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Vancouver, BC
November 2, 2011

(PROCEEDINGS RECONVENED AT 10:00 A.M.)

THE REGISTRAR: Order. This hearing is now resumed.

MR. VERTLIEB: Mr. Commissioner, the first order of business today is to deal with that outstanding request that developed when Dr. Shannon was giving evidence and my learned friend Mr. Ward asked about any references to the Pickton farm or missing women in her research, and so after that we received a phone call from Mr. Stanley Martin, counsel for the Centre of Excellence, and Mr. Martin said that he was receiving instructions to assist in answering questions so that you would be informed as you had requested. Mr. Martin is here with us and a copy of a letter dated November 1, 2011, has been distributed to counsel, they've just seen it this morning, and I think it would be appropriate for Mr. Martin to address you to answer the questions outstanding. Mr. Martin, please.

THE COMMISSIONER: Thank you. Mr. Martin.

MR. MARTIN: Good morning, Mr. Commissioner. My name is Stanley Martin. I appear as counsel for Dr. Kate Shannon and the BC Centre For Excellence in

1 HIV/AIDS. As Mr. Vertlieb said, when Dr. Shannon
2 appeared before the commission you asked her to
3 review the research documents to see if there
4 were any other materials or information relating
5 to the Pickton farm or the missing women and I am
6 appearing today to advise that Dr. Shannon has
7 done that and concluded there is no additional
8 information of that kind in the research
9 documents beyond what has already been described
10 and disclosed. Dr. Shannon has set that answer
11 out in a letter to you and that letter deals with
12 both the qualitative and quantitative aspects of
13 the research project, the Maka project. She has
14 described what information was collected and when
15 and how the information has been shared with the
16 academic community and the wider community. Dr.
17 Shannon took the opportunity of explaining that
18 partly to answer the request fully and partly
19 because it was apparent after she gave her
20 understanding there was some misunderstanding or
21 confusion as to when the research was collected,
22 what information, what they did with it. With
23 respect to the letter, I can read it into the
24 record or could highlight it. I'm in your hands.

25 THE COMMISSIONER: I don't know if it's necessary to read it

1 in if it's going to be filed.

2 MR. MARTIN: I could highlight it in that case.

3 THE COMMISSIONER: Yes. You can highlight whatever you want
4 to us, Mr. Martin.

5 MR. MARTIN: In the letter Dr. Shannon sets out the request to
6 review the documents relating to the
7 community-based research project and advise
8 whether there are any further references -- there
9 are no further references in either the focus
10 group materials or the questionnaire data.

11 Then in paragraph 3 of the letter she says:
12 "With respect to the qualitative research,
13 this involved documenting the narratives of
14 46 women through focus group discussions
15 from December 2005 to March 2006. As I said
16 in my testimony, the narratives only
17 included mention of the missing women and
18 Pickton farm in the context of delayed
19 inaction and lack of response by the
20 police."

21 She goes on to say that the results of that
22 research were widely shared with the community
23 and so on and published in a peer-reviewed
24 article. Then it says:

25 "All the references to the missing women and

1 the Pickton farm are set out in this peer-
2 reviewed article, and my written report that
3 I presented to the commission."

4 Then she turns to the questionnaire aspect
5 and she describes how this was an open cohort of
6 255 women, recruitment beginning in 2006 and
7 ongoing until the end of 2008, and her baseline
8 questionnaire was administered to each new
9 participant and then participants were
10 re-interviewed every six months as follow-up
11 during the study.

12 She sets out in the fifth paragraph that the
13 initial baseline questionnaire did not include
14 any questions relating to the missing women or
15 visits to the Pickton farm, but in April 2007 the
16 Research Ethics Board approved the addition of
17 two new questions to the questionnaire.

18 "Do you personally know women who went to
19 the Pickton farm?" (Yes or No)

20 "Have you ever been to the Pickton farm?"
21 (Yes or No)

22 And they were included at the suggestion of
23 women who were in the peer research team and the
24 community advisory board in an effort to document
25 something that was already known in the

1 community.

2 The first interviews in which those
3 questions were asked took place in the interview
4 cycle beginning in January 2008 and then the
5 research team began analysis of all the
6 information in December 2008 and published them
7 subsequently. The significance of that, of
8 course, is this is after the conviction in
9 December 2007.

10 THE COMMISSIONER: So those questions regarding the women
11 attending the Pickton farm or knowing of women
12 who went to the Pickton farm weren't asked until
13 2008?

14 MR. MARTIN: That is correct.

15 THE COMMISSIONER: All right.

16 MR. MARTIN: She goes on to set out they didn't have ethics
17 approval to ask any further follow-up questions,
18 they were simply "yes" or "no" questions on the
19 questionnaire. She describes the protocol that
20 the Centre For Excellence follows if somebody
21 produces further information which is potentially
22 of interest to the police which is to support
23 people going forward and says that is the
24 protocol -- it didn't happen.

25 Then the final paragraph of her letter she

1 describes what an academic would call the
2 knowledge translation process. Simply that, as
3 she described in the evidence, the research
4 project in co-operation with the community
5 partners was aimed at ensuring the voices and
6 experiences of the some of the most marginalized
7 women was put forward through the research. Then
8 she says that the peer-reviewed research has been
9 widely shared with the community, public and
10 policy makers over the last five years and that
11 these knowledge translation efforts have been
12 taken on jointly by the academic research and the
13 community partners in an effort to ensure
14 improved policies and programs that promote the
15 health and safety of marginalized women. So
16 that's her letter to the commission and subject
17 to any questions that's all I have.

18 THE COMMISSIONER: Thank you for appearing, Mr. Martin. Does
19 anybody have any comments?

20 MR. WARD: I'm grateful for Mr. Martin's appearance and
21 delivery of that letter which does clarify the
22 issue that I specifically was concerned about on
23 that prior occasion and I'm certainly content to
24 have that letter marked as an exhibit and that
25 would conclude that issue.

1 THE COMMISSIONER: Mr. Ward, I have some concerns about your
2 cross-examination of Dr. Shannon. I was left
3 with the impression after you cross-examined
4 Dr. Shannon that these interviews took place
5 sometime prior to Mr. Pickton's arrest, or
6 sometime prior at least to a conviction, because
7 you asked the question why they didn't go to the
8 police, and I think with the greatest of respect
9 that cross-examination was unfair.

10 MR. WARD: Well, I --

11 THE COMMISSIONER: Wait a minute. It's your responsibility as
12 counsel to clarify those things. I saw the media
13 reports regarding Dr. Shannon's evidence and they
14 were unfair, to say the least, based on what we
15 heard in this courtroom. You have to clarify
16 those questions in fairness to the witnesses. I
17 don't like interrupting cross-examination, it's
18 not my style to do that, I let the lawyers
19 cross-examine, and you'll have a liberal way to
20 cross-examine while I'm here. But you have a
21 responsibility to be fair to the witness, and
22 with the greatest of respect that wasn't done in
23 this case because we were left with the incorrect
24 impression that somehow Dr. Shannon was remiss in
25 not asking those women about what they observed

1 on the Pickton farm when in fact all of that took
2 place after the conviction.

3 MR. WARD: I appreciate that. I will look back at the
4 transcript of my cross-examination which I
5 haven't done before this morning because I didn't
6 know this matter was on the agenda. But I can
7 say that my recollection of that matter that
8 occurred sometime ago now was that I learned of
9 the fact that the witness had conducted
10 interviews in which some information about the
11 interviewees attending the Pickton farm was
12 disclosed for the first time when the witness was
13 here and with her reports. My impression at the
14 time -- and I can clearly remember this -- is
15 that my impression was that those interviews had
16 been conducted earlier than this letter discloses
17 that they were and, as I say, I'll look back at
18 the transcript.

19 THE COMMISSIONER: You don't need to look at the transcript,
20 it's clear, at least from my perspective. I'm
21 surprised, to say the least, that those
22 interviews took place in 2008 after the
23 conviction and I was left with the impression,
24 and I expect other people were as well -- I don't
25 know, I haven't spoken to anyone -- but judging

1 from the media reports they were not exactly
2 favourable to Dr. Shannon based on your
3 cross-examination.

4 MR. WARD: It's not my fault the way the evidence came out. I
5 didn't know when the interviews were conducted,
6 only the witness did.

7 THE COMMISSIONER: You could have asked that.

8 MR. WARD: Anybody could have.

9 THE COMMISSIONER: Wait a minute. You're cross-examining a
10 witness and you should know the answer that
11 you're going to get in cross-examination and it
12 was left hanging. That's all I'm saying to you.
13 All I'm saying is that I want fairness in
14 cross-examination. We treat people with fairness
15 when they come into a courtroom and those things
16 have to be asked in a proper way so incorrect
17 impressions aren't left after the witness leaves.
18 Similarly in that vein, I don't interrupt
19 cross-examination, as I said, I trust the
20 lawyers. You asked Catherine Astin, the nurse,
21 what the value of her home is. Can you tell me
22 what the relevance of that is? Again, I left you
23 alone and I left here scratching my head,
24 wondering why it was relevant for this commission
25 of inquiry to hear whether Catherine Astin lives

1 in a two million dollar home. What was the
2 purpose of that?

3 MR. WARD: Again, you're drawing my attention back to events
4 that occurred sometime ago, but my recollection
5 on that -- and I'm content to face any
6 interrogation about my conduct --

7 THE COMMISSIONER: I'm not interrogating you. I'm saying that
8 you're in a unique privileged position, you're a
9 lawyer, and we have witnesses who come in here,
10 many of them find this arena entirely foreign and
11 it's an intimidating environment, to say the
12 least, and we treat people with fairness. All
13 your witnesses were treated with deference and
14 fairness and that's the way it should be, and
15 everyone that comes into this courtroom deserves
16 respect and fairness and that's all I'm asking.

17 MR. WARD: And I certainly accept your remarks in the spirit
18 in which they're intended. I maintain that I've
19 conducted myself in accordance with the standards
20 imposed upon me for this privileged role I play.

21 With respect to the Astin matter and your
22 specific question, I was simply trying to make it
23 clear for a contextual purpose that the witness
24 was in a very comfortable economic state compared
25 to the people with whom she was dealing on the

1 Downtown Eastside which led into trying to make
 2 the point, which I think is probably obvious to
 3 anyone that has followed this case, that when bad
 4 things happen to the impoverished on the Downtown
 5 Eastside and the police are called there seems to
 6 be indifference or lack of concern. On the other
 7 hand, when a witness like Ms. Astin who comes
 8 from the Cambie Street area and lives in a nice
 9 house calls the police for help they're likely to
 10 get an immediate response. It was in the context
 11 of my questioning her -- and, again, I'm going by
 12 recollection because I wasn't expecting this sort
 13 of interlude -- but my recollection is that her
 14 evidence was, well, I didn't call the police for
 15 the poor women on the Downtown Eastside about a
 16 missing person because I knew they wouldn't do
 17 anything, but if it had been my missing relative,
 18 sure, I would have called them and I would have
 19 expected them to do something.

20 THE COMMISSIONER: What does that have to do with her living
 21 in a two million dollar house? She took umbrage
 22 at that.

23 MR. WARD: I'm sorry for that. People on the west side who
 24 call the police will get a response; people on
 25 the Downtown Eastside won't. That was the thrust

1 of the evidence.

2 THE COMMISSIONER: You're missing the point of what I'm
3 saying. We know, we have ample evidence
4 according to the witnesses who have been called
5 that they were not given treatment by the police,
6 we've heard a lot of that evidence and we'll hear
7 other evidence I expect to the contrary, that's
8 the purpose of the hearing. But my point is that
9 I'm just asking counsel to be careful and to be
10 respectful of witnesses who come here and not be
11 intrusive with respect to their personal
12 circumstances which don't help in the least.
13 It's not going to help me at the end of the day
14 when I write the report whether Catherine Astin
15 lives in a two million dollar house or a five
16 million dollar house. I don't really care and I
17 don't think it's relevant and that's my point.

18 MR. WARD: Sir, I wasn't trying to probe into her personal
19 circumstances. This is a public inquiry which I
20 gather is accessible to people watching from
21 elsewhere in Canada and indeed around the world.
22 They might not know the difference between
23 Vancouver's east side and west side but there's a
24 huge difference. People in the east side, as
25 we've heard, live in the most egregious,

1 difficult, impoverished circumstances. People on
2 the west side live in multi-million dollar
3 houses. I'm sorry I used the phrase two million
4 dollars. But it's known to us here in Vancouver
5 that houses west of the imaginary line that
6 divides west and east are valued in the
7 multi-millions of dollars.

