IPPERWASH PUBLIC INQUIRY

COMMISSIONER'S RULING
RE MOTION BY THE ONTARIO PROVINCIAL POLICE AND
THE ONTARIO PROVINCIAL POLICE ASSOCIATION

Introduction

1. The Ontario Provincial Police (the "OPP") and the Ontario Provincial Police Association (the "OPPA") have brought a motion requesting that I set aside the summons that I issued to Commissioner Gwen Boniface of the OPP on June 15, 2005 (the "Summons").

2. The Summons requires Commissioner Boniface to attend before the Inquiry and to produce the following documents:

> (1) The discipline files maintained by the OPP in respect of the "discredible conduct" of Detective Constable James Dyke and Detective Constable Darryl Whitehead;
>
> (2) The discipline files maintained by the OPP in respect of the mugs and t-shirt distributions; and
>
> (3) The orders, policies, guidelines and/or procedures maintained by the OPP in respect of the usage of "informal discipline" including those that would have governed in respect of the informal discipline used under paragraphs 1 and 2.

3. The OPP resists production of the records sought in items (1) and (2) in the absence of a judicial order. The OPP's position is that sections 69(9) and 80 of the *Police Services Act*, R.S.O. 1990, c. P.15 prevent disclosure of internal complaint files to a public inquiry; that a third party records analysis as undertaken in *A.M.* v. *Ryan,* [1997] 1 S.C.R. 157 before a judge of the Superior Court of Justice is necessary before the records can be disclosed; and that the records are privileged on the basis of common law privilege principles.

4. The OPPA objects to the disclosure or production of the contents of the discipline files on the basis of statutory prohibition under sections 69 and 80 of the *Police Services Act.* The OPPA submits further that the materials sought are inadmissible evidence at a public inquiry by virtue of sections 69(9) and 69(10) of the *Police Services Act*, section 11 of the *Public Inquiries Act*, and common law rules governing third party records and confidentiality. The OPPA submits that before the records can be produced to the Commission for inspection, the test for production of third party records as set out in *R.* v. *O'Connor* (1995), 103 C.C.C. (3d) 1 (S.C.C.) must be met.

5. The Province of Ontario objects to the production of the materials on the basis that they are not relevant to the mandate of the Inquiry, and in the alternative are privileged. In the Province's view, an *O'Connor* or *Ryan* application is not necessary, and the issue can be decided on the basis of privilege.

6. Aboriginal Legal Services of Toronto ("ALST") responds to the motion of the OPP and the OPPA and requests that their motion to quash the Summons to Commissioner Gwen Boniface dated June 15, 2005 be dismissed, and that the materials subject to the Summons be produced to the parties with standing. ALST argues that sections 69 and 80 of the *Police Services Act* are inapplicable to the records over which privilege is asserted, and that the records do not satisfy the test for "case-by-case" privilege under the common law.

7. The Chiefs of Ontario opposes the motion of the OPP and OPPA on the basis that the documents sought under the Summons are highly relevant and that there is no statutory or common law bar to the Commission issuing the Summons.

8. Written submissions were received by the Commission from the parties that decided to make submissions, and oral argument was heard in public at the Inquiry on July 19 and July 20, 2005.

Facts

9. On May 31, 2005, Deputy Commissioner John Carson of the OPP testified before this Inquiry about comments made by Officers Dyke and Whitehead on September

5, 1995. On September 5, 1995, Officers Dyke and Whitehead were engaged in surveillance of the Ipperwash Provincial Park and the Army Camp, during the course of which they made a videotape. The following exchange occurs in the videotape entered as Exhibit P-452 at the Inquiry and transcribed at pages 239-241 of the May 31, 2005 hearing transcript:

