

**THE CORNWALL
PUBLIC INQUIRY**



**L'ENQUÊTE PUBLIQUE
SUR CORNWALL**

Public Hearing

Audience publique

Commissioner

**The Honourable Justice /
L'honorable juge
G. Normand Glaude**

Commissaire

VOLUME 39

Held at :

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

Tuesday, June 6, 2006

Tenue à:

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

Mardi, le 6 juin 2006

Appearances/Comparutions

Mr. Peter Engelmann	Lead Commission Counsel
Mr. Simon Ruel	Commission Counsel
Ms. Louise Mongeon	Registrar
Mr. Peter Manderville	Cornwall Police Service Board
Mr. Larry Fitzpatrick	Ontario Provincial Police
Ms. Diane Lahaie	
Mr. David Rose	Ontario Ministry of Community and Correctional Services and Adult Community Corrections
Mr. Darrell Kloeze	Attorney General for Ontario
Mr. Peter Chisholm	The Children's Aid Society of the United Counties
Mr. Allan Manson	Citizens for Community Renewal
Mr. Dallas Lee	Victims Group
Ms. Lauren Schellenberger	
Mr. David Bennett	The Men's Project
Mr. André Ducasse	Diocese of Alexandria-Cornwall and Bishop Eugene LaRoque
Mr. Giuseppe Cipriano	The estate of Ken Seguin and Scott Seguin and Father Charles MacDonald
Mr. Mark Wallace	Ontario Provincial Police Association

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

2 L'audience débute à 10h05

3 **THE REGISTRAR:** Order. All rise. À
4 l'ordre. Veuillez vous lever.

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

8 Please be seated. Veuillez vous asseoir.

9 **THE COMMISSIONER:** Good morning all.

10 **MR. ENGELMANN:** Good morning, Mr.
11 Commissioner.

12 Just to set out the day for everyone, if I
13 may, I understand that you wish to start with a decision on
14 the Redaction Motion as brought by Father MacDonald.

15 **THE COMMISSIONER:** Yes.

16 **MR. ENGELMANN:** After which there is an
17 Application to clarify and/or amend a funding order again
18 by Father MacDonald.

19 Then, lastly, the Cornwall Police Services
20 Motion supported by the Diocese dealing with Rule 31 and
21 the issue of privilege.

22 **THE COMMISSIONER:** Yes.

23 **MR. ENGELMANN:** I would just note for the
24 record, we have some new faces here, Darrell Kloeze, whom I
25 think you've met before from the Attorney General.

1 **THE COMMISSIONER:** Yes.

2 **MR. ENGELMANN:** I think everyone else has
3 been here fairly regularly lately.

4 Mr. Cipriano is not here. He had advised me
5 last week that he had a pre-trial here in Cornwall at 9:00
6 and that he would have no difficulty being here for 10:00 -
7 --

8 **THE COMMISSIONER:** Right.

9 **MR. ENGELMANN:** --- and he's not here. So I
10 don't know how you wish to proceed.

11 **THE COMMISSIONER:** So he hasn't called?

12 **MR. ENGELMANN:** No.

13 **THE COMMISSIONER:** Well, I hope he's all
14 right. So why don't we take 15 minutes? Maybe someone has
15 a cell phone -- well, we have a landline but if we had a
16 cell phone number for him, find out if he's okay, if he's
17 not stuck in traffic or anything like that. So why don't
18 we take 15 minutes then and we'll wait for his arrival, and
19 in the meantime if there are any discussions to be had or
20 anything like that.

21 Mr. Chisholm is standing.

22 **MR. ENGELMANN:** I've come to know Mr.
23 Chisholm as a very eager guy.

24 **THE COMMISSIONER:** It seems that way.
25 Great.

1 Let's take 15 minutes and see where we go.

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

4 The hearing will reconvene at twenty after
5 ten.

6 --- Upon recessing at 10:07 a.m./

7 L'audience est suspendue à 10h07

8 --- Upon resuming at 10:41 a.m./

9 L'audience est reprise à 10h41

10 **THE REGISTRAR:** Order. All rise. À
11 l'ordre. Veuillez vous lever.

12 This hearing of the Cornwall Public Inquiry
13 is now in session.

14 Please be seated. Veuillez vous asseoir.

15 **THE COMMISSIONER:** Thank you.

16 Mr. Englemann.

17 **MR. ENGELMANN:** Good morning.

18 Mr. Cipriano is now present, sir. I
19 understand his pre-trial went late and I'll let him speak
20 to that.

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

22 **MR. ENGELMANN:** Before dealing with his
23 application to clarify and/or amend I understand you wish
24 to release a decision on his Motion to redact or remove.

25 **THE COMMISSIONER:** Thank you.

1 **MR. ENGELMANN:** So we'll start there and
2 then I have some comments to make on what we've got coming
3 next.

4 **THE COMMISSIONER:** Okay.
5 Mr. Cipriano.

6 **MR. CIPRIANO:** Good morning, Mr.
7 Commissioner.

8 I wanted to extend my apologies for my late
9 arrival. I was scheduled at a judicial pre-trial this
10 morning that unfortunately did not start until 9:30. It
11 was supposed to start at 9:00 and we got held up. I did
12 not know that you were going to give your ruling this
13 morning. I would have made alternative arrangements. So I
14 do apologize. I have no excuse for being late.

15 **THE COMMISSIONER:** I don't know what we're
16 going to do with you. I don't know. Anyway, that's fine,
17 sir. That's fine.

18 We all waited though, you know, so -- I
19 don't know. We all waited for you and so if we're looking
20 at the public person, all the monies that are going down, I
21 think you should just have to be more careful about how you
22 allocate your time.

23 **MR. CIPRIANO:** I apologize. As I said, I
24 did inform ---

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THE COMMISSIONER: Don't dig yourself any deeper. Go and sit down.

MR. CIPRIANO: Okay.

THE COMMISSIONER: Thank you.

MR. CIPRIANO: Thank you.

THE COMMISSIONER: What I want to do today is to deliver the reasons on the Motion brought on behalf of Father Charles MacDonald and then we'll hear the matter of Mr. Cipriano's Motion for Funding and then we'll deal with the privilege issues from the Cornwall Police and others.

So let me begin by saying that the Motion that we're dealing with today arises by way of Notice of Motion filed by counsel for Father Charles MacDonald and the Estate of Ken Sequin brought on April 13th, 2006.

In their written Motion materials the Applicants request the following; an order removing from the Cornwall Public Inquiry website the affidavits of the Victims Group, which the Applicants submit express conclusions of criminal responsibility that are misleading and leave the Applicants factually guilty absent any evidentiary foundation.

And secondly; in the alternative, the Applicants request a redaction of parts of the said

1 affidavits as; in the Applicants' submission, they are
2 misleading and make criminal and clinical findings of fact
3 without any evidentiary foundation, leaving the Applicants
4 factually guilty with no recourse.

5 The Victims Group, the Citizens for
6 Community Renewal and The Men's Project filed written
7 submissions on this Motion. On April 24th, 2006 I heard
8 oral arguments from counsel acting for these parties and
9 counsel for Father Charles MacDonald and the Estate of Ken
10 Seguin. Counsel for the Cornwall Public Police Service and
11 the Cornwall Police Services Board also made brief oral
12 submissions.

13 The affidavits for the Victims Group were
14 filed as part of the exhibit relating to the Victims Group
15 submissions on standing and funding in the inquiry during
16 the standing and funding hearings held on November 7th,
17 2005. These affidavits were posted on the Commission
18 website on November 17th, 2005 under the link "Parties With
19 Standing. Also, on November 17th, 2005 I released my Ruling
20 on Standing and Funding and read it into the record of
21 proceedings that day. Both the Commission transcripts of
22 proceedings and my Ruling on Standing and funding are
23 posted on the Commission website.

24 After having raised the issue of the Victims
25 Group's affidavits being posted on the Cornwall Public

1 Inquiry website with Commission counsel during the week of
2 March 27th, 2006, counsel for the Applicants filed a Notice
3 of Motion in respect of this issue on April 13th, 2006.

4 It is important to note from the outset that
5 rights to privacy or confidentiality have not been argued
6 in support of this Motion. In his oral submissions,
7 counsel for the Applicants indicated that he has not asked
8 that "the materials be marked confidential or that they be
9 taken away together".

10 Accordingly, this Motion represents a much
11 different factual context than did the Motion brought by
12 the Episcopal Corporation of the Diocese of Alexandria-
13 Cornwall. That Motion resulted in my interim order to
14 redact names from certain affidavits posted on the
15 Commission website filed by the Victims Group in support of
16 their Application for Standing and Funding and to ban the
17 publication of those affidavits, as well as to ban the
18 publication of certain of those names.

19 In that Motion I granted interim relief
20 based on the fact that it was premature and speculative to
21 deal with issues of rights of privacy in a vacuum outside
22 of an evidentiary context. As well, all of the parties who
23 made submissions in the Motion brought by the Episcopal
24 Corporation of the Diocese of Alexandria Cornwall; that is,
25 the Victims Group, the Citizens for Community Renewal, The

1 Men's Project, Father Charles MacDonald and the Estate of
2 Ken Seguin consented to the relief sought.

3 So on the issue of preliminary matters, in
4 his written Motion materials the Victims Group submits that
5 because the Estate of Ken Seguin was not granted standing
6 on Phase I of the inquiry, Mr. Cipriano does not have the
7 authority to bring this Motion on the Estate's behalf.

8 The standing and funding hearings were
9 preliminary Commission proceedings dealing with standing
10 and funding issues for both Phase I and Phase II Commission
11 hearings. I do not see how the fact that the Estate of Ken
12 Seguin was not granted standing for Phase I of the inquiry
13 would affect its ability to bring this Motion dealing with
14 evidence submitted during standing and funding hearings.
15 Accordingly, I am satisfied that the Estate was probably
16 included as an Applicant in this Motion.

17 The Victims Group also takes issue with the
18 timing and appropriateness of this Motion. It submits that
19 the issue raised in the present Motion is the same as that
20 raised in the Applicants' Motion concerning this
21 Commission's jurisdiction to inquire into specific
22 allegations of sexual abuse or other wrongdoing made by
23 alleged victims against the Applicants.

24 My Ruling in respect of that Motion was
25 released on May 1st, 2006. Although some of the arguments

1 in support of both Motions are similar, the issues raised
2 are not. This present Motion deals with limiting public
3 access to Commission Exhibits.

4 Now, I will deal with the nature of the
5 relief sought. In this Motion the Applicants are seeking
6 the removal of certain affidavits of the Victims Group from
7 the Cornwall Public Inquiry website, or in the alternative,
8 the redaction of portions of those affidavits.

9 The removal of the affidavits from the
10 Commission website would leave the affidavits available to
11 the public, in that any member of the public could request
12 copies and be provided with them at cost. Their removal
13 from the website would not prevent the public from having
14 access to them. Although not a complete ban to public
15 access, the removal of the affidavits of the Victims Group
16 from the Commission's website would limit public access
17 through the record of Commission proceedings, in that the
18 affidavits would no longer be as readily accessible by the
19 public at large.

20 In the case of the *Toronto Star Newspaper v*
21 *Ontario*, the Supreme Court of Canada decision confirmed
22 that while the *Dagenais* and *Mentuck* test was developed in
23 the context of publication bans at the time of trial, it
24 applies to all discretionary court orders that limit
25 freedom of expression and freedom of the press in relation

1 to legal proceedings. Therefore, the *Dagenais* and *Mentuck*
2 test applies to the determination of whether relief in the
3 form of the removal of the affidavits of the Victims Group
4 from the Commission website ought to be granted.

5 The alternative remedy sought by the
6 Applicants in this Motion is the redaction of parts of the
7 affidavits of the Victims Group. As in the Applicants
8 submission, they are misleading and make criminal and
9 clinical findings of fact without an evidentiary
10 foundation, leaving the Applicants factually guilty with no
11 recourse.

12 In his oral submissions, counsel for the
13 Applicants indicated that redaction is sought in order to
14 respect the presumption of innocence. The redaction of
15 parts of the affidavits of the Victims Group would also
16 limit public access to the record of Commission proceedings
17 and thus the *Dagenais* and *Mentuck* test applies.

18 In this respect it is important to note that
19 I have not been provided with submissions from counsel for
20 the Applicants on the application of the *Dagenais* and
21 *Mentuck* test in relation to the relief sought by way of
22 this Motion, as their position is that the test does not
23 apply in the context of their seeking an order removing the
24 affidavits of the Victims Group from the Commission website
25 or an order redacting parts of the affidavits.

1 In the *Vancouver Sun* case; again, a Supreme
2 Court of Canada decision, it considered the parameters of
3 the open court principle, and I quote:

4 "This court has emphasized on many
5 occasions that the open court principle
6 is a hallmark of a democratic society
7 and applies to all judicial
8 proceedings."

9 And that is cited in the *Attorney General v*
10 *Nova Scotia* cases and a number of other cases.

11 Again, continuing the citation:

12 "Public access to the courts guarantees
13 the integrity of judicial proceedings
14 by demonstrating that justice is
15 administered in a non-arbitrary manner
16 according to the rule of law. Openness
17 is necessary to maintain the
18 independence and impartiality of
19 courts. It is integral to public
20 confidence in the justice system that
21 the public's understanding of the
22 administration of justice. Moreover,
23 openness is a principle component of
24 the legitimacy of the judicial process
25 and why the parties and the public at

1 large abide by the decisions of courts.
2 The open court principle is
3 inextricably linked to the freedom of
4 expression protected by section 2(b) of
5 the Charter and advances the core
6 values therein. The right of the
7 public to receive information is also
8 protected by the constitutional
9 guarantee of freedom of expression.
10 Consequently, the open court principle,
11 to put it mildly, is not to be lightly
12 interfered with."

13 And that is quoted by Madam Justice Arbour
14 and Mr. Justice Iacobucci speaking for the majority of the
15 Supreme Court of Canada.

16 The most recent formulation of the *Dagenais*
17 and *Mentuck* test by the Supreme Court of Canada can be
18 found in the *Toronto Star Newspaper* case. In that case,
19 the test applies to all discretionary actions which limit
20 freedom of expression and freedom of the press at every
21 stage of the judicial proceedings. The test, though
22 applicable at all stages, is a flexible and contextual one.
23 Courts have tailored it to fit a variety of discretionary
24 actions such as confidentiality orders, judicial

1 investigative hearings and Crown initiated applications for
2 publication bans. The test is as follows.

