

**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 40**

**Held at :**

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

Thursday, June 15, 2006

**Tenue à:**

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

Jeudi, le 15 juin 2006

**Appearances/Comparutions**

Mr. Peter Engelmann	Lead Commission Counsel
M <sup>e</sup> Simon Ruel	Commission Counsel
Ms. Louise Mongeon	Registrar
Mr. Peter Manderville	Cornwall Police Service Board
Mr. Larry Fitzpatrick	Ontario Provincial Police
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. Dallas Lee	Victims Group
M <sup>e</sup> André Ducasse	Diocese of Alexandria-Cornwall and Bishop Eugene LaRocque
Mr. William Carroll	Ontario Provincial Police Association

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1 --- Upon commencing at 9:33 a.m./

2 L'audience débute à 9h33

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 Normand  
7 Glaude presiding.

8 Please be seated. Veuillez vous asseoir.

9 **THE COMMISSIONER:** Good morning, all.  
10 Bonjour.

11 I'd like to take a couple of moments to update you on  
12 further developments that have occurred over the last week  
13 and to outline for you the schedule for the months to come.

14 You may recall that I advised you of the  
15 possibility of hearing context evidence from the Diocese.  
16 I advised you that this evidence would either be heard  
17 during the week of June 19<sup>th</sup> or the 26<sup>th</sup>. Unfortunately,  
18 counsel for the Diocese and/or their witnesses are not  
19 available during that time. Accordingly, we will be  
20 freeing up those two weeks with the exception of the  
21 Tuesday, June 27<sup>th</sup>, when we will accomplish the following.

22 First of all, we will be hearing an  
23 application by the Upper Canada School Board to be added as  
24 a party to this Inquiry. As well, we will hear an  
25 application brought by the Diocese and by the Cornwall

1 Community Renewal to have their funding orders amended.  
2 And, finally, I intend to render a ruling on today's  
3 motion.

4 I will also break up the summer recess a bit  
5 by opening the week of July 24<sup>th</sup> in order to hear context  
6 evidence from the Ministry of the Attorney General and from  
7 the Diocese.

8 With respect to the week of August 8<sup>th</sup>, we  
9 shall complete the context evidence from the Diocese and  
10 I'm setting aside time to hear from the Upper Canada School  
11 Board in the event that they are granted funding. I expect  
12 that evidence to be completed by August 11<sup>th</sup>, failing which  
13 we will continue during the week of August 14<sup>th</sup> until that  
14 evidence is completed.

15 The schedule for the hearing week of August  
16 21<sup>st</sup> will be vacated. I've decided to make up any lost time  
17 by scheduling extra hearing dates in December; those dates  
18 being the week of December 11<sup>th</sup>, as well as the 18<sup>th</sup>, 19<sup>th</sup>  
19 and 20<sup>th</sup> of December. As well, parties should note that  
20 commencing September 1<sup>st</sup>, I will extend the hearing times in  
21 the day and shorten the lunch hours so we can complete more  
22 work each and every day.

23 Now, Commission counsel will advise the  
24 parties in writing of all of these changes and of the  
25 times. And the website will be updated accordingly.

1           These changes are being made to ensure that  
2           all outstanding motions are completed, that I provide the  
3           parties with one last opportunity to complete the context  
4           evidence, to permit the parties to digest the disclosure  
5           which will have been distributed to them in July and,  
6           finally, to give some certainty to the victims and alleged  
7           victims as to when and how their testimony will be heard.

8           Accordingly, barring any unforeseen  
9           developments, I fully intend to commence the substantive  
10          hearings together with the opening remarks starting  
11          September 5<sup>th</sup>. Should there be any further developments  
12          during the summer break, Commission counsel will  
13          communicate directly with the parties. The website will be  
14          kept current, and the media advised.

15          So subject to any questions from anyone,  
16          those are the announcements for today.

17          Mr. Engelmann.

18          **MR. ENGELMANN:** The matter that's scheduled  
19          to be heard today is the motion by Mr. Manderville on  
20          behalf of the Cornwall Community Police Service.

21          **THE COMMISSIONER:** Yes.

22          **MR. ENGELMANN:** And I know Mr. Ducasse for  
23          the Diocese will be speaking to the motion as well; as will  
24          I.

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

1 Mr. Manderville. How are you today, sir?

2 MR. MANDERVILLE: Well, thanks. Good  
3 morning, Mr. Commissioner.

4 THE COMMISSIONER: Good morning.

5 MR. MANDERVILLE: I trust you are well, as  
6 well.

7 THE COMMISSIONER: The fishing trip was a  
8 success.

9 MR. MANDERVILLE: They were biting?

10 THE COMMISSIONER: They sure were. All  
11 within limit, of course.

12 (LAUGHTER)

13 --- MOTION PRESENTED BY MR. MANDERVILLE ON BEHALF OF THE  
14 CORNWALL POLICE SERVICES BOARD AND THE CORNWALL POLICE  
15 COMMUNITY SERVICE

16 MR. MANDERVILLE: Mr. Commissioner, you are  
17 aware of the nature of this motion and I presume you've had  
18 an opportunity to review all of the materials submitted by  
19 your Commission counsel and the Diocese and our client.

20 The issue in this motion concerns the  
21 current wording of rule 31 of the Inquiry's Rules of  
22 Practice and Procedure. The Inquiry's rules can be found  
23 at Tab 5 of our Brief of Authorities; that's the not-so-  
24 thick white, Volume of Documents. Rule 31 is at page 8 of

1 the rules at Tab 5.

2 Do you have that, Mr. Commissioner?

3 **THE COMMISSIONER:** Oh yes; and it's on the -

4 --

5 **MR. MANDERVILLE:** Sorry.

6 Rule 31 states, and I quote:

7 "The Commission expects all relevant  
8 documents to be produced to the  
9 Commission by any party with standing  
10 where the documents are in the  
11 possession, control or power of the  
12 party. Where a party objects to the  
13 production of any document on the  
14 grounds of privilege, the document  
15 shall be produced in its original,  
16 unedited form to Commission counsel who  
17 will review and determine the validity  
18 of the privilege claim. The party  
19 and/or that party's counsel may be  
20 present during the review process. In  
21 the event the party claiming privilege  
22 disagrees with Commission counsel's  
23 determination, the Commissioner, on  
24 application, may either inspect the  
25 impugned documents and make a ruling,

1 or may direct the issue to be resolved  
2 by a judge assigned by the Chief  
3 Justice of the Superior Court of  
4 Justice."

5 From our client's perspective, the, I  
6 submit, obvious concern with this rule is that it seeks to  
7 compel production of documents properly subject to  
8 privilege and, in particular for the purposes of this  
9 motion, the rule seeks to compel parties with standing to  
10 produce to Commission documents properly subject to  
11 solicitor and client privilege.

12 Mr. Commissioner, as you are aware, the law  
13 and legislation recognizes several types of privilege. The  
14 only type of privilege in issue before you today is  
15 solicitor and client privilege which the law recognizes to  
16 be a special category of privilege.

17 And, first, I'd like to provide you with  
18 some background facts. Our client, the Cornwall Community  
19 Police Service, is as you are aware, a party with standing  
20 at the Inquiry. Our client, like all the other parties  
21 with standing, received a summons from the Commission to  
22 produce all relevant documents to the Commission; and it  
23 has indeed produced thousands of them.

24 Our client has identified a number of  
25 documents in its possession which would be properly subject

1 to solicitor and client privilege. A list of those  
2 documents was created and we notified Commission counsel  
3 that our client had a number of privileged documents in its  
4 possession.

5 Commission counsel has taken the position  
6 that, under rule 31, our client is forced to produce to the  
7 Commission all those documents which our client contends  
8 are properly subject to solicitor and client privilege.  
9 The Commission will then vet all of those documents, and  
10 will thereafter decide whether they are subject to  
11 privilege. If, after reviewing all of these documents at  
12 their leisure, Commission counsel come to the view that our  
13 client is correct in its assertion of solicitor and client  
14 privilege over the documents, they will be returned.

15 Now, the Cornwall Community Police Service  
16 has retained a number of various legal firms and counsel  
17 over the years. It's retained the Beamont Green Firm in  
18 Ottawa in connection with certain discipline and employment  
19 related matters; it's retained the Jewell, Obradovich Firm  
20 in Toronto for certain labour and discipline matters; it's  
21 retained the Matthews Dinsdale Firm in connection with  
22 labour matters; the Perley-Robertson Firm in Ottawa in  
23 various matters, and it has also previously retained the  
24 Smith Lyons Firm in Toronto in connection with previous  
25 relevant civil suits.

1                   The Smith Lyons Firm was retained in  
2 insurance-based matters. Its retainer was a joint retainer  
3 by the liability insurer, the Cornwall Police, and certain  
4 individual officers to defend the Cornwall Community Police  
5 Service as well as the officers named as defendants in  
6 those civil suits.

7                   The fact that the Smith Lyons retainers were  
8 joint retainers by the Community Police Service as well as  
9 several individuals is an important fact for reasons I will  
10 discuss a little later.

11                   Now, as I mentioned, Gowlings has submitted  
12 to Commission counsel a list of all the documents subject  
13 to solicitor and client privilege claims. Our client has  
14 waived claims to all other forms of privilege it is  
15 entitled to maintain with respect to certain documents.

16                   For example, our client holds a litigation  
17 privilege over certain of the documents. It has elected to  
18 waive it and has produced those documents to the  
19 Commission. Moreover, our client is not claiming any  
20 privilege over relevant communications it has had with the  
21 Crown Attorney's office over the years. Any such documents  
22 have been produced. However, our client does maintain its  
23 claim of solicitor and client privilege over documents in  
24 its possession properly subject to such a claim.

25                   We have significant concerns about a rule

1 that seeks to compel disclosure of solicitor and client  
2 privileged information to the Commission. Our client and  
3 the individuals who have that privilege -- and I know  
4 you're aware it is the client's privilege -- have not  
5 agreed to waive it. Rather, we have proposed to Commission  
6 counsel that a list of documents subject to solicitor and  
7 client privilege be submitted to the Commission counsel.  
8 And we have, in fact, submitted such a list.

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

10 **MR. MANDERVILLE:** We have proposed they  
11 review the list. Ideally, Commission counsel and we will  
12 agree that all of the documents on the list would, from  
13 their description, be privileged. For those documents on  
14 the list which are not agreed upon we would have those  
15 documents sealed in an envelope or a box and sent to the  
16 Superior Court Judge designated by the Commission, or an  
17 appropriate designate, to review the documents in question  
18 and rule on the solicitor and client privilege claims.

19 Our proposal to Commission counsel has been  
20 rejected; hence, this motion.

21 The Supreme Court of Canada has repeatedly  
22 emphasized the special nature of solicitor and client  
23 privilege. The right of a client to claim privilege over  
24 information and communications passing between the client  
25 and his or her or its solicitor is sacrosanct. Once it is

1 established it is permanent unless waived by the client.  
2 The waiver must be an informed waiver. The Supreme Court  
3 of Canada has held that solicitor and client privilege is a  
4 principle of fundamental justice subject to constitutional  
5 protection pursuant to the provision of section 7 of the  
6 Canadian Charter of Rights and Freedoms.

7 In 2002, the Supreme Court released its  
8 decision in *Lavallee and Others v Canada*. The *Lavallee*  
9 decision is at Tab 1 of our Brief of Authorities. At issue  
10 before the court in *Lavallee* was a provision in the  
11 Criminal Code which permitted searches of lawyers' offices  
12 in certain circumstances and whether the relevant provision  
13 in the Criminal Code minimally impaired solicitor and  
14 client privilege.

15 Beginning at paragraph 16, found at page 12  
16 of the decision, the court discusses prior decisions  
17 concerning solicitor and client privilege. The court notes  
18 that Dickson in *Solosky* stated that solicitor and client  
19 privilege had become a "fundamental civil and legal right".

20 The court in the same paragraph goes on note  
21 that in *McClure*, the 2001 Supreme Court of Canada decision,  
22 Mr. Justice Major describes solicitor-client privilege as a  
23 principle of fundamental justice within the meaning of  
24 section 7 of the Charter.

25 At paragraph 18 of the decision, Madame

1 Justice Arbour quotes former Chief Justice Lamer in the  
2 *Descôteaux v Mierzwinski* case, Justice Lamer confirmed that  
3 solicitor and client privilege had evolved into a  
4 substantive principle of law. Mr. Justice Lamer, in that  
5 paragraph, goes on to note certain rules or guidelines to  
6 follow concerning solicitor and client privilege. He  
7 notes:

8 "(1) Confidentiality and communications  
9 between solicitor and client may be  
10 raised in any circumstances where such  
11 communications are likely to be  
12 disclosed without the client's consent.

13 (2) Unless the law provides otherwise,  
14 when and to the extent that the  
15 legitimate exercise of a right would  
16 interfere with another person's right  
17 to have his communications with his  
18 lawyer kept confidential, the resulting  
19 conflict should be resolved in favour  
20 of protecting the confidentiality.

21 (3) Where the law gives someone the  
22 authority to do something which in the  
23 circumstances of the case might  
24 interfere with that confidentiality,  
25 the decision to do so and the choice of

1 means of exercising that authority  
2 should be determined with a view to not  
3 interfering with it, except to the  
4 extent absolutely necessary in order to  
5 achieve the ends sought by the enabling  
6 legislation.

7 (4) Acts providing otherwise in  
8 situations under paragraph two and  
9 enabling legislation referred to in  
10 paragraph three must be interpreted  
11 restrictively."

12 Madam Justice Arbour succinctly summarizes  
13 the decisions or the authorities she had reviewed at  
14 paragraph 20 on the following page. At the end of  
15 paragraph 20 she states:

16 "In other words, solicitor-client  
17 privilege must only be impaired if  
18 necessary and even then minimally."

19 **THE COMMISSIONER:** Sorry, I've lost you.  
20 Where again?

21 **MR. MANDERVILLE:** The very end of paragraph  
22 20.

23 **THE COMMISSIONER:** Yes.

24 **MR. MANDERVILLE:** The last sentence at  
25 paragraph 20:

1                    "In other words, solicitor-client  
2                    privilege must only be impaired if  
3                    necessary and even then minimally."

4                    In this instance, in this Motion, in this  
5                    Commission, I submit that the impairment of solicitor and  
6                    client privilege in this matter has not been shown to be  
7                    necessary and Rule 31 decidedly more than minimally impairs  
8                    it.

9                    In this instance, Mr. Commissioner, the  
10                    Commission has been created and you have been appointed  
11                    through a provincial Order in Council through the auspices  
12                    of the *Public Inquiries Act*. The Commission is acting as a  
13                    delegate of the executive branch of the provincial  
14                    government and not, as you are aware, the judicial branch.  
15                    As you are also aware, your authority is derived from the  
16                    *Public Inquiries Act* and the Order in Council setting out  
17                    the Commission's Terms of Reference.

18                    The Commission is, I submit, an agent of the  
19                    state acting as a delegate of the executive branch of the  
20                    provincial government.

21                    Continuing with my discussion of the  
22                    *Lavallee* decision and moving to paragraph 36, the Court  
23                    points out that:

24                    "Unlike other forms of privilege  
25                    solicitor and client privilege must

1                   remain as close to absolute as possible  
2                   if it is to retain relevance."

3                   **THE COMMISSIONER:** Can I ---

4                   **MR. MANDERVILLE:** "The Court is compelled  
5                   to adopt stringent norms to ensure its  
6                   protection."

7                   **THE COMMISSIONER:** Can I stop you for a  
8                   second?

9                   **MR. MANDERVILLE:** By all means, sir.

10                  **THE COMMISSIONER:** All right.

11                  You're saying that while I'm a member of the  
12                  judiciary my function here is as an agent of the state. Do  
13                  you have authority or can you show me someplace where I can  
14                  see that?

15                  **MR. MANDERVILLE:** I would say your Terms of  
16                  Reference ---

17                  **THE COMMISSIONER:** Yes.