SPEAKER 1: What the fuck is this? UP --
SPEAKER 2: You're not supposed to be drinking over in that area.
SPEAKER 1: Yeah, what we're freelance?
SPEAKER 2: (laughs) What --
SPEAKER 1: What are we supposed to be, UPS?
SPEAKER 2: UPA.
SPEAKER 1: He said UPS. Where are you guys from? UPS.
SPEAKER 2: UPS.
SPEAKER 1: United --
SPEAKER 2: Parcel Service, sir.
SPEAKER 1: -- Postal.
SPEAKER 2: And we're disgruntled. Still a lot of press down there?
SPEAKER 1: No, there's no one down there. Just a big, fat fuck Indian.
SPEAKER 2: The camera's rolling.
SPEAKER 1: Yeah. We had this plan, you know. We thought if we could five (5) or six (6) cases of Labatt's 50, we could bait them.
SPEAKER 2: Yeah.
SPEAKER 1: And we'd have this big net at a pit.
SPEAKER 2: Creative thinking.
SPEAKER 1: Works in the south with watermelon.

10. Deputy Commissioner Carson testified on May 31, 2005 that internal disciplinary action was taken against both officers involved in this exchange (*May 31, 2005 transcript, page 241, lines 15 and 16*). He stated that he was not aware of the particular disciplinary action, but knew that a formal hearing under the *Police Services Act* was not held (*May 31, 2005 transcript, page 242, lines 3 and 6).*

11. On June 1, 2005 after informing himself of additional information about the discipline imposed on Officers Dyke and Whitehead, Deputy Commissioner Carson testified that when the incident came to light, Officer Dyke had retired from the OPP and was working for the OPP on a contract basis. At the conclusion of the investigation into the incident, Officer Dyke no longer provided services to the OPP (*June 1, 2005 transcript, page 16, lines 8-25*). Officer Whitehead accepted informal discipline which consisted of forfeiting three days pay and attending four days of First Nations awareness training (*June 1, 2005 transcript, page 18, lines 2-25*).

12. Also on June 1, 2005 Deputy Commissioner Carson testified that several officers had been subject to informal discipline as a result of their involvement in the production and distribution of mugs and t-shirts in relation to Ipperwash (*June 1 transcript, page 26, lines 9-11*). A CD-Rom with images of the mugs and t-shirts was entered as Exhibit P-458 at the Inquiry. The mug depicts a "Team Ipperwash '95" logo and an image of an arrow through an OPP shoulder flash. The t-shirt depicts an "E.R.T., T.R.U., '95" logo with a horizontal white feather underneath it. In aboriginal tradition, the arrow and feathers symbolize dead warriors (*June 1 transcript, page 28, lines 19-22*).

13. On June 1, 2005, counsel for ALST requested production through Commission counsel of: the discipline files maintained by the OPP in respect of the "discredible conduct" of Officers Dyke and Whitehead consisting of the videotaped verbal exchange; the discipline files maintained by the OPP in respect of the mug and t-shirt distributions; and the orders, policies, guidelines and/or procedures maintained by the OPP in respect of the usage of "informal discipline".

14. On June 7, 2005, Counsel for the OPP wrote to Commission counsel and refused to produce the discipline files, stating: "The OPP as a matter of policy and in

reliance upon existing statutory authority, cannot produce, upon request, internal complaint files."

15. On June 15, 2005, I issued the Summons to Commissioner Gwen Boniface of the OPP requiring Commissioner Boniface to attend before the Inquiry and to produce:

> (1) The discipline files maintained by the OPP in respect of the "discredible conduct" of Detective Constable James Dyke and Detective Constable Darryl Whitehead;
>
> (2) The discipline files maintained by the OPP in respect of the mugs and t-shirt distributions; and
>
> (3) The orders, policies, guidelines and/or procedures maintained by the OPP in respect of the usage of "informal discipline" including those that would have governed in respect of the informal discipline used under paragraphs 1 and 2.

16. The OPP has provided to the Commission the orders and policies referred to in item (3) but has refused to produce the files referred to in (1) and (2).

