THE ELLIOT LAKE COMMISSION OF INQUIRY

R E D A C T I O N A P P L I C A T I O N

HEARD BEFORE THE HONOURABLE JUSTICE P.R. BÉLANGER
On Friday, June 20, 2014, at OTTAWA, Ontario

APPEARANCES:

P. Doody	Counsel for the Elliot Lake Commission of Inquiry
H. Mackay	Counsel for the Provincial Crown
R. MacRae	Counsel for Robert Wood
P. Jacobsen	Counsel for the Canadian Broadcasting Corporation, Globe and Mail Inc. and Canadian Press Enterprises Inc.

THE ELLIOT LAKE COMMISSION OF INQUIRY
T A B L E O F C O N T E N T S

LEGEND

[*sic*] - Indicates preceding word has been reproduced verbatim and is not a transcription error.

(ph) - Indicates preceding word has been spelled phonetically.

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FRIDAY, JUNE 20, 2014

MR. COMMISSIONER: Good morning everybody. Familiar faces. Nice to see you again, hope your summer's going well. Mr. Jacobsen you are here for the media organizations. Mr. MacRae obviously for Mr. Wood. Mr. Doody for the Commission. Ms. Mackay for the Province of Ontario. And we're here this morning for a redaction application. Any preliminary comments before we start?

MR. DOODY: Just a couple of things Mr. Commissioner. As has been our practice Commission counsel will not be making submissions this morning. We have filed a factum which was intended to present, in a neutral fashion, our understanding of the appropriate authorities in order to assist you and the parties. We've had a discussion amongst counsel. Ms. Mackay, for the Province, will be making submissions on the jurisdictional point. And so we thought, subject to your views, that the appropriate order of march would be Mr. MacRae followed by Ms. Mackay followed by Mr. Jacobsen, and then, of course, appropriate reply if necessary.

MR. COMMISSIONER: Yes, thank you very much. Anything further? Thank you. Then the floor is yours, Mr. MacRae.

SUBMISSIONS BY MR. MACRAE:

MR. MACRAE: Good morning, Your Honour, Mr.

Commissioner. I imagine these surroundings are familiar to you.

MR. COMMISSIONER: My old haunts, yes.

MR. MACRAE: I'll try to be as comfortable as I can here. It was much more comfortable in Elliot Lake.

On behalf of my client, I indicate that what I would like to begin with is a backdrop against which the application of Mr. Wood should be reviewed by this Commission, I respectfully submit, to deal with the purpose and the effect of this Commission initially, and that the Commission was commenced as a fact-finding process as a result of the tragic events in Elliot Lake on June the 23rd. Witnesses were called and examined, cross-examinations were completed. The transcripts – I acknowledge transcripts of the witnesses are available still on the website. I understand the videos are no longer. They're archived, but the transcripts are certainly there. So the evidence of Mr. Wood has been published and disseminated, and certainly commented on and has been the subject of editorial comment by the media as well as straight reporting.

And as I understand the purpose of the Commission – it's hoped that the entire construction industry and governmental agencies responsible for overseeing the entire construction process will read the Commission's report. And reports from other commissioners were referenced during the hearing of this

Commission and I anticipate they may be referenced as well in the final report of this Commission.

The testimony of all the witnesses were in some form reported in the press. The exhibits were presented to the Commission and provided on the website. And as I make clear in my factum, I didn't suggest that the entire world would view the information, but it is in fact available at touch of a button. Given that the very mandate of the Commission is to make an inquiry as to what happened, what went wrong, and a review of the actions of the individuals, in fact it's been reported in many of the factums but it was to inquire into and report on events surrounding the collapse of the Algo Centre Mall.

My submission is that I believe I can clearly state that the hope of the Commission will be that the report will be widely disseminated, studied, and, where appropriate, implemented. And while the evidence provided under oath to the Commission in Elliot Lake is important, such evidence is being reviewed by the Commission at this point in time, and that evidence, as I've indicated a couple of times, has been reported on. However I submit, against the backdrop of that, that the section 17 notice provided to Mr. Wood following his testimony at the Commission of Inquiry, the Commissioner has made very clear that there may be a finding of misconduct. And it's against the backdrop of a finding by the Commissioner, after a very extensive, probing

and, I believe, successful Commission, it will be reported by the Commission as findings of fact with respect to the events and actions that led to the collapse of the Algo Centre Mall.

The very purpose of the final report is to assist in the prevention of similar tragedy. I suggest that your report will be reviewed by the public as being factual, authoritative, well-reasoned, and I emphasise particularly, supported by the evidence. And when I suggest supported by the evidence, and emphasise that point, my point is that the evidence that was provided at the Commission of Inquiry was very different than the evidence that may be available in a *Criminal Code* proceeding trial.

And that the findings pursuant to section 17 will be based upon evidence that may not be admissible in a Criminal court. And in fact the protections offered to the witnesses underscore that – the witnesses to the Commission underscore that. Again, the Commissioner's report will be reviewed as informed as a result of completing the Commission. I emphasise that point as well too, that the information the is provided in your report that deals with Mr. Wood, and specifically with the section 17 possibility finding of misconduct, will be viewed by the public as a finding – and informed finding – as a result of completing the Commission.

And most importantly, I would submit, certainly for the Commission, and with respect to its impact on Mr. Wood, is that a final

pronouncement will deal with the collapse of the Algo Centre Mall, possibly being able to determine what the Commission considers to be the cause of the collapse, which will then focus – or draw focus – draw into sharp relief, the requirement for individuals to view the actions of all individuals, including Mr. Wood, with respect to those findings of fact.

Now one of the legal challenges from the media to Mr. Wood's request for protection of his right to a fair trial, is that there is no evidence to support Mr. Wood's assertion that the findings of misconduct regarding Mr. Wood by the Commission will impact Mr. Wood's ability to be tried – a fair trial before a judge sitting with a jury. I submit that the nature of the report of the Commission – the purpose of the report of the Commission – the stated purpose, the intended purpose, and in my respectful submission, the final purpose, underscores the error of that submission.

It is expected that the report of the Commission will be viewed by the public as a finding of fact. There's been millions of dollars of taxpayers' funds utilized for the very purpose of this important inquiry. To suggest that the report of the Commission can be compared to that of the information provided by individuals in support of an information to obtain, I submit, widely misses the mark.

I submit that the public can properly determine that affidavits filed in support of

police officers or police activities will be reviewed at a later date by a judge conducting a trial dealing with the issues of which the information to obtain were part of the process. With respect to the conduct of the Commission, it is very reasonable to suggest that the public will view the report of this Commission as the final say on what happened that led to the events - the tragic events - on June the 23rd .

I repeat, the common phrase that the assumption – the assumption is that an accused person is innocent until proven otherwise, is specifically impacted by the very purpose and stated intention of the Elliot Lake Commission of Inquiry. When the inquiry was being conducted, no individual faced *Criminal Code* charges. It was not until the completion of phase one of the hearing that Mr. Wood was charged, and actually completion of phase two and three, as well too. I close those submissions suggesting that it is expected that your rulings and findings will be given a very high degree of recognition by both the government and by the public. The Commission's not simply obtaining information evidence. The section 17 notice elevates findings of fact to the possibility of findings of misconduct.

A finding of misconduct by a judicial officer with the authority of a governmental mandate to conduct such an inquiry, in my respectful submission, Mr. Commissioner, certainly elevates the findings of this Commission to such an extent

that a member of the public will very easily conclude that a decision has already been made with respect to Mr. Wood's actions once any findings about Mr. Wood's conduct is articulated by the Commissioner in his report.

Mr. Commissioner, you've also indicated that you quite properly intend to address the citizens of Elliot Lake when the report is complete. You've been very well respected by the citizens of Elliot Lake and residents in the local area. And that respect can very easily translate into deference by the public with respect to the findings of fact.

Against that backdrop I intend to make submissions with the following roadmap, if I might proffer that to you, Mr. Commissioner. I will deal with the issue of jurisdiction. Before I move on I note that both the Attorney General and the Ontario Building Officials Association support Mr. Wood's submissions that this Commission does have jurisdiction to make the order requested by Mr. Wood. I also understand very clearly that neither of these parties take a position with respect to Mr. Wood's application aside from supporting the jurisdiction procession application. I'll then deal with the issues of the order being requested in order to provide clarity respecting the request. I will then deal very briefly with the Dagenais/Mentuck test. It's been covered very well in everyone's factums. I will then review the evidentiary basis for redaction, having regard to the real

issue that evidence respecting the conduct of juries regarding publication of certain materials is not a science.

I'll then review the alternatives to redaction and I will then review the effectiveness of the recommended and requested redaction.

Dealing with the issue of jurisdiction, I don't intend to repeat what I have included in the factum and the application, but I do submit that section 14(3) of the *Public Inquiries Act* provides complete jurisdiction to this Commission to grant the order requested. As evidenced by our appearance here today, the term "hearing" does not related specifically to hearings conducted in Elliot Lake or hearings conducted in Ottawa. In my respectful submission, section 14(3) specifically provides this Commission with jurisdiction. Section 14(3) deals with measures to prevent the disclosure of information, not only at a hearing, and not only while the Commission is sitting hearing evidence, but rather, I would submit, specifically for the request that's before Commission today.

The *Public Inquiries Act* states the following at section 14(3) – it's in everyone's factum, but it bears repeating:

> A Commission may exclude the public from all or part of the hearing or take other measures to prevent the disclosure of information....

It goes onto say that is "expected to be

injurious to (a) the administration of justice;....".

That is the section that I rely upon. Ms. Mackay has been kind enough in her factum to also draw the Court's attention to section 10(4) as an additional ground for the jurisdiction of the Commissioner to grant the relief requested.