18                  **MR. MANDERVILLE:** --- which are included in  
19                  the Brief.

20                  **THE COMMISSIONER:** Yes.

21                  **MR. MANDERVILLE:** At Tab 6, I believe.

22                  The Order in Council setting out the Terms  
23                  of Reference and also your appointment and then the *Public*  
24                  *Inquiries Act* ---

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

1                   **MR. MANDERVILLE:** --- are the means by which  
2                   the Commissioner, in this case you, derives his or her  
3                   authority.

4                   **THE COMMISSIONER:** Yes.

5                   **MR. MANDERVILLE:** The Order in Council is an  
6                   order of the Cabinet. It's an order of the executive  
7                   branch of government. The executive branch has delegated  
8                   certain authorities to you and you are here. The  
9                   Commission is formed as an adjunct, as a delegate of the  
10                  executive branch of government and not, in this instance,  
11                  the judicial branch and while you are -- and we all know  
12                  this -- you are a judge and you're sitting as the  
13                  Commissioner, I suggest you're not wearing your judge's  
14                  hat. You're wearing your commissioner's hat.

15                  **THE COMMISSIONER:** Thank you.

16                  **MR. MANDERVILLE:** Returning to my discussion  
17                  of *Lavallee* ---

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

19                  **MR. MANDERVILLE:** --- the Court notes at  
20                  paragraph 36 that:

21                                 "Unlike other forms of privilege,  
22                                 solicitor-client privilege does not  
23                                 involve a balancing of interests."

24                                 It will only yield in certainly clearly-  
25                                 defined circumstances and does not, as I just said, involve

1 a balancing of interests between in this case the interests  
2 of the state and the interests of the client in protecting  
3 the privilege.

4 The Court notes at paragraph 37 the certain  
5 rare circumstances where solicitor and client privilege  
6 will yield and cites an example of where public safety is  
7 at stake:

8 "There must be a clear and imminent  
9 risk of serious bodily harm or death to  
10 an identifiable person or group before  
11 solicitor-client privilege can be  
12 compromised."

13 And clearly, that is not the situation we  
14 have before us.

15 Paragraph 39, the Court notes again that:

16 "The privilege belongs to the client  
17 and can only be asserted or waived by  
18 the client or through his or her  
19 informed consent. The privilege is  
20 simply too important a principle to be  
21 sacrificed in the interests of  
22 expediency or administrative  
23 convenience."

24 And lastly, with respect to *Lavallee*, I'd  
25 like to turn you, Mr. Commissioner, to the Court's

1 discussion at paragraphs 44 and 45. The reason for  
2 bringing this to your attention is, I submit, directly  
3 opposite to the argument you'll hear from my friend.

4 The Court notes that it was submitted before  
5 it in *Lavallee* that, if the Crown in that instance reviewed  
6 privileged material and it was held to be privileged and  
7 returned to the party that holds the privilege, the Crown  
8 would disabuse itself of the information it had learned or  
9 would not rely upon it. And Madam Justice Arbour, at the  
10 bottom of paragraph 44 states:

11 "I cannot understand the logic of the  
12 argument that the Crown should be  
13 trusted not to use information obtained  
14 under that provision if it is  
15 subsequently proved to have been the  
16 proper subject of privilege if; as  
17 would be the case under the provision  
18 the Court was concerned with, being the  
19 relevant section of the *Criminal Code*;  
20 if, as would be the case under this  
21 provision, the conduct of the Crown  
22 examining the documents would have been  
23 entirely lawful. It is difficult to  
24 understand why the Crown should then  
25 refrain from making use of such

1 knowledge lawfully acquired. In the  
2 end, this provision is unduly intrusive  
3 upon the privilege and of limited  
4 usefulness in determining its  
5 existence."

6 In this situation, in the Commission's -- in  
7 the discussions with Commission counsel and the submissions  
8 made to you by Commission counsel, Commission counsel are  
9 asserting; one, they are not in an adversarial relationship  
10 with the parties of standing at this Inquiry and; two, they  
11 would review all the information including privileged  
12 information and then, seemingly, disabuse themselves of any  
13 ability to rely on the privileged information or any  
14 ability to use it in any way.

15 Our response to that is as follows: One,  
16 solicitor-client privilege is most emphatically not in any  
17 way related to the presence or absence of an adversarial  
18 relationship. The privilege is that of a client. It is  
19 the client's decision as to whether or not anyone other  
20 than the client's solicitor should be privy to the  
21 information. Whether or not there is an adversarial  
22 relationship is, I would submit, irrelevant to that issue.

23 Secondly, *Lavallee* says at paragraphs 44 and  
24 45 that it is simply inaccurate to presume that the Crown  
25 in *Lavallee* or, in this instance Commission counsel, would

1           disabuse themselves of the privileged information they have  
2           become aware of. Why should they? They're obtaining  
3           privileged information properly pursuant to Rule 31.  
4           They're absolutely entitled to review it under Rule 31.  
5           Why, then, is it somehow to be expected of Commission  
6           counsel that they should or would disabuse themselves of  
7           any ability to rely on the privileged information?

8                         It is simply not accurate, I submit, to say  
9           that the Commission counsel will do so, nor would it be  
10          required that they do so if Rule 31 is proper. *Lavallee*  
11          makes it clear that it is no comfort whatever to the  
12          client, the Crown or, in this instance, Commission counsel,  
13          should somehow be perceived to make a principal refusal to  
14          make use of the information they have received.

15                        I would like to turn you to another decision  
16          of the Supreme Court of Canada in *Pritchard v. Ontario*  
17          *Human Rights Commission*. This is a 2004 decision of the  
18          Supreme Court considering the issue of solicitor and client  
19          privilege in an administrative setting, and the issue is  
20          whether in-house counsel or counsel to the Human Rights  
21          Commission; opinions to the commission were privileged.  
22          And the Court held that they are.

23                        I begin my review of this decision with a  
24          discussion of Mr. Justice Major beginning at paragraph 14,  
25          which is page 6 of the nine-page decision. Justice Major

1 states:

2 "Solicitor-client privilege describes  
3 the privilege that exists between a  
4 client and his or her lawyer. Clients  
5 must feel free and protected to be  
6 frank and candid with their lawyers  
7 with respect to their affairs so that  
8 the legal system as we have recognized  
9 it may properly function."

10 The Court at paragraph 17 cites the *McClure*  
11 decision which I earlier referred to. It states:

12 "The privilege is jealously guarded and  
13 should only be set aside in the most  
14 unusual circumstances such as a genuine  
15 risk of wrongful conviction."

16 The Court also cites *Lavallee* at paragraph  
17 18 and states:

18 "The privilege must be nearly absolute  
19 and that exceptions to it will be  
20 rare."

21 The Court reiterates the finding in

22 *Lavallee*:

23 "Solicitor-client privilege does not  
24 involve a balancing of interests on a  
25 case-by-case basis."

1 At paragraph 39 of this decision the Court  
2 states:

3 "There is no applicable exception  
4 that can remove communication from the  
5 privileged class. There is no  
6 common..."

7 **THE COMMISSIONER:** I'm sorry, you said 39?

8 **MR. MANDERVILLE:** Twenty-nine (29).

9 **THE COMMISSIONER:** Sorry.

10 **MR. MANDERVILLE:** I may have mistakenly said  
11 39 which is a 36 paragraph decision. That would be a neat  
12 trick.

13 **THE COMMISSIONER:** Okay.

14 **MR. MANDERVILLE:** I was hoping to catch you  
15 on that one, Mr. Commissioner.

16 (LAUGHTER/RIRES)

17 **THE COMMISSIONER:** I'm listening, I'm  
18 listening.

19 **MR. MANDERVILLE:** Paragraph 29.

20 **THE COMMISSIONER:** Yes.

21 **MR. MANDERVILLE:** The Court states that:

22 "There is no applicable exception  
23 that can remove the [Commission from]  
24 the communication from the privileged  
25 class. There is no common interests

1                   between this Commission and the parties  
2                   before it that could justify  
3                   disclosure, nor is this Court prepared  
4                   to create a new common-law exception on  
5                   these facts."

6                   The Court goes on at paragraph 31 to state  
7                   that:

8                   "Procedural fairness does not require  
9                   the disclosure of a privileged legal  
10                  opinion. Procedural fairness is  
11                  required both in the trial process and  
12                  in the administrative law context. In  
13                  neither area does it affect solicitor-  
14                  client privilege. Both may co-exist  
15                  without being at the expense of the  
16                  other. The concept of fairness  
17                  permeates all aspects of the justice  
18                  system and important to it is the  
19                  principle of solicitor-client  
20                  privilege."

21                  Finally, at paragraph 33 the Court notes  
22                  that legislation or, in this instance I would submit a  
23                  rule:

24                  "Purporting to limit or deny  
25                  solicitor-client privilege will be

1                   interpreted restrictively. Solicitor-  
2                   client privilege cannot be abrogated by  
3                   inference. While administrative boards  
4                   have the delegated authority to  
5                   determine their own procedure as the  
6                   Commission does, the exercise of that  
7                   authority must be in accordance with  
8                   natural justice and the common law."

9                   I submit that *Pritchard*, and the statements  
10                  made by Justice Major in it, are directly applicable to the  
11                  situation you are confronted with.

12                  Rule 31 and its purported requirement; the  
13                  parties withstanding be compelled to provide solicitor and  
14                  client privileged information to Commission counsel, is a  
15                  denial of procedural fairness, a denial of natural justice  
16                  which is what the Court has noted in *Pritchard*. *Pritchard*  
17                  says procedural fairness does not require production of  
18                  solicitor and client privileged information.

19                  At Tab 3 of our brief, we have attached a  
20                  British Columbia Court of Appeal decision in *Legal Services*  
21                  *Society v. British Columbia (Information and Privacy*  
22                  *Commissioner)*. In that instance, an applicant was  
23                  seeking production from British Columbia's Information and  
24                  Privacy Commissioner of records of all of the statements of  
25                  account rendered by Legal Aid solicitors throughout the

1 province to the British Columbia Legal Aid Plan. It was a  
2 freedom of information inquiry.

3 The Court there relied on *Lavallee*, and  
4 there's only one paragraph in the decision that I would  
5 like to draw your attention to and that's paragraph 35 at  
6 page 13 of the decision.

7 At paragraph 35, the Court states:

8 "If, as *Lavallee* mandates, the  
9 privilege is to be maintained as close  
10 as possible to absolute, a standard of  
11 correctness must be applied to the  
12 Commissioner's determination of whether  
13 the disclosure of particular  
14 information carries the potential to  
15 breach the privilege of clients funded  
16 by Legal Aid. A decision of the  
17 Commissioner which places solicitor-  
18 client privilege at risk is not  
19 acceptable even if reasonable."

20 And the Court goes on to quote Mr. Justice  
21 Lowry of the British Columbia Supreme Court who states in  
22 the quoted portion immediately below paragraph 5 or  
23 comprising part of paragraph 5 that:

24 "The relevant legislation being  
25 considered by the Court was enacted to

1 ensure that what would at common law be  
2 the subject of solicitor and client  
3 privilege remains privileged. There is  
4 absolutely no room for compromise."

5 So Mr. Commissioner, to summarize thus far,  
6 the Supreme Court of Canada in *Lavallee* says that solicitor  
7 and client privilege is a rule of natural justice, a rule  
8 of fundamental justice. It is permanent. It is absolute  
9 or as close to absolute as possible.

10 There is no balancing exercise between the  
11 interests of, in this case, the Commission on one hand and  
12 the interests of the clients on the other. Solicitor and  
13 client privilege is only to be impaired when absolutely  
14 necessary and even then the only impairment is that of an  
15 absolute minimum. It is wrong to presume that the party to  
16 whom privileged information is compulsorily revealed will  
17 not make use of it. That's what the Supreme Court of  
18 Canada is saying in *Lavallee*.

19 In *Pritchard*, the Supreme Court of Canada  
20 says that the required disclosure of solicitor and client  
21 documents violates procedural fairness. The *British*  
22 *Columbia Services* decision says that a decision, or I'm  
23 going to say a rule, which places solicitor and client  
24 privilege at risk is not acceptable even if somehow  
25 reasonable.

1                   The Supreme Court of Canada is, I submit,  
2 repeatedly saying that it is simply wrong as a matter of  
3 law to seek to compel clients to disclose solicitor-client  
4 privileged information in the absence of absolute necessity  
5 which I submit is simply not present here.

6                   Moreover, even if somehow it can be shown  
7 that is absolutely necessary, and I suggest the onus for  
8 showing that rests with my friend Mr. Engelmann, even if it  
9 can be somehow shown that the compelled disclosure of  
10 solicitor-client privileged information is necessary  
11 somehow, the privilege must be absolutely minimally  
12 impaired.

13                   Now, I made reference earlier to the fact  
14 that at least for the *Smith Lyons* retainers, there was a  
15 joint retainer between the Cornwall Community Police  
16 Service and certain individuals; officers present and  
17 former. Those individuals are not designated as parties  
18 with standing at this inquiry.

19                   If we assume for the moment that Rule 31 is  
20 proper, how can this Commission compel non-parties to  
21 disclose solicitor-client privileged information to the  
22 Commission? Any such waiver would have to be an informed  
23 waiver.

24                   **THE COMMISSIONER:** Wait a minute, now.  
25 Isn't the Cornwall Police Service representing all police

1 officers then, present and past? I mean, I thought we went  
2 through that in the standing hearing when ---

3 **MR. MANDERVILLE:** No, I agree with you but  
4 the privilege is jointly held.

5 **THE COMMISSIONER:** By?

6 **MR. MANDERVILLE:** If I am retained by Mr.  
7 Engelmann and Mr. Ruel and I communicate with them and they  
8 communicate with me, it's a joint privilege. Mr. Engelmann  
9 may decide to waive it but he can't do it without Mr. Ruel  
10 agreeing and Mr. Ruel's waiver has to be informed. And if  
11 Mr. Ruel is in another part of the country or another part  
12 of the province, it's not enough for Mr. Engelmann to say,  
13 "Okay, Mr. Manderville, you can reveal this privileged  
14 communication" or I on my own initiative can reveal it. It  
15 has to be with the informed acquiescence of Mr. Ruel.

16 By the way, they have not actually retained  
17 me.

18 **THE COMMISSIONER:** No, they didn't.

19 No, no, no, other than for the insurance  
20 company, right, all of the police officers, past or  
21 present, have standing here because you represent them.

22 **MR. MANDERVILLE:** I don't disagree with you.

23 **THE COMMISSIONER:** Okay. So then the  
24 argument really is it's not really with the officers.  
25 You're saying that *Smith Lyons* represented an insurer and

1 the police force in their -- and that's where the ---

2 MR. MANDERVILLE: Correct.

3 THE COMMISSIONER: Okay.

4 MR. MANDERVILLE: Mr. Commissioner, I want  
5 to turn briefly to the *Lyons* case at Tab 4 of our brief.

6 THE COMMISSIONER: M'hm.

7 MR. MANDERVILLE: My friend Mr. Engelmann is  
8 relying on it and at page 10 of our factum, we have pointed  
9 out how the *Lyons* decision is, we believe, significantly  
10 distinguishable from the current situation on its facts.

11 Some of the distinguishable facts are as  
12 follows. Mr. Lyons testified before the MFP Commission in  
13 Toronto that he worked as a lobbyist and not as a lawyer.  
14 He did not do any legal work for or provide any legal  
15 advice to the three relevant clients whose documents were  
16 in issue. If legal work was required for those clients, it  
17 was done by other members of the law firm at which Mr.  
18 Lyons was situated.

19 He also testified before that Commission  
20 that the file -- one of the files had been destroyed and he  
21 could not produce any documents relating to it. Subsequent  
22 to his testimony, the law firm at which he worked  
23 discovered a large amount of relevant material including a  
24 file pertaining to work done by Lyons for that particular  
25 client.