3 "The publication ban or discretionary
4 court order that limits freedom of
5 expression and freedom of the press in
6 relation to legal proceedings should be
7 ordered only when:

8 (a) such an order is necessary in order
9 to prevent a serious risk to the proper
10 administration of justice because
11 reasonable alternative measures will
12 not prevent the risk; and

13 (b) the salutary effects of the order
14 sought outweigh the deleterious effects
15 on the rights and interests of the
16 parties and the public, including the
17 effects on the right to free
18 expression, the right of the accused to
19 a fair and public trial, and the
20 efficacy of the administration of
21 justice.

22 The risk in the first prong of the
23 analysis must be real, substantial, and
24 well grounded in the evidence: 'it is
25 a serious danger [that is] sought to be

1 avoided that is required, not a
2 substantial benefit or advantage to the
3 administration of justice sought to be
4 obtained.'"

5 A party seeking to limit public access to
6 legal proceedings must rely on more than a generalized
7 assertion of possible disadvantage.

8 In *Phillips v. Nova Scotia*, the Westray Mine
9 tragedy, Mr. Justice Cory adopted the test set out in
10 *Dagenais*.

11 In that case, the court considered the
12 impact of hearings of commission of inquiry on the rights
13 of a witness before that commission who was also accused in
14 concurrent criminal proceedings.

15 Mr. Justice Cory found that if the accused
16 elected to be tried before a judge alone, then a pre-trial
17 publicity will not be taken into consideration in assessing
18 the fairness of the trial, and that evidence establishing
19 the probable effects of the publicity will be required. As
20 well, relief should only follow satisfactory proof of a
21 link between the publicity and its adverse effects.

22 Mr. Justice Cory went on to say that:

23 "Negative publicity does not, in
24 itself, preclude a fair trial. The
25 nexus between publicity and its lasting

1 effects may not be susceptible of
2 scientific proof, but the focus must be
3 upon that link and not upon the mere
4 existence of publicity.”

5 The Cornwall Public Inquiry was established
6 by an Order in Council dated April 14th, 2005. The Order in
7 Council directs the Commission to inquire into and report
8 on the institutional response of the justice system and
9 other public institutions, including the interaction of
10 that response with other public and community sectors in
11 relation to allegations of historical abuse of young people
12 in the Cornwall area in order to make recommendations
13 directed to the further improvement of the response in
14 similar circumstances.

15 The Order in Council also directs the
16 Commission to inquire into and report on processes,
17 services or programs that would encourage community healing
18 and reconciliation in Cornwall.

19 In my opening remarks made on November 7th,
20 2005, I stressed that what is most important is that this
21 inquiry be public in every sense of the word. As I stated
22 in my ruling on standing and funding, openness and
23 transparency of proceedings is a guiding principle in this
24 public inquiry.

25 The Cornwall Public Inquiry website is a key

1 medium through which the Cornwall community and the broader
2 public who have an interest in the work of this inquiry can
3 easily remain informed of its progress.

4 Paragraph 6 of the Order in Council
5 established in the Cornwall Public Inquiry, informs the
6 balancing exercise which I must follow in the context of
7 the disclosure of evidence and other materials in the
8 exercise of my mandate. And I quote:

9 "The Commission shall ensure that
10 disclosure of evidence and other
11 materials balances the public interest,
12 the principle of open hearings, and the
13 privacy interests of the person(s)
14 affected, taking into account any legal
15 requirements."

16 In this respect, Rule 39 of the Commission's
17 Rules of Practice and Provisions Procedure provides:

18 "Without limiting the application of
19 section 4 of the *Public Inquiries Act*,
20 the Commissioner may, in his discretion
21 and in appropriate circumstances,
22 conduct hearings in private and/or
23 issue orders prohibiting the
24 disclosure, publication, broadcast or
25 communication of any testimony,

1 document or evidence when he is of the
2 opinion that intimate, medical or
3 personal matters or other matters are
4 of such a nature, having regard to the
5 circumstances, that the desirability of
6 avoiding disclosure outweighs the
7 desirability of adhering to the general
8 principle that the hearing should be
9 open to the public."

10 Now, with respect to the analysis, I've
11 looked at and considered the risks associated with leaving
12 the affidavits of the Victims Group on the Commission
13 website or not ordering the redaction of portions of them.
14 I find that the Applicants have not demonstrated that the
15 removal of the affidavits of the Victims Group from the
16 Commission website, or the redaction of portions of them,
17 is necessary in order to prevent a serious risk to the
18 proper administration of justice.

19 Counsel for the Applicants submit that, to
20 the extent that the affidavits make factual conclusions of
21 guilt and clinical diagnosis absent to any evidentiary
22 basis, that they are gravely prejudicial and highly
23 unreliable. He argues that the conclusions sworn to be
24 true by the Affiants will have the effect of distorting
25 facts, misleading the public and the Commission as to what

1 occurred and leave no opportunity to respond and
2 contradict.

3 In his oral submissions, counsel for the
4 Applicants argued that posting the affidavits on the
5 Commission website leaves the Applicants factually guilty;
6 that the affidavits make factual conclusions of criminal
7 responsibility without any basis for those conclusions;
8 that they have very little probative value in relation to
9 their prejudicial effect and that they are unreliable and
10 misleading; and lastly, that they bear little relevance to
11 the mandate of the inquiry.

12 In support of his argument that the
13 affidavits contain misleading information, counsel for the
14 Applicants has only directed me to one specific affidavit.

15 In his Notice of Motion and Submissions,
16 counsel for the Applicants has apparently quoted a portion
17 of the testimony of a witness from the preliminary inquiry
18 in *R. v. MacDonald* and compared it to the affidavit of that
19 witness provided to the Commission by the Victims Group in
20 its Application for Standing and Funding.

21 My first comment in this respect is that
22 incomplete testimony quoted by counsel in a Notice of
23 Motion and Submissions document does not constitute
24 evidence upon which I can draw a conclusion that the
25 affidavit in question contains misleading information.

1 I would have expected that a complete
2 transcript of the witness' testimony would have been
3 tendered as evidence in support of that argument. However,
4 in order to give Father MacDonald and the Estate of Ken
5 Seguin's argument full consideration, I shall consider
6 those portions of the evidence that was presented.

7 In so doing, I do not find that the
8 statement in the affidavit in question to be necessarily
9 inconsistent with the quoted testimony. Moreover, the
10 statement in question does not directly pertain to the
11 identification of Father MacDonald as an alleged abuser.
12 It pertains to the faith of the witness/alleged victim.

13 Counsel for the Applicants add that many
14 alleged victims in the Victims Group affidavits claim to
15 have been victims of child sexual abuse at times when they
16 were not children.

17 Again, only one specific example was
18 identified and, in any event, does not directly pertain to
19 the identification of Father MacDonald or to the late
20 Kenneth Seguin as alleged abusers.

21 Other than the instances described above,
22 counsel for the Applicants has identified the affidavits in
23 respect of which relief is sought as approximately 16 of
24 the Victims Group affidavits submitted in their Application
25 for Standing and Funding naming the Applicants as having

1 committed sexual assault.

2 Use of the word "approximately" to describe
3 the affidavits in question makes the identification of the
4 affidavits in respect of which relief is sought, difficult.
5 Further, the portion of the affidavits sought to be
6 redacted had not been identified. I'm thus unable to
7 assess how possible redactions are necessary to prevent a
8 serious risk to the proper administration of justice.

9 Now, counsel for the Applicants submits that
10 the posting of the affidavits submitted by the Victims
11 Group in its Application for Standing and Funding on the
12 Commission website implies that the Commission has accepted
13 them as true.

14 He further submits that those whose rights
15 have been affected by the affidavits and ultimately anyone
16 coming to the Commission website could be left with the
17 impression that the affidavits have been accepted as true
18 by the Commission.

19 I simply do not agree. The posting of the
20 affidavits of the Victims Group on the Commission website
21 does not imply that I have made a finding of criminal or
22 civil liability or a finding of fact which could lead to an
23 inference of guilt or civil liability. Nor is it
24 reasonable to find that a reasonable person would accept
25 these affidavits as a finding of guilt or that the fact

1 that they were on the website would give them legitimacy
2 with respect to the truth of their contents.

3 In the portion of my ruling on standing and
4 funding dealing with the Victims Group I specifically
5 stated that given that my mandate does not include
6 determining guilt or innocence, I do not make any findings
7 on this other than that the members of this group claim to
8 be victims of sexual abuse.

9 My ruling on standing and funding was issued
10 on November 17th, 2005 and read into the record of
11 proceedings. It is posted on the Commission website.

12 Further, in my opening remarks made on
13 February 13th, 2006, I stressed that, and I quote:

14 "There have been criminal proceedings
15 in courts and there are ongoing civil
16 proceedings. This inquiry does not and
17 cannot seek, in effect, to try or to
18 retry these matters. It is not within
19 my mandate to determine who did what to
20 whom although I may make findings of
21 fact about what allegations were made
22 to various public institutions and how
23 these institutions responded, including
24 the interaction of the response with
25 other public and community sectors."

1 As well, in my ruling on the jurisdictional
2 motion issued on May 1st, 2006, I again stressed that it's
3 not the intention of the Commission to try or to retry the
4 criminal or civil matters arising out of the facts that are
5 part of my mandate.

6 This is expressly prohibited by Section 7 of
7 the Order in Council establishing the Cornwall Public
8 Inquiry which provides that, and I'm reading Section 7:

9 "The Commission shall perform its
10 duties without expressing any
11 conclusion or recommendation regarding
12 the civil or criminal liability of any
13 person or organization. The
14 Commission, in the conduct of its
15 inquiry, shall ensure that it does not
16 interfere with any ongoing legal
17 proceedings relating to these matters."

18 Counsel for the Applicants directed me to
19 one instance where the affidavits from the Commission
20 website are allegedly being misused. He submits that the
21 affidavits taken from the Commission website are being
22 misused on another website and this is an example of how
23 persons visiting the Commission website could see the
24 affidavits as -- and he quotes:

25 "...reliable, accurate representations of

1 the factual basis of the inquiry and
2 accepting the conclusions of the
3 affidavits as true."

4 Counsel's assertions that certain
5 information appears on the website does not constitute
6 evidence. As well, given the limited information provided,
7 I am unable to assess the full context in which the
8 information apparently appears on the website in question.

9 In any event, based upon the limited
10 information before me, this argument falls short. I do not
11 find that the affidavits are being misused. In fact, the
12 authors of the website are very careful to say that they
13 are only allegations.

14 The removal of the affidavits from the
15 Commission website would leave the affidavits available to
16 the public, in that any member of the public could request
17 copies and be provided with them at cost.

18 In contrast to the relief sought in the
19 motion brought by the Episcopal Corporation of the Diocese
20 of Alexandria-Cornwall, the removal of the affidavits from
21 the Commission website would not prevent a member of the
22 public from posting publicly available documents on another
23 internet website.

24 Counsel for the Applicants' argument that
25 the Applicants have suffered a prejudice falls short of

1 satisfying me that that is the case. The Applicants have
2 not demonstrated that there is a real and substantial risk
3 grounded in evidence or having factual underpinnings
4 associated with leaving the affidavits of the Victims Group
5 on the Commission website or not ordering the redaction of
6 portions of them.

7 In the end, I'm concerned with fairness. I
8 must balance legitimate privacy interests with the public
9 interests and the principle of open hearings taking into
10 account any legal requirements. This balancing exercise
11 poses unique and ongoing challenges in the context of this
12 public inquiry. In this instance, counsel for the
13 Applicants has not satisfied me that there is a risk
14 associated with leaving the affidavits of the Victims Group
15 on the Commission website or not ordering the redaction
16 portions of them.

17 Accordingly, there is no need to enter into
18 an analysis of the second prong of the *Dagenais/Mentuck*
19 test; that is, to balance the effect of the order sought
20 against their effect on the rights and interests of the
21 parties and the public.

22 I would thus dismiss this motion. Thank
23 you.

24 **MR. ENGELMANN:** So Mr. Commissioner, the
25 next matter on the schedule for today is an application for

1 a clarification and/or amendment of the funding order,
2 again brought by Mr. Cipriano on behalf of Father Charles
3 MacDonald. And as this is an application to amend or
4 clarify, Commission counsel suggests that we mark new
5 documents simply with reference to the exhibits that were
6 filed for the motion for standing and funding.

7 **THE COMMISSIONER:** Yes.

8 **MR. ENGELMANN:** And last week on May 30th,
9 counsel were directed -- counsel for Father MacDonald -- to
10 file electronically by noon yesterday.

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

12 **MR. ENGELMANN:** And then other counsel
13 wishing to speak to the motion in any way, if they wish to
14 file written submissions to do so by 9:00 o'clock this
15 morning and if they didn't wish to file written submissions
16 but wish to speak to the motion they could still do so,
17 given the short timeframe for this motion and the urgency
18 to get this matter on.

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

20 **MR. ENGELMANN:** So I know that Mr. Cipriano,
21 on behalf of Father MacDonald, filed a factum with us
22 electronically yesterday at approximately 3:30. We have
23 received materials this morning from him as well and we
24 have received -- yesterday, we received electronically

1 materials from the Citizens for Community Renewal, from
2 their counsel.

3 So what I'd like to do then, if I could, is
4 simply ask that you mark the Citizens for Community Renewal
5 -- their original application was Exhibit 6. So if we
6 could mark their submissions as Exhibit 6.3? And I believe
7 you may have them electronically so that they can be
8 brought up on the screen.

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

10 **--- EXHIBIT NO./PIÈCE NO 6.3:**

11 Factum - Citizens for Community Renewal Re:
12 Application to Clarify Funding

13 **MR. ENGELMANN:** I understand that Mr.
14 Cipriano has an Application record which would include his
15 written submissions that were received yesterday afternoon
16 and perhaps that could be marked as Exhibit 12.2, and my
17 copy is blue. I received it this morning.

18 Do you have that, sir?

19 **THE COMMISSIONER:** Application record?

20 **MR. ENGELMANN:** Right; perhaps if that could
21 be marked, then, as Exhibit 12.2? My understanding is
22 Father MacDonald's Application for Standing and Funding was
23 Exhibit 12.

24 **--- EXHIBIT NO./PIÈCE NO 12.2:**

25 Factum - Father Charles MacDonald

1 Re: Application to Clarify Funding

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

3 **MR. ENGELMANN:** And then, as well, received
4 this morning a two-volume casebook filed by counsel for
5 Father Charles MacDonald and perhaps they could just be
6 marked as Exhibit 12.3; there being two volumes, the first
7 one with six tabs and the second one with another five tabs
8 right through Tab 11. And I'm not sure if counsel was
9 asked to provide sufficient copies for the Commission; in
10 other words, the five written copies plus sufficient copies
11 for all other counsel -- might be appearing up to 12 -- and
12 I'm not sure if that was done, but I'll let Mr. Cipriano
13 speak to that and also Mr. Manson with respect to his
14 materials.