In my respectful submission a finding of misconduct would be a disclosure of information pursuant to section 14(3) that can be expected to be injurious to the administration of justice by playing a part in the fairness of trial that Mr. Wood expects to receive. As the Attorney General suggested, both the redacted and an unredacted version of the report may be delivered to the Attorney General for Ontario pursuant to the order-in-council. In my respectful submission the jurisdiction of this Commission in doing either would be required to be respected by the Attorney General and an order of this Commission that the redacted report only be released until such time as one of the conditions that is requested in the order of Mr. Wood is achieved. It may be as early as if Mr. Wood elected to be tried before a provincial court justice.

I also quite disagree with the suggestion made by counsel for the media organizations that there is not a submission on behalf of Mr. Wood with respect to the jurisdiction to grant the relief that Mr. Wood is now seeking. At paragraph 18 of the factum it deals with the concerns raises in the application filed on May

20th, highlighted that the applicant was uncertain as to the content of the final report of the Commission. This uncertainty is now addressed in procedural order number 12. Your order, Mr. Commissioner, was very clear that the Commission would not be making findings in addition to the section 17 notice in the information that was provided to Mr. Wood. In the original application, I made substantial reference to the fact that the closing submissions on behalf of Mr. Wood sought, from this Commission, a finding of credibility with respect to Mr. Wood. Clearly, a finding of credibility at this point in time, in my respectful submission, would have an impact on the right of Mr. Wood to achieve a fair trial.

I'd like to now deal with the issue of the order being requested in order to provide clarity respecting that request. In procedural order number 12, you raised a number of concerns with respect to the within [*sic*] application. And contained within procedural order number 12, were the following words:

> The applicant can safely assume that the findings I make in my report about him and his actions will not go beyond the potential findings outlined in the section 17 notice.

In procedural order number 12, Mr. Commissioner, you indicated that you were perplexed by the request from Mr. Wood with respect to the opportunity to review the

material. That was based upon the backdrop that there had been substantial submissions made with respect to an overarching requirement of the Commission to make findings with respect to credibility. With the assistance of the procedural order number 12, is was very clear that the only issue before Commission that I would have to raise with respect to redaction is that of any references that flow from the section 17 notice.

With respect to the Dagenais/Mentuck test, it's very clear - that case has been articulated many times. I don't believe that there's much I can add to it today except to say that the main thrust of the case is that a publication ban should only be ordered when, A), such a ban is necessary in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures would not prevent the risk.

I've dealt with the issue of the real and substantial risk. Findings of fact by the Commission reported as findings of fact that may support other findings of fact will impact Mr. Wood's right to fair trial – the possibility. In some of the factum material filed, there's the issue of being able to provide substantive evidence with respect to the impact. And in my respectful submission I rest my submissions on the fact that the Commission will be filing a final report. There was not a request for a publication ban during the evidentiary-taking

portion of the Commission. That wasn't required.

B) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban. I'll deal with that balance. In that the evidentiary basis for redaction, having regard to the real issue, that evidence respecting the conduct of juries regarding publication of certain materials is not a science. And that's been articulated in many decisions. Mr. Wood was required to provide testimony on June 6th and June 7th.

He did not oppose the subpoena. He took no steps and, as this Commission will recall, once Mr. Wood had been charged by the Ministry of Labour I made submissions on behalf of Mr. Wood indicating that Mr. Wood that fully intended to continue to cooperate with the Commission and provide any assistance that he would be able to do in assisting the Commission in completing its mandate.

And, as well, as I've indicated, Mr. Wood's testimony was provided at a time when he was not charged with a criminal offence, and Mr. Wood' testimony was also provided prior being served with a section 17 notice. The section 17 notice provided what Commission counsel believed to be factual underpinning or issue underpinning with respect to the section 17 notice. There was no opportunity during the initial examination-chief and cross-examination of Mr. Wood to deal with those issues. When that was addressed with counsel, of course, the Commission counsel, of

course there was the possibility of recalling Mr. Wood. However that was not pursued.

MR. COMMISSIONER: My memory fails me but just for confirmation, Mr. Wood's testimony occurred prior to the section 17 notice?

MR. DOODY: I don't know, Mr. Commissioner, I can find that out.

MR. COMMISSIONER: It's easy enough to find out.

MR. DOODY: It's easy to find out and I'll find that out.

THE COURT: It was not my recollection, or at least I thought that the section 17 notice had been served prior to his evidence. I stand to be corrected.

MR. DOODY: I believe that to be the case but I can certainly find out.

MR. MACRAE: I'll make my submission with respect to that Mr. Commissioner. I recall very clearly that it was following Mr. Wood's testimony that the Commission provided myself with a copy of the section 17 notice. I dealt with that by meeting with Mr. Carr-Harris, and, quite frankly, complaining. Mr. Carr-Harris indicated that it was an issue of timing and that some people were receiving it before, some people were receiving it afterwards. I complained that some of the witnesses had received it even before the hearing started. So it's very clear in my mind that the section 17 notice was not received until after Mr. Wood testified.

MR. COMMISSIONER: I had no reason to dispute your assertion. I just have no memory. My

instructions and my discussions with Commission counsel were that as much as possible, section 17 notices ought to have preceded evidence, although that is not a legal prerequisite. In any event, as Mr. Doody says we – it can be readily verified. But for the moment, go ahead, I'll assume that your assertion is correct. I have no reason not to rely on it. That's fine Mr. MacRae.

MR. MACRAE: Thank you, Mr. Commissioner. At the time that counsel for Mr. Wood made submissions to the Commission regarding Mr. Wood's involvement in the Algo Centre Mall, his counsel was not aware, nor was Mr. Wood aware that he would be charged with a criminal offence relating to the Algo Centre Mall.

MR. COMMISSIONER: I take it he was aware however that there was, underway, an investigation by the OPP.

MR. MACRAE: Without question. Mr. Wood had been questioned and had actually been interviewed by the OPP. And also, to be candid, we had reviewed, as counsel, and Mr. Wood, certain informations and warrants with respect to search warrants that had been issued based upon information, I believe, respecting charges.

MR. COMMISSIONER: But no charge had been laid, I accept that. Sure.

MR. MACRAE: No charge had been laid. Now at this time the applicant has not been arraigned on the charges, and given disclosure that is not complete, again dealing with the submissions from

the media organizations that this application is premature, Mr. Wood has not received complete disclosure. There has been a recent correspondence I can indicate to the Court recent correspondence from the Crown responsible for the criminal proceedings, that they required the return of the electronic hard drive in order to update - and I have had recent discussions with Mr. Huneault regarding the disclosure. However there is not – there are a number of issues that remain outstanding and they have not been resolved.

MR. COMMISSIONER: Mr. Huneault is the prosecutor.

MR. MACRAE: Yes, and he's present here today.

MR. COMMISSIONER: I mean, when I say "prosecutor" I don't mean provincial prosecutor but prosecutor on the criminal charges.

MR. MACRAE: Yes, he's the Assistant Crown Attorney.

In dealing with the fairness of the trial process, as stated by the Court in *Dagenais*, one of the crucial elements of a fair trial is the right to be tried solely on the evidence before the Court, and not on any information received outside that context. And I quote that specific passage in that, in my respectful submission, because there has been so much evidence before this Commission, and so much of the evidence has been cross-examined on, and published, that evidence will be understood, I submit, by the public, as the underpinning for the findings of

fact that this Commission will make. Therefore, by extension, the possibility that a finding based upon that evidence, which as I've indicated earlier in my submissions, is much far-reaching than what may be available at the criminal trial, there will be a finding of additional evidence and evidence that a potential juror may rely upon while serving their role as a juror at this trial.

Again, that's speculation but the laws prevent any correspondence or communication with jurors once they've completed their duties. It's a very inexact science. It's very different than the United States. But I submit that a fair inference can be drawn from that that in fact the evidence before the Commission may find its way into evidence before a criminal proceeding as a result of findings of fact by the Commissioner.

As I indicated in my factum, it's not a docudrama as in *Dagenais*, and the identity of undercover police officers. But rather the Commission will, by necessity, contain findings of fact and, in my submission, that distinguishes the substantial possibility of the negative impact of the final report to the Commission.

I did mention in my factum the issue of similar fact evidence. And I used it by way of analogy, that prior to similar fact evidence being introduced to the criminal trial, the accused has many numbers of protection, many different routes to protect their rights with respect to similar fact evidence. But I do

submit that the findings of the Commission will not be subject to that control by an accused person and it would be in the public domain.

I also deal with the important component of fact-finding process at the Commission, as I've indicated earlier, may deal with the Commission – with respect to the credibility of the applicant's evidence given to the Commission under oath. When Mr. Wood attended and provided evidence, he did provide evidence under oath. He was cross-examined extensively. He provided a day and a half of testimony, and as indicated in – if I might have a moment....

MR. DOODY: Mr. Commissioner, I can indicate that Mr. Wood testified on June 6th and 7th and he was served with the section 17 notice on June 12, as Mr. MacRae recalled correctly.

MR. MACRAE: Thank you, Mr. Doody. As has been referenced in a number of factums, Mr. Commissioner, it's my submission that the Commission is in the best position to determine whether or not there is a serious threat to the accused's section 11(d) rights from pretrial publicity related to the Inquiry and the findings of the Inquiry. It's not simply – I'm not simply suggesting that all of the information that was obtained at the Commission will find its way into the Report, but any member of the public will reasonably assume that the work that's been conducted by the Commission on behalf of the Commissioner has been a distillation of those facts, evidence and exhibits to such an extent

that further review isn't necessarily needed by the public because there will be findings – there will be a report and Commission would hope, as I've indicated earlier, that it will be acted upon.

