:** All right.

1 Thank you. We'll see you at 9:30.

2 **THE REGISTRAR:** Order. All rise. À

3 l'ordre. Veuillez vous lever.

4 This hearing is now adjourned. L'audience  
5 est ajournée.

6 --- Upon adjourning at 4:36 p.m./

7 L'audience est ajournée à 16h36

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



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Sean Prouse, CVR-CM