1 Evidence subsequently emerged that Mr. Lyons  
2 had requested documents from storage pertaining to that  
3 particular client prior to his testimony. He then asserted  
4 a blanket privilege over all of the boxes of documents  
5 provided to the Commission. The client did not assert a  
6 claim of privilege.

7 Mr. Lyons provided no affidavit evidence to  
8 describe the material which he believed was in the box of  
9 documents and which might be privileged and the  
10 commissioner in the MFP Inquiry had openly expressed  
11 previously some significant reservations as to the  
12 credibility of that witness.

13 None of those factual situations are present  
14 here. Foremost among them, I submit, is the assertion by  
15 Mr. Lyons that he was not acting as lawyer to the client  
16 and therefore had not done any legal work for them. How on  
17 earth could any of the documents going to him or flowing  
18 from him have been subject to solicitor and client  
19 privilege if, on his own word, he was not acting as lawyer?

20 We have also included in our brief the Rules  
21 of Practice and Procedure for certain other inquiries.

22 **THE COMMISSIONER:** Can I stop you there,  
23 though?

24 **MR. MANDERVILLE:** By all means, sir.

25 **THE COMMISSIONER:** True that they

1 distinguished but they went through the analysis saying;  
2 however, there is a possibility that there might be  
3 privileged documents and therefore, we go through the  
4 analysis. And in the analysis, they talk about the  
5 screening process minimally impaired solicitor-client  
6 privilege, all right, and they talked about the task of  
7 screening documents could not be left to the applicant.  
8 They do speak in there that the applicant was wrong in his  
9 characterization of Commission counsel as an agent of the  
10 state and he wasn't in an adversarial position analogous to  
11 Crown prosecutors.

12 I mean, don't you think that they were  
13 covering the basis of the Supreme Court that you're talking  
14 about and they're saying, "No, that's not the case"?

15 **MR. MANDERVILLE:** Any analysis of *Lyons* has  
16 to begin, I submit, with his denial that he was acting as  
17 lawyer to these clients. It has to begin with that.

18 It then has to look at the fact that Madame  
19 Justice Bellamy had openly expressed some serious  
20 reservations as to this person's credibility and to then  
21 assert a blanket privilege over everything renders, I  
22 suggest, the Division Court justifiably sceptical as to the  
23 validity of the claim.

24 Any discussion of *Lyons*, I submit, has to  
25 begin with these are the facts that the Divisional Court

1 has in its mind when it considers the validity of what is  
2 being claimed. None of those facts are present here.

3 **THE COMMISSIONER:** All right.

4 But it does go on to say the commissioner, a  
5 judge in the Superior Court of Justice, has the power to  
6 determine whether documents are privileged and therefore  
7 inadmissible in Commission hearings. So that goes back to  
8 your first argument that you're saying that a commissioner  
9 is characterized otherwise than a judiciary because he's  
10 acting as a member of the state. In this case, it could be  
11 read to stand for the proposition that it's not.

12 **MR. MANDERVILLE:** I'm going to draw another  
13 distinction as well, and that is MFP was an inquiry  
14 established under the *Municipal Act* ---

15 **THE COMMISSIONER:** Right.

16 **MR. MANDERVILLE:** --- which, as you know,  
17 expressly requires that the commissioner be a judge of the  
18 Superior Court.

19 **THE COMMISSIONER:** Yes.

20 **MR. MANDERVILLE:** There is no such  
21 requirement in our provincial *Public Inquiries Act*. You  
22 are a judge but the commissioner need not be. The  
23 commissioner could be any man or woman in the community  
24 that is appointed.

25 **THE COMMISSIONER:** All right.

1                   **MR. MANDERVILLE:** And as I mentioned before,  
2 as you sit here today, you are not wearing your judge's  
3 hat. You're wearing your commissioner's hat. Conversely,  
4 in the municipal -- in municipal inquiries, given that the  
5 commissioner is required to be a Superior Court judge, he  
6 or she never takes off that other hat.

7                   **THE COMMISSIONER:** Okay. But the fact that  
8 I am a judge, right, should it not be read that it gives me  
9 -- assuming that I had the power to determine whether  
10 documents are privileged, whether the Act is silent or  
11 contemplates that it can be someone other than a member of  
12 the judiciary, the fact that I'm a member of the judiciary,  
13 would that not make me fall into that general proposition?

14                   **MR. MANDERVILLE:** Would that not mean -- I  
15 shouldn't be asking you the questions.

16                   **THE COMMISSIONER:** No.

17                   **MR. MANDERVILLE:** Would that not mean that  
18 we would consider every inquiry on an *ad hoc* basis  
19 depending on whether or not the commissioner happens to be  
20 a judge?

21                   **THE COMMISSIONER:** Absolutely.

22                   **MR. MANDERVILLE:** When he or she is not  
23 required to be? And wouldn't that create inconsistencies  
24 in various provincial inquiries entirely determinative on  
25 whether or not the commissioner happened to be a judge when

1           there is no requirement that he or she be so?

2                           **THE COMMISSIONER:** On the issue of  
3           privileges, on the issue of solicitor-client privilege,  
4           that might be, but the fact remains that this is a judicial  
5           inquiry, judicial because it's a member of the judiciary  
6           who is doing this. So could it not be said that the fact  
7           that it's a judicial inquiry makes it different than a non-  
8           judicial inquiry and therefore there are certain rights and  
9           obligations, I suppose, or issues that can be decided that  
10          could not otherwise be decided by a non-judicial  
11          appointment?

12                           **MR. MANDERVILLE:** I think you may be right  
13          on the hypothetical you have drawn. The problem, as I see  
14          it, is that our Supreme Court is saying you don't impair  
15          solicitor-client privilege unless absolutely necessary and  
16          someone, not the client -- it's not the client's onus --  
17          someone, and in this case I submit Commission counsel, has  
18          to show that it's absolutely necessary, not just because  
19          it's administratively expedient to do it, but it's  
20          necessary.

21                           And they also have to show that the  
22          mechanism we have devised is the minimal impairment and  
23          that there do not exist other mechanisms which would more  
24          minimally or less intrusively impinge upon solicitor and  
25          client privilege.

1                   **THE COMMISSIONER:** Can I just ask you this  
2 one? If it was a judge of the Superior Court sitting here  
3 today, would the argument be the same?

4                   **MR. MANDERVILLE:** I think it would be  
5 different in that I acknowledge that in a trial setting,  
6 trial judges from time to time are asked to rule on whether  
7 material that was divulged somehow is privileged or not,  
8 and I expect in your criminal court, that happens now and  
9 again.

10                  **THE COMMISSIONER:** You shouldn't limit the  
11 analysis to criminal court because for need, we also do  
12 family and CFSA matters which also include more, I think,  
13 relevant considerations to privilege.

14                  **MR. MANDERVILLE:** It certainly happens and  
15 trial judges make rulings on whether or not documents are  
16 privileged.

17                  **THE COMMISSIONER:** M'hm. So what's the  
18 difference if it were a Superior Court judge as opposed to  
19 an Ontario Court of Justice judge?

20                  **MR. MANDERVILLE:** Well, a judge of the  
21 Ontario Court does not have the inherent jurisdiction  
22 conferred by section 96 of the *Constitution Act* and the  
23 sort of inherent supervisory power that a Superior Court  
24 judge does.

25                  **THE COMMISSIONER:** Agreed.

1                   **MR. MANDERVILLE:** One. Two, returning to  
2 what I had said before, given that the *Municipal Act*  
3 expressly stipulates "shall be a judge of the Superior  
4 Court", coupled with the absence of any such stipulation in  
5 the provincial legislation that the commissioner be a  
6 judge, I mean the commissioner, as I said, could be anyone.

7                   **THE COMMISSIONER:** All right. Okay, section  
8 96 argument. Is there anything in here -- we're dealing  
9 with solicitor-client privilege. Is it exclusively in the  
10 purview of section 96? Is there any invoking of the  
11 inherent jurisdiction? I mean we're talking about  
12 solicitor-client privilege.

13                   **MR. MANDERVILLE:** Correct.

14                   **THE COMMISSIONER:** And it's something that I  
15 put to you that I don't think it's inherent to section 96.  
16 I think it's open to judges of the Ontario Court to ---

17                   **MR. MANDERVILLE:** I think you're right.

18                   **THE COMMISSIONER:** Okay. So let's take that  
19 away. So then why -- I just want to establish if there is  
20 a difference and I'm kind of leaning that there isn't  
21 really a difference because we're dealing -- the subject  
22 matter is solicitor-client privilege and I think it's  
23 outside of the inherent jurisdiction and I just want your  
24 comments so that I can be guided by that, if it makes a  
25 difference. I don't know that in this analysis it makes a

1 difference.

2 **MR. MANDERVILLE:** I guess the best way I can  
3 help you, and I was going to go to this in any event ---

4 **THE COMMISSIONER:** Okay.

5 **MR. MANDERVILLE:** --- is if we look at ---

6 **THE COMMISSIONER:** I'm sorry. If you're  
7 going to get to it, I don't want to destroy the flow of  
8 your argument. If you prefer just to deal with it later,  
9 that's fine.

10 **MR. MANDERVILLE:** I guess whichever you  
11 would prefer. If you want me to try and deal with it now -  
12 --

13 **THE COMMISSIONER:** No, if it will disturb  
14 the flow, keep going and we'll get back to it.

15 **MR. MANDERVILLE:** I was starting to say that  
16 included in our brief, we have attached some Rules of  
17 Practice and Procedure for other inquiries.

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

19 **MR. MANDERVILLE:** Including the Walkerton  
20 Inquiry at Tab 7 and Rule 25 of those rules is the relevant  
21 rule which we note makes no reference whatever to  
22 production of privileged documents.

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

24 **MR. MANDERVILLE:** We have attached the rules  
25 of the Toronto Computer Leasing Inquiry at Tab 8 which were

1 the rules in issue for Lyons. Rule 13 requires the  
2 production of relevant documents but makes no suggestion  
3 that privileged documents are to be produced.

4 Similarly, the Driskell Inquiry in Manitoba,  
5 and its Rules of Practice and Procedure we have attached at  
6 Tab 10. Rules 14 and 15 of that inquiry's rules set out a  
7 mechanism for dealing with disputes concerning privileged  
8 documents.

9 **THE COMMISSIONER:** Hang on a second.

10 **MR. MANDERVILLE:** And in particular, in that  
11 inquiry it's proposed that if counsel for parties with  
12 standing and commission counsel agree, the commissioner can  
13 determine the issue of privilege. If they do not agree, it  
14 is to be referred out to a neutral third-party; in this  
15 case, a ruling of the Manitoba Court of Queen's Bench.

16 **THE COMMISSIONER:** Well, it's up to the  
17 commissioner, right? So it parallels this in the sense  
18 that it's up to the commissioner to decide whether he will  
19 hear the argument or ship it off to another judge.

20 **MR. MANDERVILLE:** I believe, Mr.  
21 Commissioner, that rule 15 of those rules indicates that,  
22 "If commission counsel wish to  
23 challenge a claim of privilege,  
24 commission counsel shall apply as  
25 follows: to the commissioner or to the

1 Court of Queen's Bench of Manitoba in  
2 relation to a claim of solicitor and  
3 client privilege if the party claiming  
4 the privilege requests that the issue  
5 be adjudicated by the Court."

6 **THE COMMISSIONER:** Okay, that's fine. Thank  
7 you. Thank you. Yes.

8 **MR. MANDERVILLE:** Now, we've also attached  
9 the *Public Inquiries Act* at Tab 11 and, as I alluded to  
10 earlier, your Terms of Reference at Tab 6.

11 Briefly I want to touch on your Terms of  
12 Reference and section 6 of them, which is at page 3 of the  
13 Terms of Reference. Section 6 says:

14 "The Commission shall ensure that the  
15 disclosure of evidence and other  
16 materials balances the public interest,  
17 the principle of open hearings, and the  
18 privacy interests of the person(s)  
19 affected, taking into account any legal  
20 requirements."

21 And I submit implicit in that is that the  
22 Commission is to take into account the right of solicitor  
23 and client privilege held by parties with standing. That's  
24 part of their privacy interests. That's part of the legal  
25 requirements set out in *Lavallee* and *Pritchard*.

1                   Tab 11 of the *Public Inquiries Act*, section  
2           7 sets out the Commission's power to issue summons in  
3           respect of witnesses and documents.

4                   Section 7 says:

5                               "A commission may require any person by  
6                               summons

7                               (a) to give evidence on oath...; or

8                               (b)..."

9           -- which is, for our present purposes, the pertinent  
10          portion --

11                               "A commission may require any person by  
12                               summons to

13                               ...produce in evidence at an inquiry

14                               such documents and things as the

15                               commission may specify relevant to the

16                               subject-matter of the inquiry and..."

17          -- and I emphasize this --

18                               "...and not inadmissible in evidence at  
19                               the inquiry under section 11."

20                   Section 11 on the next page says:

21                               "Nothing is admissible in evidence at

22                               an inquiry that would be inadmissible

23                               in a court by reason of any privilege

24                               under the law of evidence."

25                   So I submit that reading those two sections

1 together, the Commission is not entitled to issue a summons  
2 seeking the production of documents properly subject to  
3 solicitor and client privilege.

4 The summons is to produce documents and  
5 things that are not inadmissible in evidence at an inquiry  
6 under section 11. Section 11, as I've just read, says  
7 nothing is admissible if it's properly subject to  
8 privilege.

9 **THE COMMISSIONER:** But we're not talking  
10 about admissibility at this point; we're talking about  
11 screening.

12 **MR. MANDERVILLE:** I quite agree and section  
13 7 says, I submit, ---

14 **THE COMMISSIONER:** Section 7, yes.

15 **MR. MANDERVILLE:** --- that when a summons is  
16 issued by this Commission, the summons is to specify  
17 documents and things required to be produced relevant to  
18 the subject-matter and not inadmissible.

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

20 **MR. MANDERVILLE:** So the summons cannot seek  
21 the production of documents which are otherwise  
22 inadmissible.

23 **THE COMMISSIONER:** All right. But what  
24 you're saying then is "All right. These are solicitor-  
25 client and they're inadmissible and, therefore, the

1 Commission has no power over them." So why are you  
2 consenting to have somebody else screen them?

3 **MR. MANDERVILLE:** I will discuss that as  
4 well.

5 **THE COMMISSIONER:** Okay. Okay.

6 **MR. MANDERVILLE:** That's the minimal  
7 impairment.

8 **THE COMMISSIONER:** Ah!

9 **MR. MANDERVILLE:** Where the rule, Rule 31 as  
10 drafted, is problematic and creates the potential for  
11 mischief is, I submit, at some point the Commission will  
12 decide to issue notices pursuant to section 5(2) of the  
13 *Public Inquiries Act*. Those notices will be issued to  
14 certain individuals or entities.

15 **THE COMMISSIONER:** Well, query whether we  
16 can -- okay. I won't -- we won't need to discuss whether  
17 it's to entities or to individuals. Okay.

18 **MR. MANDERVILLE:** The 5(2) notice tells the  
19 recipient, whoever it is, tells the recipient there may be  
20 a finding of misconduct against the recipient. At that  
21 point, if not before, the relationship between that  
22 individual and the Commission changes somewhat.

23 And I submit that the integrity of this  
24 inquiry and the perception, public perception of the  
25 inquiry's objectivity would unavoidably be called into

1 question if prior to issuing those sorts of notices the  
2 Commission reviewed privileged documents, and particularly  
3 solicitor-client privileged documents in which critical  
4 comments were made of an individual who subsequently  
5 receives a section 5(2) notice.

6 How would one ever know the extent to which  
7 the decision to issue the notice or perhaps to make the  
8 finding of misconduct against the individual was based on a  
9 review of privileged material?

10 Under the rule as presently drafted, for  
11 example, Father MacDonald is obliged to turn over all of  
12 the solicitor and client privileged material he might  
13 possess concerning prior criminal charges and the criminal  
14 proceedings or any civil proceedings brought against him.