15 --- **EXHIBIT NO./PIÈCE NO 12.3:**

16 **Volume I** - Submissions to Father Charles
17 MacDonald in the Matter of an Application
18 to Clarify Funding Tabs 1 to 6

19 **Volume II** - Submissions to Father Charles
20 MacDonald in the Matter of an Application
21 to Clarify Funding Tabs 7 to 11

22
23 **THE COMMISSIONER:** Now, is there anyone else
24 that will make any submissions on this, do you know?

1 **MR. ENGELMANN:** I don't know, sir, if others
2 are intending to make oral submissions. I note that
3 several counsel had expressed wishing to receive funding if
4 Mr. Cipriano was successful on behalf of Father MacDonald.
5 I believe there are other parties who then might seek
6 funding as well to speak to the other side of the issue in
7 the Divisional Court. But I'll let counsel speak to that.

8 **THE COMMISSIONER:** Okay. I am just trying
9 to assess time now.

10 **MR. ENGELMANN:** Perhaps we could just
11 canvass counsel right now.

12 **THE COMMISSIONER:** Yes.

13 **MR. ENGELMANN:** I think Mr. Manson has
14 submissions in response.

15 **THE COMMISSIONER:** How much time are we
16 looking at? Mr. Cipriano, how long do you think you will
17 be?

18 **MR. CIPRIANO:** I will probably be 30 minutes
19 or 40 at the most.

20 **THE COMMISSIONER:** Okay.

21 Mr. Manson?

22 **MR. ENGELMANN:** Ten (10) minutes from Mr.
23 Manson; two minutes from Mr. Bennett.

24 **MR. CHISHOLM:** Five (5) to 10 minutes.

1 **MR. ENGELMANN:** We're looking at about an
2 hour.

3 **MR. MANDERVILLE:** Perhaps five minutes and
4 perhaps none depending on what is said before.

5 **THE COMMISSIONER:** All right, good.

6 **MR. ENGELMANN:** Approximately an hour, sir.

7 **THE COMMISSIONER:** All right.

8 I don't have a watch today.

9 **MR. ENGELMANN:** It's 11:15 right now.

10 **THE COMMISSIONER:** All right.

11 Why don't we hear Mr. Cipriano and then we
12 will take a break and then we'll carry -- no, it's okay.
13 I'll just put my computer on. Thank you, Madam Clerk.

14 **(SHORT PAUSE/COURTE PAUSE)**

15 **MR. CIPRIANO:** I'll try to move as quickly
16 as I can, sir.

17 **THE COMMISSIONER:** No problem.

18 --- SUBMISSION ON MOTION BY/REPÉSENTATION SUR REQUÊTE PAR
19 **MR. CIPRIANO:**

20 **MR. CIPRIANO:** I'm going to start off by
21 advising the Commission where I'm going to go with my
22 arguments this morning.

23 The first argument I'm going to present with
24 respect to clarification for the funding of Father
25 MacDonald is that when the application for funding and in

1 the course of the inquiry there was an expectation that
2 the funding for a party who could not otherwise participate
3 in the inquiry included the ability to exercise the
4 statutory rights to review decisions that go to the
5 jurisdiction of the inquiry and, in effect, the Applicant's
6 interest. If not, if I am wrong in that interpretation and
7 that it does not include funding to exercise those
8 procedural routes, I then will move on to the next argument
9 that the Commission does have discretion to recommend
10 funding for a review in order that the proper work of the
11 inquiry can be carried out in its mandate and, finally,
12 that it ought to be funded in this circumstance.

13 So those are the arguments I'm going to put
14 forth.

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

16 **MR. CIPRIANO:** And I'll start off, I guess,
17 with some context.

18 In the fall of 2005 it was publicized that
19 the inquiry would be taking applications for parties who
20 have an interest in the inquiry, and applications for both
21 standing and funding were to be heard in the early days of
22 November.

23 On behalf of the Applicant, an Application
24 was sent to Commission counsel and parts of that -- the
25 Application is reproduced at Tab 7 of the Application

1 Record but the essential parts are reproduced in my
2 submissions. Just reading from paragraph 14 and 15 I'll
3 just summarize. It wasn't clear at that point whether the
4 Applicant would be an essential player in the inquiry. It
5 wasn't clear how the mandate was going to be executed at
6 that time and perhaps it may have been a bit premature to
7 decide on whether the Applicant should be granted standing
8 and funding given that the mandate and the execution of
9 Parts I and II of the inquiry weren't clear yet at that
10 point.

11 The Application was, however, made and the
12 Applicant was granted standing as well as funding in the
13 participation of both Parts I and II, to the extent that it
14 affects his interests.

15 In granting standing to those issues that
16 affect his interests, it's my submission that the
17 Commission was satisfied that the interests of Father
18 MacDonald are directly and substantially affected by Part I
19 of the inquiry. In granting standing for Part II, the
20 Commission was satisfied that the interests of Father
21 MacDonald in Part II are substantially affected, enough to
22 warrant that Father MacDonald be given standing at the
23 inquiry.

24 Based on the Ruling on Standing, it's my
25 submission that the Commission was satisfied that a sense

1 of wellbeing or a fear of an adverse effect on the legal
2 interests of the Applicant were objectively reasonable
3 enough that standing was appropriate for the Applicant at
4 this inquiry.

5 Now, with respect to funding, it was stated
6 that funding is awarded to those who cannot otherwise
7 participate in order to protect an interest or put forth
8 their positions at the inquiry.

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

10 **MR. CIPRIANO:** And, generally speaking, the
11 funding as recommended in section 10 and as amplified by
12 the Commission in the Ruling for Funding -- Ruling on
13 Standing and Funding -- is generally grounded in a
14 principle of fairness in that an applicant or a party has
15 been granted standing because their interests are important
16 enough that they ought to be protected at the inquiry but
17 they could not otherwise do so unless funding was
18 recommended.

19 It would be a disservice then to achieving
20 the mandate if the person who has an interest would not
21 otherwise be permitted to participate in the inquiry. And
22 so, in granting funding to the Applicant, the Commission
23 has determined that the Applicant could not otherwise
24 participate and put forth or protect the interests at stake
25 without the recommendation of funding in order that the

1 Applicant participate in the inquiry and all the procedural
2 routes that are available at the inquiry.

3 Before the inquiry commenced on February
4 13th, various parties had written to Commission counsel
5 raising some issues with respect to the jurisdiction of the
6 inquiry to take certain steps and lead certain evidence. I
7 won't go through each one but if I can summarize -- and the
8 letters are all reproduced in the Application Record -- but
9 if I can summarize, a lot of the concern was raised whether
10 the inquiry had the jurisdiction to lead evidence of
11 alleged complainants and what that would mean and what the
12 consequences for the inquiry would be.

13 And it's my submission that, given those, it
14 was still unclear at the time how Part I at least would be
15 executed by the inquiry. Commission counsel responded, as
16 well as the Commission itself, indicating what they thought
17 was the way the inquiry was going to proceed and invited
18 that if counsel or if other parties had issues, to bring
19 motions. Now, due to some scheduling and prior commitments
20 the motions were -- the Applicant had brought a motion that
21 was litigated on the 29th of March and was subsequently
22 dismissed on the 1st of May.

23 Prior to arguing the -- and filing the
24 motion, it was communicated to Commission counsel that
25 perhaps once -- it may have been a bit premature as well to

1 argue such a motion of a jurisdictional nature, given that
2 a list of witnesses were not available, what their
3 anticipated evidence would be was not available. However,
4 the Commission still wanted to pursue the issue and invited
5 that the motion be filed and litigated so that the issues
6 could be dealt with in a speedy fashion.

7 So as indicated, a motion was brought.
8 There was a ruling and subsequent to the ruling it was
9 stated that issues such as jurisdictional issues do crop up
10 in inquiries. Appeals and reviews are expected. It's what
11 has happened before. It's not an unusual route that
12 motions are brought regarding the jurisdiction of the
13 inquiry and that the Divisional Court review those issues.

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

15 **MR. CIPRIANO:** And so putting that in
16 context, the first issue that I have raised is the
17 expectation that the funding in order to participate -- or
18 a party who cannot otherwise participate and have access to
19 the tools of the inquiry, the procedural routes available,
20 that it was expected or it is expected that that funding
21 also includes the ability to exercise the statutory rights
22 available, the statutory procedural rights that are
23 available to all parties who have standing at the inquiry.

24 One of those statutory procedures is,
25 pursuant to the *Public Inquiries Act*, the ability to review

1 a decision made in the course of the inquiry in the
2 Divisional Court.

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

4 **MR. CIPRIANO:** On top of the statutory
5 rights, there is obviously the common law right to have
6 decisions of an administrative order of a public inquiry
7 reviewed at the Divisional Court, but the provincial
8 government has felt a need that it had to specifically
9 award that right in the *Public Inquiries Act* under section
10 6(2) of the *Public Inquiries Act*.

11 **THE COMMISSIONER:** But is it a right or is
12 it just saying, "This is where you will appeal if you want
13 to appeal"?

14 **MR. CIPRIANO:** The way I would phrase it is
15 it's a procedural right or route that is available to
16 parties with standing. A party with standing not only with
17 respect to -- not only has the common law procedural route
18 available to that party but they also have the statutory
19 route available to that party should they wish to have a
20 review of a decision made in the course of a public
21 inquiry.

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

23 **MR. CIPRIANO:** The importance of that, in my
24 submission, is that, I think, it's evidence that the
25 legislator contemplated that disputes at inquiries do arise

1 and that disputes can be of such a nature that they do
2 require a review of a court that has an inherent
3 supervisory jurisdiction. And the fact that it's now
4 codified in the *Public Inquiries Act*, in my submission,
5 would lead to a conclusion that issues that go to the
6 jurisdiction of an inquiry to take a certain step or calls
7 certain evidence are ones that once a decision is made, it
8 is part of the work of parties with standing to, if they
9 want, to seek reviews of those decisions given the
10 important nature of the decision and the rights and
11 consequences on interested applicants or interested parties
12 have with respect to that decision.

13 The funding that is contemplated by the
14 Order in Council and by the rules of the inquiry is really
15 one aimed at participation where it could not otherwise be
16 possible and, in my submission, participation ought to
17 include the ability to take advantage of the procedural
18 routes that are available to all parties. All parties have
19 that route available to them at the inquiry regardless of
20 whether they have funding or not. A party that does not
21 have funding obviously can seek the advice of their client
22 and decide whether a review ought to take place or not, and
23 given that a party with funding is wholly dependent on the
24 inquiry to participate and engage the tools available, then
25 it's my submission that the funding as it exists ought to

1 include the funding to have a matter that affects a party's
2 interests reviewed by a court that is designated to review
3 such issues.

4 Essentially, the objective of funding, in my
5 submission, would be that it levels the playing field
6 between those that have the ability to participate without
7 funding and those that do not have that ability. And so
8 essentially, in my submission, there is what I would rely
9 on a legitimate expectation that funding includes the
10 ability to use the procedural routes available to all
11 parties at the inquiry. Otherwise, it would not -- a party
12 who is wholly dependent on funding would not have all of
13 the procedural routes available to them as opposed to
14 parties who are not reliant on funding.

15 Now, the doctrine of legitimate expectation
16 is one that arises out of the doctrine of fairness and it
17 provides a party where a right to a procedure where, as a
18 result of action or decisions, there is a reasonable
19 expectation that such a procedure is available to them.
20 The doctrine was affirmed by the Supreme Court of Canada in
21 the *Baker case* and that quotation is cited at paragraph 50
22 of my submissions and it reads that:
23 "If the claimant has a legitimate expectation that a certain procedure will be followed, this
24 procedure will be required by the duty of fairness. Similarly, if a claimant has a legitimate
25 expectation that a certain result will be reached in his or her case, fairness may require more

1 extensive procedural rights than would otherwise be accorded. Nevertheless, the doctrine of
2 legitimate expectations cannot lead to substantive rights outside the procedural domain. This
3 doctrine, as applied in Canada, is based on the principle that "circumstances" affecting
4 procedural fairness take into account the promises or regular practices of administrative
5 decision-makers, and that it will generally be unfair for them to act in contravention of
6 representations as to procedure..."

7 Now, the doctrine has priorly been used to
8 afford someone the ability to simply make
9 representations and that's what the Supreme Court
10 had decided in reference through Canada
11 Assistance Plan.

12 However, since that case, in a case I
13 referred to the Mount Sinai Hospital Center, the Quebec
14 Ministry of Health and Social Services, Justice Binnie
15 clarified that what is meant by "procedure" is wide
16 ranging, it is not simply limited to the ability to make
17 representations. And in quote from that case where Justice
18 Binnie states:

19 "In referring to the making of
20 representations, of course Supinka..."
21 being the author of the referenced re Canada Assistance
22 Plan Justice,

23 "... was not limiting relief to just to
24 representations but intended to include

1 whatever procedural remedies might be
2 appropriate on the facts of a
3 particular case. Procedure is a broad
4 term. The door was shut only against
5 substantive relief. It seems to me,
6 notwithstanding the respondents'
7 argument, that this conclusion should
8 be affirmed."

9 That the doctrine of reasonable expectations
10 extends to procedural procedures, procedural
11 remedies in general, I think, has been applied by
12 other courts and tribunals in the Pulp and Paper
13 and Woodworkers of Canada, Local 8, to the Canada
14 Ministry of Agriculture, the Federal Court of
15 Appeal held that there was a legitimate
16 expectation to extend expectations -- the
17 expectations by applicants that a third party
18 would be consulted by the Minister in arriving at
19 a decision. In that case, the expectation was
20 not fulfilled as a third party had not been
21 contacted by the Minister in arriving at his or
22 her decision.

23 It's been held that there is a legitimate
24 expectation that employees will be entitled to certain
25 bonuses because of their bilingualism and that this policy

1 applies to both civilian and non-civilian members of CSIS
2 and the RCMP. In that case, the Federal Court determined
3 that both civilian and non-civilian members had an
4 expectation that that entitlement applied to them and there
5 was no distinguishing -- there should not be a
6 distinguishing feature between a civilian and a non-
7 civilian member.

8 Again, referring to Justice Binnie's reasons
9 in the *Mount Sinai* case, he refers to a decision of
10 *Bendahmane v. Canada*, and this is referred to at paragraph
11 55 of my submissions, in that case, the Federal Court of
12 Appeal held that a refugee had based on prior conduct of
13 the Tribunal of sending cases to a backlog reduction
14 program, that that claimant in that case specifically had
15 an expectation that his case would receive the benefits of
16 a backlog reduction program. And Justice Binnie, in my
17 submission, uses that case to indicate how procedures can
18 mean a wide range of things. It doesn't simply mean the
19 ability to make oral representations. And he quotes, and I
20 have that quotation at the end of paragraph 55 of my
21 submissions that:

22 "In affirming that the doctrine of
23 legitimate expectations is limited to
24 procedural relief, it must be
25 acknowledged that in some cases, it is

1 sufficiently important enough that to otherwise
2 not have funding, the Applicant would not
3 otherwise be able to participate and have the
4 tools at the inquiry at his disposal.

