The Legacy of Phoenix Sinclair

Achieving the Best for All Our Children

The Hon. Ted Hughes, O.C., Q.C., LL.D. (Hon), Commissioner

Volume 3 — Appendices

December 2013

Phoenix Victoria Hope Sinclair
(2000-2005)

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MANITOBA

ORDER IN COUNCIL

DATE: **March 23, 2011**

ORDER IN COUNCIL NO.: **89/2011**

RECOMMENDED BY: **Minister of Justice**

ORDER

1. The Honourable Edward (Ted) N. Hughes, OC, QC, LL.D (Hon) is appointed as commissioner to inquire into the circumstances surrounding the death of Phoenix Sinclair and, in particular, to inquire into:

   (a) the child welfare services provided or not provided to Phoenix Sinclair and her family under *The Child and Family Services Act*;

   (b) any other circumstances, apart from the delivery of child welfare services, directly related to the death of Phoenix Sinclair; and

   (c) why the death of Phoenix Sinclair remained undiscovered for several months.

2. The commissioner must report his findings on these matters and make such recommendations as he considers appropriate to better protect Manitoba children, having regard to the recommendations, as subsequently implemented, made in the reports done after the death of Phoenix Sinclair, set out in paragraph 3.

3. To avoid duplication in the conduct of the inquiry and to ensure recommendations relevant to the current state of child welfare services in Manitoba, the commissioner must consider the findings made in the following reviews and the manner in which their recommendations have been implemented. He may give the reviews any weight, including accepting them as conclusive:

   (a) A Special Case Review In Regard To The Death Of Phoenix Sinclair, Andrew J. Koster and Billie Schibler (September, 2006)

   (b) Investigation into the Services Provided to Phoenix Victoria Hope Sinclair, Department of Justice, Office of the Chief Medical Examiner (September 18, 2006)

   (c) Strengthen The Commitment An External Review of the Child Welfare System, Michael Hardy, Billie Schibler and Irene Hamilton (September 29, 2006)

   (d) "Honouring Their Spirit", The Child Death Review: A Report to the Minister of Family Services and Housing, Province of Manitoba, Billie Schibler and James H. Newton (September, 2006)

   (e) Strengthening our Youth: Their Journey to Competence and Independence, A Report on Youth Leaving Manitoba's Child Welfare System, Billie Schibler, Children's Advocate, and Alice McEwan-Morris (November, 2006)

   (f) Audit of the Child and Family Services Division, Pre-devolution Child in Care Processes and Practices, Carol Bellringer, Auditor General (December, 2006)

4. The commissioner may also consider any court transcripts and similar documents, which are not subject to a legal claim of privilege, and may give them any weight, including accepting them as conclusive.

5. The commissioner must perform his duties without expressing any conclusion or recommendation about civil or criminal liability of any person.

6. The commissioner must complete his inquiry and deliver a final report containing his findings, conclusions and recommendations to the Minister of Justice and Attorney

General by March 30, 2012. He may also give the Minister of Justice and Attorney General any interim reports that he considers appropriate to address urgent matters. All reports must be in a form appropriate for public release, but release is subject to *The Freedom of Information and Protection of Privacy Act* and other relevant laws.

7. Nothing in paragraph 1 limits the commissioner's right to request the Lieutenant Governor in Council to expand the terms of reference to cover any matter that he considers necessary as a result of information that comes to his attention during the course of the inquiry.

8. Government departments and agencies and other bodies established under the authority of the Manitoba Legislature must assist the commissioner to the fullest extent permitted by law.

9. Before public hearings take place, the commissioner may interview any person connected with the matters referred to in paragraph 1. On the commissioner's behalf, interviews may be conducted by counsel for the commissioner, either alone or in the commissioner's presence. If conducted alone, counsel must give the commissioner a transcript or a report of each interview. The commissioner may, in his discretion, rely on the evidence gathered in this manner.

10. The Minister of Finance may pay the following amounts from the Consolidated Fund, at the request of the Minister of Justice and Attorney General:

    (a) travelling and other incidental expenses that the commissioner incurs conducting his inquiry;

    (b) fees and salaries of any advisors and assistants employed or retained for the purpose of the inquiry;

    (c) any other operational expenditures required to support the inquiry.

11. This Order is effective immediately.

AUTHORITY

Subsection 83(1) and section 96 of *The Manitoba Evidence Act*, C.C.S.M. c. E150, state in part:

Appointment of commission
83(1) Where the Lieutenant Governor in Council deems it expedient to cause inquiry to be made into and concerning any matter within the jurisdiction of the Legislature and connected with or affecting

...

(c) the administration of justice within the province;

...

(f) any matter which, in his opinion, is of sufficient public importance to justify an inquiry;

he may, if the inquiry is not otherwise regulated, appoint one or more commissioners to make the inquiry and to report thereon.

Power to make rules
96 The Lieutenant Governor in Council may make provision, either generally in regard to all commissions issued and inquiries held under this Part, or specially in regard to any such commission and inquiry, for

(a) the remuneration of commissioners and persons employed or engaged to assist in the inquiry, including witnesses;

(b) the payment of incidental and necessary expenses; and

(c) all such acts, matters, and things, as are necessary to enable complete effect to be given to every provision of this Part.

MANITOBA

DÉCRET

DATE : **23 mars 2011**
DÉCRET NO. : **89/2011**
RECOMMANDATION : **Ministre de la Justice**

DÉCRET

1. L'honorable Edward (Ted) N. Hughes, O.C., c.r., LL.D. hon., est nommé à titre de commissaire chargé d'enquêter sur les circonstances du décès de Phoenix Sinclair et, notamment, d'enquêter sur :

   a) les services d'aide à l'enfance qui ont été ou non fournis à Phoenix Sinclair et à sa famille en vertu de la *Loi sur les services à l'enfant et à la famille*;

   b) les autres circonstances directement liées au décès;

   c) les raisons pour lesquelles le décès n'a été découvert que plusieurs mois après sa survenance.

2. Le commissaire fait état de ses conclusions et fait les recommandations qui, selon lui, permettront de mieux protéger les enfants au Manitoba, eu égard aux recommandations — déjà mises en œuvre — que contenaient les rapports visés au paragraphe 3 et établis après le décès de Phoenix Sinclair.

3. Afin que soit évité tout chevauchement dans la conduite de l'enquête et pour que ses recommandations soient adaptées à l'état actuel des services d'aide à l'enfance offerts dans la province, le commissaire tient compte des conclusions figurant dans les documents indiqués ci-après et de la façon dont les recommandations qu'ils contenaient ont été appliquées. Il peut donner à ces documents le poids qu'il estime approprié et notamment leur accorder pleine valeur probante :

   a) le document intitulé « A Special Case Review In Regard To The Death Of Phoenix Sinclair », rédigé par Andrew J. Koster et Billie Schibler (septembre 2006);

   b) le document intitulé « Investigation into the Services Provided to Phoenix Victoria Hope Sinclair », rédigé par le Bureau du médecin légiste en chef du ministère de la Justice (18 septembre 2006);

   c) le document intitulé « Strengthen The Commitment An External Review of the Child Welfare System », rédigé par Michael Hardy, Billie Schibler et Irene Hamilton (29 septembre 2006);

   d) le document intitulé « "Honouring Their Spririt", The Child Death Review: A Report to the Minister of Family Services and Housing Province of Manitoba », rédigé par Billie Schibler et James H. Newton (septembre 2006);

   e) le document intitulé « Strengthening our Youth: Their Journey to Competence and Independence, A Report on Youth Leaving Manitoba's Child Welfare System », rédigé par Billie Schibler, protectrice des enfants, et Alice McEwan-Morris (novembre 2006);

   f) le document intitulé « Audit of the Child and Family Services Division, Pre-devolution Child in Care Processes and Practices », rédigé par Carol Bellringer, vérificatrice générale (décembre 2006).

4. Le commissaire peut également tenir compte des transcriptions judiciaires et des documents semblables qui ne sont pas assujettis à une allégation de privilège et peut leur donner le poids qu'il estime approprié et notamment leur accorder pleine valeur probante.

5. Le commissaire s'acquitte de son mandat en évitant de formuler toute conclusion ou recommandation au sujet de la responsabilité civile ou criminelle de quiconque.

6. Le commissaire termine son enquête et remet au ministre de la Justice et procureur général un rapport définitif contenant ses conclusions et ses recommandations au plus tard le 30 mars 2012. Il peut également lui remettre les rapports intérimaires qu'il estime indiqués afin que soient réglées des questions urgentes. Tous les rapports doivent pouvoir être diffusés au public, sous réserve de la *Loi sur l'accès à l'information et la protection de la vie privée* et des autres lois pertinentes.

7. Le paragraphe 1 n'a pas pour effet d'empêcher le commissaire de demander au lieutenant-gouverneur en conseil d'élargir son mandat afin qu'il puisse traiter d'autres questions s'il le juge nécessaire en raison des renseignements portés à sa connaissance au cours de l'enquête.