8 THE COMMISSIONER: You're missing the point of what I'm
9 saying.

10 MR. WARD: I'm sorry for being obtuse.

11 THE COMMISSIONER: All right. Anybody else? Any comments?

12 MR. VERTLIEB: Perhaps this letter should be marked as the
13 next exhibit.

14 THE REGISTRAR: Exhibit 31.

15 **(EXHIBIT 31: Document entitled - Letter dated**
16 **November 1, 2011 to the Commissioner from Kate**
17 **SHANNON, PhD)**

18 MR. VERTLIEB: I trust Mr. Martin can then be excused?

19 THE COMMISSIONER: Yes. Thank you for coming, Mr. Martin.

20 MR. VERTLIEB: Next I think we should deal with the
21 application for dealing with witnesses in a way
22 that's been outlined by Mr. Gratl. He's been
23 more than patient with this application and I
24 think we should deal with his application first.

25 THE COMMISSIONER: All right.

1 MR. VERTLIEB: Mr. Gratl, I trust you're ready to proceed with
2 your application. Thank you, Mr. Commissioner.

3 MR. GRATL: Mr. Commissioner, this is an application for
4 procedural protection for vulnerable witnesses.
5 I trust you have a book of authorities, Mr.
6 Commissioner.

7 THE COMMISSIONER: Thank you.

8 MR. GRATL: In addition to the book of authorities you should
9 have tucked in a one-page double-sided *The Law of*
10 *Public Inquiries in Canada*.

11 THE COMMISSIONER: Yes, I have that.

12 MR. GRATL: And an online publication of a document entitled
13 *Some Observations About Public Inquiries* authored
14 by the Honourable Associate Chief Justice Dennis
15 O'Connor of the Court of Appeal from Ontario.
16 I've provided those documents to my friends as
17 well. I'm also passing forward an affidavit of
18 Karen Mirsky affirmed October 23, 2011.

19 THE COMMISSIONER: Yes.

20 MR. GRATL: The nature of the application, Mr. Commissioner,
21 is set out in two letters found under tab 1 of
22 the book of authorities. The first letter is
23 dated September 20, 2011. In that letter I make
24 a request for procedural protections for
25 vulnerable witnesses to ensure that evidence from

1 vulnerable witnesses is brought to this inquiry
2 for your benefit to ensure that your
3 recommendations and findings of fact are
4 appropriately informed by the most direct
5 evidence possibly, namely, the evidence of sex
6 trade workers in the Downtown Eastside. These
7 are not of course going to be the affidavits of
8 the missing women of the Downtown Eastside
9 because they're not in a position to provide you
10 with any evidence. What I'm looking for is
11 procedural protections for current and former sex
12 workers from the Downtown Eastside who are still
13 living, that is to say, the potential future
14 victims of the next Robert William Pickton.

15 THE COMMISSIONER: How many witnesses are there that fit into
16 this category that you're calling?

17 MR. GRATL: We've heard evidence from Dr. Shannon that 23 of
18 the individuals who were interviewed by her team
19 and asked the question, "Have you ever visited
20 the Pickton farm?," answered in the affirmative,
21 but we weren't able to get any details from her
22 or from her report about the nature of their
23 attendance at the Pickton farm: What happened,
24 who was there, whether they reported that to any
25 police officers and why that information was not

1 brought to the attention of the investigating
2 officers, to the extent that there were officers
3 actively investigating that issue. 23. So
4 there's one solid number. We also had evidence
5 from Susan Davis --

6 THE COMMISSIONER: Are all these 23 people, are those on your
7 witness list? Is this the purpose of this?

8 MR. GRATL: We also heard evidence, Mr. Commissioner, from
9 Susan Davis --

10 THE COMMISSIONER: No, no. Can you answer my question?

11 MR. GRATL: Do I have a witness list?

12 THE COMMISSIONER: No. Are you going to call any or all of
13 these 23 witnesses?

14 MR. GRATL: Mr. Commissioner, they're not on your witness
15 list. I know that you've made outreach to the
16 community, you've been involved in meetings in
17 the community, you went to the Downtown Eastside
18 and advised the community in the Downtown
19 Eastside what your mandate was, who you are and
20 what you'd like to do and what you'd like to
21 accomplish with your inquiry, and those, if I may
22 put this respectfully, those attempts at outreach
23 did not result in any current or former sex trade
24 workers, aside from Ms. Davis, being on your
25 witness list.

1 THE COMMISSIONER: All right. So you're saying if I grant
2 this order then more people will come forward?

3 MR. GRATL: I'm saying that Ms. Davis testified that she
4 herself has spoken to a number of current sex
5 workers, workers who are still alive, who weren't
6 killed by Mr. Pickton, and haven't died in the
7 interim, because of course there's a horrible
8 life expectancy for sex trade workers in the
9 Downtown Eastside. She says there's still some
10 living sex workers who have stories to give to
11 this commission of inquiry. Can I guarantee that
12 they'll be on the witness list? No, I can't
13 offer you any such guarantees. I can say that
14 I've opened up --

15 THE COMMISSIONER: I'm not asking for a formal list or
16 anything of that sort. I'm just curious as to
17 how many potential witnesses that we're dealing
18 with in the context of your application.

19 MR. GRATL: Dr. Shannon, her cohort, if you'll recall, was
20 some 250 sex workers which according to
21 Dr. Lowman's evidence represents approximately
22 half of the active sex workers in the Vancouver
23 area at a given time and she referred to 23
24 witnesses or potential witnesses who might have
25 something to say about what happened at the

1 Pickton farm, so we can multiply by that by two
2 for the members of the cohort that weren't
3 represented, the sex workers that weren't
4 represented. And then of course we've got a
5 death rate, a horrible death rate for sex workers
6 and people who are drug dependent on the Downtown
7 Eastside, so I would say we've got fewer than 50
8 potential witnesses, and even if this application
9 for vulnerable witness protection is granted,
10 only a fraction of those will come forward.

11 THE COMMISSIONER: What's wrong with the suggestion put
12 forward by counsel for Vancouver Police and the
13 RCMP that this be decided on a case-by-case
14 basis?

15 MR. GRATL: Do you remember the testimony of Dr. Shannon where
16 she was asked about all the procedural
17 protections that were put into place to try to
18 bring -- to try to gather a cohort of
19 respondents, that she had to create a separate
20 office in a safe environment where there was a
21 back door exit and a guarantee of anonymity.

22 THE COMMISSIONER: I know that.

23 MR. GRATL: With a female interviewer, and there were
24 successful attempts to bring in peers and to
25 involve organizations that have a history of

1 involvement and participation in providing
2 assistance to sex workers in order to ensure the
3 environment was friendly enough and safe enough
4 and trusted enough that sex workers would feel
5 comfortable providing credible and accurate
6 information to researchers, academic researchers,
7 in an environment where there was no threat of
8 cross-examination. You'll recall that evidence,
9 Mr. Commissioner.

10 You'll recall as well the evidence of
11 Catherine Astin where she indicated that were it
12 not for the guarantee of anonymity and
13 confidentiality, vulnerable, pregnant sex
14 workers, many of whom are Aboriginal and have a
15 lot to fear from government institutions,
16 wouldn't come to Sheway even to get food for
17 themselves and their children. We're talking
18 about hungry women who wouldn't get food from an
19 organization that was offering it for free unless
20 they were ensured that the information they
21 provided to Sheway was held in confidence. So
22 that's the baseline where we're working from.
23 What's wrong with the proposal of the Vancouver
24 Police Department? It doesn't pay attention to
25 the reality that you need to provide up front

1 guarantees to people before you're going to get a
2 response. You have to get assurances --

3 THE COMMISSIONER: I appreciate what you're saying and I want
4 the inquiry to be open and inclusive so that
5 people feel comfortable in coming here and I
6 think we've done that and we'll continue to do
7 that. My concern is that you're asking me to
8 make --

9 MR. GRATL: No. I'm disagreeing. The nature of my
10 application is I'm disagreeing with that
11 proposition.

12 THE COMMISSIONER: Let me finish.

13 MR. GRATL: All right.

14 THE COMMISSIONER: It's difficult to make an order in a vacuum
15 without any kind of evidentiary basis and if you
16 tell me you have a particular witness who wants
17 to come forward and testify but is afraid of
18 testifying for the various reasons that you've
19 already outlined, then I'm in a position to
20 consider the application and I'm sympathetic to
21 those concerns, everybody in this room is
22 sympathetic because we all want people to come
23 forward and testify, but I just have some
24 concerns and obviously I want to hear the rest of
25 your argument about --

1 MR. GRATL: But, Mr. Commissioner --

2 THE COMMISSIONER: Let me finish. I am some concerns of
3 making a blanket order in advance of people that
4 I don't even know will come here and testify.
5 That's the concern I have. Go ahead.

6 MR. GRATL: Let me make my application, Mr. Commissioner,
7 please and let me make my argument. I've spoken
8 a little bit about the vulnerability of witnesses
9 so let me explain what it is that I'm asking for.
10 Of course I pause to note that I'm not, in
11 effect, making this application just myself.
12 This application has the support of Amnesty
13 International, of the British Columbia Civil
14 Liberties Association, of the Pivot Legal
15 Society --

16 THE COMMISSIONER: They're not even parties to this
17 commission. What do we need to listen to what
18 the Civil Liberties Association has to say when
19 they've withdrawn from the inquiry? Why should
20 we even listen to them? I don't want to
21 interrupt you and --

22 MR. GRATL: Well, you did.

23 THE COMMISSIONER: I know, but the fact is I don't need to
24 hear what the position of people is who are not
25 here before the inquiry. I'm quite prepared to

1 hear you and I've read some of the material that
2 you've filed so go ahead.

3 MR. GRATL: I'll go on, Mr. Commissioner. I'd like to make
4 this application and I want to note that before
5 withdrawing, while they were still participants,
6 the application had the support of the Womens
7 Information Safehouse and PACE, the Prostitution
8 Alternatives and Counselling Education Society,
9 and SWUAV, Sex Workers United Against Violence,
10 all who were granted participant status and were
11 found by you, Mr. Commissioner, to have something
12 worthwhile to contribute. They were granted full
13 participant status on the basis that they had an
14 important contribution to make and they support
15 this application.

16 In addition, the application also has the
17 support of another set of full participants who
18 have also withdrawn but they lent their support
19 to this application before they withdrew and that
20 is the Downtown Eastside Womens Centre and also
21 the Committee of the February 14th Womens
22 Memorial March. So I'm not making this
23 application in isolation. We've got the support
24 of a number of organizations, some sort of well
25 placed and others that are very critical of this

1 inquiry, very critical of the provincial
2 government for failing to provide adequate
3 resources to Downtown Eastside organizations and
4 sex worker advocacy organizations, in effect,
5 preventing them from participating in the
6 inquiry. This application is designed, in part,
7 to remediate the procedural failings that those
8 organizations identified before retracting from
9 this commission of inquiry, before withdrawing
10 their participation, before boycotting and before
11 making very, very vocal criticisms about the
12 integrity of this commission. So those
13 organizations and the members of those
14 organizations and the people in the Downtown
15 Eastside who are assisted by those organizations,
16 represented by those organizations, are listening
17 very carefully to this application to find out if
18 there's some little small modicum of procedural
19 attention will be paid to them and their
20 interests to allow the door to open on their
21 involvement in this inquiry.

22 What are we looking for in particular,
23 that's set out at page 3 of my September 20,
24 2011, letter and more particulars are provided in
25 my letter of September 28, 2011. So firstly -- I

1 know, Mr. Commissioner, that this is true by
2 operation of law. I know that on some level
3 there should be -- one would hope that an
4 individual would have legal advice to this
5 effect, one would hope that they could access a
6 lawyer who could tell them that this is a
7 recognized, solid proposition of law, unshakable,
8 but the reality is a lot of people don't know
9 this and it would be of assistance to simply
10 advise from the position that you occupy that
11 people who provide testimony to the commission
12 will not have that testimony compelled in a
13 criminal proceeding against them. That's what is
14 ordinarily called use immunity and derivative use
15 immunity, and that protection is found in
16 Sections 13(2) and 13(3) of the *Public Inquiry*
17 *Act*. Similar protections are found under Section
18 7 and Section 13 of the *Charter of Rights and*
19 *Freedoms*. In a way these are very obvious
20 propositions of law to any lawyer and anybody who
21 has taken the law of evidence knows these
22 propositions, but those have haven't taken the
23 law of evidence and haven't practiced law may not
24 know those legal realities and it would be of
25 tremendous assistance to communicate those

1 realities in some way. I'm not asking for an
2 order, in effect, I'm just asking for the
3 information to be communicated. That is, in
4 effect, the first form of outreach.

5 The second form of outreach would come in
6 the form of an order. I'm seeking an order from
7 you, Mr. Commissioner, pursuant to the *Public*
8 *Inquiry Act* which allows you to control your own
9 processes and make directives respecting practice
10 and procedure to facilitate the just and timely
11 fulfilment of your duties. That's under Section
12 9 of the *Public Inquiry Act*. So I'm asking for
13 an order subject to that section. There are
14 three specific procedural protections I'm asking
15 be given to sex workers. The first is a
16 publication ban preventing the publication of any
17 information tending to reveal the identity of a
18 sex worker.