17. The general course of conduct adhered to by this Commission to obtain documents from the OPP has been as follows: Commission counsel have requested that documents be produced and the OPP has then asked that a summons be issued. Once a summons has been served, the OPP has produced the records sought to the Commission. In this case, notwithstanding that a summons was issued, the OPP refused to produce the documents.

Powers of the Commission

18. I have been appointed Commissioner to conduct this Inquiry by an Order in Council (1662/2003) dated November 12, 2003. Pursuant to section 3 of the *Public Inquiries Act*, R.S.O. 1990, Chapter P. 41, the conduct of an inquiry is under the control and direction of the commission conducting the inquiry.

19. Section 2 of the *Public Inquiries Act* states a commission may be appointed when the Lieutenant Governor in Council:

> considers it expedient to cause inquiry to be made concerning any matter connected with or affecting the good government of Ontario or the conduct of any part of the public business thereof or of the administration of justice therein or that the Lieutenant Governor in Council declares to be a matter of public concern . . . the Lieutenant Governor in Council may, by commission, appoint one or more persons to conduct the inquiry.

20. Under the Order in Council that established this Commission, the Lieutenant Governor in Council has appointed me as Commissioner to:

(a) inquire into and report on events surrounding the death of Dudley George; and

(b) make recommendations directed to the avoidance of violence in similar circumstances.

21. The Commission has a fact-finding mandate and broad powers to summon relevant witnesses and documents to fulfill that mandate. Subsection 7(1) of the *Public Inquiries Act* provides:

> Power to summon witnesses, papers, etc.
>
> 7.(1) A commission may require any person by summons,
>
> (a) to give evidence on oath or affirmation at an inquiry; or
>
> (b) to produce in evidence at an inquiry such documents and things as the commission may specify,
>
> relevant to the subject-matter of the inquiry and not inadmissible in evidence at the inquiry under section 11.

22. Section 11 of the *Public Inquiries Act* provides:

> Privilege
>
> 11. Nothing is admissible in evidence at an inquiry that would be inadmissible in a court by reason of any privilege under the law of evidence.

23. Pursuant to the *Act*, the legislature has signaled that a public inquiry may admit evidence that is otherwise inadmissible in a court of law subject to one exception: assuming it is relevant, the only evidence that is inadmissible in a public inquiry is evidence protected by a privilege.

24. The legislature's intention to allow for the broad admission of evidence in public inquiries is consistent with the purpose of public inquiries. As Cory J. stated in *Canada (Attorney General)* v. *Canada (Commission of Inquiry on the Blood System)*, [1997] 3 S.C.R. 457 (at para. 30), citing *Phillips* v. *Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97 (at pp. 137-138), one of the primary functions of public inquiries is fact-finding and investigation. According to Cory J. in *Canada (Attorney General)* v. *Canada (Commission of Inquiry on the Blood System)*, [1997] 3 S.C.R. 457 (at para. 34):

> A commission of inquiry is neither a criminal trial nor a civil action for the determination of liability. It cannot establish either criminal culpability or civil responsibility for damages. Rather, an inquiry is an investigation into an issue, event, or series of events. The findings of a commissioner relating to that investigation are simply findings of fact and statements of opinion reached by the commissioner at the end of the inquiry. They are unconnected to normal legal criteria. They are based upon and flow from a procedure which is not bound by the evidentiary or procedural rules of a courtroom. There are no legal consequences attached to the determinations of a commissioner. They are not enforceable and do not bind courts considering the same subject matter. The nature of an inquiry and its limited consequences were correctly set out in *Beno* v. *Canada (Commissioner and Chairperson, Commission of Inquiry into the Deployment of Canadian Forces to Somalia)*, [1997] 2 F.C. 527, at para. 23:
>
> > "A public inquiry is not equivalent to a civil or criminal trial. . . In a trial, the judge sits as an adjudicator, and it is the responsibility of the parties alone to present the evidence. In an inquiry, the commissioners are endowed with wide-ranging investigative powers to fulfil their investigative mandate . . . The rules of evidence and procedure are

> therefore considerably less strict for an inquiry than for a court. Judges determine rights as between parties; the Commission can only "inquire" and "report" . . .Judges may impose monetary or penal sanctions; the only potential consequence of an adverse finding . . . is that reputations could be tarnished."