8. Les ministères et organismes du gouvernement ainsi que les autres entités constituées sous l'autorité de l'Assemblée législative du Manitoba prêtent assistance au commissaire dans toute la mesure permise par la loi.

9. Avant la tenue d'audiences publiques, le commissaire peut interroger directement ou par l'intermédiaire d'un avocat les personnes touchées par les questions visées au paragraphe 1. Les interrogatoires dont l'avocat est chargé se déroulent en présence ou en l'absence du commissaire. S'il effectue un interrogatoire sans la présence du commissaire, l'avocat lui remet une transcription ou un compte rendu. Le commissaire peut, à son entière discrétion, s'appuyer sur la preuve recueillie de cette manière.

10. Le ministre des Finances peut payer les sommes suivantes sur le Trésor, à la demande du ministre de la Justice et procureur général :

    a) les frais de déplacement et les autres frais accessoires que le commissaire engage à l'occasion de son enquête;

    b) les honoraires et les salaires des conseillers et des adjoints employés ou dont les services sont retenus aux fins de la tenue de l'enquête;

    c) les autres dépenses de fonctionnement nécessaires à la tenue de l'enquête.

11. Le présent décret prend effet immédiatement.

DISPOSITION HABILITANTE

Le paragraphe 83(1) et l'article 96 de la *Loi sur la preuve au Manitoba*, c. E150 de la *C.P.L.M.*, prévoient notamment ce qui suit :

« **Nomination de commissaires**
83(1) Lorsque le lieutenant-gouverneur en conseil juge à propos de faire instituer une enquête sur toute affaire relevant de la compétence de la Législature et touchant ou ayant trait, selon le cas :

[...]

c) à l'administration de la justice dans la province;

[...]

f) à toute affaire qui, de son avis, est d'une importance publique suffisante pour justifier une enquête,

il peut, s'il n'est pas prévu d'enquête par ailleurs, nommer un ou plusieurs commissaires pour conduire l'enquête et en faire rapport.

[...]

Règles
96 Le lieutenant-gouverneur en conseil prend des dispositions, soit générales relativement à toutes les commissions qui sont délivrées et à toutes les enquêtes qui sont tenues sous le régime de la présente partie, soit spécifiques à leur égard, pour les affaires suivantes :

a) la rémunération des commissaires et des personnes qui sont engagées ou employées pour aider à l'enquête, y compris les témoins;

b) le paiement des frais accessoires et nécessaires;

c) les actes, les affaires et les choses qui sont nécessaires afin d'assurer l'application de toutes les dispositions de la présente partie ».

COMMISSION OF INQUIRY INTO THE CIRCUMSTANCES SURROUNDING THE DEATH OF PHOENIX SINCLAIR

Commissioner: E.N. (Ted) Hughes, O.C., Q.C., LL.D (Hon)

Commission Counsel and Administrative Staff

Commission Counsel
Sherri Walsh

Senior Associate Commission Counsel
Derek Olson

Associate Commission Counsel
Kathleen McCandless
Noah Globerman
Rohith Mascarenhas

Community Research Analyst
Karen Dyck

Chief Administrative Officer
Marcia Ewatski

Office Manager
Cindy Pearson

Investigators
Sam Anderson
Bruce Foster

The following individuals also contributed as Commission staff at various times:

Associate Commission Counsel: Madeline Low, Elizabeth McCandless

Administrative Staff: Carol Dougan, Judi Gaminek, Shawna Goy, Diane James, Regina Legaspi, Jennifer McIvor, Nicole Mohoric, Angela Prevost, Monica Shannon, Harvey Stelmaschuk

Clerks: Diane DeLaRonde, Sandi Desautels, Roxanne Labossiere

Sheriff Officers: Chantal Chepit, Kayla Couette, Dennis Lucero, Jeff St. Paul, Chris Robertson, Charissa Van Dorp, Amanada Wachtler

COMMISSION OF INQUIRY INTO THE CIRCUMSTANCES SURROUNDING THE DEATH OF PHOENIX SINCLAIR

ORDER

I HEREBY ORDER that the Rules of Procedure and Practice are amended in the form attached hereto as Schedule "A".

Dated: August 23rd, 2011

BY THE COMMISSIONER

The Honourable Edward (Ted) N. Hughes

SCHEDULE "A"

COMMISSION OF INQUIRY INTO THE CIRCUMSTANCES SURROUNDING THE DEATH OF PHOENIX SINCLAIR

AMENDED RULES OF PROCEDURE AND PRACTICE

PART I: GENERAL

1. The Commission's mandate, established by Order-in-Council No. 89/2011, is:

    - To inquire into the circumstances surrounding the death of Phoenix Sinclair and, in particular, to inquire into:
        - the child welfare services provided or not provided to Phoenix Sinclair and her family under *The Child and Family Services Act*;
        - any other circumstances, apart from the delivery of child welfare services, directly related to the death of Phoenix Sinclair; and
        - why the death of Phoenix Sinclair remained undiscovered for several months.

2. Public hearings will be convened in Winnipeg at the Winnipeg Convention Centre, 375 York Avenue, Winnipeg, Manitoba at a date and time to be finalized by the Commissioner.

3. In these Rules:

    (i) "Commission counsel" refers to counsel appointed by the Commissioner and retained by the Government of Manitoba to act as Commission counsel, and includes any associate counsel or junior counsel appointed by "Commission counsel" with the approval of the Commissioner and under the authority of Commission counsel's retainer;

(ii) the term "documents" is intended to have a broad meaning, and includes the following forms: written, electronic, audiotape, videotape, digital reproductions, photographs, maps, graphs, microfiche and any data and information recorded or stored by means of any device;

(iii) "intervenor" refers to a person granted status as an intervenor by the Commissioner pursuant to paragraph 9;

(iv) "party" refers to a person granted full or partial standing as a party by the Commissioner pursuant to paragraph 8; and

(v) "person" means an individual, group, government, agency or other entity.

4. All parties, intervenors, witnesses and their counsel shall be deemed to undertake to adhere to these Rules, and may raise any issue of non-compliance with the Commissioner.

5. The Commissioner shall deal with a breach of these Rules as he sees fit including, but not restricted to, revoking the standing of a party or intervenor, and imposing restrictions on the further participation in or attendance at the hearings by any party, intervenor, counsel, individual or member of the media.

6. The Commissioner may amend these Rules or dispense with compliance with them as he deems necessary to fulfill his mandate and to ensure that the Inquiry is thorough, fair and timely.

PART II: STANDING

7. Commission counsel, who will assist the Commissioner to ensure the orderly conduct of the Inquiry, shall have standing throughout the Inquiry. Commission counsel have the primary responsibility for representing the public interest at the Inquiry, including the responsibility to ensure that all matters that bear upon the public interest are brought to the Commissioner's attention.

8. A person may be granted full or partial standing as a party by the Commissioner if the Commissioner is satisfied that the person has a direct and substantial interest in all or a part of the subject matter of the Inquiry.

9. A person may be granted intervenor standing by the Commissioner if the Commissioner is satisfied that the person does not have a direct and substantial interest but has a genuine and demonstrated concern about the issues raised in the Inquiry mandate and has a particular perspective or expertise that may assist the Commissioner.

10. The Commissioner will determine on what terms a party or intervenor may participate in the Inquiry, and the nature and extent of such participation.

11. The Commissioner may direct that a number of applicants share in a single grant of standing.

12. Applicants for standing will be required to provide written submissions explaining why they qualify for standing, and how they propose to contribute to the Inquiry. Applicants for standing will also be given an opportunity to appear in person before the Commissioner in order to explain why standing ought to be granted to them.

13. As provided for in Part III (Evidence), counsel representing a witness who is called to testify before the Commission may participate during the hearing of that witness' evidence without the necessity of applying for standing.

PART III: EVIDENCE

A. General

14. The Commissioner may receive any evidence that he considers to be helpful in fulfilling his mandate whether or not such evidence would be admissible in a court of law.

15. The Commissioner may give the reviews listed in Section 3 of Order in Council No. 89/2011 any weight, including accepting them as conclusive.

16. The Commissioner may consider any court transcripts and similar documents, which are not subject to a legal claim of privilege, and may give them any weight, including accepting them as conclusive.

B. Preparation of Documentary Evidence

17. All parties granted standing under Part II of these Rules shall, as soon as possible after being granted standing, produce to the Commission true copies of all documents in their possession or control having any bearing on the subject-matter of the Inquiry. Upon the request of Commission counsel, parties shall also provide originals of relevant documents in their possession or control for inspection.

18. Upon the request of Commission counsel, any intervenor granted standing under Part II of these Rules shall, as soon as possible after being granted standing, produce to the Commission true copies of all documents in their possession or control having any bearing on the subject-matter of the Inquiry. Upon the request of Commission counsel, intervenors shall also provide originals of relevant documents in their possession or control for inspection.

19. All documents received by the Commission will be treated by the Commission as confidential, unless and until they are made part of the public record or the Commissioner otherwise directs. This does not preclude Commission counsel from producing a document to a potential witness prior to the witness giving his or her testimony, as part of Commission counsel's investigation, nor does it preclude Commission counsel from disclosing such documents to the parties and intervenors to this Inquiry, pursuant to and subject to the terms and limitations described in paragraphs 27 and 28 below.

