

COMMISSION OF INQUIRY INTO THE SPONSORSHIP PROGRAM AND ADVERTISING ACTIVITIES

NOTICE OF MOTION

TAKE NOTICE THAT the Right Honourable Jean Chrétien will make a motion to the Commissioner on a date to be fixed by the Commission at Complex Guy-Favreau, Montréal, Québec.

THE MOTION IS FOR:

- (a) an Order that Commission Counsel make public submissions with respect to the factual findings which could be supported on the evidentiary record before the Commission; and
- (b) an Order that Commission Counsel not provide advice to the Commission, other than in public, in respect of the report on Phase I of the Inquiry.

THE GROUNDS FOR THE MOTION ARE AS FOLLOWS:

1. Procedural fairness requires that parties before the Commission of Inquiry receive notice of allegations which may be made against them.
2. If Commission Counsel make private submissions to the Commissioner in respect of findings which could be made based upon the evidence which has been led, Mr. Chrétien will be deprived of notice.
3. Commission Counsel have been privy to a significant amount of evidence which has not been disclosed to the parties and/or which has not been tested (including documents and "will-say statements") which the Commissioner has not seen.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

- (a) the Affidavit of Jean-Sébastien Gallant; and
- (b) such further and other evidence as to the Commission may seem just.

DATE: May 26, 2005

BORDEN LADNER GERVAIS LLP
Barristers and Solicitors
1100 - 100 Queen Street
Ottawa ON K1P 1J9

David W. Scott
Peter K. Doody
(613) 237-5160 telephone
(613) 230-8842 facsimile

Solicitors for the Rt. Hon. Jean Chrétien

TO: COMMISSION OF INQUIRY INTO THE
SPONSORSHIP PROGRAM AND
ADVERTISING ACTIVITIES
Guy-Favreau Complex
200 René-Lévesque Blvd. West
East Tower, PO Box 608
Montréal QC H2Z 1X4

Bernard Roy, Commission Counsel
Neil Finkelstein, Co-Counsel
Guy Cournoyer, Co-Counsel

AND TO: All other Parties to the Inquiry

**COMMISSION OF INQUIRY
INTO THE SPONSORSHIP
PROGRAM AND ADVERTISING
ACTIVITIES**

NOTICE OF MOTION

BORDEN LADNER GERVAIS LLP
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David W. Scott
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Solicitors for the Right Honourable
Jean Chrétien

(PKD/js/313730-000002)

COMMISSION OF INQUIRY INTO THE SPONSORSHIP PROGRAM AND ADVERTISING ACTIVITIES

AFFIDAVIT OF JEAN-SÉBASTIEN GALLANT [Sworn May 26, 2005]

I, Jean-Sébastien Gallant, of the City of Ottawa, in the Province of Ontario, Lawyer, SWEAR THAT:

1. I am a barrister and solicitor, engaged in the practice of law with the firm of Borden Ladner Gervais LLP. I am one of the lawyers from this firm representing the Right Honourable Jean Chrétien before this Commission. As a result, I know that the matters hereinafter sworn to are true. Where I testify as to matters in which I have no personal knowledge, I will so state and will provide the basis for my belief.

2. On May 12, 2005, Mr. David W. Scott, one of Mr. Chrétien's lawyers, received a letter from M^e Bernard Roy, Lead Commission Counsel. The last paragraph of that letter reads:

Finally, your partner, Peter Doody asked Guy Cournoyer what role was envisaged to be taken by Commission Counsel after completion of the hearing stage of the Commission's mandate. The issue of the role of Commission Counsel, at the post-hearing stage, was raised by Mr. Justice Cory, at page 21, of the previously cited case of the Commission of Inquiry of the Blood System. Mr. Justice R. Decary, of the Appeal Division of the Federal Court, provided some useful and practical guidelines in *Canada (Attorney General) v. Canada (Commission of Inquiry of the Blood System)*, 151 D.L.R. (4th), paragraph 103, at page 31. Commission Counsel's involvement will be consistent with the principles and guidelines enunciated by Justices Decary and Cory.

3. On May 13, 2005, Mr. Scott received a second letter from M^e Roy, correcting the citation in the letter of May 12, 2005 and stating that that citation should have read

"Canada (Attorney General) v. Canada (Commission of Inquiry of the Blood System) (C.A.), [1997] 2 F.C. 36, par. 102, at page 80".

4. On May 13, 2005, Mr. Peter Doody, one of the lawyers representing Mr. Chrétien, wrote to M^e Roy. A copy of that letter is attached hereto as **Exhibit "A"** to this affidavit. In that letter, Mr. Doody wrote:

In paragraph 72 of the Supreme Court of Canada decision, Mr. Justice Cory stated that a Commissioner should not seek advice regarding the report from counsel who had seen evidence which was undisclosed to and untested by all the parties granted standing before a Commission of Inquiry.

As you know, Commission counsel has seen much evidence which has not been disclosed to the parties, and has not been available for cross-examination.

Your letter was not entirely clear. Please provide me with a clear answer to the question of whether Commission counsel will be providing advice to the Commissioner in respect of, or assisting the Commissioner with, the writing of his report.

5. On May 16, 2005, M^e Roy responded to Mr. Doody's letter. A copy of his letter of that date is attached hereto as **Exhibit "B"** to this affidavit. M^e Roy wrote:

Given the nature of the public inquiry, the commissioner may deem it appropriate to seek the assistance of his Counsel on questions and issues of fact and law. To the extent that the conclusions he will draw in his report will be his, and his alone, nothing precludes him from calling on his Counsel to participate in this process.

In so far as your concern that because Commission Counsel have access to evidence which was not disclosed to the parties and remains untested, they should be disqualified from participating in the post-hearing process, you should know that only relevant documentary evidence filed in the Commission's record will be considered and dealt with by the Commissioner in his report.

6. Prior to the Commission commencing its public hearings, copies of documentation which had been provided to the Commission by the Government of Canada and Crown corporations were provided to all parties with standing on computer readable disks. Updates were provided after the commencement of the public hearings.

7. On September 9, 2004, the Commissioner stated, during the hearings:

... the Commission has had to take cognizance in one way or another of something like 10 million pieces of paper.

I am not a computer and I cannot take cognizance of 10 million pieces of paper. I am going to take cognizance of what is put before me in the form of evidence, but in order to avoid criticism because there was not full disclosure, a great deal of the 10 million pieces of paper has been disclosed to everybody who had standing as a participant here so that they know, frankly, so they can't complain that something was kept from them.

But it is for those people to decide if in addition to what Commission Counsel puts before me, which is going to be a whole lot less than 10 million pieces of paper, if they want to put additional documents before me. As long as those documents are material and relevant, I will take cognizance of them as well.

So don't assume that everything that you have received in electronic form is part of the evidence that I am going to take into consideration in this matter.

Attached hereto as **Exhibit "C"** to this my affidavit is a copy of pages 425 to 430 of the Volume 3 of the transcript, which includes those statements.

8. On September 22, 2004, the Commissioner stated, during the course of the hearings:

No, there is a vast amount of material which has been supplied by the Government of Canada, including Public Works, to the Commission. The Commission has communicated what it thought was relevant to the other parties and some of that information has been produced before me.

I am very grateful, but I am not expected to go through what has been estimated to be 10 million pieces of paper.

...

So there has been a filtering process that has taken place, but I take it for granted that there may be some minutes that Mr. Hunter would like to see that have not yet been produced before me.

A copy of pages 1551 to 1553 of Volume 10 of the transcript, which contains those remarks, is attached hereto as **Exhibit "D"** to this my affidavit.

9. On November 29, 2004, Messrs. Scott and Doody, wrote to Mr. Neil Finkelstein, co-Commission Counsel. A copy of their letter of that date is attached hereto as **Exhibit "E"** to this affidavit. They wrote, among other things:

We understand that the Commission caused a subpoena to be served on the RCMP, seeking the production of documents arising out of the investigations, including the investigations which have resulted in charges. Documents were produced in accordance with that subpoena. We have not yet been provided with access to any such documents.

10. On December 1, 2004, this firm received a reply to that letter from Mr. Finkelstein. He wrote, among other things:

Fourth, you have asked for production of documents obtained from the R.C.M.P. There has been voluminous production already, and production will continue. However, there is no undertaking to provide you, now or later, with any or all specific material received from the R.C.M.P. or any agreement with the R.C.M.P. or any agreement with the R.C.M.P.

11. On May 3, 2005, Mr. Doody asked the Commissioner to direct his counsel to provide to the parties to the Commission of Inquiry the evidence underlying the criminal charges being faced by Mr. Guité. The Commissioner ruled that he would not order Commission Counsel to do that, stating:

In my view, the decisions that they took last November were well founded and I support them and I am not going to contradict them today for the reasons that are invoked by Mr. Doody.

Attached hereto as **Exhibit "F"** to this affidavit is a copy of pages 20276 to 20284 of Volume 111 of the transcript of proceedings on May 3, 2005, which sets out Mr. Doody's request and the Commissioner's ruling.

12. Attached hereto as **Exhibit "G"** to this affidavit is a copy of the Rules of Practice and Procedure of the Commission. Rule 39 provides that counsel to parties and witnesses will be provided with copies of, among other things, will-say statements, upon giving a written undertaking that they will be used solely for the purpose of the Inquiry and subject to confidentiality obligations. Rule 40 provides that, unless otherwise ordered by the Commissioner, a will-say statement may not be used for the purpose of examination or cross-examination of a witness, or be made part of the hearing record.

13. Will-say statements prepared by Commission Counsel have been provided to counsel for the parties in all cases other than where "panels" of witnesses testified from government departments or agencies.

14. On February 28, 2005, the Commissioner stated, after being asked to read a will-say statement:

Mais avant d'aller plus loin, je demanderais à Me Roy s'il s'objecte à ce que je prenne connaissance du will say. Quant à moi, c'était une pratique que nous avons suivie à la lettre de ne pas en prendre connaissance parce que je dois prendre connaissance de la preuve lorsqu'elle déroule devant nous et j'ai une certaine réticence d'empoisonner l'esprit avec une information qui n'est pas vérifiée par un serment.

and in the unofficial English translation:

Before we go any further, I would ask Mr. Roy if he has any objections to my reading the will-say. As far as I'm concerned, not reading will-says is a practice that we have followed to the letter, because I have to read the evidence as it's presented to us and I'm a little reluctant to poison my mind with information that hasn't been given under oath.

Attached hereto as **Exhibit "H"** to this my affidavit is a copy of page 12864 of Volume 74 in the original language, and 12863 of Volume 74 in the version in which the French language has been translated to English.

15. Our client was served with a subpoena requiring him to produce documents relevant to the matters being investigated by the Commission of Inquiry. A large number of documents were produced pursuant to that subpoena. A group of those documents was produced by Commission Counsel to other parties and filed as evidence before the Commission. The documents which we had produced, pursuant to the subpoena, and were not selected by Commission Counsel to be introduced into evidence, were not disclosed to the other parties.

16. I believe that other parties and witnesses also received subpoenas and produced documents to the Commission in answer to the subpoena. A large number of documents have been introduced into evidence by Commission Counsel which were received from parties and witnesses other than the Government of Canada and Crown corporations.

17. To my knowledge, we have not been provided with any documents from non-government parties other than those which have been entered into evidence.

18. The Report of Kroll, Lindquist, Avey dated May 18, 2005, and introduced into evidence on May 24, 2005, as Exhibit P-428(a), states that the subpoenas and "call letters" issued by the Commission of Inquiry to government departments and other persons resulted in approximately 28,872,000 pages of documents being produced, of which 480,789 were disclosed to parties with standing. A copy of pages 4 and 5 of that report is attached as **Exhibit "I"** to this affidavit.

19. On March 16, 2005, M^e Cournoyer stated that Commission Counsel met "many people in addition to the witnesses". Attached hereto as **Exhibit "J"** is a copy of pages 14965 and 14966 in the Original Language, and pages 14960 and 14961 in the English Translation, of Volume 84 of the transcript of the proceedings.

20. On May 25, 2005, Steven Whitla from Kroll, Lindquist, Avey stated that one of the Commission Counsel, Marie Cossette, met with a trustee in bankruptcy. Attached hereto as **Exhibit "K"** is a copy of pages 23766 and 23767 of Volume 126 of the transcript of the proceedings.

21. To my knowledge, we have not been provided with any documents or reports about meetings that Commission Counsel had with people that were not called as witnesses.

22. As a result of all of these facts, I believe that Commission Counsel have reviewed documents which have not been disclosed to all parties. In addition, they interviewed persons who were not called as witnesses. Finally, they have interviewed witnesses in the production of the will-say statements and thereby become privy to evidence which has not been tested in cross-examination.

23. On May 9, 2005, Associate Commission Counsel, M^e Guy Cournoyer, advised that Commission Counsel would not be making any submission concerning the evidence that has been heard by the Commission. Attached hereto as **Exhibit "L"** is a copy of pages 21153 and 21154 of the transcript of the proceedings, Volume 115, in both the original languages and in the English translation.

Sworn before me at the)
City of Ottawa, in the)
Province of Ontario)
this 26th day of May, 2005)

Jane Hoell)
A Commissioner etc.)



Jean-Sébastien Gallant

LG-OTT-214090701
WONA ALBRECHT, a
Commissioner, etc., Province of Ontario,
while a Student-at-Law.
Expires October 7, 2007.

This is Exhibit "A" to the
Affidavit of Jean-Sébastien Gallant
sworn this 26th day of May 2005.

Irene Noel

.....
A Commissioner for Taking Affidavits, etc.

**IWONA ALBRECHT, a
Commissioner, etc., Province of Ontario,
while a Student-at-Law.
Expires October 7, 2007.**



BORDEN
LADNER
GERVAIS

By Facsimile

May 13, 2005

Mr. Bernard Roy
Commission Counsel
Commission of Inquiry into the Sponsorship Program
and Advertising Activities
Guy-Favreau Complex
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11
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Dear Mr. Roy

Gomery Commission -- Phase IB
Our File: 313730-000002

I am writing in response to your letter to my partner David Scott of yesterday.

In the last paragraph of that letter, you state that the involvement of Commission counsel after completion of the hearing stage will “be consistent with the principles and guidelines enunciated by Justices Decary and Cory” in certain specified sections of the decision of the Federal Court of Appeal and the Supreme Court of Canada, respectively, in *Canada (Attorney General) v. Canada (Commission of Inquiry of the Blood System)*.