I wonder if I might ask the Court – or the Commission rather, to turn to the Commission counsel's book of authorities. It's tab 3. It's referenced as *Phillips* and then if the Court might turn page 36 of 46 paragraph 121.

MR. DOODY: Sorry, could you give me the reference again?

MR. MACRAE: Sure. It's in *Phillips* at tab 3 page 36 reference paragraph 121.

MR. DOODY: Thank you.

MR. MACRAE: Do you have it?

MR. DOODY: I do, thank you.

MR. MACRAE: Okay. Is it before the Commissioner?

MR. COMMISSIONER: Yes, thank you.

MR. MACRAE: Thank you. Reading directly from it,

> Another feature of public inquiries with potential implications for juror impartiality and fair trial rights is the fact that the inquiry will normally reach some conclusions on the facts. The reasoning in *Nelles v. Ontario*, *supra*, referred to with approval by this Court in *Starr v. Houlden*, *supra*, precludes a provincial inquiry from reaching any conclusions as to criminal liability, or

> "naming names". Yet it is quite possible that some of the findings of fact reached by an inquiry would, if known and accepted by jurors, impair their ability to judge a case impartially.

He does go on to say,

> Counsel for the respondent Roger Parry gave an example which I find persuasive. In filing his report, the Commissioner may, for example, state that, in his opinion, the May 9 explosion was caused by an excessive build-up of coal dust. Coal dust build-up is a variable which can usually be controlled by careful mine management techniques. The responsibility for ensuring that such tasks are carried out is assigned to the manager and the underground manager under the Coal Mines Regulation Act. It may be, however, that the defence presented by the two accused mine managers at their trial will be that the explosion was not caused by an accumulation of coal dust, but rather by an unforeseen and unpreventable build-up of methane gas. Jurors who have already heard the conclusions of the Commissioner as to the cause of the explosion may reject that defence out of hand rather than examining its merit on the basis of the evidence presented at the criminal trial.

I reference that passage, Mr. Commissioner, in that at this point in time, whether Mr. Wood will be calling a defence or not, is not known.

It doesn't have to be disclosed. And that issue may be very much alive, and I believe I can raise it from that perspective because that potential exists when an individual is charged with conduct, especially because of the evidence that was heard at the Commission, in my respectful submission, the evidence at the Commission could be distilled to a tale of two malls. One mall that people traveled through and never saw any water, and one mall that people saw torrents of water. And the evidence before the Commission, as the Commission will recall, was sometimes diametrically opposed between two parties that had been into the mall.

If I might, before we leave that case, if we might turn to paragraph 126. What factors should be considered in assessing the effect of publicity. This gets back to the issue of the suggestion by the media – by counsel for the media – that there's nothing to substantiate this request – that it's speculative. By its very nature it has to be speculative but it has to be based upon something. This paragraph deals with that. The second sentence: "The circumstances in which the impugned publicity or threatened publicity occurs must be reviewed." These circumstances would be the public release of your report in Elliot Lake that will be reaching across Canada in their review.

The form which the publicity takes – it's going to take the form of a report by a Commission. The size of the geographical area

over which it is disseminated and the extent of the audience are all relevant considerations. The Commission dealt with the report of a commission - some of the witnesses referenced it – with respect to the collapse of a building in British Columbia. It's reasonable to assume, I submit, that this report will be published and will be viewed and reviewed by the citizens of Canada, not just the citizens of Ontario. And not just the citizens of Elliot Lake or Sault Ste. Marie or the geographical area from where a jury would be drawn.

The existence of prior unrestrained publicity - there hasn't been any restraint on the publicity with respect to this particular Commission and the date of this decision predates substantially the explosion of the internet, the explosion of communication, the explosion of availability. I'm quite confident that when this case was being heard, there were not reporters sitting in the Supreme Court tweeting the results and the highlights from every witness. Tweets that were followed by thousands of people. That's a new reality.

Again, before I leave that I would like to reinforce my submission that the Commission is in the best position to determine the possibility as to whether or not there is a serious threat to the accused's section 11(d) right from pretrial publicity related to the Inquiry. As based upon what I've submitted with respect to jurisdiction, not only is the Commission in the best position,

but also, I submit, they have the jurisdiction.

I'll then turn to reviewing the alternatives to redaction. And in response to a concern that was raised by the media representative, but also in dealing – in anticipating the concern, I've indicated that it is impractical and even impossible for the applicant to wait until such time as a final report has been completed and published to seek an order of redaction. Given that, in my submission, this Commission has specific jurisdiction, the most effective way of dealing with the dissemination of the information is to ensure that the information disclosed to the public by way of the report is redacted in order that it is not injurious to the administration of justice. As Chief Justice Lamer said in *Dagenais*, the accused must be placed in the intolerable position of having to present the inadmissible information before the jury in an attempt to secure an impartial jury.

With respect to a change of venue, the comments of the Commissioner with respect to the Commission being held in Elliot Lake specifically for the purpose of responding to the concerns of the Elliot Lake residents, a change of venue would take the trial out of the Algoma District, away from the community, that the Commission intended very clearly to benefit by holding the Commission in the town of Elliot Lake. It was a very complicated process for the Commission and all of the Commission staff and Commission counsel to reside in Elliot Lake such an extended

period of time. I would submit that it's not appropriate to suggest that a change of venue would be of assistance to the residents and....

MR. COMMISSIONER: Well, my concern is not the residents at this point in this application. My concern is with the fair trial for the accused.

MR. MACRAE: That's correct, Your Honour.

MR. COMMISSIONER: And so when one balances the interests of the community against the rights of the accused, I don't thinks it's entirely fair to say that change of venue is inappropriate, if a change of venue more effectively permits a fair trial. Then it seems to me that that is an important consideration in making a favourable order to that request. The interest of the community at that point becomes secondary I would think.

MR. MACRAE: I agree with you, Mr. Commissioner. My point is that the change of venue being offered as an alternative to the redaction puts Mr. Wood in a position where he would have to seek a change of venue and then that takes him out of the community of his peers. It takes him out of his community. The evidence at the Commission was that Mr. Wood has lived in Sault Ste. Marie for in excess of thirty years. He has extended family. I was talking about the impact on Mr. Wood of having to seek a change of venue.

MR. COMMISSIONER: But here again, we're not talking about the impact on Mr. Wood's right to obtain a fair trial. We're talking about inconvenience.

MR. MACRAE: I would submit, Mr. Commissioner, it's not inconvenience, that Mr. Wood – Mr. Wood would elect to be tried by a jury of his peers from his local community. If I might continue, Mr. Commissioner?

MR. COMMISSIONER: Yes please, go ahead.

MR. MACRAE: The effectiveness of the redaction – I've dealt with that somewhat. But many of the cases do deal with publication bans being often very difficult to enforce given the access to the internet and this has also been the case where there has been publication bans issued in certain jurisdictions in Canada and ignored in the United States directly across the border. A redaction would insure that the order would be effective and would not be impacted by the internet.

Then with respect to the minimal impact of the request, you recall, Mr. Commissioner, that the initial application was brought for an opportunity to review the report prior to its release. And in that application, one of the grounds for that request was that Mr. Wood ought to properly seek an order that impacts the right of the public to a free press as minimally as possible. The Court has made very clear that any order of publication ban should not be overly broad. My respectful submission is that as a result of procedural order number 12, this process is only dealing with section 17. It is - the redaction requested – is, in my respectful submission, as minimal as possible, and also, the way the order is framed – the requested order -

the redaction requested falls away at the earliest of number of opportunities.

In conclusion, Mr. Commissioner, the application, I respectfully submit, is the following: it's made necessary as a result of the findings of fact by the Commission and the section 17 notice. It's timely, in that this Commission is not obligated to rule on this application at this time. The ruling can be held in abeyance until the Commission has completed its draft report and can review the report at that time from the perspective of the publication ban. However, if this time is not appropriate, there's no time where it would become more appropriate unless the Commission gave a decision that there's going to be a 20 day period in order to make submissions with respect to what's going to be contained in the report. My submission is it's very timely, it's very appropriate to bring it at this stage. That it's as limited as possible. It's circumscribed to ensure that the impact is minimal. It's appropriate, given the risk, to Mr. Wood's right to a fair trial.

And I close in asking an alternative. And that is that in the event that you, Mr. Commissioner, decline jurisdiction to provide only a redacted report to the Attorney General, I respectfully submit that both the redacted report and an unredacted report be provided to the Attorney General and that sufficient time be provided for the applicant, Mr. Wood, to seek an appropriate order ensuring that only the redacted

report is released to the public until such time as one of the events outlined in Mr. Wood's application occurs. Subject to any questions you may have, Mr. Commissioner, those are my submissions.

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MR. COMMISSIONER: Thank you very much Mr. MacRae, you'll have an opportunity to respond, obviously. By way of reply?

MR. DOODY: Mr. Commissioner, I've listened to my friend Mr. MacRae, and he submitted to you and he said that based upon your last procedural order, number 12, and the wording in it, which was – and I made a note of it, I don't have the order in front of me, but Mr. MacRae read it, I believe, correctly, the Commissioner will not go beyond the potential findings outlined in the section 17 notice. And Mr. MacRae, made submissions to you which appeared to be premised on the basis that there in the course of making those findings you would make no credibility findings. And, Mr. Commissioner, I just wanted, out of fairness, to indicate that, from your counsel's perspective, that it may well be necessary for you to make findings of credibility in order to make the factual findings necessary to – that you're required to make in the report.

And that in order to determine whether the potential findings set out in the section 17 report - because I remind you, Mr. Commissioner,

and counsel, that the basis of the section 17 notice was a determination of by your counsel that there was some evidence which, if accepted, and in the absence of an explanation, could be the basis for a finding of misconduct, defined as Justice Cory defined it, as including mismanagement. But some evidence which could be the basis of such a finding in order to make the factual determinations, it's our submission, that you may well have to make a determination of credibility.