15 Similarly, for example under this rule, Mr.  
16 Leduc is required to turn over to the Commission all of the  
17 solicitor and client privileged material in his possession  
18 concerning prior criminal charges against him and any civil  
19 proceedings which might have been brought against him.

20 Under this rule, Mr. Lee's clients who have  
21 initiated prior civil proceedings are obliged to turn over  
22 to the Commission any solicitor and client privileged  
23 opinions they might have received from their previous legal  
24 counsel concerning the possibility of a chance of success.  
25 Claims they had made might have some merit; they might have

1 no merit.

2 We submit this potential harm -- and it is a  
3 potential harm -- this potential harm is completely avoided  
4 by the method we had proposed to Commission counsel.

5 **THE COMMISSIONER:** Okay. So you're not  
6 really objecting to the production of the material for  
7 screening. What you're objecting to is the method outlined  
8 in section 31 -- in Rule 31.

9 **MR. MANDERVILLE:** We're objecting to the  
10 identity of the individuals or entity to whom it is to be  
11 produced. We are saying the better, less intrusive way is,  
12 in this case, for us to submit a list of the documents over  
13 which we claim privilege on behalf of our clients to  
14 Commission counsel.

15 I'm an officer of the court. Every counsel  
16 who appears in this room is an officer of the court. They  
17 have duties not to mislead and they are well known to you.  
18 Commission counsel knows that as well.

19 In our case the list we have already  
20 submitted, which is at Exhibit A to the Crane Affidavit in  
21 our Motion Record, indicates the author of the privileged  
22 document, the recipient, the date of the document, the  
23 nature of the document and the nature of the privileged  
24 claim, in all cases being solicitor and client.

25 To suggest that this information is too

1 vague to determine if it is privileged or not is, in my  
2 submission, inaccurate and the conundrum one faces as an  
3 officer of the court is to reveal too much of the  
4 document's contents. I can breach the privilege that my  
5 client has. Once the list -- we propose once the list has  
6 been submitted to Commission counsel, Commission counsel  
7 can review the list, vet it thoroughly, ideally agree on  
8 everything but there may be some form of disagreement on  
9 some documents.

10 In our case, the vast majority of the  
11 documents over which privilege is claimed are letters from  
12 the lawyer to the client, or vice versa, at a time when  
13 that lawyer had been retained.

14 It is exceedingly likely that the letters  
15 are privileged. If the letter simply said, "I'm pleased to  
16 invite you to our golf tournament next month" that letter  
17 wouldn't be privileged. But, it would not be relevant. It  
18 wouldn't have been produced.

19 If Commission counsel challenged the  
20 privileged claim on some of the documents on the list then,  
21 subject to any further discussion between the counsel for a  
22 party of standing and the Commission counsel and the  
23 ultimate inability of a party with standing and the  
24 Commission counsel to agree, then the party with standing  
25 would seal up the documents in an envelope and forward them

1 to the judge or an individual designated by the Commission  
2 for his or her review and ruling on the privileged claim.

3 **THE COMMISSIONER:** So you're saying it  
4 doesn't have to be a judge?

5 **MR. MANDERVILLE:** Pardon me?

6 **THE COMMISSIONER:** So you're saying it does  
7 not have to be a judge?

8 **MR. MANDERVILLE:** Well, the example that  
9 comes to mind is perhaps a retired judge who is not a  
10 sitting judge anymore; if the parties agreed that former  
11 Mr. Justice Gallagher, for example, or another retired  
12 judge, someone who understands privilege, of course, could  
13 be the designee to review the documents.

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

15 **MR. MANDERVILLE:** Such a procedure, I  
16 suggest, is not time consuming. It is a greatly-lessened  
17 impairment of solicitor and client privilege than that  
18 contemplated by Rule 31. It avoids the potential harm that  
19 Rule 31 creates, particularly when coupled with the  
20 probable issuance of section 5(2) notices.

21 In short, I submit Rule 31 as drafted is  
22 improper as a matter of law, simply because it has not been  
23 shown that the impairment of solicitor and client privilege  
24 is necessary and the rule in its present form more than  
25 minimally impairs it, even if it has been shown to be

1 necessary.

2 Those are my submissions, Mr. Commissioner.  
3 If you wish, I can go on to comment on the cases relied  
4 upon by Commission counsel now or I can save it for reply.

5 **THE COMMISSIONER:** Save it for reply.

6 **MR. MANDERVILLE:** Okay, thank you.

7 **THE COMMISSIONER:** Mr. Ducasse.

8 **MR. DUCASSE:** Good morning, Mr.  
9 Commissioner.

10 **THE COMMISSIONER:** Good morning.

11 **MR. DUCASSE:** Mr. Commissioner, you should  
12 have before you the Factum Authorities of the Diocese.  
13 That's essentially the only document on which I'll be  
14 relying.

15 **THE COMMISSIONER:** Yes.

16 **--- SUBMISSION BY/RÉPRESENTATION PAR MR. DUCASSE:**

17 **MR. DUCASSE:** And in terms of the  
18 submissions I would like to make today, I'll essentially  
19 follow the same road map as Mr. Manderville; that is, I'd  
20 like to briefly reiterate some of the principles in  
21 disputed claims of solicitor-client privilege and make some  
22 brief submissions as to why in our view Rule 31 of the  
23 Rules of Practice and Procedures as currently drafted do  
24 not meet the Minimal Impairment Test and, finally, a brief  
25 submission as to why, in our view, the alternative

1 procedures proposed by the Cornwall Police Services and the  
2 Diocese would meet the Minimal Impairment Test.

3 So as you know, Mr. Commissioner, the  
4 Diocese supports the position taken by the Cornwall Police  
5 Services' position on this Motion and it supports the  
6 position taken by the Cornwall Police Services' position  
7 because it is the Diocese' view that as a matter of law the  
8 position taken by the Cornwall Police Services is correct,  
9 and it is correct because it is consistent with the  
10 principles which have been mandated by the Supreme Court of  
11 Canada in terms of the importance that is to be attributed  
12 to solicitor-client privilege.

13 So having said that, I'd like to briefly  
14 reiterate some of these principles. I won't go over them  
15 in detail given that Mr. Manderville has already thoroughly  
16 reviewed them but ---

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

18 **MR. DUCASSE:** --- in terms of reference, Mr.  
19 Commissioner, they're outlined at paragraphs 11 to 17 of  
20 our Factum and I'll just pause to state that, as Mr.  
21 Manderville pointed out, the Supreme Court of Canada has  
22 held on numerous occasions that solicitor-client privilege  
23 is fundamental to the justice system in Canada and that, as  
24 a result, privilege is to be as absolute as possible and  
25 for those reasons the Supreme Court of Canada has held time

1 and time again that solicitor-client privilege can only be  
2 impaired if absolutely necessary and, even then, Mr.  
3 Commissioner, only minimally, and that has been dubbed by  
4 the Supreme Court of Canada as the "Minimal Impairment  
5 Test".

6 I would suggest to you that the importance  
7 accorded to solicitor-client privilege in a context of  
8 public inquiries, Mr. Commissioner, is expressly provided  
9 for by section 11 of the *Public Inquiries Act* and I'm not  
10 going to take you to section 11 given that Mr. Manderville  
11 has already looked at it; just to reiterate section 11  
12 provides that:

13 "Nothing is admissible in evidence at  
14 an inquiry that would be inadmissible  
15 in court by reason of any privilege  
16 under the law of evidence."

17 And I would suggest to you, Mr.  
18 Commissioner, that that's simply a codification of the case  
19 law which provides that documents which are subject to  
20 solicitor-client privilege cannot be compelled in a court  
21 of law, and I would suggest that that would extend to a  
22 commission.

23 And in that regard, Mr. Commissioner, I'd  
24 like to refer you to paragraph 17 of our Factum.

25 **THE COMMISSIONER:** Yes.

1                   **MR. DUCASSE:** And we've cited some case law  
2 from the Supreme Court of Canada which stands for the  
3 proposition that where a record is subject to solicitor-  
4 client privilege, where that record is a record of  
5 disclosure -- let me start over, Mr. Commissioner.

6                   The case law, the proposition for which the  
7 case law cited at paragraph 17 of our Factum stands is that  
8 a record which is subject to solicitor-client privilege is  
9 a record of disclosure which cannot be compelled in a court  
10 of law and, similarly, we have cited some case law that  
11 stands for the proposition that where a solicitor has  
12 information that is subject to solicitor-client privilege,  
13 he or she cannot be compelled to disclose that information  
14 and in support of those propositions we've also cited the  
15 comments of Madam Justice Arbour in the *Lavallee* decision  
16 and specifically paragraph 24 of her Reasons where she was  
17 writing for the majority and stated the following:

18                   "It is critical to emphasize here that  
19 all information protected by the  
20 solicitor-client privilege is out of  
21 reach for the state and cannot be  
22 forcibly discovered or disclosed and it  
23 is inadmissible in court. It is the  
24 privilege of the client and the lawyer  
25 acts as gatekeeper, ethically bound to

1 protect the privileged information that  
2 belongs to his or her client.  
3 Therefore, any privileged information  
4 acquired by the state without the  
5 consent of the privilege holder is  
6 information that the state is not  
7 entitled to as a rule of fundamental  
8 justice."

9 And in addition to that, Mr. Manderville has  
10 already pointed out that the importance which is accorded  
11 to solicitor-client privilege is also contemplated by  
12 section 6 of the Terms of Reference.

13 So those are the principles which govern our  
14 analysis of Rule 31 here, Mr. Commissioner.

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

16 **MR. DUCASSE:** And I would suggest that a  
17 review of those principles illustrates that Rule 31 of the  
18 Rules of Practice and Procedure of the Cornwall Public  
19 Inquiry, as currently drafted, do not satisfy those  
20 principles. It does not meet the Minimal Impairment Test.

21 Mr. Manderville has already walked you  
22 through the *Public Inquiries Act* so I don't propose to do  
23 that again. I would simply submit that Rule 31 cannot  
24 require production of privileged documents and since such  
25 production would be tantamount to forcibly discovering

1 those documents, which would be contrary not only to the  
2 dictates of the Supreme Court of Canada, Mr. Commissioner,  
3 but also, I would suggest, section 11 of the *Public*  
4 *Inquiries Act*.

5 Now, I know that Mr. Engelmann claims that  
6 the Commission has jurisdiction or authority to adopt the  
7 Rules of Practice and Procedure pursuant to section 3 of  
8 the *Public Inquiries Act*, but I would suggest that section  
9 3 of the *Public Inquiries Act* does not trump -- I can bring  
10 you to section 3 --

11 **THE COMMISSIONER:** Were you saying, "won't  
12 trump solicitor-client privilege".

13 **MR. DUCASSE:** Exactly, section 3, although  
14 does give the Commission authority to adopt Rules of  
15 Practice and Procedure, section 3 cannot be interpreted in  
16 such a way as to trump section 11 of the *Public Inquiries*  
17 *Act* nor the principles articulated by the Supreme Court of  
18 Canada. And that was directly, I would suggest, addressed  
19 by the Supreme Court of Canada in the *Pritchard* case and  
20 the *Pritchard* case is reproduced at Tab 3 of our  
21 authorities.

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

23 **MR. DUCASSE:** And I would specifically refer  
24 you, Mr. Commissioner, to paragraph 33 of that case and I  
25 believe that Mr. Manderville has already ---

1                   **THE COMMISSIONER:** Paragraph 33, right.

2                   **MR. DUCASSE:** Paragraph 33, and in paragraph  
3 33 of the *Pritchard* case, the Supreme Court of Canada  
4 stated as follows:

5                                   "Legislation purporting to limit or  
6 deny solicitor-client privilege will be  
7 interpreted restrictively. Solicitor-  
8 client privilege cannot be abrogated by  
9 inference while administrative boards  
10 have the delegated authority to  
11 determine their own procedure and the  
12 exercise of that authority must be in  
13 accordance with natural justice and the  
14 common law."

15                   I would -- sorry, Mr. Commissioner.

16                   **THE COMMISSIONER:** Can I just stop you again  
17 and I'm going to ask you the same question I asked Mr.  
18 Manderville. I mean, by giving those documents to, let's  
19 say, a Superior Court judge -- I mean, are you not  
20 breaching solicitor-client privilege then?

21                   **MR. DUCASSE:** I wouldn't say that we're  
22 breaching solicitor-client privilege. I would go back to  
23 what Mr. Manderville was saying, is we have to find a means  
24 which will satisfy Commission counsel it's got all relevant  
25 documents but yet do so in a manner which minimally impairs

1 a party's right to claim solicitor-client privilege over a  
2 document.

3 **THE COMMISSIONER:** Right, but this really  
4 isn't an issue of solicitor-client privilege, is it? I  
5 mean, all we're doing is we're acknowledging that somewhere  
6 along the line someone's got to look at these documents to  
7 determine that issue.

8 **MR. DUCASSE:** Potentially. But I would  
9 respond to your question as follows. We've set out a  
10 procedure in our material which we propose, which we  
11 suggest meets the Minimal Impairment Test. I would suggest  
12 that if you go through our procedure that at the end of the  
13 day they are going to be very few disputed claims of  
14 privilege.

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

16 **MR. DUCASSE:** That Commission counsel would  
17 be provided with sufficient detail to be able to assess  
18 whether or not privilege properly attaches to a document.

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

20 **MR. DUCASSE:** So at the end of the day we'll  
21 be able to resolve most of these issues likely on a  
22 consensual basis and if there are any remaining -- or any  
23 disputed claims of privilege at the end of the day there  
24 will be a few of them which, if need be, can be resolved by  
25 a third party, a neutral party which has nothing to do with

1 the Commission.

2 **THE COMMISSIONER:** And that's really the  
3 point of it all. Well, first of all, Mr. Manderville I  
4 think, is saying and he'll have a right to reply, that he  
5 doesn't want to go through your procedure because by  
6 putting details down of the letters he may be inadvertently  
7 breaching the solicitor-client basis.

8 **MR. DUCASSE:** I would agree with that.

9 **THE COMMISSIONER:** Okay. So but you're the  
10 one who is proposing to do just that, is to give details of  
11 the letters.

12 **MR. DUCASSE:** Yes, but if you look at our  
13 material I add the following proviso, you give a limited  
14 description of the basis for the claim of privilege; for  
15 example, you would have a list of documents over which  
16 privilege is claimed, which would be akin to a Schedule B.  
17 A Schedule B is an affidavit of documents in a civil  
18 context.

19 **THE COMMISSIONER:** Yes.

20 **MR. DUCASSE:** So you would have the date of  
21 the document, the author, the recipient and, I would  
22 suggest, we can include a real line; for example, "Letter  
23 to client re issues of liability and damages". Well,  
24 clearly, reviewing this document any reasonably well-  
25 informed person can conclude that that advice was rendered

1 in the context of the solicitor-client relationship, such  
2 that solicitor-client privilege attaches to that  
3 communication.

4 **THE COMMISSIONER:** Okay. And then we go  
5 back -- we've gone over that again, is that the difference  
6 really between having a third party do it is only the -- I  
7 don't want to say the integrity of Commission counsel  
8 because he is really tied to the Commissioner and therefore  
9 you would be saying the integrity of the Commissioner would  
10 be in doubt and then we'd really be in trouble.

11 **MR. DUCASSE:** Well, that's not necessarily  
12 what I would suggest. But I would suggest even a  
13 perception if that's the case should be enough. At the end  
14 of the day, Commission counsel will to a significant degree  
15 influence how the inquiry is going to proceed.

16 **THE COMMISSIONER:** Well, in the *Toronto*  
17 *Computer* inquiry there was no -- I mean, there was no  
18 question of that. They didn't question that fact. In the  
19 end, the Commission counsel was able to look at the  
20 documents and make the determination. So how come they can  
21 do it there and we can't?