In paragraph 72 of the Supreme Court of Canada decision, Mr. Justice Cory stated that a Commissioner should not seek advice regarding the report from counsel who had seen evidence which was undisclosed to and untested by all the parties granted standing before a Commission of Inquiry.

As you know, Commission counsel has seen much evidence which has not been disclosed to the parties, and has not been available for cross-examination.

Your letter was not entirely clear. Please provide me with a clear answer to the question of whether Commission counsel will be providing advice to the Commissioner in respect of, or assisting the Commissioner with, the writing of his report.

Please provide me with this information as soon as possible.

Yours very truly

Peter K. Doody

PKD/ac

WATERLOO REGION
•
VANCOUVER
•
TORONTO
•
OTTAWA
•
MONTREAL
•
CALGARY

This is **Exhibit "B"** to the
Affidavit of Jean-Sébastien Gallant
sworn this 26th day of May 2005.

Irene Howell

.....
A Commissioner for Taking Affidavits, etc.

IWONA ALBRECHT, a
Commissioner, etc., Province of Ontario,
while a Student-at-Law.
Expires October 7, 2007.

Commission d'enquête sur le programme de commandites et les activités publicitaires



Commission of Inquiry into the Sponsorship Program and Advertising Activities

Montreal, May 16, 2005

SENT BY FAX

Mr. Peter K. Doody
Borden Ladner Gervais
World Exchange Plaza
100 Queen Street, Suite 1100
Ottawa, Ontario K1P 1J9

Dear Mr. Doody:

Re: Gomery Commission – Phase 1B
Your file: 313730-000002

In answer to your letter of May 13, 2005, I wish to advise as follows. I believe that my letter of May 12, 2005 to David Scott was fairly precise in answering the query about the role which Commission Counsel are expected to play in the post-hearing phase, as aptly put by Mr. Justice Decary in *Canada (Attorney General) v. Canada (Commission of Inquiry of the Blood System, (C.A.))*, [1997] 2 F.C. 36, at page 80.

Given the nature of the public inquiry, the commissioner may deem it appropriate to seek the assistance of his Counsel on questions and issues of fact and law. To the extent that the conclusions which he will draw in his report will be his, and his alone, nothing precludes him from calling on his Counsel to participate in this process.

In so far as your concern that because Commission Counsel have access to evidence which was not disclosed to the parties and remains untested, they should be disqualified from participating in the post-hearing process, you should know that only relevant documentary evidence filed in the Commission's record will be considered and dealt with by the Commissioner in his report.

Yours truly,

Bernard A. Roy
Lead Commission Counsel

BAR/jl

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P.O. Box 608, Montreal, Quebec
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This is **Exhibit "C"** to the
Affidavit of Jean-Sébastien Gallant
sworn this ^{26th} day of May 2005.

Irene Macell

.....
A Commissioner for Taking Affidavits, etc.

IWONA ALBRECHT, a
Commissioner, etc., Province of Ontario,
while a Student-at-Law.
Expires October 7, 2007.

**Commission of Inquiry into
the Sponsorship Program
and Advertising Activities**



**Commission d'enquête sur le
programme de commandites
et les activités publicitaires**

Public hearing

Audience publique

Commissioner

The Honourable Justice /
L'honorable juge
John H. Gomery

Commissaire

VOLUME 3

Held at :

Old City Hall
Victoria room
111 Sussex Drive
Ottawa, Ontario
K1N 1J1

Thursday, September 9, 2004

Tenue à:

Ancien hôtel de ville
Salle Victoria
111, promenade Sussex
Ottawa, Ontario
K1N 1J1

Jeudi, le 9 septembre 2004

1 **THE COMMISSIONER:** That is it, but what is
2 on CD, as you know, is a vast amount of information. We even
3 had complaints that it was too much.

4 **MR. FINKELSTEIN:** Sir, I think what
5 happened is that it was disclosed on CD because we have made
6 voluminous disclosure, but the Auditor General decided that
7 that wasn't sufficiently material to include in her material.

8 I should say that our Rule 41 -- I don't
9 want to single out Mr. Fournier. In other cross-examinations
10 we have had there has been this issue as well. Our Rule 41
11 provides for advanced disclosure of documents that are going
12 to be referred to in cross-examination, and I would say this
13 for future cross-examinations, that if people intend to refer
14 to documents, they should comply with Rule 41 so that we can
15 make sure that we have those documents available when they are
16 to be considered by the witnesses.

17 **THE COMMISSIONER:** I think the rule is 43,
18 actually. It says:

19 "Parties shall, at the earliest
20 opportunity, notify Commission
21 Counsel of any documents or evidence
22 that they intend to file as exhibits
23 or otherwise refer to during the
24 hearings and, in any event, shall
25 notify Commission Counsel of such

1 documents or evidence no later than
2 the day before it is intended to be
3 referred to or filed."

4 But this is the first time this has come
5 up and we are not going to be standing on an absolutely strict
6 adherence to these Rules this time, but this document is not
7 part of the evidence that the Commission Counsel intended to
8 file, and if you intend to refer to it, it was really
9 incumbent on you, Me Fournier, to give notice and then the
10 exercise could have been done to make copies available to us.

11 **MR. FINKELSTEIN:** Commissioner, if I may,
12 just to be clear -- and I want to be very clear about this --
13 I am not criticising Mr. Fournier at all. I was making a
14 general statement.

15 **THE COMMISSIONER:** But I think it is a
16 useful thing. We are at a fairly early stage in our hearings,
17 and this could serve sort of as notice to people that in the
18 future, if you intend to refer in cross-examination, for
19 example, of documents that are not already deposited in
20 evidence, that you should prepare yourself and give notice to
21 Commission Counsel so that they can prepare themselves as
22 well.

23 Now, let us talk about this VFM Manual.
24 Is it a voluminous document?

25 **Me FOURNIER:** Well, I have the electronic

1 version. It is not a terribly large document, but it is
2 voluminous. I would imagine on paper it is at least a half-
3 inch document or an inch.

4 **THE COMMISSIONER:** I am sure that you
5 intend, in your cross-examination, to refer to certain
6 sections, not necessarily the whole manual.

7 **Me FOURNIER:** Yes.

8 **THE COMMISSIONER:** And I am not sure it is
9 going to be useful for me, after all, to read the whole manual
10 because I am not -- I don't see it -- but certainly, what you
11 could do, since you have it on your computer, you can plug
12 your computer into a printer somewhere here and print out the
13 pages that contain the sections that you want to refer to ---

14 **Me FOURNIER:** Yes.

15 **THE COMMISSIONER:** --- and that will
16 permit everybody here to see what it is you are referring to,
17 including the witnesses and other interested parties. That is
18 the way ---

19 **Me FOURNIER:** That is one way.

20 I was going to suggest perhaps a faster
21 way, but I am not sure how much the Auditor General will agree
22 with this method. I can put sections to her verbally ---

23 **THE COMMISSIONER:** I am sure she has it
24 committed to memory.

25 **Me FOURNIER:** It may be unfair to her to

1 proceed in this fashion. She may prefer to see it on paper.

2 **THE COMMISSIONER:** Why don't you proceed
3 and we will see if she has a difficulty, and if she does, then
4 we will deal with it in my suggested way.

5 Go ahead.

6 **Me FOURNIER:** I would just like to add one
7 thing, though, sir, and this bothers me for the rest of the
8 hearings of this Commission.

9 We were provided these documents in
10 advance on CDs, and they, as I say, indicate that this is part
11 of the Evidence Memorandum. We did not receive advice that
12 the written documents which we received much later -- we only
13 received them last week, if I am not mistaken -- were any
14 different from the ones that had been disclosed to us on CD.

15 So it is very difficult for us to assume
16 that we need to advise the Commission Counsel that we will
17 refer to this document when it is indicated to us that it will
18 be part of the Evidence Memorandum of the Auditor General.

19 **MR. FINKELSTEIN:** Well, perhaps I can
20 clarify this. I don't think counsel should assume at all that
21 because they were provided with something on CD, that that
22 would be part of the particular hardcopy materials that we are
23 producing to any witness or that that material, voluminous as
24 it is, is going to be before the Court.

25 Counsel should take it upon themselves to

1 look at what they are served in advance not only on CD but in
2 hardcopy.

3 **THE COMMISSIONER:** And I will add to that,
4 Me Fournier, by saying that you have seen probably in the
5 press reports that the Commission has had to take cognizance
6 in one way or another of something like 10 million pieces of
7 paper.

8 I am not a computer and I cannot take
9 cognizance of 10 million pieces of paper. I am going to take
10 cognizance of what is put before me in the form of evidence,
11 but in order to avoid criticism because there was not full
12 disclosure, a great deal of the 10 million pieces of paper has
13 been disclosed to everybody who had standing as a participant
14 here so that they know, frankly, so they can't complain that
15 something was kept from them.

16 But it is for those people to decide if in
17 addition to what Commission Counsel puts before me, which is
18 going to be a whole lot less than 10 million pieces of paper,
19 if they want to put additional documents before me. As long
20 as those documents are material and relevant, I will take
21 cognizance of them as well.

22 So don't assume that everything that you
23 have received in electronic form is part of the evidence that
24 I am going to take into consideration in this matter.

25 **Me FOURNIER:** I did not assume that, sir.

1 What I assumed was that the Evidence Memorandum of the Auditor
2 General, this is part of the -- was in the contents. There is
3 an Office of the Auditor General and then Evidence Memorandum.
4 It was part of it, so I assumed it was part of the package.

5 **THE COMMISSIONER:** Are you saying that the
6 VFM Manual was specifically referred to?

7 **Me FOURNIER:** Yes, sir.

8 **MR. FINKELSTEIN:** No, sir. What was
9 disclosed on disk were will-says and so on. What was
10 distributed last week was the Statement of Evidence, which is
11 different, and a book, you know it is Exhibit 2(a), of
12 documents which may or may not have been different which, it
13 turns out, is different because the Auditor General considered
14 certain documents were material.

15 So I repeat, if we serve parties with hard
16 copies of material which we say are going to be produced in
17 evidence, those are different from the will-say statements and
18 whatever accompanies those will-say statements, and it is
19 incumbent on counsel to check.

20 **THE COMMISSIONER:** In any event, let us
21 proceed in the method that you proposed and perhaps we won't
22 have a problem.

23 **Me FOURNIER:** Now, I will read a paragraph
24 to you and tell me if ---

25 **MS. FRASER:** We will try that.

This is **Exhibit "D"** to the
Affidavit of Jean-Sébastien Gallant
sworn this ^{26th} day of May 2005.

Jane Kocub

.....
A Commissioner for Taking Affidavits, etc.

IWONA ALBRECHT, a
Commissioner, etc., Province of Ontario,
while a Student-at-Law.
Expires October 7, 2007.

**Commission of Inquiry into
the Sponsorship Program
and Advertising Activities**



**Commission d'enquête sur le
programme de commandites
et les activités publicitaires**

Public hearing

Audience publique

Commissioner

The Honourable Justice /
L'honorable juge
John H. Gomery

Commissaire

VOLUME 10

Held at :

Old City Hall
Victoria room
111 Sussex Drive
Ottawa, Ontario
K1N 1J1

Tenue à:

Ancien hôtel de ville
Salle Victoria
111, promenade Sussex
Ottawa, Ontario
K1N 1J1

Wednesday, September 22, 2004

Mercredi, le 22 septembre 2004

REVISED/RÉVISÉE

1 relevance that I would put on my request.

2 **THE COMMISSIONER:** I think that is accepted as
3 something that anytime the word sponsorship or advertising comes
4 up in the Audit Review Committee minutes, those minutes should be
5 made available to you. Okay?

6 **Me LUSSIER:** Mr. Marshall?

7 **THE COMMISSIONER:** Is that a problem for you, Mr.
8 Marshall?

9 **MR. MARSHALL:** No, it is not a problem, Commissioner.
10 I just had received a note that all the minutes of audits
11 relating to sponsorship and advertising have been given to the
12 Commission through the IRC, which I reckon is some sort of
13 record. I don't know whether that is synonymous with saying they
14 have been introduced as exhibits but the information is ---

15 **THE COMMISSIONER:** No, there is a vast amount of
16 material which has been supplied by the Government of Canada,
17 including Public Works, to the Commission. The Commission has
18 communicated what it thought was relevant to the other parties
19 and some of that information has been produced before me.

20 I am very grateful, but I am not expected to go
21 through what has been estimated to be 10 million pieces of
22 paper.

23 **MR. MARSHALL:** Right.

24 **THE COMMISSIONER:** So there has been a filtering
25 process that has taken place, but I take it for granted that

1 there may be some minutes that Mr. Hunter would like to see that
2 have not yet been produced before me.

3 **MR. MARSHALL:** Okay.

4 **THE COMMISSIONER:** Those will be located either by
5 Commission counsel or by Mr. Lussier, or maybe the two of them
6 working together to make them available.

7 **MR. FINKELSTEIN:** Sir, I take the point that you just
8 made at the outset, which is we have had voluminous documents
9 given to us. We have tried our best to go through them. And I
10 must say I hear very often the answer "Well, we gave it to you",
11 and that is not always good enough for two reasons. First of
12 all, we gave you 10 million documents. It doesn't help us find
13 the three we are looking for, number one, and number two, we may
14 be two ships passing in the night. What is often necessary is
15 that Public Works say "These are the three documents that we
16 meant. They are authentic. They mean what they say. And this
17 is what we are relying on". So I agree that those particular
18 minutes in this case should be specifically produced by Public
19 Works in response to Mr. Hunter's request.

20 **THE COMMISSIONER:** Well, I do think it might be faster
21 and easier, and after all, that is a legitimate objective, fast
22 and easy, for Public Works, even if they had previously produced
23 these minutes or may have furnished them, to locate them again
24 and make them available to Mr. Hunter.

25 So we will ask you if you would make that as an

1 undertaking.

2 **MR. MARSHALL:** We will do that, Mr. Commissioner. And
3 I am sorry I have created this diversion. We will do that.

4 **Me LUSSIER:** I am informed, Mr. Commissioner, by Mr.
5 Avey that he has them with him.

6 **THE COMMISSIONER:** Well, the production may be done
7 very rapidly.

8 **Me LUSSIER:** We will strip search Mr. Avey now.

9 **(LAUGHTER/RIRES)**

10 **MR. FINKELSTEIN:** T.V cameras should be refocused.