Rules of Procedure and Practice of this Inquiry

25. I have determined, pursuant to my authority under section 3 of the *Public Inquiries Act* and the Order in Council, that this Inquiry will be conducted under the Inquiry's Rules of Procedure and Practice (the "Rules"). All parties to the Inquiry have agreed to abide by the Rules. The Order in Council establishing this Inquiry provides in paragraph 9:

> All ministries, Cabinet Office, the Premier's Office, and all boards, agencies and commissions of the government of Ontario shall, subject to any privilege or other legal restrictions, assist the commission to the fullest extent so that the commission may carry out its duties.

26. Rule 13 of the Rules of the Inquiry specifically highlights that all relevant evidence is admissible in a public inquiry unless it is privileged:

> Subject to section 11 of the *Public Inquiries Act*, the Commissioner is entitled to receive any relevant evidence at the Inquiry, which might otherwise be inadmissible in a court of law. The strict rules of evidence will not apply to determine the admissibility of evidence.

27. Under the Inquiry Rules, I have the power to order production of documents over which privilege has been claimed to Commission counsel. Rule 32 provides:

> The Commission expects all relevant documents to be produced to the Commission by any party with standing where the documents are in the possession, control or power of the party. Where a party objects to the production

> of any documents on the grounds of privilege, the document shall be produced in its original unedited form to Commission counsel who will review and determine the validity of the privilege claim. The party and/or that party's counsel may be present during the review process. In the event the party claiming privilege disagrees with Commission counsel's determination, the Commissioner, on application, may either inspect the impugned document(s) and make a ruling or may direct the issue to be resolved by the Regional Senior Justice in Toronto or His designate.

28. In *Lyons* v. *Toronto Computer Leasing Inquiry* (2004), 70 O.R (3d) 39 (Div. Ct.), Jeffrey Lyons sought an order quashing a ruling of the Honourable Denise Bellamy, Commissioner of the Toronto Computer Leasing Inquiry, which provided for Commission counsel to review documents over which Mr. Lyons was claiming solicitor-client privilege. In its decision, the Divisional Court confirmed that a commissioner has the power to determine whether documents are privileged and, therefore, inadmissible in Commission hearings (*Lyons* v. *Toronto Computer Leasing Inquiry* at para. 35). The Court also upheld the procedure of Commission counsel screening documents for privilege (at paras. 38-44).

There is no statutory privilege

29. In my view, the sections of the *Police Services Act*, upon which the OPP and the OPPA rely, do not create a statutory privilege over the documents.

30. Section 80 of the *Police Services Act* provides:

> Every person engaged in the administration of this Part shall preserve secrecy with respect to all information obtained in the course of his or her duties under this Part and shall not communicate such information to any other person except,
>
> (a) as may be required in connection with the administration of this Act and the regulations;
>
> (b) to his or her counsel;

(c) as may be required for law enforcement purposes; or

(d) with the consent of the person, if any, to whom the information relates.

31. Statutory secrecy and confidentiality provisions do not confer privilege. In *Transamerica Life Insurance Co. of Canada* v. *Canada Life Assurance Co*. (1995), 27 O.R. (3d) 291 (Gen. Div.), Justice Sharpe considered the issue of whether the Office of the Superintendent of Financial Institutions was required to produce documents in light of the following confidentiality provisions:

(a) section 22 of the *Office of the Superintendent of Financial Services Act*, R.S.C. 1985, c. 18 which provides: "(1) All information (a) regarding the business or affairs of a financial institution or persons dealing therewith that is obtained by the Superintendent, or by any person acting under the direction of the Superintendent, as a result of the administration or enforcement of any Act of Parliament . . . . is confidential and shall be treated accordingly"; and

(b) section 672 of the *Insurance Companies Act*, S.C. 1991, c, 47 which provides: "(1) Subject to section 673, all information regarding the business or affairs of a company, society, foreign company or provincial company or persons dealing therewith that is obtained by the Superintendent, or by any person acting under the direction of the Superintendent, as a result of the administration or enforcement of any Act of Parliament is confidential and shall be treated accordingly."