19 THE COMMISSIONER: I don't think -- without hearing from
20 others -- I don't think anybody is going to have
21 trouble making that order if someone comes into
22 the inquiry to testify, just so you know.

23 MR. GRATL: I understand that. I don't understand my friends
24 from the Vancouver Police Department or the RCMP
25 or the police union to take issue with that

1 provision. That's by consent. I pause to note
2 that I believe given all the commentary so far
3 publicly that effectively the media have had
4 notice of this application for some time and I
5 definitely haven't been contacted by any counsel
6 for the media in respect of this application and
7 so I would consider to the extent I have an
8 obligation and to the extent the commission has
9 an obligation to bring this application to the
10 attention of the media that that requirement has
11 been satisfied.

12 THE COMMISSIONER: We're not even there yet so I don't think
13 the media has to be notified at this stage.

14 MR. GRATL: I'm just saying they have been.

15 THE COMMISSIONER: All right.

16 MR. GRATL: So as an adjunct of that there would also be a
17 mandatory publication ban on the identities of
18 any victims of sexual assault. So that's another
19 aspect of that.

20 The second and third aspect of the
21 procedural protection I'm seeking are the ones
22 that have given rise to a little bit of
23 controversy and some opposition from the police
24 institutions that are participants at this
25 inquiry. Under point 2 at page 3 of the

1 September 20, 2011, letter I ask for protective
2 provision allowing a witness to provide the
3 commission with evidence by way of affidavit
4 without the potential for cross-examination.
5 Objections to affidavit evidence that have not
6 been subject to cross-examination would go to the
7 weight of the evidence in the balance of the
8 whole. I just pause to note that I received
9 letters of objection from the Vancouver Police
10 Department, RCMP, Mr. Woodall, counsel for
11 Detective Constable Fell, and I've heard -- some
12 of those objections in my view make a lot of
13 sense, and in particular, the objection that
14 affidavit evidence on which there's been no
15 cross-examination should not be used to make
16 findings of misconduct against any individual.
17 That wouldn't be fair, to criticize an individual
18 and undermine the reputation without providing
19 them with an opportunity to cross-examine on the
20 affidavit. That makes a lot of sense to me. I'm
21 not making application to use those affidavits in
22 that way.

23 THE COMMISSIONER: All right.

24 MR. GRATL: The second objection is one that I learned of this
25 morning. It's an objection brought by McCarthy

1 Tetrault acting on behalf of the prosecution
2 service, the Attorney General, they refer to
3 person X, that is, Mr. Pickton's 1997 victim. I
4 don't take a position on that, although I note
5 that were that person to provide an affidavit
6 there would be sufficient protections built in
7 for the Ministry of the Attorney General to deal
8 with person X and apply to cross-examine as I
9 propose. An elaboration of the process I'm
10 seeking is set out in the September 28, 2011
11 letter at page 2. At the bottom you can see I'm
12 advocating for a three-stage process for the
13 acceptance of affidavit evidence by this
14 commission. Firstly, affidavits of vulnerable
15 persons, sex workers, should be accepted into
16 evidence subject to the right of other
17 participants to apply to cross-examine on the
18 affidavit. I'll say a little bit more about that
19 in due course. That would be: a., is a
20 presumption that the affidavit would be
21 admissible; b., would be a process whereby an
22 applicant, here the Vancouver Police Department
23 or the Attorney General or the RCMP or counsel
24 for Detective Constable Fell, they could make
25 application to demonstrate that the affidavit is

1 contradicted by other admissible evidence and if
2 they were able to do so, they could obtain from
3 you, Mr. Commissioner, leave to cross-examine on
4 that affidavit. The last aspect of this process
5 under c. provides that if the applicant
6 establishes a right to cross-examine a sex worker
7 the sex worker would have the right to withdraw
8 the affidavit and forego cross-examination. So
9 they would get an out, in effect.

10 In a way I'm not asking for anything special
11 or unknown to law, this is not a novelty. This
12 type of process is pretty common in other
13 judicial processes. Of course there's a general
14 presumption, Mr. Commissioner, that an inquiry
15 should rely on the best evidence possible unless
16 there's a good reason otherwise. Whether it's
17 efficiency or whether it's accessibility or there
18 are national security reasons for it, we should
19 have public, viva voce evidence that is tested
20 under cross-examination. That is the counterpart
21 of the best evidence rule common in the courts.
22 The inquiry ought to be guided by that as a first
23 principle and I accept that I have an obligation
24 to displace that, but part of what I'd like to do
25 by referring to the other processes is just to

1 show how common it is for courts to rely on
2 affidavit evidence subject to an application to
3 displace that reliance. The first context I'd
4 like to make reference to is the civil process in
5 the British Columbia courts. It has been a rule
6 of long-standing --

7 THE COURT: I understand that. I know that in family hearings
8 and in bail hearings in criminal law affidavit
9 evidence is filed.

10 MR. GRATL: You're familiar with these processes. *Cadboro*
11 *Investment Ltd.* under tab 4 of my book of
12 authorities is just such a civil case. It's an
13 ordinary contracts dispute for non-payment on a
14 contract. Simple, straightforward, the parties
15 each of them instead of having viva voce
16 testimony, instead of having an elaborate process
17 to have witnesses take the stand and be sworn
18 in --

19 THE COMMISSIONER: You're talking about Rule 18A, summary
20 trial procedure?

21 MR. GRATL: What is now Rule 9(7).

22 THE COMMISSIONER: Yes.

23 MR. GRATL: The number of the rule has changed but the
24 principal remains the same. You can simplify
25 matters by holding a summary trial where you

1 start off filing affidavits and don't order
2 cross-examine on the affidavits unless one party
3 is successful in establishing that the evidence
4 is too contradictory to deal with it in that way
5 or there's some other good reason to
6 cross-examine. I appreciate, Mr. Commissioner,
7 the value of cross-examination to the
8 truth-finding exercise in judicial processes.
9 There's a lot written about it. I like
10 cross-examining, that's part of why I became a
11 lawyer, and it's a valuable exercise in many
12 cases, but it's not an absolute rule.

13 In the Rule 18A context, and this is found
14 -- it's stamped page 4 of the *Cadboro* case. In
15 the Court of Appeal the defendants advanced the
16 submission that the judge erred in refusing to
17 adjourn the application under Rule 18 to permit
18 the defendants to cross-examine one of the --
19 cross-examine on the affidavit of the solicitor
20 for the plaintiff. You'll see how the Court of
21 Appeal disposed of that objection and that ground
22 of appeal. I'll just read it.

23 "I am not persuaded that the judge erred in
24 exercising her discretion against the
25 application to cross-examine Mr.

1 Gustafson. His affidavit was not
2 contradicted. He had a clear memory of the
3 crucial conversation of 10th September 1984.
4 Donna Lemp (Anderson) could not -- "

5 THE COMMISSIONER: I'm familiar with the principles here.

6 MR. GRATL: It was found at the end that it was open to the
7 chambers judge in the circumstances to proceed to
8 hear the matter under Rule 18A without any
9 cross-examination on the affidavit. That's a
10 context in which one party had an affidavit filed
11 but the other party was not able to provide
12 evidence to contradict that affidavit. That's a
13 discretionary decision of the trial judge to
14 allow cross-examination. It's ordinary.
15 Hundreds of cases like this proceed by way of
16 affidavit without cross-examination in the
17 Supreme Court of British Columbia every year.
18 It's held to be a more efficient, less time-
19 consuming way of proceeding.

20 THE COMMISSIONER: I know all of that, I know.

21 MR. GRATL: I'll ask you to turn, Mr. Commissioner, to tab 8.
22 There's another case with which you're familiar,
23 the *Pires* case, *Lising* and *Pires* from the Court
24 of Appeal 2004, and you'll know that leave to
25 appeal this decision was denied by the Supreme

1 Court of Canada -- was granted and a decision of
2 the Court of Appeal was affirmed. You'll know
3 this case, Mr. Commissioner, because this was a
4 challenge to wiretap authorizations granted by
5 you yourself, Mr. Commissioner. You'll see at
6 paragraph 16 there's a reminder there that you
7 granted the authorization to intercept electronic
8 communications on August 6, 1996 for 60 days. At
9 paragraph 31 at page 26 of the decision, the
10 Court of Appeal sets out that if somebody wants
11 to challenge the affidavit in support of the
12 application to authorize interception of
13 electronic communications by way of
14 cross-examination, the applicant to cross-examine
15 has to establish a basis for cross-examination.
16 It's not a new decision in the case. It's not a
17 new decision, it's in effect just simply confirms
18 the test set out in *Regina v. Garifoli* by the
19 Supreme Court of Canada which was established by
20 this point for a decade. I'll just read from
21 that.

22 "Sopinka J. also made it clear, in the
23 passage quoted at the outset of these
24 reasons, that a basis must be shown for the
25 view that cross-examination will elicit

1 testimony tending to discredit not the
2 credibility of the informant or deponent but
3 the existence of one of the preconditions to
4 the issuance of the authorization. He
5 stated that the granting of leave is best
6 left to the discretion of the trial judge,
7 who is aware of how the dynamics of the
8 various *Charter* principles and other
9 relevant factors are playing out in the
10 trial before him or her. To quantify or
11 qualify the 'basis' that must be shown would
12 in my view unduly restrict the discretion
13 and would imply that the granting or refusal
14 of an application to cross-examine is or can
15 be more precise than it is."

16 There you have it, there was a situation in which
17 Mr. Westlake and Mr. DelBigio made a number of
18 assertions about the credibility of an informant
19 who had been used by the police to justify an
20 interception of electronic communications. The
21 informant had lied as part -- lied in the course
22 of a lie detector test, lied to the police and
23 that hadn't made it into the affidavit which
24 seems like it ought to be a big consideration.
25 Of course that was never brought to your

1 attention when you authorized the wiretap, but
2 the Court of Appeal found you have to go a little
3 bit beyond that. There has to be a basis not to
4 test the credibility of the informant but rather
5 to undermine the wiretap application as a whole
6 before you get the right to cross-examine. It's
7 a pretty big hurdle and it's been confirmed a
8 number of times by the court of appeal and by the
9 Supreme Court of Canada in cases like *Vukelich*
10 and so forth. There's a long line of cases and I
11 know my friends from the Department of Justice
12 routinely rely on those cases and they've taken
13 great steps to develop that line of argument when
14 it comes to protecting affiants from
15 cross-examination for the purpose of wiretap
16 authorizations. So that's a principle that's
17 usually of importance to the Government of Canada
18 but it seems to be of less importance in the
19 context of sex workers providing affidavit
20 evidence.

21 Of course I've already taken you to Section
22 9 of the *Public Inquiry Act* but I thought it
23 worthwhile that it might give you some comfort to
24 refer to the *Ruel Authority on the Law* and public
25 inquiries in Canada. That's the two double-sided

1 single pages. At page 90 of Professor Ruel's
2 text, Professor Ruel is discussing alternative
3 ways of bringing information into an inquiry,
4 bringing evidence before a commission of inquiry.
5 He states:

6 "Alternate methods have the advantage of
7 streamlining inquiry evidentiary process
8 with only contentious issues left to be
9 covered in a formal oral evidentiary phase.
10 In some circumstances affidavit evidence or
11 witness interview summaries or statements of
12 individual witnesses may be introduced as
13 evidence. Those would also be efficient
14 methods of introducing uncontested evidence
15 with a view of shortening and focusing
16 evidence."

17 I know, Mr. Commissioner, that yesterday during
18 Ms. Gervais' cross-examination of the witness
19 made reference to the importance of efficiency
20 and providing an opportunity to provide affidavit
21 evidence would be more efficient and leaving it
22 to the police authorities to challenge affidavits
23 if they sought fit to do so would be more
24 efficient than requiring an application for each
25 affidavit into its admissibility -- assuming of

1 course they don't object to every affidavit of
2 every sex worker who tries to bring information
3 to your attention. I'm just making that
4 assumption. It may not be borne out.

5 The second authority is the paper entitled
6 *Some Observations on Public Inquiry* authored by
7 the Honourable Associate Chief Justice Dennis
8 O'Connor who makes reference at page 3 of 6. Of
9 course Mr. Justice O'Connor was the commissioner
10 in two inquiries including the Arar inquiry which
11 involved a great number of procedural challenges
12 especially dealing with national security,
13 confidentiality under the *Canada Evidence Act*.
14 You'll recall that the terms of reference of that
15 inquiry incorporated Section 38 of the *Evidence*
16 *Act* and the Government of Canada. There were a
17 lot of objections to publicizing the information.
18 Ultimately a good deal of the Arar commission
19 report had to be redacted and a separate report
20 was released of unredacted information solely for
21 government use which was not released to the
22 public. A very high proportion, I'm told almost
23 half, of that inquiry proceeded in camera to
24 protect national security, confidentiality. So I
25 do say that when this paper is put out by Mr.