20. Any party or intervenor required to produce a document or documents pursuant to paragraphs 17 or 18 of these Rules or pursuant to a subpoena or summons issued pursuant to s. 88(1) of the *Manitoba Evidence Act* and who claims privilege over any such document shall produce a list of the documents over which privilege is claimed stating the basis and reasons for the claim of privilege.

C. Witness Interviews and Disclosure

21. Commission counsel may interview persons believed to have information or documents bearing on the subject-matter of the Inquiry. The Commissioner may choose whether or not to attend an interview.

22. Persons interviewed by Commission counsel may choose to have legal counsel present during the interview, but are not required to do so.

23. If Commission counsel determines that a person who has been interviewed should be called as a witness in the public hearings referred to in paragraph 2, Commission counsel will prepare a summary of the witness' expected testimony, based on the interview ("Summary"). Commission counsel will provide a copy of the Summary to the witness before he or she testifies in the hearing. After the Summary has been provided to the witness, copies shall be disclosed to the parties and intervenors having an interest in the subject matter of the witness' evidence, on their undertaking to use it only for the purposes of the Inquiry, and on the terms described in paragraphs 27 and 28 below.

24. The Summary of a witness' expected testimony cannot be used for the purpose of cross-examination on a prior inconsistent statement.

25. Pursuant to section 9 of Order in Council 89/2011, if Commission counsel determines that it is not necessary for a person who has been interviewed to be called as a witness, or if the person interviewed is not otherwise able to be called to testify at the public hearings referred to in paragraph 2,

Commission Counsel may tender the Summary to the Commissioner at the hearing, and the Commissioner may consider the information in the Summary when making his final findings, conclusions and recommendations.

26. Unless the Commission orders otherwise, all relevant non-privileged documents in the possession of the Commission shall be disclosed to the parties and intervenors at a time reasonably in advance of the witness interviews and/or public hearings or within a reasonable time of the documents becoming available to the Commission.

27. Before documents are provided to a party, intervenor or witness by the Commission, he or she must undertake to use the documents only for the purposes of the Inquiry and to keep their contents confidential unless and until those documents have been admitted into evidence during a public phase of the Inquiry, and to abide by such other restrictions on disclosure and dissemination that the Commission considers appropriate.

28. All documents provided by the Commission of Inquiry to the parties, intervenors and witnesses that have not been admitted into evidence during a public phase of the Inquiry, and all copies made of such documents, are to be returned to the Commission, in the case of witnesses on completion of their testimony, and in the case of parties and intervenors within seven days of the Commissioner issuing his final Report.

29. The Commission may, upon application, release any party, intervenor or counsel in whole or in part from the provisions of an undertaking regarding the use or disclosure of documents or information.

D. Witnesses

30. Witnesses who testify will give their evidence under oath or upon affirmation.

31. Witnesses are entitled to have their own counsel present while they testify. Counsel for a witness who is not a party or intervenor has standing in the Inquiry for the purposes of that witness' testimony, and may examine the witness as provided in these Rules.

32. Witnesses may be called to give evidence in the Inquiry more than once.

33. Where he considers it advisable, the Commissioner may issue a summons or subpoena pursuant to s. 88(1) of the *Manitoba Evidence Act* requiring a witness to give evidence on oath or affirmation and/or to produce documents or other things.

34. Parties and intervenors are requested to advise Commission counsel of the names, addresses and telephone numbers of all witnesses they wish to have called and, if possible, to provide summaries of the information the witnesses may have.

E. Oral Examinations

35. The order of examination of a witness will ordinarily be as follows, subject to paragraph 36, below:

    (a) Commission counsel will examine the witness. Except as otherwise directed by the Commissioner, Commission counsel may adduce evidence from a witness by way of both leading and non-leading questions;

    (b) The parties who have been granted standing to do so will then have an opportunity to cross-examine the witness to the extent of their interest. If these parties are unable to agree on the order of cross-examination, this will be determined by the Commissioner;

    (c) Subject to paragraph 36, counsel for the witness will examine the witness last, regardless of whether or not counsel is also representing another party;

    (d) Commission counsel will then have the right to re-examine the witness. Except as otherwise directed by the Commissioner, Commission counsel may adduce evidence from a witness during re-examination by way of both leading and non-leading questions.

36. Counsel for a witness may apply to the Commissioner for permission to present that witness' evidence-in-chief. If permission is granted, the witness will be examined in the following order:

    (a) Counsel will examine the witness in accordance with the normal rules governing the examination of one's own witness in court proceedings, unless otherwise directed by the Commissioner;

    (b) Commission counsel will then be entitled to examine the witness. Commission counsel may adduce evidence from a witness by way of both leading and non-leading questions;

    (c) The other parties with standing will be in entitled to cross-examine the witness, as provided for in paragraph 35(b);

    (d) Counsel for the witness will then be entitled to re-examine the witness;

    (e) Commission counsel will then be entitled to conduct a final re-examination of the witness, as provided for in paragraph 35(d).

37. Counsel will be governed by section 4.04(2) of the Law Society of Manitoba's Code of Professional Conduct regarding communication with witnesses giving evidence.

38. Once Commission counsel has indicated that they will not be calling a particular witness to testify at the public hearings, a party may apply to the Commissioner and request that the witness be called to give evidence. If the Commissioner is satisfied that the witness' testimony is needed, the Commissioner may direct Commission counsel to call the witness (in which case paragraph 35 applies) or may allow the requesting party to call the witness and adduce his or her evidence in chief (in which case paragraph 36 applies, with suitable modifications).

F. Use of Documents at Hearings

39. Copies of all documents received by Commission counsel from the Government of Manitoba, including copies of documents received from

Government departments, agencies and other bodies established under the authority of the Manitoba Legislature, as well as copies of transcripts of proceedings before any Court or Commission of Inquiry, shall be presumed to be authentic, unless a party objecting demonstrates on a balance of probabilities that they are not authentic, and original documents need not be produced.

40. Before a witness testifies at the Inquiry, Commission counsel may, where practicable and appropriate, provide the witness and the parties with a binder or a list of those documents that are likely to be referred to during that witness' testimony.

41. No document shall be used in cross-examination or otherwise unless:

(a) copies of the document have been provided to Commission counsel in a timely manner pursuant to paragraphs 17 and 18; or

(b) leave of the Commissioner has been granted.

G. Access to Hearings and to the Evidence

42. Subject to paragraph 43, the hearings referred to in paragraph 2 will ordinarily be open to the public.

43. Where the Commissioner is of the opinion that it is necessary in the interests of the maintenance of order or the proper administration of justice to exclude all or any members of the public from the hearing room, he may, after hearing submissions from interested parties, direct that portions of the hearing be held in the absence of the public or on such terms and conditions as he may direct.

44. Applications from witnesses or parties to hold any part of the hearing in the absence of all or any members of the public should be made in writing to the Commission at the earliest possible opportunity.

45. The transcripts and exhibits from the public hearings will be made available as soon as practicable for public viewing. Transcripts will be posted on the Commission's web site as soon as is reasonably practicable.

46. Transcripts of any portions of the hearing that are held in the absence of the public pursuant to paragraph 43 will be made available for public viewing on such terms as the Commissioner may direct if, after hearing the evidence and any submissions, the Commissioner concludes that it is in the public interest to release the transcripts.

PART IV: NOTICES REGARDING ALLEGED MISCONDUCT

47. The Commissioner will not make a finding of misconduct on the part of any person unless the person or, if the person is deceased, his or her estate has had reasonable notice of the substance of the alleged misconduct and has been allowed full opportunity during the Inquiry to be heard in person or by counsel.

48. Any notices of alleged misconduct will be delivered on a confidential basis to the person to whom the allegations of misconduct refer.

49. Pursuant to Section 5 of Order in Council 89/2011, the Commissioner must perform his duties without expressing any conclusion or recommendation about the civil or criminal liability of any person.

PART V: PROCEDURES ON MOTIONS

51. Three copies of the motion materials shall be filed with the Commission Office.

52. The notice of motion shall be served on any party, intervenor or person who will be affected by the order sought.

53. Evidence on a motion may be given by affidavit. Where a party to the motion has served every affidavit on which the party intends to rely, the party may cross-examine the deponent of any affidavit served by a party who is adverse in interest on the motion.

54. A party who has cross-examined on an affidavit filed by an adverse party shall not subsequently file an affidavit for use at the hearing without leave or consent, and the Commissioner shall grant leave, on such terms as are just, where he is satisfied that the party ought to be permitted to respond to a matter raised on the cross-examination with evidence in the form of an affidavit.

55. The right to cross-examine shall be exercised with reasonable diligence, and the Commissioner may refuse an adjournment of a motion for the purpose of cross-examination where the party seeking the adjournment has failed to act with reasonable diligence.

56. A party who cross-examines on an affidavit shall:

(a) order copies of the transcript for the Commission and the party being examined; and

(b) file a copy of the transcript with the Commission.

