

**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 13

Held at :

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

Wednesday, March 29, 2006

Tenue à:

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

Mercredi, le 29 mars 2006

Appearances/Comparutions

Mr. Peter Engelmann	Lead Commission Counsel
Ms. Louise Mongeon	Registrar
M ^e Simon Ruel	Commission Counsel
Mr. John E. Callaghan	Cornwall Police Service Board
Mr. Neil Kozloff	Ontario Provincial Police
Det. Insp. Colleen McQuade	
Ms. Gina Saccoccio Brannan, Q.C.	
Mr. Mike Lawless	Ontario Ministry of Community
Mr. Gregory Freund	and Correctional Services and Adult Community Corrections
Mr. Peter Chisholm	The Children's Aid Society of the United Counties
Mr. Peter Wardle	Citizens for Community Renewal
Mr. Dallas Lee	Victims Group
Ms. Lauren Schellenberger	
Mr. David Bennett	The Men's Project
Mr. Giuseppe Cipriano	The Estate of Ken Seguin and Scott Seguin and Father Charles MacDonald
Mr. Christopher Avery	Mr. Jacques Leduc
Mr. Mark Wallace	Ontario Provincial Police Association

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1 --- Upon commencing at 10:16 a.m./

2 L'audience débute à 10h16

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

6 Please be seated. Veuillez vous asseoir.

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

9 A couple of comments, I suppose. First
10 thing is that I understand we're having some problems with
11 the webcast and rather than wait around for that, I'm going
12 to proceed.

13 I also note that it's 10:15 and that some of
14 the delay was because of some late photocopying. This is a
15 long and complicated matter, this Commission, this inquiry.
16 It's important, and I know there's a lot of paper. But if
17 you have some photocopying to do, you know the rules. The
18 rules are you people get the copies done for yourselves and
19 for the rest of the people. There are some times when
20 there will be an omission or some unexplainable urgency
21 that we have to get some photocopying done, but unless and
22 until someone comes up with a really good answer to that
23 question, I want the photocopying done before 10:00. When
24 I tell people we come in at 10:00, we do that. And why do
25 we do that? Out of respect for the process and out of

1 respect for the people that are here at 10:00 and wanting
2 to have this matter dealt with. So I don't want to have to
3 repeat myself again.

4 Thank you.

5 Yes, sir. So we're here on a motion on the
6 constitutional issue regarding the jurisdiction of the
7 Commission.

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

10 I just want to apologize to you and to
11 counsel and to the public for our part in the delay this
12 morning. We did have some difficulties with some of the
13 matters we wanted to file as exhibits, so my apologies.

14 **THE COMMISSIONER:** Thank you.

15 **--- SUBMISSIONS BY/REPRÉSENTATIONS PAR MR. ENGELMANN:**

16 **MR. ENGELMANN:** Before just introducing
17 these submissions on the motion, and just giving you a
18 sense as to who is speaking and for how long ---

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

20 **MR. ENGELMANN:** --- I wanted, very briefly,
21 to make some contextual comments because as you know, we
22 have just dealt with an issue for the last couple of days,
23 dealing with the question of law, as to whether or not the
24 Diocese is a public institution, as part of the mandate or
25 the Order in Council of this inquiry.

1 With respect to this particular motion that
2 is being brought by Mr. Cipriano, it resulted after a
3 series of meetings that Commission counsel has had with the
4 parties, explaining essentially witnesses that we
5 anticipate calling, documents that we anticipate using,
6 generally talking about the evidence, not specifics, but
7 generically about the evidence that we anticipate calling
8 at the inquiry.

9 There were then, of course a series of
10 letters between counsel, and in particular Mr. Cipriano,
11 and his colleague, Mr. Neville, and Commission counsel.
12 These letters were shared with all counsel.

13 Just to be clear, Commission counsel has
14 stated throughout these preliminary discussions its
15 intention or our intention to call alleged victims of child
16 sexual abuse and in doing so, for them to testify about
17 when they complained, to whom they complained, about whom
18 they complained and some brief detail about the nature of
19 the complaint and the resulting action or response of the
20 public institution and their employees and/or officials.
21 This is in order, in our view, to examine the response of
22 the justice system and other public institutions. It was
23 felt that it was necessary to know this information and the
24 follow up which resulted. And of course, as you, yourself,
25 said on February 13th, at page 6 of the transcript, in your

1 opening remarks,

2 "This inquiry does not and cannot seek,
3 in effect, to try or re-try these
4 matters. It is not within my mandate
5 to determine who did what to whom,
6 although I may make findings of fact
7 about what allegations were made to
8 various public institutions and how
9 those institutions responded, including
10 the interaction of the response with
11 other public and community sectors."

12 So as such, counsel were advised that
13 alleged victims would testify and that in all likelihood,
14 the statements that they gave to the police and/or other
15 authorities containing their allegations would be tendered
16 as evidence. Counsel were told and have been told
17 repeatedly that those statements would not be tendered for
18 the truth of their contents.

19 We have advised counsel that statements made
20 by alleged victims to employees of public institutions
21 would be disclosed to parties, but not publicly, until such
22 time as the statements are made exhibits, if in fact they
23 are made exhibits. In other words, parties could object to
24 the admissibility of such statements on the basis of
25 relevance and even if such statements are then admitted,

1 then parties could request that the statement or part of
2 the statement be redacted or otherwise marked "C" if they
3 can meet the test that is set out in our rules, and I'm
4 thinking of Rule 39 in particular.

5 So what we're dealing with is a situation
6 where parties, through their counsel, can deal with
7 confidentiality concerns on a case-by-case basis, as they
8 arise.

9 So before the filing of his motion, Father
10 MacDonald's counsel, Mr. Cipriano, was advised that some of
11 the alleged victims of his client would be called by the
12 Commission and that statements that they made to the
13 authorities, setting out allegations, would be tendered.

14 There have been discussions between counsel
15 to narrow some of these issues and although we've not
16 resolved issues to everyone's satisfaction, parties have
17 made, what I believe to be some helpful suggestions on how
18 we may proceed.

19 For example, just yesterday, a comment was
20 made by a lawyer saying that if a lawyer for an alleged
21 perpetrator, whether that alleged perpetrator is a party or
22 simply a witness, otherwise involved, could make a comment
23 at the time that a statement is entered -- the statement
24 setting out allegations against the client -- that his
25 client rejects, refutes or otherwise takes issue with the

1 allegations and the truthfulness of those allegations.

2 So the Commission has taken the position
3 that it will lead this evidence. The Commission has also
4 taken the position that if there were preliminary
5 jurisdictional or constitutional questions, they should be
6 addressed now and not later.

7 Those are just some brief contextual
8 arguments.

9 There are a number of parties who intend to
10 make submissions on this motion. We have Mr. Cipriano,
11 obviously, who has moved the motion on behalf of his
12 client, Father MacDonald.

13 I understand that we have counsel also for
14 Jacques Leduc in attendance; Mr. Avery, who wishes to make
15 some brief comments as well, presumably in support of the
16 motion. There's no material filed.

17 Then we have responding to the motion, Mr.
18 Wardle, from the Citizens for Community Renewal; Mr. Lee on
19 behalf of the Victims Group; Mr. Bennett, and I understand
20 his submissions will be very brief. He has not filed
21 written submissions on behalf of the Men's Project; Mr.
22 Callaghan on behalf of the Cornwall Police Service; Ms.
23 Brannan on behalf of the OPP and we have Mr. Wallace on
24 behalf of the OPPA. So we have those counsel here.

25 I've been advised by counsel that they are

1 of the view that we can finish the argument of this motion
2 today.

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

4 **MR. ENGELMANN:** So Mr. Commissioner, I'd
5 like to -- as this is the first motion, the other matter
6 being a question of law, not a formal motion, I'd like just
7 to mark some of the documents that the Commission has
8 received.

9 First of all, we have the documents on
10 behalf of Father MacDonald. We have the Notice of Motion
11 and if that could be filed as M1-A1? So Motion 1, Exhibit
12 A1 on the Motion, being the Notice of Motion.

13 **--- EXHIBIT NO./PIÈCE NO M1-A1:**

14 Notice of Motion - Father Charles
15 MacDonald and the Estate of Kenneth
16 Seguin

17 **MR. ENGELMANN:** If I could just have a
18 moment.

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

20 **(SHORT PAUSE/COURTE PAUSE)**

21 **MR. ENGELMANN:** So that's M1-A1.

22 And then as well we have the applicant's
23 reply, which is M1-A2.

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

25 **MR. ENGELMANN:** You should have both those

1 documents, sir.

2 **THE COMMISSIONER:** I have the Notice of
3 Motion.

4 **MR. ENGELMANN:** Which contains argument and
5 submissions.

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

7 **MR. ENGELMANN:** And then you have the reply.
8 So you should have those two documents.

9 **THE COMMISSIONER:** Applicant's reply, yes.
10 So that will be M1-A2?

11 **MR. ENGELMANN:** That's correct.

12 --- EXHIBIT No./PIÈCE NO. M1-A2:

13 Applicant's Reply - Father Charles
14 MacDonald and the Estate of Kenneth
15 Seguin

16 **MR. ENGELMANN:** Then on behalf of the
17 Citizens for Community Renewal, we have a factum.

18 **THE COMMISSIONER:** I'm sorry, by who? Who
19 are we going with now?

20 **MR. ENGELMANN:** Factum of the Citizens for
21 Community Renewal.

22 **THE COMMISSIONER:** Yes.

23 All right, so that's ---

24 **MR. ENGELMANN:** If that could be M1-B1.

25 --- EXHIBIT NO./PIÈCE NO. M1-B1:

1 Factum of Citizens for Community
2 Renewal

3 **MR. ENGELMANN:** And then we have the Book of
4 Authorities, if that could be M1-B2, and I'm not sure, sir,
5 if you have a copy of that. I could hand one up.

6 **THE COMMISSIONER:** What's that now?

7 **MR. ENGELMANN:** It's a white cover.

8 **THE COMMISSIONER:** Do I have that?

9 So M1-B2?

10 **MR. ENGELMANN:** Yes.

11 --- EXHIBIT NO./PIECE NO. M1-B2:

12 Brief of Authorities of Citizens for
13 Community Renewal

14 **MR. ENGELMANN:** Then, sir, on behalf of the
15 Victims Group.

16 **THE COMMISSIONER:** Yes.

17 **MR. ENGELMANN:** You have a factum1. If that
18 could be M1-C1?

19 **THE COMMISSIONER:** All right. I've noticed
20 that there's some ---

21 **MR. ENGELMANN:** Oh.

22 **THE COMMISSIONER:** --- black marks.

23 **MR. ENGELMANN:** Okay, that's the -- is that
24 the affidavit of Mr. Talach?

25 **THE COMMISSIONER:** Yes.

1 **MR. ENGELMANN:** All right. Perhaps that
2 should be M1-C1. All right?

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

4 **MR. ENGELMANN:** And that particular document
5 was redacted by agreement between counsel for the Victims
6 Group and counsel for the Diocese yesterday; and the
7 redaction being consistent with the redaction that was done
8 with Mr. Talach's other affidavit.

9 **THE COMMISSIONER:** All right.

10 **MR. ENGELMANN:** You will note in particular,
11 sir, I believe it's at the end of either paragraph 10 or 11
12 ---

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

14 **MR. ENGELMANN:** I don't have the document in
15 front of me.

16 **THE COMMISSIONER:** Paragraph?

17 **MR. ENGELMANN:** Just under paragraph 10, I
18 believe.

19 **THE COMMISSIONER:** Yes.

20 **MR. ENGELMANN:** What in fact has happened,
21 the reference to a particular exhibit has been deleted. I
22 believe it was Tab D or Exhibit D.

23 **THE COMMISSIONER:** And there's a document
24 struck?

25 **MR. ENGELMANN:** That's correct.

1 **THE COMMISSIONER:** Under D?

2 **MR. ENGELMANN:** That's right.

3 There was an unsworn affidavit and those
4 parties agreed on consent to redact the reference from that
5 document and also the Tab.

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

7 **MR. ENGELMANN:** So if that could be M1-C1.

8 **--- EXHIBIT NO./PIÈCE NO. M1-C1:**

9 Affidavit of Robert P.M. Talach

10 **MR. ENGELMANN:** And then if the Victims
11 Group's submissions could be M1-C2.

12 **--- EXHIBIT NO./PIÈCE NO M1-C2:**

13 Victims Group Submissions - Father
14 Charles MacDonald and the Estate of
15 Kenneth Seguin

16 **THE COMMISSIONER:** Yes.

17 **MR. ENGELMANN:** And then the Victims Group
18 Book of Authorities; if that could be M1-C3.

19 **--- EXHIBIT NO./PIÈCE NO M1-C3:**

20 Victims Group - Brief of Authorities -
21 Father Charles MacDonald and the Estate
22 of Kenneth Seguin

23 **MR. ENGELMANN:** The next document, Mr.
24 Commissioner, would be the factum of the Cornwall Police
25 Service.

1 THE COMMISSIONER: Yes.

2 MR. ENGELMANN: Do you have a copy of that?

3 THE COMMISSIONER: That's this document?

4 MR. ENGELMANN: Yes.

5 THE COMMISSIONER: Yes.

6 MR. ENGELMANN: If that could be M1-D1.

7 --- EXHIBIT NO./PIÈCE NO M1-D1:

8 Submissions of the Cornwall Police
9 Services in respect of the Motion by
10 Father Charles MacDonald and the late
11 Ken Seguin

12 MR. ENGELMANN: Then there should be from
13 the OPP, a factum; if that could be M1-E1.

14 THE COMMISSIONER: Which one, now, from the
15 Ontario Provincial Police?

16 MR. ENGELMANN: That's correct.

17 THE COMMISSIONER: Yes.

18 MR. ENGELMANN: You should have a factum, a
19 record and authorities.

20 THE COMMISSIONER: Just a second.

21 Yes.

22 MR. ENGELMANN: So if the factum could be
23 M1-E1; if the record could be M1-E2 ---

24 THE COMMISSIONER: The record.

25 MR. ENGELMANN: --- and if the authorities

1 could be M1-E3.

2 --- EXHIBIT NO./PIÈCE NO M1-E1:

3 Factum - The Ontario Provincial Police
4 (Jurisdictional Motion)

5 --- EXHIBIT NO./PIÈCE NO M1-E2:

6 Responding Application Record - The
7 Ontario Provincial Police

8 --- EXHIBIT NO./PIÈCE NO M1-E3:

9 Brief of Authorities - The Ontario
10 Provincial Police (Jurisdictional
11 Motion)

12 THE COMMISSIONER: So I'm missing E2. What
13 is E2?

14 MR. ENGELMANN: E2 should be their record.

15 THE COMMISSIONER: Okay.

16 MR. ENGELMANN: It's entitled "Responding
17 Application Record: The Ontario Provincial Police
18 Jurisdictional Motion".

19 THE COMMISSIONER: M'hm.

20 MR. ENGELMANN: Do you have that, sir?

21 THE COMMISSIONER: Yes.

22 MR. ENGELMANN: That should be M1-E2.

23 THE COMMISSIONER: Yes, okay.

24 MR. ENGELMANN: And then their Authorities
25 is M1-E3.

1 THE COMMISSIONER: M'hm.

2 MR. ENGELMANN: That leaves us, then, lastly
3 with the OPPA.

4 THE COMMISSIONER: Yes.

5 MR. ENGELMANN: And you should have two
6 documents.

7 THE COMMISSIONER: Yes.

8 MR. ENGELMANN: A Factum, M1-F1 and
9 Authorities M1-F2.

10 THE COMMISSIONER: Okay.

11 --- EXHIBIT NO./PIÈCE NO. M1-F1:

12 Factum of the Ontario Provincial Police
13 Association

14 --- EXHIBIT NO./PIÈCE NO. M1-F2:

15 Book of Authorities - Father Charles
16 MacDonald and the Estate of Kenneth
17 Seguin

18 MR. ENGELMANN: There should also be a loose
19 case.

20 THE COMMISSIONER: Yes.

21 MR. ENGELMANN: RDS v. The Queen.

22 THE COMMISSIONER: M'hm.

23 MR. ENGELMANN: I'm not sure if it got
24 scanned.

25 THE COMMISSIONER: No.

1 **MR. ENGELMANN:** This is a copy from this
2 morning. You should have a hard copy of it.

3 **THE COMMISSIONER:** Yes, I do.

4 **MR. ENGELMANN:** And to my knowledge, those
5 are the documents that you will be asked to refer to.
6 There may be reference to other documents and if there are,
7 presumably, these are documents that already form part of
8 the record or are available on our system. But to my
9 knowledge, those are the documents that counsel wish to
10 rely upon and, again, our Registrar should be able to
11 follow the arguments and things will be on the screen, not
12 just for counsel but for the public.

13 **THE COMMISSIONER:** Right, thank you.

14 **MR. ENGELMANN:** Those are my brief
15 preliminary remarks and Mr. Cipriano is here and ready to
16 go.

17 **THE COMMISSIONER:** Thank you.

18 Oh, Mr. Engelmann, are there any new -- not
19 parties but lawyers that I should meet this morning?

20 **MR. ENGELMANN:** Yes. Mr. Avery, who has
21 been here once before, I believe.

22 **MR. AVERY:** Good morning.

23 **MR. ENGELMANN:** On behalf of Mr. Leduc.

24 **THE COMMISSIONER:** Thank you.

25 **MR. AVERY:** Yes.

1 **THE COMMISSIONER:** Thank you.

2 **MR. ENGELMANN:** Yes, Mr. Freund, who is here
3 on behalf of the Ministry of Correctional Services.

4 **THE COMMISSIONER:** Thank you.

5 **MR. ENGELMANN:** He works at least in part
6 with -- and you've seen several lawyers for the Ministry;
7 Mr. Neuberger, Mr. Rose, Mr. Rouleau and Mr. Freund.

8 **THE COMMISSIONER:** All right.

9 **MR. ENGELMANN:** He is here this morning.
10 And I believe everybody else is accounted
11 for.

12 Mr. Lee is assisted by his clerk -- and I'm
13 sorry, I have forgotten your name.

14 **MS. SCHELLENBERGER:** My name is Lauren.

15 **MR. ENGELMANN:** Lori, okay.

16 **THE COMMISSIONER:** Miss Lori has a last
17 name?

18 **MR. ENGELMANN:** Yes, I hope so.

19 **MR. LEE:** It's Lauren Schellenberger, Your
20 Honour.

21 **THE COMMISSIONER:** Good morning.

22 **MS. SCHELLENBERGER:** Good morning.

23 **MR. ENGELMANN:** And as far as I know, that's
24 it for new faces.

25 **THE COMMISSIONER:** Thank you.

1 **MR. ENGELMANN:** Thank you.

2 **THE COMMISSIONER:** Mr. Cipriano, good
3 morning, sir.

4 --- SUBMISSION ON MOTION BY/REPRÉSENTATIONS SUR REQUÊTE PAR
5 **MR. CIPRIANO:**

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

8 Mr. Engelmann tried to place this motion in
9 context and I would also like to complete the context in
10 which this motion is brought.

11 **THE COMMISSIONER:** Sure.

12 **MR. CIPRIANO:** I think it goes without
13 saying that this is not a retrial of the criminal charges
14 that were laid against various individuals in Cornwall.
15 That's not only governed by the Terms of Reference but you
16 have said in the past, and I think it goes without saying.

17 However, I would like to draw your attention
18 to comments that you made the other day on Monday in
19 response to some of the submissions on the Diocese issue.

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

21 **MR. CIPRIANO:** You said -- I believe it was
22 counsel for the Victims Group who was making submissions
23 and he classified his submissions as not being legal ones
24 but what the public expects of this Commission.

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

1 **MR. CIPRIANO:** And you said that the public
2 thinks that we are here to retry cases. Those were your
3 words, Mr. Commissioner.

4 I'm not saying that that's what's going to
5 happen but that's part of the public perception that we're
6 dealing with here in Cornwall.

7 The submissions on behalf of The Men's
8 Project on the Diocese issues, paragraph 3 says that:

9 "The Commission was established due to
10 the rumours, innuendo and conspiracy
11 theories that have been bandied about
12 in the public domain. The Commission
13 must examine the facts, separate them
14 from the rumours and determine what
15 really happened."

16 Counsel for the Victims Group on the Diocese
17 issue said that we have to determine which ones are true
18 and which ones are valid and which are rumours. That's the
19 public perception that we are dealing with in this
20 Commission. While the Commission itself may not -- will be
21 entitled to make certain findings of criminal liability,
22 the public perception is that criminal liability will be
23 found.

24 **THE COMMISSIONER:** Just a minute now. You
25 know, in fairness, and I don't have the transcript, I think

1 that what we have had to do as a commission, as an inquiry,
2 which I hoped would be a responsibility shared by all
3 counsel as officers of the court, if I can use that
4 expression, is to remind the public -- and I think that to
5 a large degree I don't think I have heard anyone here say
6 that we are retrying anything. What the public's
7 expectations are and what reality is are two different
8 things.

9 **MR. CIPRIANO:** I agree, Mr. Commissioner.

10 However ---

11 **THE COMMISSIONER:** But in any event ---

12 **MR. CIPRIANO:** Sorry.

13 **THE COMMISSIONER:** Go ahead, go ahead.

14 **MR. CIPRIANO:** I agree what the public
15 expectation is and what the reality is are two different
16 things. However, we are dealing when Witness X gets into
17 that box.

18 **THE COMMISSIONER:** Yes.

19 **MR. CIPRIANO:** And says that he was sexually
20 abused by certain individuals.

21 **THE COMMISSIONER:** Well, I don't know -- I
22 don't know that that is the question that would be put to
23 him.

24 **MR. CIPRIANO:** Well, when their statement is
25 put to them.

1 **THE COMMISSIONER:** Yes.

2 **MR. CIPRIANO:** Their statement contains
3 graphic details of oral sex, of how his penis was taken
4 out.

5 **THE COMMISSIONER:** Right.

6 **MR. CIPRIANO:** When that gets put to them
7 it's publicly disseminated.

8 **THE COMMISSIONER:** Well, you are making
9 assumptions there.

10 **MR. CIPRIANO:** Well, if that statement is
11 then admitted as an exhibit or we have a live webcast of
12 this the world at large will hear that statement. The
13 statement will be out there. It will be publicly
14 disseminated.

15 **THE COMMISSIONER:** Says who?

16 **MR. CIPRIANO:** Well, if that's the intention
17 of the Commission.

18 **THE COMMISSIONER:** The intention of the
19 Commission is to look into how public institutions, how
20 institutions responded to allegations of sexual abuse.

21 **MR. CIPRIANO:** Yes.

22 **THE COMMISSIONER:** I don't know now, but
23 let's assume someone was called to the stand. And I think
24 people understand that; they would be told not what
25 happened. It would be, I would think, questions like, "Are

1 you so and so?" "Yes." "Did you bring a complaint to the
2 attention of Cornwall Police?" "Yes, I did." "And was
3 that complaint with regard to sexual abuse?" "Yes, it
4 was." "With respect to who, that person?" "Yes."

5 I don't know that if someone were to say,
6 "And were those contents true?" I don't know that that
7 would be very relevant per se.

8 **MR. CIPRIANO:** Well, Mr. Commissioner, the
9 Commission counsel has stated that the witness will be
10 asked to identify the statement and whether that statement
11 was made truthfully.

12 **THE COMMISSIONER:** Well, I don't know that -
13 - I don't know -- you see, we're getting into ---

14 **MR. ENGELMANN:** No, in fact, that is exactly
15 -- if I can just speak for a moment?

16 **THE COMMISSIONER:** Okay.

17 **MR. ENGELMANN:** I have said time and time
18 again we will not be asking alleged victims of sexual abuse
19 whether -- we will not be tendering these statements for
20 the truth of their contents. We will be asking alleged
21 victims if the public official; the police officer, the
22 probation officer, whomever, accurately set out the
23 allegations that were made to them. In other words, we'll
24 be asking whether the statement accurately depicts what
25 that alleged victim said to the police officer, whether

1 that's the Cornwall Police Service, whether that's the
2 Ontario Provincial Police, what have you. We will not be
3 asking you to accept the statement for the truth of its
4 contents. We will not be asking as individuals whether the
5 full gambit of the allegations therein are true.

6 I've said that on many occasions. I'm
7 saying it again this morning.

8 **MR. CIPRIANO:** Well, Mr. Commissioner, I
9 disagree. I don't see how that can -- if you ask them if
10 that's the statement that they made the police. Then, the
11 allegation is out there. The criminal accusation is out
12 there for the public.