11 **(LAUGHTER/RIRES)**

12 **MR. HUNTER:** I am tempted to stop this search at this
13 point with that prospect.

14 **(LAUGHTER/RIRES)**

15 **MR. HUNTER:** Sir, I understand that the Audit Review
16 Branch would, of course, have records dealing with their
17 treatment of audits. Has a review been done of their records
18 insofar as what may be relevant to this Commission of Inquiry?

19 **MR. MARSHALL:** Yes, it has been done.

20 **MR. HUNTER:** And have all of those documents been
21 produced to the Commission?

22 **MR. MARSHALL:** Yes, in the sense we have just
23 discussed, they have all been made available. If there are any
24 specific ones, we will endeavour to ---

25 **MR. HUNTER:** Is there an index of the Audit Review

This is Exhibit "E" to the
Affidavit of Jean-Sébastien Gallant
sworn this 26th day of May 2005.

Irene Kocik

.....
A Commissioner for Taking Affidavits, etc.

IWONA ALBRECHT, a
Commissioner, etc., Province of Ontario,
while a Student-at-Law.
Expires October 7, 2007.

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BORDEN
 LADNER
 GERVAIS

By Facsimile and by Mail

November 29, 2004

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Mr. Neil Finkelstein
 Co-Commission Counsel
 Commission of Inquiry into the Sponsorship Program
 and Advertising Activities
 63 Sparks Street, 5th Floor
 Ottawa ON K1P 5A6

Dear Mr. Finkelstein

The Right Honourable Jean Chrétien
Our File: 313730-000002

We are writing to you because we are extremely concerned that the Commission is not fulfilling its obligations to investigate fully the matters set out in its mandate, and that, as a result, the parties to the Commission of Inquiry, including our client, will be prejudiced. Our concerns in this regard were heightened by the remarks of the Commissioner on November 22 in response to the issue raised by Mr. Fournier with respect to cross-examining Mr. Guité on matters relating to his outstanding criminal charges. It seems clear, as a result of those remarks and earlier remarks by Commission Counsel, that this Commission of Inquiry will not be examining any such evidence.

You will recall that, on November 22, the Commissioner made the following remarks during submissions by Messrs. Auger, Doody and Fournier on these issues:

- Mr. Auger, I am going to do what is referred to in certain quarters as a somewhat pre-emptive strike here, because I have had a look during the lunch hour at the criminal charges which your client is facing, and I have serious doubts in my mind whether any questions concerning those charges would be relevant to the matters which I am charged to look into. [page 6348, line 15 to line 21]
- So I thought I would tell you on the assumption that lawyers like to know what the presiding Commissioner is thinking. I am thinking that we may avoid the question of the agreement between counsel for the Commission and counsel for the Crown prosecutor and simply decide any questions

concerning these particular contracts on the question of relevance.
[page 6350, line 11 to line 16]

- And I am going to suggest to you, with respect, that the charges have more to do with public opinion research contracts, which are outside the scope of my mandate, than advertising and sponsorship contracts.
[page 6357, line 14 to line 17]
- I have a duty to investigate the matters which are the subject of my mandate, and I don't think that the Groupaction contracts, which were the subject of her 2002 report, are matters which fall within the scope of my mandate. [page 6364, line 14 to line 17]
- We may not have to deal with them at all, because as I say, it appears to me, with the benefit of having re-examined the charges that Mr. Guité is facing, that I think we can deal with most of these questions and maybe all of them on the grounds of relevance and not relying on section K of the mandate. [page 6377, line 12 to line 17]

It appears to us that, in making these comments, the Commissioner must have been proceeding without a clear knowledge of the facts underlying these contracts. That is not surprising, since very little evidence in respect of these contracts has been led to date.

As Mr. Doody pointed out in his written submissions and orally on November 22, there is ample evidence upon which to conclude that the matters in issue in the criminal charges, arising out of the contracts identified in the indictment against Mr. Guité and Mr. Brault, overlap significantly with the issues before this Commission. Mr. Edelson, Mr. Guité's lawyer, has sworn on oath that, having reviewed the disclosure delivered by the Crown Attorney in respect of the indictment, the criminal allegations are "inextricably linked" to the issues identified by the Auditor General in both the 2002 and 2003 reports. The RCMP has stated, in a press release issued at the time Mr. Guité and Mr. Brault were charged, that the charges were laid "within the scope of a far-reaching investigation of irregularities in the Government of Canada Sponsorship Program and deal with more specifically with three contracts related to the Visibility Program of the Government of Canada".

The indictment refers to five separate contracts: EN771-6-0065/01-ACA, EN771-8-0024/01-ZCA, EP043-9-0145/01-ZCA, EN771-6-0176/01-ZCA, and EN771-7-036-ZCA.

The documents disclosed to us by the Commission include the actual contract documents for three of those, and documentation describing one of the others.

Contract EN771-6-0065/01-ACA, dated July 2, 1996, is in the database at Bates numbers 7046828 through 7047363. The scope of work is described as:

To provide the services of the most senior personnel within Groupaction Marketing Inc. in providing the necessary research; background development; market analysis; strategic plan development; liaison; ongoing regional, provincial and local contact; concept development; strategic alliance negotiations and

execution; for Québec and all maritime provinces, strategic visibility program for the federal government.

The contract documents for contract EN771-8-0024/01-ZCA, dated April 1, 1998, is found at Bates numbers 7047596 through 7047603. The "Énoncé de travail" of that contract is as follows:

L'entrepreneur devra préparer une analyse d'opportunités reliées au programme de visibilité pour le Gouvernement du Canada dans le cadre d'activités aussi bien culturelles que sportives n'excluant pas les sports motorisés et effectuer une recherche qualitative sur des cibles importantes en matière de communication.

Le tout dans le but de recommander des programmes de commandite reliés à des programmes du Gouvernement du Canada ou à des Sociétés de la Couronne.

Contract EP043-9-0145/01-ZCA, dated May 1, 1999, is found at Bates numbers 7047606 through 7047618. The "Énoncé de travail" is as follows:

L'entrepreneur devra fournir des services de recherche qualitative pour évaluer l'impact des différentes commandites du gouvernement du Canada dans le domaine « Loisirs, Chasse et Pêches ».

L'entrepreneur devra préparer une analyse d'opportunités reliées au programme de visibilité pour le gouvernement du Canada dans le cadre d'activités aussi bien culturelles que sportives, en mettant l'emphase au niveau des sports de participation de plein air. Il devra aussi faire la préparation d'une série de recommandations dans le but de guider le gouvernement du Canada dans ses futurs investissements en commandite dans ses secteurs d'activités et ce, incluant les sociétés de la couronne pour qui il pourrait être pertinent de participer à titre de commandites.

Contract EN771-6-0176 does not appear to have been produced in its entirety, although the cover page of that contract is found at Bates number 7004114. A letter from Myra Conway, the Director General of the Finance Sector of Public Works and Government Services Canada, to Mr. Brault, found at Bates number 7196025, describes that contract in the following way:

Services reliés à un contrat (EN771-6-0176) visant l'élaboration d'une stratégie de communication pour le programme canadien du contrôle des armes à feu du ministère de la Justice - \$330,000.

The Kroll report of February 4, 2003, at page 39, describes this contract in the following way:

The total contract value of this initiative was for \$330,000, for services to be provided related to the Firearms Project. The contract identifies a number of activities that are to be undertaken towards the development of a communication strategy for the firearms legislation.

The letter from Mr. R.R.B. Smith, Director, Fraud Investigations and Internal Disclosure Directorate, at Public Works and Government Services Canada, to the RCMP, dated April 22, 2003, found at Bates numbers 7123766 and 7123767, describes this contract in the following way:

Le contrat de 1996-1997 conclu avec Groupaction (EN771-6-0176) portait sur l'élaboration d'une stratégie promotionnelle concernant la nouvelle loi canadienne sur le contrôle des armes à feu.

These contracts are also referred to in evidence which has already been filed.

The document entitled "1996-1997 Budgets" prepared by CCSB staff dated March 31, 1997, which can be found at Exhibit P-88(c), starting at page 485, lists as part of the 1996-1997 year to date commitments from the APORS budget, the \$500,000 committed under Groupaction contract EN771-6-0065 and \$330,000 committed under Groupaction contract EN771-6-0176. The contract number EN771-6-0065/01-ACA is found starting at page 23 of Exhibit P-102, an exhibit prepared by Commission Counsel entitled "Sponsorship Contracts signed by Mario Parent". Exhibit P-107, prepared by Commission Counsel, entitled "Summary of Agencies receiving Contracts" lists at Tab 13, under the heading "Known Contracts Awarded to Groupaction July 1, 1995 to April 28, 1997", contracts EN771-6-0065 and EN771-6-0176.

There is no question but that the subject of these contracts, and the role Mr. Guité, among others, played in respect of their creation, administration, execution, and circumstances relating thereto are relevant to the matters into which this Commission has been directed to inquire. Among other things, they are relevant to "creation of the Sponsorship Program", the "selection of communications and advertising agencies", the "management of the Sponsorship Program and Advertising Activities by government officials at all levels", and the "receipt and use of any funds or commissions disbursed in connection with the Sponsorship Program and Advertising Activities by any person or organization", all matters into which the Commission is directed to investigate and report pursuant to the Terms of Reference. They are also relevant to the issues for Phase 1A, as enunciated by the Commissioner on May 7, 2004. Among others, the issues enunciated by the Commissioner to which these matters are relevant are "the creation of the Sponsorship Program, the selection of communications and advertising agencies (including the creation, purpose and objectives of the Advertising Program), and the management of the Sponsorship Program and Advertising Activities of the Government of Canada", "whether any person or organization in the Government of Canada gained an advantage financially, politically or otherwise from the activities and, if so, who, to what purpose and to what effect", and "the path of the funds, including the approvals and procedures in relation thereto, within the Government of Canada".

To date, there has been not one piece of evidence called in respect of the question of whether "any person or organization in the Government of Canada gained an advantage financially, politically or otherwise" other than the evidence as to tickets to sponsored events and golf balls.

We note that the subpoena issued to our client, signed by the Commissioner, requires him to attend to give evidence in respect of a number of things, including:

any gift, contribution, or payment, in any form, made directly or indirectly by any recipient of funds from the Sponsorship Program, National Unity Reserve or Advertising Activities of the Government of Canada ...

It also requires him to produce, for the period between January 1, 1994 and the present, "any document in connection with the receipt of funds (directly or indirectly) by yourself, by your constituency office (former or present) or by any other organization, corporation or person acting on your behalf or for your benefit" from any entity listed. The entities listed include Groupaction.

We assume that subpoenas were issued to all other witnesses, including Mr. Guité. We therefore do not understand why the Commissioner was of the view that monies received by Mr. Chrétien from Groupaction (of which there were none) is relevant, but the question of whether Mr. Guité received any benefit from the same company (which seems to be the subject of the criminal charges which he is facing) are not relevant.

As we set out in our written submissions filed on November 22, the law is clear that all parties to this Inquiry are entitled to fairness. That duty of fairness includes an obligation on the part of the Commission to fulfill its mandate without favour or distinction amongst the parties.

Rule 7 of the *Rules of Procedure* adopted by the Commission grants to parties a number of rights, including the right to access to documents filed with or produced to the Commission which are relevant to the Inquiry. We understand that the Commission caused a subpoena to be served on the RCMP, seeking the production of documents arising out of the investigations, including the investigations which have resulted in charges. Documents were produced in accordance with that subpoena. We have not yet been provided with access to any such documents.

It is apparent that Commission Counsel do not intend to lead evidence, relevant to the mandate of the Commission, in respect of the misconduct or lack thereof, of those persons accused of criminal activities. The Commissioner, from his public pronouncements, appears to have blessed this approach. If misconduct by those accused of criminal activities is not considered by the Commission as one of the possible explanations for the manner in which the sponsorship program and advertising activities were administered, the Commission will have failed to fully and fairly carry out its mandate. This failure will prejudice those whose reputations depend on the truth being found in these proceedings.

These are important matters. They must be addressed immediately, before this Commission has averted its eyes from this evidence for so long that it cannot be rectified.

Please provide us, at your earliest opportunity, with a written indication that Commission Counsel will be calling evidence in respect of these matters, and will be providing all

parties, including our client, access to the documentary evidence already gathered by you in respect thereof, including the documents received from the RCMP pursuant to the subpoena.

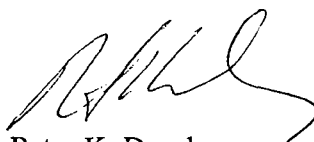
Please also provide us, forthwith, with all relevant information in respect of the "agreement between counsel for the Commission and counsel for the crown prosecutor" referred to by the Commissioner at lines 13 to 15 of page 6350 of the transcript, including any documentation in respect thereof.

We look forward to your early response.

Yours very truly

D. W. Scott

David W. Scott



Peter K. Doody

PKD/js
LG-OTT-23851311

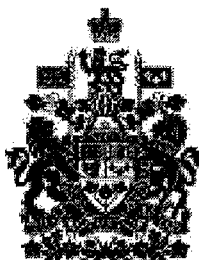
This is Exhibit "F" to the
Affidavit of Jean-Sébastien Gallant
sworn this 26th day of May 2005.

Irene Koller

.....
A Commissioner for Taking Affidavits, etc.

IWONA ALBRECHT, a
Commissioner, etc., Province of Ontario,
while a Student-at-Law.
Expires October 7, 2007.

**Commission of Inquiry into
the Sponsorship Program
and Advertising Activities**



**Commission d'enquête sur le
programme de commandites
et les activités publicitaires**

Public hearing

Audience publique

Commissioner

The Honourable Justice /
L'honorable juge
John H. Gomery

Commissaire

VOLUME 111

Held at :

Guy-Favreau Complex
Salle des Saules
Conference Centre
200 René-Lévesque Blvd. West
Suite 050, Level 00
Montreal, Quebec
H2Z 1X4

Tuesday, May 3, 2005

Tenue à :

Complexe Guy-Favreau
Salle des Saules
Centre des conférences
200 boul. René-Lévesque Ouest
Pièce 050, Niveau 00
Montréal, (Québec)
H2Z 1X4

Mardi, le 3 Mai 2005

PUBLICATION BAN/ORDONNANCE DE NON-PUBLICATION

**PUBLICATION BAN
ORDONNANCE DE
NON-PUBLICATION**

20276

**SUBMISSION
REPRÉSENTATION
(Doody)**

1 **MR. PRATTE:** Absolutely.