5 Funding that was provided was provided on
6 the basis of participation, and participation, in my
7 submission, means having access to the tools that are
8 available to parties. Part of the tools or one of the
9 tools and, in fact, what I would submit an important tool
10 that is available to a party, particularly a party whose
11 interests may be deeply affected from an action that the
12 Inquiry takes or a decision or a witness that the Inquiry
13 calls, is the ability to exercise the rights given under
14 section 6(2) of the *Public Inquiries Act* to have a decision
15 reviewed by a court, which has the inherent supervisory
16 jurisdiction to review decisions that arise and settle
17 disputes that arise in the course of a public inquiry.

18 And so in my submission, having granted
19 funding to the applicant in order to participate at the
20 Inquiry, it is reasonable to expect that that Applicant can
21 have access to the tools that are available to all parties
22 of the Inquiry. Certainly, if parties have access to those
23 tools, then a party who is relying totally on the funding
24 of the Inquiry should not be denied access to those tools
25 as well. And by "tools", I mean the procedural routes and

1 remedies that are available to all parties at the Inquiry.

2 As I stated earlier, the *Public Inquiries*
3 Act creates a statutory right of review. This is above and
4 beyond the common law ability of a party to have a decision
5 reviewed by a court with inherent jurisdiction. And in my
6 submission, I think the fact that the legislature has
7 chosen to codify that ---

8 **THE COMMISSIONER:** Codify what?

9 **MR. CIPRIANO:** Sorry?

10 **THE COMMISSIONER:** Codify?

11 **MR. CIPRIANO:** The ability of a party to
12 seek review under section 6(2) of the *Public Inquiries Act*.

13 **THE COMMISSIONER:** Well, I don't know really
14 if it's to codify; it's just to tell you where you should
15 bring your application. It doesn't create any new right.
16 You always have that right to appeal.

17 **MR. CIPRIANO:** Oh, I agree. That right is a
18 residual right that all parties have. In my submission,
19 the fact that the government has gone to the extent of
20 actually legislating it, in my submission, would mean that
21 the government has contemplated that disputes arise that
22 are important enough that they ought to be referred to or
23 settled by a court that has an inherent jurisdiction to
24 review matters that are arising out of a public inquiry.

25 The fact that it's been added as a section

1 of the *Public Inquiries Act*, an Act which we use at a
2 public inquiry and specifically made for public inquiries,
3 in my submission, indicates that part of the work of an
4 inquiry is also a review of issues that arise that, for
5 instance, that go to the jurisdiction of the inquiry or
6 that go to the jurisdiction of the inquiry to take a
7 certain step or leads during evidence, particularly where
8 they affect the substantial and legal rights of an
9 applicant with standing.

10 And in my submission, the reason for this is
11 to ensure that there is confidence in the inquiry process
12 and that fairness and legality are all available to all
13 parties. As I indicated, all parties with standing,
14 regardless of funding, have the residual route available to
15 them to seek reviews, regardless of the *Public Inquiries*
16 *Act*. But having expressly provided for that procedural
17 route in the *Public Inquiries Act* above and beyond what is
18 available at the common law is, in my submission, evidence
19 that the legislature has expected and contemplated reviews
20 to be part of the work of the inquiry.

21 Various parties in this Inquiry had raised
22 concerns prior to the beginning of the Inquiry.
23 The Commission invited that the Motions be brought and
24 litigated and subsequent to the issue being decided it was
25 indicated that Motions such as jurisdictional ones do

1 routinely arise and reviews of these issues are not
2 unusual. They are, in fact, common and they have happened,
3 as we saw from the litigation of the jurisdictional Motion,
4 there are numerous cases that deal with the issue of a
5 jurisdictional inquiry to take certain steps all by courts
6 that have the inherent jurisdiction to review those issues.

7 The ability to exercise that review is a
8 procedural right that is available to all parties, not only
9 at common law but the very fact that it was created in the
10 *Public Inquiries Act*. However, given that an Applicant who
11 is dependent on funding, the Commission is then in a sense
12 the gatekeeper of what procedural routes are available, and
13 in my submission should funding not include the ability to
14 seek review under the *Public Inquiries Act*, then an
15 Applicant could not properly have access to all of the
16 tools of the inquiry as was expected by being granted
17 funding. In effect, would it take away some of the
18 procedural routes available to an Applicant who is wholly
19 dependent on the inquiry for funding?

20 By analogy, funding to exercise both common
21 law and statutory rights exist in other legal context. We
22 know that in the Criminal Law context, Legal Aid is
23 available to parties in order that they have
24 representations at trials to represent their rights to put
25 forth defences, even to enter in guilty pleas. That

1 funding is not taken away at the conclusion of the trial
2 matter. Funding is available to accused persons and
3 convicted persons to appeal decisions all the way up to the
4 Supreme Court of Canada.

5 **THE COMMISSIONER:** But it's not automatic.

6 **MR. CIPRIANO:** It's not automatic, no, but
7 it is available. It's not taken away simply because a
8 person is dependent on funding from the state.

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

10 **MR. CIPRIANO:** And in fact, there are even
11 provisions where people do not qualify, for example, in the
12 *Youth Criminal Justice Act*, people who do not qualify
13 financially, courts are empowered to grant funding,
14 regardless of the decision made by a Legal Aid body. And
15 in my submission, public funding for counsel is available
16 in the administrative law context.

17 **THE COMMISSIONER:** So if it's not automatic
18 for Legal Aid people why would it be automatic for your
19 client?

20 **MR. CIPRIANO:** In my submission, when
21 funding was awarded in order to participate at the inquiry
22 participation, in my submission, would include the ability
23 to use all the tools and procedural routes available at the
24 inquiry, and one of those tools or routes is the ability to
25 have decisions reviewed by a court that has been deemed by

1 the government to be the proper forum of review for issues
2 that arise.

3 **THE COMMISSIONER:** And what happens if
4 you're not happy with the Divisional Court; that the
5 funding be extended to go to the Court of Appeal and to the
6 Supreme Court of Canada?

7 **MR. CIPRIANO:** Well, a party always has the
8 residual discretion under the common law to have matters
9 reviewed.

10 **THE COMMISSIONER:** Absolutely.

11 **MR. CIPRIANO:** Obviously that's not included
12 in the *Public Inquiries Act* so ---

13 **THE COMMISSIONER:** So what you're saying to
14 me is that the only funding that is automatically available
15 to a party is to go to Divisional Court.

16 So what happens if you're not happy with the
17 Divisional Court, where would you get the funding to go to
18 the Supreme Court of Canada, let's say?

19 **MR. CIPRIANO:** That would be something that
20 perhaps would be subject of an application to the
21 Commission. But what I am submitting to the Commission is
22 that when the Commission granted funding to the Applicant
23 it granted funding to have -- to be able to participate in
24 the tools that are at least available to parties with
25 funding, and one of those is an ability to seek review at

1 the Divisional Court. It doesn't say to seek review until
2 you're satisfied. It says at the very least to seek it to
3 a court that has an inherent supervisory jurisdiction and
4 that would be the Divisional Court.

5 Whether there are subsequent funding
6 applications to go further, I think, would be something
7 that we'd have to cross if we ever get there. But at this
8 point, when funding was granted on the basis of
9 participatory rights, it's my submission that participation
10 meant the ability to use the procedural routes available to
11 all parties that have been granted standing because of
12 their substantial interest in the inquiry and its process.

13 And I'd like to draw an analogy, at least in
14 the administrative law context, with the case that I refer
15 to at paragraph 75 of my submissions, which is *New*
16 *Brunswick Minister of Health and Community Services v*
17 *G.(J)*. And in that one, the Children's -- I believe it was
18 not the Children's Aid Society, the Minister pursuant to
19 the *Family Services Act* by taking custody over the
20 Appellant's three children and the Appellant had wished to
21 review or challenge that custody order; had applied for
22 Legal Aid, Legal Aid did not cover it, and the review was
23 done without the Appellant having the ability to have
24 counsel there.

1 In that case, the Supreme Court held that
2 the action of the Ministry in taking away the children of
3 the Appellant triggered the Appellant's rights under
4 section 7 of the *Canadian Charter of Rights and Freedoms*,
5 specifically the security of the person's interest, and
6 that to deprive the Appellant of the ability to have
7 counsel for a review of that decision effectively violated
8 the principle of fundamental justice to participate and
9 receive a fair determination of that decision.

10 I use that case to draw an analogy to the
11 present inquiry where a procedural route is available on a
12 decision that does impact the Applicant's rights.

13 **THE COMMISSIONER:** Well, do you not think
14 that the rights are a little different in a sense that
15 they're taking children away from their parents and it's
16 almost like a life sentence of taking them away permanently
17 as opposed to whether or not certain questions will be put
18 to some witnesses?

19 **MR. CIPRIANO:** Well, in my submission, and
20 I'll get to this later on.

21 **THE COMMISSIONER:** Sorry. I didn't want to
22 interrupt you.

23 **MR. CIPRIANO:** No, no, but it's going to
24 come up anyway. I think in this case the Applicant's
25 interests under section 7 are similar and they are

1 triggered in the sense that securing the person
2 contemplates a wide range of interests that affect
3 psychological integrity and stigmatization of a person by
4 actions of a Commission or of a Tribunal of a court or of
5 the state, and so while it may not be the same as having
6 your children taken away from the state, the psychological
7 impact of an act and of a public inquiry to call certain
8 evidence, particularly when there are -- particularly when
9 it's an important jurisdictional issue I think, there is an
10 analogy to be drawn there. But I will get to that once I
11 get to that part of the argument.

12 Just going back to the *G.(J.)* case, the
13 analogy I was drawing was that in order to have fairness
14 amongst all the parties who have standing that funding,
15 when it was granted to the Applicant, meant that the
16 Applicant had the ability to access the procedures and
17 review decisions that impact the interests of the Applicant
18 that are otherwise available to all parties.

19 The issue that would be under review would
20 be, in my submission, an important one. It deals with the
21 jurisdiction of the Inquiry to take a certain step. So
22 it's one in which given the nature of the issue, is one --
23 it's not simply a decision that goes to an evidentiary
24 issue or a minor objection of an inquiry. In my
25 submission, the jurisdictional issue goes to an important

1 step that the inquiry has determined it's going to take.
2 So it is one that arises in numerous other inquiries and
3 one that does affect the rights of the Applicant in the
4 sense of that's why he was probably granted standing.

5 **THE COMMISSIONER:** Does the fact that none
6 of your confrères have joined you in your Motion, for
7 example, Monsieur Leduc or Diocese, and that they've taken
8 the position, I understand, I don't know, that really what
9 the whole issue deals with the weight and the balancing of
10 the interests once the witness is on the stand and that we
11 deal with them individually.

12 Is the fact that none of those people have
13 joined you in your Motion not kind of undermine your
14 argument a little bit?

15 **MR. CIPRIANO:** Well, I mean, I'm not going
16 to speak for the decision that other parties have made.
17 You know, they've made them for their own reasons. They've
18 consulted with their clients and they've taken certain
19 positions, so I'm not going to comment on those decisions.
20 Whether that weakens my argument is -- I mean, I don't want
21 to re-litigate the issue. It's been litigated. So I'm not
22 going ---

23 **THE COMMISSIONER:** No, you're not going to
24 do that.

1 I guess my question is in assessing -- when
2 you write to Legal Aid for an appeal, right, because that's
3 what you have to do and you say "Look it, I have a good
4 right to appeal and this is why."

5 In deciding whether or not there's any
6 weight to your appeal, would somebody not look at the fact
7 that others haven't gone that route and they've said "No,
8 no, no, this isn't a jurisdictional issue"?

9 **MR. CIPRIANO:** Well, I can't speak for the
10 decision making of Legal Aid, but usually there would be
11 one counsel writing an opinion to Legal Aid based on an
12 evidentiary record.

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

14 **MR. CIPRIANO:** Whether Legal Aid then
15 compares that to what a co-accused may have done I don't
16 know. I can't speak for their decision making process.

17 But in my submission, the funding that is
18 included as it currently stands when it included
19 participation to use the tools at the inquiry, doesn't have
20 that internal review procedure to see if there's merits to
21 an appeal. There's nothing, as it stands right now, that
22 has an internal review procedure or an internal mechanism
23 to apply for funding for a review. Whether that's created
24 is another story, but there's nothing, as it stands right
25 now, and so in my submission, when funding was granted it

1 was reasonable to expect that it included the ability to
2 participate in the procedural routes that are available to
3 all parties, regardless of whether they have standing or
4 regardless of whether they have funding.

5 Ultimately, if that's not the case, in my
6 submission, the consequence would be that parties who are
7 wholly dependent on funding from the inquiry would not have
8 access to all the procedural routes that are available to
9 parties in general who have standing at the Inquiry.

10 Put it another way -- sorry, go ahead.

11 **THE COMMISSIONER:** You've told me that their
12 appeals are routine, I suppose, a matter of course in
13 inquiries. Do you have any precedents where counsel had
14 been funded by inquiries to proceed with appeals?

15 **MR. CIPRIANO:** I don't have any precedents.

16 **THE COMMISSIONER:** Did you look at any?

17 **MR. CIPRIANO:** I've tried to look at some
18 and couldn't find any. Mind you, my time was a bit limited
19 given the commitments I had last week, but I can indicate I
20 couldn't find any specifically on point.

21 **THE COMMISSIONER:** Have you found any where
22 they were not given -- specifically given funds?

23 **MR. CIPRIANO:** I mean, I can't -- I don't
24 know what happened in other inquiries, whether certain
25 other inquiries have given funding or not. I don't have it

1 included here but I believe from reading some of the
2 rulings in the *Jakobek* Inquiry -- that was a municipal
3 inquiry and in the municipal inquiry the Commissioner did
4 not have the discretion to recommend funding but did so
5 anyway, at least not for a review because the party seeking
6 the review was not reliant on funding, but did exercise a
7 discretion based on the recommendation from the municipal
8 council that funding ought to be provided to two of the
9 parties, at least to participate at the inquiry.

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

11 **MR. CIPRIANO:** So I can't speak for what
12 happened subsequent to that.

13 **THE COMMISSIONER:** Okay.

14 **MR. CIPRIANO:** And I didn't provide that
15 ruling here in my submissions, so I don't want to refer to
16 it.