COMMISSION OF INQUIRY INTO THE CIRCUMSTANCES SURROUNDING THE DEATH OF PHOENIX SINCLAIR

The Honourable Edward (Ted) N. Hughes, OC, QC, LLD. (Hon), Commissioner

VOLUME 2

TRANSCRIPT OF PROCEEDINGS before the Commission, held at the Winnipeg Convention Centre, 375 York Avenue, Winnipeg, Manitoba, on the 29th day of June, 2011

JUNE 29, 2011 [1]
RULING BY THE COURT

JUNE 29, 2011
PROCEEDINGS CONTINUED FROM JUNE 28, 2011

THE CLERK: This hearing into the commission inquiry into the circumstances surrounding the death of Phoenix Sinclair is now in session. Please be seated.

THE COMMISSIONER: Well, as you likely appreciate, I think this is going to take a little while I review the 17 applications before me, but we will get under way.

The public call for applications of participation in this commission of inquiry provided as follows:

> "Applications for standing as a party are being invited from any person or group with a direct and substantial interest in the subject matter of the Inquiry. Applications for standing as an intervenor are being invited from any person or group that does not have a direct and substantial interest but has a genuine and demonstrated concern about the issues raised in the Inquiry mandate and has a particular perspective or expertise that may assist the Commissioner."

The rules of procedure and practice for this inquiry, consistent with the call for applications provide:

> "8. A person may be granted full or partial standing as a

> party by the Commissioner if the Commissioner is satisfied that the person has a direct and substantial interest in all or a part of the subject matter of the Inquiry.
>
> 9. A person may be granted intervenor standing by the Commissioner if the Commissioner is satisfied that the person does not have a direct and substantial interest but has a genuine and demonstrated concern about the issues raised in the Inquiry mandate and has a particular perspective or expertise that may assist the Commissioner."

As a, as recorded in those rules, it is my responsibility to determine the terms of participation of a party or intervenor, the nature and extent of that participation and provision is made for me directing that a number of applicants share in a single grant.

What will amount to a direct and substantial interest is necessarily contextual and will depend on the terms of reference of the inquiry. In meeting my responsibility of determining whether each applicant for standing, as a party to these proceedings, has a direct and substantial interest, there is unquestionably involved, on my part, the application of a degree of judgment. With respect to the manner of the exercising of that judgment, Commissioner O'Connor, in the commission of inquiry into the actions of Canadian officials in relation to Maher Arar

said that judgment should have regard to the subject matter of the inquiry, the potential importance of the findings or recommendations to the individual or organization, including whether their rights, privileges, or legal interests may be affected and the strength of the factual connection between the individual or group and the subject matter involved.

I consider that to be sound reasoning which I have followed in deciding on the applications for party standings that are before me.

The subject matter of this inquiry is as spelled out in paragraph 1 of the order in council establishing the commission, followed by paragraphs 2 and 3, which contain directives that I must following in carry (sic) out my inquiry into the identified subject matter.

Besides my concurrence with Commissioner O'Connor, I am in accord with the remarks of commission counsel spoken yesterday when she addressed this commission on the test for a standing as a party. Equally so with respect to her reference to the rights and obligations that flow from a grant of party standing.

The test for granting intervenor status is not a, the direct and substantial one. I am again in agreement with what was said by commission counsel relating to the less onerous extensive role of intervenors. Those granted intervenor status participate in a different manner, but the opportunity they have to contribute to the work of the commission is both real and substantial. Firstly, the rules relating to documentary disclosure have applicability to them and secondly, during the course of the hearing, they will be given access to all transcripts and exhibits filed at the hearings. On the occasion on which those with party status make their closing submissions to the commission, the intervenors will have the opportunity to do

the same and they can do so either or both in, through oral or written presentations. If a need arises, intervenors may also be called upon by the commission at other times for their assistance.

Before I move to a consideration of the applications before me, I wish to make special reference of the role of commission counsel, whom, as I made clear, as is made clear in our rules of procedure and practice, has standing throughout the inquiry. With her rests the primary responsibility for representing the public interest. It will be her responsibility to ensure that all matters that bear on the public interest are brought to my attention and to investigate and to lead evidence in a thorough but completely impartial and balanced manner such that public confidence in the process in integrity and impartiality of the inquiry itself will be maintained throughout.

On announcing the appointment of Ms. Walsh and members of her legal team, Ms. Low and Ms. McCandless on April the 15th, I went into greater detail about the importance of the position of commission counsel and the duties and responsibilities resting with her. The proceedings of that day can be found on the commission website.

Until the beginning of this week, I had 16 applications for consideration. A seventeenth was received on Monday. Based on the factors that I have enumerated and taken into account in deciding the presence or otherwise of a direct and substantial interest in the subject matter of this inquiry, I have concluded that nine of the applicants do have the required direct and substantial interest. Some of those remaining will be afforded intervenor status and I will address those applications in a few minutes.

With respect to the nine, I will speak to the

reasoning on the basis of which I have concluded as I have with respect to each of them. Before I do so, I will tell you now that there will not be nine individual grants of party status. There will be some groupings, as contemplated by our rules. Where the facts and circumstances that give rise to the presence of a direct and substantial interest are substantially the same in more than one application, I have grouped those with that substantially similar interest into a single grant. In the instances where I have done that, I will, in a few moments, expand on my reasons. I appreciate that substantially the same direct and substantial interest is not the same as identical interests. But in each instance, the real substance of the interest is, in my opinion the same and hence my decision to group. That will necessitate those within a group to meet at an early date and chart their course. The result of my grouping will result in five grants of standing as parties to these proceedings. While my decisions are based on what I have just said and will be amplified upon in a few moments, the result I have arrived at will have the ancillary positive effect of achieving the most possible expeditious process, as well as having an impact on the cost of these proceedings. In the public interest, I cannot lose sight of those significant factors.

I make an individual grant of standing as a party to this inquiry to the following three applicants: (1) The Department of Family Services and Consumer Affairs of the Government of the Province of Manitoba, (2) Manitoba Government and General Employees Union, (3) Intertribal Child and Family Services. I will briefly outline my reasons for these, those decisions. It should be noted that all applications are public documents and are available for viewing on the inquiry website.

With respect to the Department of Family Services

and Consumer Affairs and the Government of Manitoba, this commission could not adequately carry out its assignment without the full participation of the, of the Department. The reasons why that is so are made abundantly clear in counsel's letter of June 3rd. He made the following points: (1) The Department is the legal successor to Winnipeg Child and Family Services Agency, in whose care Phoenix Sinclair was placed twice during her short life. Winnipeg Child and Family Services, which is now a part of the Department, also provided services to Phoenix and her family until about March 2005. (2) The Department has overall responsibility for the regulation of child welfare services in Manitoba. (3) The Department has responsibility for oversight of the implementation of the recommendations made in the six reviews that followed the death of Phoenix, all of which reviews are identified in the order of council, establishing the commission and to which the commission is mandated to give its attention to with respect to the matter of implementation.

The Department's participation is critical to the commission effectively meeting its mandate. It clearly has a direct and substantial interest in all of the subject matter of the inquiry and accordingly, full party status is accorded to it.

Manitoba Government and General Employees Union. The Union is the sole and exclusive representative with respect to terms and conditions of employment of 400 of its members who are employed as front line service providers within the child welfare system of Manitoba. They work for the department to whom I have just granted party status. The Union bargains those terms and conditions of employment with the Department. The application accords, records that eight, 38 of its members have been identified as being directly involved in providing services to Phoenix and/or

her family in the five years prior to her death. Most, if not all, of those 38 members are expected to detail at the inquiry the circumstances and the particulars of their involvement. The Union has said in its application, paragraph 25:

> "As the front-line workers who provided [the] services to Phoenix Sinclair, many MGEU members will be able to explain how the Child Welfare system [operated] generally and how services were provided specifically to Phoenix Sinclair and her family. They will be able to explain how most of the services provided were consistent with Departmental expectations and expectations of the general public."

Paragraph 26:

> "However, it is possible (and very [likely regrettable] regrettably likely) that some MGEU members will be subjected to public scrutiny and criticism regarding their role."

Paragraph 27:

> "In that respect, it is also possible that [the] the Department and its counsel will be in a legal

> conflict as it relates to their ability to fully and adequately represent its employees. That is, without admitting as much, if MGEU members, as employees of the Department failed to meet childcare standards or expectations [of] policies and procedures of the Department, then the Department and its counsel will be unable to fully and adequately represent the interests of ... MGEU members at the Inquiry."

It is because of the possibility of such a conflict existing that I lean to granting party status to the union, notwithstanding that status, that status has already been granted to the employer of the union's members. The union has put its mind to possible consequences if its members and, and if, if -- to its members and has expressed its concern in the following paragraph and it points to The Law of Public Inquiries by Simon Ruel, page 57, as authority for it. Paragraph 47:

> "A person who is alleged to have committed misconduct clearly has a substantial and direct interest in the subject matter of [the] inquiry. However, the test of substantial and direct interest covers a wider class of persons than those who may be subject to simply adverse findings in a

> commissioner's report. A substantial and direct interest may also arise from the fact that one's legal interests may be affected or when the subject matter of the inquiry may seriously affect a person. This is certainly true when [the] the propriety or legality of the actions of a person may be called into question [and] and encompasses fear of a person's sense of well-being or fear of an adverse affect (sic) on one's reputation, if serious and objectively reasonable."