2 **THE COMMISSIONER:** Thank you. I understand better
3 now. I don't entirely sympathize with it but I understand it.

4 Mr. Doody, are you going to say something on this
5 issue?

6 **MR. DOODY:** I would like to, Commissioner.

7 Sir, I will be very brief. I expect as brief or
8 briefer than my colleague Me Pratte, but this issue -- and I
9 rise to speak on this issue because my friend Mr. Auger -- this
10 issue comes before you because my friend Mr. Auger objected to
11 the filing of this document because of the issue with respect to
12 exploring the areas relating to the criminal charges against Mr.
13 Guité. And therefore, I rise at this time because of that.

14 I do not intend to repeat the submissions I made, I
15 believe it was the 22nd day of November, when I made submissions
16 before this Commission that the Commission should not close its
17 eyes to the evidence that underlies the criminal charges. I did
18 make a written submission at that time and I simply ask the
19 Commission to take cognizance of the submissions I made at that
20 time.

21 Following the written submissions which I made and the
22 oral submissions as well, I wrote to Commission counsel on the
23 29th day of November and in that letter, I told Commission
24 counsel that we understand that the Commission had caused a
25 subpoena to be served on the RCM Police seeking production of

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20277

**SUBMISSION
REPRÉSENTATION
(Doody)**

1 documents arising out of the investigations which gave rise to
2 the criminal charges and we asked for production of the
3 documents gathered by the RCM Police.

4 And in the letter to Commission counsel of the 29th day
5 of November, I wrote, and I quote:

6 "If misconduct by those accused of criminal
7 activities is not considered by the Commission as
8 one of the possible explanations for the manner
9 in which the Sponsorship Program and advertising
10 activities were administered, the Commission will
11 have failed to fully and fairly carry out its
12 mandate. This failure will prejudice those whose
13 reputations depend on the truth being found in
14 these proceedings."

15 That letter was met with a response on the 1st of
16 December by Commission counsel and Commission counsel wrote to
17 me and said that:

18 "You have asked for production of documents
19 obtained from the RCMP. There has been
20 voluminous production already, and production
21 will continue. However, there is no undertaking
22 to provide you, now or later, with any or all
23 specific material received from the RCMP or any
24 agreement with the RCMP. I refer you, yet again,
25 to Item "K" in the Commission's Terms of

1 Reference which requires the Commissioner to
2 consider the impact of the Commission's
3 proceedings on criminal investigations or
4 prosecutions, and to exercise his discretion in
5 relation thereto."

6 And we did not receive production of the RCMP
7 investigation.

8 In the letter -- just to complete the record, in the
9 letter to Commission counsel on the 29th of November, I also
10 asked for production of the agreement with the Attorney General
11 of Quebec in respect of this matter. Initially, that was
12 refused and then on the 15th day of February, I was provided with
13 two letters, one from Assistant Deputy Minister Claude Simard of
14 the Attorney General's office, the Department of the Attorney
15 General in the Province of Quebec, to you, dated July the 9th,
16 and second, a response to that by Me Cournoyer dated the 26th day
17 of July.

18 And in the letter from Me Cournoyer, he wrote to Me
19 Simard:

20 "Pour faire suite à votre lettre du 9 juillet
21 dernier, je vous informe que les procureurs de la
22 Commission ont décidé de ne pas mettre en preuve
23 les faits entourant les contrats visés dans les
24 chefs d'accusations criminelles pendants contre
25 Messieurs Guité, Brault et Coffin lors des

1 interrogatoires devant le commissaire Gomery."

2 So that was made clear to me. Sir, I simply say this:
3 as my friend Me Pratte said, a significant issue before this
4 Commission relates to the credibility of this witness. He was
5 asked yesterday, just to raise one example, why the contracts,
6 the sponsorship contracts, were switched from Everest to
7 Groupaction and he was asked why he did that. One would have
8 thought that the facts underlying the charges which Mr. Guité is
9 jointly facing with Mr. Brault may be one of the reasons for the
10 switch of those contracts, but we are not allowed to examine
11 that issue.

12 You said yesterday, Mr. Commissioner, that you were
13 thinking that perhaps -- that while you were of the view that
14 the Commission counsel's undertakings you would not interfere
15 with that, that is their undertakings do not call evidence, you
16 were considering whether you ought to allow other counsel to
17 cross-examine on these issues.

18 With the greatest of respect, sir, if such an offer
19 were to be made to other counsel, it would be effectively
20 useless because we know nothing about these charges. We have
21 not been given any information or any documentation with which
22 to ask questions. So to ask questions armed with nothing would
23 be like starting a trial with no information in your briefcase.

24 So what I am asking, sir, is two things. Number one,
25 that you let this document be filed as all other documents have

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20280

**SUBMISSION
REPRÉSENTATION
(Doody)**

1 been filed in this Commission, and secondly and more broadly,
2 that you direct your counsel to provide to the parties to this
3 Commission of Inquiry the evidence underlying the criminal
4 charges. And if that is done, then I will be asking the
5 opportunity to examine this witness once I have had an
6 opportunity to review those documents and prepare to explore the
7 facts underlying the criminal charges.

8 And if I could ask that the submission I made in
9 November, the written submission, and the correspondence to
10 which I have referred be marked as exhibits on the record at
11 this inquiry?

12 **THE COMMISSIONER:** That is fine; go ahead.

13 **MR. DOODY:** The first is the written submissions in
14 November. Perhaps that would be JC, I believe, four (4)?

15 --- **EXHIBIT NO./PIÈCE NO JC-4:**

16 Written submissions of the Rt. Hon. Jean Chrétien
17 in respect of whether the Commission of Inquiry
18 may refuse to consider evidence relating to
19 outstanding criminal charges or criminal
20 investigations

21 **MR. DOODY:** The correspondence between me and Mr.
22 Finkelstein of November 29th and his response of December the 4th
23 which could be JC-5, and the letter from Bernard Roy to myself
24 dated February 15th of this year, which enclosed the
25 correspondence between the Assistant Deputy Minister of the

1 Attorney General's office in Quebec and Me Cournoyer could be
2 JC-6.

3 --- EXHIBIT NO./PIÈCE NO JC-5:

4 Letter to Mr. Neil Finkelstein dated November 29,
5 2004 from Mr. Peter K. Doody and Mr. David Scott

6 --- EXHIBIT NO./PIÈCE NO JC-6:

7 En liasse - Letter from Me Bernard Roy dated
8 February 15, 2005 to Mr. Peter K. Doody - Letter
9 from Me Claude Simard dated July 9, 2004 - Letter
10 from Me Guy Cournoyer dated July 26, 2004 to Me
11 Claude Simard

12 **MR. DOODY:** Those are my submissions, sir.

13 **THE COMMISSIONER:** Thank you.

14 Mr. Auger?

15 **MR. FOURNIER:** Mr. Commissioner, I ---

16 **THE COMMISSIONER:** This is going to be a very brief
17 issue and I am happy to hear you, maître, but I would ask you to
18 be very brief. We got into new areas and so on. It seems to be
19 a mountain being made out of a molehill.

20 **MR. FOURNIER:** I will try to be as brief as I usually
21 am in cross-examination, sir.

22 **THE COMMISSIONER:** Yes, thank you very much. I would
23 appreciate that.

24 **MR. FOURNIER:** There are two additional facts that I
25 would like to bring to your attention in support of the position

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**SUBMISSION
REPRÉSENTATION
(Fournier)**

1 that the objection should be dismissed. One of the additional
2 facts is contained in Volume 37 of the evidence. That is the
3 evidence of November 22nd. When Mr. Guité was examined on the
4 subject, he said that those parts which relate to the decision
5 as to which agencies and which sponsorships would be given
6 amounts of money to, he said that he deflected the questions
7 that were being put to him by the Auditor General because that
8 had nothing to do with the subject matter of their investigation
9 which was the three Groupaction contracts.

10 I submit that there you have, so to speak from the
11 horse's mouth, recognition that the document in question
12 contains information which is strictly not covered under Section
13 "K". I will not repeat my argument at the time that Section "K"
14 should be read out but I believe you heard it. I don't think
15 any decision was ever made on that.

16 And the second new thing is that we are operating
17 today under a publication ban. Certainly that publication ban
18 has the effect of protecting whatever criminal investigations or
19 criminal procedures are presently taking place and all that
20 would be required, sir, is that if you come to the conclusion
21 that any of the evidence adduced regarding these charges might
22 be deleterious to the criminal proceedings or the criminal
23 investigations, all you have to do is not lift the publication
24 ban with respect to them.

25 Thank you, sir.

PUBLICATION BAN
ORDONNANCE DE
NON-PUBLICATION

20283

SUBMISSION
REPRÉSENTATION
(Auger)

1 **THE COMMISSIONER:** Thank you.

2 Mr. Auger.

3 **MR. AUGER:** Thank you, Commissioner. I can do this
4 very briefly.

5 Firstly, to respond to Mr. Doody's last point, this is
6 not an exercise this morning in a debate of the scope of cross-
7 examination.

8 **THE COMMISSIONER:** No.

9 **MR. AUGER:** Mr. Fournier is about to begin his and I
10 reserve my right to object at that time if he pursues areas that
11 I think of our concern.

12 This is a narrow debate on the admissibility of the
13 one-page document. I agree with the comment you made ---

14 **THE COMMISSIONER:** Let me ask you a very simple
15 question.

16 **MR. AUGER:** Certainly.

17 **THE COMMISSIONER:** It seems that after listening to Me
18 Pratte, what really motivates him is he wants this handwritten
19 document in the record. The other documents attached are
20 already in the record.

21 Would you have any objection to detaching this first
22 page in your client's handwriting, which has already been read
23 into the record ---

24 **MR. AUGER:** It is already in the record. I have no
25 objection. Thank you.

1 **THE COMMISSIONER:** --- and deposit it as an exhibit.
2 Then I will decide this whole issue in that way. I am detaching
3 the page which is Mr. Guité's handwriting and I am depositing
4 that as an exhibit. The remainder of the document is not to be
5 deposited for the very good reason that it is already part of
6 the record in any event and also because it contains some
7 references to the criminal charges, which we have agreed we
8 would not touch.

9 Me Pratte, this will be marked as your exhibit, JP
10 whatever the next number is. What number is it?

11 **THE REGISTRAR:** Eight (8).

12 **THE COMMISSIONER:** Eight (8). JP-8. There you go.

13 --- **EXHIBIT NO./PIÈCE NO. JP-8:**

14 Fax from Mr. J.C. Guité to Mr. Minto.

15 **THE COMMISSIONER:** With respect to Mr. Doody's
16 application, I have no intention of ordering Commission counsel
17 to do anything which is in contradiction of what they have
18 already decided to do. In my view, the decisions that they took
19 last November were well founded and I support them and I am not
20 going to contradict them today for the reasons that are invoked
21 by Mr. Doody.

22 When, Mr. Doody, you come to cross-examine Mr. Guité,
23 there may be questions of the admissibility of some of the
24 questions you ask, and I will rule upon that at that time if the
25 issue arises.

This is Exhibit "G" to the
Affidavit of Jean-Sébastien Gallant
sworn this 26th day of May 2005.

Irene Kocel

.....
A Commissioner for Taking Affidavits, etc.

IWONA ALBRECHT, a
Commissioner, etc., Province of Ontario,
while a Student-at-Law.
Expires October 7, 2007.



Commission of Inquiry into
the Sponsorship Program
and Advertising Activities

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(Revised August 10, 2004)
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DEFINITIONS

1. Unless otherwise provided, the following words mean:

- a. Commission: the Commission of Inquiry into the Sponsorship Program and Advertising Activities established by Order in Council P.C. 2004-110, promulgated on February 19, 2004 pursuant to Part 1 of the *Inquiries Act*;
- b. Commissioner: the Honourable Mr. Justice John H. Gomery of the Superior Court of Québec, appointed by Order in Council P.C. 2004-110;
- c. Commission counsel: counsel engaged to aid and assist the Commissioner in the Inquiry. Commission Counsel have standing throughout the Inquiry;
- d. Commission Offices: the offices of the Commission located in the City of Montreal, Québec, at 200 boulevard René-Lévesque West, Place Guy Favreau, 6th floor, room no. 608 and in Ottawa, Ontario, at 222 Queen Street;
- e. Party: a party who obtains standing under Sections 12 and, where applicable, 13 of the *Inquiries Act* with respect to the matters that are relevant to that party's interests, or a party that has been granted standing at the discretion of the Commissioner for all or a portion of Phases IA and IB of the Inquiry;
- f. Inquiry: this shall have the same meaning as Commission.
- g. Intervenor: a party who does not have a substantial and direct interest but has clearly ascertainable interests and perspectives essential to the Commissioner's mandate whose standing has been granted by the Commissioner for all or a portion of Phases IA and IB of the Inquiry;
- h. Party: a person or organization who has been granted standing as a party or as an intervenor.