1 Justice O'Connor this is a jurist who has had a
2 lot of opportunity to carefully consider
3 procedural protections, redactions and all sorts
4 of other complications that arise in the course
5 of an inquiry.

6 On page 3 of 6 in the second to last full
7 paragraph Mr. Justice O'Connor sets out that:

8 "Unlike civil or criminal trials, inquiries
9 do not need to be conducted within the
10 confines of the fixed rules of practice and
11 procedure. Inquiries are not trials, they
12 are investigations. They do not result in
13 the determination of rights or
14 viabilities, they result in findings of fact
15 and or recommendations. Subject to what I
16 say below about the need for procedural
17 fairness for those who may be affected by
18 the report of inquiry, a commissioner has a
19 very broad discretion to craft the rules
20 and procedures necessary to carry out his
21 or her mandate."

22 In my respectful submission, Mr. Commissioner,
23 that should give you some comfort in terms of any
24 complaints that what I'm proposing is in any way
25 unorthodox or outside of your jurisdiction or

1 outside of the powers of the terms of reference
2 in some way. Those comments in my respectful
3 submission to some extent attenuate the usual
4 rhetorical flourishes that counsel may embark on
5 in respect of the need for and desirability of
6 cross-examination in all the circumstances.

7 You've heard a great deal of testimony about
8 the vulnerability of survival sex workers in the
9 Downtown Eastside. The violence imposed on them
10 from all sources, lateral violence, violence from
11 pimps, domestic violence from boyfriends,
12 violence at the hands of police officers, coerced
13 sex acts from police officers. You've heard from
14 Dr. Lowman that when allegations were made by
15 PACE in 2001 that the Vancouver Police
16 Department, members of vice, uniformed officers,
17 engaged in violence against survival sex workers
18 that was released as part of the 2001 PACE
19 report, the Vancouver Police Department responded
20 by restricting the right of one of their
21 spokespeople from engaging in sensitivity
22 training for its officers. So there's no
23 question -- there should be no question that on
24 some occasions at least the Vancouver Police
25 Department responds to challenges made against

1 it, allegations of wrongdoing, impropriety.
2 There is, in effect, in that example an instance
3 of retaliation by police officers for attempts to
4 criticize the Vancouver Police Department and I'm
5 sure by the end of this inquiry you'll have heard
6 of more examples.

7 You've also heard a great deal of evidence
8 that sex workers have a lot to lose by getting
9 involved. There's a big downside risk for sex
10 workers to get involved in an inquiry of this
11 type. I've provided and I'm filing as an exhibit
12 with your leave, Mr. Commissioner, the affidavit
13 of Karen Mirsky, affirmed October 23rd, 2011. I
14 provided copies of this to my friends I believe
15 it was on October 23rd. Ms. Mirsky is a criminal
16 lawyer, she's been in practice in criminal law
17 for a number of years, and you can see from her
18 affidavit that she has engaged in advocacy on
19 behalf of street-level sex workers for nine years
20 which has put her in contact with numerous on-
21 street sex workers as well as off-street sex
22 workers. She has spoken with sex workers who
23 have been male, female, transsexual and
24 transgendered, ranging in age from 18 years to 50
25 years and she's been involved with the Pivot

1 Legal Society as part of their sex work
2 subcommittee. She was involved with them from
3 2002 to 2009. That sex work subcommittee was
4 advised by two active street-level sex workers
5 who attended meetings and participated in the
6 decision-making processes of the meeting. That
7 committee took approximately 100 affidavits from
8 street-level sex workers and used the information
9 provided within the affidavits as evidence in
10 support of a constitutional challenge to most
11 aspects of the *Criminal Code* provisions relating
12 to sex work. There was a report prepared
13 entitled *Voices For Dignity: A Call to End the*
14 *Harms Associated With Canada's Sex Trade Laws*.
15 So that affidavit campaign is an indication that
16 sex workers under the right conditions are
17 prepared to provide affidavits setting out their
18 experience in engaging in sex work in the
19 Downtown Eastside. So the affidavit process,
20 there's some evidence at least that the affidavit
21 process might work, that it might bring, even if
22 there are 50 potential sex workers who might be
23 witnesses, the affidavit process might be a
24 component of what is required to get their
25 evidence before the inquiry. In addition -- I

1 keep wanting to call you "your lordship" --

2 THE COMMISSIONER: You don't need to call me that. I've had
3 enough of that in another lifetime.

4 MR. GRATL: Maybe "your honour" still remains but, Mr.

5 Commissioner, you can see in paragraph 7b that

6 Ms. Mirsky also engaged in legal research around

7 the constitutional challenge to the sex work laws

8 and the *Criminal Code*, and she deposes that one

9 of her main challenges was locating a

10 street-level sex worker who was currently engaged

11 in sex work to act as a plaintiff or to mount a

12 constitutional challenge as a person charged with

13 related offences in the *Criminal Code*. She

14 assisted in interviewing and vetting potential

15 plaintiffs and ultimately learned of a number of

16 limitations that sex workers perceive in

17 participating in the civil process.

18 You may recall the *SWUAV* case which was

19 granted leave to appeal by the Supreme Court of

20 Canada, Mr. Justice Ehrcke ultimately dismissed

21 the constitutional challenge that was brought by

22 the Pivot Legal Society, among others, with the

23 support of the Pivot Legal Society, dismissed

24 that challenge on the basis that there was no

25 private interest standing on the part either of

1 Sex Workers United Against Violence as a
2 non-profit society or of Sharon Kiselbach,
3 because Sharon Kiselbach was a former sex worker
4 and SWUAV was simply a collective of sex workers
5 under the society act. Neither of them were
6 granted public interest standing and
7 notwithstanding all the efforts of Ms. Mirsky and
8 others, they were unable to locate any person
9 prepared to act as a test case litigant who is a
10 current sex worker for the reasons later set out
11 in her affidavit.

12 THE COMMISSIONER: I think I'll stop you there for the morning
13 break.

14 THE REGISTRAR: We'll now recess for 15 minutes.

15 (PROCEEDINGS ADJOURNED AT 11:07 A.M.)

16 (PROCEEDINGS RESUMED AT 11:27 A.M.)

17 THE REGISTRAR: Order. This hearing is now resumed.

18 THE COMMISSIONER: Mr. Gratl.

19 MR. GRATL: Thank you, Mr. Commissioner, and thank you for the
20 opportunity to lay out this application in
21 detail. There was a great deal of evidence from
22 Mr. Lowman -- from Dr. Lowman, from Dr. Shannon,
23 from Catherine Astin, from Susan Davis and from
24 Ms. Frey in respect of this application, and
25 rather than take you to individual places in the

1 transcript, let me just indicate that a great
2 deal of their evidence dealt with the
3 vulnerability of survival sex workers for a
4 number of reasons because, of course, they're
5 subject to this intersection of bias and
6 prejudice and racism that so deeply disadvantages
7 them and disempowers them in respect of
8 institutions so that their perspective is --
9 frankly it's difficult to recognize from the
10 perspective of the middle class. It's hard for
11 me to put myself in the shoes of survival sex
12 workers to understand how threatening various
13 levels of authority are, and in that respect it
14 was very helpful to receive the testimony of
15 Elaine Allan and Terrie Gratton and her
16 experience in even attempting to give evidence in
17 court against somebody who had seriously sexually
18 assaulted her.

19 THE COMMISSIONER: I think most of us who have been around in
20 these courts for a long time, particularly those
21 of us who practiced criminal law, are well aware
22 of the vulnerabilities and the difficulties the
23 people that you're speaking of have in navigating
24 the criminal justice system. In fact, the system
25 is a lot more friendly and more sensitive now

1 than it was 25 or 30 years ago, so to that extent
2 I guess we've come a long way, but I appreciate
3 what you're saying and I don't know if it's
4 necessary for you to repeat what Dr. Lowman said
5 or Dr. Shannon said. Those are facts regarding
6 the poverty and the circumstances of the people
7 living in the Downtown Eastside and what they
8 face dealing not only with the criminal justice
9 system but also in dealing with other
10 institutions they have to deal with.

11 MR. GRATL: Unfortunately it's not just the reputation of this
12 commission that we have to contend with. We also
13 have to contend with the reputation of all the
14 other legal processes within the minds of sex
15 workers. We've heard some evidence about that,
16 and through no fault of this commission, legal
17 processes have a bad reputation among sex
18 workers. They collectively have the perception
19 that being around judges and lawyers is a bad
20 thing. If there are judges and lawyers around
21 that invariably means bad consequences for sex
22 workers. That's quite apart from the reputation
23 of the police, and of course there are police
24 lawyers here and that has an effect. There is a
25 lot of testimony about the adversity in interest

1 between the police and sex workers and the way
2 that sexualizes sex workers, so having police
3 lawyers here, even if they do have velvet fists
4 like Mr. Hern does and Mr. Dickson does, it's
5 still a fist.

6 Sex workers are quite aware as a result of
7 their own personal experiences and the experience
8 of their peers of the negative consequences that
9 can befall them if they manage to get ensnared in
10 legal processes, so they're quite inclined to
11 avoid legal processes entirely. That's set out
12 in a little more detail in Ms. Mirsky's
13 affidavit. She sets out on the basis of her
14 experience at page 5 --

15 THE COMMISSIONER: I've read the affidavit.

16 MR. GRATL: Page 5, subparagraph c:

17 "Street-level sex workers often fear
18 cross-examination by lawyers as to their
19 habits and life patterns. Involvement in
20 criminal activity and illicit drug use are
21 too often taken uncritically as conclusive
22 determinants of dishonesty or inaccurate
23 recollection or perception."

24 Then at subparagraph d she sets out the many
25 reasons that street-level sex workers have a

1 subjective and objective fear of participating in
2 this commission. Even being identified as
3 participating in the commission can result in a
4 loss of benefits such as social assistance due to
5 this discovery by government workers that the
6 potential witnesses are involved in sex work;
7 they face the potential loss of their children if
8 they have children in their custody due to
9 seizure by the Ministry of Children and Family
10 Development, or by relatives who are not aware of
11 their participation in sex work; they may face
12 fear of difficulty in securing the eventual
13 return of their children who may have already
14 have been seized by the ministry or may be in the
15 custody of relatives who are not aware of their
16 participation in sex work; they may face the loss
17 of stable housing or inability to obtain stable
18 housing due to the discovery of their
19 participation in sex work; they may fear the loss
20 of stable clientele if their reputation for sex
21 work is considered by their clientele to attract
22 extra attention by police authorities or others;
23 they may fear reprisals by clients or predatory
24 individuals who do not support their
25 participation in the commission. You've already

1 heard some evidence about some of those
2 individuals, very dangerous individuals
3 potentially, not to be scoffed at. There is also
4 the fear of reprisals by police officers who do
5 not support their participation in the
6 commission. We've seen across a number of
7 studies and across a number of witnesses that
8 there is a great deal of support for the
9 proposition that there are what amount to
10 unlawful activities engaged in by police officers
11 against sex workers: violence, extortion of sex
12 acts. I'm not saying every police officer is
13 engaged in that activity and we know there are
14 some good officers, but there are bad officers.
15 The "bad lieutenant" is out there. Whether or
16 not any efforts are made by the Vancouver Police
17 Department to capture and apprehend those "bad
18 lieutenants" is of course a live issue at this
19 commission. There is a significant fear of
20 reprisals by police officers, well documented by
21 the objective methodologically sound surveys
22 conducted by various different sources in the
23 past 15 years. Those studies are in evidence.
24 There is also a fear of reprisals by friends or
25 associates who do not support participation in

1 the commission; a fear of loss of a stable source
2 of illicit drugs because drug traffickers might
3 not want the added scrutiny that might attend
4 giving testimony at this inquiry, and the fear of
5 reprisals by drug traffickers who are concerned
6 about the extra scrutiny.

7 Moreover, there's the concern about giving
8 evidence, live viva voce evidence, may trigger
9 memories relating to various different kinds of
10 trauma. That could be childhood trauma, some
11 type of sexual abuse or physical abuse by
12 parents, family, persons in authority, such as
13 foster parents or people hired by the government
14 to provide housing or guardianship for foster
15 children, wards of the state, or it could be
16 trauma that was inflicted during the person's
17 time when they weren't aware of the state setup
18 during sex work and we know those reports are
19 legion. We also know from the evidence that sex
20 workers often take steps to try to limit their
21 own perception or recollection of those traumatic
22 incidents, including self-medication, formation
23 of drug dependencies and so forth, and we know
24 there aren't a lot of counselling options
25 available to survival sex workers -- certainly

1 not in the Downtown Eastside and I'd wager not
2 otherwise. The point being that there's a
3 heightened psychological vulnerability to sex
4 workers even talking about their stories to
5 anybody, even counsellors, and that ought to be
6 taken into account in terms of framing the
7 process by which this inquiry provides an avenue
8 for sex workers to get their stories to this
9 commission.