17 And I guess to put it another way is, if a
18 decision -- if a party who is not reliant on funding
19 decided to review a decision or if the jurisdictional
20 decision went the other way and a party decided to review,
21 who didn't have funding, obviously the decision impacts the
22 applicant's interests. Would it not be proper to expect
23 that the funding, as it exists, includes the ability to
24 make representations at a review brought by a party who has
25 exercised their ability to review that decision? Would it

1 not -- would the review court not require a full hearing to
2 ensure fairness and that the review is done properly with
3 respect to all interested parties?

4 And so if the review procedure is available
5 to a party, regardless of whether they have standing or
6 not, then, in my submission, certainly it's reasonable to
7 expect that the funding to participate includes the ability
8 to seek a review of an issue that a) goes to the
9 jurisdiction of the inquiry to take a certain step and b)
10 goes to the -- is available to -- is statutorily available
11 to a party regardless of whether they have standing or not.

12 Now, I'll move on to my second issue and
13 that is; if I'm incorrect in expecting that the funding as
14 it currently stands does not include funding to exercise
15 the procedural route available to the party, then it's my
16 submission that the Commission does have jurisdiction to
17 recommend funding. They can't grant it, as it hasn't
18 granted funding to anyone. It simply made recommendations
19 for funding, but it does have, pursuant to the Order in
20 Council and the Rules of Procedure, the discretion to
21 recommend funding to go to the judicial review stage.

22 Again, I'll repeat, the Applicant's
23 participation here at this inquiry is wholly dependent on
24 funding from the inquiry. Obviously, the standing is
25 sufficient enough that the party did get standing and the

1 party cannot otherwise participate but for the funding.

2 **THE COMMISSIONER:** Well, what about costs at
3 the divisional court level? If you're so sure about your
4 appeal you can go home and seek costs there.

5 **MR. CIPRIANO:** Well, I would imagine that
6 the funding includes costs as well or the ability to make
7 representations on cost.

8 And if I'm wrong that the funding as it
9 stands does not include the ability to go to judicial
10 review and that the Commission does have discretion to
11 recommend funding to do this, I imagine in that application
12 for funding something would have to be provided to the
13 Commission with respect to what a party can predict
14 reasonably what the costs will be. Perhaps agreements can
15 be reached that the issue is important enough that it
16 doesn't require costs. I don't know, but if something like
17 that has to be set up, then that will probably have to be
18 canvassed.

19 **THE COMMISSIONER:** What happens if costs are
20 awarded against your client? Are you going to ask that the
21 Commission pay everybody else's costs?

22 **MR. CIPRIANO:** Well, in -- when I use the
23 word "funding" I include costs as well. If that's
24 incorrect then that's something that would have to be
25 determined.

1 **THE COMMISSIONER:** You're bringing a motion.

2 **MR. CIPRIANO:** Yes.

3 **THE COMMISSIONER:** You're asking me -- what
4 is it that you want? If I understand you correctly, and I
5 want to make sure, you're saying, "I want my account for
6 Father Charles MacDonald for bringing this judicial review,
7 to be paid out of the public fund. And if I lose and costs
8 are awarded against me, against Father Charles MacDonald,"
9 you want me to recommend to the Attorney General that the
10 public purse pay for the costs of your unsuccessful appeal.
11 Is that what you're telling me? I just want to know.

12 **MR. CIPRIANO:** Well, firstly what I -- the
13 first part of what I am seeking, or my clarification is
14 that the funding as it exists includes the funding to go to
15 a judicial review; meaning it includes costs as well.

16 **THE COMMISSIONER:** What do you mean by that?
17 That means that if -- sir, you're telling me that it means
18 that if you go to the divisional court and you lose and
19 costs are awarded against your client, that you expect that
20 the public purse will pay everybody's costs. Is that what
21 you're telling me?

22 **MR. CIPRIANO:** Well, as I stated, the first
23 part of the argument is that it was expected that
24 participation included the costs of a review, including
25 costs that may be awarded or may not be awarded.

1 **THE COMMISSIONER:** That's all I need.

2 **MR. CIPRIANO:** Okay. Sorry.

3 **THE COMMISSIONER:** So your answer is "yes"?

4 **MR. CIPRIANO:** Yes.

5 **THE COMMISSIONER:** Okay. And what basis do
6 you come up with that one? I don't understand how --
7 like Legal Aid. Help me out here. Does Legal Aid have the
8 same principles that if you're given funds for -- well,
9 Legal Aid in a civil matter, I suppose, Children's Aid
10 matter, and you appeal and you lose and the Children's Aid
11 Society, for example, asks for costs and those costs --
12 does that mean Legal Aid pays for the costs?

13 **MR. CIPRIANO:** I can only speak -- I mean, I
14 can't speak for -- I don't know what Legal Aid pays in
15 civil cases.

16 **THE COMMISSIONER:** So you don't know?

17 **MR. CIPRIANO:** They do pay for -- in
18 criminal cases -- the costs tend not to be an issue in
19 criminal cases but ---

20 **THE COMMISSIONER:** I don't think that
21 they're -- I don't think they have ever been argued or
22 rarely, I suppose. Anyways, okay.

23 So what you are telling me, that your
24 request right now is that if I order funding -- if I --
25 sorry -- if I recommend to the Attorney General funding,

1 that you would -- it would encompass everybody's costs?

2 **MR. CIPRIANO:** Well, that would have to be
3 part of the recommendation that's made. Perhaps -- as I
4 stated earlier, right now there's nothing that exists that
5 one can apply to have the merits of the review, at least
6 the review -- similar to what Legal Aid has is when you
7 write the opinion. If that is created or not, perhaps that
8 will be the form by which the recommendation is based on
9 the recommendation of some internal review committee of
10 some sort. Obviously, that would have to be part of the
11 application if some mechanism is created by which an
12 applicant applies and, in applying, must state an opinion
13 as to the merits of the review.

14 **THE COMMISSIONER:** So let's assume we set up
15 a system like that and the recommendation is that your
16 client not be funded, what happens then?

17 **MR. CIPRIANO:** I guess it depends the way
18 the system is set up.

19 **THE COMMISSIONER:** You appeal that?

20 **MR. CIPRIANO:** I mean -- we're all
21 speculating at this point. I don't know.

22 **THE COMMISSIONER:** No, but there would have
23 to be, I suppose, an appeal process in that as well then.

24 **MR. CIPRIANO:** Perhaps they come -- there's
25 -- one of the remedies could be that they come back in

1 front of the Commission to make a determination or -- I
2 don't know. I mean it's clearly speculation at this point
3 and it's not -- I'm not suggesting that the Commission do
4 that. I'm just saying there's nothing equivalent to where
5 one would give an opinion as to what the cost of a review
6 is, when it can be done, and so on. There's nothing
7 equivalent to that right now available. Whether it becomes
8 available then would obviously have to encompass what
9 happens if you're refused at that point.

10 And getting back to the second issue that I
11 raised, that the funding ought to be recommended in this
12 case is that, unlike some other administrative law settings
13 there's no really internal procedural reviews of decisions
14 of an inquiry available other than that contemplated by the
15 *Public Inquiries Act* which is a review to the divisional
16 court. And as I stated earlier, in stipulating that as
17 part of the Act, it's my submission that the legislature
18 has provided that the divisional court is the best forum to
19 settle disputes that arise, particularly when the disputes
20 concern the jurisdiction of an inquiry to take a certain
21 step.

22 And in my submission, where there are
23 adequate procedural routes available, statutorily as
24 provided by the legislature, to review decisions of an
25 inquiry or a tribunal, then it's my submission that those

1 procedural routes do become part of the work of the inquiry
2 given that it's contemplated as being the ultimate arbiter
3 of disputes that arise in a public inquiry.

4 **THE COMMISSIONER:** The ultimate?

5 **MR. CIPRIANO:** Well, not ultimate in the
6 sense that it can be appealed further but at least as
7 contemplated, that's where you go. There's no internal
8 review procedure at the inquiry. What's contemplated is
9 that's where you go should a dispute arise.

10 And so given that it's there and it's
11 available to parties, it's my submission that in this case
12 on a review of a jurisdictional issue, it's my submission
13 that it is part of the work of the inquiry for a party to
14 seek a review of the decision given that it's available to
15 all parties regardless of funding.

16 And as I said, to put it another way, what
17 would happen if a party went on to review a decision, who
18 was not dependent on funding? Certainly, the parties who
19 had funding would expect and would -- or would apply to the
20 Commission that their views, particularly when they were --
21 they litigated the issue, should be heard by the review in
22 court. And that would include as well any costs that would
23 be -- could be attributed to parties.

24 And I'll get back to what you had asked
25 earlier and the analogy between this case and when I was

1 referring to section 7 of the Charter. Section 7 reads
2 that:

3 "Everyone has the right to life,
4 liberty and security of the person and
5 not to be deprived thereof except in
6 accordance with the principles of
7 fundamental justice."

8 And the first issue that comes up is
9 whether, of course, an inquiry can grant the remedy under
10 the Charter if they feel that -- or if someone applies for
11 the remedy under the Charter given that the inquiry is not
12 a court. But in my submission, the case law from the
13 Supreme Court is clear that an administrative body,
14 including an inquiry, can apply the Charter to its
15 decisions, particularly if they have -- particularly if the
16 legislature provides the ability of the tribunal -- when I
17 use the word "tribunal" I mean a public inquiry -- to
18 determine and interpret law and questions of its own
19 jurisdiction in these contexts, and it's my submission that
20 the case law indicates that a tribunal does have --
21 becomes, to use the words of the Charter, "a court of
22 competent jurisdiction".

23 As demonstrated in the motions that have
24 been brought earlier with respect to whether a party is a
25 public institution or the jurisdictional issue, I think

1 that demonstrates that obviously the Commission does have
2 the ability to interpret law and to decide on issues of its
3 own jurisdiction. The proceedings here although it's not a
4 court *per se*, they are quasi judicial. Parties are
5 represented by counsel, evidence is taken under oath,
6 exhibits are part of the public record, transcripts are
7 kept; the Commission has power to issue subpoenas and
8 search warrants, order production of disclosure and the
9 Commission can hear motions brought to it by counsel
10 respecting its own jurisdiction. The applicants or the
11 parties are bound by the decisions of the Commissioner.

12 And so given that, the Commission not only
13 has jurisdiction over the parties, has jurisdiction over
14 the subject matter of the procedural routes available, and
15 having the ability to decide questions of law including
16 constitutional issues of its own jurisdiction, the
17 Commission does have the ability to grant remedies pursuant
18 to the Charter and the Constitution.

19 Now, I raised section 7 because section 7
20 involves two steps; firstly, the party would have to show
21 that a breach or a denial of section 7 infringes either
22 their life, liberty or security of the person's interests,
23 and once that is engaged then the infringements must be
24 found to violate a principle of fundamental justice.

25 As I indicated earlier, the security of the

1 person protects both physical and psychological integrity.
2 The psychological integrity referring to serious state-
3 imposed psychological stress as was contemplated in the
4 *Morgentaler* case. In the *Morgentaler*, the Supreme Court
5 goes on and says that: "Security of the person is deprived
6 when a decision stigmatizes the person. There is a loss of
7 privacy, destruction of private life, uncertainty of
8 outcome due to overlong subjection to this due to criminal
9 accusations. And although we're not at a criminal
10 proceeding, a lot of the issues that arise do arise in the
11 context that they happen in criminal proceedings or in
12 criminal investigations that happened prior. I'm not
13 saying that they're happening here that way.

14 And so in my submission, the decision does
15 engage the Applicant's rights under section 7; that is, the
16 right of security of the person. It was argued on the
17 basis of presumption of innocence of all the criminal
18 allegations and so now that the Commission has determined
19 that it will lead evidence from the alleged complainants,
20 it's my submission that this decision does implicate the
21 Applicant's section 7 rights.

22 Now, it has been expressed by the Applicant
23 that a review is sought to the Divisional Court and the
24 reason for that is obviously the interest that the
25 Applicant has in the inquiry. Should a review not be

1 available because the funding does not include a review to
2 an Applicant who is wholly dependent on the inquiry, then
3 in my submission it would show to a degree that not all the
4 routes available to parties are available to those who have
5 funding from the inquiry. I think funding to participate
6 in the inquiry includes funding to participate in the
7 routes available in order that there is confidence in the
8 inquiry process to use the tools available and that there
9 is fairness amongst the parties that everyone is starting
10 from a level playing field and so that everyone can use
11 what is adequately available to them by virtue of being
12 granted standing. Obviously, if a party is not granted
13 standing their interests have been determined not to be
14 sufficient enough to warrant standing and so they cannot
15 avail themselves of what's available to them by the *Public*
16 *Inquiries Act*.

17 And so, in my submission, to not grant
18 funding for a review would not level the playing field and
19 give the participatory rights that have been recommended
20 available to all parties in the sense that not all parties
21 would have available to them all the procedural routes that
22 are available to all parties with standing regardless of
23 funding.

24 So those would be my submissions.

25 **THE COMMISSIONER:** Thank you very much.

1 All right. It's 12:15 and we should be
2 taking a break and, I guess, come back at 2:00.

3 **THE REGISTRAR:** Order; all rise. À l'ordre;
4 veuillez vous lever. The hearing will reconvene at 2:00
5 p.m.

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

7 L'audience est suspendue à 12h15

8 --- Upon resuming at 2:06 p.m.

9 L'audience est reprise à 14h06

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

12 This hearing of the Cornwall Public Inquiry
13 is now in session. Please be seated. Veuillez vous
14 asseoir.

15 **THE COMMISSIONER:** Good afternoon.

16 **MR. MANSON:** Thank you, Mr. Commissioner.

17 --- **SUBMISSION BY/REPRÉSENTATION PAR MR. MANSON:**

18 **MR. MANSON:** We don't agree with Mr.
19 Cipriano's view of the general funding including funding
20 for a judicial review application, but we do agree with his
21 submission that you have discretion to make a
22 recommendation.

23 First, I want to say that in our submission
24 there is nothing in the *Public Inquiries Act* nor anything
25 in the Order in Council that would expressly provide you

1 with the power to make a recommendation about funding for
2 a judicial review.

3 Mr. Cipriano has raised an interesting
4 argument about legitimate expectations but, in our
5 submission, while that is an involving administrative law
6 concept that hasn't yet completely crystallized, it doesn't
7 apply in this situation.

8 If I could just refer to the *Mount Sinai*
9 case that Mr. Cipriano relied upon, paragraph 29 -- I'm
10 just going to read a brief quotation.

11 **THE COMMISSIONER:** Hang on just a second.
12 Right here.

13 **MR. MANSON:** It's not mentioned in our
14 submission. I just read it very early this morning. But
15 in paragraph 29 of *Mount Sinai*, Justice Binnie gives a
16 capsulized explanation of legitimate expectations:

17 "The doctrine of legitimate
18 expectations, on the other hand, looks
19 to the conduct of the public authority
20 in the exercise of that power including
21 established practices, conduct or
22 representations that can be
23 characterized as clear, unambiguous and
24 unqualified. The expectations must not
25 conflict with the public authority's

1 statutory remit."