STANDING AND FUNDING RECOMMENDATIONS

2. A party may be granted standing by the Commissioner if the Commissioner is satisfied that the following conditions are met:

- 41
- a. the party is directly and substantially affected by Phase IA or IB of the Inquiry or portions thereof, or,
 - b. the party represents clearly ascertainable interests and perspectives essential to the Commissioner's mandate in Phases IA and IB, which the Commissioner considers ought to be separately represented before the Inquiry, in which event the party may participate in a manner to be determined by the Commissioner.
3. Any party wishing to be granted standing must apply by way of a motion in writing supported by affidavit on or before May 31, 2004, or at the discretion of the Commissioner at any other date, which must include the following information:
- a. name, address, telephone and fax numbers, and e-mail address of the party;
 - b. whether the party seeks standing as a party or as an intervenor for all or a portion of Phases IA and IB of the Inquiry;
 - c. the areas and issues where the party is directly and substantially affected or where the party has a clearly ascertainable interest or perspective which would enhance the work of the Commissioner and the reasons in support thereof;
 - d. the names of the lawyers, if any, representing the party, together with the lawyer's address, telephone number, e-mail address and fax number.
4. Applicants for standing will be permitted to make oral submissions not exceeding 15 minutes at a public standing hearing in Ottawa, on June 21 to 23, 2004, or at the discretion of the Commissioner at any other date.
5. The Commissioner will determine any special conditions under which a party may participate and those parts of the Inquiry in which a party granted standing may participate.
6. From time to time, the Commissioner may, in his discretion, at any time grant to or rescind standing from a party, or modify the status or conditions of the standing of a party.
7. The rights of a party as defined in Rule 1 (e) hereof, will include:
- i. Access to documents filed with or produced to the Commission which are relevant to the Inquiry and subject to the Rules of Procedure and Practice;
 - ii. Advance notice of documents which are proposed to be introduced into evidence by Commission counsel;
 - iii. Advance provision of statements of anticipated evidence, if applicable.
 - iv. A seat at the counsel table;
 - v. The opportunity to suggest witnesses to be called by Commission counsel, and the opportunity to apply for an order that a particular witness be summoned to appear;
 - vi. The right to cross-examine witnesses on matters relevant to the basis upon which standing was granted; and
 - vii. The right to make closing submissions.
8. The rights of an intervenor as defined in Rule 1(g) will include any or all of the following at the Commissioner's discretion:

- i. Numbers i), ii), iii), v) and vii) in paragraph 7; and
- ii. Opportunity to suggest areas for examination of a certain witness by Commission counsel, failing which an opportunity to request leave to examine the witness on such areas;

9. In order to avoid repetition and unnecessary delay, at the discretion of the Commissioner, certain applicants may be grouped into coalitions where they have a similar interest or perspective, where there is no conflict of interest, and where their relevant interest or perspective will be fully and fairly represented by a single grant of standing to the parties as a group.

10. For the purposes of Phases IA and IB of the Inquiry, parties who would not otherwise be able to participate may seek funding by way of a motion in writing, with supporting affidavit(s), to be filed with the Commission on or before July 12, 2004, or at the discretion of the Commissioner at any other date. Funding will be recommended at the Commissioner's discretion in accordance with paragraph (h) of the terms of reference on July 19, 2004, or at the discretion of the Commissioner at any other date. There will be no oral hearing with respect to funding.

11. In order to qualify for a funding recommendation, a party must:

- a. establish the party's inability to participate in the Inquiry without funding and the absence of an alternative means of funding;
- b. provide a satisfactory plan as to how it intends to use the funds and account for them;
- c. demonstrate sufficient interest and proposed involvement in the Inquiry; and
- d. establish a special expertise or experience with respect to the Commission's mandate;

12. The Commissioner's recommendations for reimbursement of legal fees and expenses to those who have been granted funding shall be made in accordance with Treasury Board Guidelines. Funding will not include fees and expenses for experts to be called by the parties with standing in Phase IA or 1B or fees and expenses related to the investigative activities of agencies retained by the parties.

13. Commission counsel will be open to suggestions from the parties as to the types and names of experts to be called, but Commission counsel will have the primary responsibility for calling experts to be paid by the Commission. It is not contemplated that the Commission will recommend funding for experts for parties.

RIGHT TO BE REPRESENTED BY COUNSEL

14. Any party with standing or any witness has the right to be assisted or represented by Counsel as provided in these Rules. Anyone interviewed by or on behalf of Commission Counsel is entitled to have one personal counsel present for the interview to represent his or her interests.

PRE-HEARING INTERVIEWS

15. Commission counsel may request any person or any organization to submit to one or more interviews with Commission counsel or other person designated by such counsel for that purpose, at any reasonable time appointed by Commission counsel. No person or organization is required to submit to such interviews.

HEARING AND DECORUM

16. In so far as it needs to gather evidence under Phases IA and IB, the Commission is committed to a process of public hearings.

17. However, applications may be made by a party asking that the Commissioner issue an order that any portion of the proceedings be in camera, or issue an order prohibiting the disclosure, publication or communication of any testimony, document or evidence. Such applications shall be made in writing, supported by affidavit(s), at the earliest opportunity. The evidence and submissions on such applications may be presented in private or in public, or a combination of both, at the discretion of the Commissioner, according to these Rules, which are applicable to in camera matters with appropriate modifications.

18. The Commissioner may, at its discretion, issue an order that any portion of the proceedings be in camera, or issue an order prohibiting the disclosure, publication or communication of any testimony, document or evidence.

19. The Commission will set the dates, hours and places of its hearings. Unless otherwise provided, hearings will start at 9:30 a.m. and end at 5:00 p.m., from Monday to Thursday, inclusive, and will take place in Montréal at the Guy-Favreau Complex, 200 René-Lévesque Blvd. West and in Ottawa, at Victoria Hall, Bytown Pavilion, 111 Sussex Drive (former City Hall) or at such other place as the Commission determines.

20. People attending the hearings will rise when the Commissioner enters the hearing room and will remain standing until he takes his seat. Whenever the hearing is adjourned or is terminated, those present in the room will stand up and remain standing until the Commissioner has left the hearing room.

21. No one will be authorized to address the Commissioner during the hearings, before first rising.

22. Anything which may detract from proper decorum will be prohibited, and the Commissioner may exclude any person from the hearing room at his discretion.

APPLICATIONS AND MOTIONS

23. Except in the case of a dispensation by the Commission, any demand to the Commission must be submitted in writing, supported by an affidavit, with a notice of presentation filed at the offices of the Commission at least five clear days before presentation and served on the parties with standing or their attorneys.

24. Service may be made by e-mail, fax or process server addressed to the party or witness, or to counsel representing the party or witness.

THE EVIDENCE

(i) General provisions

25. In the ordinary course, Commission counsel will call and question witnesses to testify at the Inquiry.

26. The Commission is entitled to receive evidence which might otherwise be inadmissible in a court of law. Evidence will be admissible based on its probative value in relation to the Commission's mandate.

27. Parties are encouraged to provide to Commission counsel, at the earliest opportunity, the names and addresses of all witnesses whom they feel should be heard, together with a brief description of the witness' evidence, as well as relevant evidence and copies of all relevant documentation.

28. Commission counsel has a discretion to refuse to call a witness or present evidence. Where Commission counsel refuses to call a witness or present evidence, a party may apply to the Commissioner for an order that such witness be called or such evidence be presented. Such application must be made in writing, supported by affidavit. It must indicate the name and address of the witness, give a summary of his testimony or the reasons for not providing it. A copy of any document which the witness intends to file into the record must accompany his application. If this Commissioner is satisfied that the witness or evidence is needed, Commission counsel will call the witness or present the evidence.

(ii) Witnesses

29. Witnesses will give their evidence at a hearing under oath or affirmation.

30. Witnesses may be called more than once. During the hearings, witnesses' depositions will be taken by stenography, stenotypy, or mechanically recorded.

(iii) The order of examination

- 31.
- a. Commission counsel will first adduce the evidence from the witness. Except as otherwise directed by the Commissioner, Commission counsel can adduce evidence by way of both leading and non-leading questions;
 - b. Parties granted standing to do so will then have the opportunity to cross-examine the witness to the extent of their interest;
 - c. At the Commissioner's discretion, the order of cross-examination will be determined by the parties having standing, failing which by the Commissioner;
 - d. with the permission of the Commissioner, counsel for a witness, regardless of whether or not the counsel is also representing a party with standing, may then examine his witness, and
 - e. Counsel for the Commission will have the right to ask further questions of the witness;
 - f. the Commissioner may require a witness to adduce any evidence or respond to any question, including questions from the Commissioner, which the Commissioner deems to be relevant;
 - g. except with the permission of the Commissioner, no counsel other than the Commission counsel may speak to a witness about his or her evidence while the witness is giving any part of his or her evidence. Commission counsel may not speak to any witness about his or her evidence while the witness is being cross-examined by other counsel.

(iv) Access to evidence

32. All documentary or physical evidence filed before the Commission shall be identified and marked "P" for public settings in numerical order and, if necessary, "C" for sessions *in camera* or hearings for which a non-disclosure, a non-publication or a non-communication ban order has been issued.

33. One copy of the "P" transcript of the evidence and the "P" exhibits of the public hearings will be available to be shared and consulted by counsel for the parties. The transcript will be available in an office outside the hearing room. A disk version of the transcript or the exhibits or an additional hard copy may be ordered by anyone prepared to pay its cost.

34. Another copy of the "P" transcripts of the public hearings and a copy of "P" exhibits will be available in the media room to be shared by the media.

35. Only the Commission, under conditions to be determined, can authorize and give access to "C" transcripts and exhibits.

(v) Documents and evidence

36. The Commission expects all evidence and documents relevant to the Commission's mandate to be produced to the Commission by any party with standing or by anyone who has received a *subpoena*, whether or not the *subpoena* specifically comprehends the particular evidence or document.

37. A party with standing who knows of the existence of any relevant document or evidence which has not been filed as an exhibit or produced to Commission counsel must bring it to the attention of Commission counsel at the earliest

opportunity. If Commission counsel decides that the evidence or document is not relevant, it shall not be disclosed or filed as a relevant document or evidence. This does not preclude the document or evidence from being used in cross-examination by any of the parties, but no such document or evidence may be used in cross-examination unless it has been brought to the attention of Commission counsel in accordance with this Rule. Before such a document or evidence may be used for the purpose of cross-examination, it must be made available to all parties by counsel intending to use it not later than the day prior to the testimony of that witness. Subject to the discretion of the Commissioner, the evidence or document will then be filed in the Commission's record.

45

38. Originals of relevant documents are to be provided to Commission counsel upon request.

39. Counsel to parties and witnesses will be provided with copies of documents, evidence, information and will-say statements (hereinafter "things" in this Rule) which are relevant to the parties' or witnesses' interests, upon giving written undertaking that all such things will be used solely for the purpose of the Inquiry and, where the Commission considers it appropriate, that its disclosure will be further restricted. The Commission may require that these things, and all copies made, be returned to the Commission. Counsel are entitled to provide such documents, evidence, or will-say statements to their respective clients only on terms consistent with the undertaking given, and upon the clients entering into written undertakings to the same effect. These undertakings will be of no force regarding any document, evidence or information once it has become part of the public record. The Commission may, upon application, release any party in whole or in part from the provisions of the undertaking in respect of any particular document, evidence, or other information,

40. Unless otherwise ordered by the Commissioner, a will-say statement may not be used for the purpose of examination or cross-examination of a witness, or be made part of the hearing record. It will always be subject to the confidentiality and return provisions of Rule 39.

41. Documents, evidence or information received from a party, or any other organization or individual, shall be treated as confidential by the Commission unless and until they are made part of the public record or the Commissioner otherwise declares. This does not preclude the Commission from presenting a document, evidence or information to a proposed witness prior to the witness giving his or her testimony, as part of the investigation being conducted.

42. Commission counsel will endeavour to provide reasonable notice of documents that will likely be referred to during the course of that witness' testimony. That notice will be provided to both the witness and the parties with standing relating to issues upon which the witness is expected to testify,

43. Parties shall at the earliest opportunity notify Commission counsel of any documents or evidence that they intend to file as exhibits or otherwise refer to during the hearings, and in any event shall notify Commission counsel such documents or evidence no later than the day before it is intended to be referred to or filed.

MEDIA COVERAGE

44. The Commission may authorize the tape recording and live broadcasting of the public hearings by a designated media representative who will provide such recording and live feed to all other media pursuant to a pooling agreement. If the media cannot agree on a pooling agreement, they may apply to the Commissioner for a decision.

45. Representatives of the media who have signed the pooling agreement have the same rights in connection with the utilization of the tape recording and live broadcasting feed of the public hearings as the designated media representative.

46. The designated media representative authorized to tape record and broadcast the public hearings shall provide a copy of such recording to the Commission's Registrar, not later than three days after the recorded hearing.

47. Cameras and microphones will be located at pre-determined places in the hearing rooms. Only fixed cameras and the lighting system in the hearing room will be allowed.

48. No media scrums, interviews, or reporting will be allowed in the hearing rooms or within the distance of ten (10) meters from the hearing room entrances.

49. Media representatives will have to abide by the Commission's directives.

50. Whenever the Commission decides pursuant to Rules 17 and 18 to proceed in camera, or issue a publication, disclosure or communication ban, the designated media representative must, to the satisfaction of the Commission, take all necessary measures to ensure that all tape recording or sound recording machines have been turned off.

51. No other forms or means of recording, re-broadcasting or photographing beyond those permitted by these Rules will be allowed in the hearing rooms.

52. Notwithstanding Rule 51, the Commission may allow, at his discretion at times and under conditions set by him, one photographer to take pictures in the hearing room with the understanding that he make available his negatives to representatives of the media pursuant to a pooling agreement of the kind described in Rule 44 above.

MODIFICATIONS

53. All parties, witnesses, and their respective counsel and members of the media and the public, must adhere to these Rules which may be amended or dispensed with by the Commission at its discretion to ensure fairness.

Montréal, this eighteenth day of June 2004

The Honourable John H. Gomery,
Commissioner

Last Modified: 2004-08-10

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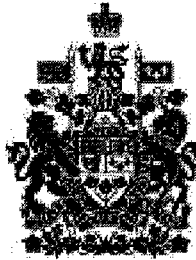
[[Rules of Procedure and Practice](#) | [Tentative Schedule](#)]

This is Exhibit "H" to the
Affidavit of Jean-Sébastien Gallant
sworn this 26th day of May 2005.

Irene Albrecht
.....
A Commissioner for Taking Affidavits, etc.

IWONA ALBRECHT, a _____
Commissioner, etc., Province of Ontario,
with _____

**Commission of Inquiry into
the Sponsorship Program
and Advertising Activities**



**Commission d'enquête sur le
programme de commandites
et les activités publicitaires**

Public hearing

Audience publique

Commissioner

The Honourable Justice /
L'honorable juge
John H. Gomery

Commissaire

VOLUME 74

Held at :

Guy-Favreau Complex
Salle des Saules
Conference Centre
200 René-Lévesque Blvd. West
Suite 050, Level 00
Montreal, Quebec
H2Z 1X4

Monday, February 28, 2005

Tenue à:

Complexe Guy-Favreau
Salle des Saules
Centre des conférences
200 boul. René-Lévesque Ouest
Pièce 050, Niveau 00
Montréal, (Québec)
H2Z 1X4

Lundi, le 28 février 2005

REVISED/RÉVISÉE

1 will say parce que, si on demandait à Me Roy de nous dire
2 pourquoi est-ce que Monsieur Himelfarb va venir devant vous, il
3 nous lirait son will say.

4 Alors, je pense que dans ce contexte-là, vous avez le
5 devoir de prendre connaissance du will say de Monsieur Himelfarb
6 pour juger de la pertinence et du bien-fondé de son assignation.