13 **THE COMMISSIONER:** I don't understand.
14 You're saying, "Did you make this complaint to the police
15 officer?"

16 **MR. CIPRIANO:** Yes, "Does this accurately
17 reflect the complaint you made?"

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

19 **MR. CIPRIANO:** Presumably, that witness is
20 going to be saying "yes".

21 **THE COMMISSIONER:** "Is this the statement
22 that you gave to the police?" In other words, did the
23 police change it on you? I don't think that has anything
24 to do with the truth of its contents.

25 **MR. CIPRIANO:** No, but what I'm saying is

1 for the public it doesn't matter whether we treat it for
2 the truth of its contents or not. It will be there.

3 And if I can refer, Mr. Commissioner, to the
4 *Starr v. Houlden* case.

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

6 **MR. CIPRIANO:** At page 3 simply in the head
7 notes.

8 **THE COMMISSIONER:** Which one?

9 **MR. CIPRIANO:** *Starr v. Houlden*.

10 **THE COMMISSIONER:** And where is it?

11 **MR. CIPRIANO:** Page 3.

12 **THE COMMISSIONER:** We have to get things up
13 on the -- so what are you referring to? What document are
14 you referring to?

15 **MR. CIPRIANO:** I guess it would be in the
16 Book of Authorities of the Citizens for Community Renewal.

17 **THE COMMISSIONER:** Okay. So that's M1-B2?

18 **MR. CIPRIANO:** Tab 1.

19 **THE COMMISSIONER:** Yes, *Starr v. Houlden*,
20 yes.

21 **MR. CIPRIANO:** Page 3, the third paragraph
22 of the head note.

23 **THE COMMISSIONER:** Yes.

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

25 **THE COMMISSIONER:** Okay. And so that's the

1 "profound concern"?

2 **MR. CIPRIANO:** Page 3 of the case. I don't
3 know what scan page it is. No, that's not it. It starts
4 at paragraph, "The Commissioner while specifically
5 prevented..."

6 Oh, it might be a different pagination.
7 Sorry. Let's see what's in the head note. Well, it would
8 be page 3 at the top, page 3.

9 **THE COMMISSIONER:** The first paragraph.

10 **MR. CIPRIANO:** The first paragraph. There
11 it is on the screen now.

12 **THE COMMISSIONER:** Okay.

13 **MR. CIPRIANO:** It says:

14 "The Commissioner, while specifically
15 prevented from making a determination
16 of criminal responsibility could,
17 nevertheless, due so by implication. A
18 finding of intent once the findings of
19 fact are made regarding the existence
20 of dealings and benefits is almost an
21 irresistible inference. It is a
22 reasonable inference that persons can
23 be presumed to have intended the
24 natural consequences of their acts.

25 The Commissioner need not make findings

1 of guilt in the true sense of the word
2 for the inquiry to be *ultra vires* the
3 province. Suffice it that the inquiry
4 is in effect a substitute police
5 investigation and preliminary inquiry
6 to a specific allegation of criminal
7 conduct."

8 That's what I am getting at, Mr.
9 Commissioner, is that for the public it's irrelevant
10 whether the statement is in for the truth of its contents.
11 They will see it as a criminal accusation that's going to
12 be left unanswered.

13 Now, there has already been charges laid
14 against certain individuals. They have gone through
15 preliminary inquiries. That box is full of transcripts of
16 examinations for discoveries, preliminary inquiries. These
17 people have been cross-examined at length.

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

19 **MR. CIPRIANO:** Their veracity, their
20 credibility, their motivation, their financial motivation,
21 their reasons for fabricating things have all been
22 established and public on the record. For them to come
23 here and now make a criminal accusation against our clients
24 and to leave it at that without more would not be a full
25 public inquiry. It will inherently turn the inquiry into a

1 trial. How can I, as counsel, here representing a former
2 accused person, sit there and let criminal accusations be
3 made on live webcast for the whole world to see and just
4 sit there without more? How can I not cross-examine him on
5 the motivation? How many times the strategy that he or she
6 went through with other victims in going to the police
7 which we all have, which all came out.

8 If this person is allowed to make a criminal
9 accusation then I, as this person's counsel, am bound to
10 act competently and to cross-examine him to show that the
11 accusation is not accurate.

12 Now, I have to preface this. I'm not here
13 standing saying that I want the Commission to prove my
14 client is factually innocent. That's not what I'm here to
15 do. But the Commission cannot leave my client factually
16 guilty.

17 **THE COMMISSIONER:** Well, for example, Father
18 Charles has had his day in court and the charges were
19 stayed against him.

20 **MR. CIPRIANO:** Yes.

21 **THE COMMISSIONER:** That's a pretty strong
22 fact.

23 **MR. CIPRIANO:** Yes, that's the only fact.

24 **THE COMMISSIONER:** That's right. And so how
25 do you propose that we look into how public institutions

1 and the justice system dealt with his complaint if we don't
2 know (a) that there was a complaint; (b) with respect to
3 whom and then we take it from there and we forge on?

4 **MR. CIPRIANO:** It's public knowledge that
5 certain people were charged. We can just walk to the
6 courthouse in Cornwall and pull up the indictment or
7 information.

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

9 **MR. CIPRIANO:** We can walk there and easily
10 see when the preliminary inquiries took place, when the
11 examinations for discovery took place, order the
12 transcripts, see what transpired. We can read the charge
13 that was laid. That's public knowledge. Why would you
14 need someone to come and testify as to the contents of
15 their statement and whether that statement accurately
16 reflects the complaint that they made? What does that have
17 to do with the mandate of this inquiry?

18 **THE COMMISSIONER:** It's a rhetorical
19 question, I guess.

20 **MR. CIPRIANO:** Well, I mean people are going
21 to say -- the respondents are going to say, "Well, we have
22 to know how the charge was dealt with" and then we're going
23 to get into facts surrounding delaying of the charge.
24 We're going to get into why the complaint was made and
25 that's when I step in and say, "Well, we're going to get

1 into a trial," because we know from the transcripts, at
2 least -- and I can show you the transcripts. They've been
3 examined as to why they went to certain police officers and
4 not others, why they chose to use specific words and not
5 others, the meetings that they had to strategize to see how
6 much money they would receive in civil suits. That's all
7 going to come out. It's going to turn into a trial.

8 **THE COMMISSIONER:** Well, I don't know that
9 it's going to come out.

10 **MR. CIPRIANO:** Well, an accusation is made -
11 - the point I'm trying to make is, in Cornwall -- obviously
12 we're here because something happened. We want to find out
13 what happened but the problem is, to the context that what
14 happened impacts my client, it's our position that our
15 client did nothing wrong. The acts never occurred. That's
16 our position. We are not saying that criminal acts never
17 occurred in Cornwall, but with respect to our client, our
18 position is he was presumed innocent.

19 **THE COMMISSIONER:** He is.

20 **MR. CIPRIANO:** He is presumed innocent.
21 That's a constitutional presumption. It is now
22 irrebuttable with respect to the charges. To have an
23 accusation now made in public, again after that presumption
24 is irrebuttable leaves him factually guilty, and that's
25 what this Commission cannot do.

1 I would like to take you to the blood case.

2 **THE COMMISSIONER:** Yes.

3 **MR. CIPRIANO:** I guess that would be in Mr.
4 Wardle's Book of Authorities. Tab 6; thank you. No,
5 that's *Jakobek*, Tab 7.

6 **(SHORT PAUSE/COURTE PAUSE)**

7 I'd like to go to paragraph 52, please, of that case. It
8 looks like its page 16 of the case, entitled, "What can be
9 included in the commissioner's report".

10 "What then can commissioners include in
11 their reports? The primary role,
12 indeed, the *raison d'être* of an inquiry
13 investigating a matter is to make
14 findings of fact. In order to so, the
15 commissioner may have to assess and
16 make findings as to the credibility of
17 witnesses. From the findings of fact,
18 the commissioner may draw appropriate
19 conclusions as to whether there has
20 been misconduct and who appears to be
21 responsible for it. However, the
22 conclusions of a commissioner should
23 not duplicate the wording of the code
24 defining a specific offence. If this
25 were done, it could be taken that a

1 commissioner was finding the person
2 guilty of a crime. This might well
3 indicate that the commission was in
4 reality a criminal investigation
5 carried out under the guise of the
6 commission of inquiry."

7 As well, Mr. Commissioner, I don't know if
8 perhaps you should have this. It was given to us, I
9 believe, last Friday by Commission counsel and I believe
10 it's quoted in my reply. It is the interpretation of the
11 Terms of Reference at the Newfoundland Commission of
12 Inquiry by Justice Lamer. I don't know, Mr. Commissioner,
13 if you have that letter.

14 Okay. It's page 7, the paragraph, "It must
15 be emphasized..."

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

17 **MR. CIPRIANO:** This is a commission of
18 inquiry after acquittals to determine specifically what
19 went wrong and what happened in that and whether there
20 should be any kind of, in the worst case, money paid out to
21 some of the accused persons who were acquitted.

22 It's important to distinguish that
23 commission, in the sense that there was a due process
24 there; findings of fact were made in the criminal procedure
25 where it was allowed to be made.

1 That paragraph:
2 "It must be emphasized that it would
3 not be permissible for such a
4 commission to determine that the person
5 in question was factually guilty. Such
6 a finding would be attempting to do
7 exactly what only a criminal court may
8 do. Rather, factual innocence cannot
9 be determined. That is all that should
10 be reported. This may be a fine
11 distinction but so also may be a
12 distinction between a finding of
13 misconduct and one of criminal
14 responsibility."

15 Mr. Commissioner, the Cornwall Public
16 Inquiry website contains affidavits submitted by many of
17 the complainants. Those affidavits leave my client
18 factually guilty. They state that he was guilty of
19 criminal offences. In my submission, they're -- some of
20 them are misleading and they are contradicted by what that
21 very person said under oath at the preliminary inquiry.
22 And I can give you specific examples, if you'll permit me
23 to.

24 **THE COMMISSIONER:** Just a minute, just a
25 minute. First of all, what are you referring to?

1 **MR. CIPRIANO:** The affidavits for standing.

2 **THE COMMISSIONER:** Oh.

3 **MR. CIPRIANO:** Those are available on the
4 Commission's website.

5 **THE COMMISSIONER:** Right, because they were
6 filed as exhibits.

7 **MR. CIPRIANO:** Yes. They were not blacked
8 out and they contain factual conclusions of criminal
9 responsibility.

10 **THE COMMISSIONER:** You've been here since
11 the beginning, your firm representing Father Charles.

12 **MR. CIPRIANO:** Yes.

13 **THE COMMISSIONER:** And we noted yesterday
14 that when people objected to material, we had a discussion
15 or, failing which, they would come to me.

16 Did you make an application to have those
17 things not filed as exhibits or redacted in any way?

18 **MR. CIPRIANO:** I spoke to Commission counsel
19 yesterday morning about my concern about these affidavits
20 and he indicated that I should bring it to your attention
21 during this motion.

22 **THE COMMISSIONER:** Right, but what I'm
23 saying is, don't you think you should have brought that
24 motion when you had the material?

25 **MR. CIPRIANO:** I didn't realize they were

1 going to be posted publicly on the website.

2 **THE COMMISSIONER:** Okay. So now you know
3 but ---

4 **MR. CIPRIANO:** Well, the point I'm making is
5 that those affidavits contain factual conclusions of
6 criminal misconduct. They're available -- well, let's read
7 one.

8 **THE COMMISSIONER:** No, I don't need to read
9 one.

10 **MR. CIPRIANO:** They specifically say, "So
11 and so sexually abused me."

12 **THE COMMISSIONER:** Right.

13 **MR. CIPRIANO:** Okay. That's a factual
14 finding. It's a conclusion that someone was a victim.

15 **THE COMMISSIONER:** Yes, but, sir -- I guess
16 I'm getting a little ---

17 **MR. CIPRIANO:** The point I'm making with
18 this ---

19 **THE COMMISSIONER:** No, no, just stop for a
20 second. Stop for a second. I think we're blurring the
21 lines here.

22 All material that are filed and marked as
23 exhibits, all right, were put on the website, unless there
24 was an objection. So if you failed to bring an objection
25 in a timely fashion, then I don't want you to visit on the

1 Commission of Inquiry any participation in having those
2 things put up on the website.

3 If you would've brought an objection and we
4 could've talked about it, we could've decided that on the
5 merits. So to come now and say, "Well look it, it's there
6 and it's not fair," well, that should be the subject of
7 another motion. But to say that that's part of the inquiry
8 now, that's not fair.

9 **MR. CIPRIANO:** Well, in my submission, Mr.
10 Commissioner, it is part of the inquiry. It is. When
11 someone goes to see what this inquiry is about they'll go
12 to the website, they'll follow the links and they can get
13 to these affidavits.

14 **THE COMMISSIONER:** And that's your fault.

15 **MR. CIPRIANO:** Well, I brought this up with
16 Mr. Engelmann yesterday and ---

17 **THE COMMISSIONER:** It's been on -- when did
18 it go on the website?

19 **MR. CIPRIANO:** I don't know. I found out
20 about it a few weeks ago.

21 **THE COMMISSIONER:** A few weeks ago. And you
22 brought it up yesterday?

23 **MR. ENGELMANN:** Mr. Commissioner, you may
24 recall at the time, and I don't have a transcript reference
25 but parties were advised that this material was being

1 entered as exhibits so that it could go out there for the
2 public and in fact at the time, I believe -- I don't know
3 if it was Mr. Talach or Mr. Lee for the Victims Group, had
4 some concern about the identification of one of the alleged
5 victims. So in fact we did redact, I think, the signature
6 or name of a particular member of the Victims Group. I
7 don't understand why people weren't aware of it at the
8 time.

9 I did -- Mr. Cipriano did bring this up to
10 my attention yesterday and I said that he should mention it
11 as a concern in some form or fashion either before you or
12 otherwise and I do agree; if he has an issue with this,
13 then the proper thing to do now, I think, is to bring a
14 motion and then there'll be a determination as to whether
15 or not the objection is timely. We are certainly of the
16 view that if parties have concerns about confidentiality,
17 that's that part of the process as an exhibit is going into
18 the public record in accordance with our rules.

19 **THE COMMISSIONER:** Thank you.

20 **MR. CIPRIANO:** Perhaps this will be the
21 subject of a future motion, but the point I'm making with
22 this is the public's perception of what this inquiry is
23 about. They will see these affidavits posted on the
24 Commission website and say, "Oh, this is what the
25 Commission is about. This person was sexually abused by so

1 and so".

2 **THE COMMISSIONER:** Well, let's leave aside
3 the fact that those are there, all right? When we start
4 the evidence, right, the fact that the complaint was made,
5 whether or not somebody testifies, do you not think that
6 the complaint itself will be filed?

7 **MR. CIPRIANO:** Well, the fact that the
8 complaint was made, it's obvious the fact that there was a
9 charge laid. How could a charge be laid without the
10 complaint being made?

11 **THE COMMISSIONER:** There may be some
12 complaints laid where there are no charges laid. What we
13 want to do here is investigate what institutions did as a
14 result of complaints.

15 **MR. CIPRIANO:** Okay. So we have the victim
16 in the box saying, "I went to the police" ---

17 **THE COMMISSIONER:** Yes.

18 **MR. CIPRIANO:** --- "and I complained of a
19 criminal act," whatever that act may be. What more do you
20 need from the victim other than that?

21 **THE COMMISSIONER:** We'll find out.

22 How many times did he complain -- I don't
23 know, I don't know. How many times did he complain; how
24 did you feel about how the police were dealing with you; do
25 you think you were dealt with fairly. I don't know but

1 there we go; things like that.

2 **MR. CIPRIANO:** But this is why it will, in
3 my submission, turn this into a very -- it'll turn into a
4 cross-examination similar to a criminal trial because
5 there's been disclosure of why or how they felt handled by
6 the police. There's been disclosure of that in the
7 criminal process. There's been disclosure of the people
8 they haven't proceeded against. It's there. Some of them
9 have been examined in the examinations for discovery. They
10 will be examined and cross-examined as to why they chose to
11 go to one police officer over another; why they chose to go
12 to a particular police force over another; why they chose
13 to go one institution over another.

14 It will turn it into a credibility contest
15 and a trial.

16 **THE COMMISSIONER:** Well, that's what you
17 say.

18 **MR. CIPRIANO:** That's what I can anticipate
19 will happen.

20 **THE COMMISSIONER:** Okay.

21 **MR. CIPRIANO:** One of the reasons why I was
22 reluctant to bring this motion is because it could be
23 premature until we have proper will-says from people.

24 **THE COMMISSIONER:** No, no, no, no, no. You
25 brought a constitutional challenge saying that "You, Mr.

1 Commissioner, cannot have someone come on the stand and
2 testify that they filed a complaint". That's what you're
3 doing.

4 **MR. CIPRIANO:** No; that they can't come on
5 the stand and give details of what the accusation is. It's
6 a public knowledge that they -- that a complaint was filed.

7 **THE COMMISSIONER:** Say that again?

8 **MR. CIPRIANO:** It's public knowledge ---

9 **THE COMMISSIONER:** No, no.

10 **MR. CIPRIANO:** --- that a complaint was
11 filed.

12 **THE COMMISSIONER:** What is your complaint?
13 What is your complaint; that people cannot come on the
14 stand and talk about what really happened to them vis-à-vis
15 their alleged perpetrator?

16 **MR. CIPRIANO:** Yes, because that will turn
17 it into a trial.

18 **THE COMMISSIONER:** And I don't foresee at
19 any time anyone going into those allegations.

20 **MR. CIPRIANO:** Well, then why then would
21 Commission counsel need to admit their statement into
22 evidence?

23 **THE COMMISSIONER:** That the complaint was
24 made, maybe?

25 **MR. CIPRIANO:** Why would you need a

1 statement illustrating graphic details? We don't. That's
2 why.

3 **THE COMMISSIONER:** That's what you say.
4 That's fine.

5 That's your submission on that point?

6 **MR. CIPRIANO:** Well, the point -- you're
7 going to hear from the respondents and you're going to hear
8 that.

9 **THE COMMISSIONER:** From the respondents; who
10 do you mean by respondents?

11 **MR. CIPRIANO:** The parties opposed to my
12 motion.

13 **THE COMMISSIONER:** Yes.

14 **MR. CIPRIANO:** And they are going to show
15 you and lead you through many cases ---

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

17 **MR. CIPRIANO:** --- that deal with
18 commissions of inquiry that touch upon the issues of
19 criminal liability.

20 **THE COMMISSIONER:** Yes.

21 **MR. CIPRIANO:** Okay.

22 And then they are going to show you the
23 cases and each one says that it's okay that a commission of
24 inquiry touches upon criminal liability so long as its pith
25 and substance is not a criminal investigation.

1 **THE COMMISSIONER:** Right.

2 **MR. CIPRIANO:** And that's fine. I agree
3 with that statement.

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

5 **MR. CIPRIANO:** That is not a general
6 sweeping statement of law for all commissions of inquiries,
7 however.

8 The difference between those commissions of
9 inquiry and this one, and there is a quote from Justice
10 Dixon in *Di lorio*, and don't know exactly what quote is,
11 but ---

12 **THE COMMISSIONER:** But what value is that to
13 me?

14 **MR. CIPRIANO:** Okay.

15 Well, the point I'm trying to make is in all
16 of those commissions of inquiries the *lis*, the complaint
17 was not in dispute. For example, in the Blood case there
18 is no dispute the victims received tainted blood. In the
19 *Jakobek* case there is no dispute that the City of Toronto
20 entered into leasing agreements with computer companies.
21 In *O'Hara* there was a due process, there was findings of
22 fact that there were no -- there was no criminal
23 responsibility and so the dispute was settled. In
24 *Consortium* there is no dispute that certain contracts were
25 entered into. The misconduct that could have been found

1 was not criminal or even if it did touch on criminal
2 things, they weren't there for that.

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

4 **MR. CIPRIANO:** In this one the *lis*, the
5 facts giving rise to this Commission of Inquiry are in
6 dispute as they affect Father MacDonald.

7 **THE COMMISSIONER:** Can you say that again;
8 the facts?

9 **MR. CIPRIANO:** The facts, the allegations as
10 they pertain to Father MacDonald are in dispute. They are
11 not settled. They have never been found to have -- to be
12 proven or have merit. That's the difference between this -
13 --

14 **(TECHNICAL INTERRUPTION)**

15 **THE COMMISSIONER:** Can we continue there,
16 Madam Reporter?

17 Okay. Go ahead.

18 **THE REGISTRAR:** Yes.

19 **MR. CIPRIANO:** That's the difference between
20 this one and all the other ones, is that the factual basis
21 giving rise to the public inquiry is not settled here.

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

23 **MR. CIPRIANO:** And to have an accusation out
24 there will leave it settled in a way that leaves my client
25 factually guilty.

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

2 **MR. CIPRIANO:** That's the problem, and that
3 would be exceeding the jurisdiction of the inquiry.

4 **THE COMMISSIONER:** All right.

5 **MR. CIPRIANO:** And I would like to touch on
6 the factual basis that led to this inquiry. The factual
7 basis that led to this inquiry is inherently criminal. It
8 was criminal accusations, criminal investigations, criminal
9 charges.

10 If I can take you, Mr. Commissioner, to the
11 -- sorry; I don't know the number -- it would be in the
12 materials filed on behalf of the OPP and I'm sorry, I don't
13 know the ---

14 **THE COMMISSIONER:** M1-E1?

15 **MR. CIPRIANO:** M1-E1, Tab A.

16 **THE COMMISSIONER:** Well, wait. Which one
17 are you looking at? There are three 'E's.

18 **MR. CIPRIANO:** Oh.

19 **THE COMMISSIONER:** You're looking at the
20 Book of Authorities?

21 **MR. CIPRIANO:** It would be the responding
22 application record.

23 **THE COMMISSIONER:** Yes. That's M1-E2.

24 **MR. CIPRIANO:** E2.

25 There is an affidavit of an inspector,

1 Colleen McQuade.

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

3 **MR. CIPRIANO:** Paragraph 9 of that
4 affidavit.

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

6 **MR. CIPRIANO:** It says:

7 "On November 4th, 2004 the Premier of
8 Ontario, Dalton McGuinty, announced
9 that the Government of Ontario was
10 committed to calling the public inquiry
11 into Project Truth."

12 **THE COMMISSIONER:** Yes.

13 **MR. CIPRIANO:** If we turn to Tab A of that
14 affidavit, the exhibits ---

15 **THE COMMISSIONER:** Tab A, yes.

16 **MR. CIPRIANO:** Tab A.

17 It's a letter written by Peter Griffiths, as
18 he was as a Crown Attorney. The letter reads:

19 "I met several weeks ago with Detective
20 Inspector Tim Smith to discuss his
21 investigation into allegations of
22 historical sexual abuse involving
23 Father Charles MacDonald, the Catholic
24 priest, from Cornwall. As you may
25 know, Det. Insp. Smith as twice before

1 investigated these allegations as new
2 complainants have come forward. The
3 most recent investigation resulted in
4 three counts of indecent assault which
5 are still before the Courts. During
6 the prosecution of these indecent
7 assaults charges, the complainants met
8 with the P.C., Perry Dunlop, of the
9 Cornwall Police Service and shared with
10 him some further information. P.C,
11 Dunlop subsequently commenced a civil
12 law suite charging that a large number
13 of the Cornwall residents and officials
14 have been involved in a conspiracy to
15 obstruct justice to protect them from
16 prosecuting gay pedophiles. PC Dunlop
17 alleged that the catholic Bishop in
18 Cornwall, the former Chief..."

19 And so on.

20 The point is the facts giving rise to this
21 inquiry, the foundation of this inquiry is inherently
22 criminal.

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

24 **MR. CIPRIANO:** It stems from criminal
25 accusations, criminal investigations and criminal charges.

1 Because of that, that separates this inquiry from the other
2 inquiries such as the Blood Inquiry, *Consortium*, *Jakobek*.

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

4 **MR. CIPRIANO:** Those inquiries, although
5 they may have touched on criminal misconduct, misconduct
6 there didn't necessarily mean criminal behaviour.
7 Misconduct could have meant in how a government or a
8 certain government official dealt with obtaining leases and
9 so on. It could touch on criminal activity. Charges were
10 subsequently laid, we know, in the Blood Inquiry. They are
11 criminal before the courts.

12 But this one -- misconduct in this inquiry
13 can only mean criminal misconduct. It cannot mean anything
14 else.

15 **THE COMMISSIONER:** Just what -- well,
16 there's Section 5 dealing with notices to people for
17 misconduct. Dealing with the issue of -- the real issue
18 with this inquiry is the institutional response to
19 allegations of complaint of historical sexual abuse.