Returning to the possibility of conflict referenced earlier, the union has added the following in its application, paragraph 56:

> "In addition, as in the Kingston Prison for Women Inquiry, MGEU members who were directly involved in providing care to Phoenix Sinclair and her family will be in need of legal representation as it relates to their personal role in the provision of services. Some of the MGEU members may choose not to be represented by counsel for the Department and indeed, there may be many factual matters on which the Union and the Department

> may differ with regard to the environment in the Child Welfare system [in the] in the time period leading to the events surrounding Phoenix Sinclair and immediately thereafter. While this may not necessarily be the case for all employees, where there is [a] conflict between the MGEU member, the MGEU and the Department, the grant of full standing to ... MGEU can be restricted as appropriate as it [related] to the right to cross-examination where the MGEU and the Department have a similar interest on particular issues."

I have concluded that the Union has a direct and substantial interest in the inquiry and standing as a party is accorded to it. I would anticipate that the Department, I would anticipate the Department preceding the Union in cross-examination of witnesses and where there is no conflict between the Department and a member of the Union, the Union will, in such instances, be appropriately restricted in its cross-examination.

Intertribal Child and Family Services. This is a First Nation Child and Family Service agency established in April 2001, exclusively delivering child and family services to three First Nations communities, one of which is Fisher River First Nation, the location where the death of Phoenix occurred. The agency points out that shortly after the death of Phoenix, it had contact with the family and was the first agency to report information concerning her death. It emphasizes that the mandate of this

commission will require it to review the agency's involvement and activities during the relevant times in question. I agree. It correctly points out that the very locus of the tragedy distinguishes the Agency from all other parties to the inquiry. It has pointed out that the death of Phoenix within the mandated territorial agency, territorial area of the Agency, has had a deep and devastating impact on the entire Fisher River community. I am satisfied that Intertribal Child and Family Services has a direct and substantial interest in this inquiry that warrants its status as a party to the inquiry.

I now turn to a consideration of the general Child and Family Services Authority, the First Nations of Northern Manitoba Child and Family Services Authority, the First Nations of Southern Manitoba Child and Family Services Authority and the Child and Family All Nations Coordinated Response Network known as ANCR, ANCR, pardon me, ANCR. Prior to 2004, child and welfare services were delivered throughout Manitoba in accordance with the governing statute of the province, the Child and Family Services Act. The actual delivery of on the ground services were through agencies mandated by the director of Child and Family Services to whom the agencies were responsible. The predominant service provider to residents of the city of Winnipeg was the Winnipeg Child and Family Services agency, of which I have already made mention.

In or about November 2003, pursuant to the recently enacted Child and Family Services Authority Act, a major shift in the delivery of services was underway as a result of the provision in that act creating four authorities, three of which I have just identified and each authority was charged with administering and providing for the delivery of child and welfare services.

In the case of the Northern Authority, it is to

(a) people who are members of the Northern First Nations specified in the Regulations, (b) persons who are identified with those Northern First Nations and (c) other persons as determined in accordance with a protocol established in the Regulations.

In the case of the Southern Authority, it is to (a) people who are members of the Southern First Nations specified in the Regulations, (b) persons who are identified with those Southern First Nations and (c) other persons as determined in accordance with the protocol established in the Regulations.

The third authority identified in the Act is the Métis Authority and it is given the same responsibility as the Northern and Southern Authorities, but confined to all Métis and Inuit people. That authority is not an applicant for standing.

Then follows in the Act provision for the general authority which was given responsibility for administering and providing for the delivery of child and welfare services to all persons not receiving services from another authority.

The authorities are authorized to mandate service agencies to provide required services. Such agencies are always responsible to the authority which has mandated them to deliver services.

Provision is also made in the Authorities Act for the four of them jointly designating an agency to provide joint intake and emergency services in any geographic region of the province established by Regulation.

The applicant, Child and Family All Nations Coordinated Response Network, ANCR, is the agency designated for the indicated purpose in the geographic areas of Winnipeg, Headingley, East and West St. Paul. The Southern Authority is the mandated authority to which ANCR

is responsible and to whom it reports. Intertribal Child and Family Services, to whom I have already granted a standing is also under the direction of the Southern Authority, in that the Fisher River Reserve is within the territorial, territorial jurisdiction of that authority.

Following the proclamation of the Authorities Act, there was a period of transition while caseloads were transferred to the authorities. The Department of Family Services and Consumer Affairs, as the successor to the Winnipeg Child and Family Services Agency, can be expected to give the commission the details of the child welfare services provided or not provided to Phoenix and her family during her lifetime.

Because these pour, four parties whose applications I am now addressing had neither responsibility for nor other involvement in the life of Phoenix, I limit their involvement to that aspect of the foregoing aspect of the inquiry's work. I say that with the expectation that her life and death and the involvement of Phoenix and her family with the delivery of family welfare services will be, will be fully explored by the commission counsel and by those who had responsibility for her care and welfare. If circumstances should arise indicating that there is a need for the relaxing of that limitation, that can be dealt with by application to me at the appropriate time.

There was involvement and participation and intense interest by the authorities, following the discovery of the death of Phoenix. The General Authority had particular interest and involvement at that stage, firstly because of its statutory responsibility for service delivery to all persons not receiving services from another authority, and secondly because of its awareness of the services that had previously been provided to Phoenix and her family by Winnipeg Child and Family Services Agency.

In the course of the devolution process, that agency became a mandated agency of the general authority. Holding the responsibility it did, the General Authority participated in an internal review conducted with respect to the death of Phoenix.

With respect to the findings made in reviews identified in paragraph 3 of the order in council establishing this commission and the implementation of the recommendations made in them, it is apparent to me that many of them bear on the mandate of the commission as stated in paragraph 1 of the order in council. All of those matters are of significant importance to the three authorities and to ANCR. Recommendations that had been made have province wide implications involving all four authorities. So does the matter of implementation those, of those recommendations. When I consider these factors and the important role that the legislature has given to the relatively newly formed authorities, with particular attention to the delivery of services to First Nations in this province, I have concluded that the three authorities which have applied for standing and also ANCR, because of its role as the designated intake agency for Winnipeg contemplated by the Act, all have a direct and substantial interest in the subject matter of a major part of this inquiry. That is the part that addresses the recommendations that have been made in the identified reviews that have, that bear on the mandate of the commission as outlined in paragraph 1 of the order in council and the implementation of them consistently across the entire province. On these matters, the standing status that I have awarded to the four of them will be full and unrestricted.

I see no reason why these four applicants should have separate standing. It is a clear instance where there

should be a sharing of a single grant. The interests of the parties are not divergent in any substantial way. They will make a significant contribution to the work of the commission as consideration is given to the protection and welfare of children who are and who become the responsibility of the authorities and of ANCR.

I note also that the Authorities Act specifically requires that each authority, in respect of the persons for whom it is responsible to provide services must cooperate with other authorities to ensure that the delivery of child and welfare, family services in the province is properly coordinated. It is that cooperation that I expect to occur as the three authorities work together as partners in the grant of standing that I have made to them. It should not be difficult for ANCR to participate with the same level of cooperation. I note that in presenting its application, it, it is represented by the same law firm as the Southern Authority.

I now come to consider the applications of Steve Sinclair and Kimberly-Ann Edwards. Steve Sinclair is the biological father of Phoenix Sinclair. He advised that from the, from the time Phoenix was three months old, he, as her father, had a close relationship with her and when he and the biological mother of Phoenix, Samantha Kematch, Kematch, permanently separated in June 2001, he took custody of Phoenix.

In their applications for standing, Steve Sinclair and Kimberly-Ann Edwards say that they have been friends for a number of years. At one time they lived in the same neighbourhood. Commencing in August 2000, Sinclair often brought Phoenix to the home of Edwards and eventually, the child stayed with Edwards overnight and before long, she was staying for extended weekends. From the time of the separation of the biological parents,

Phoenix spent long periods in the care of Edwards and when she was there, Steve was a frequent visitor with his daughter. Kimberly-Ann Edwards says that for a considerable amount of the time, she was the primary caregiver for Phoenix.

Edwards and Sinclair say that the last contact they had with Phoenix was when Kematch came to the Edwards home and with the consent of Edwards, took Phoenix for a visit in the park. Sinclair and Evans (phonetic), Edwards say that their efforts to subsequently locate Phoenix were unsuccessful, notwithstanding what they describe as numerous calls to government agencies and other organizations for help in their search for her.

I have concluded that both Sinclair and Edwards have a direct and substantial interest in this inquiry and I award that status to both of them, as to, that is to say, as full parties. However, their interests are so similar that it is appropriate they share a single grant of standing. They are represented by the same counsel.