And I use as an example - a prosaic example – a civil action arising out of a motor vehicle accident in which there's an allegation by the plaintiff that the defendant was driving his motor vehicle too fast. And the defendant testifies that he looked at the speedometer in the time period leading up to the collision and noted that the speed was, say, 50 kilometres an hour in a 60 zone. And the plaintiff and other witnesses testified that the defendant was traveling faster than that. The trial judge may well be required to make a finding of credibility in order to base his or her finding of fact. But the factual finding about which notice is required, as section 17 says, I've just got it here,

> a Commission shall not find misconduct by a person unless a) reasonable notice of the possible finding and a summary of the evidence supporting the possible finding have been given to that person and b) that

person has been given a reasonable opportunity to respond.

So, in a civil action the basic obligation of procedural fairness is met by the statement of claim setting out the allegations and the opportunity to the defendant to defend. In an inquiry, the same fairness obligation is met by the requirement to give notice of the possible finding. But in our submission, the misconduct to which section 17 speaks is not credibility in the evidence before you. It's misconduct in the facts into which you are inquiring, and it may well be that you are required simply by virtue of the conflicting evidence you've heard to make a finding of credibility. And that need not have been set out in the section 17 notice.

MR. COMMISSIONER: Mr. MacRae, respond to that immediately. I'm tempted to agree entirely. Otherwise every section 17 notice sent out by Commission counsel would have to anticipate that there may be issues of credibility. And they are impossible to be pointed to before the evidence is given. The fact that here the evidence was given – or the section 17 was given after the evidence, that doesn't change the basic concept that what the section 17 notice is looking to protect are findings of misconduct during the envelope of events that the Commission is inquiring into, not conduct, for example, at the inquiry.

MR. MACRAE: Mr. Commissioner....

MR. COMMISSIONER: In other words, if you are

relying on the fact that credibility is not mentioned in section 17, I would think, that that is probably a false reliance, a false hope. And by that I'm not saying that there will be, of necessity, findings of credibility one way or another. I'm just saying that the purpose of section 17 is not to protect your client against potential findings relating to credibility.

MR. MACRAE: Certainly, Mr. Commissioner. You've invited me to respond to that immediately...

MR. COMMISSIONER: Sure.

MR. MACRAE: ...but I ask you for your indulgence because I would to speak with my client...

MR. COMMISSIONER: Sure.

MR. MACRAE: ...before I respond to that.

MR. COMMISSIONER: That's fine. That's okay. Ms. Mackay, please?

SUBMISSIONS BY MS. MACKAY:

MS. MACKAY: I intend to be quite brief, Commissioner.

I'll just give a brief overview of our position, Commissioner, as you know, we don't take any position as to whether the redaction sought by the applicant should be made, but it is our position that you do have the jurisdiction to make those redactions should you determine they are necessary. In our submission I'll deal with each one of these more fully. Your jurisdiction can be found in three areas. In section 14(3) of the *Public Inquiries Act*, in section 10(4) of the

Public Inquiries Act and finally, in our submission, you have the inherent jurisdiction to control your own processes, and this position is supported by the *Phillips v. Nova Scotia* decision of the Supreme Court of Canada, which is found at volume 1, tab 1 of Ontario's authorities.

I note that Mr. Longo, counsel for the Ontario Building Officials Association is not here today. Ontario does oppose the relief sought by the OBOA. I'm content to make submissions on that, Mr. Commissioner, or to rely on the submissions in my factum, whichever the Court would prefer.

MR. COMMISSIONER: I think you can rely safely on what's in your factum.

MS. MACKAY: Okay. That's great. Then I'll move right to the jurisdictional issue. Section 14(3) is in the general section of the *Act* entitled "Hearings", but it falls under the subheading, "Exclusion of the Public". And the section states,

> A commission may exclude the public from all or part of a hearing or take other measures to prevent the disclosure of information if it decides that the public's interest... is outweighed by the need to prevent the disclosure of information that could reasonably be expected to be injurious to,
>
> (a) the administration of justice;
>
> (b) law enforcement;
>
> (c) national security; or

(d) a person's privacy, security or financial interest.

And I make only two brief submissions on this point. First, "take any other measures" is an extremely broad legislative phrase. And it is separate and distinct from the power to exclude the public from hearings in the section because the section uses the word "or". I also note that this phrase is in addition to the latest version of the *Public Inquiries Act*. There was the power under the former Act in section 4 to take some measures about excluding the public. But the addition of the phrase "take any other measures", in our submission, demonstrates an intent by the legislature to expand the Commissioner's powers in this regard. And it is not, therefore, in our submission, so narrow as to apply only to excluding the public from hearings as submitted by counsel for the media organizations.

Secondly, it's Ontario's submission that to limit this provision only to the exclusion of the public at hearings, would not be logical. Because it does not, in our submission, make sense that the legislature would, on the one hand, expand the Commissioner's powers to prevent the disclosure of information to protect the four very important interests set out in section 14(3) at the hearings stage, but then allow the release of that information that could be injurious to those four important interests at the final report stage. And right in this context, it's our submission that 14(3) cannot be limited only

to excluding the public from hearings.

If you find, Mr. Commissioner, that you don't have jurisdiction pursuant to section 14(3) of the *Act*, it's our submission that you have that jurisdiction pursuant to section 10(4). Section 10(4) is also an addition the current iteration of the *Public Inquiries Act*. And it states that

> A commission may impose conditions on the disclosure of information at a public inquiry to protect the confidentiality of that information.

And in our submission it's not limited to any particular phase of the inquiry.

It is found in the section of the Act described as "Information and Evidence", and under the subheading of "Protection of Confidential Information". And in our submission it's an extremely broad provision which, in Ontario's submission would provide you with clear jurisdiction to temporarily redact parts of your final report pending one of the four occurrences that the applicant has set out in his factum.

Pursuant to the minority decision the *Phillips* case, the statutory powers of a Commissioner to control it's own processes should be read generously to give best effect to those powers. And I refer you to paragraphs 174 to 176 in that regard.

MR. COMMISSIONER: There were two minority decisions.

MS. MACKAY: That's right, and I will refer a bit later to the minority decision of Justice

L'Heureux-Dubé. The paragraphs 174-176 are found in Justice Cory's decision. And of course because it is a minority decision the comments can be considered obiter. But one commentator, Mr. Ratushny in his book, *The Conduct of Public Inquiries*, states that "the minority reasons are likely to be treated as authoritative unless and until they are modified by future rulings of the Supreme Court." In our submission they have not been so modified and do, in fact, of course, take into account the findings of the Supreme Court in *Dagenais* because it was decided afterwards.

Additionally, the Court in *Phillips* found that a commission has broad common law jurisdiction to control its own processes. And therefore it's Ontario's position that you have the jurisdiction to order redaction of the parts of your final report through this inherent jurisdiction, even if you find you do not have those powers pursuant to the *Public Inquiries Act*.

In addition to noting that a broad common law jurisdiction exists, the minority decisions of both Justice Cory and Justice L'Heureux-Dubé state that the most appropriate forum to make orders regarding the restraints to inquiry proceedings designed to protect the integrity of criminal trials is generally the Commission. The Commission is best placed to assess the potentially harmful effects of evidence and the use of flexible measures to overcome individual threats to fair trial rights is the most

efficient means of protecting constitutional rights during the inquiry process and criminal proceedings.

And one must ask, in our submission, where else someone in Mr. Wood's position, at an early stage of the prosecution, could seek this relief at this juncture. And with respect to those comments from *Phillips*, I would refer you to paragraphs 36 and 38 in the judgment of Justice L'Heureux-Dubé and paragraphs 170 and 174 to 176 in Justice Cory's decision.

The *dicta* in *Phillips* was echoed much more recently in the 2007 Ontario Court of Appeal decision arising from the Cornwall Inquiry (*Episcopal Corporation of the Diocese of Alexandria-Cornwall v. Cornwall Public Inquiry*, 2007 ONCA 20). And that is found at volume 2 of our book of authorities at Tab 5. And the paragraph to which I refer is paragraph 24. And the Ontario Court of Appeal notes

> that a commissioner's power to make orders such as publicity bans "should be given a reasonable and purposive interpretation in order to provide commissions of inquiry with the ability to achieve their goals.

MR. COMMISSIONER: What paragraph again, sorry?

MS. MACKAY: That's paragraph 24. I should also note here that it is Ontario's position that this Commission has the jurisdiction to apply the Charter and that is based on the law set out in the factum of Commission counsel, so I won't

repeat that here.

In summary therefore, it is Ontario's position that it is not trite law that there is no inherent jurisdiction in the Commissioner, as argued by the media organizations in paragraph 14 of their factum. It is notable, in our submission, that there is no authority provided for that proposition in their factum or in their materials. I should advise that I had a conversation with Mr. Jacobsen this morning and he indicates he is relying on the *Keable* decision of the Supreme Court (*A.G. of Que. and Keable v. A.G. of Can. et al.*, [1979] 1 S.C.R. 218). I have not had a chance to review that decision because it was not included in the materials. I do understand it's a pre-*Charter* case from 1978.

MR DOODY: '79.

MS. MACKAY: '79. In our submission, more recent authorities, the 1995 *Phillips* decision and the 2007 *Cornwall* decision clearly state there is an inherent jurisdiction.

And finally on this point, the power to redact does not need to be specifically set out in the Order-in-Council as appears to be suggested by the media organizations. The Order-in-Council must be read to conform with the law and to be read in conjunction with the law. In our submission this Commission derives its powers from the *Act*, the Order in Council and the common law. And in this case, the Order in Council specifically contemplates that this inquiry will not in any way interfere or conflict with any

ongoing investigation or proceeding related to these matters.