7 **LE COMMISSAIRE:** Mais avant d'aller plus loin, je
8 demanderais à Me Roy s'il s'objecte à ce que je prenne
9 connaissance du will say. Quant à moi, c'était une pratique que
10 nous avons suivie à la lettre de ne pas en prendre connaissance
11 parce que je dois prendre connaissance de la preuve lorsqu'elle
12 déroule devant nous et j'ai une certaine réticence d'empoisonner
13 l'esprit avec une information qui n'est pas vérifiée par un
14 serment.

15 **Me LUSSIER:** Absolument.

16 **LE COMMISSAIRE:** Alors, qu'est-ce que vous pensez sur
17 cette question, Me Roy?

18 **Me ROY:** Je n'ai pas d'objection.

19 **LE COMMISSAIRE:** Alors, est-ce que quelqu'un peut me
20 fournir une copie du will say de Monsieur Himelfarb?

21 **Me LUSSIER:** Je vais vous donner la mienne. J'en ai
22 deux, monsieur le commissaire.

23 Je peux également préciser que nous avons offert à Me
24 Roy, de façon à accommoder tout le monde, d'offrir un affidavit
25 de Monsieur Himelfarb qui va répéter les mêmes choses et nous

**Commission of Inquiry into
the Sponsorship Program
and Advertising Activities**



**Commission d'enquête sur le
programme de commandites
et les activités publicitaires**

Public hearing

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L'honorable juge
John H. Gomery

Commissaire

Translation/ Traduction

VOLUME 74

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Pièce 050, Niveau 00
Montréal, (Québec)
H2Z 1X4

Lundi, le 28 février 2005

1 which wants Mr. Himelfarb to testify, that you may now read the
2 will-say, because if we were to ask Mr. Roy to tell us why Mr.
3 Himelfarb is to testify before you, he would read you his will-
4 say.

5 So, in that context, it's your duty to read Mr.
6 Himelfarb's will-say to judge the relevance and soundness of the
7 subpoena.

8 **THE COMMISSIONER:** Before we go any further, I would
9 ask Mr. Roy if he has any objections to my reading the will-say.
10 As far as I'm concerned, not reading will-says is a practice
11 that we have followed to the letter, because I have to read the
12 evidence as it's presented to us and I'm a little reluctant to
13 poison my mind with information that hasn't been given under
14 oath.

15 **MR. LUSSIER:** Absolutely.

16 **THE COMMISSIONER:** What do you think about this issue,
17 Mr. Roy?

18 **MR. ROY:** I have no objection.

19 **THE COMMISSIONER:** So, can someone give me a copy of
20 Mr. Himelfarb's will-say?

21 **MR. LUSSIER:** I'll give you mine. I have two, Mr.
22 Commissioner.

23 I can also tell you that to make it convenient for
24 everyone, we offered to give Mr. Roy an affidavit by Mr.
25 Himelfarb that repeats the same things, and we wouldn't have

This is Exhibit "I" to the
Affidavit of Jean-Sébastien Gallant
sworn this 26th day of May 2005.

Iwona Albrecht

.....
A Commissioner for Taking Affidavits, etc.

**IWONA ALBRECHT, a
Commissioner, etc., Province of Ontario,
while a Student-at-Law.
Expires October 7, 2007.**

**THE COMMISSION
OF INQUIRY INTO
THE SPONSORSHIP
PROGRAM AND
ADVERTISING
ACTIVITIES**

Kroll Lindquist Avey
Report

May 18, 2005

2.0 SCOPE OF INVESTIGATION

2.1 Available Documentation

The COI issued subpoenas, a sample copy of which is included in Appendix B to this report, to individuals and corporations of interest, and the GOC issued "Call Letters", a sample of which is included as Appendix C hereto, to all federal departments, requesting documentation and information relating to the "Sponsorship Program" and "Advertising Activities" which were the subject of Chapters 3 and 4 of the November 2003 Report of the Auditor General of Canada.

Table 1 summarizes the volume of documents which were provided to the COI in response to the subpoenas and call letters.

Table 1: COI Universe of Documents – Summary Metrics

<u>Document Libraries</u>	<u>Number of Boxes</u>	<u>Estimated Number of Pages</u>
PWGSC	5,170	20,680,000
Other Government Departments	623	2,492,000
Commission of Inquiry (COI)	<u>1,275</u>	<u>5,100,000</u>
Total	<u>7,068</u>	<u>28,272,000</u>

Of the estimated 28.3 million pages catalogued, 559,411 were captured in a document management database and 480,789 were disclosed to parties with standing.

The protocols and procedures, document library and catalogue maintenance, document review and analysis and document production and disclosure undertaken by Kroll are detailed in Appendix D to this report.

In addition, at the request of COI counsel, Kroll sent a letter, a sample of which is included in Appendix E hereto, to all identified recipients of sponsorship funds, and requested each to provide information and documentation to the COI pertaining to their sponsorship.

All of these documents were available to Kroll as part of our review. To the extent we have relied on any of these documents in preparing this report, they have been reproduced and entered as exhibits before the Commissioner.

2.2 Scope Limitation

The above-noted documentation requests and subpoenas related to a 10-year period from April 1, 1994 to March 31, 2004. We note, certain of the requested books and underlying records and documentation relating to the communications agencies and their principals were not available for our review. Further, we understand that the COI has heard evidence that some of the relevant GOC documents were destroyed during this time period. In addition, we understand that many of these documents have been subject to a number of audits and that as part of that process many documents were moved from the original locations in which they were found, into a "reconstructed" file for purposes of analysis.

As a result of these factors Kroll cannot provide assurance that the GOC documents and files it has reviewed are complete and represent the files as they were in the original instance. Furthermore the incompleteness of the communications agencies' and their principals' books and underlying records and related files and documentation restrict our ability to report on the ultimate use of all sponsorship and advertising funds for those agencies and related contracts and events of interest.

Kroll has done a review of selected agencies, contracts and events. Kroll has not done a review of all SPS contracts and all advertising contracts.

Kroll did not investigate any transactions which were the subject of criminal charges or which may have been the subject of ongoing criminal investigations.

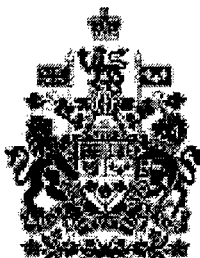
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Affidavit of Jean-Sébastien Gallant
sworn this 26th day of May 2005.

Iwona Albrecht

.....
A Commissioner for Taking Affidavits, etc.

IWONA ALBRECHT, a
Commissioner, etc., Province of Ontario,
while a Student-at-Law.
Expires October 7, 2007.

**Commission of Inquiry into
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**Commission d'enquête sur le
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**The Honourable Justice /
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John H. Gomery**

Commissaire

VOLUME 84

Held at :

Guy-Favreau Complex
Salle des Saules
Conference Centre
200 René-Lévesque Blvd. West
Suite 050, Level 00
Montreal, Quebec
H2Z 1X4

Wednesday, March 16, 2005

Tenue à:

Complexe Guy-Favreau
Salle des Saules
Centre des conférences
200 boul. René-Lévesque Ouest
Pièce 050, Niveau 00
Montréal, (Québec)
H2Z 1X4

Mercredi, le 16 mars 2005

1 **LE COMMISSAIRE:** Je ne sais pas si vous le savez déjà,
2 parce que c'est relativement récent, mais Me Rochefort
3 représente une association d'agences de publicité et il a été
4 admis à titre d'intervenant pour nous aider avec les normes, les
5 pratiques et aussi le point de vue des agences de publicité en
6 général. Je ne sais pas si Monsieur Richard fait partie de
7 cette association mais je ne vois pas une grande distinction
8 entre ce que, lui, il peut nous offrir et ce que cette
9 association nous offre.

10 **Me COUILLARD:** À mon sens, je ne sais pas moi non
11 plus. À ma connaissance, je ne sais pas s'il fait partie de
12 cette association. À ma connaissance, ce serait seulement,
13 comme je vous dis -- je répète ce que j'ai dit, au niveau de la
14 connaissance des faits qui ont eu lieu au moment où il avait des
15 fonctions de direction.

16 **LE COMMISSAIRE:** Merci beaucoup.

17 Me Cournoyer, avez-vous un point de vue à m'offrir au
18 nom de la Commission ou au nom des procureurs de la Commission?

19 **Me COURNOYER:** Écoutez, il est clair, compte tenu des
20 décisions que vous avez rendues, que Monsieur Richard ne se
21 qualifie pas à titre de participant. Quant à la question de
22 l'intérêt à titre d'intervenant, je pense que votre décision
23 rendue dans le cas de l'association répond d'une certaine
24 manière à cette question-là parce que les intérêts de
25 l'industrie sont couverts.

1 La dernière chose, il est possible, parce que les
2 procureurs de la Commission auront éventuellement à le
3 rencontrer, que Monsieur Richard soit un témoin. Il a été
4 rencontré par les enquêteurs mais nous rencontreront, de même
5 que nos enquêteurs, beaucoup plus de personnes que de témoins et
6 en temps opportun, nous prendrons une décision mais cette
7 décision n'a pas été prise à l'heure actuelle et l'évolution de
8 la présentation de la preuve nous guide dans l'appréciation de
9 la nécessité de faire entendre une personne ou une autre. Et il
10 me semble que tout plus naturellement, Monsieur Richard est un
11 témoin potentiel, s'il y a lieu.

12 **LE COMMISSAIRE:** Merci.

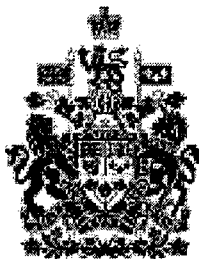
13 Est-ce qu'il y a quelqu'un d'autre qui aimerait
14 s'exprimer au sujet de cette requête?

15 Me Couillard, d'abord la Commission est reconnaissante
16 pour la collaboration déjà offerte par Monsieur Richard et pour
17 l'intérêt avec lequel il suit nos travaux mais je ne pense pas
18 qu'il se qualifie comme -- soit comme participant ni comme
19 intervenant et avec nos remerciements, sa requête est rejetée.
20 Merci beaucoup.

21 Alors, où sommes-nous rendus?

22 **Me COURNOYER:** Alors, je vais être prêt d'ici cinq
23 minutes à faire entendre le témoignage de madame Andrée Côté-
24 gosselin. J'ai discuté avec mon collègue, Me Leduc, qui
25 s'approche et quant à ce qui concerne le témoignage de Monsieur

**Commission of Inquiry into
the Sponsorship Program
and Advertising Activities**



**Commission d'enquête sur le
programme de commandites
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Public hearing

Audience publique

Commissioner

**The Honourable Justice /
L'honorable juge
John H. Gomery**

Commissaire

Translation/ Traduction

VOLUME 84

Held at:

Guy-Favreau Complex
Salle des Saules
Conference Centre
200 René-Lévesque Blvd. West
Suite 050, Level 00
Montreal, Quebec
H2Z 1X4

Wednesday, March 16, 2005

Tenue à:

Complexe Guy-Favreau
Salle des Saules
Centre des conférences
200 boul. René-Lévesque Ouest
Pièce 050, Niveau 00
Montréal (Québec)
H2Z 1X4

Mercredi, le 16 mars 2005

1 know this, because it is a relatively recent development, but
2 Mr. Rochefort, who represents an association of advertising
3 agencies, was granted intervenor standing to assist us with the
4 standards, practices and perspective of advertising agencies in
5 general. I don't know whether Mr. Richard belongs to that
6 association but I see very little distinction between what he
7 can offer us and what that association is offering.

8 **MS. COUILLARD:** I don't know either. To my knowledge,
9 I don't know whether he belongs to that association. To my
10 knowledge, it would only, as I say -- I reiterate what I have
11 said, in terms of a knowledge of events that occurred at the
12 time when he held a management position.

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

14 Mr. Cournoyer, can you offer a perspective on behalf
15 of the Commission or the Commission lawyers?

16 **MR. COURNOYER:** Listen, clearly, given the decisions
17 that you have rendered, Mr. Richard does not qualify as a party.
18 As for the issue of interest as an intervenor, I believe that
19 your decision in the case of the association answers the
20 question to some degree, as the industry's interests are
21 covered.

22 One last thing, it is possible, since the Commission's
23 lawyers may possibly have to meet with him, that Mr. Richard may
24 become a witness. The investigators have met with him but, like
25 our investigators, we will meet many people in addition to the

1 witnesses and will make a decision, at the proper time. However
2 that decision has not yet been made and the evidence, as it
3 evolves, will guide us in our assessment of the need to hear a
4 particular person. And it seems to me that, all the more
5 naturally, Mr. Richard may be a potential witness, if the need
6 arises.

7 **THE COMMISSIONER:** Thank you.

8 Would anyone else like to speak to this motion?

9 Ms. Couillard, first, the Commission is grateful for
10 the cooperation offered by Mr. Richard in the past and for the
11 interest with which he follows our work, but I do not think that
12 he qualifies as -- as either a party or an intervenor and his
13 motion is dismissed, with our thanks. Thank you very much.

14 Now, where were we?

15 **MR. COURNOYER:** Well, I will be ready in five minutes
16 to hear the testimony of Ms. Andrée Côté-Gosselin. I have
17 consulted with my colleague, Mr. Leduc, who is approaching and,
18 as far as the testimony of Mr. Gosselin is concerned, my
19 colleague has offered submissions that I consider reasonable.
20 And since circumstances would have required me to bring back Mr.
21 Gosselin to testify later, I propose to postpone the
22 continuation of Mr. Gosselin's testimony until the morning of
23 March 29, the Tuesday after Easter.

24 **MR. LEDUC:** Of course you have my consent and rest
25 assured, Mr. Commissioner, of the continued participation of my

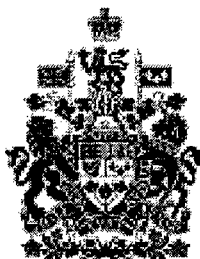
This is **Exhibit "K"** to the
Affidavit of Jean-Sébastien Gallant
sworn this 26th day of May 2005.

Irene Loven

.....
A Commissioner for Taking Affidavits, etc.

IWONA ALBRECHT, a
Commissioner, etc., Province of Ontario,
while a Student-at-Law.
Expires October 7, 2007.