I have reached the decision just indicated for a number of reasons. Sinclair is the biological father and he asserts his interest and concern for the wellbeing of his daughter throughout her life. In my view, that alone warrants the standing I have afforded to him.

This inquiry is about Phoenix Sinclair. Much of the evidence will not bear directly on Phoenix as the person and personality that she was during her short life. Kimberly-Ann Edwards, as her intermittent caregiver during the first three years of her life, had significant contact with her and will be able to tell us about the little girl that she was and who she says enjoyed a good life during the time they spent together with Phoenix calling Kimberly nana-mom. She is entitled to participate of I, as I have indicated.

That completes the list of applicants to whom I will grant standing as parties to the inquiry. I now turn to a consideration of the granting of intervenor status. There will see, be three such grants and I will speak to each of them.

Firstly, the Faculty of Social Work, University of Manitoba. The Faculty, through its dean and with the authorization of the University, has requested intervenor status. I have no hesitation with granting that request and I express my appreciation for the willingness of the University of Manitoba to be of assistance. I have already identified the level of participation afforded to intervenors. If the Faculty makes a submission at the close of the hearings, it will undoubtedly be very helpful to me. I say that, given the basis for the Faculty's expression of interest in the work of this inquiry, expressed in the following paragraph its, of its application:

> "The Faculty of Social Work at The University of Manitoba is the only accredited social work educational program in the Province. Accordingly, the majority of social workers with undergraduate or graduate degrees working in Manitoba's child welfare system are graduates of the Faculty. Moreover, the Faculty continues to work with the Child Welfare Authorities and the Child Protection [directives to] to identify training and educational needs for social workers and

> others working in the system. To this end, we have collaborated in the establishment of a range of educational opportunities including courses, diplomas and specializations with a focus on child welfare. Faculty members have also been involved in research and program evaluations in the area of child welfare at a provincial, national and international level. In addition, the faculty is currently engaged in reviews of its curricula and the Inquiry is certainly relevant to these activities."

I now come to the application of the Assembly of Manitoba Chiefs. The Assembly has placed before me a very thoughtful and well prepared issues and issues outline which it wishes to address at this inquiry. The presentation is made under the following three headings: (1) The Treatment of First Nations Children and Families in Indian Residential Schools and the Child Welfare System and the Inter-Generational Effects on First Nation Children and Families, (2) The Role of First Nations in the Delivery of Child and Family Services, (3) The Challenges Facing the Child Welfare System.

My consideration of the subject matter identified in these three items and the detailed subheadings listed beneath them would invite serious consideration of a request for parting (sic) standing if this inquiry was one into the entire child welfare system of this province. That is not the scope of this inquiry. Rather, it is, as

recorded at the top of page 1 of the issues outline paper, an inquiry into the circumstances surrounding the death of Phoenix Sinclair.

Unquestionably, as this commission looks at the child welfare services provided or not provided to Phoenix Sinclair and her family before and after devolution, many of the practices and procedures related to the delivery of child welfare services are going to come under the spotlight and receive the attention and consideration of this commission. As that occurs, the focus will be on the facts of the Phoenix Sinclair tragedy and not on the broad brush envisaged by this applicant. I do not see the Association of Manitoba Chiefs having a direct and substantial interest in the central and critical component of the assignment given to me, in that this applicant has had no involvement whatever in the facts surrounding the life and death of Phoenix Sinclair. The applicant has not met the test to be afforded party standing.

With the opportunity to receive documentary disclosure, review the transcripts of all of the proceedings at this inquiry and to view all the exhibits, the Assembly of Manitoba Chiefs may well be in a position, as an intervenor, to assist me in fulfilling my mandate. By that time, the matter in which the child welfare system worked or did not work in the case of Phoenix Sinclair will be a matter of record. The perspective and expertise of the Assembly could very well be most helpful to me by addressing the strengths and/or weaknesses of the child welfare system in the province, as disclosed by the evidence presented at the hearing and by suggesting changes or improvements to the benefit of First Nations children and families, as well as others who will, in the future, be provided with child and family welfare services. Accordingly, intervenor status is awarded to the Assembly

of Manitoba Chiefs.

Before leaving my consideration of this application, I wish to mention that in his submission, counsel for the Assembly of Manitoba Chiefs indicated an intention to call witnesses who have evidence which is relevant to the mandate of this inquiry. As per Rule 34, both parties and intervenors are requested to advise commission counsel of the names and addresses and telephone numbers of witnesses they wish to have called. I'm sure that commission counsel will welcome the Assembly of First Nations Chiefs' suggestions in that regard.

Also, with respect to Rule 18, the Assembly of Manitoba Chiefs will be required, will be required to provide commission counsel with documents that are relevant to the mandate of this inquiry.

I now come to the Southern Chiefs' Organization Inc. The Southern Chiefs' Organization advised that it advocates on behalf of the political and legal interests of its 33 member Southern Manitoba First Nations, who are in turn currently represented by the chiefs of these communities. Its advocacy is on behalf of the protection, preservation, promotion and enhancement of First Nations peoples with inherent rights, languages, customs and traditions through the application and implementation of the spirit and intent of the treaty making process. For the same reasons I declined to, to, declined party status to the Assembly of Manitoba Chiefs, I decline the same request of the Southern Chiefs' Organization. Also for the same reasons expressed with respect to the Assembly Manitoba Chiefs' application, I grant intervenor status to the Southern Chiefs' Organization in order to enable it to make a submission to me following the close of the evidence on matters relating to the strengths and/or weaknesses of the child welfare system in this province as disclosed by

the evidence presented at the hearing and by suggesting changes or improvements to the benefit of First Nations children and families, as well as others who will, in the future, be provided with child and welfare services.

My inclination was to direct the Assembly of First Nations and Chiefs and the Southern First Nations of Chief (sic) to share a single grant of intervenor statting (phonetic), standing. The Southern Chiefs' Organization tell me, however, that the interest of the Assembly of Manitoba Chiefs and the Southern Chiefs' Organization "vis-à-vis child welfare are divergent". Had I been considering a grant of party status to either the Assembly of Manitoba Chiefs or the Southern Chiefs' Organization, which I am not, I would have required more information of the, on the extent of that divergent that has been referred to, divergence that has been referred to. Since, however, it is intervenor status that is to be granted to each of them, I will accept the Southern Chiefs' Organization statement of that divergence and grant a separate intervening standing to each of them.

As an intervenor, Southern Chiefs' Organization is also encouraged to identify witnesses to commission counsel and will be required to provide commission counsel with documents that are relevant to the mandate of the inquiry.

Besides the application made to the commission on Monday, which I will come to, this leaves four applications that neither party nor intravenous, intervenor status will be granted. I will state my reasons with respect to each.

First is the Phoenix Sinclair Foundation Inc. The Foundation was formed as a non-profit organization on August 24th, 2007. It was an obvious outgrowth of the sad death of Phoenix Sinclair. In its application, it has set forth both its mission and its goals. Rather than

repeating them here, I will reference the Foundation's website of www.tpsfi.webs.com, where more information can be found.

In its application, the Foundation has said that its purpose is to "promote positive societal changes in the child protection system so that no other children in care die". It is clear that in pursuit of that purpose, the Foundation places great emphasis on the safety of aboriginal children in care. While the Foundation sets out a number of grounds in support of its request, the first on its list is central to its request. It reads:

> "(1) The Foundation seeks answers as to how and why a child, who was in the care of Child and Family Services, could have been subjected to long term serious abusive treatment, without Child and [welfare] ... Services noticing. The Foundation wants to ensure that the child protection system makes the appropriate systemic changes to prevent children from 'falling between the cracks'".

I expect evidence called by commission counsel will bear out the assumptions made in the first sentence of that statement. What is stated therein will be a central focus of this inquiry, along with the expectation of the improvements that are addressed in the second sentence. In my considered judgment, those witnesses called by commission counsel will answer the issues raised in that central ground advanced by the Foundation, insofar as they

can be answered, and hopefully, that will be fully answered.

I view the remaining grounds for standing advanced by the Foundation as being ancillary to the first. While the Foundation has been incorporated to do good and useful work, I do not see it being in a position to assist me in the achievement of the mandate that has been given to me. I say that bearing in mind the participation of those afforded standing and those entitled to participate with more limited role as intervenors. Into the former category falls Steve Sinclair and Kimberly-Ann Evans, Edwards, two of the four founders of the Phoenix Sinclair Foundation Inc. Considering all of the foregoing, I do not see the Foundation as having a direct and substantial interest, nor coming within the boundaries specified for receipt of intervenor status.

I now turn to a consideration of the Northern Action Group (NAG) Inc., Lawrence Traverse and Janelle Sutherland and Carman S. These applications come from sincere and well-meaning people. Well-meaning in the sense that each of them have had experiences in the child welfare system of this province which they believe, if they had the opportunity to relate to the commission, would be of assistance to it in successfully achieving the mandate given to it.

In the case of NAG, I am told that it is an advacy (phonetic), advocacy group for families expressing conflict with the current welfare system. The chair of NAG who authored the application is the father of children who he says have been taken from him and made permanent wards of, I assume, the Department of Family and Services and Consumer Affairs.