22 **MR. DUCASSE:** Well, as Mr. Manderville, I  
23 think, correctly pointed out, the *Lyons* case can readily be  
24 distinguished from the situation that we have here. I  
25 won't go through all the distinguishing factors of that

1 decision but at the end of the day we have to come back to  
2 what is the Supreme Court of Canada telling us? The  
3 Supreme Court of Canada is telling us that if we are going  
4 to impair solicitor-client privilege we could only do so in  
5 a manner that most minimally impairs that right.

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

7 Let's not skirt the issue a little bit,  
8 though. I'll bring you back to it.

9 In the decision, I would say that the  
10 Divisional Court implicitly went on and -- well,  
11 not -- explicitly said, "Oh, right, assuming that  
12 there is a question of solicitor client  
13 privilege", all right?

14 So they put it back in the realm of not  
15 distinguishing and not doing anything and saying, "We're  
16 going to deal with this head on and here it is". And so  
17 they implicitly -- well, implicitly said that Commission  
18 counsel could do it. So they didn't argue.

19 **MR. DUCASSE:** Yes. What the Court said in  
20 the *Lyons* case is that they drew a distinction; right?  
21 They said that Commission counsel is not an adversarial  
22 position to the parties. In theory that may be correct,  
23 Your Honour, but at the end of the day there are going to  
24 be instances in a commission where the interests of  
25 Commission counsel are going to be different than the

1 interests of a party, and where -- this motion is an  
2 excellent example where that could arise.

3 Although in theory it may be right, the  
4 Commission counsel is not an agent of the state, it's not  
5 an adversarial position, there's going to be instances  
6 where, in the context of public inquiries, they're going to  
7 have different interests.

8 **THE COMMISSIONER:** Well, the interests of  
9 Commission counsel is to bring forward as an officer of the  
10 court or of the Commission the truth, matters that are  
11 before the public. So that is ---

12 **MR. DUCASSE:** And that task will not be  
13 impeded if valid claims of solicitor-client privilege are  
14 maintained. I think we've set out a position which  
15 balances the interests of the parties relatively well.  
16 We've got a relatively detailed protocol to deal with  
17 disputed claims of privilege.

18 **THE COMMISSION:** No, I understand.

19 **MR. DUCASSE:** And therefore that ensures  
20 that Commission counsel will have access to all documents  
21 which are relevant to an issue in the context of this  
22 inquiry and at the same time permit parties to assert valid  
23 claims of solicitor-client privilege. It's a balancing act  
24 and I would suggest to you that Rule 31 as it's currently  
25 drafted doesn't satisfy that balancing act because I would

1 suggest it more than minimally impairs that right, Mr.  
2 Commissioner.

3 Just to continue with my submissions, Mr.  
4 Commissioner, as to why Rule 31 of the Rules of Practice  
5 and Procedure as currently drafted does not meet Minimal  
6 Impairment Test, as Mr. Manderville alluded to in his  
7 submissions there are a number of parties involved in this  
8 inquiry which have been subject to legal proceedings  
9 whether criminal or civil, and continue to be involved in  
10 those proceedings and disclosing documents to Commission  
11 counsel that could potentially be prejudicial to the  
12 interests of those parties.

13 **THE COMMISSIONER:** What do you mean by that?

14 **MR. DUCASSE:** Well, for example, if a party  
15 is compelled to have to disclose to Commission counsel a  
16 document over which solicitor-client privilege is claimed  
17 and that's ultimately disclosed in the context of the  
18 inquiry, that could be highly prejudicial to a party which  
19 is involved in civil proceedings.

20 **THE COMMISSIONER:** Well, wait a minute.  
21 We're just talking about the screening process now.

22 **MR. DUCASSE:** Okay.

23 **THE COMMISSIONER:** Okay, so ---

24 **MR. DUCASSE:** And -- sorry, go ahead.

25 **THE COMMISSIONER:** So we're saying that --

1 we're just determining whether it's solicitor-client. If  
2 it is solicitor-client it goes back to you and nothing  
3 said.

4 **MR. DUCASSE:** There's still the risk that  
5 Commission counsel could conclude that it's not subject to  
6 a valid claim of solicitor-client privilege and gets  
7 disclosed in that fashion.

8 **THE COMMISSIONER:** And for which you can  
9 appeal.

10 **MR. DUCASSE:** Theoretically, yes.

11 I mean, are we going to appeal -- provide  
12 for an appeal right for when Commission counsel reviews a  
13 document, concludes that it's not subject to solicitor-  
14 client privilege ---

15 **THE COMMISSIONER:** Well, then ---

16 **MR. DUCASSE:** --- and then we have to make  
17 sure it's not disclosed to everyone and then we appeal that  
18 ruling.

19 **THE COMMISSIONER:** You come to me or I send  
20 it to somebody. So let's assume for a minute that you go  
21 to another third party. That person says, "It's not  
22 solicitor-client" and you disagree, okay? So your rights  
23 are protected all the way along.

24 **MR. DUCASSE:** I agree with that, Mr.  
25 Commissioner.

1                   **THE COMMISSIONER:** All right.

2                   So I had another thought and it eludes me  
3 now. It'll come back. Go ahead, sir.

4                   I'm sorry, I've got it now.

5                   **MR. DUCASSE:** Sure.

6                   **THE COMMISSIONER:** You're giving arguments  
7 or examples of other parties and the only two parties that  
8 are objecting to this are you and Mr. Manderville. So  
9 presumably the other parties don't see a problem with that  
10 so I don't know that we want to hear examples from them  
11 because, presumably, they are proceeding. And I don't know  
12 where we're at, at that.

13                   **MR. DUCASSE:** Fair enough, Mr. Commissioner.  
14 I don't mean to speak for any of the other parties.

15                   **THE COMMISSIONER:** No.

16                   **MR. DUCASSE:** Clearly, in the context of our  
17 client, we have a significant concern about -- I would  
18 suggest, be compelled to disclose documents over which  
19 solicitor-client privilege attaches.

20                   **THE COMMISSIONER:** Yes.

21                   Again, I come back to your disclosing. It  
22 sounds like the minute it comes in it's going to be made  
23 public. You're producing them for the purposes of  
24 screening, is what we're really talking about. Because  
25 nobody's saying -- we're not even at the point as to

1           whether or not they will be used and those things.

2                       **MR. DUCASSE:** Well, despite the fact that it  
3           may be for screening, we're still disclosing to a party ---

4                       **THE COMMISSIONER:** "To a party". Well ---

5                       **MR. DUCASSE:** Well, to Commission counsel  
6           who is a stranger to the solicitor-client relationship.

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

8                       **MR. DUCASSE:** We're being compelled to  
9           disclose that to a party, potentially a second party. And  
10          I mean that's the point I'm trying to make, Mr.  
11          Commissioner, is -- does it most minimally impair? I would  
12          suggest that it does not.

13                      And it would seem incongruous to me as well  
14          that in the context of civil proceedings, for example, in  
15          which my client may be involved, there's a number of  
16          documents over which solicitor-client privilege has been  
17          asserted. They have not been disclosed. No one's  
18          challenged that reasoning. And now we find ourselves in  
19          the context of this inquiry potentially having to disclose  
20          those documents. It just seems to me that that would be an  
21          incongruous result.

22                      **THE COMMISSIONER:** Wait a minute.

23                      Of not having to disclose in the civil  
24          proceedings, but you have ---

25                      **MR. DUCASSE:** You disclose their existence.

1                   **THE COMMISSIONER:** Yes.

2                   **MR. DUCASSE:** You don't physically turn over  
3 the documents.

4                   **THE COMMISSIONER:** No, no, but this is  
5 different than a civil proceeding. This is an inquiry.

6                   **MR. DUCASSE:** Yes.

7                   **THE COMMISSIONER:** So do you not see a  
8 difference between an inquiry process and a civil action?

9                   **MR. DUCASSE:** Not in terms of assertions of  
10 solicitor-client privilege. I mean, it's a fundamental  
11 right to the Canadian justice system.

12                   **THE COMMISSIONER:** Yes.

13                   **MR. DUCASSE:** At the end of the day the  
14 privilege is there to protect the client. And as a lawyer  
15 I'm ethically and legally bound not to disclose that to  
16 anyone ---

17                   **THE COMMISSIONER:** Absolutely.

18                   **MR. DUCASSE:** --- under any circumstance.

19                   **THE COMMISSIONER:** Then there is a  
20 difference, because under civil action you claim the  
21 privilege in your Schedule B of your Affidavit of  
22 Documents, whatever, "C" or whatever it is. But in this  
23 case, you're acceding to the fact that someone is going to  
24 read what you claim to be privileged documents. Why is  
25 that different?

1                   **MR. DUCASSE:** Not necessarily, Mr.  
2 Commissioner. If you look -- I mean I've got -- the  
3 procedure that we're proposing is set out at paragraph 21.

4                   **THE COMMISSIONER:** Right, but what you're  
5 saying, that if that proceeding, if that screening --  
6 you're going one step further, I'd say, than Mr.  
7 Manderville, because you're going to produce a little more  
8 detail; flush out the meat of what's in that letter.

9                   **MR. DUCASSE:** M'hm.

10                  **THE COMMISSIONER:** And, if that doesn't work  
11 you're saying that someone's going to read that letter for  
12 the purposes of determining whether or not it's solicitor-  
13 client.

14                  **MR. DUCASSE:** No.

15                  **THE COMMISSIONER:** So you ---

16                  **MR. DUCASSE:** I'm sorry. What I've --  
17 possibly, ultimately, our ultimate scenario is if  
18 Commission counsel and the parties cannot resolve the  
19 disputed claim of privilege, the ultimate arbiter that  
20 we're suggesting ought to be a judge of the Superior Court  
21 of Justice.

22                  **THE COMMISSIONER:** All right.

23                                 And so my question to you is: why is that?  
24 Why is that different than a civil proceeding? And, my  
25 comment to you is, because the inquiry is a different

1           beast. And that's why you're here saying, "When all else  
2           fails, we'll give it" -- why would you give it to anybody  
3           and not claim the thing to be absolute and "I will not" ---

4                   **MR. DUCASSE:** Well, I go back to my  
5           balancing of the interests. I'm not sure the distinction  
6           you're trying to draw, Mr. Commissioner.

7                   **THE COMMISSIONER:** I'm trying to show -- I'm  
8           trying to explore with you whether or not there's a  
9           difference between an inquiry and a civil proceeding. And,  
10          what I'm saying is, you're at the point where, when all  
11          else fails, in an inquiry you are going to disclose for the  
12          purpose of the screening material.

13                   **MR. DUCASSE:** We're going to disclose their  
14          existence, not necessarily ---

15                   **THE COMMISSIONER:** No, no, no. I'm sorry,  
16          but let's get it straight so that I can understand.

17                   If your method, if your suggested procedure  
18          does not complete the issue and determine the issue, you're  
19          saying that you will give those documents to someone to  
20          read over. And the real issue here is, who is that  
21          someone?

22                   **MR. DUCASSE:** Yes.

23                   **THE COMMISSIONER:** All right.

24                   So what I'm saying is, if the solicitor-  
25          client privilege attaches, you would normally not produce

1           that to anyone, but you are willing to do it in the form of  
2           an inquiry and I'm saying why is that? I'm saying to you,  
3           I think it's because the inquiry is a different beast than  
4           a criminal proceeding, than anything else.

5                       **MR. DUCASSE:** I think the client would have  
6           less difficulty -- agree to disclose under the model which  
7           we're proposing.

8                       **THE COMMISSIONER:** Just a second, now. It's  
9           not a question of whether the client wants to or doesn't  
10          want to.

11                      **MR. DUCASSE:** If there's summons, you're  
12          correct. If there's summons they have that obligation.  
13          What I'm trying to say is the privilege is the client's to  
14          waive.

15                      **THE COMMISSIONER:** Right. What I'm saying  
16          is under the procedure we have, whether the client is  
17          kicking or screaming matters not. The procedure is you are  
18          going to proceed to give the documents.

19                      **MR. DUCASSE:** Potentially, yes.

20                      **THE COMMISSIONER:** And someone's going to  
21          look them over.

22                      **MR. DUCASSE:** Potentially, yes.

23                      **THE COMMISSIONER:** Yes.

24                      **MR. DUCASSE:** It may be of some assistance  
25          if I go over the procedure that we're proposing.

1                   **THE COMMISSIONER:** I understand it, in the  
2 sense that -- let me tell it to you the way I understand it  
3 and you tell me if it's correct, is that you're going to  
4 produce and say you're going to produce a schedule giving  
5 the names, the dates, the address and the purpose for which  
6 the letter was written.

7                   **MR. DUCASSE:** Correct.

8                   **THE COMMISSIONER:** All right.

9                   And so I'm saying that's fine and maybe you  
10 should try and do it that way. But in the end, if that  
11 doesn't work out, it's going to go to someone. And, you've  
12 agreed to that, that it's going to go to someone.

13                   **MR. DUCASSE:** Potentially, yes, ultimately.

14                   **THE COMMISSIONER:** "Potentially".

15                   **MR. DUCASSE:** Well, as I said earlier, Mr.  
16 Commissioner, the protocol that we've detailed is -- you  
17 have your list, right?

18                   **THE COMMISSIONER:** Yes.

19                   **MR. DUCASSE:** And if then -- if there's  
20 still a dispute, Commission counsel has the opportunity of  
21 saying, "Okay, I'm not satisfied, but this is a valid claim  
22 of privilege. I need some further information from you."  
23 And then the party can submit that further information.

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

25                   **MR. DUCASSE:** If, at that point -- and I

1 would suggest that at this point most disputed claims of  
2 privilege would be resolved -- let's assume that's not the  
3 case.

4 **THE COMMISSIONER:** Let's assume that it is  
5 not the case.

6 **MR. DUCASSE:** The next step that we suggest  
7 is, okay, Commission counsel would meet with the party to  
8 see if they can resolve the dispute of claim of privilege.

9 **THE COMMISSIONER:** Yes.

10 **MR. DUCASSE:** And if then they cannot, then  
11 what we're suggesting is that the judge in the Superior  
12 Court of Justice would be nominated to review this; someone  
13 who would be completely insulated from the inquiry  
14 proceedings.

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

16 **MR. DUCASSE:** So in terms of risk of this  
17 officer of the court seeing this documentation, I'm willing  
18 to suggest that most disputed claims of privilege, by the  
19 time Commission counsel and the parties meet, will be  
20 resolved.

21 **THE COMMISSIONER:** I don't think that's the  
22 point here. The point here is who gets produced to? I  
23 mean, I would have thought, with the greatest respect, that  
24 all of the steps you've taken to try to resolve those  
25 things by giving as much detail and meaning should be done,

1 should have been done, or should be done very shortly.

2 **MR. DUCASSE:** Yes.

3 **THE CHAIRPERSON:** And so now we're really at  
4 the point where Mr. Manderville is saying, "I don't want to  
5 do this. I don't want to go any further in disclosing what  
6 those letters are about for fear of inadvertently  
7 disclosing something, and I want to go to a third party  
8 directly".

9 **MR. DUCASSE:** Well, I can't speak for the  
10 position Mr. Manderville has taken. I mean, we've set out  
11 our position. It's got some nuances ---

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

13 **MR. DUCASSE:** --- in terms of the procedure  
14 contemplated by the Cornwall Police Services doesn't. But,  
15 I think, if one were to take a step back and look in terms  
16 of balancing the interests of the parties, that the  
17 procedure that we've proposed balances those interests; and  
18 balances them in such a way as to ensure that the right is  
19 minimally impaired.

20 **THE COMMISSIONER:** All right.

21 **MR. DUCASSE:** I won't take you -- I mean,  
22 we've discussed the procedure that we're proposing in some  
23 detail, Mr. Commissioner, so I won't take you to it. It's  
24 highlighted at paragraph 21 of our material.

25 Subject to any questions which you may have,

1 Mr. Commissioner, those are my submissions in support of  
2 this motion.

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

4 **MR. DUCASSE:** Thank you.

5 **THE COMMISSIONER:** All right.