**Commission of Inquiry into
the Sponsorship Program
and Advertising Activities**



**Commission d'enquête sur le
programme de commandites
et les activités publicitaires**

Public hearing

Audience publique

Commissioner

The Honourable Justice /
L'honorable juge
John H. Gomery

Commissaire

VOLUME 126

Held at :

Guy-Favreau Complex
Salle des Saules
Conference Centre
200 René-Lévesque Blvd. West
Suite 050, Level 00
Montreal, Quebec
H2Z 1X4

Wednesday, May 25, 2005

Tenue à:

Complexe Guy-Favreau
Salle des Saules
Centre des conférences
200 boul. René-Lévesque Ouest
Pièce 050, Niveau 00
Montréal, (Québec)
H2Z 1X4

Mercredi, le 25 mai 2005

1 Montreuil, monsieur le commissaire.

2 **Me HOLLAND:** Vous avez raison, Me Lussier.

3 **M. ST-LAURENT:** Mais pour résumer tout ce que j'ai
4 dit, au moment où on a écrit les commentaires qui sont là, on ne
5 pensait pas au 250 000\$.

6 **Me LUSSIER:** O.k. Donc, ça serait possiblement soit
7 une autre rubrique ou une autre forme ---

8 **LE COMMISSAIRE:** C'est un autre poste à considérer.

9 **M. ST-LAURENT:** Voilà.

10 **LE COMMISSAIRE:** Oui.

11 **MR. LUSSIER:** Mr. Whitla, you testified this morning
12 that you attempted to get some figures from Mr. Renaud's
13 bankruptcy trustee.

14 **MR. WHITLA:** I personally didn't. Commission counsel
15 did.

16 **MR. LUSSIER:** Oh, okay.

17 **MR. WHITLA:** We requested Commission counsel to try to
18 obtain that for us, and they were unsuccessful.

19 **MR. LUSSIER:** And it was reported to you that they
20 were unsuccessful.

21 Would that have been Me Cournoyer? It was Me Roy who
22 met the bankruptcy trustee?

23 **MR. WHITLA:** I believe it was Marie Cossette.

24 **MR. LUSSIER:** Marie Cossette.

25 So for the 2001 bankruptcy, the bankruptcy trustee did

1 not have relevant bank accounts or sufficient information?

2 **MR. WHITLA:** Again, I am third hand -- providing you
3 third-hand information. My understanding is that it was
4 requested. The trustee indicated he would attempt to locate it
5 and if he ---

6 **THE COMMISSIONER:** He didn't have anything in his
7 file.

8 **MR. WHITLA:** Yes.

9 **THE COMMISSIONER:** Frankly, it is as simple as that.

10 **MR. LUSSIER:** And do you know the name of that
11 trustee?

12 **MR. WHITLA:** I personally do not.

13 **THE COMMISSIONER:** We could furnish that to you if you
14 would like to pursue that ---

15 **MR. LUSSIER:** I remember Me Roy showing me the
16 bankruptcy documents. I can't remember whether we filed them or
17 not. I tried to look in the exhibit numbers this morning. I
18 don't think that we filed Mr. Renaud's -- that morning, I
19 remember filing certain documentation under the GC heading which
20 was the ---

21 **MR. COURNOYER:** May I suggest that we check that over
22 lunch and we will make sure.

23 **THE COMMISSIONER:** I think I am ready for lunch in any
24 event.

25 **Me LUSSIER:** Ce serait la -- de toute façon, la bonne

This is **Exhibit "L"** to the
Affidavit of Jean-Sébastien Gallant
sworn this ^{26th} day of May 2005.

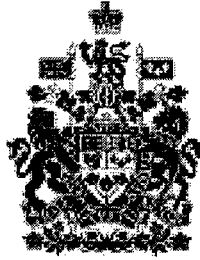
Joe Koen

.....
A Commissioner for Taking Affidavits, etc.

IWONA ALBRECHT, a
Commissioner, etc., Province of Ontario,
while a Student-at-Law.

07.

**Commission of Inquiry into
the Sponsorship Program
and Advertising Activities**



**Commission d'enquête sur le
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Public hearing

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Commissioner

The Honourable Justice /
L'honorable juge
John H. Gomery

Commissaire

VOLUME 115

Held at :

Guy-Favreau Complex
Salle des Saules
Conference Centre
200 René-Lévesque Blvd. West
Suite 050, Level 00
Montreal, Quebec
H2Z 1X4

Monday, May 9, 2005

Tenue à :

Complexe Guy-Favreau
Salle des Saules
Centre des conférences
200 boul. René-Lévesque Ouest
Pièce 050, Niveau 00
Montréal, (Québec)
H2Z 1X4

Lundi, le 9 Mai 2005

**PUBLIC HEARING
AUDIENCE PUBLIQUE**

21153

**SUBMISSION
REPRÉSENTATION
(Cournoyer)**

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

2 L'audience débute à 9h33

3 **LE COMMISSAIRE:** Bonjour. Veuillez vous asseoir.

4 Bonjour, Me Cournoyer.

5 **Me COURNOYER:** Bonjour, monsieur le commissaire.

6 Avant d'entamer l'interrogatoire de Monsieur Corbeil,
7 il y un certain nombre de questions d'intendance que je voudrais
8 soulever avec vous.

9 La première, nous avons informé nos collègues ce matin
10 que, pour la préparation des représentations écrites qu'ils
11 doivent vous soumettre, chaque participant sera limité à 40
12 pages, sauf le Procureur général du Canada qui, pour des raisons
13 évidentes, disposera d'un nombre de pages plus important, soit
14 80.

15 **LE COMMISSAIRE:** Est-ce que je peux ajouter qu'il
16 n'est pas nécessaire absolument de remplir toutes les 40 pages.

17 **(LAUGHTER/RIRES)**

18 **LE COMMISSAIRE:** Si vous avez -- si vous, par
19 concision, réussissez à dire ce que vous avez à dire dans 15
20 pages, je vais les lire avec autant de plaisir que de lire les
21 40 pages. O.k.?

22 Alors, 40 pages c'est la limite. Ce n'est pas
23 obligatoire.

24 **Me COURNOYER:** C'est le plafond.

25 J'ajoute que les procureurs de la Commission ne

1 produiront aucune représentation sur la preuve qui a été
2 présentée. Les représentations écrites doivent être soumises à
3 la Commission au plus tard le 10 juin.

4 Par ailleurs, il a toujours été entendu qu'après la
5 fin de la présentation de la preuve des procureurs de la
6 Commission, les parties peuvent, selon l'article 28 des Règles
7 de procédure, demander à la Commission de faire entendre ou
8 réentendre certains témoins. Ces requêtes devront être soumises
9 à la Commission au plus tard lundi prochain, le 16 mai, à 12h30.

10 Les représentations ---

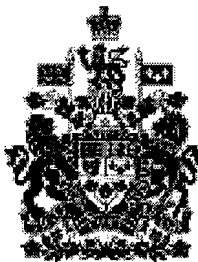
11 **LE COMMISSAIRE:** Est-ce que je peux vous demander de
12 préciser la nature de cette demande et est-ce qu'elle doit être
13 faite en forme d'une requête? Réponse "Non", je pense, qu'une
14 lettre suffira ?

15 **Me COURNOYER:** Mais une lettre ---

16 **LE COMMISSAIRE:** Qu'est-ce que vous proposez faire?

17 **Me COURNOYER:** C'est-à-dire que compte tenu, monsieur
18 le commissaire, des représentations variables qui pourraient
19 être faites, dans certains cas je sais que certains de mes
20 collègues m'ont informé qu'ils allaient probablement proposer,
21 pour des points mineurs, le dépôt d'un affidavit. Et pour nous
22 permettre de trancher de la question de façon organisée et bien
23 structurée, je privilégierais le modèle de la requête aussi
24 informelle fuisse-t-elle, mais d'une requête qui établit
25 clairement la nature et les raisons pour lesquelles les témoins

**Commission of Inquiry into
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Translation/ Traduction

VOLUME 115

Held at:

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H2Z 1X4

Monday, May 9, 2005

Tenue à :

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Salle des Saules
Centre des conférences
200, boul. René-Lévesque Ouest
Pièce 050, Niveau 00
Montréal, (Québec)
H2Z 1X4

Lundi, le 9 Mai 2005

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

2 L'audience débute à 9h33

3 **THE COMMISSIONER:** Good morning. Please be seated.

4 Good morning, Mr. Cournoyer.

5 **MR. COURNOYER:** Good morning, Mr. Commissioner.

6 Before beginning Mr. Corbeil's examination, there are
7 a few administrative questions I'd like to raise with you.

8 First, you informed our colleagues this morning that,
9 when preparing their written submissions for you, each
10 participant would be limited to 40 pages, except for the
11 Attorney General of Canada, who, for obvious reasons, would be
12 allowed more pages, that is, 80.

13 **THE COMMISSIONER:** May I add that it's not absolutely
14 necessary to fill all 40 pages.

15 **(LAUGHTER/RIRES)**

16 **THE COMMISSIONER:** If you have -- if you are concise
17 enough to say what you have to say in 15 pages, I'm going to
18 read them with as much pleasure as I would 40 pages. Okay?

19 So 40 pages is the limit. It's not obligatory.

20 **MR. COURNOYER:** That's the ceiling.

21 I would add that Commission counsel will not be making
22 any submission concerning the evidence that has been entered.
23 The written submissions must be delivered to the Commission by
24 June 10 at the latest.

25 In addition, it was always understood that, after

1 Commission counsel had finished presenting their evidence, the
2 parties could, under Section 28 of the Rules of Procedure, ask
3 the Commission to recall certain witnesses or call new ones.
4 Those applications must be submitted to the Commission by next
5 Monday at the latest, May 16, by 12:30 p.m.

6 The submissions ---

7 **THE COMMISSIONER:** May I ask the specific nature of
8 this application, and whether it has to be presented in the form
9 of a motion? I think the answer is no, that a letter will
10 suffice?

11 **MR. COURNOYER:** But a letter ---

12 **THE COMMISSIONER:** What are you proposing to do?

13 **MR. COURNOYER:** That is, Mr. Commissioner, given the
14 various submissions that might be made, in certain cases, I know
15 that some of my colleagues have informed me that they are
16 probably going to propose, for minor points, that an affidavit
17 be submitted. And to allow us to decide these matters in an
18 organized and well-structured way, I would favour using a
19 motion, even if it's quite informal, but a motion that
20 establishes clearly the nature and the reasons why the witnesses
21 -- why we want to call or recall witnesses.

22 **THE COMMISSIONER:** And that will be communicated to
23 all the other participants?

24 **MR. COURNOYER:** Exactly.

25 **THE COMMISSIONER:** Yes.

**COMMISSION OF INQUIRY
INTO THE SPONSORSHIP
PROGRAM AND
ADVERTISING ACTIVITIES**

**AFFIDAVIT OF JEAN-SÉBASTIEN GALLANT
[Sworn May 26, 2005]**

BORDEN LADNER GERVAIS LLP

Barristers and Solicitors
1100 - 100 Queen Street
Ottawa ON K1P 1J9

David W. Scott
Peter K. Doody
(613) 237-5160 telephone
(613) 230-8842 facsimile

Solicitors for the Rt. Honourable Jean Chrétien

(File 313730-000002/PKD/js)

COMMISSION OF INQUIRY INTO THE SPONSORSHIP PROGRAM AND ADVERTISING ACTIVITIES

WRITTEN REPRESENTATIONS IN RESPECT OF MOTION INVOLVING ROLE OF COMMISSION COUNSEL

Part I – Overview

1. Commission Counsel have announced that they will make no public submissions. They intend, however, to advise the Commissioner in private with respect to the report he will be providing. As a result, parties are denied their rights to procedural fairness in that they are denied the right to notice of submissions which may reflect adversely upon them.

Part II – Facts

A. Commission Counsel will not be making Public Submissions

2. On May 9, 2005, M^e Guy Cournoyer, Associate Commission Counsel, advised the parties that Commission Counsel would not be making any submission concerning the evidence that had been heard by the Commission.

Transcript, May 9, 2005, Volume 115, pp.21153 and 21154, Exhibit “J” to Affidavit of Jean-Sébastien Gallant, sworn May 26, 2005 (hereinafter “Gallant Affidavit”), *Motion* Record, Tab 2J, pp.55-56 (Original Language) and pp.58-59 (English Translation)

B. Commission Counsel will be Making Private Submissions

3. On May 12, 2005, Mr. Chrétien's lawyers received a letter from M^e Bernard Roy, Lead Commission Counsel. The last paragraph of that letter reads as follows:

Finally, your partner, Peter Doody asked Guy Cournoyer what role was envisaged to be taken by Commission Counsel after completion of the hearing stage of the Commission's mandate. The issue of the role of Commission Counsel, at the post-hearing stage, was raised by Mr. Justice Cory, at page 21, of the previously cited case of the Commission of Inquiry of the Blood System. Mr. Justice R. Decary, of the Appeal Division of the Federal Court, provided some useful and practical guidelines in *Canada (Attorney General) v. Canada (Commission of Inquiry of the Blood System)*, 151 D.L.R. (4th), paragraph 103 [subsequently corrected to par.102], at page 31. Commission Counsel's involvement will be consistent with the principles and guidelines enunciated by Justices Decary and Cory.

Gallant Affidavit, paras.2-3, Motion Record, Tab 2, pp.4-5

4. On May 13, 2005, Mr. Peter Doody, one of the lawyers representing Mr. Chrétien, wrote to M^e Roy. In that letter, Mr. Doody wrote:

In paragraph 72 of the Supreme Court of Canada decision, Mr. Justice Cory stated that a Commissioner should not seek advice regarding the report from counsel who had seen evidence which was undisclosed to and untested by all the parties granted standing before a Commission of Inquiry.

As you know, Commission counsel has seen much evidence which has not been disclosed to the parties, and has not been available for cross-examination.

Your letter was not entirely clear. Please provide me with a clear answer to the question of whether Commission counsel will be providing advice to the Commissioner in respect of, or assisting the Commissioner with, the writing of his report.

Letter, Peter Doody to Bernard Roy, Exhibit "A" to Gallant Affidavit, Motion Record, Tab 2A, p.1

5. On May 16, 2005, M^e Roy responded to Mr. Doody's letter. M^e Roy wrote:

Given the nature of the public inquiry, the commissioner may deem it appropriate to seek the assistance of his Counsel on questions and issues of fact and law. To the extent that the conclusions he will draw in his report will be his, and his alone,

nothing precludes him from calling on his Counsel to participate in this process.