Subject to any questions, you may have, Commissioner, those are my submissions on behalf of Ontario.

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MR. COMMISSIONER: Yes, thank you very much. Mr. Jacobsen.

SUBMISSIONS BY MR. JACOBSEN:

Mr. Commissioner, it's always difficult to argue that someone doesn't have – or a judicial officer doesn't have jurisdiction in front of them. And the reason for doing this is so that you are not induced into making, what I would submit, is a judicial error. The proposition that we put forward to state that there is no inherent jurisdiction, and by that I mean no inherent jurisdiction to make a substantive order in law. Clearly from the *Public Inquiries Act* you have inherent jurisdiction, if you want to put it that way, to control your own process, which means that you have the jurisdiction to grant adjournments, to – and that's not clearly set out in the *Act*, or to take other measures that would allow for the hearings themselves to proceed in an orderly manner.

There is a very clear distinction in the *Act* between hearing process and the report. One is

fact-finding and the other is drawing conclusions and reporting on facts for the public, hopefully to eventually hear. Now in the *A.G. of Quebec and Keable* case which the Attorney General's office has – they weren't aware of it, it's been quite a celebrated case, it's six judges of the Supreme Court of Canada said, or agreed with the following, and this is at page 250 of that, it's [1979] 1 SCR 218 at page 250.

MR. COMMISSIONER: I'm sorry, give that to me again, please.

MR. JACOBSEN: I'm sorry. [1979] 1 SCR 218 at page 250.

MR. COMMISSIONER: Thank you.

MR. JACOBSEN:

> Because a commissioner has only limited authority he enjoys no inherent jurisdiction, unlike superior courts which have such jurisdiction in all matters of federal or provincial law unless specifically excluded. It is by virtue of this inherent jurisdiction that superior courts have a general superintending power over federal as well as provincial authorities, as held in *Three Rivers Boatman (supra).* It is unnecessary to decide in the present case whether any possible attack against an affidavit made under s. 41(2) of the *Federal Court Act* comes within the exclusive jurisdiction conferred upon the Trial Division of the Federal Court by s. 18 of that Act,

> because I find it clear that any jurisdiction for entertaining such attack can only be found in a superior court. The Commissioner is therefore bound to accept the affidavit as submitted unless it is set aside by a competent court.

So there is a clear statement that you have, with the greatest of respect, sir, no inherent jurisdiction to expand your jurisdiction into areas of substantive law as opposed to procedural law.

And clearly, the redaction of a report that would affect the public's right under section 2(b) of the *Charter*, would be a substantive measure as opposed to a procedural measure. you would be directly affecting, at least in a *prima facie* way, the right of the public to get access to this material.

MR. COMMISSIONER: I don't disagree with you, except to this extent: while the Commission may not have inherent jurisdiction, it may have jurisdiction conferred upon it...

MR. JACOBSEN: That's correct.

MR. COMMISSIONER: ...in a variety of ways. One of those ways was one that didn't exist during *Keable* and that was the *Canadian Charter of Rights and Freedoms*.

MR. JACOBSEN: I'm going to get to that.

THE COURT: Okay. That's fine, then, get to it when you think you ought to.

MR. JACOBSEN: Now, the – so what I'm going to do then, sir, is deal with the issue of jurisdiction

and then I'm going to get to the issue of – assuming that you do have jurisdiction – why the publication ban shouldn't be granted.

So my friends referred to sections in the *Act*, and I'll be getting to those in a moment. But what I would point out is that, on a the proper reading of the Order in Council, and the *Act*, the powers conferred on the Commission for the purpose of allowing it to carry out its investigative mandate have no application to its responsibility and duty to report its findings, conclusions and recommendations. These two functions, to inquire into and to report, are entirely separate.

Now, Mr. Wood and the Attorney General rely on the powers granted to the Commission pursuant to the *Act* by the Lieutenant Governor in Council and paragraph 14(3)(a) of the *Act*, as sources of the Commission's authority. But they don't point to any specific power granted to the Commission. Rather they rely on general readings of the *Act* and I want to take you, therefore, to the *Act* and we'll start with 14(3).

The first thing I would point out here is that this - and I'm just going to read it because my friend from the AG's office says that other measures to prevent disclosure must mean that you can do what you are being asked to do today. But the history of this is interesting in the sense of, if you compare this section to the section of the *Statutory Powers Procedure Act*, it is very similar. And what happened with the *Statutory*

Powers Procedure Act, is originally there is only in there the power to exclude the public – I'm sorry – there's only the power to ban publication. And then along came a case, or a situation, where the Law Society of Ontario [*sic*] purported to ban publication – or to put a publication ban on a hearing. And what was argued is, you can't do that, you don't have specific authority. And so they changed the *Act*.

So what we now have is that you can exclude the public from any part of a hearing, or take other measures to prevent the disclosure of information, which would mean that you could go *in camera*, for example. That's what that means, or take other measures to prevent the disclosure of information. And it's the only way it can make sense, Mr. Commissioner. This is under the heading, "Hearings".

Now, my friend wants to – my friends want you to ignore that. But that would be to, in my submission, to induce judicial error. Because clearly, if you look at this section, it's under the heading "Hearings" and then subheading, "Holding a hearing". Next subheading, "Hearings Open to public". Next subsection, "Exclusion of public."

> A commission may exclude the public from all or part of a hearing or take other measures to prevent the disclosure of information if it decides that the public's interest in the public inquiry or the information to be disclosed in the

public inquiry is outweighed....

Now, if you read that, it is clearly about a hearing, because it talks about preventing the disclosure of the information if it decides that the public's interest in the public inquiry or the information to be disclosed – that's clearly the hearing. You're not involved at this stage in writing your report in information that is to be disclosed to the public. This is all about being able to grant publication bans if necessary or put sealing orders on particular information, or exclude the public entirely from the hearing room. It can be, in my submission, not seen as anything more.

And the problem is that what my friends are asking you to do, in my submission, is something that only the Attorney General can do in this situation. And I'm not saying that makes – that that's the best policy for them to have adopted. But what they have done is they have said, to you, Mr. Commissioner, you must report - make a report. And it is then that the Attorney General that releases the report, although the Attorney General may turn to the Inquiry as they usually do and say, "Inquiry, please release the report."

But there is an example that comes out of the Hughes Commission. And I've asked the clerk to hand up the two documents I gave you earlier this morning. And I know that in Mr. Doody's factum he referred to this. And now what happened in *Hughes*, in the Hughes situation, is that they did it the right way. And you have at page – the

best I could do was to get the memoir of Sam Hughes and to have it confirmed by the heritage, *patrimoine*, statement that you have, and in both cases, what you will see is that the Attorney General held up the release of the report.

So if I could take you to the memoir first, it's at page – oh it's hard to read - 209....

MR. COMMISSIONER: 269.

MR. JACOBSEN: 269?

THE COMMISSION: Yes.

MR. JACOBSEN: In the second full paragraph, let me just start with the second line on that page: "The famous harbour, sanctuary of ships, was shrouded in snow" etcetera, etcetera, and he said,

> I went to the Confederation Building to present the report to the Government of Newfoundland and Labrador represented by the acting premier, Winston Baker, and the Minister of Justice, Paul Dicks. This was done in form. The press was represented, pictures were taken and the ceremonies concluded with an excellent luncheon and much agreeable conversation. Here Helen and I received the parting gifts of the representatives of the literary and sculpture genius of the province, we left with many expressions of mutual regard and determination to return, as yet unfulfilled although still contemplated.
>
> Nevertheless the report was not then released to the public, the government's

> stated reason being that the release of the report would seriously impair the prospect of a fair trial for the accused.

and he says lower down that,

> I had many calls about this, particular from newspaper, radio and television people who sensed a "cover-up" as they called it and who, on the whole, refused to take seriously the stated reasons for the government's decision. I believed, as I hope any conscientious lawyer would, bearing in mind that there were almost a dozen prosecutions in train and that there had been extraordinary province-wide publicity given the hearings of the Commission, that the government had decided wisely. The rational also applied to the screening of a television production entitled "The Boys of St. Vincent", it was alleged, on the Mount Cashel affair, and typically designed to stimulate the public prurience.

And that, of course, is the *Dagenais* case.

MR. COMMISSIONER: But there had been no request before Mr. Justice Hughes in advance of his turning the report over to the government.

MR. JACOBSEN: That's right. But, but....

MR. COMMISSIONER: Nobody had asked him to do anything but turn it over to the government which he did.

MR. JACOBSEN: And then he says, whenever I was asked....

MR. COMMISSIONER: I mean I'm just pointing out, that's the difference between that case and our case. We have, in this case, Mr. MacRae saying, "do it before". The fact that Mr. Justice Hughes turned it over is not indicative that he made a conscious decision to protect any particular rights. He hadn't been asked to do that.

MR. JACOBSEN: Well I don't know what he had been asked to do, frankly, from this,...

MR. COMMISSIONER: Well, we need to know that.

MR. JACOBSEN: ...but....

MR. COMMISSIONER: Otherwise it means nothing.

MR. JACOBSEN: But well what it does show is that, when my friends say that it's not up to the Attorney General to release the decision, in my submission it is. And since it's up to the Attorney General to release the decision, it is the, in my respectful submission, sir, it is your obligation to provide the Attorney General with the report and then the jurisdiction flows from the Attorney General to release it or not.

MR. COMMISSIONER: Although the legislation says he must release it.

MR. JACOBSEN: But it doesn't say when.

MR. COMMISSIONER: It doesn't say when.

MR. JACOBSEN: So that's where the delay comes in.

MR. COMMISSIONER: I'm just saying that in this case is – it doesn't help me, in the sense that it doesn't involve an application before Commissioner Hughes not to release his report. It just is indicative of the fact that the

government, once it received the report, made a decision not to release it.