6 Why don't we take a short break, 15 minutes?

7 We can come back, then.

8 Thank you.

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

11 The hearing will reconvene at 11:15.

12 --- Upon recessing at 11:02 a.m. /

13 L'audience est suspendue à 11h02

14 The hearing will reconvene at 11:15.

15 --- Upon recessing at 11:03 a.m. /

16 L'audience est suspendue à 11h03

17 --- Upon resuming at 11:19 a.m. /

18 L'audience est reprise à 11h19

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

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

24 **THE COMMISSIONER:** Mr. Engelmann?

25 --- SUBMISSIONS BY/REPRÉSENTATIONS PAR MR. ENGELMANN:

1                   **MR. ENGELMANN:** Good morning, Mr.  
2 Commissioner.

3                   I neglected to do something at the beginning  
4 of this motion that I have done in all of the motions.  
5 Perhaps it's because of our slightly different role but I  
6 did not ask that certain materials be marked as exhibits  
7 and I'm indebted to our court reporters for reminding me of  
8 that. So I thank them.

9                   So if we could just mark some of these  
10 exhibits at this time. This is Motion 3, as we've called  
11 it, on the Rule 31 issue. So if the Cornwall Police  
12 Service Motion Record could be entered as M3-A1?

13                   **THE COMMISSIONER:** Yes.

14 --- **EXHIBIT NO./PIÈCE No M3-A1:**

15                   Cornwall Police Services Board and the  
16 Cornwall Community Police Service  
17 regarding Rule 31 of the Rules of  
18 Practice and Procedure of the Cornwall  
19 Public Inquiry - Motion Record

20                   **MR. ENGELMANN:** Then there's also a Factum  
21 from the Cornwall Police Service; if that could be M3-A2?

22                   **THE COMMISSIONER:** Okay, yes.

23 --- **EXHIBIT NO./PIÈCE No M3-A2:**

24                   Cornwall Police Services Board and the  
25 Cornwall Community Police Service

1                                    regarding Rule 31 of the Rules of  
2                                    Practice and Procedure of the Cornwall  
3                                    Public Inquiry - Factum

4                    **MR. ENGELMANN:** And there's a separate Book  
5 of Authorities for the Cornwall Police Service; if that  
6 could be M3-A3?

7                    **--- EXHIBIT NO./PIÈCE No M3-A3:**

8                                    Cornwall Police Services Board and the  
9                                    Cornwall Community Police Service  
10                                   regarding Rule 31 of the Rules of  
11                                   Practice and Procedure of the Cornwall  
12                                   Public Inquiry - Book of Authorities

13                    **MR. ENGELMANN:** And then for the Diocese of  
14 Alexandria-Cornwall, if the Factum and Authorities could be  
15 M3-B1?

16                    **--- EXHIBIT NO./PIÈCE No M3-B1:**

17                                    Episcopal Corporation of the Diocese of  
18                                    Alexandria-Cornwall - Factum and  
19                                    Authorities

20                    **MR. ENGELMANN:** The Affidavit of Amy Quinn  
21 filed by the Diocese, if that could M3-B2?

22                    **--- EXHIBIT NO./PIÈCE No M3-B2:**

23                                    Episcopal Corporation of the Diocese of  
24                                    Alexandria-Cornwall - Affidavit of Amy  
25                                    Quinn

1                   **MR. ENGELMANN:** And then the Commission  
2 Factum, M3-C1.

3           **--- EXHIBIT NO./PIÈCE No M3-C1:**

4                                   Commission - Factum

5                   **MR. ENGELMANN:** Commission Authorities, M3-  
6 C2.

7           **--- EXHIBIT NO./PIÈCE No M3-C2:**

8                                   Commission - Authorities

9                   **MR. ENGELMANN:** And then there were three  
10 letters, correspondence between counsel that were exchanged  
11 some time ago and there's a letter dated February 6<sup>th</sup> from  
12 me to Messrs. Callaghan and Manderville. There's a letter  
13 dated March 6<sup>th</sup> from Maître Ruel to Mr. Manderville and then  
14 there's a letter dated March 7<sup>th</sup>, all 2006, from Mr.  
15 Manderville to both me and Maître Ruel. Perhaps those  
16 could just be marked jointly as M3-C3(a), (b) and (c), in  
17 that order.

18                   **THE COMMISSIONER:** Yes. Okay. Thank you.

19           **--- EXHIBIT NO./PIÈCE No M3-C3(a):**

20                                   Letter dated February 6 to Mr. John  
21 Callaghan/Peter Manderville from Mr.  
22 Engelmann

23           **--- EXHIBIT NO./PIÈCE No M3-C3(b):**

24                                   Letter dated March 6 to Mr. Peter  
25 Manderville from Mr. Simon Ruel

1           --- EXHIBIT NO./PIÈCE No M3-C3(c):

2   Letter dated March 7 to Mr. Simon Ruel  
3   from Mr. Peter Manderville

4           **MR. ENGELMANN:** And I did hand up a case and  
5 I note when we have handed up loose cases, we haven't  
6 marked them.

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

8           **MR. ENGELMANN:** And I note counsel have been  
9 admonished from time to time for handing up loose cases or  
10 perhaps not admonished but reminded of the need to do these  
11 things in advance and I have apologized to counsel. There  
12 is a case from the Ipperwash Inquiry that unfortunately  
13 counsel were all -- counsel arguing were already familiar  
14 with and it's simply a case that adopts the reasoning from  
15 the *Lyons* case and you should have a copy of that, sir.

16           **THE COMMISSIONER:** I do.

17           **MR. ENGELMANN:** And maybe I could just start  
18 there very briefly.

19   On page 16 of that decision, Commissioner  
20 Linden rules on issues of over-disputed documents that the  
21 process that should be followed, as you will see in his  
22 ruling:

23   "Documents over which privilege or  
24 claim should be produced to Commission  
25 counsel in accordance with Rule 32."

1                   Rule 32 of the Ipperwash Inquiry is  
2                   identical to Rule 31 of this inquiry and it says:

3                                 "...which delineates the procedures  
4                                 upheld in *Lyons* and *Toronto Computer*  
5                                 *Leasing*."

6                   The case also talks about how, you know,  
7                   this is not a civil proceeding, how public inquiries,  
8                   commissions of inquiries should have different processes  
9                   given the different nature of commissions of inquiry, and  
10                  that's consistent with what you saw in the *Lyons* case as  
11                  well that you engaged in some discussion certainly with  
12                  both my colleagues on. And I just want to point out that  
13                  there is no disagreement between counsel here about the  
14                  importance of privilege and certainly about the importance  
15                  of solicitor-client privilege.

16                  But the cases that have been referred to you  
17                  are criminal cases; they are civil cases; in one case, a  
18                  case that is an administrative body, the Ontario Human  
19                  Rights Commission, but a case where the Commission is  
20                  acting in an adversarial position. The *Pritchard* case that  
21                  was cited to you is an example of a decision that the  
22                  Ontario Human Rights Commission makes on a paper review.  
23                  They decide to dismiss Pritchard's complaint and then  
24                  Pritchard on the judicial review seeks a copy of the legal  
25                  opinion that the Commissioners relied upon in coming to

1 their decision to dismiss the complaint.

2 So even in that role, we're dealing with  
3 Commission counsel that would be in a quasi-prosecutorial  
4 fashion typically, not Commission counsel in a public  
5 inquiry as we saw in *Lyons* and as we see in *Ipperwash* or in  
6 this case. So I just wanted to point that out and I think  
7 despite the fact -- and I agree with my friends that the  
8 fact circumstances in *Lyons* are clearly different and  
9 there's absolutely no suggestion in this case that there  
10 was any wrongdoing or any lack of credibility on the part  
11 of any of the lawyers involved in this case.

12 I want to start from that premise right at  
13 the beginning but what is significant is the Divisional  
14 Court recognizing that you have to deal with privilege  
15 issues differently in a public inquiry process. And we  
16 have cited for you, sir, a number of cases setting out the  
17 importance of public inquiries, the importance that they be  
18 open and transparent, and this is particularly true in  
19 public inquiries where there are allegations that  
20 institutions may have concealed information from the public  
21 or otherwise covered up certain allegations or what have  
22 you.

23 I think that's why these cases talk about  
24 the need for openness, the need for transparency and the  
25 need to have a process, some form of screening process to

1 deal with how privileged claims should be determined and a  
2 process that's different than simply running up to the  
3 Divisional Court or some other form of court to have  
4 decisions made.

5 So maybe I could just comment very briefly  
6 on the correspondence that I've given because nobody has  
7 touched upon it and Exhibit M3-C3(a) was a letter that was  
8 written to the Cornwall Police Service counsel back in  
9 February that simply said in the second paragraph that:

10 "The letter does not contain sufficient  
11 information to enable us to identify  
12 the particular documents in your  
13 disclosure disks [et cetera]..."

14 And then in the third paragraph, we're  
15 talking about a schedule of documents and saying it too  
16 contains insufficient information.

17 There was an attempt to resolve this and  
18 you'll see that attempt is discussed further in M3-C3(b)  
19 and M3-C3(c). Unfortunately, the parties were not able to  
20 resolve this but there certainly was an effort to do so.  
21 It was not successful.

22 So just very briefly, it is our position as  
23 Commission counsel that the position adopted by the moving  
24 party and the party supporting adopts a formal litigation  
25 process as if the Commission was a party adverse to them in

1       some form of court litigation, as opposed to a process in a  
2       public inquiry.

3               As I've said, we take no issue with the  
4       parties' position with respect to the importance of  
5       privilege, whether we're dealing with solicitor-client  
6       privilege, which has been given a special status, or some  
7       other form of privilege such as litigation or other  
8       privilege. And this is despite the fact -- we acknowledge  
9       the importance despite the fact that the rules of evidence  
10      for public inquiries are more flexible and evidence can be  
11      admissible that is otherwise not admissible in court.

12              The *Public Inquiries Act* and our Rules of  
13      Procedure talk about the fact that privileged documents are  
14      inadmissible into evidence and we recognize that. What  
15      we're really dealing with here is a dispute about a  
16      screening process, and that's it and that's all.

17              So where we take some issue with the  
18      position of the parties is that the parties claim -- and  
19      the parties here I'm referring to the Cornwall Police  
20      Service and the Diocese -- that Rule 31 forces them to  
21      waive privilege claims they may have. We're saying that  
22      Rule 31 does not ask any parties to waive privilege of any  
23      sort. What it does, and perhaps it's not as clearly worded  
24      as it could be, but what it does is it says let's engage in  
25      an informal review or screening, no parties' waiving of

1 privilege, and we submit, in fact, it's quite the contrary  
2 and there's a reference to that at paragraphs 17 and 18 of  
3 our Factum.

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

5 **MR. ENGELMANN:** Rule 31 has been read to  
6 you. So I'm not going to read it again but in my  
7 respectful submission, it contemplates an informal process  
8 and we've discussed this with the counsel as to how this  
9 process would work, but essentially it's a process where  
10 Commission counsel sits down with counsel to a party  
11 asserting a privilege claim, they review documents together  
12 where privilege is asserted, with -- and here are the  
13 possible results, and this is why I say privilege never  
14 gets waived.

15 The first possible result is there's a minor  
16 or brief review of a document and Commission counsel agrees  
17 with counsel for the party, the document is privileged, the  
18 document is returned, and that ends the matter. There is  
19 no issue of waiver.

20 Secondly, the hypothetical scenario is that  
21 even after a brief review, there's a disagreement and that  
22 disagreement continues to exist. And as was proposed in  
23 M3-C3(b), what the Commission has proposed in those  
24 circumstances when there is a disagreement between  
25 Commission counsel and counsel for a party after a brief

1 review of the document that the matter would then go  
2 directly to a Superior Court judge. That was a proposal  
3 that was made in the context of that letter.

4 Clearly there would be no waiver of the  
5 privilege. The party would continue to assert the  
6 privilege. There's no issue, as my friend Mr. Ducasse  
7 suggests, of the Commission disclosing the document because  
8 in that circumstance the document would be returned to  
9 counsel for the parties and that party would continue to  
10 assert the privilege claim before another body.

11 Lastly, the third step if that decision is  
12 made by a third party with no involvement in this  
13 proceeding and counsel disagrees again with the decision,  
14 if the third party says, "No, privilege doesn't apply",  
15 well then they are free to appeal that decision. So in no  
16 way through any of those steps is there any waiver of  
17 privilege by counsel. So we want to start from the premise  
18 that Rule 31 and the informal pre-screening process that it  
19 envisions does not involve a waiver.

20 What we've done in the factum at length and  
21 I don't want to repeat it, it's there, and there are a  
22 number of cases including the *Westray* case that is cited  
23 for you, the *Lyons* case in others, is we've set out the  
24 importance of public inquiries being just that, being  
25 public, and that matters that are contentious should be

1       dealt with in some form of open context or at least with  
2       some check either through the commissioner or through  
3       Commission counsel.

4               So aside from our disagreement on the issue  
5       of waiver, and we say there is no waiver by the process  
6       that we've contemplated, we also have a disagreement on the  
7       position at least in writing -- I wasn't hearing it too  
8       much in their oral arguments -- that a commissioner under  
9       the Ontario *Public Inquiries Act* lacks the power to  
10      determine whether privilege attaches.

11              Now, our submission as counsel is that  
12      whether you are a judge of the Ontario Courts of Justice,  
13      whether you are a judge of the Superior Court, whether you  
14      are a judge of the Supreme Court or a retired judge of the  
15      Supreme Court, or whether you are a lawyer acting as the  
16      commissioner, you as the commissioner have the powers that  
17      are given to you under the *Public Inquiries Act* and those  
18      powers include, if not the explicit power, certainly the  
19      implicit power to determine claims of privilege.

20              Otherwise, the whole purpose of dealing with  
21      issues in an efficient, transparent, effective way would be  
22      eliminated because every time you would have to make a  
23      decision as the commissioner as to whether or not a  
24      document should be admissible on a question of privilege,  
25      this whole process would stop and we would run off to the

1 Divisional Court or some other Superior Court.

2 With the greatest of respect, that just  
3 isn't how things work. Whether judges of the Superior  
4 Court who have some inherent power, whether judges of the  
5 Ontario Courts of Justice who deal with privileged claims  
6 on a daily basis, or administrative tribunals, and I'm  
7 thinking of Labour Boards, Labour Arbitrators, Human Rights  
8 Tribunals, many other tribunals, some of whom I appear  
9 before on a regular basis, they determine privilege issues  
10 on a daily basis. And all of them have statutory  
11 provisions like the statutory provision here when we're  
12 dealing with administrative tribunals that say "evidence  
13 can be admitted that is otherwise inadmissible in court",  
14 but they all have that exception and that exception is you  
15 cannot admit privileged evidence.

16 So those tribunals have to make  
17 determinations on a daily basis as to whether things are  
18 solicitor-client privilege, some other form of class  
19 privilege or individual privilege.

20 So with the greatest of respect, I think we  
21 certainly have a disagreement on your powers to do that.  
22 And clearly, Commissioner Linden in Ipperwash has  
23 determined he has that power. The Divisional Court  
24 determined that it was appropriate in the *Lyons* case. I  
25 don't think there should be any issue about the inherent

1 power, whether we look at your other life or someone  
2 sitting in your position or the like. My submission simply  
3 is that as a commissioner, under the *Public Inquiries Act*,  
4 you have that power.

5 And you'll see in our Factum, sir, there's a  
6 distinction made by I think it's the Cornwall Police  
7 Service about the *Driskell* case and the powers that are  
8 given to commissioners under the appropriate Act in  
9 Manitoba are far different than the powers you have here  
10 when we have a full Part III inquiry. And in that case  
11 clearly it's set out that any decisions of this type must  
12 go to the Manitoba Court of Queen's Bench. It's a  
13 completely different statutory setup than what we have in  
14 the Province of Ontario.