32. Justice Sharpe in the *Transamerica Life Insurance* decision at paragraph 25 said the following with respect to statutory confidentiality:

> . . . a statutory promise of confidentiality does not constitute an absolute bar to the information sought here, in my view, a statutory promise of confidentiality does not constitute an absolute bar to compelling production of the documents and information in the possession and control of OSFI. I see no reason to give statutory confidentiality a higher degree of protection that any other form of confidentiality. There is no reason why Parliament should be taken to have adopted the legal category of confidentiality without intending that category to have its ordinary legal meaning and effect. It is well established that confidential information may be

> subpoenaed and introduced in evidence if ordered by a court. The general rule is that although information is confidential, it must be produced unless the test laid down in *Slavutych* v. *Baker*, [1976] 1 S.C.R. 254 is met. Parliament could have provided that the information and documents at issue here could not be compelled by summons, but in my view, to accomplish this end, specific language to that effect would be required.

33. The OPP sought to distinguish this case on the basis that section 80 of the *Police Services Act* is different from the provisions considered by Justice Sharpe because it contains exceptions for when information may be communicated. In my view, the enumeration of these exceptions does not change the nature of section 80 of the *Police Services Act*: it is a confidentiality or secrecy provision, and not a privilege provision.

34. The OPP also submitted that it relies on the following passage by Peter Hogg in *Liability of the Crown,* quoted in the *Transamerica Life Insurance* decision: "Many statutes contain provisions that expressly make information confidential . . . The scope of these provisions is a matter of interpretation in each case. Those provisions that specifically prohibit the introduction of evidence in court will obviously be effective to withhold the protected material from litigation . . . ". In my view, this statement points to the necessity of looking to the specific language of a statute to interpret its provisions in a given case.

35. If the legislature intended to establish a privilege, it would have done so explicitly. The *Education Act*, for example, creates a statutory privilege over pupil records:

> A record is **privileged** for the information and use of supervisory officers and the principal and teachers of the school for the improvement of instruction of the pupil, and such record,
>
> (a) subject to subsections (2.1), (3) and (5), is not available to any other person; and
>
> (b) except for the purposes of subsection (5), is not **admissible in evidence for any purpose in any trial, inquest, inquiry, examination, hearing or other**

> **proceeding**, except to prove the establishment, maintenance, retention or transfer of the record,
>
> without the written permission of the parent or guardian of the pupil or, where the pupil is an adult, the written permission of the pupil. R.S.O. 1990, c. E.2, s. 266 (2); 1991, c. 10, s. 7 (2). [emphasis added]

36. Subsection 69(9) of the *Police Services Act* provides:

> (9) No document prepared as a result of a complaint is admissible in a civil proceeding, except at a hearing held under this Part.

37. Subsection 69(9) of the *Police Services Act* uses neither the word "privileged", nor does it delineate a broad category of proceedings as is the case in the *Education Act*; instead, it refers only to documents being inadmissible in civil proceedings.

38. Pursuant to section 11 of the *Public Inquiries Act* and in accordance with the broad investigative mandate of public inquiries, evidence that is inadmissible in civil proceedings may be admissible in public inquiries: the only exclusion is for privilege. If the legislature had intended to exclude evidence that is inadmissible in a civil proceeding from admission in public inquiries, the legislature would have referred to this exclusion expressly. When a provision specifically mentions one or more items but is silent with respect to other items that are comparable, it is presumed that the silence is deliberate and reflects an intention to exclude the items that are not mentioned (Sullivan, *Sullivan and Driedger on the Construction of Statutes,* Fourth Edition (2002), Butterworths: at p. 187).