20 **MR. CIPRIANO:** Yes.

21 **THE COMMISSIONER:** So if you're talking
22 about misconduct, yes, I can deal with misconduct over
23 there.

24 **MR. CIPRIANO:** Yes.

25 **THE COMMISSIONER:** Yes.

1 **MR. CIPRIANO:** But when you're dealing with
2 misconduct in terms of accusations, that misconduct --
3 accusations made against certain people of criminal
4 behaviour ---

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

6 **MR. CIPRIANO:** --- that misconduct can only
7 mean criminal misconduct. It cannot be separated.
8 Misconduct, when dealing with accusations in this inquiry,
9 is equal to criminal misconduct.

10 **THE COMMISSIONER:** Well, I disagree with
11 you, but okay.

12 **MR. CIPRIANO:** I'm not taking about
13 misconduct if a certain police force didn't act or a
14 certain institution didn't act properly. Obviously, that
15 may or may not be criminal misconduct.

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

17 **MR. CIPRIANO:** It may lead to whatever
18 conclusions.

19 But misconduct in the sense that, can the
20 Commission make certain findings of misconduct with respect
21 to the accusation themselves, in that context misconduct
22 inherently means criminal misconduct.

23 **THE COMMISSIONER:** But it's irrelevant to
24 this inquiry.

25 **MR. CIPRIANO:** If it's irrelevant, why do we

1 need to have statements given into evidence?

2 THE COMMISSIONER: I'm not about to answer
3 your question.

4 MR. CIPRIANO: It seems that no one is
5 willing to answer that question.

6 THE COMMISSIONER: Sir.

7 MR. CIPRIANO: I just -- I -- I've ---

8 THE COMMISSIONER: We will put that under a
9 soft voice.

10 MR. CIPRIANO: Yes.

11 THE COMMISSIONER: Under your breath
12 response, young man.

13 (SHORT PAUSE/COURTE PAUSE)

14 MR. CIPRIANO: I just lost my train of
15 thought here, Mr. Commissioner. I'm looking for the case
16 book.

17 If I could again turn to the *Krever* Blood
18 case at Tab 7 of the Citizen for Community Renewal's Book
19 of Authorities.

20 THE COMMISSIONER: At Tab 6?

21 MR. CIPRIANO: Tab 7.

22 THE COMMISSIONER: Sorry. Yes.

23 MR. CIPRIANO: This is a case -- the
24 *Consortium* case will be relied on heavily to say that this
25 Commission can't touch on issues of criminal responsibility

1 because it is not pith and substance what the Commission is
2 about. You will find that quoted throughout the factums of
3 many of the respondents.

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

5 **MR. CIPRIANO:** And as I said earlier, that
6 is one of the statements of law dealing with public
7 inquiries. But it's my respectful submission that that
8 case doesn't stand for that proposition only.

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

10 **MR. CIPRIANO:** In my submission that case
11 creates two, at least two legal criteria for commissions of
12 inquiry and the differing feature between those two
13 criteria are the factual foundation that gave rise to the
14 inquiry, whether it be a tragedy such as in the Blood case
15 or leasing contracts or whether it be criminal as in this
16 one or as it was in *Starr v. Houlden* or as it was in the
17 *Nelles* case.

18 **THE COMMISSIONER:** Isn't really, though,
19 balancing individual rights and public rights in the sense
20 that Father Charles was charged. Father Charles was duly
21 dealt with in law and the charges were stayed. And Father
22 Charles is saying, "The least I hear about this, the better
23 it is because every time something pops up it affects me,
24 and I don't want to do that and I certainly don't want to
25 be dragged in the mud by people who don't understand the

1 process."

2 **MR. CIPRIANO:** So if I understand, your
3 question is ---

4 **THE COMMISSIONER:** Individual rights versus
5 public rights.

6 **MR. CIPRIANO:** Okay. Correct me if I'm
7 wrong.

8 What you are asking is whether he doesn't
9 want to go through with this or doesn't want to be dragged
10 through this again because the public who wants to know
11 doesn't know the process.

12 Is that ---

13 **THE COMMISSIONER:** No, no. What I'm saying
14 ---

15 **MR. CIPRIANO:** --- correct?

16 **THE COMMISSIONER:** --- is that what you're
17 trying to do is protect your client's interests, and your
18 client's interest is not to have to relive the whole trial
19 again.

20 **MR. CIPRIANO:** No. I would disagree with
21 that statement.

22 **THE COMMISSIONER:** Okay.
23 Help me out then.

24 **MR. CIPRIANO:** I agree with it to the extent
25 that I'm here to protect my client's interest.

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

2 **MR. CIPRIANO:** Whether it means going
3 through the whole trial again, so be it.

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

5 **MR. CIPRIANO:** I'm sorry. I'm just -- I'm
6 trying to remember the wording of what you said.

7 This isn't an argument that people would
8 understand the process. The reason I'm here standing here
9 today is to ensure that this Commission does not leave my
10 client factually guilty.

11 Now ---

12 **THE COMMISSIONER:** So I guess my question is
13 -- what you are saying is you don't the witnesses to
14 testify; you don't want their complaints to be filed,
15 right?

16 **MR. CIPRIANO:** Well, if a witness is simply
17 going to come to say that they went to a police force to
18 make a complaint and gave a statement, perhaps we'd have to
19 deal with it on a witness by witness basis. But if their
20 statements with details are going to be admitted into
21 evidence, that's where we run into the problems.

22 And I guess one of the basic questions
23 probably that a lot of people want to answered for me is:
24 How can this inquiry proceed like that? And I have to --
25 this is why I felt a need to file a reply in that I'm not

1 trying to exclude all victims here.

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

3 **MR. CIRPIANO:** I can only speak for those
4 who are going to allege that my client committed criminal
5 acts.

6 **THE COMMISSIONER:** So you only -- other
7 victims or alleged victims can come and testify, but not
8 your client?

9 **MR. CIPRIANO:** Well, I wouldn't have much of
10 an argument to say that another priest accuser couldn't
11 come and testify. I don't have standing to protect his or
12 her interests, but I can only speak for my client's
13 interests. The reason for that is, as I said earlier, the
14 facts giving rise are still in dispute and ---

15 **THE COMMISSIONER:** Who says they're in
16 dispute?

17 **MR. CIPRIANO:** Well, they have never been
18 found to be true by a court.

19 **THE COMMISSIONER:** Courts don't just find
20 truth or not. Your client's charges were stayed.

21 **MR. CIPRIANO:** Yes. That's all that can be
22 found.

23 **THE COMMISSIONER:** Well, that's pretty good.
24 He's still walking the street.

25 **MR. CIPRIANO:** Yes.

1 **THE COMMISSIONER:** He's presumed innocent.

2 **MR. CIPRIANO:** Yes.

3 **THE COMMISSIONER:** Right?

4 And he will be treated with the same respect
5 that I accord everyone. So.

6 **MR. CIPRIANO:** Again, I go back to the quote
7 I read earlier from *Starr v. Houlden*.

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

9 **MR. CIPRIANO:** It's the public perception.
10 It's the inferences that the public draws from hearing a
11 criminal accusation from a witness.

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

13 **MR. CIPRIANO:** If he's presumed innocent the
14 criminal accusation that's left there unanswered will
15 contradict that presumption of innocence. It will leave my
16 client factually guilty and that's what this Commission
17 cannot do.

18 **THE COMMISSIONER:** Well, this Commission has
19 no intention, absolutely none, of dealing with your
20 client's situation with respect to criminal charges.

21 **MR. CIPRIANO:** But I'm not saying that this
22 Commission is trying to, but in doing so, it may
23 inadvertently leave my client factually guilty.

24 I'm going to get back to -- I'm going to use
25 the *Nelles* case for this argument.

1 **THE COMMISSIONER:** And where is that?

2 Mr. Cipriano.

3 **MR. CIPRIANO:** I'm trying to see if it's ---

4 **THE COMMISSIONER:** Is it in your material?

5 **MR. CIPRIANO:** It's in C3, Tab 3.

6 **THE COMMISSIONER:** Mr. Wardle, you're
7 assisting?

8 **MR. WARDLE:** I'm just trying to assist.

9 **THE COMMISSIONER:** Thank you.

10 **MR. ENGELMANN:** These cases are found in
11 several volumes. You could find it in C3, Tab 3.

12 **THE COMMISSIONER:** Hang on. C3, Tab 3.

13 All right. Okay.

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

15 **MR. CIPRIANO:** I have to go to page 9 of
16 that case and I hope it's -- these are not numbered, the
17 pages in here.

18 **THE COMMISSIONER:** Can we go to a copy where
19 the pages are numbered?

20 **MR. CIPRIANO:** Yes. I apologize; M1-E3.

21 **THE COMMISSIONER:** I'm sorry?

22 **MR. CIPRIANO:** M1-E3. It's the Book of
23 Authorities of the Ontario Provincial Police.

24 **THE COMMISSIONER:** Okay. Just a second.
25 What tab?

1 MR. CIPRIANO: Tab 4.

2 THE COMMISSIONER: Yes.

3 MR. CIPRIANO: Page number 9. At the top of
4 page number 9, actually. There it is.

5 It says:

6 "Further, the fact that the findings or
7 conclusions made by the commissioner
8 are not binding or final in future
9 proceedings is not determinative of
10 what he will decide.

11 What is important is that a finding or
12 conclusion stated by the commissioner
13 would be considered by the public as a
14 determination and might well be
15 seriously prejudicial if a person named
16 by the commissioner as responsible for
17 the deaths in the circumstances were to
18 face such accusations in further
19 proceedings. Of equal importance, if
20 no charge is subsequently laid, a
21 person found responsible by the
22 commissioner would have no recourse to
23 clear his or her name."

24 Now, you're probably going to say to me,
25 "I'm not going to make findings of responsibility. We're

1 simply going to ask them what complaint they made." And
2 again, when the accusation is out there I go back to the
3 *Starr v. Houlden* case and it says it's not necessary for
4 the commission to make findings for the inference, for the
5 implications to be made.

6 Again, reading from the *Nelles* case ---

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

8 **MR. CIPRIANO:** --- page 7.

9 **THE COMMISSIONER:** I'm sorry?

10 **MR. CIPRIANO:** Page 7 at Tab 4.

11 **THE COMMISSIONER:** Yes.

12 **MR. CIPRIANO:** There's a quote in the middle
13 of the page, starting "I cannot imagine..."

14 **THE COMMISSIONER:** Yes.

15 **MR. CIPRIANO:** It says:

16 "I cannot imagine that there could have
17 ever been the slightest doubt as to why
18 each of the members of the Trayner team
19 is here represented by counsel funded
20 for the Province. If such a doubt has
21 ever existed, let me make it quite
22 clear that each of them may be found to
23 have been implicated, either by
24 accident or with deliberation in the
25 death of the children."

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

2 **MR. CIPRIANO:** And the point of that is we -
3 - in having accusations put forth by certain witnesses, the
4 reason why we're here is to avoid having people left
5 factually guilty. That's why counsel, as myself, is here
6 protecting the interests of my client.

7 It goes without saying that we have a duty
8 to ensure that this Commission does not leave my client
9 factually guilty and so we must tread cautiously.

10 I'm going to go back to the question I
11 asked; of course, how can this Commission take place
12 without hearing from the victims?

13 And, as I said, I'm not trying to exclude
14 all victims or their statements.

15 If I can draw your attention to page 9 again
16 of the same tab, the same case. At the end of page 9, the
17 last paragraph, I'd like to read that.

18 "It was probably inherent in the terms
19 of the Order-in-Council that the task
20 of meeting the need of the parents and
21 the public as a whole to be informed of
22 all available evidence by full
23 examination of the matters is to be
24 enquired into and to ensure full public
25 knowledge of the completeness of the

1 matters referred to, but to do so
2 without expressing any conclusion of
3 law regarding civil or criminal
4 responsibility was one of extreme
5 difficulty, at times approaching the
6 impossible. Where such an impasse
7 arises it should be resolved, in our
8 opinion, by a course that best protects
9 the civil rights of the persons the
10 limitation was designed to protect.
11 The task of the commission is thus a
12 delicate and difficult one, but the
13 limitation imposed by the Order-in-
14 Council must be obeyed."

15 Keeping that in mind, I would like to go to
16 the -- back to the blood case which was Tab 7 of the Book
17 of Authorities of the Citizens for Community Renewal,
18 starting at page 15, paragraph 44.

19 The court here is considering the criteria,
20 the legal criteria set out in *Nelles*, in the *Nelles* case
21 and in the *Starr v. Houlden* case and is dismissing that
22 criteria as applicable to the Blood Inquiry.

23 The court states:

24 "I cannot accept this position."

25 Meaning the *Starr* position and the *Nelles* position.

1 "The test set out above is appropriate when
2 dealing with commissions investigating a
3 particular crime. However, it should not be
4 applied to inquiries which are engaged in a
5 wider investigation, such as that of the
6 tragedy presented in this case. I agree
7 with the Federal Court of Appeal that if the
8 comments made in *Nelles* were taken as a
9 legal principle of law applicable to every
10 inquiry, the task of many if not most
11 commissions of inquiry would be rendered
12 impossible.

13 The decisions in *Nelles* and *Starr* are
14 distinguishable from the case at bar. In
15 *Nelles*, the court found that the purpose of
16 the inquiry was to discover who had
17 committed the specific crime of killing
18 babies at the Hospital for Sick Children in
19 Toronto. By the time the case reached the
20 Court of Appeal, one criminal prosecution
21 for the deaths had failed and an extensive
22 police investigation into the deaths was
23 still continuing. When it established the
24 commission, the government described it as
25 an inquiry into deaths thought to have been

1 the result of deliberate criminal acts."

2 And then the next paragraph:

3 "*Starr* can be similarly distinguished."

4 And it goes on how they distinguish it saying
5 that that inquiry was, in pith and substance, a criminal
6 investigation.

7 The reason I quote those paragraphs is the
8 Supreme Court is not saying that those tests are no longer
9 relevant. What they're saying is that in inquiries that
10 are inherently criminal in context, the *Starr* and *Nelles*
11 cases is the appropriate way to proceed.

12 Now, I'm not saying that this inquiry is, in pith
13 and substance, a criminal investigation, nor is it intended
14 to be so, but when we hear from certain witnesses we will
15 be entering into a realm in which, through cross-
16 examination, it will be turned into a criminal trial and
17 the public's perception will turn it into a criminal
18 accusation and leaving people factually guilty.

19 The reason why the *Starr* and *Nelles* approach
20 should be used in an inquiry in which there is -- in which
21 its very foundation are criminal charges, criminal
22 investigations and criminal accusations, is that they are
23 there -- the terms of reference are there to protect those
24 who are being accused. It is so that they are not left
25 actually guilty.

1 And so while it is true that Commissions of
2 Inquiry can touch upon criminal matters, the approach taken
3 in *Starr* and the approach taken in *Nelles* is the proper
4 approach, in my respectful submission, when dealing with an
5 inquiry that is inherently criminal.

6 As I stated earlier, I don't think the public
7 will get a full inquiry if a victim is called to testify
8 and is then -- their statement goes into evidence and it's
9 simply left at that.

10 The public record goes a lot further. The public
11 record from previous proceedings went into why a statement
12 was made, to whom it made it to, the motivation, the
13 motivation for making the statement. And if that witness
14 is then going to criminally accuse someone, the inquiry
15 ought to hear the motivation behind it, and in my
16 respectful submission, it would be turning it into a trial.

17 Mr. Commissioner, I think those, subject to
18 a reply, would be my submissions, subject to any questions
19 you would have.

20 **THE COMMISSIONER:** No, not at this point.

21 We'll take a short break, a 15-minute break,
22 and then we will resume. Thank you.

23 **THE REGISTRAR:** Order. All rise. À
24 l'ordre. Veuillez vous lever.

25 The hearing will reconvene at 11:45.

1 --- Upon recessing at 11:31 a.m./

2 L'audience est suspendue à 11h31

3 --- Upon resuming at 11:49 a.m./

4 L'audience est reprise à 11h49

5 **THE REGISTRAR:** This hearing of the Cornwall
6 Public Inquiry is now in session. Please be seated.
7 Veuillez vous asseoir.

8 **THE COMMISSIONER:** Thank you.

9 Good morning, sir.

10 --- SUBMISSIONS ON MOTION BY/REPRÉSENTATIONS SUR REQUÊTE

11 **PAR MR. AVERY:**

12 **MR. AVERY:** Good morning, Mr. Commissioner.

13 I will be extremely brief. My name is
14 Christopher Avery. I'm here on behalf of Jacques Leduc.

15 **THE COMMISSIONER:** Yes.

16 **MR. AVERY:** As indicated in writing to Mr.
17 Engelmann on March the 8, 2006, on behalf of Mr. Leduc
18 there is no position being taken and we are not
19 participating in the motion brought today on the
20 jurisdictional and constitutional question by Father
21 Macdonald and the Estate.

22 However, as Mr. Engelmann prefaced this
23 morning, there have been discussions amongst all the
24 parties as a result of the motion being brought that
25 stretch outside the four corners of the Application.

1 **THE COMMISSIONER:** That?

2 **MR. AVERY:** I don't propose ---

3 **THE COMMISSIONER:** That stretch outside the
4 Application; what's that mean?

5 **MR. AVERY:** Yes, essentially as, Mr.
6 Commissioner, you'll recall from this morning, many of your
7 responses to my friend, Mr. Cipriano's submissions related
8 to relevance.

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

10 **MR. AVERY:** That's where this had stretched
11 to.

12 The relevance question has nothing to do
13 with the jurisdictional or constitutional question. It's
14 just something that we will be discussing on a case-by-case
15 basis. The parties have been, as I understand it, very
16 good about trying to arrange as much of this in advance to
17 maximize the efficient use of our time here.

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

19 **MR. AVERY:** I just want to indicate on
20 behalf of Mr. Leduc that we do anticipate objecting on a
21 case-by-case basis should there be evidence called which
22 contains the features of any specific allegations of sexual
23 abuse.

24 Mr. Commissioner, you indicated earlier this
25 morning of when, where, who did you complain to, what

1 happened as a result of the complaint. I don't anticipate
2 that being contentious. Any details, on the other hand,
3 would be.

4 I can also indicate at this time that we
5 anticipate objecting to any unedited copies of any
6 statements containing the specifics of allegations going
7 in.

8 **THE COMMISSIONER:** No, and as you said,
9 that's for a later date.

10 **MR. AVERY:** Exactly, this is all for a later
11 date. It has been something that has been discussed
12 amongst the parties leading up to today. I want to be very
13 clear so that none of the other parties misunderstand that
14 by not making submissions on this constitutional and
15 jurisdictional question, we are not in any way abandoning
16 our right to object to the remainder of the materials.

17 **THE COMMISSIONER:** So I take it that you
18 don't see this as a constitutional issue?

19 **MR. AVERY:** Not in the least.

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

21 **MR. AVERY:** Subject to any questions, Mr.
22 Commissioner.

23 **THE COMMISSIONER:** Thank you.

24 All right. Mr. Wardle.

25 --- SUBMISSIONS ON MOTION BY/REPRÉSENTATIONS SUR REQUÊTE

1 **PAR MR. WARDLE:**

2 **MR. WARDLE:** Good morning, Mr. Commissioner.

3 **THE COMMISSIONER:** Good morning.

4 **MR. WARDLE:** For my submissions you'll need
5 a copy of my Book of Authorities, which is Exhibit M1-B2.

6 **THE COMMISSIONER:** I have, okay. And your
7 submissions ---

8 **MR. WARDLE:** The Factum is M1-B1.

9 **THE COMMISSIONER:** Right, okay.

10 Go ahead.

11 **MR. WARDLE:** I have three submissions to
12 make, Mr. Commissioner, on behalf of my clients, Citizens
13 for Community Renewal.

14 The first one is that this Commission has an
15 obligation to hear evidence from victims concerning reports
16 they made to public institutions about alleged abuse
17 suffered at the hands of specific individuals. In my
18 submission, it's a necessary part of the core mandate of
19 the Commission to inquire into the institutional response
20 to these allegations.

21 Put in another way, it would be impossible
22 for you, in my submission, to report -- because your
23 mandate, as you know, uses the word "report".

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

25 **MR. WARDLE:** It would be impossible for you

1 to report on the institutional response to the allegations
2 without hearing from those who made them in the first
3 place; to whom they made them, when they made them, what
4 they told the representatives of the public institutions
5 involved.

6 The purpose of hearing that evidence in my
7 submission is not to determine guilt or innocence of a
8 perpetrator but simply so that, at the end of the day, you
9 can evaluate the response or lack of response of the public
10 institution concerned. It's that simple, in my submission.

11 And much of my friend's argument, with due
12 respect to Mr. Cipriano, much of his argument turns on the
13 purpose for which the evidence is called. He says you'd be
14 hearing that evidence for the purpose of making -- and I'm
15 just quoting from his Factum, "criminal findings against
16 the applicant or to determine them factually guilty".
17 That's a phrase I have lifted from his reply Factum.

18 And with respect, I say this is a motion.
19 You have in front of you motion material and this
20 Commission, like a court, has to rely on evidence in
21 resolving any motion. What does the evidence show on this
22 motion about the Commission's intentions? Well, the only
23 evidence we have with respect to the intentions of
24 Commission staff is Mr. Engelmann's letter of February 12th,
25 which is in the motion record.

1 If you turn that letter up and I referred to
2 it in my Factum -- perhaps we can just go to the Factum.
3 It's probably the easiest.

4 You'll see that Mr. Engelmann's letter --
5 this is at paragraph 18 of my Factum. All that Mr.
6 Engelmann's letter says is that:

7 "The inquiry will be calling alleged
8 victims of Father MacDonald and the
9 late Kenneth Seguin to testify in
10 relation to reports of allegations of
11 abuse against them in order to inquire
12 into the public institutional responses
13 to the allegations."

14 That's all that's in the record for this
15 motion about the purpose for which this evidence is going
16 to be called and that, in my submission, precisely fits
17 with the mandate of this Commission, which is to look into
18 and report on the institutional response.

19 So that's my first submission.

20 My second submission is this: If the
21 evidence of victims is called for that purpose, the purpose
22 set out in Mr. Engelmann's letter, which is the only
23 evidence you have before you on this motion, then there is
24 simply no issue that there is no constitutional impediment
25 to calling that evidence for that purpose.

1 And I'm going to refer briefly, and I know
2 other counsel will refer to the same cases, but I am going
3 to refer to three cases, *Starr*, the blood inquiry case and
4 *Jakobek*. And *Jakobek*, in my submission, is helpful because
5 it's the most recent of all these cases. It has some
6 similarity to this case and it wraps very neatly all the
7 prior law.

8 But let me just start with *Starr*, and that's
9 in my Book of Authorities. You'll see, because the issue
10 really is, you know, is there -- by calling this evidence
11 are you somehow going outside your terms of mandate and
12 venturing into federal jurisdiction? That's the issue. It
13 wasn't framed that way by my friend, but that's the only
14 issue that could be framed in terms of a constitutional
15 impediment to calling this evidence.

16 So if you look at *Starr*, and this is the
17 case my friend relies on very heavily, starting at
18 paragraph 18, you'll see the Supreme Court of Canada
19 outlines the way in which the court has to look at a
20 division of powers case in terms of the approach:

21 "...identify the matter of the law,
22 look for its dominant feature or pith
23 and substance and you do that by
24 examining both the purpose and effect
25 of the law."

1 Here, we would be looking at the Order in
2 Council.

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

4 **MR. WARDLE:** And then going over the page,
5 and I'll come back to the precise terms of the *Starr*
6 inquiry in a moment, but if you look at paragraph 20,
7 you'll see that the court says, and I'm in the second
8 sentence of that paragraph:

9 "At the outset it is worth noting that
10 this Court has consistently upheld the
11 constitutionality of provincial
12 commissions of inquiry and has
13 sanctioned the granting of fairly broad
14 powers of investigation which may
15 incidentally [and that's the key word]
16 have an impact upon the federal
17 criminal law and criminal procedural
18 powers. At the same time, however,
19 this Court has consistently held that
20 the power of the provinces to establish
21 commissions of inquiry is not
22 constitutionally unlimited."

23 So that's the issue, is whether or not if
24 it's an incidental impact on the federal criminal law of
25 power, it's within provincial jurisdiction. What happened

1 in *Starr*, of course, is that the inquiry in that case went
2 way over the line, and that's what makes it such an
3 exceptional case and so different from this case.