2 The only source of a possible legitimate
3 expectation argument that Mr. Cipriano can find is the
4 original funding order. In our submission, that's
5 singularly inadequate. I'd also point out that the analogy
6 to the criminal process which he referred to, the Rowbotham
7 Order situation which, again, out of fairness to the
8 unrepresented accused faced with complex issues, courts in
9 Ontario have said that fairness may require the appointment
10 of state-funded counsel, I know of no source that suggests
11 that a Rowbotham Order extends to an appeal. It extends to
12 that trial.

13 But lastly, and this plays on Justice
14 Binnie's comment that the expectations must not conflict
15 with the public authority's statutory remand, it's our
16 position that part of your mandate is not just to pursue
17 its substantive elements but to pursue them fully, fairly,
18 effectively and expeditiously. If there's any weight to
19 the suggestion that the funding order is a carte blanche
20 that any party can seek judicial review at any time on any
21 issue and be funded from the public purse, that is
22 inconsistent with the need to pursue your mandate
23 effectively and expeditiously. There is no question that
24 litigation outside of this commission room can and will
25 likely generate delay. So that kind of inherent

1 encouragement for delay is, in our view, inconsistent with
2 your mandate.

3 I want to move, though, from the issue of
4 whether the original funding rulings include judicial
5 review which, in our submission, they do not, to the
6 question of discretion. It's our position that you do have
7 discretion to recommend funding for a particular judicial
8 review application and perhaps for parties to respond.
9 There may be some issues which ought to be reviewed, not
10 necessarily because your rulings are wrong but to clarify
11 your mandate and to enhance public confidence in the
12 inquiry itself, but that kind of discretion to recommend
13 funding needs to be exercised with due consideration to
14 proper factors.

15 In our submission, our written submission,
16 Mr. Commissioner, at paragraph 10, we list what we consider
17 to be the proper factors to be considered for the exercise
18 of discretion to recommend funding for an application;
19 nature of the issue, merits of the challenge, extent of
20 anticipated delay and the extent of public funds involved.
21 In paragraph 11 we list the factors to be considered, in
22 our submission, when a respondent is asking for funding for
23 someone else's judicial review application; whether
24 participation is necessary to ensure full argument; whether
25 public confidence requires the party's participation; the

1 extent of public funds involved and the need to avoid
2 funding of duplicate interests already adequately
3 represented.

4 With respect to all of these matters, Mr.
5 Commissioner, you are well placed to make the necessary
6 assessments, with one exception, and that is merits. With
7 all due respect, it's difficult for an individual to assess
8 their own ruling. By definition, a judicial review
9 application will be a challenge to one of your rulings.

10 What we have proposed at paragraph 14 and
11 on, onward from there, is a simple protocol that involves
12 two elements; number one, the Commission should retain an
13 independent assessor to assess the merits of a proposed
14 judicial review application and; number two, the assessment
15 should be done according to a test of arguable case.

16 I have a suggestion if you're of a mind to
17 follow this submission, and just to give you an idea of the
18 kind of person I think ought to be the independent
19 assessor, and I gave his name to Mr. Engelmann last week.
20 I have not been in touch with him but I was thinking
21 somewhere along the lines of Allan Gold who is a bencher, a
22 very well respected member of the Bar, if not one of the
23 most respected litigators in the country; someone with
24 Commission experience and also someone who was on the Legal
25 Aid Test Case Funding Committee which meets every month to

1 review applications for test case funding. That's just a
2 sense of the kind of person -- assuming that they were
3 available and assuming that they would agree to turn these
4 things around very quickly. This whole protocol that we're
5 proposing is premised on the notion that everyone would be
6 required to turn the material around quickly. Arguable
7 case, we submit, is the appropriate standard. It's used by
8 Ontario courts in a number of leave to appeal cases,
9 situations. I also found this morning while I was doing
10 some research, it's been expressed as the usual standard
11 for leave to appeal with respect to sentence appeals, and I
12 have an Authority for that that wasn't in my material, and
13 I apologize, but it's a case called *Laliberté*. Madam
14 Justice Jackson from the Saskatchewan Court of Appeal
15 described the leave to appeal process, which in
16 Saskatchewan is distinct whereas here we do it as one along
17 with the sentence appeal. That's a year 2000 case, 143CCC
18 third 503.

19 The advantage of an arguable case, which has
20 also been described as a reasonable possibility of success,
21 the arguable case threshold would include both the question
22 of legal merit and also the adequacy of the evidentiary
23 basis.

24 I won't go through the protocol. It's set
25 out in paragraphs 17 and 18. There's no magic to any of

1 the elements. They could easily be changed. But you see
2 what the idea is, Mr. Commissioner, is that if you agree to
3 employ an independent assessor who would agree to turn
4 things around very quickly, that person would provide the
5 assessment of the merits. Yes, there's an arguable case or
6 no, there isn't an arguable case. And then you could
7 decide whether to forward the recommendation to the
8 Attorney General. That would take you out of the loop of
9 dealing with the merits, but it would also ensure that
10 there is some assessment of merits because frankly I can't
11 see how a recommendation could go forward without an
12 assessment of merits.

13 If that were the case, you would be obliged
14 to do it anytime someone chose to propose a judicial review
15 application.

16 **THE COMMISSIONER:** I don't know about that.
17 I think there are -- as a judicial officer, other than
18 perhaps the perception of bias, which is important, I think
19 someone can detach themselves sufficiently in the proper
20 case where perhaps we're talking about frivolous; we're
21 talking about those types of cases that we can dispose of
22 them.

23 Let me ask you this. Let's assume that we
24 find someone and we can do this very quickly, and that
25 person says, "No, no arguable cause and case" and so comes

1 back to me with the recommendation and then Mr. Cipriano
2 says, "Tough luck. I want you to rule in favour." And
3 then I say, "No". What happens then?

4 **MR. MANSON:** Well, at that point, quite
5 clearly, that would be another decision by a Commissioner
6 that could be subject to judicial review. I mean, I hate
7 to go down that road, but it would be judicial review with
8 no guarantee of funding.

9 **THE COMMISSIONER:** Well, I'm -- and I
10 suppose my biggest concern in all of this is the four-
11 letter word, "delay". It's got five, but I'll call it
12 four. We're just ---

13 **MR. MANSON:** Yes.

14 **THE COMMISSIONER:** --- delaying, delaying,
15 delaying.

16 **MR. MANSON:** If we go back to the factors
17 that I set out, I agree that you would be in a position to
18 say, "Given the nature of this issue, it has such little
19 bearing, it's not being funded". End of story. You would
20 be in a position to say, "With all due respect, counsel,
21 this is frivolous. It's not being funded". But once we
22 get -- keeping in mind that arguable case means possibility
23 of success, that becomes -- assuming that it's an important
24 issue -- and I would submit that depending on merits, and I
25 didn't participate in this issue, so I don't intend to say

1 anything about the merits, but a question of jurisdiction
2 is a serious matter.

3 **THE COMMISSIONER:** Except that -- yes, I
4 don't know. I thought we had skipped over the
5 jurisdictional issue because Mr. Cipriano did not argue
6 that no alleged victims could testify. He says the alleged
7 victims with respect to my client can't testify. And so is
8 it really a jurisdictional question? I don't think so.

9 **MR. MANSON:** Well, it's jurisdictional in
10 the sense that it deals with the powers of the Commission.
11 It doesn't mean the Commission is disbanded, but it deals
12 with the powers of the Commission.

13 I appreciate that delay is a concern and had
14 any of this occurred to any of us a number of months ago,
15 we could have sat down in the abstract and talked about it
16 whereas now it's already June. I appreciate that, Mr.
17 Commissioner.

18 And as I indicated, the proposal that we
19 make at paragraph 17, even though it's not stipulated, it's
20 predicated on the understanding that everyone would make a
21 commitment to turn this around fast. In other words, from
22 our perspective, the Motion's already been argued. The
23 ruling has been made. It ought not to be that difficult
24 for someone to put their position in writing within a
25 relatively short period of time. It's not a new matter, it

1 was just dealt with.

2 If there has to be any oral amplification,
3 again that can be done relatively quickly and then all the
4 material would go to the assessor on the understanding that
5 you would get an answer within a week.

6 Now, I used the name Alan Gold and I have
7 not been in touch with him about this because I'm involved,
8 I didn't think it would be appropriate but as an example of
9 someone whose view would be respected. Now, that doesn't
10 mean a guarantee that someone wouldn't say, "Mr.
11 Commissioner, you were wrong last month, and Gold is wrong
12 now, and I'm going to" -- it doesn't mean that of course.

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

14 **MR. MANSON:** I only offer it as a way of
15 bringing merits back into the matrix because I think merits
16 are an important factor.

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

18 **MR. MANSON:** If I could go on to the CCR's
19 position with respect to this issue, in the original
20 hearing, my colleague, Mr. Wardle, represented the CCR, but
21 I think our position is set out in general terms in
22 paragraph 19 that:

23 "Subject to accommodating issues of
24 privilege, confidentiality and respect
25 for the presumption of innocence, all

1 relevant evidence should be heard
2 publicly by the Cornwall Public
3 Inquiry."

4 That's almost a paraphrase of remarks you made earlier
5 today, Mr. Commissioner.

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

7 **MR. MANSON:**

8 "While the focus of the Inquiry is the
9 response of the justice system and
10 other public institutions to
11 allegations of abuse, those responses
12 can only be assessed after hearing some
13 details of the original allegations."

14 What details, how much is yet to be decided,
15 but it's for that reason that if the judicial
16 review goes forward, we would want to participate
17 and we would accordingly, if there's going to be
18 funding for judicial review, we would request
19 funding for two counsel to prepare the Factum but
20 one counsel to make the argument.

21 Subject to any questions, Mr. Commissioner,
22 I think that's all the help I can provide.

23 **THE COMMISSIONER:** I have a couple of
24 questions for you.

25 Any thoughts about let's assume we fund -- I

1 recommend funding for Father MacDonald, and he loses and
2 costs are awarded against him.

3 **MR. MANSON:** Costs are an *in persona* matter.
4 They're awarded against Father MacDonald. If anyone wants
5 to try to collect them, it's up to them. You asked about
6 Legal Aid. In civil matters, Legal Aid has nothing to do
7 with costs awarded against the legally funded.

8 **THE COMMISSIONER:** Right.

9 **MR. MANSON:** The Act does, in section 46 --
10 I only know this because I looked it up -- require that
11 costs awarded to a legally aided client belong to Legal
12 Aid. But what happens in civil litigation, I'm sure that
13 someone like Mr. Manderville or Mr. Decasse, they're much
14 better able than me to -- if you have an indigent
15 plaintiff, that sometimes generates a Motion for security
16 for costs. And so the whole question about arguability
17 gets argued out there.

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

19 **MR. MANSON:** That's the defendant's response
20 to being sued by an indigent plaintiff.

21 Our position would be costs have nothing to
22 do with funding.

23 **THE COMMISSIONER:** Yes.

24 **MR. MANSON:** And your funding or funding
25 from the Attorney General would apply according to the

1 particular regime, counsel fee and disbursements, end of
2 story. If there is a cost award against anybody on the
3 judicial review, that's a personal -- an *in persona* award.
4 And you know, frankly, I think it's unlikely that there
5 would be a cost award, but if there is, so be it.

6 **THE COMMISSIONER:** My understanding is
7 Divisional Court is awarding costs against individuals as
8 well depending on the case.

9 **MR. MANSON:** Well, I mean, certainly the
10 same thing would apply to the Citizens for -- the CCR. I
11 mean, if for some reason a court was of the view that we
12 ought to pay costs, that would be a serious matter for us
13 and I would expect that we would raise that with our
14 clients before we took instructions to participate.

15 **THE COMMISSIONER:** M'hm. I saw them perk up
16 a little.

17 **MR. MANSON:** Yes, yes.

18 **THE COMMISSIONER:** I just thought, I'd
19 advise you of that. All right.

20 Thank you.

21 **MR. MANSON:** Thank you.

22 **THE COMMISSIONER:** Mr. Engelmann. I'm
23 sorry.

24 **MR. ENGELMANN:** I just wanted to ask. Mr.
25 Manson has indicated a desire to participate and to get

1 funding; funding has been given to Father MacDonald, and
2 I'm just wondering, Mr. Commissioner, I just wanted to
3 advise you and the parties that Divisional Court is holding
4 a date ---

5 **THE COMMISSIONER:** Right.

6 **MR. ENGELMANN:** --- for this Inquiry. The
7 *Public Inquiries Act* does talk about Divisional Court
8 dealing with matters in a summary and expeditious way.

9 So I am just wondering if parties who are
10 appearing who are asking for funding could let us know
11 whether or not they would be prepared to argue the case on
12 that date.

13 **THE COMMISSIONER:** Mr. Manson, July 13th?

14 **MR. MANSON:** We will be there. If it goes
15 forward, and if it goes forward on July 13th, we will be
16 there, Mr. Commissioner.

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

18 Mr. Lee

19 **MR. LEE:** Good afternoon.

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

21 --- SUBMISSION BY/REPRÉSENTATION PAR MR. LEE:

22 **MR. LEE:** Let me start before I forget; July
23 13th isn't the day I would have picked necessarily in my
24 schedule, but we will make ourselves available if that's
25 the day it goes ahead.

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

2 **MR. LEE:** My comments will be brief.

3 I agree to a large extent with most of what
4 Mr. Manson said. I have a couple of points where I differ
5 with him.

6 Off the top, we too agree that you do have
7 the discretion to recommend funding for judicial review.
8 The distinction that I want to draw is between funded and
9 non-funded parties because that's what we're dealing with
10 here. We're dealing with -- the options available to a
11 funded party against those against a non-funded party.

12 As Mr. Cipriano went into at length this
13 morning, there are procedural avenues; there are rights, as
14 he called them that are available to all parties with
15 standing.

16 The difference as I see it is that those
17 parties that are funded to a large extent may not be able
18 to exercise those rights without funding. And it's a
19 distinction that I think is important.

20 And my submission to you, Mr. Commissioner,
21 is that wherever possible, this Commission of the Inquiry
22 should do what it can to level the playing field if you
23 will, and I will explain what I mean by that.

24 It is clear to me that funded parties could
25 not be put in exactly the same position as non-funded

1 parties because we are dealing with the public purse here,
2 and that's a consideration that's valid and that's a
3 consideration that needs to be taken into account.

4 It's not as easy in this case as we might
5 hope it would be for you to make a recommendation that the
6 Attorney General starts writing cheques because that's what
7 we've asked for. That's not going to happen here, and it
8 shouldn't happen here.