39. In my view, section 11 of the *Public Inquiries Act* is a full answer to the question of whether the *Police Services Act* prevents the admission of the discipline files as evidence at the Inquiry; however, the OPP and the OPPA have raised the issue of whether a public inquiry is a "civil proceeding" as referred to in section 69 of the *Police Services Act*.

40. *Canada (Solicitor General)* v. *Ontario (Royal Commission of Inquiry into Confidentiality of Health Records)*, [1981] 2 S.C.R. 494, the case relied on by the OPP and the OPPA for the proposition that a public inquiry is a civil proceeding does not interpret "civil proceeding" to include a judicial inquiry. This decision stands for the proposition that the police informer privilege applies to a public inquiry. It does not define a public inquiry as a civil proceeding.

41. The OPPA relies on *Re Newfoundland and Labrador & Royal Newfoundland Constabulary Association*, (2004) 133 L.A.C. (4th) 289 (Arbitrator Oakley) as authority for the proposition that a judicial inquiry is a civil proceeding. This case is distinguishable as it relates to the interpretation of a collective agreement.

42. In my view, a public inquiry is not a "civil proceeding" as referred to in the *Police Services Act*. A public inquiry is an investigative and not an adjudicative process. It is inquisitorial not adversarial. Under the mandate of this Inquiry, I can make no determination of civil or criminal liability, nor can I impose damages or penalties. The Order in Council establishing the Commission provides that:

> The commission shall perform its duties without expressing any conclusions or recommendation regarding the civil or criminal liability of any person or organization. The commission, in the conduct of its inquiry, shall ensure that it does not interfere with any ongoing legal proceedings relating to these matters.

43. My conclusion that the phrase "civil proceedings" does not include public inquiries is supported by legal dictionary definitions of the words "civil" and "proceeding":

(a) The *Canadian Law Dictionary* (Fourth Edition (1999), Barron's: at p. 47) provides the following definition of the word "civil" but does not contain a definition of "proceeding":

> **CIVIL** 1. The branch of law that pertains to suits other than criminal practice and is concerned with the rights and duties of persons in contract, tort, etc.; 2. civil law as opposed to common law;

(b) The *Dictionary of Canadian Law* (Third Edition (2004), Thomson Carswell: at p. 192 and 998-999) provides the following definition of the words "civil" and "proceeding":

> **CIVIL**. *adj*. 1. Of legal matters, private as opposed to criminal. 2. Used to distinguish the criminal courts and proceedings in them from military court and proceedings. 3. Used to distinguish secular from religious.
>
> . . . .
>
> **PROCEEDING.** *n.* . . . . 8. Includes an action, application or submission to any court or judge or other body having authority by law or by consent to make decisions as to the rights of persons.

44. A public inquiry is of a very different nature from both civil trials and administrative hearings. In civil actions and purely administrative hearings, there is some *lis* between the participants, which the decision-maker must determine. An adversarial process is engaged and the role of the judge or tribunal is to reach a decision with respect to that *lis* based on the evidence and argument presented. In contrast, there is no *lis* in a public inquiry. Public inquiries are investigative.

45. The OPP has argued that because section 69(9) of the *Police Services Act* defines “civil proceeding” to include hearings held under Part V of the *Police Services Act*, which can result in findings of misconduct similar to those that may be made in public inquiries, a “civil proceeding” must also include a public inquiry. In my view, a hearing under the *Police Services Act* is quite different from a public inquiry because it is adversarial and because it can result in penalties being imposed on the officers involved.

46. Accordingly, the *Police Services Act* does not provide a statutory bar to the Commission’s receipt of the summonsed discipline files, or to production of the allegedly privileged documents to Commission counsel.