In so far as your concern that because Commission Counsel have access to evidence which was not disclosed to the parties and remains untested, they should be disqualified from participating in the post-hearing process, you should know that only relevant documentary evidence filed in the Commission's record will be considered and dealt with by the Commissioner in his report.

Letter, Bernard Roy to Peter Doody, Exhibit "B" to Gallant Affidavit, Motion Record, Tab 2B, p.12

6. Prior to the Commission commencing its public hearings, copies of documentation which had been provided to the Commission by the Government of Canada were provided to all parties with standing on computer readable disks.

Gallant Affidavit, para.7, Motion Record, Tab 2, p.6

7. On September 9, 2004, the Commissioner stated, during the hearings:

... the Commission has had to take cognizance in one way or another of something like 10 million pieces of paper.

I am not a computer and I cannot take cognizance of 10 million pieces of paper. I am going to take cognizance of what is put before me in the form of evidence, but in order to avoid criticism because there was not full disclosure, a great deal of the 10 million pieces of paper has been disclosed to everybody who had standing as a participant here so that they know, frankly, so they can't complain that something was kept from them.

But it is for those people to decide if in addition to what Commission Counsel puts before me, which is going to be a whole lot less than 10 million pieces of paper, if they want to put additional documents before me. As long as those documents are material and relevant, I will take cognizance of them as well.

So don't assume that everything that you have received in electronic form is part of the evidence that I am going to take into consideration in this matter.

Transcript, September 9, 2004, Volume 3, pp.425 to 430, Exhibit "C" to Gallant Affidavit, Motion Record, Tab 2C, p.18

8. On September 22, 2004, the Commissioner stated, during the course of the hearings:

No, there is a vast amount of material which has been supplied by the Government of Canada, including Public Works, to the Commission. The Commission has communicated what it thought was relevant to the other parties and some of that information has been produced before me.

I am very grateful, but I am not expected to go through what has been estimated to be 10 million pieces of paper.

...

So there has been a filtering process that has taken place, but I take it for granted that there may be some minutes that Mr. Hunter would like to see that have not yet been produced before me.

Transcript, September 22, 2004, Volume 10, pp.1551-1553, Exhibit "D" to Gallant Affidavit, *Motion Record*, Tab 2D, pp.21-22

9. On November 29, 2004, Messrs. Scott and Doody, wrote to Mr. Neil Finkelstein, co-Commission Counsel. They wrote, among other things:

We understand that the Commission caused a subpoena to be served on the RCMP, seeking the production of documents arising out of the investigations, including the investigations which have resulted in charges. Documents were produced in accordance with that subpoena. We have not yet been provided with access to any such documents.

Letter, David Scott and Peter Doody to Neil Finkelstein, Exhibit "E" to Gallant Affidavit, *Motion Record*, Tab 2E, p.12

10. On December 1, 2004, this firm received a reply to that letter from Mr. Finkelstein. He wrote, among other things:

Fourth, you have asked for production of documents obtained from the R.C.M.P. There has been voluminous production already, and production will continue. However, there is no undertaking to provide you, now or later, with any or all specific material received from the R.C.M.P. or any agreement with the R.C.M.P. or any agreement with the R.C.M.P.

Gallant Affidavit, para.10, *Motion Record*, Tab 2, p.7

11. On May 3, 2005, Mr. Doody asked the Commissioner to direct his counsel to provide to the parties to the Commission of Inquiry the evidence underlying the criminal charges being faced by Mr. Guité. The Commissioner ruled that he would not order Commission Counsel to do that, stating:

In my view, the decisions that they took last November were well founded and I support them and I am not going to contradict them today for the reasons that are invoked by Mr. Doody.

Transcript, May 3, 2005, Volume 111, pp.20276-20284, Exhibit "F" to Gallant Affidavit, *Motion Record*, Tab 2F, p.39

12. Rule 39 of the Rules of Practice and Procedure of the Commission provides that counsel to parties and witnesses will be provided with copies of, among other things, will-say statements, upon giving a written undertaking that they will be used solely for the purpose of the Inquiry and subject to confidentiality obligations. Rule 40 provides that, unless otherwise ordered by the Commissioner, a will-say statement may not be used for the purpose of examination or cross-examination of a witness, or be made part of the hearing record.

Gallant Affidavit, para.12, *Motion Record*, Tab 2, p.8

13. Will-say statements prepared by Commission Counsel have been provided to counsel for the parties in all cases other than where "panels" of witnesses testified from government departments or agencies.

Gallant Affidavit, para.13, *Motion Record*, Tab 2, p.8

14. On February 28, 2005, the Commissioner stated, after being asked to read a will-say statement:

Mais avant d'aller plus loin, je demanderais à Me Roy s'il s'objecte à ce que je prends connaissance du will-say. Quant à moi c'était une pratique que nous avons suivi à la lettre de ne pas en prendre connaissance parce que je dois prendre connaissance de la preuve lorsqu'elle déroule devant nous et j'ai une certaine réticence d'empoisonner l'esprit avec une information qui n'est pas vérifiée par un serment.

and in the unofficial English translation:

Before we go any further, I would ask Mr. Roy if he has any objections to my reading the will-say. As far as I'm concerned, not reading will-says is a practice that we have followed to the letter, because I have to read the evidence as it's presented to us and I'm a little reluctant to poison my mind with information that hasn't been given under oath.

Transcript, February 28, 2005, Volume 74, p.12864 (Original Language), and p.12863 (English Translation), Exhibit "H" to Gallant Affidavit, *Motion Record*, Tab 2H, p.48 (Original Language), and p.50 (English Translation)

15. Mr. Chrétien was served with a subpoena requiring him to produce documents relevant to the matters being investigated by the Commission of Inquiry. A large number of documents were produced pursuant to that subpoena. A group of those documents was produced by Commission Counsel to other parties and filed as evidence before the Commission. The documents which were produced, pursuant to the subpoena, and were not selected by Commission Counsel to be introduced into evidence, were not disclosed to the other parties.

Gallant Affidavit, para.15, *Motion Record*, Tab 2, p.9

16. Other parties and witnesses also received subpoenas and produced documents to the Commission in answer to the subpoena. A large number of documents have been introduced into evidence by Commission Counsel which were received from parties and witnesses other than the Government of Canada.

Gallant Affidavit, para.16, *Motion Record*, Tab 2, p.9

17. The parties have not been provided with any documents from non-government parties other than those which have been entered into evidence.

Gallant Affidavit, para.17, *Motion Record*, Tab 2, p.9

18. The subpoenas and "call letters" issued by the Commission of Inquiry to government departments and other persons resulted in approximately 28,872,000

pages of documents being produced, of which 480,789 were disclosed to parties with standing.

Report of Kroll, Lindquist, Avey, dated May 18, 2005, pp.4-5, Exhibit "I" to Gallant Affidavit, *Motion Record*, Tab 2I, pp.52-53

19. Commission Counsel have reviewed documents which have not been disclosed to all parties. In addition, they have interviewed witnesses in the production of the will-say statements and thereby become privy to evidence which has not been tested in cross-examination.

Gallant Affidavit, paras.19-22, *Motion Record*, Tab 2, pp.9-10

Part III – Issues

20. It is submitted that there are two issues with respect to this motion:

- (a) whether it is appropriate for Commission Counsel's submissions to the Commissioner in respect of findings that could be made on the evidence be made in public; and
- (b) whether Commission Counsel should have any role in advising the Commissioner with respect to the writing of his report after the evidentiary phase ceases.

Part IV – Argument

21. Commissions of inquiry perform an important public function. They also, however, create a risk in that commissions of inquiry are not subject to many of the institutional constraints placed upon the various branches of government and are thus able to operate free from the safeguards which ordinarily protect individual rights in the face of government actions.

***Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97 at 139-140 (hereinafter "Westray"); [Brief of Authorities, Tab 1]**

22. It is essential that commissions follow the dictates of procedural fairness, for their findings may damage the reputation of a witness. For most, a good reputation is their most highly prized attribute.

***Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System)*, [1997] 3 S.C.R. 440 at 471; [Brief of Authorities, Tab 2]**

23. The search for truth conducted by a commission of inquiry does not excuse the violation of the rights of the individuals being investigated. The considerable powers of commissioners and the ready, numerous and often tempting opportunities for abuse make it necessary that vigilance be exercised in protecting witnesses' rights.

***Canada (Attorney General) v. Canada (Commissioner of the Inquiry on the Blood System)*, [1997] 2 F.C. 36 at 57-58, para.32 (C.A.); [Brief of Authorities, Tab 3]**

24. The duty to act fairly has two components: the right to be heard (the *audi alteram partem* rule) and the right to an impartial hearing (the *nemo iudex in sua causa* rule). The right to be heard includes the right to sufficient notice of the findings which may be made by a body investigating matters in which a person is involved.

***Re Therrien*, [2001] 2 S.C.R. 3 at paras.82-83; [Brief of Authorities, Tab 4]**

***Stevens v. Canada (Attorney General)*, [2004] F.C.J. No. 2116 at paras.41-42 (F.C.); [Brief of Authorities, Tab 5]**

25. In the Inquiry into Certain Bank Failures, Commissioner Willard Estey permitted a full public argument by Commission Counsel on the understanding that the argument did not represent the views of the Commission. He did so on the basis, firstly that it was preferable to have Commission Counsel express his advice to the Commission publicly and not in private, and that s.13 notices under the *Inquiries Act* were waived by parties who might be adversely affected (although counsel providing waivers did obtain particulars of the possible inferences that might be drawn from the evidence against their clients).

***The Inquiry into the Collapse of the CCB and Northland Bank (Ottawa 1986)*, Transcript at 12212-3, and 12221, cited in John**

Sopinka, Q.C., "The Role of Commission Counsel", Pross, Christie, Yogis, *Commissions of Inquiry*, (Toronto, Calgary, Vancouver: Carswell, 1990), pp.75-85 at 83; [Brief of Authorities, Tab 6]

26. The late John Sopinka wrote:

Where this course is adopted, it would be wrong to have commission counsel advise the commissioner privately without giving the parties affected by such advice an opportunity to meet it.

Sopinka, "The Role of Commission Counsel", *supra*, at 83; [Brief of Authorities, Tab 6]

27. Justice Berger, as he then was, described his manner of dealing with this issue in the Mackenzie Valley Pipeline Inquiry in the following way:

Then there is the problem of assuring that the inquiry's own staff do not wind up writing the report of the inquiry. To put it in another way, there is the problem of ensuring that the inquiry staff are not allowed to put their arguments privately to the commissioner or to the inquiry. I have sought to overcome this by laying down a rule that the recommendations that the inquiry staff wished to developed should be presented to the inquiry by commission counsel at the formal hearings. In this way, the inquiry staff will be developing what they conceived to be the appropriate terms and conditions to be applied, but they will not be able to do so privately. It will be necessary for them to place them before the inquiry, where they can be challenged, adopted or ignored by the other participants in the inquiry.

Thomas R. Berger, "The Mackenzie Valley Pipeline Inquiry", [1976] 3 *Queen's Law Journal* 3 at 14; [Brief of Authorities, Tab 7]

A. Commission Counsel should play no Role in the Final Report if they are Privy to Undisclosed and Untested Evidence

28. As Lead Commission Counsel, M^e Bernard Roy, noted, the Federal Court of Appeal has stated that so long as the findings a commissioner makes in his report are his own, he may, if he considers it advisable, seek the assistance of one or more of his counsel, in relation to questions of fact, evidence and law. In the immediately following paragraph, however, that Court wrote:

This being said, it is one thing to seek the assistance of counsel who participated in the examination of witnesses and it is another

to seek the assistance of counsel who have reviewed confidential submissions that were not disclosed to the appellants. The method adopted at the very end of the hearings for inviting submissions from the parties was particularly dangerous in that it opened the door to the possibility that a person in respect of whom unfavorable findings of fact would be made in the final report might not have had knowledge of all of the evidence relating to that person. Since the harm has been done, I am satisfied that the commissioner will not seek advice from those of his counsel who know things of which he and the appellants do not have knowledge.

Canada (Attorney General) v. Canada (Commissioner of the Inquiry into the Blood System), , [1997] 2 F.C. 36 at 80, para.103 (C.A.); [Brief of Authorities, Tab 3]

29. In the same case, the Supreme Court of Canada endorsed those remarks and said this:

If the submissions did contain new, undisclosed and untested evidence, the Commissioner should not seek advice regarding the report from counsel who received the confidential submissions.

30. Commission counsel are clearly privy to abundant evidence which has not been disclosed to the parties and/or is untested. That evidence includes not only the 27.6 million pages provided to the Commission and not released to the parties, but also the will-say statements, which have been disclosed to the parties but which are untested in that they have not been disclosed to the Commissioner and were not allowed to be the basis of cross-examination.

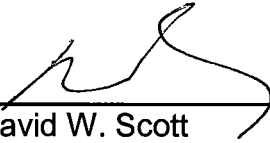
B. Conclusion

31. The combination of a complete absence of public submissions by Commission Counsel as to conclusions which could be found on the evidence, and the announced intention to make private submissions in respect of those matters, will ensure that procedural fairness is deprived to Mr. Chrétien and other parties.

Part V – Order Requested

32. It is respectfully submitted that Commission Counsel should make public submissions prior to the submissions of the parties, in respect of factual conclusions which could be derived from the evidence, and that they should play no role in advising the Commissioner with respect to the writing of the report.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 26th day of May 2005.



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Schedule A – Authorities

1. *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97
2. *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System in Canada – Krever Commission)*, [1997] 3 S.C.R. 440
3. *Canada (Attorney General) v. Canada (Commissioner of the Inquiry on the Blood System)*, [1997] 2 F.C. 36 (C.A.)
4. *Re Therrien*, [2001] 2 S.C.R. 3
5. *Stevens v. Canada (Attorney General)*, [2004] F.C.J. No. 2116 (F.C.)
6. John Sopinka, Q.C., “The Role of Commission Counsel”, Pross, Christie, Yogis, *Commissions of Inquiry*, (Toronto, Calgary, Vancouver: Carswell, 1990), pp.75-85
7. Thomas R. Berger, “The Mackenzie Valley Pipeline Inquiry”, [1976] 3 Queen’s Law Journal 3 at 14

Schedule B – Statutes, Regulations and Bylaws

Nil.