9 There has to be some discretion exercised on
10 your part in terms of what you recommend and I agree with
11 Mr. Manson in his submissions that the way that you
12 exercise that discretion is by making some kind of
13 determination which reviews the merits of the application,
14 not solely the application for funding -- sorry, yes, the
15 application for funding but the merits of the application
16 for judicial review as well.

17 And I also agree with Mr. Manson when he
18 says that it's well, let me just make in my submission it's
19 -- the decision as to merits isn't properly made by you or
20 perhaps by your counsel. It needs to be done independently
21 and again; it's as much for appearance's sake as for
22 anything else.

23 Where I do differ from Mr. Manson is that if
24 you turn to paragraph 10 of his written submissions, he
25 sets out the four factors that he brought you through

1 today.

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

3 **MR. LEE:** The paragraph reads,

4 "The exercise of discretion in respect
5 of an application to recommend funding
6 for judicial review should include
7 consideration of the following
8 factors."

9 He lists

10 "...the nature of the issue; the merits
11 of the challenge; the extent of the
12 anticipated delay and the extent of
13 public funds involved."

14 I take some issue with Option C being the
15 "the extent of the anticipated delay". I am a
16 little bit concerned that there's being as much
17 weight afforded to that consideration as the
18 others in that my position is and I submit to you
19 that if there's an issue that has merit, that
20 deserves to be heard at the Divisional Court, I
21 don't think we can limit a party's ability to go
22 that route because of the delay.

23 It's a valid consideration. I'm not sure
24 it's as big a consideration as "the nature of the issue,
25 the merits of the challenge or the extent of public funds".

1 And what I mean by that -- I can see the
2 look on your face, so I will expand on that. What I mean
3 by that is a legitimate worthy review needs to be permitted
4 to proceed even if there's going to be a delay in the
5 inquiry. Nobody wants a delay and everybody is hoping, as
6 Mr. Manson said and Mr. Engelmann is taking great strides
7 to get across to us, this needs to happen as quickly as it
8 can possibly happen. And I can tell you that my clients
9 have an incredibly large interest in this Inquiry
10 proceeding as quickly as possible. They're all very
11 anxious to have this end and done with but we need to make
12 sure that where a review is legitimate and it's worthy that
13 it needs to have the opportunity to go forward. Otherwise,
14 the proposal set forth by CCR makes sense to me.

15 The only other small addition I would make,
16 and I don't think Mr. Manson was suggesting that any of
17 this is set in stone but I thought while I'm up here I
18 might make an additional suggestion.

19 In paragraph 17 of his materials he sets
20 forth a protocol to be adopted, a deal with funding
21 requests. So obviously that's where he sets out the nature
22 of what would be given to the Commission, what the
23 Commission would do with it and so forth. At Part C of
24 that he sets out that you, Mr. Commissioner, would provide

1 an opportunity to the parties to make brief oral submission
2 about their positions.

3 I would just add to that that in my opinion
4 it would be -- included in that should be an opportunity
5 for parties to make written submissions to the assessor on
6 the arguable case issue. I think it would be important
7 that the parties be given the opportunity to express as to
8 why they believe it is or is not an arguable case and I'm
9 not sure, as reflected there, that was set out.

10 Other than that everything makes sense to
11 me.

12 The only other comment I wanted to make was
13 with respect to funding for Respondents. I share the
14 concerns expressed by Mr. Cipriano that this question that
15 we're debating about today doesn't only affect funded
16 parties who wish to bring an application for judicial
17 review but also those who may be wishing to respond to an
18 application that's been made.

19 For example, if it's your determination that
20 Mr. Cipriano or Father MacDonald, rather, is not entitled
21 to funding for judicial review and he decides to proceed
22 anyways, my clients may well wish to apply for funding at
23 that point.

24 I just wanted to put that out there that it
25 puts us in a bit of an awkward position if we're left to

1 respond to something, and specifically I'm thinking of a
2 case where a non-funded party, for example, one of the
3 institutions may decide to move for judicial review, they
4 have no need for funding, just to make you aware of the
5 fact that likely in that case, despite the fact that the
6 moving party hasn't requested funding, we likely would
7 request funding to respond to that.

8 Other than that, as I said, July 13th is a
9 date that works for us, and if we can get going by then.
10 And subject to any questions, that's all I wanted to say.

11 **THE COMMISSIONER:** You want to get on the
12 same playing field, you say. The question I have is if
13 someone who is self-funded has a decision to make as to
14 whether they want to invest or not in the decision of
15 moving forward. Someone who is provincially funded can
16 take -- presumably, has a new balancing act to make. It's
17 free money. They can go. So they don't have to make that
18 determination as to whether or not they want to take the
19 money and spend that money, because in the end the person
20 who is self-funded will be out of pocket, whereas the
21 person who is fully funded from the provincial purse has
22 nothing to lose.

23 **MR. LEE:** That's where costs come in. It
24 seems to me that the possibility of having cost ordered
25 against you in a civil proceeding is always one of the

1 major considerations of whether or not you proceed. That's
2 an extra layer of protection. It would be a consideration
3 from my group certainly, in respect for going to Divisional
4 Court and having costs awarded against us.

5 **THE COMMISSIONER:** Well, I don't know that -
6 - well, who knows.

7 **MR. LEE:** Who knows is exactly right.

8 It seems to me, Mr. Commissioner, that
9 taking my clients in particular without funding it's very
10 likely that we would not participate in a judicial review.

11 **THE COMMISSIONER:** Well, whatever happened
12 to the other four-letter word, pro bono?

13 **MR. LEE:** It's a possibility. It's
14 certainly not my decision to make but it's something we've
15 obviously considered. But I don't think you can expect
16 that that's going to happen time and time again. It may.
17 It may not.

18 **THE COMMISSIONER:** No, I'm not talking about
19 time and time again.

20 Pro bono, for those of you who are
21 listening, means the four-letter word free.

22 I mean, if you're so certain of your
23 position, then whoever goes up pro bono could get costs
24 from the parties.

1 **MR. LEE:** Well, that's true. I mean, it's a
2 lot ---

3 **THE COMMISSIONER:** It works both ways you
4 know.

5 **MR. LEE:** It's a lot easier when you want to
6 bring an application for judicial review and you're sure of
7 your position. If we're in a position where we need to
8 respond ---

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

10 **MR. LEE:** --- there may well be situations
11 where the position may well have some merit. We
12 nonetheless need to respond to it.

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

14 **MR. LEE:** It's just not the same, in my
15 opinion.

16 **THE COMMISSIONER:** Thank you.

17 Mr. Bennett.

18 **MR. BENNETT:** Good afternoon, Mr.
19 Commissioner.

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

21 --- SUBMISSION BY/REPRÉSENTATION PAR **MR. BENNETT:**

22 **MR. BENNETT:** I agree with my friends that
23 this is a matter of putting everyone on equal footing, that
24 the -- for parties who don't have access to funds outside

1 of this Commission it would be difficult to have any type
2 of review or be involved in any type of review.

3 And I have to say it could easily have been
4 us today up here instead of Mr. Cipriano, depending on
5 which way one of the decisions had gone ---

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

7 **MR. BENNETT:** --- and we would have
8 anticipated that you would have had the authority to
9 recommend funding.

10 So I don't think that's really the issue. I
11 think what the real issue is how to deal with merit and how
12 to make sure that there's not a carte blanche that any
13 counsel can just say "We want money from the public purse
14 and we want to go forward."

15 While I recognize the proposal by the
16 Citizens Coalition may be a very good one and we wouldn't
17 be opposed to that, there may be another way of dealing
18 with that. Again, I'm going back to the issue of cost.

19 What I would like to recommend is that --
20 obviously you have no say on how the Divisional Court --
21 but that your counsel, when they participate, be instructed
22 to seek costs if the Divisional Court were to determine
23 that a case was without merit so that they wouldn't -- if
24 there was a case that was truly a good case of importance
25 and it really wasn't sure how it may go, that the

1 Divisional Court -- that your counsel would be instructed,
2 you know, that they can leave that in the Divisional
3 Court's hands to determine this is a good case and
4 therefore we're not going to go that route, but there would
5 be an opportunity to say to a party "You know, we really
6 think you've wasted everyone's time and money and we're
7 going to award costs against you" and that would send a
8 very good message and it would be something we would have
9 to advise our clients of and take into account as a
10 potential risk.

11 And I'm not sure what the test is for them
12 to -- that counsel would propose, whether it's without
13 merit or arguable case or something. But it wouldn't be
14 that unusual where sometimes counsel will ask for cost and
15 sometimes they don't. So to leave it to the Divisional
16 Court when they're reviewing the material to determine this
17 was a good case or not.

18 **THE COMMISSIONER:** But then -- yes, you see,
19 the problem there is that the lawyer, and I don't mean that
20 -- any of the lawyers would still get paid and it would be
21 their client that would be penalized.

22 **MR. BENNETT:** Well, first ---

23 **THE COMMISSIONER:** In this case, let's
24 assume Father MacDonald ---

1 **MR. BENNETT:** But I assume if I came back
2 and told my client I'm getting paid and all of a sudden you
3 have to pay \$30,000 I don't think I'd be my client's
4 counsel much longer and they may turn around and say "What
5 happened here? How come you didn't advise us of this
6 before and how come this?" I would presume I would have
7 had to have that discussion and my client would be advised
8 of those risks and would have agreed to proceed with them,
9 and that would be part of getting instructions from my
10 client in those circumstances.

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

12 **MR. BENNETT:** And I recognize it may be a
13 hollow victory if the people who require funding don't have
14 any funds to begin with but it is something people will
15 have to consider, and I know certainly, from my client's
16 perspective, it would be something they would seriously
17 take into consideration.

18 Even when we first got involved in the
19 inquiry, one of the first questions is what's our liability
20 here, what's our potential exposure, what could happen by
21 getting involved, and those are the types of responsible
22 discussions counsel would have with their client about
23 these types of issues.

24 **THE COMMISSIONER:** But when we get to the
25 merit, wouldn't one of the things be the fact that your

1 clients, the alleged Victims Group's clients, disassociated
2 yourselves with Mr. Cipriano's client and Mr. Leduc and
3 said "No, no, no, no, this is not a jurisdictional issue.
4 This is an evidentiary balancing of priorities which we'll
5 take here"; wouldn't that be a way of assessing merits?

6 **MR. BENNETT:** It may be.

7 I think the unfortunate difficulty is the
8 perception, because right now I'm standing up here and
9 saying I agree with your decision. It was absolute
10 beautiful wisdom.

11 **THE COMMISSIONER:** Of course.

12 **MR. BENNETT:** But there might be another
13 time when I'm not standing here with that belief.

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

15 **MR. BENNETT:** And I think if I was in Mr.
16 Cipriano's position it would be difficult for me to agree
17 that there would be a perception that you would have the
18 ability to make a decision about that.

19 **THE COMMISSIONER:** No, no, but maybe I
20 didn't explain myself. The merits -- on the issue of the
21 merits, all right, a person looking at the chess match or
22 the way players have played out the motion is that Mr.
23 Leduc, any alleged perpetrators from the church, et cetera,
24 have said "We don't agree. We don't want to join him on
25 that. We think it should be the way I've decided." So on

1 the merits, objectively, objectively we have two to one,
2 two groups to one, who are saying "That's not the way to
3 go."

4 **MR. BENNETT:** I think I'll take you back to
5 some of your earlier comments about ---

6 **THE COMMISSIONER:** Sure.

7 **MR. BENNETT:** --- we don't have a scorecard
8 here.

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

10 **MR. BENNETT:** And I don't think how many
11 parties join in on -- and I understand that because I quite
12 frankly don't think there is any merit to this appeal, but
13 there may be other cases where I do and I think there's the
14 broader issue of -- and unfortunately we're in the
15 situation where my perspective is where sometimes bad facts
16 can make bad law. It could have been a decision on an
17 issue where perhaps the merits -- and it might not have
18 been quite as how I view it on this case and that's why, I
19 think, it's an unusual situation that the three of us who
20 oppose the Motion are up saying "We don't oppose in
21 principle the idea of funding."

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

23 **MR. BENNETT:** And that's the difficulty that
24 we face. And I don't think what the issue is should cloud
25 the bigger picture of -- because it's probably going to

1 arise at some other point. So whatever happens with
2 respect to this needs to be approached in a way that it's
3 setting a precedent that will be helpful as we move
4 forward. And I recognize that it's a very difficult one
5 because ---

6 **THE COMMISSIONER:** You keep doing that to me
7 though, ---

8 **MR. BENNETT:** Yes.

9 **THE COMMISSIONER:** --- telling me how
10 difficult it is and then you go back and sit down.

11 **MR. BENNETT:** That's why I'm a mediator and
12 you're a judge.

13 It is a very difficult one, and there is
14 also the issue of not only the merits of delay, because one
15 of the aspects under the review is there is no timetable.
16 There is nothing in the *Inquiries Act* or in any of the
17 rules that say "What's the timeframe for this?" And one of
18 the things that I would recommend is that if there is a
19 recommendation for funding, however it comes forward -- and
20 I mean, there may be a system where it's determined no,
21 there is no merits there for no funding, but if there is,
22 that there be timelines put on it.

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

24 **MR. BENNETT:** So for example, if there is a
25 July 13th date it would be, okay, there will be funding but

1 it has to be brought by this July 13th and you can't -- the
2 funding is not available to bring in next October or
3 November, and that for any type of funding it be tied to a
4 timetable that we would have to meet because we have real
5 concerns about any types of delays.

6 **THE COMMISSIONER:** Absolutely.

7 **MR. BENNETT:** I think that's shared by
8 everybody in this room. Well, the majority of people are
9 concerned about that.

10 **THE COMMISSIONER:** So what happens if -- do
11 I need to get the agreement of everybody as to who I pick?
12 Do I get to pick?

13 **MR. BENNETT:** Do you get to pick the date?

14 **THE COMMISSIONER:** No, not the date, the
15 person who's going to work at -- the Mr. Gold position; let
16 me put it that way.

17 **MR. BENNETT:** Well, I think what I took from
18 Mr. Manson's comments were it's the type of person you're
19 looking for, someone who has a significant judicial
20 experience, someone who is well respected in the field,
21 whether it's Mr. Gold or a retired judge, or a current
22 judge, someone who commands a certain respect amongst their
23 peers.

24 But I recognize it can lead back to the
25 Catch 22; they say "no" and then I think at that point any

1 of us faced with that would then decide "Do we go out on
2 our own?"

3 **THE COMMISSIONER:** Okay. So not only -- so
4 what you're saying is we go through this whole process.
5 Let's assume whoever is appointed comes back and says "No
6 merit." I say no funding and they go ahead in any event.