15 The third disagreement we have is whether or  
16 not the list provided by the Cornwall Police Service in  
17 lieu of following the Rule 31 process provides sufficient  
18 detail to allow Commission counsel to assess the privilege  
19 claim.

20 Our argument before you, sir, is that Rule  
21 31 is consistent with the powers and the processes that  
22 should be followed by commissions of inquiry, but  
23 alternatively, if you should determine that it does breach  
24 -- it's not necessary in these circumstances, it's not a  
25 minimal impairment of this protection of solicitor-client

1 privilege, we would submit that a procedure similar to that  
2 set out by the Diocese, with a couple of distinctions,  
3 might be appropriate. And I will turn to that in a couple  
4 of minutes but -- so that will be the alternative argument.

5 But what we're saying -- and the  
6 disagreement is whether or not the schedule that you'll see  
7 -- and I'll turn to it in a few minutes -- that is set out  
8 by the Cornwall Police Service is sufficient.

9 **THE COMMISSIONER:** Is?

10 **MR. ENGELMANN:** Is sufficient to make  
11 reasonable determinations on whether a document is  
12 privileged just on its face, just by looking at a list.  
13 And I'll just cite some examples when I come to it.

14 So as I've said, and I'm just going to  
15 review my notes, I think I've hit most of the points but  
16 this is a different situation than the criminal or civil  
17 cases that my friends have referred you to. It's even a  
18 different situation than *Pritchard* which is the  
19 administrative law case.

20 We have rules of procedure which are  
21 different. We have clearly the distinction between public  
22 inquiries, as I've said, and other forms of bodies.

23 **THE COMMISSIONER:** What about Mr.  
24 Manderville's claim that it is adversarial in the sense  
25 that if you started issuing 5.2 notices, that then -- well,

1 he's claiming it's adversarial.

2 **MR. ENGELMANN:** Well, I'm not saying that  
3 there won't be times in any inquiry where it may appear,  
4 because of an issue that is controversial, that Commission  
5 counsel takes a different position than one of the many  
6 parties that is before a commission of inquiry. But it has  
7 been well recognized in law, and I think *Lyons* is a good  
8 example of that, that these types of inquiries are just  
9 that; they're inquiries or they're investigations.

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

11 **MR. ENGELMANN:** Commission counsel is not  
12 here in any kind of prosecutorial capacity whether that's a  
13 criminal prosecutorial capacity, whether that's some kind  
14 of civil prosecutorial capacity such as a lawyer appearing  
15 for a human rights commission trying to prosecute a human  
16 rights complaint.

17 So it is different and I think the  
18 Divisional Court recognized that in *Lyons* and I would rely  
19 on that case. And whether or not the case is  
20 distinguishable on the facts, that is a principle of law  
21 and that is being asserted by the Divisional Court and I  
22 would urge you to accept that. I'm not going to get into  
23 whether it's binding or not, but I think it's an important  
24 situation, an important example.

25 **THE COMMISSIONER:** All right. Then the

1 fallback is perception. So wouldn't it look better to the  
2 public if everything got shipped off to some other party,  
3 to a Superior Court judge, to have this thing done?

4 **MR. ENGELMANN:** Well, I mean, perception is  
5 an interesting statement and I think perception is, when  
6 we're looking at this, who is it that should be determining  
7 the screening process? And I recognize that in an  
8 adversarial setting it would be important for the public or  
9 anyone for that matter that a third-party who is not  
10 adjudicating or not participating make all of those  
11 decisions.

12 I think this process is an exception to that  
13 rule and I think it's an exception because it's not  
14 adversarial and because of the nature of public inquiries.  
15 I think the public expects the Commission and Commission  
16 counsel to investigate everything thoroughly; so not just  
17 accept the claims by parties that documents are privileged  
18 but to look at that and to have some kind of a process to  
19 examine that.

20 I don't think there's any disagreement that  
21 there should be some process. The question is who does it,  
22 when and how quickly and effectively that can be done. And  
23 this inquiry, like any other, is not simply to be public.  
24 It's not simply to look at things thoroughly. It's to try  
25 and do things efficiently and in an effective manner.

1                   My answer, I guess, on the perception point  
2                   is, I think it's important for the public that claims of  
3                   privilege don't simply be accepted at face value; that  
4                   someone needs to look at those claims; someone needs to at  
5                   least make some informal determination and, in my  
6                   respectful submission, I don't believe the public would  
7                   have a problem with that being done by what is considered  
8                   to be an independent party, that of Commission counsel.

9                   Now, that would be different if there were  
10                  any assertion at all that Commission counsel was in any way  
11                  tainted or in any way not credible or, likewise, as in  
12                  *Lyons*, that a counsel for any of the parties might be, and  
13                  that's not the issue here.

14                  **THE COMMISSIONER:** Well, you hope.

15                  **MR. ENGELMANN:** Well, it's certainly not the  
16                  issue at this time.

17                  Your other question, sir, about the notice  
18                  and the 5(2) notice and whether that can be an issue, I  
19                  would refer you to our Factum and I think we try and  
20                  address that. It's at page 19 of M3-C1.

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

22                  **MR. ENGELMANN:** And at paragraph 50, we try  
23                  and set out the argument that I believe is being made by  
24                  the Cornwall Police Service that there might be some form  
25                  of harm because of the Commission's power to issue 5(2)

1 notices, whether that's to an individual or to the  
2 institution. And at paragraph 51, we set out our response.

3 The first response is the issue that both  
4 courts and tribunals can disabuse themselves of evidence  
5 that may have been reviewed for that purpose of determining  
6 admissibility. And I realize Mr. Manderville has hit that  
7 argument by referring you to paragraphs 44 and 45 of  
8 *Lavallee*. I would just again urge you when considering  
9 *Lavallee* to consider the fact that that case was considered  
10 in earnest by the Divisional Court in *Lyons*. The Court  
11 determined that in dealing with public inquiries or  
12 commissions of inquiries you should restrict how you view  
13 that case in the context of a non-adversarial setting.

14 And we set out that reviewing information  
15 and documentation does not affect their objectivity and  
16 there's no reason to believe that would affect the  
17 objectivity of the Commissioner and its counsel. And  
18 there's a reference to a decision, a consortium decision,  
19 which is a decision that you've been referred to in the  
20 past, a decision of Justice Binnie from the Supreme Court  
21 of Canada, and then a reference to the Krever Commission  
22 case.

23 Again, I'm not going to turn you to these  
24 cases. We've set out two paragraphs from both, but the key  
25 really is that in paragraph 53 of the Factum, the issuing

1 of notices -- and this is key -- the issuing of these  
2 notices is confidential. Commission doesn't just issue the  
3 notice and broadcasts this to the world. That is  
4 confidential and, in our view, would not result in any  
5 potential harm to the perception of the Commission's  
6 objectivity. And we set out that no reasonable person  
7 viewing the matter realistically and practically and having  
8 thought the matter through would conclude that it is more  
9 likely than not that the Commissioner, whether consciously  
10 or unconsciously, would not decide fairly based on the fact  
11 that Commission counsel reviewed documents that were  
12 ultimately agreed to be privileged.

13 And in any event, as we said in the next  
14 paragraph, any finding of misconduct must be based on the  
15 evidence that is brought out at the inquiry. And if that  
16 evidence isn't brought out at the inquiry, if somehow  
17 there's some concern that Commission counsel viewed a  
18 document later determined to be privileged, might have said  
19 something negative about an officer or a Children's Aid  
20 Society worker, whomever, when it comes to making a finding  
21 of misconduct it must be made on the evidence here. So we  
22 submit that that argument is somewhat of a red herring and  
23 it's not really a concern.

24 I think again there was an argument that was  
25 made to you with respect to section 7 and section 11 of the

1        *Public Inquiries Act* and again it's how you read the  
2        document. My friends say you have the right to summons all  
3        relevant documents but you cannot summons documents that  
4        are privileged, and we get back to the same issue.

5                        First of all, the test is, and we've relied  
6        on counsel on this and perhaps this is why there aren't  
7        more parties before us this morning, to first determine  
8        what are their relevant documents and to produce their  
9        relevant documents. If some of those relevant documents  
10       also have a privilege claim as in the case with these two  
11       parties, then the question is who determines that privilege  
12       claim. And their argument would simply be, presumably,  
13       "Well, you can't force us to produce these documents  
14       because they're privileged".

15                       So in that case, they're determining that  
16       the documents are privileged. We're saying, no, someone  
17       else has to make that determination. This is a public  
18       inquiry and we're proposing a process, a screening process  
19       that has been adopted by the last three public inquiries,  
20       that I'm aware of, in this province: Walkerton, the  
21       Leasing case and Ipperwash.

22                       And just on that point, and it's in our  
23       Factum and I'll leave it with you, sir, my friends suggest  
24       that Rule 31 is different than the rules that were set out  
25       in Walkerton and in the Leasing case. And they're right,

1       they are different, but the process that was followed in  
2       those cases when these issues arose is identical to the  
3       process that's proposed by Rule 32 in Ipperwash and Rule 31  
4       here in this case. And that's, I think, where we got to  
5       these rules because in Walkerton that's exactly what they  
6       did. When the government made privilege claims, there was  
7       a process, an informal screening process involving  
8       Commission counsel just as we've suggested in this case.

9                   **THE COMMISSIONER:** So how do we know that?

10                  **MR. ENGELMANN:** Well, sir, I've referred  
11       that -- that is something that you'll find in the Walkerton  
12       report and that is referred to in our Factum, and I'll just  
13       find the cite.

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

15                  **MR. ENGELMANN:** Yes, paragraph 40 of our  
16       Factum, page 15. There's a reference to Chapter 14 of  
17       Justice O'Connor's report in Walkerton. And I'll just read  
18       briefly:

19                   "Early in the process, the government  
20                   indicated that it would assert a claim  
21                   of Cabinet privilege over certain  
22                   government documents. In the interests  
23                   of avoiding lengthy court proceedings,  
24                   an agreement was reached: Commission  
25                   counsel would inspect documents

1 produced by the government before any  
2 assertion of privilege. Once the  
3 Commission had identified documents  
4 that it intended to put into evidence,  
5 the government could, if it saw fit,  
6 claim privilege. Both parties would  
7 then have an opportunity to resolve the  
8 issue on a document-by-document basis.  
9 If the parties failed to agree, a  
10 hearing would be set up [et cetera]..."

11 So that's the process that is set out in the  
12 Walkerton report. We have provided that in our Book of  
13 Authorities but again I don't know if there's a need to  
14 turn to the tab because the relevant provision is set out  
15 for you. That provision then finds itself into the  
16 Ipperwash rules in Rule 32. It then finds itself in our  
17 rules, and we have the decision, as I've said, in *Lyons*  
18 which sets that out as well.

19 I wanted to very briefly deal with the  
20 alternative argument for a minute, if I can.

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

22 **MR. ENGELMANN:** I just need the Diocese  
23 Factum for a moment; paragraph 21.

24 And this is different than the approach  
25 taken by the Cornwall Police Service in that we're getting

1 more detail. Whether Rule 31 remains in its current form  
2 or whether there's a precursor or whether this can be done  
3 informally between parties, Commission counsel really has  
4 no issue with what they propose in "A":

5 "All parties with standing should be  
6 required to deliver a list setting out  
7 all pertinent details of the documents  
8 over which a claim of privilege is  
9 being asserted, including each  
10 document's date, its author and  
11 recipient and a brief description of  
12 the content of the document so as to  
13 demonstrate that communications were  
14 given in the context of solicitor-  
15 client relationship. This description  
16 is to be as brief as possible so as not  
17 to destroy the privilege."

18 And then in "B" it talks about:

19 "Commission counsel can then review  
20 this list to determine if, it's in  
21 view, a claim of privilege over a  
22 document is questionable."

23 Now, we haven't had this experience with the  
24 parties, with the exception of the Cornwall Police Service.

25 **THE COMMISSIONER:** Right.

1                   **MR. ENGELMANN:** We have yet to receive a  
2 list from the Diocese. I know they are in the process of  
3 producing their documents as we speak. So we may get a  
4 different list from the Diocese than the list we have from  
5 the Cornwall Police Service. In other words, a list that  
6 has more detail and may allow Commission counsel, looking  
7 at it, to make some determinations.

8                   But the Diocese's proposal then goes on  
9 saying that parties can then file further material; there  
10 can be affidavits; we can then have a further decision and  
11 discussion between Commission counsel and counsel to  
12 attempt to resolve and then if unable to resolve the  
13 disputed claim of privilege then it goes off to a judge of  
14 the Ontario Superior Court.

15                   And the concern the Commission has, or the  
16 Commission counsel has with this proposal is its length and  
17 its cumbersome nature. We certainly don't take issue with  
18 how this starts. We take issue with how it follows through  
19 and we would submit, as an alternative argument, something  
20 similar to what the Diocese is proposing; however, with a  
21 provision that there still can be a pre-screening process  
22 similar to what we've proposed and how we see Rule 31  
23 happening before the matter goes off to the Superior Court.

24                   So we would be inserting a paragraph in this  
25 process to deal with the pre-screening if Commission

1           counsel and counsel for a party could not agree after  
2           looking at a fully itemized list.

3                       **THE COMMISSIONER:** Help me out here. What  
4           you're saying then is you're willing to negotiate and let  
5           the parties go somewhere short of producing the actual  
6           documents to satisfy you that it is privileged?

7                       **MR. ENGELMANN:** Yes.

8                       **THE COMMISSIONER:** And you're saying, then,  
9           when all else fails they have to provide you with the  
10          document. You read it over -- you or someone in your  
11          office.

12                      **MR. ENGELMANN:** Yes.

13                      **THE COMMISSIONER:** So bottom line is you  
14          want to reserve the right in the end to compel them to give  
15          you the document.

16                      **MR. ENGELMANN:** We want to reserve the right  
17          to have a pre-screening process, like in Ipperwash, like in  
18          Walkerton, where I can sit across the table from Mr.  
19          Manderville. We can have a discussion about the document.  
20          I'd have the right to have a brief look at it. If I agree  
21          with it, that it's clearly a privileged document, I hand it  
22          back to him. We never see the document again. If we  
23          disagree then it goes off to a third party.

24                      **THE COMMISSIONER:** To a third party, as  
25          opposed to me?

1                   **MR. ENGELMANN:** Well, it could be you, sir,  
2 or it could be a judge of the Superior Court.

3                   **THE COMMISSIONER:** And so what's your view  
4 about that?

5                   **MR. ENGELMANN:** Well, we had set out in  
6 Exhibit M3-C3(b) that we would agree with counsel for a  
7 party that it could go off to a judge of the Superior  
8 Court.

9                   **THE COMMISSIONER:** And why is that?

10                  **MR. ENGELMANN:** Well, again, given the alter  
11 ego situation between Commission counsel and the  
12 Commissioner, we thought in those circumstances that a  
13 brief review or some kind of screening process involving  
14 Commission counsel would be sufficient and then it could go  
15 off to a party having nothing to do with this matter.

16                   We also thought that that might deal with  
17 some concerns if there were still lingering concerns about  
18 the 5(2) notice. But as I've said, we don't really believe  
19 those are legitimate concerns as per the reasons set out in  
20 paragraphs 50 through 53 of our Factum.

21                   But that was a proposal that we had made and  
22 I don't recoil from it. It was a proposal we made to the  
23 parties and if they were concerned about minimal impairment  
24 we thought that might be of some assistance to them.

25                   **THE COMMISSIONER:** Okay.

1                   **MR. ENGELMANN:** It's certainly not out of  
2 any disrespect for you, Mr. Commissioner. It was just a  
3 proposal that we have made and simply don't want to recoil  
4 from it.

5                   So just very briefly then if I can take you  
6 to Motion Record of the Cornwall Community Police Service;  
7 and that would be M3-A1. I'm looking at the affidavit of  
8 Mark Crane.

9                   **THE COMMISSIONER:** Yes.