Lawrence Traverse is the father of a daughter who he says was "murdered" in care. Janelle Sutherland is the

aunt of that child. Mr. Traverse says, quote, he, he, says he, "has many important questions he wishes to have answered" and he "seeks changes in the child welfare protection system of Manitoba so, so that similar deaths as that of his daughter and Phoenix Sinclair will be prevented from happening to any other child".

He has had other children also taken into care. He respectfully requests standing at the inquiry to bring closure to his daughter's case and closure to his family so that they might move forward and heal.

Janelle Sutherland is a sister-in-law to Lawrence Traverse. She is fameer (phonetic) with the, with his family members. She says she was the -- well, the primary help to him and like her brother-in-law, besides many important questions she wishes to have answered, she seeks changes in the child protection system of Manitoba so that similar deaths such as that of her niece and Phoenix Sinclair can be prevented from happening to any other child.

Carman S. has three children who were taken into care. Two of those children, as Carman describes it, are not doing well. He makes the application on their behalf, as well as his own. The applicant states the reason for the application in these words:

> "The reason I feel that my family has contributions to make is because we were in the same system, the same social workers even. Our insights are unique and our feedback would have no intent other than truly ... to share our thoughts and opinions on what would make the system work

better."

Insofar as I am aware, none of these applications that I have just reviewed are from groups or individuals who have had any contact with or direct knowledge about the death of Phoenix Sinclair or members of her family. As clearly stated in paragraph 1 of the order in council establishing this commission of inquiry, its mandate is to inquire into the circumstances surrounding that death. Yesterday, commission counsel correctly stated the relationship that paragraphs 2 and 3 of the order in council have to that mandate when she said:

> "... Mr. Commissioner, in defining the scope of the mandate which has been given to this commission, it is clear that the terms of paragraphs two and three ... must be read in light of the wording of the first paragraph [of the order in council], which ... requires you to inquire into the circumstances surrounding the death of Phoenix Sinclair. This means that in reviewing the findings and recommendations of the reports listed in paragraph three you must have regard to those [finding] ... recommendations which specifically address the child welfare services provided or not provided to Phoenix Sinclair ... and any recommendations about child

> welfare services which are in the nature of the services provided to Phoenix and her family. This [includes] any systemic recommendations about those aspects of the child welfare system which were engaged in the services provided to Phoenix and her family."

These three applicants, therefore, do not have a direct and substantial interest in the subject matter of this inquiry. That is to say they are not able to contribute to the work of this commission of inquiry as it looks into the life and death of Phoenix Sinclair, or her family, nor the services provided or not provided to the deceased during her lifetime.

In considering the matter of intervenor status, I appreciate my responsibility as imposed by paragraphs 2 and 3 of the order in council to make recommendations to better protect Manitoba children and to consider specific recommendations and their implementation that arise from the identified reports prepared subsequent to the death of Phoenix. I am also quite aware of what I have referred with respect to the relationship that paragraphs 2 and 3 of the order in council have to the commission's mandate as expressed in paragraph 1 of that order. In deciding the matter of intervenor status for these three applicants, I have borne those facts in mind, as well as the standard set in our rules for achieving intervenor stantus (phonetic), status, namely, a genuine and demonstrated concern about issues raised in the inquiry's mandate and a particular perspective on expertise that may assist the commission.

I have already made three grants of intervenor

status to those applicants that I have concluded meet the tests set forth in the rules and I believe are in a position to assist the commission in its work. The principle additional factor that these three applications that I am now addressing would bring to the table would be their experience, the experiences they have had with respect to the interfacing of themselves and their children with the child welfare system of this province. In my considered judgment, that factor would not add material benefit to the role that will be fulfilled at this inquiry by commission counsel and by those to whom I have afforded either party or intervening, intervenor status. I quite appreciate the sadness and perhaps exasperation left with these applicants as a result of their own experiences with the child welfare system, but central to the work of this commission, of which I cannot lose sight, is Phoenix Sinclair. As I go down the path that will take me on that journey, it is quite possible that answers to the questions raised by these three applicants will appear. But for the reasons I have stated, they will not be afforded standing at this inquiry.

Mr. Traverse is seeking standing, in seeking standing, asked that "at the very least" he be a witness to these proceedings. That will be a matter for commission counsel.

I've considered the application first made earlier this week on behalf of the former children's advocate, Billy Schibler. Ms. Schibler participated in the preparation of four of the reports referenced in paragraph 3 of the order in council appointing the commission. She is prepared to appear as a witness.

It has not yet become clear to me just what role her counsel seeks to play here. Until the evidence begins to unfold, I am not convinced that counsel will have

certainty in that regard. No grant of participation will be made at this time, but counsel will be entitled to resume his application when circumstances allow him to bring more certainty to his request.

I have brief comments to make with respect to two possible participants who were alerted to these proceedings by commission counsel. The first is the children's advocate of the province of Manitoba, who is invited by commission counsel to consider the matter of participation. I am aware the advocate has indicated her willingness to be a witness and to cooperate in any way possible, but given firstly the statutory duties of the holder of that office and secondly, the contents of the substance of the mandate given to this commission, I must record my surprise at the absence of an application from her to be afforded standing at this inquiry.

The second is the Government of Canada, represented by the Department of Aboriginal and Northern Affairs and its minister. Commission's counsel's invitation to consider participation was accompanied by her referencing funding arrangements in place by the Government of Manitoba under which the Government of Canada has accepted responsibility for the funding of child welfare services for First Nations in the province of Manitoba. A letter was written and received yesterday by commission counsel from counsel to the Department. It advised that the Federal Crown does not intend to seek standing. It explained why that is so, but offered the possibility of a witness being available to assist the commission. I am appreciative of that response.

Including, I want to tell you that two weeks ago commission counsel and I visited the reserve at Fisher River. I thought that to be a matter of respect that ought to be shown, given that that is the place where Phoenix

spent her, the last period of her life. We were warmly received by the chief and band council. There was no discussion about the assignment with which this commission is tasked, other than acknowledgement of its formation. We were greatly impressed with the progress and development that we observed during a tour of the reserve. Besides the obvious economic development taking place, we learned of the steps forward that had been taken to make available to those who reside on the reserve a variety of social services to assist in easing the challenges that arise in the course of daily life.

That completes my ruling on the applications for standing at the hearing and I now turn to you, Madam Counsel, and ask what is the next step?

COMMISSION OF INQUIRY INTO THE CIRCUMSTANCES SURROUNDING THE DEATH OF PHOENIX SINCLAIR

Commissioner: E.N. (Ted) Hughes, O.C., Q.C., LL.D (Hon)

Counsel for the Parties, Intervenors, Witnesses and Others

Counsel for the Parties and Intervenors

Gordon A. McKinnon and Sacha Paul,
Counsel for the Department of Family Services

Garth H. Smorang, Q.C. and Trevor Ray,
Counsel for the Manitoba Government and General Employees' Union

Hafeez Khan and James Benson,
Counsel for Intertribal Child and Family Services

Laurelle Harris and Michelle Pollock-Khan,
Counsel for the General Child and Family Services Authority

Kris Saxberg, Harold Cochrane, Luke Bernas and Shawn Scarcello
Counsel for First Nations of Northern Manitoba Child and Family Services, the First Nations of Southern Manitoba Child and Family Services and Child and Family Services All Nation Coordinated Response Network

Jeff Gindin, George Derwin and David Ireland,
Counsel for Kimberly-Ann Edwards and Nelson Draper Steve Sinclair (Steve Sinclair)

Jay Funke, Jessica Saunders and Tom Rees,
Counsel for the Assembly of Manitoba Chiefs and Southern Chiefs' Organization (AMC/SCO)

Gregory L. Juliano and Maria Versace,
Counsel for the University of Manitoba, Faculty of Social Worker

William Haight and Kara Bjornason,
Counsel for the Manitoba Métis Federation and Métis Child and Family Services Authority and Helen Waugh

Greg Tramley and David Phillips,
Counsel for the Aboriginal Council of Winnipeg

Catherine L. Dunn,
Counsel for Ka Ni Kanichihk Inc.