MR. JACOBSEN: Well, the reason I address it is that I may have been wrong but I thought that Mr. Doody's factum was using for the purpose to say that it had been delayed in the past and I wanted to point out that who delayed it. It wasn't the Commissioner, so there's no authority there for the suggestion that it's the Commissioner who assumed jurisdiction to delay the report.

MR. COMMISSIONER: I also note that this was part of the grade eight history curriculum reference guide.

MR. JACOBSEN: Well that's why I said in my factum that it was pretty obvious that you didn't have any inherent jurisdiction. I only found this after I read Mr. Doody's factum and I did a little bit of research on it.

MR. COMMISSIONER: I've always liked, you know, applications that I don't have jurisdiction because generally speaking in the past it meant that I could go home early.

MR. JACOBSEN: Fair enough.

MR. COMMISSIONER: It might not be applicable to this circumstance.

MR. JACOBSEN: Right.

MR. COMMISSIONER: Thank you. Go ahead.

MR. JACOBSEN: The other section that the Attorney General relies on was section 10, 10(4), "Protection of confidential information". Now there' nothing confidential about the information that you are being asked to redact, as I

understand it, first of all. Secondly, what you have been asked to redact has already been made public. The facts have already been made public as fairly conceded by Mr. Wood's counsel. So it cannot be confidential information and it's clearly – clearly what this is intended to do is if someone comes in with some information that is particularly sensitive about their health or about some financial situation and they appear before you, sir, and they say, "here's the reason why I don't want this made public", that you would have the jurisdiction to say "we're going to protect that confidential information."

MR. COMMISSIONER: Well for example I think I exercised that jurisdiction in these proceedings when – with no objection – that involved photographs of a particularly sensitive nature.

MR. JACOBSEN: So, in my submission, the - this again comes under the heading of information and evidence, and in particular the – under the subheading "protection of confidential information", and in my submission that it would be quite a stretch to say that this section allows you to redact your report and present a redacted report to the Attorney General when your terms – the terms of your mandate clearly say you are to report – simply to report.

Now I don't say that the law is right. But I say that that's where – there it lies. Now when my friends refer to Justice Cory's decision - or Justice Cory's *obiter*, again I would point out the - at paragraph 121 of the *Westray*

Decision, that what is being addressed here is what you do during the hearing, not what you do in your report Now the distinction, in my submission, is very important. And at paragraph 174 that my friend from the Crown's office referred you to,

> judicial comments on this section suggest that commissions of inquiry have a general power to control their proceedings and are not tied to a narrow interpretation of the enabling statute.

But again there's distinction to be drawn, with the greatest of respect, sir, between controlling your proceedings and making substantive decisions on legal rights, on *Charter* rights, that have not been provided to you as a Commissioner. I know you have that jurisdiction if you're sitting as a Superior Court judge. But in my submission your jurisdiction does not extend to expanding your substantive law rights.

And I have included in my factum reference to ways of interpreting statutes, particularly where you're looking at headings. And they are taken into account as *Sullivan on the Construction of Statutes* says, and I've referred to that.

And I would also point out to you that there is a clear distinction in the *Act* between, for example, section 14 which has as its heading "Holding a hearing" and then going to section 20 which deals with "Report of Commission." And there is nothing in Report of Commission to grant

you any substantive law right to do anything other than delivery of report in writing to the Minister etcetera. You can deliver an interim report, and then we've got section 4 which doesn't apply, that is if the report – if you don't deliver your report, what the Minister can do.

So in my respectful submission, and I say this with the greatest respect and I don't say that the law should be this way by any means, that is that because of the wording of the Order in Council, which could have granted you the authority to issue a redacted report if you saw fit, and because of the wording of the *Public Inquiries Act*, with the greatest respect, sir, you, in my submission, you have no jurisdiction to grant this order.

And I say that the reason for this – it all makes sense when you realize that the party that actually releases the report to the public is the Attorney General. It is not you. It is not this Commission. And we see that in the Hughes Commission, that's the way it went.

Now, I'm now going to turn to second prong of my argument and that is that the Dagenais/Mentuck test has not been met. So if you do have to find that you do have jurisdiction, then these submissions will follow.

And I know that you are very aware of Open Court principle and the importance of it, and the reasons behind it. They're set out in *Dagenais* and *Mentuck* and countless cases from the Supreme

Court of Canada. And acknowledged in Mr. Wood's amended factum, one of the central goals of a public inquiry is to shed light on the circumstances surrounding a community problem or tragedy. And the overarching function of public inquiries is one of public interest which includes both public scrutiny and public education. So, what you are really being asked to do here is to redact one of the essential elements – the description of the activities of one of the major players. In fact someone for whom a section 17 notice has been given. The public, in my respectful submission, has waited long enough to find out what your conclusions are.

The public needs to know and the public does not get to know by knowing only parts of the report, by only getting access to parts of the report, or only getting - or getting it piecemeal. We know how matters are received by the public. They are not going to read – be able to read, in context, the report a year and a half or two years from now after the criminal proceeding is finished. They are not going to take your redacted report and be able to read sense into it a year and a half later. We don't ask them to do that, *Public Inquiries Act* doesn't contemplate that and it shouldn't be required.

Now, my friend has said that - Mr. Wood's counsel has made a number of speculative statements, in my submission. He said, and I'm not quoting directly because I'm not that good of

a shorthand reporter but he said along the lines of, with respect to the section 17 notice, it will be reported as a finding of fact, it will be supported by the evidence, and then he said it may be different than the *Criminal Code* prosecution evidence – it may be. Then he says, and this evidence may not be available to the *Criminal Code* prosecution but he gives you no examples. He provides no evidence of what this might be. And then this is the most prospective of all, evidence from the Commission may find its way – and I think I'm going to just paraphrase - into the jury pool, is what he's saying. It may find its way.

But let me say a couple of things about that. The cases have been quite clear and it's – you have the recent Justice Nordheimer cases and Justice Durno case – I was on both of those and I'll speak briefly to them - that the concern about "polluting the jury pool" is one that the courts are drifting more and more away from because they realize that there has never – there's no substantive evidence that's ever been published by anyone to suggest that jury pools – that it's not possible to empanel an impartial jury. And one of the reasons that there's been confusion in this area is people – and sometimes even the courts – don't draw the distinction between an impartial juror and a juror who knows nothing about the case.

And what we have seen going all the way back to the *Bernardo* case, when there was extensive

publicity about Paul Bernardo, is that Justice Lesage was able to empanel within a day and a half because he was looking for people who could render an impartial decision. There probably were very few people who hadn't heard about the horrific allegations made by Paul Bernardo and seen the trial – the so-called deal with the devil that was done with his then wife Homolka. And so what we see there is the evolution of the distinction between a juror who knows nothing about the case and a juror who's able to render an impartial verdict.

Now again, much of this information is already out there because we know that Mr. Wood testified on June 6th and 7th for, I understand, a day and a half. And my friend also raises the canard of the internet. And it is true that in today's world, if the juror wants to go and find out a great deal about a case, the juror can do it often through the internet. But as the cases have said on numerous occasions, we expect better of jurors. We expect jurors to obey the direction of a trial judge. We have challenges for cause. We have numerous protections including, of course, the change of venue.

Now my friend for Mr. Wood says that Mr. Wood wants to be - elect to be tried by his peers from his local community. Well that's not the right that is put into the *Code*. His right is to be tried by – if he elects trial by jury, and that's a big "if", I would suggest – but if he elects trial by jury, it's to be tried by his peers,

that is, other persons in Ontario.

And we've – if that wasn't the case, then you wouldn't have change of venue applications being successful. But the very fact that, if necessary, there could be a change of venue, that would be a possibility. But we don't see many of those any more because the Courts are more and more agreeing, in my submission, with what we saw said by Justice Nordheimer in his decision – in several of his decisions.

Now the – and for the purposes of brevity, I'm not going to take you to those decisions. I think you've got them. You've got the references in my factum, you don't need to hear it twice. But what I would say is that at paragraph – that Justice Nordheimer does say - and let me get the reference here for you. Sorry Your Honour, I just want to make sure I've got the right one.

Yes, this is at tab 2 of our book of authorities, and like so many of these cases they're named by the media – there's too many of them, but this is *Canadian Broadcasting Corporation, Sun Media etcetera and Her Majesty the Queen in Right of Canada and Alexander Lisi and Mr. Bahrami* (*Canadian Broadcasting Corporation and Others v. HMQ*, 2013 CanLII 75897 (ON SC)). This had to do with the request that the media was making to get access to the informations to obtain with respect to the drug charges against Mr. Lisi. This is before Lisi was charged other more serious offences. And so what happened originally was that what was just

the drug charges – they're very minor - they couldn't be heard by a jury. Then we got the extortion charge which was a charge which could be heard by a jury and so that's where – that's the background for this.

And Justice Nordheimer says at paragraph 40:

> I'm prepared to accept that there is some risk to Mr. Lisi's fair trial rights that might arise from the release of this material. Undoubtedly some of the references in the intercepted private communications will not reflect well on Mr. Lisi. But I contrast that possibility with certain other salient facts. One, is that there has been a fair amount of publicity in this matter that does not reflect well on Mr. Lisi as his counsel fairly acknowledged.

And I think we've got the same situation here.

> It is not therefore clear that this additional material will significantly affect any impression that may have already been formed in the minds of the public.
>
> [41] Another consideration is the effect that the passage of time can have. Despite what some may think, experience shows that members of the public do not remember, in any great detail, events that they read or heard about months earlier. Anyone with experience sitting through a challenge for cause based on publicity can

attest to that reality. People either paid little or no attention to the matter in the first instance, or have only the vaguest recollections of the event when questioned about it through the challenge process. This point was aptly put in R. v. Murrin, [1997] B.C.J. No. 3182 (S.C.) where Oppal J. said, at para. 20:

> Common sense tells us that public knowledge is at times fleeting in matters of this nature.