7 **MR. BENNETT:** Well, you can go ahead if you
8 want. I mean, there is no ability ---

9 **THE COMMISSIONER:** Well, what about ---

10 **MR. BENNETT:** --- for the Commissioner to
11 say to someone you cannot review this.

12 **THE COMMISSIONER:** Binding arbitration, that
13 if the person in question says no case, no case.

14 **MR. BENNETT:** Yes, and that would be it.

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

16 **MR. BENNETT:** I wouldn't have a difficulty.
17 I don't know about my colleagues. But clearly there's got
18 to be a fast way to deal with it. That's my only concern
19 with what's being suggested by -- because when I look at
20 Mr. Manson's proposal ---

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

22 **MR. BENNETT:** --- the context of the July
23 13th date, no way, because I see by the time you get
24 someone, a proposals put it; one week to respond; something
25 to go back to you; you recommend it to the Ministry of

1 Attorney General, and my guess is September.

2 I just don't see it happening within one
3 month, and that's the difficulty we face with that type of
4 proposal.

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

6 **MR. BENNETT:** But certainly the idea that
7 you have the ability to recommend funding, we are in total
8 agreement with. And I think that there has to be some
9 mechanism that removes you from determining the merits
10 because quite frankly it would be difficult for you to one
11 day say, "Okay, I think my ruling on this case had no
12 merit." And the next time say, "Well, this one, there
13 might be some merits to appealing my decision on this".

14 **THE COMMISSIONER:** I tend to disagree with
15 you on that point. I think that judges can look back and
16 detach themselves if only for the purposes of clearly
17 establishing -- applying a clearly established test, if
18 there is one to be able to determine those things. And I
19 don't know that it's cast in stone or that I think it's
20 easy for me to say that we are shortchanging the judiciary
21 somewhat. I will leave it at that.

22 **MR. BENNETT:** And my final point is
23 consistent with my friend's that obviously, if there is ---

24 **THE COMMISSIONER:** One for all and all for
25 one, yes. Thank you.

1 **MR. BENNETT:** --- and maybe what we could
2 also consider is where there is joint positions that maybe
3 look at the parties joining together and it may not be
4 necessary to have four parties arguing the same -- I'm
5 thinking of Commission counsel and three in. It may not be
6 necessary, depending on what the issue is.

7 **THE COMMISSIONER:** Right.

8 **MR. BENNETT:** And obviously you wouldn't be
9 able to order us to do that, but it might be something you
10 might want to strongly recommend.

11 **THE COMMISSIONER:** Thank you very much.

12 **MR. BENNETT:** Thank you.

13 **THE COMMISSIONER:** Mr. Chisholm.

14 **MR. CHISHOLM:** Are we taking turns, Mr.
15 Commissioner?

16 **THE COMMISSIONER:** What? You have something
17 to say? I am ready to listen.

18 **MR. CHISHOLM:** I was just going to say we
19 have no submissions with respect to Mr. Cipriano's Motion
20 and observations with respect to the question that you put
21 out about you are so sure of the merits of your application
22 for judicial review rely upon a cost award of the
23 Divisional Court. One observation I would make would be
24 that while the costs generally follow the event, the scale
25 of cost could be a partial indemnity scales as opposed to

1 substantial indemnity scale, which would leave the
2 successful party without full indemnification for the
3 costs. That's my only comment here, Mr. Commissioner.

4 Thank you.

5 **THE COMMISSIONER:** Thank you.

6 Anyone else has any comments to make? Any
7 positions to take in this matter?

8 **MR. KLOEZE:** Mr. Commissioner, Commission
9 counsel has just asked me whether or not there is any
10 comment from the Attorney General, and the only comment
11 that I have to make is that any recommendation for funding
12 by you goes to the Policy Division of our Ministry and
13 there are counsel in that Division who advise the Attorney
14 General as to the recommendation that you make. That
15 Division is separate and apart from us as counsel; we are
16 representing the Attorney General's interest at this
17 Inquiry, but we have advised the counsel at Policy Division
18 that a recommendation may be forthcoming out of the Motion
19 today and that any recommendation should be dealt with
20 expeditiously.

21 **THE COMMISSIONER:** And "expeditiously" means
22 what in the Ministry's -- Mr. Lee got this once because we
23 have Mr. Lee time now, but what do you think is
24 expeditiously?

25 **MR. KLOEZE:** I honestly can't comment on

1 what the timeframe is for dealing with those
2 recommendations, but I know that counsel in that Division
3 and the Attorney General are very concerned about any
4 prospect of delay and we'll deal with any recommendation in
5 as short a time as they possibly can.

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

7 **MR. KLOEZE:** Thank you, sir.

8 **THE COMMISSIONER:** Anybody else?

9 Mr. Cipriano?

10 **MR. CIPRIANO:** I have nothing to add.

11 **THE COMMISSIONER:** Well, come on.

12 Pardon me? July 13th?

13 **MR. CIPRIANO:** I looked at my calendar and
14 that date. This is the first time I heard that date
15 proposed. I don't want to upset the Commission. Right now
16 I have something scheduled for that week, but knowing what
17 the decision of today's outcome will be, I can certainly
18 make every effort to replace myself where I have to be in
19 Ottawa on that date to make myself available for July 13th.

20 **THE COMMISSIONER:** So what do you think
21 about the scheme of getting somebody to help me out here?

22 **MR. CIPRIANO:** I say I don't disagree with
23 the proposal by Mr. Manson. When I read it yesterday, I --
24 although we differ on the issue of whether the funding as
25 it exists now -- but ---

1 **THE COMMISSIONER:** I don't even want to hear
2 about that. I just want to hear about his proposal.

3 **MR. CIPRIANO:** I think it is an appropriate
4 way to deal with it. It does cover the issue of a party
5 not abusing public funding and just going to judicial
6 review for any reason whatsoever.

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

8 **MR. CIPRIANO:** And so it does cover that and
9 it does cover the issue of merit, which you have raised and
10 so I am not opposed to it. I think it's an appropriate
11 position to put forward and to consider.

12 As I indicated in my submissions earlier,
13 there is nothing right now within the Commission internally
14 or available to do something like that and that's why all
15 we have available is a judicial review. So something like
16 this could for the future perhaps speed up the process.

17 I haven't turned my mind to the mechanics of
18 it, but it seems, the way it is proposed, it's -- I would
19 not be opposed to something like that.

20 **THE COMMISSIONER:** Well I know -- how about
21 would you agree to it?

22 **MR. CIPRIANO:** Right now I think it's a good
23 proposal. I would like some time to reflect on it, but I
24 can't see myself disagreeing with it. I would suggest it's
25 a good compromise to deal with issues like this that I

1 think it's a novel issue that has arisen and ---

2 **THE COMMISSIONER:** But it's novel because
3 from my understanding it's never been raised in any
4 Commission ever. Everyone has gone on to do their appeals
5 without seeking funding. I think.

6 **MR. CIPRIANO:** Well, I think it's an
7 appropriate way to address an issue like this.

8 **THE COMMISSIONER:** You understand that I
9 would not be bound by any of that; by the recommendation.

10 **MR. CIPRIANO:** I'm sorry?

11 **THE COMMISSIONER:** I wouldn't be bound by
12 that recommendation.

13 **MR. CIPRIANO:** By the recommendation made
14 by?

15 **THE COMMISSIONER:** The Mr. Gold of the
16 world. It would be his recommendation to me based on ---

17 **MR. CIPRIANO:** Well, I suppose, like I say,
18 we have no -- if that's the way, I'm not saying that's the
19 way you are going to decide, but if it is a way that the
20 Commission is going to head in that direction, I suppose a
21 mechanism would be set up by which you will tell us whether
22 you will or will not be bound by that and we will have to
23 deal with it as it arises, I suppose.

24 **THE COMMISSIONER:** M'hm. Anything else?

25 **MR. CIPRIANO:** No.

1 **THE COMMISSIONER:** Thank you.

2 Mr. Engelmann?

3 Let's take a short break. We will come back
4 in 15.

5 **THE REGISTRAR:** Order. All rise. À
6 l'ordre. Veuillez vous lever.

7 The hearing will reconvene at 3:05 p.m.

8 --- Upon recessing at 2:53 p.m./

9 L'audience est suspendue à 14h53

10 --- Upon resuming at 3:42 p.m./

11 L'audience est reprise à 15h42

12 **THE REGISTRAR:** Veuillez vous lever.

13 This hearing of the Cornwall Public Inquiry
14 is now in session. Please be seated; veuillez vous
15 asseoir.

16 **THE COMMISSIONER:** Thank you.

17 What I would like to do this afternoon is
18 render a -- I suppose -- the decision itself of what I
19 decided to do with reasons to follow.

20 The reason for that is simple that that
21 four-letter word "delay" cannot hamper us any further. And
22 so what I have decided to do is -- and again, for reasons
23 to follow -- is to recommend to the Attorney General that
24 there be funding for the judicial review.

25 I am going to do that on the basis that the

1 application and the argument be complete -- well, that the
2 argument be held on July 13th, which I understand from Mr.
3 Engelmann is a date that is being held by the Divisional
4 Court.

5 I am recommending that the CCR, the Men's
6 Project and the Victims Group be recommended for funding
7 but for two counsel for preparation and one counsel
8 attendance fee in total.

9 That if costs are awarded, I want to make it
10 very clear that this recommendation does not cover any
11 costs being awarded against any party. It will be the
12 responsibility of the unsuccessful party or the party to
13 whom the costs are assessed to bear that responsibility.

14 I think that's it.

15 Mr. Engelmann, does that cover it, do you
16 think?

17 **MR. ENGELMANN:** Yes. And I understand, sir,
18 that you will have reasons over the next few days, written
19 reasons ---

20 **THE COMMISSIONER:** Yes.

21 **MR. ENGELMANN:** --- to be issued and posted
22 on the website.

23 **THE COMMISSIONER:** Yes. Thank you very
24 much.

25 What we will do is I will provide -- because

1 I doubt there will be any appeal from that decision -- so
2 what I will be doing is providing you with the reasons, and
3 I think the reasons will be important because I've outlined
4 in the few minutes that I've had -- well, I don't want to
5 get into detail, but this is not an earth shattering
6 precedent. I think it will be limited to the facts of this
7 case and we will be discussing a procedure. I will be
8 considering a procedure for the future and that type of
9 thing, but I think that when we are dealing with the
10 alleged victims, when we are dealing with the process and
11 with this Inquiry proper, I think that it is essential that
12 the word "delay" be dealt with very seriously and that we
13 should take the opportunity of July 13th, so that we can
14 start planning for the fall.

15 Are there any questions arising out of that?

16 So, Mr. Cipriano, let me be very clear here.
17 July 13th is a date set in stone and that I would -- well,
18 funding will not continue past July 13th. You can be
19 assured of that.

20 All right? Thank you.

21 Now, some of you wish to run; others wish to
22 continue the session. So those of you who wish to leave
23 are free to go.

24 Thank you.

25 **MR. CIPRIANO:** Thank you, Mr. Commissioner.

1 **MR. ENGELMANN:** Just before people go, I
2 think the train is at 4:45. So I'll just take a minute
3 because I wanted to, Mr. Commissioner, give Mr. Manderville
4 an opportunity to decide whether he wished to start today
5 or not. I have spoken to the parties that are actively
6 participating in his Motion, and we are looking at next
7 Thursday morning and we could start either at the usual
8 time at 10:00 or I understand parties could start as early
9 as 9:30.

10 **THE COMMISSIONER:** Yes.

11 **MR. ENGELMANN:** So I wanted to give Mr.
12 Manderville the choice as to whether or not, if it suits
13 you, whether he wishes to start today or start next week.

14 **THE COMMISSIONER:** Yes.

15 **MR. ENGELMANN:** So perhaps we could hear
16 from him for just a moment.

17 **THE COMMISSIONER:** Right.

18 **MR. MANDERVILLE:** Good afternoon, Mr.
19 Commissioner.

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

21 **MR. MANDERVILLE:** It would be my personal
22 preference to start next Thursday morning at 9:30.

23 **THE COMMISSIONER:** Yes.

24 **MR. MANDERVILLE:** I anticipate my argument
25 to be about an hour to an hour and fifteen minutes.

1 Mr. Engelmann has suggested, and I am by no
2 means holding him to it, that he would be about 40 minutes.
3 Monsieur Ducasse would be about 15 minutes, and I would
4 expect we would have it all wrapped up by lunch break.

5 **THE COMMISSIONER:** All right.

6 **MR. MANDERVILLE:** But I could start now if
7 you would prefer that.

8 **THE COMMISSIONER:** No, I -- well, who was
9 it? I'm in your hands today in the sense that it's your
10 Motion and I know that you're ready to go. It's a question
11 of preference because we are coming back on Thursday in any
12 event because time will not permit us to finish this.

13 **MR. MANDERVILLE:** Correct.

14 **THE COMMISSIONER:** And so really, if you
15 prefer on Thursday, I am fine with that.

16 Mr. Ducasse, do you have any problems? You
17 would have to come back on Thursday in any event because
18 you won't be heard today.

19 **MR. DUCASSE:** That's correct, Mr.
20 Commissioner.

21 **THE COMMISSIONER:** All right.

22 **MR. DUCASSE:** I have no specific preference.

23 **THE COMMISSIONER:** Well, I would prefer then
24 to hear it all at once. That would be easier for me.

25 **MR. MANDERVILLE:** I agree with you.

1 **THE COMMISSIONER:** And so we will --

2 **MR. MANDERVILLE:** And is 9:30 amenable for
3 you?

4 **THE COMMISSIONER:** Nine thirty (9:30) is
5 fine, yes. And that will give us time to do that.

6 All right?

7 **MR. MANDERVILLE:** Thank you, Mr.
8 Commissioner.

9 **THE COMMISSIONER:** Is there anything else?
10 Any other case law you would like to discuss, Mr. Manson?
11 Mr. Ducasse?

12 **MR. DUCASSE:** No, I'm fine.

13 **THE COMMISSIONER:** All right. Well, hence
14 we finish another day. Thank you.

15 **THE REGISTRAR:** Order. All rise. À
16 l'ordre. Veuillez vous lever.

17 This hearing is now adjourned. L'audience
18 est ajournée.

19 --- Upon adjourning at 3:49 p.m./

20 L'audience est ajournée à 15h49

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C E R T I F I C A T I O N

I, Sean Prouse a certified court reporter in the Province of Ontario, hereby certify the foregoing pages to be an accurate transcription of my notes/records to the best of my skill and ability, and I so swear.

Je, Sean Prouse, un sténographe officiel dans la province de l'Ontario, certifie que les pages ci-hautes sont une transcription conforme de mes notes/enregistrements au meilleur de mes capacités, et je le jure.



Sean Prouse, CVR-CM