4 If you go on a little further, and I'm not
5 going to take you through all this although some of my
6 friends may, but you'll see that at paragraph 30 -- I'm
7 sorry, paragraph 28, and it's the very end of paragraph 28,
8 just before the next paragraph. That's correct. It starts
9 "In my view", and this is summarizing the *O'Hara* decision.
10 And you see the court says:

11 "This passage from the judgment of the
12 Chief Justice reconciles to a large
13 extent the cases that have gone before
14 in this area while adhering to well-
15 established principles of adjudication
16 in the context of division of powers.
17 The comments of the Chief Justice
18 recognized that there may be a double
19 aspect to a commission of inquiry.
20 There will be cases, however, where the
21 Court is able to identify a predominant
22 feature that outweighs the competing
23 incidental aspect."

24 And then a little further down at the end of
25 paragraph 29, referring to the *O'Hara* decision again --

1 this is just before the end of that paragraph. You'll see:
2 "The judgment is a clear affirmation of
3 the view that the pith and substance of
4 a commission must be firmly anchored to
5 a provincial head of power and that it
6 can't be used either purposefully or
7 through its effect as a means to
8 investigate and determine the criminal
9 responsibility of specific individuals
10 for specific offences."

11 Now, of course, what happened in *Starr* was
12 the Supreme Court of Canada determined that that's exactly
13 what the Order in Council was doing because of the way the
14 Order in Council was worded, because there was a parallel
15 police investigation, because the wording of it mimics the
16 *Criminal Code* provision, because there were specific
17 identified individuals and because the focus of the inquiry
18 was mirrored on those individuals. Nothing could be
19 different, more different than this situation where your
20 mandate is to inquire and report on the response of public
21 institutions.

22 **THE COMMISSIONER:** But you have to agree
23 that Father Charles MacDonald and other people that may be
24 alleged perpetrators would be concerned about having their
25 names brought up in this inquiry and the fact that they

1 were charged at some point and that there are allegations,
2 very serious allegations out there about them.

3 **MR. WARDLE:** I agree with that and there is
4 a way to deal with that. I am going to come to that in my
5 submission.

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

7 **MR. WARDLE:** So I have taken you very
8 quickly through *Starr*.

9 I'm going to just turn now, if I may, to the
10 blood inquiry case.

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

12 **MR. WARDLE:** And I just note that the blood
13 case was a broad-based inquiry into the blood system in
14 Canada.

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

16 **MR. WARDLE:** But the issue in the case that
17 went to the Supreme Court of Canada was whether the
18 Commission could make findings against named individuals,
19 findings of misconduct and, in particular, would that
20 somehow amount to a determination of liability in the eyes
21 of the public.

22 Come back to what my friend said before the
23 break, perception of the public. If you look at blood, and
24 this is at my book of materials at Tab 7, and you turn to
25 paragraph 43 and 44?

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

2 **MR. WARDLE:** You'll see that the court, and
3 I believe this is Justice Cory for the Supreme Court of
4 Canada, refers to *Nelles* in paragraph 43 and of course the
5 issue in *Nelles* was whether or not the Commissioner could
6 name names. And then you will see at the end of this
7 paragraph, there is the quote from *Nelles*:

8 "The appellants..."

9 And these are the people in the Blood Inquiry who are
10 saying you can't make these findings of misconduct.

11 "... rely upon this statement to support
12 their position that a commissioner
13 cannot make findings which would appear
14 in the eyes of the public to be
15 determinations of legal liability.

16 I cannot accept this position. The
17 test set out above is appropriate when
18 dealing with commissions investigating
19 a particular crime."

20 And just stopping there; that is not the
21 case here. It wasn't the case there and it's not the case
22 in this inquiry.

23 "However, it should not be applied to
24 inquiries which are engaged in a wider
25 investigation, such as that of the

1 tragedy presented in this case. I
2 agree with the Federal Court of Appeal
3 that if the comments made in *Nelles*
4 were taken as a legal principle of law
5 applicable to every inquiry, the task
6 of many if not most commissions of
7 inquiry would be rendered impossible."

8 And then the third case I want to take you
9 to briefly is *Jakobek*, and that's in my Book of Authorities
10 at Tab 6.

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

12 **MR. WARDLE:** Now, *Jakobek* has some
13 similarities to this case in the sense that the pith and
14 substance of the inquiry in Toronto was into the leasing of
15 computers between the city and MFP, but as an incidental
16 aspect to that investigation, the Commission began to hear
17 evidence about transactions, discussions that took place
18 between Mr. Jakobek who held a prominent position with the
19 city and Mr. Domi, who was a representative of the leasing
20 company.

21 Now, in one sense one could say that the
22 commission was looking into matters which had the potential
23 of giving rise to criminal charges but come back to this
24 issue about the double aspect, and you will see in this
25 case, starting at paragraphs 8 and 9 are the summary of the

1 facts, which I think are well known to everyone here. And
2 then beginning at paragraph 15, you will see, and this is
3 the Divisional Court, and I believe it is Justice Swinton
4 for the Court, Justice Swinton goes through very nicely and
5 concisely a number of the cases including *Consortium*, which
6 I am sure some of my friends will deal with.

7 You will see, starting in paragraph 15, she
8 outlines the critical paragraph in *Consortium* in which
9 Justice Binnie really was commenting on the Blood Inquiry
10 case.

11 Paragraph 16, again from *Consortium*, the
12 fact that Justice Binnie in that case emphasized that *Starr*
13 was an exceptional case to be contrasted with the line of
14 cases in which the Supreme Court has given broad scope to
15 provincial inquiries.

16 And then you will see over the page at
17 paragraph 17, and this is again from *Consortium*, referring
18 back to Blood, Justice Cory expressing approval on a number
19 of cases where provincial inquiries have been held
20 constitutional even though they inquired into conduct that
21 might be the subject of criminal liability.

22 And then here is the conclusion, and this is
23 really what I want to leave you with on this issue. This
24 is paragraph 18:

25 "A provincial or a municipal inquiry

1 that is in pith and substance directed
2 to matters within provincial
3 jurisdiction may proceed despite
4 possible incidental effects on the
5 federal criminal law power."

6 And that is really, in my submission, the
7 test you have to apply here to Mr. Cipriano's Motion
8 because that is what he is, in essence, saying; that by
9 hearing this evidence from these victims you would be going
10 beyond provincial jurisdiction and intruding on federal
11 jurisdiction.

12 So the question is whether or not this
13 inquiry is directed, in pith and substance, towards matters
14 within provincial jurisdiction. And this is a classic
15 broad-based inquiry, in my submission, properly grounded in
16 a number of heads of provincial power under the
17 *Constitution Act*, and I have outlined those in my Factum.

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

19 **MR. WARDLE:** Now, my friend suggested -- he
20 didn't raise this, this morning, but he suggested this in
21 his Factum, and I want to deal with it. He suggested in
22 his Factum that the facts and allegations giving rise to
23 this inquiry were the criminal accusations made during
24 Project Truth against named individuals. We would simply
25 say about that, that's far too narrow a characterization of

1 the events that gave rise to this inquiry and some of this
2 was covered in the previous motion by my colleague, Mr.
3 Manson. But even if that were true, that's not the issue.
4 The issue is whether or not the inquiry is, in pith and
5 substance, directed towards matters which are within
6 provincial jurisdiction.

7 One look at the Terms of Reference will
8 satisfy you that the answer to that is "yes". That is what
9 distinguishes this case from *Nelles* and that's what
10 distinguishes this case from *Starr*.

11 And finally, and this is just dealing with
12 my friend's Reply Factum on this point, if I could put this
13 in front of you, this would be M1-A2.

14 **THE COMMISSIONER:** I have it.

15 **MR. WARDLE:** Paragraph 24.

16 I must say, with all due respect to my
17 friend, he simply has this wrong. This is not an accurate
18 characterization of any of these inquiries. Just looking
19 at *Westray* as a simple example, everyone in this room knows
20 that the *Westray* Inquiry involved a tragedy that took place
21 at a mine, but everybody in this room also knows that at
22 the same time the inquiry was going on, the mine managers
23 had been charged criminally. That was the issue before the
24 Supreme Court of Canada. All of these cases are cases that
25 had both a possible criminal aspect to them but primarily

1 pith and substance of the inquiry directed towards
2 provincial jurisdiction.

3 So we say that, very simply coming back
4 to the test in *Jakobek*, if you look at your mandate, you
5 look at the broad purposes of your mandate, the way in
6 which the Terms of Reference have been structured
7 consistent with all sorts of public inquiries that have
8 that broad public purpose mandate, that it's quite easy to
9 determine that this is not an inquiry like *Starr* or like
10 *Nelles*. It is within provincial jurisdiction.

11 Now, my third argument is that -- and this
12 is where I come back to you, the question you asked a
13 little earlier. My third submission is that the
14 Applicants' submission on many of the issues that have been
15 raised this morning is really speculative. And let me deal
16 first with the suggestion that we will be drawn inevitably
17 into consideration and determination of the merits of the
18 allegations against Father MacDonald.

19 First of all, you have to take Mr.
20 Engelmann's letter at face value for purposes of this
21 motion.

22 Secondly, it is too early to know who is
23 going to be called and exactly what they are going to say.
24 We are not at that point in the inquiry.

25 Third, in my submission, and I believe, sir,

1 you really said this earlier this morning, in my
2 submission, there is going to have to be sufficient
3 evidence called from these Complainants to determine
4 whether there was a reasonable basis for a public
5 institution to respond in some way. So you are going to
6 have to hear who the allegation is directed towards, when,
7 perhaps how many times the abuse occurred. There may be
8 more information you need to learn, but you are not
9 learning that for the purpose of making a finding as to
10 whether the abuse took place. You are hearing that
11 evidence in the context of assessing the institutional
12 response or lack of response. And that is the critical
13 distinction, in my submission, that Mr. Cipriano simply
14 glosses over.

15 Were you to hear the evidence for the
16 express purpose of making a determination as to whether or
17 not a specific complainant was sexually abused by Father
18 MacDonald and you made that clear and you announced that
19 you were going to make that finding, then we might be
20 starting to head in the *Starr* direction, but that's not
21 where we are.

22 My friends -- and I just want, before I
23 leave that point, go back, if I may, to Blood and pick up
24 -- and this is the precise passage, I believe, my friend
25 referred to, or maybe he didn't refer to this particular

1 passage. But in the Blood Inquiry case, at paragraph 52,
2 Justice Cory deals with what can be included in a
3 commissioner's report. And you will see, he says:

4 "What then can commissioners include in
5 their reports? The primary role,
6 indeed the raison d'être, of an inquiry
7 investigating a matter is to make
8 findings of fact. In order to do so,
9 the commissioner may have to assess and
10 make findings as to the credibility of
11 witnesses. From the findings of fact,
12 the commissioner may [have to] draw
13 appropriate conclusions as to whether
14 [or not] there has been misconduct and
15 who appears to be responsible for it."

16 Now "misconduct" here, just pausing there,
17 Mr. Commissioner, the misconduct we would be looking at
18 here would be in connection with the response of the public
19 institutions, not in connection with Father MacDonald; not
20 unless Father MacDonald was part of some inadequate
21 response by a public institution.

22 And then you will see he goes on to say:

23 "...the conclusions of a commissioner
24 should not duplicate the wording of the
25 Code."

1 That's not an issue here. We are nowhere
2 near there.

3 Over the page:

4 "Similarly, commissioners should
5 endeavour to avoid making evaluations
6 of their findings of fact in terms that
7 are the same as those used by courts to
8 express findings of civil liability."

9 And then, you will see he goes on to say in
10 paragraph 54:

11 "Perhaps commissions of inquiry should
12 preface their reports with a notice
13 that the findings of fact and
14 conclusions they contain cannot be
15 taken as findings of criminal or civil
16 liability."

17 Well, you have already done that in this
18 Commission. You did that on the opening day when we were
19 here in November and you've done it several times since.

20 So I say this issue that will be drawn into
21 the determination of the merits of the claim against Father
22 MacDonald is simply speculation at this point. There
23 should be no reason to go down that road, given the mandate
24 of this inquiry.

25 Now, my friend also says, and this is the

1 question you addressed to me, "But isn't there going to be
2 damage done to Father MacDonald's reputation?"

3 First of all, that, in my submission, is
4 speculation at this point. We simply don't know yet what
5 evidence is going to come forward, what it's going to look
6 like or what terms are going to be put around that
7 evidence; for example, a statement.

8 And as Mr. Engelmann pointed out this
9 morning, if a witness statement is going to be submitted
10 that makes specific allegations against Father MacDonald,
11 there are many ways that statement can be dealt with by
12 this Commission.

13 So in my submission it's speculative and
14 really premature for this argument to be raised, but I
15 would also like to point out, and this is in the blood case
16 again:

17 "...that commissions of inquiry have to
18 make findings of fact and they have to
19 make those findings even though they
20 may have some impact in the community,
21 on reputations. They have to be
22 careful. They have to be prudent. But
23 they do have to make findings."

24 And you'll see Justice Cory in blood, and
25 this is at paragraph 38 and following. Now, he's dealing

1 with the federal Act but these are broader conclusions:

2 "Section 13 of the Act makes it clear
3 that commissioners have the power to
4 make findings of misconduct. In order
5 to do so, commissioners must also have
6 the necessary authority to set out the
7 facts upon which the findings of
8 misconduct are based, even if those
9 facts reflect adversely on some
10 parties. If this were not so, the
11 inquiry process would be essentially
12 pointless. Inquiries would produce
13 reports composed solely of
14 recommendations for change, but there
15 could be no factual findings to
16 demonstrate why the changes were
17 necessary. If an inquiry is to be
18 useful in its roles of investigation,
19 education and the making of
20 recommendations, it must make findings
21 of fact."

22 And then, you'll see down a little bit,
23 referring to the decision in the federal Court trial
24 division, he refers to Justice Decary's decision:

25 "A public inquiry into a tragedy would

1 be quite pointless if it did not lead
2 to the causes and players for fear of
3 harming reputations and because of the
4 dangers that certain findings of fact
5 that might be invoked in civil or
6 criminal proceedings. It is almost
7 inevitable that somewhere along the way
8 or in a final report, such an inquiry
9 will tarnish reputations and raise
10 questions in the public's mind
11 concerning the responsibility borne by
12 certain individuals."

13 And then you'll see Justice Cory says,
14 "I'm in agreement with those
15 observations and in my view it is clear
16 that commissioners must have the
17 authority to make those findings of
18 fact which are relevant to explain and
19 support their recommendations."

20 So you have a tough job to do, when we get
21 to the findings stage.

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

23 **MR. WARDLE:** Because you do have to balance,
24 and you do have to be sensitive to the reputations of
25 people like the Applicant here, Father MacDonald. But your

1 mandate is directed towards institutional response. That's
2 what your report is going to be about.

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

4 **MR. WARDLE:** You just go back to the wording
5 of the Terms of Reference. You'll be reporting on the
6 response or lack of response of those institutions. You
7 may have to go back and make some determinations about
8 allegations that were brought forward, for example, whether
9 they appeared credible or whether they appeared reasonable
10 or whether they appeared baseless to the person who
11 responded or didn't respond to them.

12 But in my submission, you will not be, in
13 your report, making determinations about whether specific
14 acts of sexual abuse occurred. That's not part of your
15 mandate. And if that's not part of your mandate, then what
16 is Father MacDonald's problem?

17 Those are my submissions.

18 **THE COMMISSIONER:** Thank you.

19 Mr. Lee.

20 **MR. LEE:** I'll just take a moment to gather
21 everything here.

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

23 So what will you be referring me to, sir?

24 ---SUBMISSION ON MOTION BY/REPRÉSENTATION SUR REQUÊTE PAR

25 **MR. LEE:**

1 **MR. LEE:** I will be referring to the Victims
2 Group submissions, which is M1-C2. I will also be
3 referring you to the Victims Group Book of Authorities,
4 which is M1-C3. I will briefly be referring to the
5 Applicant's Reply, which is M1-A2.

6 I seem to have had a little bit of a
7 clerical error with one of the cases in my Book of
8 Authorities, in that there are no page numbers or paragraph
9 numbers, so I think it might be best when referring to
10 that, being *Nelles*, I think it might be best to refer to
11 the OPP's Book of Authorities, which is M1-E3, just for
12 that case.

13 **THE COMMISSIONER:** Yes.

14 **MR. LEE:** Do you have all that, Mr.
15 Commissioner?

16 **THE COMMISSIONER:** Yes.

17 **MR. LEE:** I'd like to start by looking a
18 little bit more in depth, not tremendously in depth at
19 *Nelles* and *Starr* since those are the authorities relied on
20 so heavily by Mr. Cipriano.

21 Now, as we've heard and, as you know, in
22 *Nelles*, the Ontario Court of Appeal considered the inquiry
23 called to examine the circumstances surrounding the deaths
24 of children at the Hospital for Sick Children in Toronto.
25 The circumstances of that case were a little bit different

1 in that a case was stated to the divisional court asking
2 essentially whether -- the Commissioner himself asking
3 whether or not he was entitled to express his opinion.

4 If we can turn to the OPP's Book of
5 Authorities, to the *Nelles* case?

6 **THE COMMISSIONER:** What tab, please?

7 **MR. LEE:** Tab 4, I believe.

8 **THE COMMISSIONER:** Yes.

9 **MR. LEE:** So just for context, the very
10 first paragraph of that decision -- if we can go down to
11 the decision itself, not the head note -- so at the end of
12 that first paragraph, it cites a case. The case was stated
13 pursuant to the *Public Inquiries Act* and the question was
14 as follows:

15 "Was I right in determining that I am
16 entitled in my report, subject to
17 certain qualifications I have set
18 forth, to express my opinion upon
19 whether the death of any child was a
20 result of the action, accidental or
21 otherwise, of any named person or
22 persons?"

23 And if we go down further in the decision,
24 at paragraph 7, the Terms of Reference or the Order in
25 Council is set out in full. And there's a paragraph that

1 begins, "Now, therefore.." in capital letters. We're on
2 paragraph 7 here. I think we're looking at the ---

3 **THE COMMISSIONER:** What are you -- we're on
4 *Nelles*?

5 **MR. LEE:** Yes, we're on *Nelles*. Sorry, I'm
6 just waiting for ---

7 **THE COMMISSIONER:** On page what?

8 **MR. LEE:** Where you see, "Now, therefore..."

9 **THE COMMISSIONER:** Yes.

10 **MR. LEE:** So:

11 "Now, therefore, pursuant to the
12 provisions of the Act, a commission be
13 issued to appoint the Honourable
14 Justice Grange who..."

15 And the standard part of the Order in Council:

16 "...without expressing any conclusion
17 of law regarding civil or criminal
18 responsibility..."

19 And then if we go down to Part 3, which is the really
20 relevant part here,

21 "...to inquire into and report on and
22 make any recommendations with respect
23 to how and by what means children who
24 died in cardiac wards, 4A and 4B at the
25 Hospital for Sick Children in between

1 the [dates] came to their deaths."

2 So the Order in Council in *Nelles* gave the
3 commissioner the express power to inquire into and report
4 on how and by what means the children died. Now, the real
5 crux of the case is how the commissioner interpreted that
6 mandate, and so if we go further on in the decision -- and
7 again, I think up on the screen here we have the -- okay,
8 sorry. It's paragraph 12 of the one that I have here. It
9 begins, "The commissioner has found..."

10 I'm sorry, this case will be the only one we
11 have problems with, Mr. Commissioner, I believe.

12 **THE COMMISSIONER:** No, I understand that,
13 but -- so what page are we going to?

14 **MR. LEE:** I have a different version than
15 what's in the OPP materials, obviously. It's on page 6 of
16 mine.

17 **THE COMMISSIONER:** And what do you want to
18 -- what paragraph? How does it start?

19 **MR. LEE:** The paragraph begins, "The
20 commissioner has found..." In your copy, it's at the
21 second paragraph on page 7 of 10.

22 **THE COMMISSIONER:** Yes.

23 **MR. LEE:** And it reads:

24 "The commissioner has found that the
25 Order in Council allows him to

1 determine whether or not the children
2 died as a result of an overdose of
3 digoxin or some other drug to determine
4 whether or not the administration of
5 the drug was accidental or non-
6 accidental and to identify the
7 administrator."

8 So the Order in Council clearly required the
9 commissioner to inquire into both the cause of death and
10 the intention of the administrator of the drug. The order,
11 however, according to the Court of Appeal -- the Order in
12 Council being -- limited the commissioner's power by
13 forbidding him to express any conclusion of law regarding
14 civil or criminal responsibility.

15 So if we go down to, again, paragraph 21 of
16 the case I have, it begins:

17 "In the result, then, we think the
18 Divisional Court.."

19 **THE COMMISSIONER:** Page number?

20 **MR. LEE:** Page 9.

21 **THE COMMISSIONER:** Page 9?

22 **MR. LEE:** There it is there.

23 Are you there, Mr. Commissioner?

24 **THE COMMISSIONER:** Yes, I'm there.

25 **MR. LEE:**

1 "In the result then, we think the
2 Divisional Court was wrong in its
3 conclusion that the question stated by
4 the commissioner should be answered in
5 the affirmative. To be clear, it is
6 our opinion that if there is a finding
7 of non-accidental, the non-accidental
8 administration of a lethal overdose of
9 digoxin, thereby causing death, the
10 commissioner is prohibited from naming
11 the person responsible, for to do so
12 would amount to stating a conclusion of
13 civil or criminal responsibility. In
14 addition, if the act of administration
15 of a lethal dose of digoxin by a member
16 of the staff of the hospital to a
17 patient was accidental, naming the
18 person administering it would in the
19 circumstances of this case, also amount
20 to a conclusion of civil or criminal
21 responsibility and is prohibited. The
22 commissioner is obliged to hear all of
23 the evidence relating to the cause of
24 death of the children and this would
25 include evidence which tended to show

1 that one or more of them died as a
2 result of unlawful or negligent acts.
3 While the commissioner must not
4 identify an individual as being legally
5 responsible for a death, he should
6 analyze and report upon all of the
7 evidence with respect to the
8 circumstances of each death and if he
9 can, make recommendations with respect
10 to that evidence."

11 So the Court of Appeal's solution was simply
12 to forbid the commissioner from naming names.

13 So the jurisdictional issue in that case
14 stemmed from the commissioner's intention to report on,
15 first; the cause of death and; second, the person
16 responsible for the death and then on top of that the
17 intention of that person. So the commissioner, in effect,
18 in that case intended to express his opinion not only with
19 respect to the physical commission of the act but also the
20 responsibility for it.

21 So clearly, in my submission, *Nelles* can be
22 distinguished from this case. The problem with *Nelles* was
23 that the commissioner was looking into the commission of
24 specific crimes with the intention of reporting on all of
25 the elements of those crimes. The Court of Appeal ruled

1 that he simply went too far, in that he could report on the
2 cause of death and he could even report on the intention of
3 the administrator of the drug, but if he was going to do
4 both of those, he couldn't also name names.

5 Presumably, then, I would submit to you,
6 that if you take away his power to report on the intention;
7 for example, naming names would be fine. There would be no
8 problem with saying, "X administered the drug and the baby
9 died and I have nothing to say about intention." That
10 would have been fine. It's all of those elements together
11 that was the problem.

12 Now, *Starr v. Houlden* is the other decision
13 that's relied on heavily by Mr. Cipriano, and it's at Tab 2
14 of my Book of Authorities. Again, as we know, that was
15 called to investigate whether Patricia Starr and Tridel
16 Corporation conferred benefits on public officials. And
17 again, I won't bring you through the reading of it because
18 I think we all know by now. But the Terms of Reference in
19 section 121 of the *Criminal Code* were virtually identical,
20 in that section 121 was more or less brought into the Terms
21 of Reference. So in effect, the inquiry in *Starr* was
22 primarily aimed at the investigation of certain named
23 individuals, being Starr and Tridel, had committed specific
24 criminal offences.

25 So what the Supreme Court had to do was

1 examine the purposes and functions of that inquiry to see
2 whether or not they were distinct from the investigation
3 and prosecution of a specific crime. And given the facts
4 in *Starr* and the way it was set out, the court ruled that
5 the Order in Council itself was unconstitutional, as the
6 purpose and effect of the order was a substitute police
7 investigation.

8 Now, in *Starr*, if I can have you turn to
9 page -- or paragraph, rather, 35 -- and I intend to read to
10 you paragraph 35 and 36. It's lengthy, but I think it's
11 important here.