10 Moreover, and this is quite important, Mr.
11 Commissioner, at page 7 of Ms. Mirsky's affidavit
12 she indicates that street-level sex workers may
13 be experiencing survival guilt, and this is an
14 important factor regarding which I know that
15 Ms. Davis gave some evidence in connection with
16 her attempt to report a serious rape in 1991.
17 You'll recall her testimony that she was in front
18 of Craftsman Collision, a person in a blue
19 station wagon that was crushed in on one side
20 seriously sexually assaulted her. She tried to
21 report it to police, waited for an hour for
22 police to arrive, then she tried to call again,
23 tried to make contact with a police officer, and
24 now she formed the opinion -- and, again, this
25 was inaccurately reported by the media -- she

1 didn't say it was Robert William Pickton who
2 raped her in 1991, she said it may have been, but
3 it may have been her mind playing tricks on her,
4 but there was a resemblance she thought long
5 after the fact after Mr. Pickton was arrested in
6 2002, she made a connection there and wasn't sure
7 about that connection. She said she was
8 experiencing survival guilt because she didn't do
9 enough to bring her rape to the attention of the
10 police authorities. Of course in any case where
11 a person is sexually assaulted there is a
12 question of not only catching that person for
13 that assault but preventing them from committing
14 future assaults. This survival guilt is an
15 important factor in the Downtown Eastside.
16 People might not want to come forward, especially
17 if they've been on the Pickton farm, especially
18 if they knew of some attacks by Mr. Pickton that
19 fall short of murder or might even be murder that
20 they knew about but didn't report for whatever
21 reasons they might have, some good, maybe some
22 that are not good, but that's an important aspect
23 in understanding that level of survival guilt is
24 important in the process.

25 The reason I mention all of these potential

1 downsides is that there ought to be a ledger
2 perceived, not on an individual basis but
3 perceived in terms of a group of individuals.
4 We've been talking about sex workers, survival
5 sex workers that have been studied as a group,
6 they've been understood as a group. A group of
7 approximately 50 of them within this particular
8 target group that met a set of characteristics
9 that your counsel Mr. Vertlieb talked about in
10 his opening, that group of people is especially
11 vulnerable and they should be understood as a
12 group, and that's precisely the group that you,
13 Mr. Commissioner, need to know about in order to
14 understand how best to heal the relationship
15 between the Vancouver Police Department and this
16 group. It's critical to have that perspective if
17 at all possible to inform your findings of fact.
18 It's within your power, Mr. Commissioner, under
19 Section 14 of the *Public Inquiry Act* to receive
20 and accept information that you consider
21 relevant, necessary and appropriate.

22 THE COMMISSIONER: I know that.

23 MR. GRATL: I'll just refer to the *F.W.J.* case under tab 7 of
24 the authorities for a discussion of what's
25 appropriate. That was a case dealing with the

1 criminal context and the admissibility of hearsay
2 evidence of child victims of sexual assault under
3 the necessity and reliability exemption to the
4 hearsay rule.

5 THE COMMISSIONER: You don't need to go over this. I'm
6 familiar with *Khan, Smith* and all of the cases
7 that came down from there with exception to the
8 historical hearsay rules.

9 MR. GRATL: I just want to refer to one passage, it will be
10 brief, paragraph 44:

11 In each case the trial judge must determine
12 whether on the facts and circumstances of the
13 case necessity has been established. Often that
14 will involve going into the reasons for the
15 problem. Often too, it will involve expert
16 evidence.

17 Mr. Commissioner, you've heard a lot of
18 expert evidence on this issue. With respect,
19 this is not an application that is being made in
20 a vacuum. We have heard two weeks of evidence
21 now about the vulnerability of sex workers,
22 survival sex workers as a group and the reasons
23 why they're vulnerable and the barriers they face
24 in participation in society at large and in
25 particular in judicial processes. So that's the

1 second branch of the procedural protections that
2 I'm asking for. The presumption that affidavit
3 evidence can be filed with leave for parties
4 adverse in interest to apply to cross-examination
5 in cases where it's important or fair that they
6 be entitled to cross-examine, and then lastly, a
7 right for the applicant to withdraw the affidavit
8 if leave to cross-examine is granted. The last
9 aspect is the right to receive affidavit evidence
10 anonymously -- and I just want to put that on the
11 shelf for the moment if we can.

12 THE COMMISSIONER: What is going to be your response if I
13 allow that and your learned friend says you ought
14 not to pay any attention to that if they're done
15 anonymously because they're going to say the
16 evidence is worthless? What's your response to
17 that?

18 MR. GRATL: I would say it would still be worthwhile to
19 receive that evidence for the purpose of crafting
20 your recommendation.

21 THE COMMISSIONER: That's precisely what they're going to say,
22 that I ought not to pay attention to that at all
23 because it's given anonymously and without the
24 benefit of any cross-examination, so what's your
25 response to what their argument is likely to be?

1 MR. GRATL: I would say it goes to weight and the weight that
2 could be attached to an anonymous affidavit would
3 depend on the circumstances. Those are issues
4 that could be argued after the fact, after an
5 affidavit is received into evidence, and of
6 course if it's a controversial issue, if it's an
7 affidavit that suggests that Constable Dickson
8 didn't listen to a complaint or what have you,
9 that would be a circumstance where, of course,
10 Mr. Commissioner, you wouldn't attach any weight
11 to that affidavit and wouldn't even admit it into
12 evidence because it affects the reputation of an
13 individual. But I just want to leave that issue
14 aside because in my submission the guarantee that
15 there will be a firm process for providing
16 affidavits to this inquiry is a precondition to
17 my reaching out or anybody reaching out to sex
18 workers in the first place, I'm not even going to
19 get them in the door.

20 When I first received this mandate to act as
21 independent counsel for Downtown Eastside
22 communities especially sex workers and drug
23 users, I opened up an office in the Downtown
24 Eastside at 678 East Hastings, right in the core
25 there where everything is happening. The alley

1 behind is where the sex workers were moved to the
2 other side of Hastings. On the other side of the
3 street is the Astoria Hotel where Mr. Pickton
4 hung out. Again, across the street at Princess
5 is the Princess Convenience Store where Ms. de
6 Vries was picked up -- was last seen. It's right
7 in the heart of things, and I tried to create an
8 office that was as inviting as possible but even
9 that just didn't work, it wasn't an inviting
10 enough space. Maybe that's because I'm a male,
11 maybe that's because I don't have enough
12 experience in the Downtown Eastside advocating
13 for sex workers and I'm not a known and trusted
14 figure in the way that Ms. Mirsky is, maybe it's
15 because I don't have the right demeanour.
16 Whatever it is, Mr. Commissioner, my level of
17 outreach wasn't enough. I just am not able to
18 bring that evidence before the commission without
19 this level of procedural protection because
20 they're not coming through the door, and what is
21 proposed by the Vancouver Police Department,
22 namely, we can apply on an individual basis, in
23 my submission on the evidence that's not going to
24 do it. You need what Dr. Shannon said was
25 appropriate protocol, that you could offer

1 guarantees in advance, you need what Catherine
2 Astin said, you have to be able to offer
3 confidentiality, offer guarantees in advance, and
4 the same with Professor Lowman. If you want
5 people to participate in your information-
6 gathering exercise you have to be able to offer
7 the guarantees in advance. Those are my
8 submissions.

9 THE COMMISSIONER: Thank you. Who else has an interest?

10 THE REGISTRAR: Mr. Gratl, did you wish to mark your
11 affidavit?

12 MR. GRATL: Yes.

13 MR. VERTLIEB: Mr. Commissioner, I'm just wondering if it
14 might be better to hear from any of the other
15 participants who will support Mr. Gratl, just to
16 help the context, I think that might be helpful
17 from discussions I've had.

18 THE COMMISSIONER: I'm trying to figure out who else has an
19 interest in this issue. Ms. Gervais, you have?

20 MS. GERVAIS: Robin Gervais, independent counsel for
21 aboriginal interests. Mr. Commissioner, as
22 independent counsel for aboriginal interests I
23 would like to say that I support Mr. Gratl's
24 application for the protection of vulnerable
25 witnesses for a variety of reasons.

1 The first reason is with respect to the
2 unique relationship that aboriginal people have
3 with policing authorities. I believe that you
4 heard evidence of that at the study commission
5 and you heard evidence of that last week from Mr.
6 Crey and from some of the family members. In
7 line with this argument I'd like to point out the
8 disproportionate number of aboriginal sex trade
9 workers in the Downtown Eastside. On a very
10 practical level, although I do not have a list of
11 witnesses at this point, you may be aware that I
12 have had difficulty engaging with the aboriginal
13 community in my role, and aboriginal members of
14 the Downtown Eastside community are starting to
15 come forward now and starting to pull me aside
16 and want to provide me with information, and I
17 think it would be really helpful in my role as
18 independent counsel to provide them with an
19 alternative to be able to provide evidence to the
20 commission through affidavits should they choose
21 to do that. I think that it would increase their
22 confidence in the process and it would decrease
23 their fear. We have also heard evidence that
24 many of the missing and murdered women in the
25 Downtown Eastside are not from Vancouver and we

1 have heard evidence that many aboriginal women in
2 the Downtown Eastside are from outside of
3 Vancouver, sometimes in remote locations and
4 impoverished communities. I also think on a
5 practical level it would be helpful to be able
6 offer this form of providing evidence to the
7 commission to those people that live outside of
8 Vancouver should they wish to provide evidence
9 and are not able to travel here.

10 I would echo Mr. Gratl's comments with
11 respect to the efficiency of the evidence and I
12 support Mr. Gratl's subject provision that the
13 evidence is not to be used for findings of
14 misconduct but is to be used to inform the
15 commission for the purpose of making
16 recommendations to ensure that the commission has
17 all of the relevant information before it.

18 I would like to turn your attention to one
19 further passage in the article provided to you by
20 Mr. Gratl that was authored by the Honourable
21 Chief Justice O'Connor. It is on page 3, the
22 third paragraph from the bottom, that begins
23 with:

24 The first is that inquiries have in my view
25 tended to overuse the evidentiary

1 adversarial type of hearing processes
2 suitable for legal trials to gather.
3 information. I think we have yet to take
4 full advantage of all of the possibilities
5 for different processes that can be tailored
6 to meet the needs of investigating and
7 reporting on the various types of matters
8 set out in inquiry mandates.

9 I believe that greater creativity and
10 flexibility in fact-determining processes
11 will ultimately improve the inquiry process
12 from the perspective of all participants,
13 increasing responsiveness, decreasing costs
14 and ultimately improving the process and
15 results of public inquiries.

16 In closing, Mr. Commissioner, we support Mr.
17 Gratl's application and we ask that his
18 application not only include sex trade workers
19 but aboriginal women as well, and with your
20 permission Mr. Roberts would like to say a couple
21 of words.

22 THE COMMISSIONER: Thank you. Mr. Roberts.

23 MR. ROBERTS: For the record, also speaking on behalf of
24 aboriginal women, Mr. Commissioner, you have
25 before you I believe the letter of Mr. Doust of

1 September 30, 2011.

2 THE COMMISSIONER: No, I don't.

3 MR. ROBERTS: It's on my counsel table. I assumed it's on
4 everybody's table. I wonder, Mr. Vertlieb, do
5 you have that handy?

6 MR. VERTLIEB: I'm sorry, I don't know.

7 MR. CROSSIN: I'll give him mine.

8 MR. ROBERTS: Thank you. I want to refer to this letter --
9 and Ms. Gervais was more comfortable in my
10 addressing it, perhaps because I know Mr. Doust
11 quite well -- but in my submission this letter
12 should be of assistance to yourself, Mr.
13 Commissioner, in deciding this application. Here
14 is Mr. Doust on September 30, 2011 responding to
15 Mr. Gratl's application and saying in the first
16 sentence:

17 The Criminal Justice Branch for this
18 province takes no position on Mr. Gratl's
19 September 20, 2011, request for witness
20 protection protocols.

21 That's everything that Mr. Gratl has been
22 addressing the court on, except respecting
23 the potential application of such protocols
24 to the complainant, person X, in the 1997
25 charges against Robert William Pickton.

1 I won't read any further. We all know that to be
2 the victim complainant in the incident which gave
3 rise to the attempted murder and aggravated
4 assault charges against Pickton. That exception
5 is accepted by my learned friend Mr. Gratl as one
6 of the exceptions in the use of affidavit
7 evidence.