And then at paragraph 47, Justice Nordheimer goes on to say:

> The problem, of course, is that it is impossible at this stage to determine whether there will be a period of sustained pre-trial publicity. While the events are currently attracting substantial media attention, there is no way of knowing whether that attention will continue for the two or more years that it will take for Mr. Lisi's case to reach trial.

Now, Your Honour, I'm not an expert on these matters, but given that there's been limited Crown disclosure on the criminal trial against Mr. Wood, I think it's fair to assume his trial is probably at least a year to 18 months off.

Experience shows that events that received great media attention at one point are virtually forgotten months later. In this case there are a number of events that may occur over the coming

months that may affect the continued interest of the media in this matter. I would also observe that if the current publicity is sustained, it is open to Mr. Lisi to bring an application some time prior to trial for a publication ban at that time.

So he's recognizing, in my submission, that a publication ban may be the way to handle a matter and may be the way to handle this matter. That there could be a publication ban put on the media repeating anything that is said in your report. Now that, I fairly concede, that that doesn't mean that persons who want to couldn't get into the – couldn't get on the internet on re-read your report.

But the fact of the matter is that that's generally not what we're trying to protect here. What we're trying to protect is release and repetition in the mass media. Because it's the mass media that is going to allegedly pollute the jury pool.

The other matter I would point out is that Mr. Wood is not likely to be the major or even – the major attention on the release of the report. As his counsel has fairly pointed out, there is a great deal that will likely for the construction industry generally. There will be a great deal of comment with respect to the way the way the industry works, I would expect, and the way the law, perhaps, does or doesn't protect the public.

But this is not a matter where we are – this is not an inquiry into Mr. Wood that puts Mr.

Wood front and centre, which again reduces the attention that the public will focus on him, and, in my submission, increases the likelihood that we don't have to worry about being able to empanel impartial jurors a year to 18 months from now. And that is assuming that he elects trial by judge and jury.

And on the issue of jurors, if I could take you to the *Dagenais* decision, and it – I think you have it in many places but it is in tab 4 of our material – and take you to paragraph 91. And this is in the – under the heading of "The Efficacy of Some Publication Bans." And the....

MR. COMMISSIONER: Just give me a moment, please.

MR. JACOBSEN: I'm sorry.

MR. COMMISSIONER: I have the *Mentuck* case.

MR. JACOBSEN: Tab 4.

MR. COMMISSIONER: I'm sorry, I don't have your book of authorities. Anyway, go ahead.

...MS. MACKAY PASSES UP HER COPY

MR. COMMISSIONER: Thank you very much. Tab 4?

MR. JACOBSEN: Tab 4 please, and that's page 31, paragraph 91.

MR. COMMISSIONER: Thank you.

MR. JACOBSEN: And just to begin, under the heading "The Efficacy of Some Publication Bans."

MR. COMMISSIONER: Yes, got it.

MR. JACOBSEN:

> There are several reasons to be concerned about the efficacy of some publication bans (i.e., bans aimed at preventing the jury from being influenced

by information gathered outside the criminal proceedings).

To begin, I doubt that jurors are always adversely influenced by publications. There is no data available on this issue. However, common sense dictates that in some cases jurors may be adversely affected. Assuming this, I nevertheless believe that jurors are capable of following instructions from trial judges and ignoring information not presented to them in the course of the criminal proceedings. As Lord Taylor CJ wrote in *Ex parte Telegraph Plc.*, [1993] 2 All ER 971 (CA), at p. 978:

> In determining whether publication of matter would cause a substantial risk of prejudice to a future trial, a court should credit the jury with the will and ability to abide by the judge's direction to decide the case only on the evidence before them.

Now, Mr. Commissioner, the whole jury system depends on jurors acting in good faith. And there have been numerous cases that say we assume that jurors will act in good faith. That they are not going to go trolling on the internet to try and reach a conclusion about a case they are about to hear. And I think that that – as a – and there had been no jurisprudence since *Dagenais* to take, by the Supreme Court of Canada or anyone else, to take - to object to this

concept of us being able to rely on jurors.

The next item I want to refer to, Your Honour, is Mr. Wood's position regarding the provincial offences trial. And as I understand it, just a few days ago, the Crown Counsel submitted to Justice Villeneuve that there was a substantial overlap of the narrative between the two sets of charges, that is the provincial offences under the *Occupational Health and Safety Act* and the criminal trial.

And what doesn't make sense, in my respectful submission, as you relate it to this case, is that what Mr. Wood, is asking the judge to do is to ensure the occupational health and safety charges which cannot be heard by a jury, will go first. And as a result, in my submission, there would be publicity surrounding all of that, and that that very publicity, because there's a substantial overlap of the narrative, would be harmful to his alleged fair trial rights in the criminal matter. And there's a very limited jurisdiction to ask for a publication ban of the occupational health and safety matter.

So, in other words, if you're going to talk about prejudicing the fair trial, what my friend seems to be suggesting is that, perhaps we'll wait and let the occupational health and safety matter go ahead, when he'll be closer to the criminal trial, presumably, if it goes in the order he requests, but there doesn't seem to be any concern about fair trial with respect to those submissions.

Now, my friend could say, I suppose, "Well, I'll ask for a publication ban." But we haven't seen that. There's been no reference to that made. And my understanding is that no such request has been made.

Now, that brings you back, in my respectful submission, to the question of balancing between the – what my friend has put forward as his client's interest in a fair trial against the fulfilling your important function in releasing this to the public if you have the jurisdiction. I think it's the Attorney General that would do that, but I made those submissions.

In the *Westray* Decision at paragraph 62, and I'm sure you've had this read to you numerous times, but I think that it bears re-reading.

> One of the primary functions of public inquiries is fact-finding. They are often convened, in the wake of public shock, horror, disillusionment, or skepticism, in order to uncover "the truth". Inquiries are, like the judiciary, independent; unlike the judiciary, they are often endowed with wide-ranging investigative powers. In following their mandates, commissions of inquiry are, ideally, free from partisan loyalties and better able than Parliament or the legislatures to take a long-term view of the problem presented.

Again, indicating that what you are really reporting on here is the collapse – you're not

reporting on Mr. Wood, which just – and I say that just to say that the focus of your report is not going to be on Mr. Wood, unlike the focus of what we saw in the Lisi application where the focus was directly on Lisi. It was the findings or the allegations made by police officers in order to get search warrants directly against Mr. Lisi. And it said some extremely damning things about Mr. Lisi and the company he takes, and need I say, the company he keeps, and need I say, the company that the Mayor of Toronto keeps.

So then to go on.

> Cynics decry public inquiries as a means used by the government to postpone acting in circumstances which often call for speedy action. Yet, these inquiries can and do fulfill an important function in Canadian society. In times of public questioning, stress and concern they provide the means for Canadians to be apprised of the conditions pertaining to a worrisome community problem and to be a part of the recommendations that are aimed at resolving the problem. Both the status and high public respect for the commissioner and the open and public nature of the hearing help to restore public confidence not only in the institution or situation investigated but also in the process of government as a whole. They are an excellent means of informing and educating concerned members

of the public.

And here, in light of that, you are being asked to redact, in your report, some of what I would suggest are some of the most salient features relating to the narrative. And it is important that the public know. If the public – my submission is that the concerns about there being a report for the Attorney General and a report for the public, it's going to cause skepticism. Why would that be? What are the real grounds for it, and has it really been justified? And in my submission the presentation to the public of a partially redacted final report following more than two years of a wide-ranging, open and inclusive investigation into this tragedy, could significantly diminish and detract from the good input and the work that the Commission will have done. The public, in my respectful submission, needs to have your full report as soon as possible.

Now, the Commission today is being asked to do something that, in my submission, has never been done before. And that is an important feature of all of this. Never before has a Commissioner provided the government with a redacted report and a full report. And the reason I submit for that is that it is not up to the Commissioner to redact the report. If the government wants to redact the report, or to prevent the issuance of the report as was happened in *Hughes*, it can do so. I'm not saying that there wouldn't be some remedy that could be

approached there by the media or others, but the report itself has to be - if we follow the precedent – has to be provided to the government. And my friends have not been able to point to any circumstance where the interpretation put on the sections in the *Public Inquiries Act* advanced by the Attorney General or by Mr. Wood have ever been ruled on. You would be breaking, in my respectful submission, new ground to expand your jurisdiction to produce a redacted report for the Attorney General.

So you have a much more complete and perhaps even coherent statement of our argument in our factum. But subject to any questions you have, those are my submissions.

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MR. COMMISSIONER: Thank you very much, Mr. Jacobsen. We'll take a few minutes and then we'll hear any reply. Let's take ten minutes, please.

R E C E S S

U P O N R E S U M I N G:

MR. COMMISSIONER: Your reply, please.

REPLY BY MR. MACRAE:

I have three points to make which arise as a result of the submissions. Although my friend suggests that Mr. Wood would not be front and

centre with respect to the report, in my respectful submission, the Commission ought to properly consider that Mr. Wood is the only person who has been charged with a criminal offence relating to this. And my friend speculated and, in my submission, took some liberties, and so I'm going to do the same in suggesting that it would not be surprising that if every article that deals with the report of the Commission mentions Mr. Wood, because Mr. Wood has a peculiar position – not a peculiar position necessarily but he has a particular position, unfortunately, of being the only person who faces *Criminal Code* charges – and very serious *Criminal Code* charges as a result of the Commission.