12 The court wrote:

13 "At the outset, I wish to emphasize
14 that I do not rely on any one fact,
15 viewed independently, to conclude that
16 this particular inquiry is *ultra vires*
17 the province. The process of
18 characterization in division of powers
19 adjudication is not a formalistic or
20 technical exercise. Rather, the
21 exercise is designed to identify the
22 true nature and character of the law by
23 looking at its overall purpose and
24 effect. Indeed, the characterization
25 of a law demands a holistic rather than

1 a 'check-list' approach. In my view,
2 there are two key facts, whose combined
3 and cumulative effect, lead me to the
4 conclusion that this inquiry is in
5 effect a substitute criminal
6 investigation and preliminary inquiry.
7 First, the only named parties are two
8 private individuals, one being a
9 corporation, who have been singled out
10 for investigation. Unlike *O'Hara*,
11 where the named individual was the
12 victim of alleged misconduct, the
13 present inquiry names individuals who
14 are the alleged perpetrators of the
15 misconduct. Second, the investigation
16 of these two named individuals is in
17 the context of a mandate that, as
18 recognized by the Court of Appeal for
19 Ontario, bears a "striking resemblance"
20 to s. 121(1)(b) of the Criminal Code.
21 The Court of Appeal held that the
22 crucial difference between the terms of
23 reference and the Code provision rested
24 in five words that are present in s.
25 121 but which are missing from the

1 terms of reference."

2 And so the Court of Appeal goes through what
3 those terms are -- the Supreme Court, rather.

4 At paragraph 36, the court continues:

5 "With the greatest of respect for the
6 Court of Appeal, I cannot agree with
7 its analysis. The reasoning of the
8 court simply does not, in my view,
9 conform with what the terms of
10 reference actually require the
11 Commissioner to do. First, the wording
12 of the terms of reference makes it
13 obvious that s. 121(1)(b) of the Code
14 has virtually been incorporated into
15 the mandate of the inquiry. The
16 language is simply too similar for any
17 other conclusion to be drawn. Second,
18 the structure of the terms of reference
19 itself suggests that a nexus exists
20 between the dealings and benefits."

21 Now, if I can have you turn to paragraph 39,
22 the court continues:

23 "To allow this inquiry to continue as
24 it is formulated would result in the
25 Commissioner's assimilating his role to

1 that of a judge presiding at a
2 preliminary inquiry. In essence the
3 inquiry is entering into the
4 preliminary stages of the judicial
5 criminal process by taking evidence,
6 determining its sufficiency and
7 ultimately deciding whether a *prima*
8 *facie* case exists against either or
9 both *Starr* and *Tridel Corporation Inc.*
10 There is no doubt that a number of
11 cases have held that inquiries whose
12 predominant role it is to elucidate
13 facts and not conduct a criminal trial
14 are validly constituted even though
15 there may be some overlap between the
16 subject matter of the inquiry and
17 criminal activity. Indeed, it is clear
18 that the fact that a witness before a
19 commission may subsequently be a
20 defendant in a criminal trial does not
21 render the commission *ultra vires* the
22 province. But in no case before this
23 Court has there ever been a provincial
24 inquiry that combines the virtual
25 replication of an existing Criminal

1 Code offence with the naming of private
2 individuals while ongoing police
3 investigations exist in respect of
4 those individuals."

5 So it's my submission that *Starr* and *Nelles*
6 were exceptional in that the principles set out in those
7 decisions are not of a general application.

8 Now, as you've heard a little bit today,
9 since the decision in *Starr*, the Supreme Court has had the
10 opportunity to explain its decision and the principles set
11 out therein. One of those decisions is *Consortium*
12 *Developments v. Sarnia* which is at Tab 1 of my Book of
13 Authorities.

14 If we turn to paragraph 49 of that decision,
15 the second sentence reads:

16 "The reason why the jurisdictional
17 challenge succeeded in *Starr* was not
18 that the framers of the provincial
19 Order in Council hoped that the
20 Commissioner would be able to conduct a
21 substitute police investigation, but
22 because this Court concluded that in
23 fact that is what the Order in Council
24 directed the Commissioner to
25 undertake."

1 And at the next paragraph, we've already
2 heard that the court when on to state:

3 "The decision in *Starr* cannot be taken
4 as a licence to attack the jurisdiction
5 of every judicial inquiry that may
6 incidentally, in the course of
7 discharging its mandate, uncover
8 misconduct potentially subject to
9 criminal sanctions."

10 Again, the key word there, as Mr. Wardle
11 pointed out, is "incidentally" and of course "in the course
12 of discharging its mandate".

13 The blood case is the other case that I
14 would like to take you to at this point, which is in Tab 5
15 of my Book of Authorities. And again, as Mr. Wardle was
16 pointing out, this is an inquiry under the federal
17 *Inquiries Act*, but the principles there are applicable.

18 If we can turn to paragraph 43 of that
19 decision, and again this is where you've already been
20 brought where the general proposition set out in *Nelles* is
21 relied upon by the appellants. As Mr. Wardle pointed out,
22 the court, the Supreme Court in this case, says at
23 paragraph 44:

24 "I cannot accept this position. The
25 test set out above is appropriate when

1 dealing with commissions investigating
2 a particular crime. However, it should
3 not be applied to inquiries which are
4 engaged in a wider investigation, such
5 as that of the tragedy presented in
6 this case."

7 And my submission, of course, is that this
8 is one of those inquiries where there was a broader scope
9 and a broader mandate and it should not be tied down to the
10 specific nature of the inquiries and the rules set out in
11 *Nelles* and in *Starr*.

12 And continuing, at paragraph 51:

13 **THE COMMISSIONER:** I'm sorry; go ahead.

14 **MR. LEE:** The court wrote:

15 Clearly, the findings that may be made
16 in *Phillips* and that were made in
17 *O'Hara* and *Keable* would fail the strict
18 test set out in *Nelles* and referred to
19 in *Starr*. Yet each of these
20 commissioners has made or may make
21 findings of misconduct, as authorized
22 by the Act. This they could not and
23 cannot do without stating findings of
24 fact that are likely to have an adverse
25 effect on the reputation of

1 individuals. Nonetheless, the
2 inquiries were upheld by this Court.
3 It follows that the strict test
4 advanced by the appellants cannot be of
5 general application. A more flexible
6 approach must be taken in cases where
7 inquiries are general in nature, and
8 are established for a valid public
9 purpose and not as a means of
10 furthering a criminal investigation."

11 It is clear from the Order in Council of
12 this inquiry, Mr. Commissioner, that the predominant
13 purpose is to inquire into the institutional response to
14 allegations of sexual abuse made by young persons in the
15 Cornwall area, and you're doing that for the broader
16 purpose of making recommendations to improve future
17 responses.

18 So the purpose of this inquiry is not in any
19 way a substitute police investigation. The Order in
20 Council makes it clear that the inquiry has been called to
21 investigate and report on allegations of sexual abuse, not
22 to determine the guilt or liability of those accused. And
23 so we're looking at the allegation and the response and not
24 the veracity of the accuser or the guilt of the accused.

25 This is a broad inquiry that is concerned

1 with examining how critical institutions operate. It's
2 about restoring public confidence in its institutions and
3 the public needs to understand what has happened and also
4 needs to know that those institutions now understand what
5 has happened as well. And all of that is a part of
6 satisfying and reassuring the public that this will never
7 happen again, and that's the broad nature of this inquiry,
8 Mr. Commissioner. It has absolutely nothing to do with
9 finding criminal guilt or innocence or civil liability.

10 Now, Mr. Cipriano in his materials has
11 conceded that the inquiry's Terms of Reference are *intra*
12 *vires* (sic) the province.

13 **THE COMMISSIONER:** Well, no, not quite.

14 **MR. LEE:** Well, that was certainly my
15 impression of his materials.

16 **THE COMMISSIONER:** I think he said ---

17 **MR. LEE:** If I can take you to paragraph 1
18 of his reply, it reads:

19 "The applicants have never asserted
20 that the Cornwall Public Inquiry or its
21 Terms of Reference are *ultra vires* the
22 provincial government nor do they
23 assert this in this motion."

24 **THE COMMISSIONER:** Right. I'm sorry.

25 **MR. LEE:** So my submission is that sounds

1 like a concession.

2 **THE COMMISSIONER:** I was looking at
3 paragraph 4, I think. It says -- they were referring to
4 the Terms of Reference "may be valid". So there was a
5 "may" there.

6 **MR. LEE:** Okay. So there's -- at the very
7 least he hasn't suggested they are not valid; if that's
8 fair.

9 So what we're dealing with here, and the
10 narrow issue is whether or not victims could take the stand
11 at this inquiry if their evidence will amount to
12 allegations against the applicants, being Charles MacDonald
13 and there has been much said about Ken Séguin today, but
14 that's the narrow issue here. The Supreme Court has set
15 out general principles to help us consider that issue, Mr.
16 Commissioner.

17 We've heard a little bit today about the
18 predominant purpose of a provincial inquiry in determining
19 the constitutionality of an inquiry and we're not going to
20 deal with that, but I would submit to you that when you
21 consider the more narrow issue of the jurisdiction of an
22 inquiry to receive specific evidence, the predominant
23 purpose of that evidence also has to be considered.

24 If we can turn back to *Consortium*, at Tab --
25 I see Mr. Engelmann checking his watch here.

1 **THE COMMISSIONER:** How much time will you
2 require to complete your submissions?

3 **MR. LEE:** I would think at least 20 minutes,
4 probably.

5 **THE COMMISSIONER:** I'm sorry?

6 **MR. LEE:** At least 20 minutes, I would
7 think.

8 **THE COMMISSIONER:** Terrific. Well, we'll
9 take a break wherever you want to choose to break there at
10 the next point. If you want to complete your point now or
11 ---

12 **MR. LEE:** Sure. If you'd let me just take
13 you to *Consortium* and then perhaps after my discussion of
14 that decision ---

15 **THE COMMISSIONER:** Sure.

16 **MR. LEE:** --- it would be a good time.
17 So as I said, that's at Tab 4 of my
18 materials.

19 **THE COMMISSIONER:** Yes.

20 **MR. LEE:** And I'm looking at paragraph 100.

21 **THE COMMISSIONER:** Wait a minute. Tab 4 is
22 the *Westray Mines*.

23 **MR. LEE:** Sorry. Yes, you're absolutely
24 right. I apologize. I'm looking at paragraph 39 of
25 *Consortium*. I do want *Consortium*. It's just the wrong

1 paragraph. Sorry. Okay. I am at Tab 1. Thank you.

2 Sorry. Tab 1, paragraph 39.

3 That reads:

4 "A more recent and instructive case is
5 the Blood Inquiry case. That case
6 involved a challenge to the authority
7 of Commissioner Krever to find not only
8 the 'facts' about Canada's blood
9 supply...but to draw inferences that
10 might indicate that there had been
11 conduct on the part of the corporations
12 or individuals which could attract
13 criminal culpability or civil
14 liability. The terms of reference in
15 that case, as here, did not make any
16 allegations of misconduct. In that
17 aspect, it provides a striking parallel
18 to the present case. This Court
19 unanimously rejected the challenge to
20 Commissioner Krever's notices of
21 potential misconduct, and his authority
22 eventually to make findings that
23 disclosed misconduct if he were to
24 think it fit to do so. The ruling in
25 that case ought to be applied to the

1 present case to hold that not only may
2 the Commissioner acting under the
3 second branch of s. 100 inquire into,
4 as part of his larger mandate, conduct
5 which may have potential criminal or
6 civil consequences, but may in his
7 report make findings of misconduct
8 based on the factual findings, provided
9 that they are necessary to fulfill the
10 purpose of the inquiry as it is
11 described in the terms of reference."

12 So again, we have that broader purpose test.

13 And if we turn to paragraph 52, briefly, the
14 court continues:

15 "The exceptional nature of *Starr*, and
16 the exceptional set of facts that
17 compelled this Court's decision, was
18 emphasized in the *Blood Inquiry* case.
19 In that case as stated, the *Krever*
20 *Inquiry*, established under the federal
21 *Inquiries Act*, was held to be within
22 its jurisdiction to make findings of
23 misconduct, even misconduct carrying
24 potential civil or criminal liability,
25 provided such findings were properly

1 relevant to the broader purpose of the
2 inquiry, as set out in its terms of
3 reference. In delivery the reasons of
4 this Court [and this is the Blood] Cory
5 J. distinguished *Starr* and *Nelles*
6 saying:
7 Clearly, those two inquiries were
8 unique. They dealt with specific
9 incidents and specific individuals,
10 during the course of criminal
11 investigations."

12 And then it lists some other cases that the
13 blood inquiry case picked up on. And it says, speaking of
14 the *Westray* case:

15 "The *Westray* case is particularly
16 interesting in comparison to the facts
17 of this case because at the time the
18 mine managers were called to testify
19 before the Commission they were in fact
20 simultaneously facing charges under the
21 provincial Occupational Health and
22 Safety Act. The affirmation of the
23 correctness of those decisions by
24 unanimous Court in the Blood Inquiry
25 case renders the division of powers

1 ground of appeal untenable in the
2 present case as well."

3 So I take those paragraphs as meaning, Mr.
4 Commissioner, that an otherwise validly constituted
5 provincial inquiry, which is what we have here, will not be
6 rendered *ultra vires* the province as, if it's part of its
7 larger mandate; again, the broader purpose, it investigates
8 or makes findings of misconduct, provided that such
9 findings are necessary to fulfill the purpose of the
10 inquiry as described in its terms of reference or properly
11 relevant to the broader purposes of the inquiry as set out
12 in the terms of reference.

13 So again, you have a discretion to do the
14 things we're asking you to do here, so long as it pertains
15 to the broader purpose of the inquiry which in no way has
16 anything to do with findings of criminal guilt. It has
17 nothing to do with findings of civil liability. The
18 broader purpose of this inquiry is looking into the
19 response to allegations and to making reports. That has
20 nothing to do with criminal liability -- criminal guilt.

21 That's a good place to break, I think.

22 **THE COMMISSIONER:** Thank you.

23 Let's come back at 2:00.

24 **THE REGISTRAR:** Order. All rise. À
25 l'ordre. Veuillez vous lever.

1 This hearing will reconvene at 2:00 o'clock.

2 --- Upon recessing at 12:48 p.m./

3 L'audience est suspendue à 12h48

4 --- Upon resuming at 2:02 p.m./

5 L'audience est reprise à 14h02

6 **THE REGISTRAR:** This hearing of the Cornwall
7 Public Inquiry is now in session. Please be seated;
8 veuillez vous asseoir.

9 **THE COMMISSIONER:** Good afternoon.

10 How was lunch, Mr. Lee?

11 **MR. LEE:** Delightful.

12 How was yours, Mr. Commissioner?

13 **THE COMMISSIONER:** Great. Great.

14 --- SUBMISSION ON MOTION BY/REPRÉSENTATION SUR REQUÊTE PAR
15 **MR. LEE (cont'd/suite):**

16 **MR. LEE:** I'm going to take you, right of
17 the bat, to the *Westray Mines* case, which is at Tab 4 of my
18 Authorities.

19 **THE COMMISSIONER:** Yes.

20 **MR. LEE:** The reason I'm taking you there is
21 that I want to get in a little bit to what you asked
22 earlier about balancing the public's interest versus the
23 private interest.

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

25 **MR. LEE:** I would submit to you that the

1 importance of public inquiries requires that all persons
2 with relevant evidence to be given will be compellable to
3 testify as witnesses.

4 Now, that's what the *Westray Mines* case
5 deals with and while it's concerned with the propriety of
6 compelling the testimony of the accused persons in that
7 case, the general principles set out in that case are
8 useful in considering the propriety of calling the victims
9 in the present inquiry.

10 Justice Cory in his concurring reasons
11 discussed a number of important factors to be considered in
12 attempting to achieve a fair balance between an alleged
13 threat to individual rights and the public interest in
14 compelling testimony. That begins at paragraph 88 of the
15 decision, and I would like to read you just some snippets
16 out of this. I won't go through the entire thing.

17 **THE COMMISSIONER:** Okay.

18 **MR. LEE:** So beginning at paragraph 88, he
19 writes:

20 "The first stage of the analysis
21 requires that the public interest in
22 obtaining the compelled testimony be
23 identified. The nature and purpose of
24 the Inquiry must be examined. In this
25 case the division of power issue had

1 already been decided."

2 **MR. LEE:** He then sets out a quote, and
3 below that at the paragraph beginning "In other words..." he
4 summarizes. He says:

5 "In other words, the primary purposes
6 of the inquiry are to identify the
7 causes of the explosion to determine
8 whether or not it could have been
9 prevented and to suggest the means for
10 preventing the recurrence of such a
11 disaster. Its aim is not to conduct a
12 criminal investigation or assign
13 criminal responsibility."

14 He goes on to say:

15 "These purposes are of very significant
16 public importance. The mandate of the
17 Inquiry is of a similar nature to the
18 types of proceedings which the Law
19 Reform Commission of Canada has
20 suggested in its Working Paper, which
21 are important enough to warrant broad
22 investigatory powers."

23 Now, a working paper is set out there. It
24 says:

25 "What is 'substantially public

1 importance?' A new statute should not
2 list categories of such matters;
3 legislative life being what it is,
4 inevitably such a list would quickly
5 prove incomplete and obstructive. In
6 most instances, however, whether a
7 given matter is of such kind should be
8 evident. Does it involve, for example,
9 serious accusations of incompetence of
10 venality in government itself? Serious
11 breakdown in the implementation or
12 administration of an established
13 government policy? Natural disasters
14 badly handled or an unexplained serious
15 accident? It is fair to say that,
16 although one cannot anticipate all
17 questions that can reasonably be deemed
18 to be of substantial public importance
19 'one will know one when one see one.'
20 In this case, the magnitude of the
21 tragedy, its impact throughout Nova
22 Scotia, the extensive publicity which
23 has followed the explosion and
24 accompanied the progress of the
25 Inquiry, and the undeniable importance

1 of the mining industry to the Nova
2 Scotia economy all emphasize the great
3 public significance of the Inquiry.
4 The public interest in learning the
5 truth about what happened includes a
6 very real desire to obtain all of the
7 relevant information in as timely a
8 manner as possible. The scale of this
9 disaster and its widespread impact are
10 of such a notable and exceptional
11 nature that the strong and continuing
12 community interest in holding an open
13 inquiry must be given ample weight."

14 So that's the first consideration that
15 Justice Cory raises when he's trying to decide between the
16 individual rights and the public rights.

17 He goes on at paragraph 91 to consider the
18 second stage of the analysis. It reads:

19 "There are three important factors
20 which must be considered in the effort
21 to achieve a fair balance between the
22 threat to individual rights and the
23 public interest in compelling
24 testimony. First, to conduct the
25 inquiry without full access to the

1 information which will be provided by
2 the testimony of the two most senior
3 mine managers would severely impair the
4 effectiveness of the Inquiry. More
5 importantly, it would aggravate rather
6 than assuage the public cynicism
7 concerning the ability of the
8 government to protect industrial
9 labourers adequately or to investigate
10 the circumstances that surrounding this
11 tragedy properly. A good deal of the
12 public interest in proceeding with the
13 Inquiry is therefore dependent upon the
14 Inquiry having access to the testimony
15 of the respondents."

16 If I can move to paragraph 95, which is the
17 last paragraph of this case I will refer you to. It says:

18 "Therefore, although there is no
19 absolute rule that all witnesses
20 other than accused at their own
21 trials are compellable, there is a
22 presumption in our system of
23 criminal justice that persons
24 will, in fact, be compellable
25 witnesses. Any harm which may be

1 suffered by a witness as a result
2 of compelled testimony can be
3 avoided by granting the
4 appropriate Charter remedy short
5 of testimonial immunity. If this
6 approach is adopted, Charter
7 relief can be properly tailored to
8 the actual harm suffered.
9 Further, the search for truth is
10 promoted by such a system which
11 couples a principle of broad
12 compellability with Charter
13 protections for the witness in
14 subsequent criminal proceedings."

15 So in this case we have the accused in
16 criminal proceedings that are ongoing being compellable and
17 the court is essentially saying that "We're going to compel
18 them. We need to hear what they're going to say for the
19 purposes of this inquiry. It's important. The public
20 requires to hear it and we will deal with it later. There
21 are Charter remedies available to them and that's the
22 appropriate approach today.

23 I would submit to you that in that case, if
24 the accused, in a concurrent criminal proceeding can
25 testify, surely the victims at this inquiry can testify,

1 Mr. Commissioner.

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

3 **MR. LEE:** As I have said, it is within the
4 inquiry's mandate to hear any and all evidence relating to
5 its predominant purpose, being the institutional response
6 to allegations of sexual abuse.

7 It is not possible, in my submission, to
8 examine the propriety of that response without
9 understanding the circumstances surrounding the complaints
10 themselves, including details of when the complaint was
11 made, to whom it was made and the nature of the complaint.

12 That evidence, in some part, requires
13 detail. It does not require detail into the actual acts
14 that make up the abuse, if you will. We simply need enough
15 detail to enable you to be able to understand the nature of
16 the allegation in a general sense.

17 I would like to turn briefly to Mr.
18 Cipriano's reply -- Applicant's reply ---

19 **THE COMMISSIONER:** Yes.

20 **MR. LEE:** --- at paragraph 37, and this goes
21 back to the issue with findings of misconduct, which you've
22 touched on a little bit today and Mr. Wardle touched on as
23 well.

24 At paragraph 37, Mr. Cipriano writes:

25 "Any recommendations made that a public

1 institution ought to have acted
2 differently in light of criminal
3 accusations against the applicants
4 leaves them factually guilty by giving
5 merit to the criminal accusation. This
6 is precisely what a public inquiry
7 cannot do."

8 In my submission, with all due respect, that
9 is wrong, Mr. Commissioner.

10 I submit to you it would be impossible -- it
11 would be entirely possible for you to find that a) an
12 institution reacted improperly to an allegation and b) that
13 in the end the accused person did absolutely nothing wrong.

14 We are dealing with the allegation. At the
15 time the allegation is made, we don't know what the end
16 result is going to be. There is a duty and there is a
17 responsibility to respond to the allegation.

18 If down the road we find out that the
19 allegation was bogus or whatever it may be, it does not
20 affect the nature of that initial response, and that
21 response is what we're concerned with.

22 You're not going to undertake that analysis
23 to determine whether or not the allegation was bogus,
24 whether or not it can be supported in law by evidence, but
25 the basic proposition that we need to evaluate the response

1 makes sense.

2 In paragraph 38, Mr. Cipriano writes:

3 "Due to the criminal circumstances
4 behind the Cornwall Public Inquiry,
5 there can be no distinction between a
6 finding of misconduct and criminal
7 liability. The alleged misconduct is
8 criminal, being accusations of sexual
9 abuse. Therefore, a finding of
10 misconduct means that the criminal
11 accusation has merit, leaving the
12 accused factually guilty."

13 And I would submit to you that the way the
14 word "misconduct" is used in the sense of a public inquiry
15 has absolutely nothing to do with the accusation of sexual
16 abuse. Misconduct, in this case, will be confined to the
17 response. So as I believe -- it was either yourself or Mr.
18 Wardle, I'm not sure which, said, "Unless Father MacDonald
19 was somehow in charge of responding to allegations of
20 sexual abuse, there will not be a finding of misconduct
21 against him."

22 The purpose of this Commission is not to
23 make a finding of misconduct in relation to the sexual
24 abuse itself, and there is no suggestion by anybody that
25 that is what would happen here.

1 This inquiry obviously has to look into the
2 past to see what has happened, but it also has to conduct
3 itself with a view to making recommendations for the
4 future. As part of that dual purpose, this inquiry needs
5 to hear all of the available evidence from all of the
6 available sources, and it cannot otherwise satisfy its
7 mandate.

8 Mr. Wardle earlier today brought you to the
9 Blood case, and I won't bring you there again, but just a
10 very brief quote that he read today was:

11 "If an inquiry is to be useful in its
12 roles of investigation, education and
13 the making of recommendations, it must
14 make findings of facts. It is these
15 findings which will eventually lead to
16 the recommendation which will seek to
17 prevent the recurrence of future
18 tragedies."

19 Now, if I can turn your attention briefly to
20 Tab 5 of my materials, that is the Blood case, and I would
21 like to take you to paragraph 34. This is important when
22 it gets to Mr. Cipriano's submissions about the public
23 perception versus -- I believe Mr. Cipriano used the
24 phrase, "It's not about what we, in this room, know; it's
25 about what the public is going to know."