8 So why is this significant? Our
9 institutional framework in this country, it is
10 the Criminal Justice Branch that has
11 responsibility for the administration of criminal
12 justice in this province. Here we have Mr.
13 Leonard Doust, one of the most senior counsel in
14 the practice of criminal law on both sides of the
15 fence in this province, speaking on behalf of the
16 Criminal Justice Branch saying he does not oppose
17 the application. In my respectful submission,
18 this is hugely supportive of the application that
19 Mr. Gratl has brought forward. The rest of the
20 letter you might note, beginning perhaps at the
21 third paragraph where Mr. Doust says:

22 "The primary function of the commission as
23 with all commissions of inquiry is to
24 uncover the truth,"

25 And he refers to the *Phillips v. Nova Scotia* case

1 in 1995 and, first of all, I would say that all
2 reads in relation in my respectful submission to
3 the significance of person X's evidence being
4 subject to cross-examination, and second, it
5 cannot really be in response to the other aspects
6 that Mr. Gratl wants to have dealt with by
7 affidavit evidence or he would not be taking a
8 position on the matter, and further, I would say
9 and submit respectfully that that article by Mr.
10 Justice O'Connor of Ontario is a very helpful
11 article. I don't want to overdue it, other
12 counsel have referred to it, but those two
13 paragraphs that have been read out, Mr.
14 Commissioner, are under a subject about
15 procedural process in independent inquiries, and
16 I respectfully submit it would be very helpful in
17 your determination. Thank you.

18 THE COMMISSIONER: Thank you, Mr. Roberts.

19 MR. WARD: Cameron Ward, counsel for the families of 18 of the
20 missing and murdered women. Mr. Commissioner, on
21 behalf of my clients I want to offer qualified
22 support for my friend Mr. Gratl's application.
23 I'll explain the qualification in a moment but
24 first I wish to put this application into its
25 proper context.

1 The *Public Inquiry Act*, specifically Section
2 22, confers to you, Mr. Commissioner, a power to
3 summons witnesses to this proceeding and then the
4 practice and procedure directive for evidentiary
5 hearings that governs this particular
6 commission's work provides in Rule 44A that
7 commission counsel shall decide who shall be
8 called as a witness at the evidentiary hearings.
9 That Rule 44 goes on to say in G, this: After
10 commission counsel has called all witnesses on
11 behalf of the commission, a participant may apply
12 to the commissioner for permission to call a
13 witness, and if permission is granted certain
14 subrules apply. So the rules we are operating
15 under create two categories of witnesses. The
16 first category are those witnesses who commission
17 counsel determines ought to be called and they
18 may be compelled by subpoena or summons if
19 necessary. I doubt whether my friend's
20 application has much impact on that class of
21 witnesses. I don't know because at this stage we
22 don't have, or at least I don't have, a list of
23 the upcoming witnesses beyond the three scheduled
24 to be here next week. Certainly none of those
25 three are vulnerable in my submission and I

1 anticipate that sometime after next week a number
2 of police officers and other public officials
3 will be attending to give evidence dealing with
4 the fact-finding mandate of this commission I
5 would submit that none of those would be
6 vulnerable witnesses either. I can say with
7 respect to the second category, that is, the type
8 of witnesses contemplated by rule 44G of our
9 rules of practice, I on behalf of the families
10 expect to make an application under that subrule
11 for permission to call additional witnesses and
12 some of these witnesses may only testify if there
13 are suitable protocols in place to protect their
14 identities from public disclosure. So to that
15 extent that I may be attempting to have witnesses
16 with material to testify under Rule 44G, I
17 support the application for vulnerable witness
18 protection as contemplated by my friend Mr.
19 Gratl's submission. Those are my commissions.

20 THE COMMISSIONER: Thank you, Mr. Ward. Mr. Dickson.

21 MR. DICKSON: Yes, Mr. Commissioner, Tim Dickson for the
22 Vancouver Police Department and Police Board.
23 Mr. Commissioner, let me begin if I can by saying
24 what we do not oppose, what we are in agreement
25 with or do not oppose, it is of course very

1 important that this inquiry hear relevant
2 evidence from all quarters and that certainly
3 includes the Downtown Eastside and, indeed, some
4 such evidence has rightly been heard already. If
5 sex trade workers have relevant evidence to give
6 then this inquiry should hear from them and it
7 should do so in a manner sensitive to their
8 circumstances.

9 I think as you pointed out earlier, I think
10 everyone must be in agreement with that. First
11 of all, in terms of the protections Mr. Gratl is
12 seeking, the first is a statement made by you
13 that evidence given by vulnerable witnesses
14 cannot be used against them in any other form and
15 we don't take any issue with that. As Mr. Gratl
16 points out, that's well established on the law.
17 We also don't take issue with a publication ban
18 over their identities, although there may be
19 instances on a case-by-case basis where such a
20 ban should not issue; the media may take issue
21 with a particular case, a witness may not wish
22 that ban to be issued. What we do oppose is a
23 blanket order that evidence may be put in by
24 affidavit without cross-examination, and before
25 as part of the application one of the grounds of

1 relief sought was anonymity from the
2 participants. Mr. Gratl has said he wishes to
3 put that on a shelf for now but on a blanket
4 basis that is something we oppose.

5 Our position is that the presumption, as Mr.
6 Gratl acknowledges, is that evidence in this
7 hearing commission, not the study commission but
8 in this hearing commission, should be given
9 orally and be subject to cross-examination.

10 That's the starting point. Any departure from
11 that we say, Mr. Commissioner, needs to be done
12 on a case-by-case basis. We simply need to look
13 at the nature of the evidence that is going to be
14 given and the nature of the vulnerabilities in
15 the particular case and then craft an appropriate
16 response.

17 In brief, at this moment the application is
18 just premature. There is no witness who has said
19 that he or she wishes to testify but will not
20 without certain protections. All of it is
21 speculative and the application ought not to be
22 considered in a vacuum. It's merely hypothetical
23 at this point and it's speculative. Let me say
24 again, there may be instances where protections
25 should be ordered. This inquiry should not be

1 unresponsive to the circumstances of vulnerable
2 individuals and it may be proper to have a
3 witness testify behind a screen, for instance.
4 It may be that evidence in the form of an
5 affidavit is not contentious and could go in.
6 Right now we don't know any of that. We have to
7 see what the evidence is and we have to see what
8 the particular fears are, the particular
9 vulnerabilities. Those are really the two
10 considerations I suggest that you, Mr.
11 Commissioner, and the participants will have to
12 consider, what is the witness saying and why does
13 this particular witness need procedural
14 protections, and there's a range of protections
15 that can be ordered, but those should be tailored
16 to the specific circumstances.

17 Mr. Commissioner, I handed up a green brief,
18 a thin green one, and I'd just like to take you
19 quickly to two texts on public inquiries. The
20 first is behind tab 2, and you've seen one page
21 of this already, it's from Professor Ruel's --
22 I'm not sure if he's a professor -- Simon Ruel's
23 text on public inquiries and the first page of
24 the text, page 90, this is what you've seen
25 already. Let me just point out a few passages.

1 In the first under presentation of evidence he
2 says:

3 "In a public inquiry context, evidence will
4 most often be adduced by way of viva voce
5 testimony. A public inquiry without oral
6 testimony would be inconsistent with its
7 public and educational purposes. Oral
8 testimony also allows the evidence to be
9 clarified and tested by the commissioner,
10 commission counsel and by parties with
11 standing through questions and
12 Cross-examination.

13 Depending on the circumstances, less formal
14 methods of adducing evidence may be used."

15 Then he goes on to say:

16 "A commission could rely on pre-existing
17 records or reports, or on factual overview
18 reports, statements or narratives,
19 background papers or detailed chronologies
20 prepared by commission staff, parties with
21 standing or witnesses."

22 If we go down the bottom of the middle paragraph
23 he says:

24 "Such alternative methods have the advantage
25 of streamlining the inquiry evidentiary

1 process with only contentious issues left to
2 be covered in a formal evidentiary phase."

3 The last paragraph on that page he says:

4 "In some circumstances, affidavit evidence
5 or witness interview summaries or statements
6 of individual witnesses may be introduced as
7 evidence. Those would also be efficient
8 methods of introducing uncontested evidence
9 with a view of shortening and focusing
10 evidence."

11 That's so, and you can see the analysis
12 there, that you've got to look at the nature of
13 the evidence and if it's controversial, if it's
14 contested, then probably it is not appropriate
15 for it to go in by affidavit without
16 cross-examination. If we go over the page, the
17 next page jumps in the text to page 158 and under
18 heading 3, Quality of Evidence Required to Make
19 Findings, Mr. Ruel says:

20 "Although the strict rules of evidence do
21 not apply to the proceedings of commissions
22 of inquiry, this does not mean that the
23 findings of commissioners of inquiry should
24 be based on evidence of poor quality.

25 Commissioners of inquiry should not base

1 their findings and recommendations on
2 speculation, rumours, innuendoes or on
3 unreliable evidence. This is particularly
4 true for findings of misconduct. In making
5 adverse findings commissioners of inquiry
6 should rely as much as possible on evidence
7 that would be admissible before a court.
8 Commissioners should be reticent to rely on
9 hearsay evidence when making adverse
10 findings, and should refer to first source
11 evidence to seek corroboration. However,
12 evidence of a lower quality may be accepted
13 to address contextual or systemic issues.

14 We've had some of that contextual evidence.
15 We've heard all sorts of allegations that were
16 contained in surveys, and I'll return to that
17 theme, but that's what that went in for, it went
18 in for context. Direct statements, not
19 necessarily only against individuals, because a
20 lot of the time we've seen people do not know
21 names of police officers against whom they've
22 been making allegations. They're making
23 allegations against the police, police officers,
24 maybe it's the VPD, but statements of those kind
25 may well be controversial and it will need to be

1 considered how that evidence needs to be
2 approached. But the first thing we need is to
3 know what the evidence is, and right now we don't
4 know, we don't know whether there are witnesses
5 who will come forward and we certainly don't know
6 what they're going to say.

7 If I can take you, Mr. Commissioner, just
8 briefly to tab 3, and this is just the second of
9 the texts on public inquiries I wish to refer you
10 to. Tab 3, the last page, the last paragraph
11 above that heading on the page, this is Professor
12 Ratushny's text. He says:

13 "There are a number of factors to consider
14 when replacing oral testimony with written
15 documentation. If the credibility or
16 reliability of the witness is at issue,
17 oral testimony and the opportunity for
18 cross-examination may be required. If the
19 area of contention is narrow, it might be
20 possible to limit oral testimony to that
21 area. Even where there first appears to be
22 an area of contention, it may be resolved
23 by consent of the parties. Or it may be of
24 marginal relevance and not worth pursuing.
25 Finally, where a witness's evidence is not

1 contentious, commission counsel still may
2 wish to call her simply because she was a
3 key player in the event and should be heard
4 by the public.

5 Again, that's the analysis that needs to be
6 undertaken. You need to know what the evidence
7 is going to be. In the context of the witness
8 seeking procedural protections you need to know
9 what the particular fears of that witness are,
10 because only then can you craft the appropriate
11 response. So in short, Mr. Commissioner, it
12 needs to proceed on a case-by-case basis. Right
13 now it is entirely speculative, it's in a vacuum,
14 it's merely hypothetical. We need to see whether
15 witnesses will come forward and seek to testify
16 and then we need to craft the response.

17 Let me say this, Mr. Gratl is out there
18 seeking witnesses and that's appropriate and
19 hopefully it will yield witnesses who wish to
20 come forward. He suggests that he needs a
21 blanket rule, a blanket guarantee that they will
22 not have their identities disclosed, I think, and
23 that they will not be subject to
24 cross-examination because only then might they
25 come forward. In our letter, which I trust

1 you've read in response to his application, we
2 suggest that an affidavit be put in, it can be
3 anonymous, it can say what the evidence is, it
4 can say what the particular fears are and then
5 that can be considered. Really that's how it
6 ought to unfold. At that stage there is no risk,
7 there is no risk to a witness. If the witness
8 doesn't obtain the procedural protections he or
9 she believes are needed and doesn't therefore
10 want to testify, then he or she can withdraw.
11 But we need to be able to consider what the
12 proposed evidence is. Without it, it's merely a
13 vacuum.

14 THE COMMISSIONER: All right.

15 MR. DICKSON: Let me say just a little bit more, Mr.

16 Commissioner. Again, we say that this
17 discussion, this debate really needs to go on at
18 a later time when we have witnesses who have come
19 forward, but I do want to stress that there is
20 prejudice. There is prejudice if allegations are
21 made against the police and not -- there's no
22 opportunity to cross-examine them. There's
23 prejudice if the affidavits are anonymous and
24 there's prejudice if they're shielded from
25 cross-examination and there's prejudice if the

1 allegations are vague and can't be countered.