Also with respect to the issue of election by judge and jury, my friend indicates that this application is one of first instance. I don't necessarily agree with that submission, but I would point out that in the factum of Mr. Wood, it's made very clear that Mr. Wood does not take this step lightly. If there was a stated intention, or even a formed intention to deal with this matter short being even in a position to make a decision about an election, it would be a very different situation.

This is a very complicated procedure for Mr. Wood. It's an expensive procedure for Mr. Wood, and it's not taken lightly. There simply hasn't been enough disclosure provided and a review of the disclosure undertaken to make that election.

As so, what Mr. Wood's application intends to do is to preserve all of the appropriate rights that he has, the most important one, I would submit, to be tried by a jury of his peers.

With respect to the *Bernardo* case, the facts in that case were horrific. The evidence in that case was horrific. The evidence was not provided until the trial, is my recollection. And it was evidence – when my friend mentions the "deal with the devil", it was evidence that dealt not so much with what happened but who did it. But my point is that those were not findings of fact. There was no evidence during that trial that was mentioned where there had been findings of fact with respect to the conduct of Mr. Bernardo prior to the commencement of the criminal trial. And yes, they were able to empanel an impartial jury, the matter was proceeded with and completed. But there's no similarity either in law or in facts with respect to that situation.

And if I can ask the Court to turn to Commission's book of authority, tab 3, to the *Phillips* case, and in particular, paragraph 124 on page 37. This is the distinction that I once again draw the Court's attention to, and it's a very important distinction. It states:

> Public inquiries such as the one which is the subject of this appeal are not and cannot be mere substitutes for criminal proceedings. That their primary purpose is not to assign responsibility or blame is not always recognized by the public.

> In the eyes of most citizens, a public inquiry has many of the characteristics of a criminal trial. The inquiry is often chaired by a judge, who hears the testimony of witnesses under oath and the submissions of lawyers, and who draws conclusions from the evidence presented. A potential juror watching parts of televised hearings may not be unduly influenced by the testimony of any particular witness or witnesses. Common sense, however, suggests that the potential for lasting impartiality is much less when what is published are the carefully reasoned conclusions of a judge who has heard all the testimony and examined all of the evidence relevant to the inquiry mandate. The publication of these findings of facts and conclusions will create a much greater risk of prejudice to fair trial rights. It is this distinction which may require a different treatment of evidence presented in a public hearing and the final inquiry report. Thus, for example, the publication of the final report of the *Hughes Inquiry* was delayed until the completion of the trials of all the former brothers of Mount Cashel.

And then if I might ask you to turn, Mr. Commissioner, to page 43 of 46, paragraph 163.

MR. JACOBSEN: The same decision?

MR. MACRAE: Same decision, yes.

MR. COMMISSIONER: Paragraph 163?

MR. MACRAE: 163, Mr. Commissioner, beginning at the bottom of the page.

> The second condition relates to the Commissioner's final report. For the reasons set out earlier, I am of the view that the publication of the Commissioner's conclusions prior to the completion of the criminal trials could have very well influenced the jurors in their deliberations. The publication of the report should be delayed until such time as Parry and Phillips have had an opportunity to review it and, if so advised, to bring an application to ban its publication until such time as the criminal charges had been disposed of.

So clear, the Court has drawn a substantial and extensive distinction between pretrial publicity that deals with media relationships such as in *Lisi* - we have a situation that was raised where there's been pretrial publicity that's been adverse with respect to Mr. Lisi. But there's been no findings of fact. In fact, that's what the Justice in that particular situation talks about, that it's a long way until there's going to be findings of fact. And he suggests that people may have forgotten by then.

In my respectful submission, your findings, I would submit, that I believe it to be the situation that this Commission would like very

much for the findings of the Commission to be respected by the Attorney General and any recommendations of the Commission to be implemented. That's the very purpose of the Commission.

I'll deal with the issue – if I move on, Mr. Commissioner - I'll deal with the issue – Mr. Huneault is still here - I'll deal with the issue of the Ministry of Labour matter. It - quite frequently, everything is not as it seems. And I understand that my friend has not had the opportunity to review the proceedings, transcript of the proceedings, and also did not have the opportunity to attend at a number of judicial pretrials and non-judicial pretrials with respect to that matter.

At the end of the day Mr. Justice Villeneuve has reserved until August the 12th to decide. My position on the application - and the reason the opposition to the adjournment of the trial of the Ministry of Labour was not because the Ministry of Labour was then going to go to trial first. I spoke very clearly to Mr. Justice Villeneuve on Monday and I stated to Mr. Justice Villeneuve that the true purpose of the application, and the opposition to the application is to require that the Ministry of Labour withdraw the charges or stay the charges.

Because the Crown had already made clear in judicial pretrials, and made very clear in the factum that they filed and the affidavit that they files in support of the motion for the

adjournment, that they had already made the decision that the criminal trial would proceed first. And the reason they made that decision is because of the possibility of a *Keinapple* application, because of issue estoppel, because of abuse of process.

And so my position very clearly on the record, was that this wasn't a response that was seeking an early trial from the perspective of the Ministry of Labour charges. It was a procedure being undertaken by the accused in order to force the Ministry of the Attorney General to essentially pick a lane. They had already chosen the lane, so there was never, and there isn't, in my respectful submission, even as of today, a possibility that the Ministry of Labour charges will proceed before the *Criminal Code* charges, because of the severity of the *Criminal Code* charges the Crown has made it clear that it's intending to proceed.

So, on the surface, it may seem at odds that counsel for Mr. Wood is seeking an early trial in the Ministry of Labour. But procedurally it was a very much different question that was being dealt with, and that in fact it drew a response from Mr. Justice Villeneuve as a result of those submissions that we were talking about prosecutorial discretion, and when I finished those submissions, Mr. Justice Villeneuve asked me directly, because of the outcome this adjournment being that you submit there will be no trial, in the Ministry of Labour charges, are

you not drawing me, as a judge, directly into the arena to interfere with prosecutorial discretion? So that matter is under reserve, we expect to receive its decision, but my submission to you, in response to my friend's submissions, is that the Crown has already made very clear that they are not intending to proceed with the Ministry of Labour charges first. They are going to proceed with the *Criminal Code* charges.

MR. COMMISSIONER: I'm missing something I suppose, but what if Justice Villeneuve happens to agree with you?

MR. MACRAE: The Crown is going to have to either stay the charges or withdraw the charges. Because they've already made clear in their material that they are not going to proceed first with the Ministry of Labour charges because of the severity of the *Criminal Code* charges.

MR. COMMISSIONER: All right, I understand.

MR. MACRAE: And then lastly, if I might just explain something, Mr. Commissioner, in Procedural Order number 12, there's an extensive discussion about the lack of notice with respect to the bifurcation of the application, and I would like to address that, both on behalf of myself and on behalf of my client.

Following on my forwarding the letter to counsel with respect to bringing this application, I was caught by surprise that the letter was actually published and that there was no discussion with myself as counsel about the availability of dates for the particulars of the

application. I now understand why that is, and I'm certainly not complaining. As a result of the issuance of your procedural order, I did in fact certainly meet with my client and I did, with my client's authority and his review, I did complete a five-page letter to the Commission counsel setting out some concerns I had, and setting out the requirement that I was going to bifurcate - attempt to bifurcate this hearing. I chose, as a procedural matter, not to do that because I found out as a result of the first one, and on further reflection, that this subsequent letter would be published on the web as well too.

And so, I apologize for a perception that it may have been unannounced or by surprise. But as a result of Mr. Wood facing criminal charges, it was a decision that was made entirely by his counsel, and not by Mr. Wood. And I would like to take responsibility for that and I'd also like to make you aware of that.

And then lastly, my friend has suggested with respect to credibility, and I understand what Mr. Doody is saying regarding credibility. The issue before the Court, or the Commission, on this application is simply that of section 17 notice redaction of information with respect to the section 17 notice.

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MR. COMMISSIONER: Thank you. I'll deal with that. Anything further?

REPLY BY MS. MACKAY:

MS. MACKAY: I have two brief points in reply. Just with respect to the argument that the Commissioner doesn't have the inherent jurisdiction to make a substantive ruling of law and it's limited to only procedural matters, there's no such distinction in the Act, in our submission. And the case law that is set out by your counsel which indicates you have the ability to apply the *Charter*, certainly belies the argument and certainly any ruling in that regard would be a substantive ruling of law.

With respect to the Attorney General making the redactions rather that the Commission, the Attorney General is not a judicial officer, and I would just reiterate that the *Phillips* decision makes clear that a Commission is best placed to assess the facts and evidence that the Commission has heard and how they may affect the fair trial rights of an individual. There is no suggestion that, in that case, that any other body is better placed to do that.

Finally, with respect to the submission that the Attorney General hasn't proffered any authority interpreting the sections of the *Public Inquiries Act* in the manner in which we indicate they should be interpreted, I would note that this is first commission of inquiry in Ontario since the passage of the new *Act*, and this is the first application of this kind in Ontario. So while it may be true that this decision in this

matter will be charting new ground, that's necessary in this case because of the newness of the *Act*. And those sections, of course, have not been judicially considered until today.

That is all the comments I'd make in reply, Commissioner.

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MR. COMMISSIONER: All right, thank you. Anything further? Well thank you all very much. I'll be issuing my decision in the course of time after I've had occasion to consider your submissions.

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CERTIFICATE OF TRANSCRIPT
EVIDENCE ACT, subsection 5(2)

I, John A. Curry, certify that this document is a true and accurate transcription of the recording of The Elliot Lake Commission of Inquiry Redaction Application held at 161 Elgin Street, Ottawa, Ontario, taken from Digital Recording 0411_CR09_20140620_094412__10_BELANGPA.dcr which has been certified in Form 1.

July 2, 2014
Date

ORIGINAL SIGNED BY
John A. Curry