1 This is under the heading "The Scope of a
2 Commissioner's Power to Make Findings of Misconducts." The
3 court wrote:

4 "A commission of inquiry is neither a
5 criminal trial nor a civil action for
6 the determination of liability. It
7 cannot establish either criminal
8 culpability or civil responsibility for
9 damages. Rather, an inquiry is an
10 investigation into an issue, event or
11 series of events. The findings of a
12 commissioner relating to that
13 investigation are simply findings of
14 fact and statements of opinion reached
15 by the commissioner at the end of the
16 inquiry. They are unconnected to
17 normal legal criteria. They are based
18 upon and flow from a procedure which is
19 not bound by the evidentiary or
20 procedural rules of a courtroom. There
21 are no legal consequences attached to
22 the determinations of a commissioner.
23 They are not enforceable and do not
24 bind courts considering the same
25 subject matter."

1 Then it sets out of quote. It
2 continues after the quote:
3 "Although the findings of a
4 commissioner may affect public opinion,
5 they cannot have either penal or civil
6 consequences. To put it another way,
7 even if a commissioner's findings could
8 possibly be seen as determinations of
9 responsibility by members of the
10 public, they are not and cannot be
11 findings of civil or criminal
12 responsibility."

13 At paragraph 35, it writes:

14 "What then should be the result of the
15 appellants' submission that a
16 commissioner conducting a public
17 inquiry does not have the jurisdiction
18 to make findings that would be
19 considered by reasonably informed
20 members of the public to be a
21 determination of criminal or civil
22 liability? Since it is clear that a
23 commissioner's findings cannot
24 constitute findings of legal liability,
25 it would appear that the appellants are

1 asserting that in light of the
2 potential harm to the reputations of
3 parties or witnesses, a commissioner
4 should not be permitted to allocate
5 blame or assign responsibility for the
6 events under scrutiny."

7 That's exactly what's happening here.

8 Mr. Cipriano was asking us to consider the
9 effect on reputation. As we've just heard from what I've
10 read, an inquiry cannot make findings of liability or
11 guilt. It cannot make legal determinations. Even if it
12 wanted to and tried to, its findings as a matter of law are
13 not capable of establishing guilt and liability.

14 Mr. Cipriano's concerns are with the
15 public's perception and what the public is going to see.
16 He's worried that the public simply cannot or will not
17 understand the difference between the findings of this
18 inquiry and those made in a court of law.

19 I submit to you, Mr. Commissioner, that that
20 is where the Commission's ability and even its duty to
21 educate the public come into play.

22 There are various steps available to you to
23 do whatever you need to do to explain to the public the
24 difference between what is happening here and what would be
25 happening in a court of law.

1 You can fully explain what we're doing here.
2 Mr. Engelmann can fully explain what we're doing here and,
3 for Mr. Cipriano's purposes, what we are not doing here and
4 what we cannot do being here. Mr. Cipriano is at liberty
5 to explain at length the fact that Father MacDonald
6 maintains his innocence. Nobody is denying that. It is
7 perfectly within his rights to tell everybody that
8 regardless of what anybody else says, according to Father
9 MacDonald nothing happened.

10 I submit to you that we need to give both
11 the public and this Commission some credit that the
12 Commission can do the job of educating the public and the
13 public can appreciate the difference between this process
14 and a criminal process.

15 Mr. Cipriano contends that the effect of
16 calling the victims of abuse at this inquiry will be to
17 seriously prejudice the applicants and that they will have
18 no recourse to clear their names and, essentially, that
19 their reputations will be stained.

20 Mr. Wardle earlier today brought you the
21 Blood case where the Supreme Court set out a statement from
22 Justice Décary in the Federal Court of Appeal. The very
23 last part of that is:
24 "It is almost inevitable that somewhere along the way, or
25 in a final report, such an inquiry will tarnish reputations

1 and raise questions in the public's mind concerning the
2 responsibility borne by certain individuals. I doubt that
3 it would be possible to meet the need for public inquiries
4 whose aim is to shed light on a particular incident without
5 in some way interfering with the reputations of the
6 individuals involved." So clearly, it was within the
7 jurisdiction of the inquiry to hear evidence that may
8 negatively impact upon the reputation of a person.

9 I submit to you that the position -- Mr.
10 Cipriano's position with respect to the effect of receiving
11 that evidence on Father MacDonald is overstated. As
12 everyone here knows, the amount of media attention that has
13 surrounded Father MacDonald, in particular, for years now
14 has been enormous.

15 It is difficult to imagine that whatever
16 comes out of this inquiry is going to have that great an
17 impact on Father MacDonald in terms of media attention or
18 in terms of what the public knows or what the public
19 thinks. It is all out there already and it's been out
20 there for years.

21 Mr. Commissioner, we need to keep in mind
22 that this inquiry's broad overriding purpose is to look at
23 the institutional response to allegations.

24 As has been stated today, it is not here to
25 determine whether "A" abused "B" or whether "B" is telling

1 the truth about that abuse; whether the allegations could
2 be proven in the end is not the point. The issue is
3 whether the complaint was even dealt with. If so, was it
4 dealt with appropriately. If no, why not? Who did his or
5 her job and who did not, and which institutions responded
6 properly and which didn't? Nowhere in that analysis, I
7 submit to you, is it necessary for you to pronounce on the
8 guilt or innocence of anyone.

9 Of course, you are entitled, and I submit
10 you are required to hear from the victims in this matter.
11 This is all about allegations made by those victims and you
12 need the appropriate details of those allegations to look
13 into the response to them.

14 It is not possible to measure the
15 institutional response if you can't even be certain that
16 there was something to respond to. You need that basic
17 premise first. You need the groundwork laid so that you
18 can do your job, Mr. Commissioner.

19 What we need to try to do here is to
20 understand exactly what it is that Mr. Cipriano is
21 concerned about. His concern, I would submit to you, at
22 its heart seems to be that by allowing victims to testify
23 at this inquiry you must -- and I use the word "must"
24 because that's the word he used -- accept the contents of
25 the allegations made as truthful.

1 So you have to accept that "A" did indeed
2 sexually abuse "B". Mr. Cipriano's reasoning, as I
3 understand it, is that in order to assess the
4 appropriateness of an institution's response you have to
5 first accept that the allegation was worthy of a response
6 in the sense that it was true. And with respect, that
7 position is wrong. There is absolutely no need for you to
8 accept that any of the allegations is or was true. You are
9 simply being asked to determine, first, whether an
10 allegation was made; second, the response to that
11 allegation, whether it's good or bad; whether there was a
12 response or whether there was no response, and then you are
13 asked to assess the appropriateness of that response.

14 In order to determine appropriateness it has
15 absolutely nothing to do with the truth of the complaint
16 and, as I said earlier, allegations that in the end prove
17 to have no merit still require an appropriate response.
18 It's not about the truth of the statement and it never will
19 be at this inquiry.

20 This inquiry, most importantly, is not
21 investigating a crime. Your concern and the inquiry's
22 concern is the institutional response to allegations that
23 were made. As part of your mandate you need to uncover all
24 of the relevant evidence and you need to be permitted to
25 hear that evidence so long as it is being heard in

1 furtherance of the inquiry's broader purpose.

2 This inquiry, Mr. Commissioner, must hear
3 from the victims. To limit the scope of this inquiry by
4 refusing to hear from the victims who are at the very heart
5 of the inquiry would make it impossible for you to satisfy
6 your mandate.

7 Subject to any questions you might have,
8 those are my submissions.

9 **THE COMMISSIONER:** Thank you.

10 Mr. Bennett.

11 Oh, I'm sorry; I'm sorry.

12 **MR. CALLAGHAN:** No, no, no.

13 **THE COMMISSIONER:** I thought maybe you were
14 leaving, Mr. Callaghan.

15 (LAUGHTER/RIRES)

16 **THE COMMISSIONER:** Mr. Bennett, how are you
17 today?

18 --- SUBMISSION ON MOTION BY/REPRÉSENTATION SUR REQUÊTE PAR
19 **MR. BENNETT:**

20 **MR. BENNETT:** Good. Good afternoon, Mr.
21 Commissioner.

22 With respect to the law on this, once I
23 received the beautifully-drafted factum of my friend, Ms.
24 Brannan, from the OPP, I determined it wasn't necessary to
25 draft one. We adopt the law as it's set out and it's very

1 comprehensive, and we feel it's important with respect to
2 Part 1.

3 I would just like to address briefly an
4 issue that hasn't been touched on this morning, and that's
5 with respect to Part 2.

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

7 **MR. BENNETT:** Because I understand Mr.
8 Cipriano's motion deals also with Part 2.

9 **THE COMMISSIONER:** Yes.

10 **MR. BENNETT:** And we have -- obviously, we
11 believe the law is the same but in terms of Part 2, we
12 believe nothing that's determined in this motion should
13 prejudice the ability of survivors being able to maybe say
14 more during Part 2. Again, we don't know where we are
15 going with Part 2.

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

17 **MR. BENNETT:** But there is an anticipation
18 that there is a possibility. There may be some type of
19 process where survivors will be telling their story,
20 possibly not in public, not on the record, and we wouldn't
21 want anything in this motion and your determinations to
22 limit that ability for someone to get up and say, "This is
23 what happened to me and this is who did it to me" and all
24 of the facts.

25 So with respect, we believe the issue may be

1 slightly different for Part 2.

2 And those are my submissions, subject to any
3 questions.

4 **THE COMMISSIONER:** That's fine, thank you.

5 **MR. BENNETT:** Thank you.

6 **MR. CALLAGHAN:** Good afternoon, Mr.
7 Commissioner.

8 **THE COMMISSIONER:** Mr. Callaghan.

9 **MR. CALLAGHAN:** I ---

10 **THE COMMISSIONER:** How was your lunch?

11 **MR. CALLAGHAN:** My lunch was quite good. I
12 had a nice salad, frankly.

13 **THE COMMISSIONER:** Really?

14 (LAUGHTER/RIRES)

15 **MR. CALLAGHAN:** Well, I don't know where
16 you're staying but we're all staying at a hotel where
17 everybody seems to eat a lot, so having salad at lunch is
18 probably the wise counsel on an inquiry that might go quite
19 a while.

20 **THE COMMISSIONER:** Fries on the side?

21 **MR. CALLAGHAN:** No fries.

22 (LAUGHTER/RIRES)

23 --- SUBMISSION ON MOTION BY/REPRÉSENTATION SUR REQUÊTE PAR

24 **MR. CALLAGHAN:**

25 **MR. CALLAGHAN:** My submissions are going to

1 be directed to why this is not a constitutional issue or if
2 it is it doesn't meet the test; second, that it really is
3 an issue of procedural fairness as understood by the case
4 law, which is something that you are going to have to
5 address in a more fulsome record and at the appropriate
6 time and; third, just to provide context. As I said
7 yesterday, we're at the beginning stages and decisions that
8 you make now are going to inform people but they shouldn't
9 limit things going forward.

10 Let me start. Obviously, the motion here is
11 that it is a constitutional issue that limits your ability
12 to call witnesses.

13 I'm not going to repeat what I said
14 yesterday regarding what I believe to be the pith and
15 substance of this inquiry. I'm not going to take you
16 through the case law. Mr. Wardle has done that and Ms.
17 Brannan is going to do that, save and except with respect
18 to the issues of procedural fairness.

19 But suffice it to say that this inquiry on
20 its face, as directed by the Order in Council, is not
21 dealing with a disguised criminal investigation. Rather,
22 it's quite to the contrary and that, as I've said in the
23 past, you've got certain governing documents -- you've got
24 the *Constitution Act* and the division of powers and you've
25 got the Order in Council as permitted under the *Inquiries*

1 Act.

2 So I think that the first place to start --
3 and, again, my submissions are not going to be long -- is
4 to address the Order in Council which I have in my material
5 which is M1-D1 at Tab 2.

6 (SHORT PAUSE/COURTE PAUSE)

7 MR. CALLAGHAN: Well, we had emailed
8 documents that were to be placed with the documents. We
9 sent it all electronically, so I'm not certain what to say.
10 Yesterday, they were all bound. So I'm wondering where I
11 might find it.

12 MS. BRANNAN: I can give you some help. If
13 you're using the factum of the OPP, the green thin one, the
14 Terms of Reference are at Tab 2 of the factum.

15 THE COMMISSIONER: No, not Tab 2.

16 MS. BRANNAN: You're looking for the Terms
17 of Reference?

18 MR. CALLAGHAN: Yes.

19 MS. BRANNAN: The factum is the thin -- the
20 thin ---

21 THE COMMISSIONER: The thin green one.

22 Sorry.

23 MS. BRANNAN: Yes.

24 THE COMMISSIONER: Thank you.

25 Pardon me? I can't hear you. Just a

1 second.

2 MS. BRANNAN: M1-E1.

3 THE COMMISSIONER: Yes, yes.

4 MS. BRANNAN: Tab 2 ---

5 THE COMMISSIONER: Of "B".

6 MS. BRANNAN: Of "B", B-2, Schedule B-2.

7 THE COMMISSIONER: Yes, the last one.

8 (SHORT PAUSE/COURTE PAUSE)

9 MR. CALLAGHAN: I was just sorting out, Mr.
10 Commissioner, where I might find the other material, but
11 let's just move this matter along.

12 In the Order in Council, then, I think we
13 have to start where I started the last time which is the
14 preamble. It's a shame that Mr. Sherriff-Scott isn't here
15 to "Drieger" us today but ---

16 (LAUGHTER/RIRES)

17 MR. CALLAGHAN: --- I go back to my
18 submissions yesterday that you have to ---

19 THE COMMISSIONER: He's watching. He is
20 watching.

21 MR. CALLAGHAN: I suspect he is.

22 (LAUGHTER/RIRES)

23 MR. CALLAGHAN: The truth of the matter is -
24 - I'm not going to repeat what I said yesterday about
25 compartmentalizing. You have to look at it as a whole.

1 As I said yesterday, whilst I don't think
2 you can listen to any one minister or any one government
3 person to tell you what it means, the history about how we
4 got here is not irrelevant. So if you look at the proviso,
5 and keeping in mind the Project Truth experience that led
6 to this; and it says:

7 "Whereas allegations of abuse of young
8 people have surrounded the city of
9 Cornwall and its citizens for many
10 years, the police investigations and
11 criminal prosecutions relating to these
12 allegations have concluded. Community
13 members have indicated that a public
14 inquiry will encourage individual and
15 community healing."

16 Pausing there, that proviso is very
17 important insofar as it defines the scope in many respects
18 of what this inquiry is about. It's not about every
19 allegation of sexual abuse in the city of Cornwall. What
20 we are talking about are the police investigations and
21 criminal prosecutions relating to these allegations have
22 concluded, such as Charlie MacDonald. They have concluded.
23 That is, they are complete. The prejudice is now complete.
24 In the case of Ken Séguin he has passed away.

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

1 **MR. CALLAGHAN:** So it's very important that
2 we're not misled to think that the Governor in Council sent
3 you on some chase to ferret out allegations that are yet
4 unproven or un-dealt with. Quite to the contrary; they are
5 asking you to deal with those that have concluded. That
6 should inform what we do going forward.

7 And so when we get into the historical abuse
8 of young people and the mandate in section 2, it's got to
9 be read in relation to the concluded allegations. I think
10 that's an important aspect from the constitutional pith and
11 substance point and also from the procedural fairness, as
12 I'll show you in a minute.

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

14 **MR. CALLAGHAN:** Under the pith and
15 substance, clearly, you're not -- you're dealing with a
16 disguised criminal investigation. Rather, they are
17 concluded.

18 In terms of the overall approach, in terms
19 of why I say -- and again, I'm not going to go into any
20 great detail because I know Ms. Brannan has got an
21 impressive presentation, I'm certain, as to the
22 constitutional pith and substance law, but I do direct your
23 attention to the *Krever* case which you can find at M1-C3,
24 and if I can just find the tab -- I'm going to be working
25 with a different one but if I could find it here it's at

1 Tab 5. I'm holding my breath to make sure I've got the
2 same citations.

3 I just want to illustrate a very small
4 point and that's ---

5 **THE COMMISSIONER:** So I have got the case.
6 What tab?

7 **MR. CALLAGHAN:** I'm sorry, M1 ---

8 **THE COMMISSIONER:** Yes. No, I have it.

9 **MR. CALLAGHAN:** Tab 5, the *Krever* case, what
10 was described as "blood".

11 **THE COMMISSIONER:** What paragraph, though?

12 **MR. CALLAGHAN:** I'm at paragraph 38, but not
13 to read it because it's been read and I wouldn't want to be
14 repetitive.

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

16 **MR. CALLAGHAN:** But if you remember
17 paragraph 38 this is the discussion about the *Inquiries Act*
18 and where Mr. Justice *Krever* points -- or Mr. Justice *Cory*
19 points out in *Krever* that, you know, you have an obligation
20 to hear the evidence and it's unfortunate that people have
21 to testify but you have the obligation.

22 What he then goes on to talk about in
23 paragraph 55 is, as the title says, "The Need for
24 Procedural Fairness" and that's important because that's
25 not pith and substance. That may invoke an issue for you

1 if somebody acts in a way that doesn't abide by procedural
2 fairness because *certiorari* would apply.

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

4 **MR. CALLAGHAN:** But if you then read in
5 paragraph 55, and I'll start with -- there is sentence in
6 there that said, "It is true..."

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

8 **MR. CALLAGHAN:**

9 "It is true that the finding of a
10 Commissioner cannot result in either
11 penal or civil consequences for a
12 witness. Further, every witness enjoys
13 the protection of the Canada *Evidence*
14 *Act* and the *Charter* which ensures that
15 the evidence given cannot be used in
16 other proceedings against the witness.
17 Nonetheless, procedural fairness is
18 essential for the findings of
19 commissions may damage the reputation
20 of a witness. For most a good
21 reputation is the most highly prized
22 attribute. It falls that it is
23 essential that procedural fairness be
24 demonstrated in the hearings of the
25 commission."

1 That's where this argument properly belongs,
2 as counsel for Mr. Leduc pointed out. That's exactly what
3 we are talking about.

4 And if one looks at the circumstances, just
5 to foreshadow where you might deal with this just to be
6 complete, if one goes to the *Consortium* case which is at
7 Tab 1 of that same binder -- once again, I'm holding my
8 breath that they are paginated the same.

9 And here we have at paragraph 41, lo and
10 behold when we get to it -- 41, please; right to the
11 heading, please.

12 There we go, "Procedural Fairness at the
13 Inquiry". That was the issue. It wasn't
14 constitutionality. It was more -- and when it got to this
15 point of the argument it was procedural fairness.

16 And if you go down to the sentence starting
17 "Witnesses" -- if I may, I know it's so difficult. It's a
18 big paragraph. It's up about six from the bottom. There
19 you are - you're just at it, way at the top there, good.

20 "Witnesses are routinely required to
21 make disclosure of relevant documents
22 to Commission counsel, and in the
23 spirit of even-handedness it should be
24 customary for Commission counsel, to
25 the extent practicable, to disclose to

1 witnesses, in advance of their
2 testimony, any other documents obtained
3 by the Commission which have relevance
4 to the matters proposed to be covered
5 in testimony, particularly documents
6 relevant to the witness's own
7 involvement in the events being
8 inquired into. Judicial inquiries are
9 not ordeals by ambush. Indeed,
10 judicial inquiries often defend the
11 validity of their existence and methods
12 on the ground that such inquiries are
13 inquisitional rather than adversarial,
14 and that there is no *lis* between the
15 participants. Judicial inquiries are
16 not, in that sense, adversarial. On
17 that basis, the appellants and others
18 whose conduct is under scrutiny can
19 legitimately say that as they are
20 deemed by the law not to be
21 adversaries, they should not be treated
22 by Commission counsel as if they were."

23 So it sort of sets out that this is a matter
24 of procedural fairness. It is not a matter, when one gets
25 into it, of pith and substance.

1 Ms. Brannan will take you to other portions
2 of that which describes circumstances similar where
3 criminal investigations have concluded. The difficulty
4 that I have in making these arguments at the moment is that
5 I cannot agree with the statement that more may not be
6 required of witnesses in the sense that we may be required
7 to examine further insofar as if the police had to come to
8 reasonable, probable grounds -- because that may be an
9 issue that you may request to inquire into with respect to
10 these concluded investigations -- that it may require
11 something more than just the statement.

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

13 **MR. CALLAGHAN:** I can't envision that today.
14 I think we have to let things reach a fullness of time, and
15 it would be very wrong to say that we are going to say to
16 Mr. MacDonald that we don't intend to delve into these
17 issues because we are not here to uncover a criminal
18 investigation. But by the same token, there are other
19 aspects of this inquiry that may require you to go a little
20 bit further to satisfy yourself as to some of the
21 responses, and so not to be a limited-type of inquiry in
22 terms of the judgement.

23 I say that for a lot of reasons. There are
24 going to be other issues. I think it is fair that you be
25 alerted because, as I say, you are at the early stages and

1 these judgements become important. It is unfair to you not
2 for us to at least, you know, tell you some of the issues.

3 Mr. Engelmann raised an issue today about
4 confidentiality.

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

6 **MR. CALLAGHAN:** The public authorities in
7 this room have documents that are FOI requirements.

8 You have a stipulation in your Order in
9 Council to preserve that. Well, that is an issue of
10 procedural fairness.

11 There will be issues surrounding the nature
12 of how one does a police investigation maybe sensitive, as
13 it was in *Keable*. These are issues that may come to light
14 as this matter progresses. I am not suggesting it is a
15 matter now, and I am only doing this as a courtesy to the
16 Commissioner so as to not mislead you that it is a simple
17 issue. It is a simple issue with respect to pith and
18 substance but beyond that, it becomes a little bit more.

19 I think I have exhausted my submissions.
20 Thank you.

21 **THE COMMISSIONER:** Thank you.

22 **(CELLULAR PHONE RINGS/TÉLÉPHONE CELLULAIRE SONNE)**

23 **--- SUBMISSION ON MOTION BY/REPRÉSENTATION SUR REQUÊTE PAR**
24 **MS. BRANNAN:**

25 **MS. BRANNAN:** My apologies. It's not a good

1 way to start, is it?

2 **THE COMMISSIONER:** Well, there could be
3 worse ways.

4 **MS. BRANNAN:** Good afternoon. I've already
5 lost my first gold star, I can see.

6 Mr. Kozloff, maybe you could turn that off
7 for me because I'm not sure that I did?

8 Mr. Commissioner, I would like to start just
9 by -- and I probably do this more for myself than
10 for you, sir, although it will help both of us,
11 just to let you know what I am going to be using
12 by way of documents.

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

14 **MS. BRANNAN:** I will of course -- I have our
15 Factum, which is M1-E1.

16 **THE COMMISSIONER:** Yes.

17 **MS. BRANNAN:** Our documents are all bound in
18 green but for the Application Record.

19 Our Brief of Authorities, which is M1-E3.

20 I am unlikely to refer to our Application
21 Record, which has the affidavit of detective Inspector
22 McQuade. It was prepared in order to assist Mr. Kozloff
23 and I preparing our Factum to just have a factual base to
24 get to where we wanted to go. Of course, while we excluded
25 the blood case from our Brief of Authorities, we probably

1 shouldn't have. I will refer to it, and that can be found
2 at Tab 7 of the Committee for Citizens Renewal's Brief of
3 Authorities, which I believe is M1 ---

4 **THE COMMISSIONER:** B2.

5 **MS. BRANNAN:** B2?

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

7 **MS. BRANNAN:** I don't want to disappoint
8 you, Mr. Commissioner, but I feel my work is done having
9 heard all of my colleagues who have preceded me,
10 particularly with respect to the issue of whether or not
11 your Terms of Reference are constitutional.

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

13 **MS. BRANNAN:** But being the lawyer that I
14 am, I am certainly not going to be able to give up this
15 opportunity to express the opinion of my client, the
16 Ontario Provincial Police, and of course attempt to earn a
17 few gold stars from you, sir.

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

19 **MS. BRANNAN:** The Terms of Reference, before
20 I get to them, I would like to start with a quote from the
21 *Consortium* case. That case can be found at Tab 8 of our
22 Authorities, at paragraph 26. I begin with this quote only
23 to pick up where my friend, Mr. Callaghan, left off and
24 then to proceed to the Terms of Reference.

25 It is paragraph 26. It's partway down. I think I may

1 have even highlighted it for you, my first gold star:

2 "The power to authorize a judicial
3 inquiry is an important safeguard of
4 the public interest, and should not be
5 diminished by a restrictive or overly
6 technical interpretation of the
7 legislative requirements for its
8 exercise."

9 And here is what is important and here is
10 what I think is the pith and substance of what Mr. Cipriano
11 is concerned with and what we should all be concerned with.

12 "At the same time, of course,
13 individuals who played a role in the
14 events being investigated are also
15 entitled to have their rights
16 respected. The basic issue in this
17 appeal is how a balance is to be struck
18 between those two requirements."