2 We saw Ms. Davis testify, and through no
3 fault of her own, she is not able to place the
4 date in which that incident she spoke to
5 occurred. The police, therefore, cannot search
6 their records and they cannot respond. There
7 will likely be and there may be more evidence of
8 that kind, but there is prejudice in that and so
9 much the more so if it's anonymous and so much
10 the more so if there's no opportunity for
11 cross-examination.

12 We heard from Dr. Shannon, as Mr. Gratl
13 spoke to a little bit, and we saw there her
14 survey evidence and some of the survey evidence
15 suggested that police coerce sex workers into
16 sex. That came from an anonymous survey where
17 someone checks a box and it results in headlines,
18 it results in the headline behind tab 4 in the
19 *The Province*, "Vancouver Cops Force Prostitutes
20 to Perform Sexual Favours, Inquiry Told". There
21 is real prejudice in that for the police. This
22 is in a major newspaper, and although it has the
23 comma, "inquiry told," the words that come before
24 the comma are eye catching to the average reader.
25 We've had that context evidence, and we're not

1 able to reach behind into Dr. Shannon's research
2 and test the allegations. There's prejudice in
3 that. I'm not saying that Dr. Shannon should not
4 have been here and spoken to her research, but
5 that is the reality and we ought not -- one of
6 the factors that would need to be considered when
7 presented with an affidavit from a witness who
8 wishes to come forward and not be cross-examined
9 and perhaps testify anonymously, is that context,
10 it is that prejudice. But, as I say, that is a
11 debate for another day when there is an actual
12 evidentiary matrix, but that is a consideration
13 that needs to be kept in mind.

14 I won't speak to the cases Mr. Gratl took
15 you to except just on this, the *F.W.J.* case, the
16 hearsay case with which you're familiar. I just
17 point out there the court had the child witness
18 in front of him, he could see in that case that
19 the child was not able to testify, it was known
20 what the hearsay evidence was. All of those
21 factors could be considered, particular
22 circumstances of the child and the hearsay
23 evidence that was going to be introduced. That
24 is essentially the analysis that needs to go on
25 here, but we need to have particular

1 circumstances.

2 Lastly, let me speak if I can to the Mirsky
3 affidavit, Mr. Commissioner. You have read the
4 affidavit and you will have seen that throughout
5 it is phrased in the hypothetical, in the
6 speculative: Sex workers may have this fear,
7 they may have another fear, they may be reluctant
8 to engage with government, they may fear
9 cross-examination. And that may be so in respect
10 of particular vulnerable individuals who wish to
11 come forward and give testimony and it remains to
12 be seen and it should remain to be seen, but let
13 me take you to page 5, 10d if I can just for a
14 moment. There Ms. Mirsky says that: "Many
15 street-level sex trade workers have a subjective
16 and objective fear of participating in the
17 commission as identified street-level sex workers
18 because such identification may result in," and
19 she's listed a number of fears and it may result
20 in those fears -- we don't know -- but the fears
21 that are laid out in these 10 subparagraphs can
22 all be addressed through a publication ban. She
23 says in it that one of the fears might be loss of
24 benefits such as social assistance due to their
25 discovery by government workers who are not aware

1 of their participation in sex work, and that may
2 well be a legitimate fear and that can be
3 addressed through a publication ban. The same
4 with 2, loss of children and custody, the same
5 with troubles with eventual return, the same with
6 stable housing, loss of a stable clientele, fear
7 of reprisals by clients or predatory individuals,
8 and that may be a serious concern and it may well
9 be that the commission needs to take great care
10 in ensuring that nothing of that kind comes to
11 pass. Down to 8, fear of reprisals by friends or
12 association; 9, stable source for illicit drugs.
13 All of these have to do with disclosure of their
14 identities publicly and there may be, as I say,
15 legitimate cause for concern there, but it is not
16 addressed through and not responded to through
17 anonymity in respect of the participants and it's
18 not addressed by putting in the affidavit and not
19 having any of it subject to cross-examination.

20 The last item I'd just like to take you to,
21 because I think you have the point, is Mr.
22 Justice O'Connor's observations on public
23 inquiries Mr. Gratl handed up to you. If we go
24 to page 4 of 6, the bottom left-hand corner, I
25 just want to draw your attention to other

1 comments that Justice O'Connor makes. You were
2 shown comments before in his paper where he's
3 saying of course an inquiry is not court and it
4 can be more flexible and the like. But if you
5 look at the full paragraph at the bottom of the
6 page, it says:

7 "My second observation about the inquiry
8 process relates to the need to ensure
9 procedural fairness to those who may be
10 adversely affected by the information that
11 emerges during the course of it. This is
12 critically important. There is enormous
13 potential for an inquiry, particularly a
14 public inquiry, to serious damage personal
15 and professional reputation,"

16 And I'll pause there and say that is absolutely
17 the case. I'm sure you've been following the
18 media, and there are all sorts of allegations
19 here that cannot be effectively tested through
20 cross-examination, such as survey evidence or
21 allegations that are so vague as not to be able
22 to be tested by evidence from the parties that
23 are being criticized, they are reported in the
24 press, and that's the nature of the process, but
25 there is a concern there and procedural fairness

1 needs to be kept in mind.

2 Down at the bottom of that page, the
3 paragraph that begins there:

4 "Those caught up in an inquiry process face
5 a very real danger of having a professional
6 or personal reputation seriously affected by
7 the exceptional amount of public attention
8 generated by the inquiry process."

9 That's certainly so. Over the page, the
10 second paragraph in the middle of it, he says:

11 "I do suggest that it is essential that
12 commission counsel in deciding what evidence
13 to call and how to lead it lean over
14 backwards to be fair and balanced and alert
15 to the potential for unfair damage to
16 reputation,"

17 And again, that is so. There are a number of
18 considerations that need to be taken into account
19 here. One is seeking to have evidence come from
20 all quarters. Another is seeking that it is
21 evidence of a high quality, and another is
22 procedural fairness. That balancing process,
23 those factors, various factors, can only be
24 addressed when we know what the nature of the
25 evidence is that is sought to be called and

1 sought to be called on a basis of no
2 cross-examination and anonymity.

3 Mr. Commissioner, I propose to leave it
4 there unless you have any concerns you'd like to
5 raise.

6 THE COMMISSIONER: We'll come back at two o'clock.

7 THE REGISTRAR: This hearing is now adjourned until 2:00 p.m.

8 (PROCEEDINGS ADJOURNED AT 12:26 P.M.)

9 (PROCEEDINGS RECONVENED AT 2:00 P.M.)

10 THE REGISTRAR: Order. This hearing is now resumed.

11 MR. BRONGERS: Thank you, Mr. Commissioner. Jan Brongers for
12 the Government of Canada. We share the
13 fundamental concern that underlies this
14 application, namely, that vulnerable witnesses
15 who need procedural protection so they can
16 testify at the inquiry without jeopardizing their
17 personal safety should be given such protection.
18 The question is how do we do this. Mr. Gratl
19 suggests that this be done with a
20 one-size-fits-all approach having you, Mr.
21 Commissioner, issue a series of blanket orders
22 that would automatically cover if and when these
23 issues arise in the future. With all due
24 respect, however, we do not think the question of
25 how to protect vulnerable witnesses can be dealt

1 with through a one-size-fits-all approach. Each
2 witness's privacy concerns will be different and
3 they must be balanced with such other valid
4 concerns, including the procedural fairness
5 rights of those who may be impacted by testimony
6 and the public's right to know what evidence is
7 being considered by the inquiry, and that is why
8 we suggest this question should be dealt with on
9 an individual basis by tailoring the protection
10 to the needs of the witness while taking into
11 account procedural fairness and other concerns.
12 We say this because it's our view that it's
13 simply not possible to craft in advance a
14 suitable one-size-fits-all vulnerable witness
15 protection order. Indeed, this can be
16 demonstrated by Mr. Gratl's own struggles with
17 this issue and the manner in which his
18 application has evolved and morphed over time as
19 he recognizes the need to craft exceptions and
20 qualifications to his initial request for relief.
21 If I may, Mr. Commissioner, I'd like to take the
22 commission to Mr. Gratl's initial application
23 letter. This is his letter of September 20th and
24 it is at tab 1 of Mr. Gratl's application book.
25 It's a rather thick document with a clear cover.

1 THE COMMISSIONER: I have it here.

2 MR. BRONGERS: If we could just turn to page 3 of the letter,
3 this is the page where Mr. Gratl sets out his
4 relief sought in those three numbered paragraphs.
5 So looking at the first order Mr. Gratl was
6 seeking, he asked for, "an automatic publication
7 ban preventing the publication of any information
8 tending to reveal identity of a vulnerable
9 witness". The term "vulnerable" was not defined.
10 So the question is, does it cover anyone who says
11 that they are vulnerable.

12 At the hearing today Mr. Gratl seemed to
13 indicate that the order would not be that broad
14 and, in fact, the terms would only cover sex
15 trade workers and victims of sexual assault. Ms.
16 Gervais then indicated that the order should also
17 apply to aboriginal women. Perhaps there should
18 be others. What about the police officer who
19 fears potential scorn from her neighbours if she
20 testifies live at this inquiry? She may feel
21 vulnerable, but some might argue that that's not
22 the sort of vulnerability that warrants a
23 publication ban or the right to give evidence
24 anonymously. What about the whistle blower?
25 What about a police officer who feels vulnerable

1 in his employment situation if he were to
2 criticize police management? Some might agree
3 that contrary to the police officer who is simply
4 worried about embarrassment, the whistle blower
5 police officer does deserve to be covered by this
6 order. The point is, it's difficult to craft a
7 one-size-fits-all solution.

8 Let's look at the second order that Mr.
9 Gratl was seeking. He asked for a protective
10 provision allowing a witness to provide the
11 commission by way of affidavit without the
12 potential for cross-examination. The order is
13 not limited to vulnerable witnesses. Again, it's
14 a very broad order that if granted would appear
15 to give an automatic right for any witness to
16 testify through affidavits that cannot be subject
17 to cross-examination, and many would probably
18 feel that such a provision would not be
19 appropriate for many of the witnesses. Indeed,
20 I'm sure few would agree that the police should
21 be given an automatic right to give evidence in
22 this way. Recognizing problems with this issue,
23 Mr. Gratl refined the order sought in his
24 subsequent letter of September 28th which I
25 believe is at tab -- which is right behind the

1 initial letter. If you just turn to page 2 of
2 that letter, Mr. Gratl refines the order by
3 saying while there should be a procedure
4 developed, "Affidavits of vulnerable persons" --
5 so now it is qualified, it's not just any person,
6 it's a "vulnerable" person -- "should be accepted
7 into evidence subject to the right of other
8 participants to apply to cross-examine on the
9 affidavit." Then, "To establish a right to
10 cross-examine on an affidavit of a vulnerable
11 person, an applicant must demonstrate that the
12 affidavit is contradicted by other admissible
13 evidence." And thirdly, "If the applicant
14 establishes a right to cross-examine a vulnerable
15 affiant, the affiant has the right to withdraw
16 the affidavit and forego cross-examination." Mr.
17 Gratl also refined his order two paragraphs later
18 where he says that affidavits not subject to
19 cross-examination should not be taken to support
20 findings of misconduct against individuals.
21 Again, the question is, is this enough or is it
22 too stringent? It probably depends on the
23 witness, it probably depends on the nature of
24 their evidence.

25 Finally, Mr. Gratl asked for a third order,

1 so I'm going back to the first letter Mr. Gratl
2 sent on September 20th, I'm going back to the
3 third paragraph, he wants a protection provision
4 for reception of affidavit evidence by anonymized
5 deponents. I understand Mr. Gratl has asked us
6 to park consideration of this aspect of the
7 order, perhaps out of a recognition that this too
8 may be too broad or insufficiently precise to
9 ensure adequate procedural fairness. I point
10 this out not to belittle the genuine efforts of
11 Mr. Gratl to try and craft a solution to this
12 issue, but it does illustrate the difficulty of
13 trying to impose a one-size-fits-all solution in
14 a factual vacuum. Instead we suggest what formal
15 order should be granted to ensure adequate
16 protection for witnesses should be dealt with if
17 and when the issue concretely arises.