Third Party Records Analysis

47. The third party records analysis proposed by the OPP and the OPPA has no application. While some of the criminal cases in which records relating to officers’

misconduct and discipline are sought by accused persons do refer to the privacy interest of officers in relation to their employment records, in the cases that follow *R.* v. *O'Connor* (1985), 103 C.C.C. (3d) 1 (S.C.C.), in the context of police discipline files, the "third party" is the police and not the individual officer. Typically, an accused will seek production of documents relating to the investigating officers. Such documents are in the possession of the police and not in the possession of the Crown. The documents are therefore not automatically producible to the accused under the Crown's disclosure obligations.

48. In this case, the documents are within the possession of a party to this proceeding, which, as such, has an obligation to produce relevant documents. It is within my mandate to make decisions regarding relevance and privilege.

Case-by-Case Privilege

49. I have determined that there is no statutory privilege or bar in the *Police Services Act* with respect to the documents sought. There may be a claim of common law case-by-case privilege based on the Wigmore criteria as referred to in *Slavutych* v. *Baker*, [1976] 1 S.C.R. 254 and *A.M.* v. *Ryan*, [1997] 1 S.C.R. 157 at para. 20; however, without access to the documents, neither Commission counsel nor I can assess whether the documents are privileged.

50. My decision with respect to possible case-by-case privilege is reserved pending review of the documents by Commission counsel and if necessary, by me.

Waiver

51. ALST submitted that privilege, to the extent that it is found to exist at law and on these facts, over the discipline files in relation to Officers Dyke and Whitehead has been waived by virtue of Deputy Commissioner Carson’s disclosure to the Commission and to the public of the details of the discipline imposed on the officers. In my view, there has been no waiver by the OPP or its officers as a result of the disclosure to the Commission or to the public of the details of the discipline with the consent of the officers.

Ruling

52. In my view, the documents should be produced to Commission counsel. Accordingly, my ruling is as follows:

(i) Documents over which privilege are claimed should be produced to Commission counsel in accordance with Rule 32, which delineates the procedure upheld in *Lyons* v. *Toronto Computer Leasing Inquiry*, (2004) 70 O.R (3d) 39 (Div. Ct.);

(ii) There is no statutory privilege or bar preventing the production of the documents required by my summons to Commissioner Boniface dated June 15, 2005; and

(iii) A third party records analysis by a Judge of the Superior Court of Justice has no application because the documents are held by a party to this Inquiry.

53. The OPP is required to produce the discipline files in respect of the "discredible conduct" of Detective Constable James Dyke and Detective Constable Darryl Whitehead on September 5, 1995, and the discipline files maintained by the OPP in respect of the mugs and t-shirt distributions. The documents should be produced to Commission counsel who will review the documents. I will then make my decision regarding the claim of common law, case-by-case privilege.

54. Therefore, the motions to set aside the Summons are dismissed. I direct that:

(i) The OPP shall deliver the following documents to Commission counsel by no later than 5:00 p.m. August 22, 2005:

(1) The discipline files maintained by the OPP in respect of the "discredible conduct" of Detective Constable James Dyke and Detective Constable Darryl Whitehead; and

(2) The discipline files maintained by the OPP in respect of the mugs and t-shirt distributions.

(ii) Commission counsel shall review the documents for relevance and possible privilege;

(iii) The review will be conducted confidentially on Inquiry premises;

(iv) Counsel for the OPP and the OPPA may attend and participate in the review; and

(v) Relevant and non-privileged material will be distributed to parties with standing in the usual manner employed by this Inquiry.

55. The OPPA has requested that if after hearing submissions I want to enforce the Summons by requiring the OPP to produce the documents to Commission counsel, I should first state a case in writing to the Divisional Court in accordance with subsection 6(1) of the *Public Inquiries Act*. If, after consideration of this ruling, the OPPA still wishes me to state a case, the OPPA should provide confirmation of this request including the particulars of the case to be stated no later than 5:00 p.m. on August 19, 2005.

Released: August 15, 2005

The Honourable Sidney B. Linden
Commissioner