19 Because, Mr. Commissioner, it's not just Mr.
20 Cipriano's client who is going to have to have things said
21 about him in this inquiry. It is not just Mr. Cipriano's
22 client whose rights we have to respect.

23 Given what you will be doing throughout this
24 process, there may be times when people will take the stand
25 while you are responding to your Terms of Reference and you

1 will find conduct that is, indeed, misconduct as part of --
2 incidental to your Terms of Reference.

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

4 **MS. BRANNAN:** And all of the people who take
5 that stand and swear on the Bible, we have to respect their
6 rights and interest in order to balance this situation.

7 Let's go to the Terms of Reference. I am
8 not going to go through all the case law that talks about
9 the pith and the substance. I'm going to try and bring
10 together what everybody has said about the Terms of
11 Reference and maybe put it -- as my mother would say,
12 please keep it very simple and understandable.

13 And that is this. Our position is that the
14 Terms of Reference are *intra vires* the Province of Ontario.
15 The primary purpose of this Commission is to inquire into
16 the very matters that this Province has jurisdiction over.

17 The Terms of Reference in this inquiry do
18 not require you nor do they entitle you to make any
19 findings or express any opinion of actual or probable
20 criminal or civil responsibility. These Terms of Reference
21 are not framed in the language that the Terms of Reference
22 in *Starr v. Houlden* were. They aren't even remotely
23 synonymous with any section of the *Criminal Code*.

24 These Terms of Reference do not name names
25 of private individuals. These Terms of Reference do not

1 ask you to carry on a commission of inquiry while there is
2 a parallel police investigation ongoing, and it is for all
3 of these and the reasons of my friends who have gone before
4 me where they have cited the Law, that we start with Terms
5 of Reference that no court could strike down, in my humble
6 opinion.

7 Mr. Cipriano is concerned that if you hear
8 from the victims of his client, you will need to make ---

9 **THE COMMISSIONER:** The victims of his
10 client?

11 **MS. BRANNAN:** The victims of the Applicant.

12 **THE COMMISSIONER:** Yes.

13 **MS. BRANNAN:** Right? His client, Father
14 Charles MacDonald -- you will need to make criminal
15 findings. Now, before I get to that particular issue, I
16 submit obviously there is no reason for you to make
17 criminal findings to fulfill your mandate. In order to
18 fulfill your mandate, though, you are going to have to look
19 at the response of the justice system and public
20 institutions. You are going to have to look at and hear
21 evidence from -- and I am going to put the victims aside
22 for a moment -- from all the people who may have had
23 contact with those victims. If you are going to call those
24 witnesses, you must necessarily call the victims first
25 because there is no way you will be able to determine the

1 response in a vacuum. It is an impossibility and it isn't
2 just incidental to your Terms of Reference, it is you
3 fulfilling your Terms of Reference by having those victims
4 take the stand.

5 What do we need to know from the victims?
6 In order for you to determine that there was an appropriate
7 response or an inappropriate response or no response, for
8 that matter, I think and I would submit that you need to
9 hear the following evidence from the victims.

10 We have to know first who made these
11 allegations. Victims will have to take the stand and
12 victims will have to present themselves, who they are,
13 where they come from, what they do, what they did. I
14 recognize it as the opportunity for the publication ban,
15 but you are going to have to hear that evidence.

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

17 **MS. BRANNAN:** You are going to need to know
18 against whom the allegations were made. You will need to
19 know who the perpetrator is and not just it was a member of
20 the Clergy. That would be an extremely unfair way of
21 putting it because we cannot then have people thinking,
22 well, what member of the Clergy was that? And every member
23 of the Clergy then takes the hit. That would be extremely
24 unfair. It would be the same with respect to any police
25 officer or any Crown attorney. You can't have the whole of

1 that particular institution be taking the hit. It has to
2 be the individual who is actually involved.

3 To whom were the allegations made? You
4 certainly can't determine a response without knowing to
5 whom the victim made the allegations. Did they make them
6 to the police? Did they make them to the Diocese? Did
7 they make them to the Children's Aid Society? And some
8 more difficult ones; to a teacher; to a parent that may
9 assist you in understanding why the response was what it
10 was; to a caregiver; to a healthcare practitioner; to a
11 probation officer, and I expect there are many other
12 examples.

13 The other important issue will be, when?
14 And the reason why I am presenting this is because you may
15 have to get into the details; when the allegations were
16 made. It may be very important to the response of the
17 judicial system other public institutions if the
18 allegations were made many years after the incident, for
19 example.

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

21 **MS. BRANNAN:** We heard from our contextual
22 experts that there are reasons why there may be a delay in
23 disclosure or why such disclosure is incremental. And the
24 fact that there is delay and the fact that the disclosure
25 may have been incremental by these victims will inform the

1 response of the public institutions and the justice system.

2 The very difficult one, Mr. Commissioner, is
3 the nature of the allegations.

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

5 **MS. BRANNAN:** The details. Well, there are
6 some details I think we are going to need.

7 We are going to need to know from the
8 perspective of that victim that they were assaulted.
9 That's their allegation. That's why we're here.

10 But let's use one example. The victim says
11 "An individual assaulted me and as a result of that
12 assault, I was injured; and I attended at the local
13 hospital and I was treated". The police go to the local
14 hospital and there are no records; or there are records
15 that indicate that an injury occurred that was consistent
16 with the allegation or the police ascertained that there is
17 evidence, which proves that the alleged abuser might be in
18 a different city that day; or they may find that indeed,
19 there were injuries. You need to know all of this
20 information in order to determine that the response by the
21 police or the response by the Crown, the response by the
22 justice system was appropriate. In some cases, it may
23 explain why charges were never laid.

24 The details of the allegation -- and these
25 may be -- the allegations -- these may be set out in

1 statements. They may be in written form; they may be in
2 videotape; they may be oral; they may be all three. They
3 may be preliminary hearing transcripts; they may be trial
4 transcripts. All of these things will inform the response
5 of the justice system and other public institutions at the
6 time that the details of the allegations were relevant.

7 So our submission is that you will have to
8 look at the nature and the details of the allegations in
9 order to determine the response.

10 Another example; when you're assessing the
11 response of a police officer to a specific allegation by a
12 specific alleged victim, you may have to know all the
13 information that that officer had in front of him or her at
14 the time in order to assess the officer's response. That
15 may be some of the details of the allegations. I think
16 people have thought that the word "details of the
17 allegations" means the graphic and actual abuse. Details
18 of the allegations means far more than that, given your
19 mandate, in my submission.

20 And think too, as you move forward, that you
21 have a process where these officers are then seeking from
22 crown attorneys an opinion as to whether or not the crown
23 attorney believes there are reasonable prospects for a
24 conviction. You have to hear what the crown attorney heard
25 in order to determine if the response was appropriate.

1 So as the Commissioner, you will require
2 this information to assess the response, to assess whether
3 the response was appropriate; to assess whether there was
4 no response and to assess if the no response- response was
5 appropriate.

6 What you don't need in order to do all of
7 those things is you don't need to make a finding of guilt
8 or innocence. You merely need that information to require
9 -- you need that information in order for you to determine
10 the response.

11 **THE COMMISSIONER:** Can I just stop you there
12 for a minute?

13 **MS. BRANNAN:** M'hm.

14 **THE COMMISSIONER:** Let's assume for a moment
15 that that's what we're doing. We are going through all of
16 this and as we go through it -- and this is purely
17 hypothetical, but that complaint was made. Someone dropped
18 the ball. Someone dropped the ball and as we keep going
19 down of the dropping the ball and we go through all the
20 circumstances, we lay forward some groundwork that would
21 seem to indicate that not only did people drop the ball,
22 but that perhaps there's more evidence that the accused was
23 really the actual perpetrator. What do we do with that?

24 **MS. BRANNAN:** Well, I think that *Jakobek* and
25 *Consortium* help us with that, and if you would like me to

1 go to that right now?

2 **THE COMMISSIONER:** No. If you're going to
3 address it sometime during your discussion, that's fine.

4 **MS. BRANNAN:** I believe it does help you. I
5 mean, that is what's happened in a lot of these cases where
6 as a result of the inquiry being called and people taking
7 the stand and evidence being given, various types of
8 misconduct are uncovered.

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

10 **MS. BRANNAN:** And the question is what do
11 you do with that? And I think -- I would submit that, just
12 as in *Jakobek* you report on it. It is what it is, and if
13 it's going to be acted upon, it will be acted upon beyond
14 these walls.

15 **THE COMMISSIONER:** Right.

16 **MS. BRANNAN:** But I will address *Jakobek* and
17 *Consortium* and what happens when we come across or we brush
18 up against those types of -- that type of evidence.

19 **THE COMMISSIONER:** Thank you.

20 **MS. BRANNAN:** So I was going to go back to
21 the safeguards in dealing with the evidence, and I believe
22 that that's in the blood case. It may very well be that
23 one of my colleagues has already brought this paragraph to
24 your attention.

25 And I'm jumping a bit because I am now

1 jumping from you've heard this evidence and you've got all
2 these details and now you're going to go to your report.
3 At paragraph 52 of blood, it sets out the safeguards of
4 dealing with the evidence. This might also help you with
5 the example you just gave me, Mr. Commissioner.

6 "And this is the primary role; indeed,
7 the raison d'être of an inquiry
8 investigating into the matter is to
9 make findings of fact. In order to do
10 so, the commissioner may have to assess
11 and make findings as to the credibility
12 of witnesses."

13 That's the dropping the ball that you were
14 talking about and you're going to have to determine, you
15 know, whether or not that person is telling you the truth
16 and also the credibility of the victims with respect to
17 when those allegations were delivered and what they were.

18 "From the findings of the fact, the
19 commissioner may draw appropriate
20 conclusions as to whether there has
21 been misconduct and who appears to be
22 responsible for it. However, the
23 conclusions of a commissioner should
24 not duplicate the wording of the Code
25 defining a specific offence. If this

1 were done it could be taken that the
2 commissioner was finding a person
3 guilty of a crime."

4 It's a very fine line, I will give you that.
5 But it's a line you're permitted to walk. And if, in fact,
6 well, evidence is tendered here over the next period of
7 time, and you come across misconduct, I see no reason why
8 you cannot draw appropriate conclusions that there was
9 misconduct; who might be responsible for it, and then you
10 must stop there. I don't think you can go any further.

11 But if you look down at paragraph 53 in
12 blood ---

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

14 **MS. BRANNAN:** Talking about what can be
15 included in your report when you've made these findings of
16 misconduct, it cannot be the principal focus of this Public
17 Inquiry.

18 So when you are drafting the report at the
19 end of the day and you've come across this evidence that
20 has led you to believe there's misconduct and you want to
21 write about it, that is all well and good, but the primary
22 focus of this public inquiry is the response of public --
23 the response of the justice system and public institutions.
24 And if while dealing with the response and your findings
25 and your report and ultimately your recommendations with

1 respect to those responses, you happen to come across some
2 misconduct, you're not prevented from reporting on it. It
3 just cannot be the focus of your report.

4 And I think that's what happened in *Jakobek*
5 with Justice Bellamy. She came across some pretty serious
6 stuff and she reported on it. The report said that was
7 okay. That's where it ended and then it's dealt with at
8 another level.

9 **THE COMMISSIONER:** I suppose what I -- when
10 I'm reading this document or that paragraph, I can't seem
11 to fathom where I could find -- where to come up a form of
12 misconduct other than the response of the institutional --
13 I mean, how could I find Father MacDonald, for example,
14 guilty of misconduct unless he was in the public forum and
15 he had a reason to -- in a public sector?

16 **MS. BRANNAN:** Well, you can't. I mean, I
17 don't see how you can because, I mean, all we're going to
18 hear about Father MacDonald is that there's a victim who
19 says he was abused by Father MacDonald and when and,
20 really, it's going to end there. Unless Father MacDonald
21 was an individual in the Diocese and, of course, that's
22 another issue, which I don't want to argue, but let's just
23 say Father MacDonald was in the Diocese and received a --
24 and they happened to be a public institution, which is a
25 lot of hypotheticals here.

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

2 **MS. BRANNAN:** Then, you could inquire into
3 his response. But the fact that Father MacDonald was
4 charged and how those charges were dealt with, I don't
5 think you can inquire into those vis-à-vis Father
6 MacDonald, but you can certainly inquire into those vis-à-
7 vis the police, the Crown -- I'm not sure I'm going to go
8 in the area of the judges. I will leave that to you, but
9 the police and the Crown for certain and provincial court
10 judges; how that was handled at the provincial court level.
11 I think you can look into that and you can report on it and
12 you can make recommendations; absolutely. There may be
13 misconduct in those places. If there is, you report on it.
14 You cannot though go that extra step and conclude that
15 someone is guilty of a crime.

16 **THE COMMISSIONER:** Right.

17 **MS. BRANNAN:** That's where you have to stop.

18 **THE COMMISSIONER:** I don't know, but even if
19 Father MacDonald came up and admitted that he did something
20 wrong, so what? I don't think it would affect anything in
21 my job, in the Commission's work.

22 **MS. BRANNAN:** In the Commission's work.

23 I mean, had he at the time come to a police
24 officer and admitted it ---

25 **THE COMMISSIONER:** Ah.

1 **MS. BRANNAN:** --- different story.

2 **THE COMMISSIONER:** Yes.

3 **MS. BRANNAN:** But if he came forward today
4 and made those admissions, I am not even sure that it would
5 be -- that's today. You're looking at the response to
6 historical abuse and how it was handled during a period of
7 time in the eighties and nineties.

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

9 **MS. BRANNAN:** And then, my friend, Mr.
10 Wardle, very rightly pointed out paragraph 54, which I
11 believe is of great assistance from Justice Cory with
12 respect to what commissioners of inquiry can do in
13 prefacing their reports regarding findings of fact and
14 conclusions and not being able to make findings of criminal
15 or civil liability.

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

17 **MS. BRANNAN:** You know, I have to say that I
18 understand Mr. Cipriano's argument or his concern. I
19 shouldn't say his argument, his concern.

20 **THE COMMISSIONER:** His concern, m'hm.

21 **MS. BRANNAN:** He has a case where his client
22 was charged and those charges were dealt with and Mr.
23 Cipriano says, "That's it. We can't delve into what he did
24 or didn't do anymore". I have some sympathy for that
25 because when you look at our factum and, in particular,

1 look at paragraph 10 on page 5.

2 **THE COMMISSIONER:** Okay. Hold on a second
3 there.

4 **MS. BRANNAN:** That's the thin green
5 document.

6 **THE COMMISSIONER:** Paragraph?

7 **MS. BRANNAN:** Paragraph 10.

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

9 **MS. BRANNAN:** If you look at each of these
10 cases with few exceptions, and I think *Nelles* might be the
11 only exception *Nelles*, when the inquiry started. I believe
12 that there was one set of charges that had been dealt with.

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

14 **MS. BRANNAN:** In the other cases, a lot of
15 people haven't been charged at all. So no charges have
16 been laid and some of the cases like *Nelles*, the charges
17 have been disposed of. But *Nelles* is a different type of
18 case. And then there are cases at the time where the
19 inquiry is going on, where charges had been laid but the
20 prosecutions are actually going on and that's *Westray*.

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

22 **MS. BRANNAN:** But I have to say through you,
23 sir; to Mr. Cipriano, I say, if it is okay and the Supreme
24 Court of Canada said it is okay to carry on an inquiry into
25 matters that may touch upon criminal conduct, in cases

1 where people like Mr. Jakobek, in cases where many of the
2 nurses in *Nelles* have not been charged, in a case, like in
3 *Faber*, where the man had not been charged who was
4 compellable but refused to testify; if we can have
5 inquiries that look into those matters, surely, surely we
6 can have an inquiry that looks into matters where the
7 charges are fully disposed of. It doesn't make sense that
8 we can't.

9 And maybe he's not saying that. Maybe what
10 he's saying is, "Yes, you can go ahead and have your
11 inquiry, but you just can't talk about my guy." Well, that
12 doesn't make sense either because think about poor Mr.
13 Jakobek. You know, he wasn't even charged; never mind
14 charged and presumed innocent until proven guilty. He
15 wasn't even charged. Yet, he took the stand and every day,
16 you know, his misconduct was there for the public to see
17 and reported on by Justice Bellamy, but only as incidental
18 to her main -- and you're not going to even have to do
19 that.

20 So while I have some sympathy for his
21 concern, I, at the end of the day, don't understand it.

22 And I have to, then, take you back to blood
23 and in particular, paragraph 34. There are a lot of
24 reputations that are going to take -- are going to be
25 scrutinized in this inquiry -- actions scrutinized and

1 therefore reputations potentially tarnished. And let's see
2 what Justice Cory has to say about that because it relates
3 to the findings of misconduct.

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

5 **MS. BRANNAN:** We're not talking about Father
6 Charles' misconduct -- Father Charles MacDonald's
7 misconduct. We're talking about potentially other people's
8 misconduct.

9 "A commission of inquiry is neither a
10 criminal trial nor a civil action for
11 the determination of liability. It
12 cannot establish either criminal
13 culpability or civil responsibility for
14 damages. Rather, an inquiry is an
15 investigation into an issue, event or
16 series of events."

17 That's exactly what we're going to do here.

18 "The findings of the commissioner
19 relating to that investigation are
20 simply findings of fact and statements
21 of opinion reached by the commissioner
22 at the end of the inquiry. They are
23 unconnected to normal, legal criteria.
24 They are based upon and flow from a
25 procedure which is not bound by the

1 evidentiary or procedural rules of a
2 courtroom."

3 Which is why we have to take heed of what
4 Mr. Callaghan has to say about procedural fairness. Even
5 though we're not in a courtroom, there still has to be
6 procedural fairness.

7 "There are no legal consequences
8 attached to the determination of a
9 commissioner."

10 From my perspective, therein lies the crux.

11 "They are not enforceable and do not
12 bind courts considering the same
13 subject matter. The nature of an
14 inquiry and its limited consequences
15 were correctly set out in *Beno v.*
16 *Canada.*"

17 And that's the Somalia Commission.

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

19 **MS. BRANNAN:** If you look down into that
20 paragraph, the Federal Court says:

21 "A public inquiry...[et cetera] is not
22 equivalent to a civil or criminal
23 trial..."

24 Et cetera, et cetera. Then go down to where it says, "The
25 rules of evidence..."

1 "The rules of evidence and procedure
2 are therefore considerably less strict
3 for an inquiry than for a court.
4 Judges determine rights as between
5 parties. The commission can only
6 inquire and report. Judges may impose
7 monetary or penal sanctions. The only
8 potential consequence of an adverse
9 finding..."

10 And I might not completely agree with this, but this is one
11 of the potential consequences:

12 "...is that reputations could be
13 tarnished."

14 And Mr. Cipriano is concerned about his
15 client's reputation. Rest assured, Mr. Commissioner, every
16 lawyer in this room, who represents a public institution or
17 any part of that public institution is concerned about the
18 reputations of their clients. We all are. And Mr.
19 Cipriano says, "This is going to affect the public opinion.
20 Public opinion is going to say Father Charles MacDonald is
21 guilty, factually guilty. The court didn't find him that
22 way".

23 Well, this is what Justice Cory has to say
24 about that:

25 "Thus, although the findings of a

1 commissioner may affect public
2 opinion..."

3 I would read to here, the evidence at the inquiry may
4 affect public opinion.

5 "...they cannot have either penal or
6 civil consequences."

7 To put it another way, even if a
8 commissioner's findings could possibly seen as
9 determinations of responsibility by members of the public,
10 they are not and cannot be findings of civil or criminal
11 responsibility.

12 You know, and I think what Mr. Cipriano
13 says, "Well, that's a distinction without a difference."
14 Once they get on the stand and they make those statements
15 that's it. The court of public opinion is going to say,
16 "They're guilty". Well, I agree with you, Mr.
17 Commissioner, it's the responsibility of all of us in this
18 room, to make sure that as we're going through this
19 process, that there's a public education aspect to this as
20 to what this inquiry is all about. And certainly, these
21 two motions -- if these two motions haven't assisted the
22 public in understanding what the business is going to be
23 going on in this room over the next, well, I hesitate to
24 say months, don't say it -- then we haven't done our job.
25 I think we have, though.

1 And I think that if you asked a member of
2 the public today, "What does all this mean?" I think a
3 member of the public might be saying to us, "It means that
4 you, Mr. Commissioner, are going to do exactly what the
5 Attorney General said. And that is, get to the bottom of
6 this".

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

8 **MS. BRANNAN:** And somehow determine what
9 these responses were. Were they appropriate? Did they
10 happen? Did they not happen? Not what could have been;
11 what was. And then out of what was; what recommendations
12 you might have, to improve the process.

13 But rest assured that throughout this
14 process, and I'm certain of it -- I'm certain of it, that
15 there are reputations that will be tarnished.
16 Unfortunately, it's a sad fact that that's what happens in
17 every public inquiry. I'm not sure anybody could name a
18 public inquiry where not one, two, three or more people had
19 to suffer their reputations being very closely scrutinized
20 and their conduct closely scrutinized.

21 Just one last point and I'm not going to go
22 back to all of the law. My friends have done an awesome
23 job in dealing with the law.

24 **THE COMMISSIONER:** They keep telling me
25 you've done an awesome job.

1 **MS. BRANNAN:** Well, you know, I'm last on
2 the list, so I have to carve my argument down because it
3 doesn't make sense to keep banging away at it. But let me
4 just say this ---

5 **THE COMMISSIONER:** They've all given you the
6 gold star today.

7 **MS. BRANNAN:** Oh, thank you.

8 **THE COMMISSIONER:** All right.

9 **MS. BRANNAN:** But what there isn't, and you
10 know we looked through all of these cases; there are no
11 cases where the court has said that victims of misconduct
12 or criminal activity are to be prevented from giving their
13 evidence. And I went through these and nobody addressed
14 the issue of the victims. It was a fait accompli. They
15 were going to take the stand and they were going to tell
16 their story.

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

18 **MS. BRANNAN:** So you have to take, I think
19 something from that, that because the court hasn't
20 addressed it, that it's a moot point. They should take the
21 stand. They should tell their story. They should give the
22 details. I'm not certain that the graphic details are
23 necessary, but the details of the allegations, so that you
24 can properly discharge your mandate.

25 So I take you now, only to the last

1 submission I want to make and that is this. It's the last
2 in my factum.

3 **THE COMMISSIONER:** Yes.

4 **MS. BRANNAN:** It's at paragraph 25.

5 **THE COMMISSIONER:** Yes.

6 **MS. BRANNAN:** And my old administrative law
7 professor, Rod MacDonald, used to say to me, "Always at the
8 end of the day in these cases, try and look at the logic,
9 because logic and common sense is sometimes far more
10 helpful than all the legal arguments you can put in a pot."
11 And we see at paragraph 25:

12 "If the Supreme Court of Canada has
13 held a validly constituted provincial
14 inquiry it may compel evidence from
15 persons who are concurrently charged
16 with criminal offences arising from
17 events which form the very subject
18 matter of that inquiry..."

19 It's not the case here.

20 "...and from persons who may
21 subsequently be charged with criminal
22 offences arising from events which form
23 the very subject matter of that
24 inquiry."

25 Then, it is submitted that it's a matter of

1 logic and common sense and it follows that you, sir, Mr.
2 Commissioner, may inquire into specific allegations of
3 sexual abuse or other wrongdoings that may be alleged by
4 the victims of this particular Applicant and that you may
5 hear evidence -- and I'm stepping out here a bit, because
6 I'm going from his first motion -- and that you may hear
7 evidence regarding past wrongdoings and allegations from
8 past alleged victims of the Applicants.

9 It makes common sense that if the Supreme
10 Court says you can do what I read out to you, you must be
11 able to do what Commission counsel is proposing to do and
12 that's put the victims on the stand and let them give their
13 evidence.

14 **THE COMMISSIONER:** Thank you.

15 **MS. BRANNAN:** Thank you.

16 **THE COMMISSIONER:** Okay, so now it's time
17 for the afternoon break. Come back at 3:30, please.

18 **THE REGISTRAR:** All rise. À l'ordre.
19 Veuillez vous lever.

20 This hearing will reconvene at 3:30.

21 --- Upon recessing at 15:14 p.m./

22 L'audience est suspendue à 15h14

23 --- Upon resuming at 15:30 p.m.

24 L'audience est reprise à 15h30

25 **THE REGISTRAR:** All rise. À l'ordre.