18 At this point in time commission counsel
19 have not indicated that they intend to call any
20 witnesses who may be vulnerable, who may wish to
21 have their identity protected or who may wish to
22 give evidence anonymously. Similarly, at this
23 point in time commission counsel has not
24 indicated that they intend to tender any evidence
25 by way of affidavit. Should commission counsel

1 decide later to call vulnerable witnesses or to
2 tender affidavit evidence, then these issues can
3 and should be dealt with preferably on the basis
4 of consensus reached by participants and their
5 counsel. Furthermore, at this point in time, as
6 Mr. Ward pointed out, none of the participants
7 have brought a Section 44G application to call
8 their own witnesses and, indeed, according to the
9 rules, that cannot be done until after the
10 commission has finished calling all of its
11 witnesses, which of course is unlikely to occur
12 for quite sometime. We are confident that if and
13 when any of the participants bring such
14 application with respect to vulnerable witnesses,
15 again, counsel and their participants will be
16 reasonable in attempting to craft a consent order
17 that is tailored to the needs of the witness
18 while, if necessary, taking into account
19 questions of procedural fairness to others that
20 may be impacted by their testimony. To conclude,
21 Mr. Commissioner, we submit that this application
22 is simply premature. While we agree with the
23 sentiment in which it has been brought, we do not
24 think a one-size-fits-all approach would be
25 beneficial to the individual witnesses, to the

1 participants or to the commission. Instead, a
2 tailor-made approach should be used that fits the
3 specific witness and the specific evidence.

4 Mr. Commissioner, Mr. Gratl has brought a
5 formal application, and as Mr. Vertlieb pointed
6 out he's been very patient in waiting for today
7 to argue this application, and we submit that it
8 does warrant a formal order. We suggest in these
9 specific circumstances the application should be
10 dismissed but without prejudice to the right of
11 commission counsel, a participant or a witness to
12 make specific requests or orders protecting the
13 disclosure of information in the interests of
14 personal safety and security. Thank you, Mr.
15 Commissioner.

16 THE COMMISSIONER: Thank you. Mr. Crossin.

17 MR. CROSSIN: Yes, Crossin for the Vancouver Police Union. I
18 just have a short and much broader submissions to
19 you. It is my respectful submission to you that
20 there actually is fundamental common ground on
21 this issue on behalf of all the participants, and
22 that is this, that there likely will be
23 circumstances where it will be necessary to
24 create what has been referred to as a safe
25 environment in order for you to receive evidence

1 of certain witnesses. I think that proposition
2 that that likely will be something you are going
3 to have to deal with will arise in this case, and
4 you've heard the submissions and they're very
5 cogent submissions of Mr. Gratl and Ms. Gervais,
6 as to why that likely will be so. The issue it
7 seems to me is not the goal but the route and the
8 appropriate route to that assessment, and with
9 the greatest of respect to the contrary view, I
10 believe you should assess the need for
11 safeguards, and if needed, the nature and extent
12 of those safeguards as and when individual
13 circumstances come before you. I say this
14 because you in my submission require those
15 individual circumstances and perhaps submissions
16 on those circumstances in order to properly and
17 judicially exercise your discretion in this area.
18 You do have a broad discretion and certainly
19 given the nature of a public inquiry it can and
20 should be exercised in a purposeful and creative
21 way. You no doubt will do that. You may
22 ultimately, depending on the circumstances,
23 invoke none or some or all of Mr. Gratl's factors
24 that he has put before you. You may determine
25 depending on those circumstances that something

1 different is required in order to create that
2 safe environment, depending on the circumstances
3 before you. But I say to you with the greatest
4 of respect that you should -- and I don't say
5 necessarily must -- I say should only embark on
6 that exercise when invested with all relevant
7 circumstances as and when they are brought before
8 you. It is my submission that approach to the
9 exercise of discretion and the principle that it
10 is built upon is well known and well regarded and
11 well suited to this inquiry. The message that
12 the commission sends is that the commissioner is
13 prepared to accommodate the concerns, and you
14 will hear individual circumstances and you will
15 hear those circumstances armed with a broad
16 discretion to do the right thing depending on
17 those circumstances, but you will do so with due
18 regard to process. It's my submission to you
19 that it is that broad principle that you may find
20 helpful in assessing the more appropriate
21 approach to what I say is ultimately a common
22 goal.

23 I have just one final comment, and it's in
24 relation to the submission of Mr. Roberts that
25 you could find some comfort in the fact that the

1 Criminal Justice Branch took no position on the
2 application, and I think my friend suggested you
3 might find that helpful in dealing with this
4 issue, and I rarely, if ever, disagree with my
5 learned friend Mr. Roberts, but I do suggest
6 another perspective. Some find the phrase on an
7 application "taking no position" frankly as
8 distinctly unhelpful and it can be read as the
9 Criminal Justice Branch finding it unnecessary to
10 offer a view simply because they have no interest
11 in this application. Those are my submissions.

12 THE COMMISSIONER: Thank you.

13 MS. HATCHER: Mr. Commissioner, Claire Hatcher for Detective
14 Constable Fell. I rise very briefly just to
15 clarify a point Mr. Gratl referred to this
16 morning. He referred to correspondence from Mr.
17 Woodall opposing Mr. Gratl's application. I just
18 wish to clarify that we do not oppose the
19 application. In his correspondence Mr. Woodall
20 stated, "We take no position with one caveat,"
21 and that is the case-by-case caveat. To simply
22 reiterate what my friends have said, we
23 respectfully submit that it may well be
24 appropriate for some witnesses to tender their
25 evidence by affidavit and in some cases even

1 anonymously, but it ought not be a blanket rule
2 and I just wished to clarify that.

3 THE COMMISSIONER: Thank you.

4 MS. JUBA: Mr. Commissioner, it's Angela Juba, J-U-B-A, on
5 behalf of the Criminal Justice Branch. Earlier
6 today my friend Mr. Roberts handed you a copy of
7 a letter from Mr. Doust to Mr. Vertlieb. I trust
8 you have that with you.

9 THE COMMISSIONER: Yes.

10 MS. JUBA: The Criminal Justice Branch will be relying on its
11 written submissions with respect to Mr. Gratl's
12 application but I do want to make a few brief
13 points.

14 First, I would like to respond to my friend
15 Mr. Roberts' submissions this morning. Mr.
16 Crossin touched on them as well in his
17 submission. Mr. Roberts is quite right, that we
18 do not oppose Mr. Gratl's application, but it's
19 also true that we do not support the application.
20 We simply take no position and I want to make
21 that clear.

22 THE COMMISSIONER: I understand that.

23 MS. JUBA: I thought I would briefly outline our position in
24 the letter, I know you have it, but essentially
25 if you are to adopt the witness protection

1 protocols suggested by my friend Mr. Gratl we ask
2 that Ms. Anderson be excluded from their scope
3 and that if her evidence is to be received by the
4 commission that any questions concerning the
5 evidence be received on a case-by-case basis in
6 respect of her evidence, simply because of the
7 centrality of her evidence to the commission's
8 findings of fact pursuant to term of reference 4.

9 THE COMMISSIONER: I don't think there's any suggestion that
10 she would fit into the category of the relief
11 that being is sought here.

12 MS. JUBA: Excellent. I just wanted to make that point clear.
13 Thank you.

14 THE COMMISSIONER: Any other --

15 MR. GRATL: I think, Mr. Commissioner, Marlene --

16 THE COMMISSIONER: Yes.

17 MR. GRATL: -- Basil has a submission.

18 THE COMMISSIONER: Yes.

19 MS. BASIL: Good afternoon, Mr. Commissioner. My name is
20 Marlene Basil, M-A-R-L-E-N-E B-A-S-I-L. I'm a
21 Carrier First Nation. I just want to tell you
22 that I support his application to this inquiry.
23 I have, like, a few friends from the Downtown
24 Eastside, survivors.

25 THE COMMISSIONER: Yes.

1 MS. BASIL: They have approached me because of the very thing
2 that Mr. Gratl is trying to put across for
3 protection, and they have told me personally that
4 they are afraid to come and talk, to give their
5 testimony because of repercussions from the law
6 side of life. Thank you.

7 THE COMMISSIONER: Thank you for coming forward, Ms. Basil.

8 MS. BASIL: You're welcome.

9 MS. GERVAIS: Robin Gervais, independent counsel for
10 aboriginal interests. Just a quick point.

11 THE COMMISSIONER: All right.

12 MS. GERVAIS: In the arguments I've heard I'm not sure that
13 anybody is really taking into account the unique
14 role that Mr. Gratl and I are playing. It is
15 part of our mandate to bring proposed witnesses
16 to commission counsel. I know this is a unique
17 role and I don't know of any other commission
18 where this role has been fulfilled and I really
19 see this application and the ability to provide
20 affidavit evidence as a tool in that.

21 THE COMMISSIONER: Thank you, Ms. Gervais. Does commission
22 counsel -- Mr. Gratl, do you have anything
23 further?

24 MR. GRATL: I do, very briefly. Mr. Commissioner, I just want
25 to apologize briefly for my intemperate remarks

1 this morning. I didn't mean to interrupt you and
2 I let my compassions get carried away and I just
3 hope none of that would interfere with your
4 response to the application -- I know that is not
5 the case.

6 THE COMMISSIONER: Yes.

7 MR. GRATL: I also wanted to indicate overall that the reason
8 for the presumption that affidavit testimony can
9 be tendered would be to allow the commission to
10 be responsive to the need to encourage witnesses
11 to come forward. Without that presumption, my
12 work would be made much more difficult and to my
13 mind the fairness issues that my friends for the
14 police rightly raise can be dealt with at the
15 second step where they would have the right to
16 apply for leave to cross-examine any witnesses
17 about whom they have some doubt about -- about
18 whom there might be contradictions in the
19 evidence and in respect of whom there might be
20 fairness issues arising. Those fairness
21 considerations are not lost in the process that I
22 have proposed.

23 THE COMMISSIONER: So you concede that if the order is granted
24 in the general way that you seek the order to be
25 granted there should be a right to cross-examine?

1 MR. GRATL: There should be a right to apply to cross-examine.
2 It's not one-size-fits-all approach. It's a
3 presumption and then it can be tailored in
4 individual cases if there are reasons to cross-
5 examine. Those are my submissions.

6 THE COMMISSIONER: Thank you.

7 MR. ROBERTS: Mr. Commissioner, Darrell Roberts. I'm probably
8 violating protocols that people think are in
9 place here but this is not a courtroom, it's a
10 public inquiry and I've been asked to help out on
11 this inquiry so I'd like a brief word of reply.

12 THE COMMISSIONER: Yes.

13 MR. ROBERTS: With respect to the letter that I referred to
14 this morning of Mr. Leonard Doust, I never heard
15 so much made of my reference to that letter. I
16 think it speaks for itself, but my real point of
17 reply, Mr. Commissioner, is this, with the utmost
18 respect for those who have addressed submissions
19 against this application, it seems to me
20 respectfully that the difference between the two
21 positions, the position in the application which
22 I support, and the position of Mr. Dickson and
23 counsel for the Department of Justice and my good
24 friend Mr. Crossin, the difference is really very
25 slight. The application seeks to put in place

1 now the availability for certain kinds of
2 witnesses, very restricted. The opportunity to
3 give evidence by affidavit and undo it later if
4 the circumstances as they may appeal to you, sir,
5 may demand it. The opposition parties say oh,
6 no, we do agree that there should be the
7 opportunity later when individuals come forward
8 to put in place this special way of providing
9 evidence. I submit with the --

10 THE COMMISSIONER: You're going to say unless there are rules
11 ahead of time there won't be anybody coming
12 forward?

13 MR. ROBERTS: That's right. That slight difference is this
14 significant. There won't be people coming
15 forward, or most unlikely. Those who may seek to
16 come forward need some encouragement, and I am
17 reminded of an old maxim that you and I and all
18 of us grew up with, "justice must not only be
19 done must shall manifestly appear to be done."
20 How does that apply to a commission of inquiry?
21 In my submission it's essential for this inquiry
22 to be open and appear to be open and be inclusive
23 in every respect to encourage people to come
24 forward, and that applies in this way, that an
25 order along the lines that is sought by Mr. Gratl

1 which I support is in favour of justice having
2 the appearance of being done on this commission
3 of inquiry, and in my submission that favours,
4 Mr. Commissioner, you making the order that is
5 sought in his application.

6 THE COMMISSIONER: Thank you, Mr. Roberts. Do commission
7 counsel have any position?

8 MR. VERTLIEB: I think it's been well canvassed by everyone
9 here and you have the issues. There is nothing I
10 can add to assist you.

11 THE COMMISSIONER: Thank you. I don't know if we have any
12 real rules here but is there anybody else that
13 wants to say anything else? We've let people pop
14 up whenever they want. All right.

15 I'm indebted for all of your submissions,
16 and particularly you, Ms. Basil, for you coming
17 forward. I appreciate your input. I'll give my
18 reasons, my decision, tomorrow morning at ten
19 o'clock.

20 THE REGISTRAR: This hearing is now adjourned until ten
21 o'clock tomorrow morning.

22 (PROCEEDINGS ADJOURNED AT 2:28 P.M.)

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