10                  **MR. ENGELMANN:** At Exhibit A we have a list  
11 -- this just gives you an example about why counsel looking  
12 at a list like this might want to look further. Now, I am  
13 told that some of this connects with part of the much  
14 larger disclosure we have from the Cornwall Community  
15 Police Service, but if we just look at documents 1 through  
16 4, for example.

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

18                  **MR. ENGELMANN:** We have the document type is  
19 handwritten notes. There's no description of the document.  
20 It simply says, "Handwritten Notes, Cornwall Community  
21 Police Service, Solicitor-Client Privilege". We don't have  
22 a date. We don't have any details. And that goes for  
23 number 2, it goes for number 3, it goes for number 4.

24                  **THE COMMISSIONER:** No, no. Number 2; what  
25 they're saying it's producible, as I understand it.

1                   MR. ENGELMANN: Yes.

2                   THE COMMISSIONER: Producible redactions  
3                   necessary.

4                   MR. ENGELMANN: Yes.

5                   And that's the same for 2, 3 and 4.

6                   THE COMMISSIONER: M'hm.

7                   MR. ENGELMANN: What I'm saying and what I'm  
8                   trying to illustrate, sir, is that this is quite different  
9                   than what we envision the Diocese is talking about with  
10                  their process. Again, I look at, say, document 11 which  
11                  just says "Action Memo, Cornwall Community Police Service,  
12                  Solicitor-Client Privilege". And, you know, there are  
13                  other examples. We have minute excerpts. We have  
14                  documents between police officers.

15                  So there are certainly documents where any  
16                  reasonable person, in my respectful submission, would  
17                  wonder why a privilege claim is being made. There's no  
18                  description of the documents. There's no description as to  
19                  what's in the letter or other document.

20                  And therefore, what I'm saying is as an  
21                  alternative it would seem to make sense that we have a  
22                  process similar to what the Diocese is proposing, although  
23                  we still think there should be a requirement for some form  
24                  of pre-screening by Commission counsel. And that ensures  
25                  that matters are dealt with in an open and transparent

1 fashion. It also ensures, in my respectful submission,  
2 that there is some efficiency and that this inquiry can get  
3 on and do its business in an expeditious fashion.

4 **THE COMMISSIONER:** What about the claim that  
5 in one case -- I think the Smith Lyons file where there was  
6 an insurer who was a party as well?

7 **MR. ENGELMANN:** What I understood about that  
8 exchange and what I was having difficulty with was the  
9 distinction between individual members of the Police  
10 Service and the Police Service. Because clearly Mr.  
11 Manderville and his colleagues represent both and they've  
12 indicated that.

13 **THE COMMISSIONER:** That's not the issue. I  
14 think the issue was there was an insurer on the file as  
15 well so that they would be a co-party and so they would  
16 need -- well, certainly the insurance company is not a  
17 party to this matter.

18 **MR. ENGELMANN:** Yes.

19 **THE COMMISSIONER:** And therefore they can't  
20 submit that document because there are other people  
21 involved that are not parties.

22 **MR. ENGELMANN:** Again I go back to my  
23 original position that the pre-screening process that is  
24 proposed here is not a waiver of privilege.

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

1                   **MR. ENGELMANN:** And if that privilege wishes  
2 to be retained and the privilege argument wishes to be  
3 retained then the insurance company, which would not be  
4 subject to your order, could maintain the privilege claim.  
5 They could dispute that the document should be produced and  
6 in that case it would not be produced because it would be a  
7 disagreement between counsel for the Police Service and  
8 counsel for the Commission.

9                   The document would then be retained by  
10 counsel; in other words, Mr. Manderville or his colleagues.  
11 The matter would then go to either yourself or a Superior  
12 Court judge for a determination and, again, if they wish to  
13 dispute the claim they have other ways of dealing with it.

14                   I don't see a waiver argument, sir. That's  
15 my basic response.

16                   **THE COMMISSIONER:** All right.

17                   **MR. ENGELMANN:** Okay. Those are my  
18 submissions unless you have any questions.

19                   **THE COMMISSIONER:** Thank you.

20                   Mr. Manderville.

21                   **---REPLY BY/RÉPLIQUE PAR MR. MANDERVILLE:**

22                   **MR. MANDERVILLE:** Thank you, Mr.  
23 Commissioner; a few disparate points in reply.

24                   First off, I'd ask that you be provided on  
25 your screen with our motion record and in particular the

1 exhibit to the affidavit.

2 **THE COMMISSIONER:** Yes.

3 **MR. MANDERVILLE:** Commission counsel took  
4 you to some examples in that list, handwritten notes, and  
5 he indicates they're undated. Obviously there would be a  
6 very good explanation for that. If the handwritten notes  
7 didn't have a date on them, what date does one assign to  
8 them?

9 However, if you turn over the page to page  
10 2, several items on there are letters from a member of the  
11 Cornwall Police Service to an identified lawyer on a  
12 specific date, and solicitor and client privilege is  
13 claimed. Or a letter from an identified lawyer to an  
14 identified member of the Cornwall Police on a specific date  
15 and the privilege claimed is a solicitor and client  
16 privilege.

17 The mechanism we had proposed was that  
18 Commission counsel review the list. And I'm going to  
19 submit that a great many of the items on this list, if they  
20 are relevant, and they are, are obviously privileged.  
21 There may be some where there's some questions asked.  
22 What's the nature of these handwritten notes? What's the  
23 nature of this memorandum? Let's talk about this and see  
24 if we can sort it out.

25 But the bulk of these are, I submit,

1 patently, obviously privileged communications. You take a  
2 list of a hundred and some-odd documents and perhaps  
3 Commission counsel and counsel for the party with standing  
4 acting reasonably want to know more information of 10,  
5 about 10 of them. Information is exchanged. Maybe they  
6 agree on seven of the 10; the other three go out for  
7 review. That's the mechanism that was proposed and that is  
8 the mechanism that was ultimately rejected.

9 But, I'd also ask that you turn your  
10 attention to the March 6, 2006 letter coming to Gowlings  
11 from Commission counsel.

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

13 **MR. ENGELMANN:** That was Exhibit M3-C3(b).  
14 That letter, the very first bullet point in the letter,  
15 openly proposes that the documents containing legal advice  
16 be segregated -- no screening proposed there -- sent  
17 directly to a judge of the Superior Court of Justice.  
18 There's an acknowledgement, I submit, in that letter with  
19 that proposal that there is a potential harm in the  
20 screening mechanism that Rule 31 proposes. And it's quite  
21 clearly set out in that letter which Commission counsel  
22 correctly realized, "There's a potential harm if we are to  
23 review these. Let's have these screened by a neutral third  
24 party being a judge of the Superior Court".

25 Now, Commission counsel attached a number of

1 cases in their brief and I want to touch on some of them  
2 briefly because obviously they're attached in an effort to  
3 assist you in arriving at your decision and I submit,  
4 unfortunately, they do not assist you.

5 *Bortolotti v. Ministry of Housing* at Tab 1  
6 is an Ontario Court of Appeal decision from 1977. It does  
7 not deal with solicitor and client privilege. It deals  
8 with relevance and the ability of a commissioner to  
9 determine relevance issues.

10 And at least the version I've got does not  
11 have page numbers unfortunately, but my friend quoted from  
12 either page 626 or paragraph 626.

13 The quoted portion begins:

14 "Apart from the supervisory role of the  
15 Divisional Court..."

16 Regrettably, Mr. Commissioner, they're not  
17 actually numbered.

18 **THE COMMISSIONER:** Okay. It's the third  
19 from the back. Third page -- actually, no. They're double  
20 page so -- you have it?

21 **THE REGISTRAR:** Page 10.

22 **MR. MANDERVILLE:** The sixth page from the  
23 back or ---

24 **THE COMMISSIONER:** We have it on the screen  
25 in any event and I have it in my notebook in the ---

1                   "Apart from the supervisory role of the  
2                   Divisional Court in respect of barriers  
3                   of jurisdiction, the Commission ---

4                   **MR. MANDERVILLE:** Quite right.

5                   **THE COMMISSIONER:** --- has very broad  
6                   powers."

7                   **MR. MANDERVILLE:** That was the provision  
8                   relied upon by Commission counsel. I would ask you to turn  
9                   your attention to the paragraph directly above it.

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

11                  **MR. MANDERVILLE:** It says:

12                                "There may also be procedural practices  
13                                amounting to a denial of natural  
14                                justice which raise a jurisdictional  
15                                issue."

16                                And as you heard from me before, the Court  
17                                in *Pritchard* and *Lavallee* says the compelled disclosure of  
18                                solicitor-client privilege information is a procedural  
19                                practice amounting to a denial of natural justice. The  
20                                Court of Appeal adhered -- adverted to that possibility,  
21                                and again this case did not deal with solicitor and client  
22                                privilege.

23                                Commission counsel also relied on or put to  
24                                you the *Westray Mine* case, *Phillips v. Nova Scotia*.

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

1                   **MR. MANDERVILLE:** That case dealt with the  
2                   compellability of witnesses and not with solicitor-client  
3                   privilege. But at paragraph 65 of that decision ---

4                   **THE COMMISSIONER:** Paragraph 65, yes.

5                   **MR. MANDERVILLE:** Yes, sir. The Court notes  
6                   partway down the paragraph:

7                                   "More importantly for the purposes of  
8                                   this appeal is that risk that  
9                                   commissions of inquiry, released from  
10                                  many of the institutional constraints  
11                                  placed upon the various branches of  
12                                  government, are also able to operate  
13                                  free from the safeguards which  
14                                  ordinarily protect individual rights in  
15                                  the face of government action."

16                   These are very real dangers that must be  
17                   carefully considered and I would submit that the forced  
18                   disclosure of solicitor-client privilege information is an  
19                   undermining of the safeguards that protect the individual  
20                   rights in our day-to-day society.

21                   Turning to Tab 4 of the Commission counsel's  
22                   Brief, *Babcock v. Canada*, this is a case that dealt with  
23                   Cabinet privilege and not solicitor and client privilege.  
24                   It's a situation where the British Columbia government had  
25                   disclosed for a two-year period documents which after two

1 years they claimed were subject to Cabinet privilege and  
2 wanted them back.

3 The Court at paragraph 17 speaks of the  
4 balancing done by a judge in a situation where Cabinet  
5 privilege is claimed; balancing competing public interests  
6 and protection and disclosure of information.

7 The Supreme Court in *Lavallee* says when  
8 you're dealing with solicitor-client privilege you do not  
9 do this balancing. And I would hasten to add, and my  
10 friend referred you to the mechanism in the Walkerton  
11 Inquiry, that was a Cabinet privilege mechanism. It was a  
12 mechanism for determining claims of Cabinet privilege where  
13 the balancing is done. Balancing quite simply is not done  
14 in solicitor-client privilege claims and there were no  
15 solicitor-client privilege situations in the Walkerton  
16 Inquiry.

17 **THE COMMISSIONER:** Wait a minute now. We  
18 are talking about discipline files in Ipperwash.

19 **MR. MANDERVILLE:** No, Walkerton.

20 **THE COMMISSIONER:** I'm sorry. Okay,  
21 Walkerton. Okay. Sorry.

22 **MR. MANDERVILLE:** That's quite all right,  
23 sir.

24 Tab 5, the Commission counsel has attached a  
25 section concerning Donald Marshall, Nova Scotia Supreme

1 Court, Appeal Division. Again, it concerns Cabinet  
2 privilege and again the Court discusses the balancing of  
3 interests that is done in considering the claims of Cabinet  
4 privilege.

5 At Tab 7, Commission counsel have attached  
6 the decision of *Maranda v. Richer*, a Supreme Court decision  
7 in 2003. That decision cites and follows *Lavallee* and the  
8 Court carefully distinguishes solicitor-client privilege  
9 from all other types of privilege and says the solicitor-  
10 client privilege is a principle of substantive law.

11 The last case relied upon by the Commission  
12 counsel that I'd like to refer you to is at Tab 8 and that  
13 is the decision concerning the Krever Commission in the  
14 Blood Inquiry by the Supreme Court in 1997. First off,  
15 you'll note it is pre-*Lavallee*. Secondly, the Court talks  
16 about the issuance of 5(2) notices and their possible  
17 effect.

18 Paragraph 35 -- sorry, 55, the Court states:

19 "The findings of fact and the  
20 conclusions of the commissioner may  
21 well have an adverse effect upon a  
22 witness or a party to the inquiry. Yet  
23 they must be made in order to define  
24 the nature of and responsibility for  
25 the tragedy under investigation and to

1 make the helpful suggestions needed to  
2 rectify the problem. It is true that  
3 the findings of a commissioner cannot  
4 result in either penal or civil  
5 consequences for a witness. Further,  
6 every witness enjoys the protection of  
7 the *Canada Evidence Act* and the  
8 *Charter...*"

9 Which includes section 7 which the court says cannot compel  
10 solicitor-client privilege information to be disclosed.

11 Reading on:

12 "...which ensures that the evidence  
13 given cannot be used in other  
14 proceedings against the witness."

15 And here's the important portion:

16 "Nonetheless, procedural fairness is  
17 essential for the findings of  
18 commissions may damage the reputation  
19 of a witness. For most, a good  
20 reputation is their most highly prized  
21 attribute. It follows that it is  
22 essential that procedural fairness be  
23 demonstrated in the hearings of the  
24 commission."

25 Earlier, Mr. Commissioner, I referred you to

1 the *Pritchard* case where our Supreme Court says the forced  
2 disclosure of solicitor-client privilege information does  
3 not accord with procedural fairness.

4 The sort of harm, I submit, we want to avoid  
5 is a situation where Commission counsel do the screening as  
6 opposed to counsel for the parties with standing doing the  
7 screening like happens in every civil case.

8 As my friend hastened to point out, there is  
9 no issue here about the integrity of anyone in this room.  
10 There is no suggestion that counsel for the parties with  
11 standing will be anything less than honourable officers of  
12 the court in doing the screening about what is privileged  
13 and what is not and what is relevant and what is not.

14 The concern is Commission counsel reviewing  
15 privileged information, which Rule 31 says they're allowed  
16 to do, and perhaps that privileged information gives a  
17 complete roadmap as to who a section 5(2) notice should be  
18 issued to. *Lavallee* says you cannot expect Commission  
19 counsel or the Crown in *Lavallee* to disabuse themselves of  
20 the information they obtained. They obtained it properly.  
21 Rule 31, as currently worded, says it's proper to get this  
22 information. Why is it improper to use it if it's proper  
23 to obtain it and look at it and make the determination?  
24 That's the potential harm and it has not, I submit and I  
25 re-submit, been shown that it's a necessary feature of this

1 inquiry that parties be compelled to disclose solicitor-  
2 client privilege information, and it has not been shown  
3 that the current mechanism is the minimal impairment.

4 We submit there is a better way. For those  
5 minimal numbers of documents that the parties acting  
6 reasonably, including Commission counsel, cannot agree on,  
7 those minimal numbers of documents should be referred out  
8 to a neutral third party to insulate Commission counsel and  
9 to insulate the Commission from the perception -- and then  
10 public perception is important in inquiries -- from the  
11 perception that maybe decisions were made based upon the  
12 benefit of reviewing privileged materials.

13 And that's all I have, subject to any  
14 questions you may have.

15 **THE COMMISSIONER:** Thank you.

16 Maître Ducasse?

17 **MR. DUCASSE:** I have nothing to add to Mr.  
18 Manderville's reply submissions, Mr. Commissioner.

19 **THE COMMISSIONER:** Thank you.

20 So as I've indicated, I fully expect to be  
21 in a position to render a decision on June 27<sup>th</sup>.

22 Is there anything else to be done today? If  
23 not, we'll close up for the day.

24 **MR. ENGELMANN:** No, I think that's it for  
25 the day.

1                   **THE COMMISSIONER:** Thank you.

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

3 l'ordre. Veuillez vous lever.

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

6 --- Upon adjourning at 12:14 p.m./

7 L'audience est ajournée à 12h14

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

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

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



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Sean Prouse, CVR-CM