1 Veillez vous lever.

2 This hearing of the Cornwall Public Inquiry
3 is now in session. Please be seated.

4 **--- SUBMISSION ON MOTION BY/REPRÉSENTATION SUR REQUÊTE PAR**
5 **MR. WALLACE:**

6 **MR. WALLACE:** I'll read this myself. My
7 name is Mark Wallace. I am appearing this afternoon as
8 counsel on behalf of the Ontario Provincial Police
9 Association.

10 I can say at the outset that being fifth in
11 the batting order of necessity is going to make me a lot
12 briefer than I would have otherwise been if I had been the
13 lead-off hitter.

14 **THE COMMISSIONER:** You get to bat clean-up.

15 **MR. WALLACE:** In one way of speaking,
16 although I think Ms. Brannan has done that.

17 I, like the rest that have gone before me,
18 on the responding side, am clearly of the view that the
19 Terms of Reference that you are operating under, are in
20 fact *intra vires* of the province and, as I understand the
21 Applicant's position, he's stating to the effect that you
22 cannot allow the victims of Father MacDonald, the allegedly
23 abused, to testify because to do that would result in you
24 making findings of factual guilt and that's not something
25 you're permitted to do and to do so would be acting outside

1 or in excess of your jurisdiction.

2 In my respectful submission, there's no
3 logical foundation for that. The mere fact that you
4 receive the facts of the allegation doesn't raise those
5 findings to findings of factual guilt. It doesn't
6 logically follow.

7 It's our position that you can and should
8 hear and, in fact, are required to hear some details
9 concerning the allegations. I think a useful starting
10 point is to look at the purpose of public inquiries
11 generally, as we are instructed in the blood case which is
12 the only case that I had reproduced, which is M1-F2.

13 I had the benefit of seeing the factum of
14 the Ontario Provincial Police in advance and I was aware of
15 the cases that they were providing. I just didn't want to
16 duplicate them needlessly. And I'd refer you to paragraph
17 29, and I'll be referring to 29 and 30.

18 At paragraph 29, it states that:

19 "Commissions of inquiry have a long
20 history in Canada and have become a
21 significant and useful part of our
22 tradition. They have frequently played
23 a key role in the investigation of
24 tragedies and made a great many helpful
25 recommendations aimed at rectifying

1 dangerous situations."

2 Jumping forward to the second-last part of
3 paragraph 30, it states:

4 "One of the primary functions of public
5 inquiries is fact-finding. They are
6 often convened, in the wake of public
7 shock, horror, disillusionment, or
8 scepticism, in order to uncover "the
9 truth".

10 And if you drop down about halfway through
11 that paragraph, it states that:

12 "Yet, these inquiries can and do fulfil
13 an important function in Canadian
14 society. In times of public
15 questioning, stress and concern they
16 provide the means for Canadians to be
17 apprised of the conditions pertaining
18 to a worrisome community problem and to
19 be a part of the recommendations that
20 are aimed at resolving the problem."

21 And finally:

22 "Both the status and high public
23 respect for the commissioner and the
24 open and public nature of the hearing
25 help to restore public confidence not

1 only in the institution or situation
2 investigated but also in the process of
3 government as a whole. They are an
4 excellent means of informing and
5 educating concerned members of the
6 public."

7 And as we can see, the functions would
8 include the fact-finding, the making of recommendations and
9 the educating. That is -- and the educating, I would
10 submit, includes not only educating about the facts
11 themselves and what happened but educating in terms of the
12 process that we're all involved with at this point in time.
13 And this dovetails with what you were asked by Mr. Cipriano
14 this morning and it was mentioned later, about the damage
15 to reputations and the leap of faith that some members of
16 the public may make in terms of taking an allegation that
17 is tendered and elevating it to a fait accompli, a factual
18 finding of guilt.

19 In the few times that I have been present at
20 the hearings, it has been my impression that you've gone
21 out of your way to educate, inform the members of the
22 public about what's going on here. When something causes a
23 delay, there's always an explanation. There was an
24 explanation prior to the commencement of these arguments,
25 explaining why this was being done.

1 I would suggest that as far as the issue of
2 the possible *lis*, the way the public deals inappropriately
3 with something like that is an area that you can, and we
4 all can educate the public in terms of minimizing --
5 probably not possible to eradicate it completely, but at
6 least minimize it to the best of our ability.

7 Your Terms of Reference and the mandate
8 under which you act is to, in short words, examine the
9 institutional response of the justice system and other
10 public institutions to the allegations of historical abuse.
11 You're to inquire into and report on the response. It's
12 the institutional response or responses that are under
13 scrutiny and not the allegations themselves, and that, in
14 my respectful submission, is why the actual truth or
15 falsity of the allegations do not lie at the heart of the
16 inquiry.

17 What is the focus and the purpose is the
18 response to those allegations, although, in my submission,
19 the truth or falsity of the allegations, and for that
20 matter the motive behind them, would be irrelevant to your
21 mandate. The details of the allegations themselves are
22 relevant. And when I say "details", I'm using a compendium
23 of phrase to mean not only the "when," "where," "why" but
24 also the facts of the allegations themselves.

25 They're relevant, in my submission, because

1 you are unable to assess the response and allegation
2 generated without knowing something about the allegation.

3 How much you need to know about an
4 allegation in order to assess the response in terms of its
5 appropriateness of inappropriateness will depend on
6 circumstances and therefore, in my submission, should be
7 considered on a case-by-case basis.

8 As a general statement, however, when
9 considering the amount of detail that you would require to
10 be heard concerning an allegation, you might consider it
11 and back again in terms of relevancy. Relevancy of what?
12 Relevancy of the response.

13 The amount of detail concerning an
14 allegation, in my respectful submission, that would be
15 relevant is whatever level of detail is necessary to
16 explain the institutions' response. Since you're concerned
17 about the institutions' response, what did we do and why
18 did we do it, the institutions and those persons who
19 represent them, they must be able to answer those questions
20 and must be able to refer to the details of the
21 allegations, if necessary, to explain their actions or
22 inactions.

23 Therefore, in my respectful submission, you
24 must be able to hear some circumstances surrounding the
25 allegations. How much will depend on the response and the

1 ability of the person to explain their actions upon hearing
2 or receiving or having it conveyed to the allegation.

3 **THE COMMISSIONER:** Isn't it, bottom line,
4 coming back to the old criminal trial, the balancing of the
5 probative value versus the prejudicial value? I mean,
6 isn't that the concept that we should be looking at, once
7 we get down to whether or not we should look and to what
8 extent we should be looking at the details of a complaint?
9 How probative is it to this inquiry and the higher it is,
10 well then the higher the prejudicial value -- that we can
11 tolerate the prejudicial value. And if it's not relevant
12 to the inquiry, then it's not a probative value and the
13 prejudicial effect is higher. It just keeps on balancing.

14 **MR. WALLACE:** Yes, to a certain extent. I
15 don't think anybody wants to engage in a gratuitous
16 trashing of anyone's reputation.

17 **THE COMMISSIONER:** No.

18 **MR. WALLACE:** There has to be a sound reason
19 to offer this, and I suppose we're saying "different sides
20 of the same coin here, just expressing it differently."

21 It just occurred to me that considering the
22 functions of the inquiry and the fact that findings have to
23 be related to the discharge of the mandate, when you posed
24 the question earlier this afternoon to Ms. Brannan about
25 what happens if somebody dropped the ball and you hear

1 somebody else dropped the ball and -- at least as I
2 understood your question, the result of which would appear
3 to be the exposure of a criminal offence. That's how I
4 understood your question to be.

5 It seems to me that the misconduct that
6 you're talking about is with respect to the subject matter
7 of the inquiry. That is the response. It's not a general
8 statement of bad things. The findings of misconduct, as
9 the Blood case state, have to be related to the discharge
10 of the mandate and necessary to explain the findings and
11 the recommendations. And it's because the inquiry is
12 concerned about the responses of the institutions that the
13 relevance of the allegations is established.

14 I think, in my respectful submission, that
15 simply because some persons may not deal appropriately, in
16 face of clear directions to the contrary from yourself as
17 to the purpose -- that type of evidences led, the
18 allegation-type evidence -- the mere fact that some people
19 would not deal with it, some members of the public not deal
20 with it in a proper fashion when it otherwise has a
21 legitimate and proper purpose for being tendered, is surely
22 not a reason not to hear it.

23 In my respectful submission, based on all of
24 the case law that was cited to you earlier today, this
25 evidence is required, is necessary and should be heard.

1 Thank you.

2 **THE COMMISSIONER:** Thank you, sir.

3 The good thing, Mr. Cipriano, about having a
4 feeling that everyone's against you today is the fact that
5 you can get up and speak last.

6 **MR. CIPRIANO:** I suppose that could be a
7 good or bad thing.

8 **THE COMMISSIONER:** No, no.

9 **MR. CIPRIANO:** I don't want to have people
10 miss their trains. People probably hate me enough today.

11 (LAUGHTER/RIRES)

12 **THE COMMISSIONER:** No, no, not at all.

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

14 CIPRIANO:

15 **MR. CIPRIANO:** I guess we have to clear up
16 some confusion first and I apologize if there was any.

17 My, I think, reply materials set out the --
18 what I would refer as the jurisdictional issue.

19 In paragraph four where I submit that -- I
20 never once challenged the Terms of Reference as being *ultra*
21 *vires* the province. What I am submitting in paragraph
22 four, and I apologize if in drafting it I may have misled
23 people, it's in the execution of the Terms of Reference
24 that the inquiry will be exceeding its jurisdiction, not in
25 executing all of its Terms of Reference but in the matter

1 that is subject to the motion today. That's all I meant.
2 I didn't mean to mislead anyone.

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

4 **MR. CIPRIANO:** I'm going to start off with
5 the first submission made by Mr. Wardle. He says:

6 "The commission of inquiry has a duty
7 to hear about the abuse that has been
8 suffered in order to necessarily inform
9 itself."

10 The problem with that submission, Mr.
11 Commissioner, is that there is a premise there that
12 something criminal occurred.

13 **THE COMMISSIONER:** Well, just a minute now.
14 There are certain things that occurred that were criminal
15 acts.

16 **MR. CIPRIANO:** Yes.

17 **THE COMMISSIONER:** Some people pleaded
18 guilty.

19 **MR. CIPRIANO:** Yes.

20 **THE COMMISSIONER:** I don't know. Some
21 people may have been found guilty.

22 **MR. CIPRIANO:** Yes.

23 **THE COMMISSIONER:** So those people committed
24 criminal acts.

25 **MR. CIPRIANO:** Yes, but my motion is simply

1 with respect to those who are alleging my client committed
2 criminal acts and so when we're speaking of those persons.

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

4 **MR. CIPRIANO:** There is a lack of -- well, I
5 don't think this Commission can conclude without making a
6 criminal finding that there has been suffering.

7 **THE COMMISSIONER:** That's not true at all;
8 that's not true at all. I guess I should bring you to your
9 paragraph 34 in your -- I found that to a certain point
10 disappointing on my part because I thought that we had
11 attempted -- the Commission and myself had made a point of
12 indicating at the beginning that if we talk of victims and
13 perpetrators; right, there's always understood the "a" in
14 front of that. It's the alleged victim; the alleged
15 perpetrator unless they have been found guilty and properly
16 found guilty in a court of law.

17 **MR. CIPRIANO:** Yes.

18 **THE COMMISSIONER:** So then you say in
19 paragraph 34:

20 "...to a large extent, the CPI has
21 already accepted, for the purposes of
22 Part II that criminal acts took place."

23 How do you come to that conclusion?

24 **MR. CIPRIANO:** Well, Part II talks about
25 community healing.

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

2 **MR. CIPRIANO:** And presumably, part of that
3 healing is healing from criminal actions.

4 **THE COMMISSIONER:** Presumably. Is that like
5 assuming?

6 **MR. CIPRIANO:** Well, I don't think there is
7 anyone here who would say that criminal actions did not
8 take place.

9 **THE COMMISSIONER:** Except for those who had
10 been found guilty or who have pleaded guilty I don't know
11 about that. You see, because the way I might be reading
12 it, and I find it unfortunate that in communicating that in
13 phase two, which is about to rollout, slowly but surely, is
14 community healing, is really healing, and I'm just having a
15 general discussion with you now, of the community for the
16 fact that we are in this situation. And so if the mandate
17 is for looking at the response of public institutions,
18 right, I'm not even saying that anybody did anything wrong
19 right now. We are at the stage where we are investigating
20 and finding out, but that in the end let's assume that I
21 say nothing happened here. Everything was fine, the police
22 acted -- everybody acted properly. I still think we need
23 phase two because this community has been under a cloud for
24 so many years.

25 Can't you see it that way?

1 **MR. CIPRIANO:** That's fair enough but, you
2 see, phase two isn't yet structured and so it's difficult
3 to know where we are going.

4 **THE COMMISSIONER:** How could you come up with
5 a statement like that?

6 **MR. CIPRIANO:** But certainly -- certainly
7 phase two will involve some form of healing with respect to
8 criminal actions that took place. At least, that's what I
9 presume.

10 **THE COMMISSIONER:** No.

11 **MR. CIPRIANO:** If that's incorrect, then I
12 stand to be corrected.

13 **THE COMMISSIONER:** Well, you have standing
14 for phase two.

15 **MR. CIPRIANO:** Yes, I believe so

16 **THE COMMISSIONER:** Yes.

17 **MR. CIPRIANO:** If I remember correctly.

18 **THE COMMISSIONER:** For Father Charles
19 primarily.

20 **MR. CIPRIANO:** Yes.

21 **THE COMMISSIONER:** So you will see, but I
22 think that consistent with the position that we have always
23 taken and I have always taken is that this is not a retrial
24 of anything.

25 **MR. CIPRIANO:** No, and I'm not saying that

1 this Commission has stated otherwise. I agree. My point
2 is how the -- when allegations are made that are criminal
3 in nature, how that's left then in the public domain.

4 Mr. Wardle made reference to the pith and
5 substance of the *Nelles* case.

6 **THE COMMISSIONER:** Yes.

7 **MR. CIPRIANO:** And that one was found to be
8 pith and substance within the province. There was nothing
9 wrong with the terms and reference. The problem with that
10 case was that it would have been -- it's very difficult to
11 make findings given the context in which that inquiry was
12 taking place and the context of criminal actions or
13 possible criminal actions.

14 The point I wish to make is, and I'd like to
15 refer you back to the *Consortium* case.

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

17 **MR. CIPRIANO:** And it was quoted by Mr.
18 Callaghan that paragraph, and it's at Tab 5 of the M1-B2.

19 **THE COMMISSIONER:** Yes, go ahead.

20 What paragraph?

21 **MR. CIPRIANO:** I'll just wait until it's put
22 up on the screen there.

23 Paragraph 41. That would be page 18.

24 At the end of the paragraph there, there's a
25 sentence that begins with the word "indeed".

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

2 **MR. CIPRIANO:** And it says:

3 "Indeed, judicial inquiries often
4 defend the validity of their existence
5 and methods on the ground that such
6 inquiries are inquisitorial or
7 inquisitional rather than adversarial
8 and that there is no *lis* between the
9 participants."

10 And I want to focus on that term "*lis*",
11 meaning dispute. The unique nature of this inquiry with
12 respect to how it affects my client is that there is a
13 dispute that has not been factually settled. On the one
14 hand, there are those who say criminal acts took place. On
15 the other hand, there are myself as lawyers who say that
16 criminal actions did not take place. It is not the role of
17 this inquiry, nor can it be to make any findings in that
18 dispute.

19 Now, it's unfortunate that we're left with
20 an unsettled dispute but that's part of our criminal legal
21 system. We have to live with that system. That's what we
22 have.

23 Now, a number of responses referred to cases
24 and what you're saying you're allowed to touch upon
25 criminal issues because it's not the pith and substance.

1 It's not what's essentially driving this inquiry, and I
2 agree. The criminal matters are not essentially driving
3 this inquiry but because that *lis* exists in this unique
4 case, that is why this inquiry has to tread carefully and
5 cautiously and that's why I refer again back to *Nelles* and
6 *Starr*, because they form the criteria to use when dealing
7 with inquiries that have come up in criminal matters.

8 And simply reading from the head note in the
9 *Nelles* case ---

10 **THE COMMISSIONER:** Where are we going?

11 **MR. CIPRIANO:** No, I'm sorry.

12 **(SHORT PAUSE/COURTE PAUSE)**

13 **MR. CIPRIANO:** Exhibit M1-C3, Tab 3.

14 The last paragraph in the head note begins
15 with "although".

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

17 **MR. CIPRIANO:**

18 "Although the Commissioner's findings
19 and conclusions would not be binding,
20 they would be considered by the public
21 as a determination and could seriously
22 prejudice any person named in
23 subsequent proceedings even if no
24 proceedings were taken. The person
25 would have no recourse to clear his or

1 her name, a finding that death was
2 caused by the deliberate action of a
3 named person would really amount to a
4 finding that the person acted with the
5 intention to cause death and,
6 therefore, would amount to a conclusion
7 of law as a civil or criminal
8 responsibility. Similarly, a finding
9 that a named person accidentally
10 administered a fatal dose of drugs
11 would amount to a conclusion of civil
12 or criminal responsibility and was also
13 precluded."

14 When a police officer comes to give evidence
15 or a crown attorney to say that they had a reasonable
16 prospect of conviction, to say that they had reasonable and
17 probable grounds to lay the charge, that without more can
18 leave a person factually guilty, and the reason I said
19 earlier this morning that we would be entering into a
20 criminal trial is because we have already examined in the
21 criminal proceedings why it is an alleged victim went to a
22 certain police force when they did, why it is they spoke to
23 a certain person at that force and not another, why it is
24 that they waited, why it is they came into the whole
25 proceeding at the time they did, why it is someone had to

1 swear an affidavit in support of the civil lawsuit to make
2 the complaint.

3 Mr. Lee was speaking of you need a full
4 inquiry; you need to have the inquiry -- all relevant
5 evidence has to be heard at the inquiry. Well, to not hear
6 that, then you wouldn't get all the relevant evidence and
7 it would, in my submission, turn the inquiry into a
8 criminal trial because that's out there. The transcripts
9 are out there. The cross-examinations are out there. The
10 cross-examinations that go to the credibility of the
11 allegation, that go to the motive behind the allegation and
12 the number of changes made to the allegation; without even
13 getting into the detail of the allegation, that's all out
14 there.

15 So then to have a victim, an alleged victim
16 come here and make a criminal accusation, if we are going
17 to get all the relevant evidence, all the relevant evidence
18 has come out in the formal criminal proceedings and it will
19 do so again.

20 I believe it was Mr. Callaghan who made
21 reference to the fact that the Terms and Reference are not
22 -- do not ask to conduct a criminal procedure and they're
23 pith and substance within the jurisdiction of the province,
24 and I agree. I never once said that the Terms and
25 Reference are outside the jurisdiction of the province.

1 But where we disagree is in the execution of
2 the Terms of Reference and that could lead the inquiry into
3 a jurisdiction in which it does not have.

4 He also says that the prejudice is now
5 complete and so it doesn't matter whether his name will be
6 dragged into this again.

7 Well, I don't know if the prejudice is
8 complete. He is presumed innocent and that presumption
9 will always stay with him. It's a constitutional
10 presumption and it stays with him.

11 The fact that now we can hear allegations
12 again and hear from a police officer and a crown attorney
13 as to whether there was a reasonable prospect of conviction
14 will, in my respectful submission, leave him factually
15 guilty and so it will negate that presumption of innocence.
16 This argument could also touch on procedural fairness, but
17 as I stated earlier in my submission, in the execution of
18 the Terms of Reference, I think it's a jurisdictional
19 issue, and it probably overlaps with the procedural issue.

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

21 **MR. CIPRIANO:** I respectfully disagree with
22 the OPP submission that you are able to make findings of
23 incidental misconduct.

24 **THE COMMISSIONER:** "Findings of incidental
25 misconduct"?

1 **MR. CIPRIANO:** Misconduct that may be
2 incidental to the main goal of the inquiry.

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

4 **MR. CIPRIANO:** And I agree with the Law on
5 that. We've seen the Law on this and the Supreme Court and
6 the courts of appeal said time and again that in certain
7 commission of inquiry, even incidental criminal findings
8 are okay because that's not pith and substance what the
9 inquiry is about.

10 But again, I go back to that issue of the
11 dispute between the parties in this one, which makes this
12 one so unique. The fact that there is such a dispute
13 between the parties in this one, in my respectful
14 submission, forbids this Commission of Inquiry from making
15 anything that could be perceived as factual guilt. That is
16 why I rely so heavily on both the *Nelles* case and the *Starr*
17 case. Those cases and the *Starr* case in particular
18 distinguishes a lot of the inquiries that came before it in
19 which there has been due process, such as in *O'Hara*. In
20 *O'Hara* there was due process. There was a finding that
21 there was no criminal responsibility.

22 Finally, I just touch upon the issue of
23 victims who have testified before because I think it's a
24 good question to pose.

25 Victims have testified before, so why should

1 they be not allowed to testify here?

2 I am not saying that shouldn't be allowed to
3 testify. It's what we get from them that could create the
4 problem. But in the times when victims have been allowed
5 to testify, I would submit that the *lis*, the dispute
6 between the parties was not there as it is here, and that's
7 what distinguishes this inquiry from those that have gone
8 past.

9 I am not saying that this inquiry is a
10 substitute police investigation, it is not. The Terms of
11 Reference are clear that it is not. I am not questioning
12 the Terms of Reference. It's the execution, which can
13 create and lead us into a problem. Yes, there is a
14 balancing of rights between the public's right to know what
15 occurred and the persons who are accused and having their
16 constitutional rights. In *Nelles*, the Court of Appeal said
17 that the Terms of Reference are there. They have to be
18 followed and we have to respect this so that this isn't
19 just someone whose name might be -- his reputation might be
20 stained in the community. We are dealing not simply with
21 someone who may have had some misconduct as in getting
22 contracts with a municipal government, we are dealing with
23 serious criminal allegations that, if found guilty, would
24 likely carry upward to mid-range penitentiary sentences.
25 So the accusations are serious. The role that this inquiry

1 is going to play is going to be a serious one and we have
2 to, in my final submission, be careful in how we work with
3 what is going to be said in this inquiry.

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

5 **MR. CIPRIANO:** Thank you.

6 **THE COMMISSIONER:** Thank you.

7 So we are calling the witness, the second
8 one, Mr. Engelmann?

9 **MR. ENGELMANN:** I suspect that would really
10 make people miss their trains, so we may not be too keen on
11 doing that this afternoon.

12 I am happy to say, however, Mr.
13 Commissioner, that the Commission will be in a
14 position to lead some evidence on Monday. We had
15 anticipated we wouldn't have to do that until
16 Tuesday because of this Motion. What I would
17 suggest if it would be all right with you is
18 perhaps we start at midday on Monday.

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

20 **MR. ENGELMANN:** We have the policy evidence
21 from the Children's Aid Society. I note Mr. Carrière (ph)
22 is here and he would be the first witness called by my
23 colleague, Me Dumais. Then, we have also Mr. McLean (ph)
24 and Mr. Morris (ph) lined up for next week. I think if we
25 start about 1:00 p.m. on Monday, we should have no problem

1 concluding that evidence next week.

2 **THE COMMISSIONER:** All right.

3 **MR. ENGELMANN:** We wouldn't be in a position
4 to lead other evidence next week in any event, so if it
5 pleases you, then I would propose we start at 1:00 p.m.

6 **THE COMMISSIONER:** All right. Any comments
7 form parties? I guess those who are not here today, we
8 would have to advise them.

9 **MR. ENGELMANN:** Yes.

10 **THE COMMISSIONER:** And ensure that whatever
11 disclosure material reaches them in a timely fashion.

12 **MR. ENGELMANN:** My understanding, Mr.
13 Commissioner, is that disclosure material is now ready or
14 will be ready in moments.

15

16 **THE COMMISSIONER:** Okay.

17 **MR. ENGELMANN:** So I am hoping that if
18 counsel had just a couple of minutes, we can give them
19 disclosure disks before they depart.

20 **THE COMMISSIONER:** All right.

21 On this Motion as I said yesterday, I will
22 be rendering a decision within the next 30 days and as
23 quickly as it is completed, I will not wait the 30 days, I
24 will do it during some day when we are sitting or somewhere
25 along there.

1 Any other matters to be spoken to today?

2 On that note then, we will resume on Monday,
3 at 1:00 p.m. I hope you all have a safe drive home and
4 have a good weekend.

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

7 The hearing is now adjourned. L'audience
8 est ajournée.

9 --- Upon adjourning at 4:10 p.m./

10 L'audience est ajournée à 16h10

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

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

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



Sean Prouse, CVR-CM