Counsel for Witnesses

Kristine Barr,
Counsel for Marie Pickering

Ted E. Bock,
Counsel for Darlene MacDonald in her capacity as the Children's Advocate

Bernice Bowley
Counsel for Diva Faria

Greg Brodsky, Q.C. and Ursula Goeres,
Counsel for Billie Schibler and Margaret Lavallee

Richard Buchwald,
Counsel for Debbie De Gale

Harold Cochrane,
Counsel for Darlene Garson, Cindy Hart, Allison Kakewash, Angela Murdock, Keith Murdock

Robert England,
Counsel for Andrew Koster

William Gange and Kalyn Bomback,
Counsel for SOR #5, SOR #6, SOR #7, SOR #9, DOE #1, DOE #2, DOE #3 and DOE #4
SOR #9 and Nikki Humenchuk

Joel Katz,
Counsel for Corporal Robert Baker

Alan Ladyka,
Counsel for Jan Christianson-Wood in her capacity as Special Investigator for the Office of the Chief Medical Examiner,

Glenn McFetridge,
Counsel for Lissa Donner, Jan Sanderson and Dr. Rob Santos

Sacha Paul,
Counsel for SOR #3

Vivian Rachlis,
Counsel for SOR #1, SOR #2, SOR #4, Mary Wu

Ryan Rolston and Shannon McNicol,
Counsel for Dan Berg and Diana Verrier

Helga Van Iderstine,
Counsel for Dr. G. Altman,

Robert Zaparniuk,
Counsel for Roberta Dick

Other

Jonathan Kroft and Baillie Chisick,
Counsel for the Canadian Broadcasting Corporation, CTV Winnipeg, Global Winnipeg and The Winnipeg Free Press

COMMISSION OF INQUIRY INTO THE CIRCUMSTANCES
SURROUNDING THE DEATH OF PHOENIX SINCLAIR

The Honourable Edward (Ted) Hughes, Q.C.,
Commissioner

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Transcript of Proceedings
Public Inquiry Hearing,
held at the Winnipeg Convention Centre,
375 York Avenue, Winnipeg, Manitoba

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TUESDAY, MARCH 19, 2013

MARCH 19, 2013

PROCEEDINGS CONTINUED FROM MARCH 12, 2013

THE COMMISSIONER: I want to say that first thing this morning, that when we adjourned on Wednesday I had just posed a series of questions to Mr. Saxberg of D'Arcy & Deacon and requested a reply by Friday. I want to acknowledge that that reply came in on time and certainly was assistance to me in preparing my remarks for today, and I thank the firm of Mr. Saxberg for that cooperation.

On February the 6th I raised a concern that D'Arcy & Deacon LLP could be in a conflict as a result of the multiple clients the firm represents in these proceedings. Mr. Saxberg stated his belief that the firm was not in a position of conflict of interest.

I referred the matter to the Law Society of Manitoba. It has found a conflict of interest to exist in three instances:

First, between Mr. Saxberg's clients, Faria and Berg, on the one hand, and the general authority, by virtue of its evidence from its CEO, Jay Rodgers, on the other.

The general authority is a party with standing at this Commission as the holder of a shared grant with the southern authority, northern authority and ANCR. The holders of the shared grant are represented by Mr. Saxberg.

The Law Society said, and I quote:

> "There can be no question however that the interests of the individual clients would be materially and adversely affected by the evidence of a witness to the effect that the standards in 2005 were clear, and that the decision to close the file signed off by Ms. Faria, and supervised by Mr. Berg (who testified that it met the standards required of a protection investigation) was in error. Mr. Saxberg will now find himself in the very difficult position of having to rationalize the evidence of Mr. Rodgers with that of Ms. Faria and Mr. Berg. While that constraint may or may not have an adverse impact on his representation of the General Authority, the same cannot be said of his individual clients."

Second, regarding the conflict between Mr. Saxberg's client, supervisor Faria on the one hand and his client, the social worker Dick, whom Faria supervised on the other hand, the Law Society said, quote:

> "Ms. Dick's evidence with respect to her practice of determining a response time based upon the workload demands at intake was denied by Ms. Faria. Only one version can be accepted by the Commissioner. Where do Mr. Saxberg's loyalties lie? Quite clearly the interests of the two witnesses' conflict. He cannot argue that one of his clients is telling the truth while the other is not. If in the context of the issues before the Commissioner this is a significant point, we conclude that the interests of Ms. Faria are directly adverse to those of Ms. Dick and vice versa."

Third, with respect to current general authority

employee Christianson-Wood, who is also the writer of the Section 10 report on the one hand, and Faria and Berg on the other, the Law Society said, and I quote:

> "Notwithstanding that Mr. Saxberg's representation of Ms. Christianson-Wood is in her capacity as an employee of the General Authority, the duty of loyalty that he owes to her and to the General Authority in that context must inevitably conflict with the equivalent duties that he owes to Ms. Faria and Mr. Berg."

It is my reading of the letter from the Law Society that the conclusion it reached in the closing paragraph of its letter that:

> "... we have concluded that Mr. Saxberg's representation of multiple parties has given rise to conflicting interests and that his duty of loyalty to his clients is compromised ..."

was a result of the finding of those three instances of conflict of interest that I have just identified. Mr. Saxberg advises that he is withdrawing as counsel for social workers Faria, Berg and Dick and that new counsel has been arranged for them. Insofar as Mr. Saxberg's clients who have been identified in the above three instances are concerned, the foregoing arrangement leaves for my consideration the general authority and Mr. Saxberg's association with it as counsel for the four participants who share a single grant of standing.

Before I turn to address that issue, I will now wish to comment on the position in which Mr. Saxberg's client, Verrier, finds herself.

In Mr. Saxberg's letter of March the 7th, 2013 to the Commission, in which he sets out his proposal for continued participation as counsel in these proceedings, he states, and I quote:

> "To be clear, the Northern Authority, the Southern Authority and ANCR were not involved in the delivery of services to Phoenix Sinclair. As such, they will not be taking a position with respect to the conduct of any of the

individual social workers that have testified in Phase 1 of this proceeding."

Without making any predetermination of these matters, I am mindful that as Commissioner of an inquiry I may make findings of misconduct with respect to the conduct of an entity or an individual witness. Before doing so, pursuant to this Commission's rules of procedure and practice, the Commission will provide a notice of alleged misconduct on a confidential basis to the said witness, entity or their counsel. This allows them the opportunity to respond to the notice prior to making any such finding.

In light of Mr. Saxberg's comments that the institutional clients he represents will not be taking a position with respect to the conduct of any of the individual social workers that have testified in phase one of this proceeding, I do not see how he can reasonably believe that representation of Ms. Verrier, who was an individual social worker who testified in phase one and whose conduct is, therefore, potentially subject to findings by me of an adverse nature, is not jeopardized by his concurrent representation of both Ms. Verrier and the authorities and ANCR. Accordingly, it is my decision that Mr. Saxberg and his firm are disqualified from continuing

to represent Verrier in these proceedings.

Now, with respect to the single grant made to the three authorities and ANCR, Mr. Saxberg makes the following proposal, and I quote:

> "In order to remedy the appearance of conflict with Mr. Rodgers and Ms. Christianson-Wood vis-à-vis their relationship with the General Authority, the General Authority has instructed us to seek an individual grant of standing so it can retain new counsel."

That would leave Mr. Saxberg continuing as counsel for the other three parties to the single grant, namely the southern authority, the northern authority and ANCR.

It is important to record the history of the joint grant of standing as a single party. The grant was made on June the 29th, 2011. At that time, I declined standing in phase one because it was apparent to me that the four entities "had neither responsibility for nor other involvement in the life of Phoenix". They were, however,

granted full and unrestricted standing for the balance of the inquiry.

On February 28th, 2012 Mr. Saxberg wrote to the Commission requesting full standing for the three authorities and ANCR in phase one stating as reasons for the request the following, and this is a lengthy quotation from his letter of that date:

> "The Honourable Commissioner premised his decision in this regard on the assumption that neither the Authorities nor ANCR had responsibility or involvement in any aspect of Phase 1.
>
> The Authorities and ANCR have now identified eight (8) individuals that were directly involved in important matters related to Phase 1 of the Inquiry. Commission Counsel is aware of these individuals and has indicated that they will be interviewed and perhaps summoned to testify during Phase 1 of the Inquiry.
>
> These individuals fall under the

auspice of the Authorities and ANCR due to the fact that they were either employees of the Authorities or ANCR during the time period in which they were involved in Phase 1 matters, or they were employees of Agencies for which the Authorities are ultimately responsible, or they are now currently employees of the Authorities or ANCR."

And he went on, at a later stage of the letter, to say:

"These individuals, along with the Authorities and ANCR as their employers and/or regulators, have a direct and substantial interest in Phase 1 of the Inquiry for the following reasons:

- The legal interests of these individuals and thereby the Authorities and ANCR may be affected as a result of their

involvement in Phase 1 of the Inquiry;

- These individuals and thereby the Authorities and ANCR may be subject to adverse findings during Phase 1 of the Inquiry which would have adverse affects on their reputations;
- These individuals and the Authorities and ANCR may be seriously affected by their involvement in Phase 1 of the Inquiry."

And then he continued:

> "As the Honourable Commissioner stated in his June 29, 2011 ruling with respect to the various applications for standing, these above factors are relevant in establishing a direct and substantial interest necessitating full party status ...

Further, and apart from the above, the findings of fact with respect to Phase 1 of the Inquiry will necessarily affect the validity and perceived effectiveness of the recommendations and the implementation of those recommendations by the Authorities and ANCR since the death of Phoenix Sinclair. These matters will be dealt with in Phases 2 and 3 of the Inquiry, which the Authorities and ANCR already have standing in.

It is therefore crucial that the Authorities and ANCR have standing with respect to Phase 1, so that they may ensure that the factual underpinnings that relate directly to the recommendations are properly before the Commission.

An important role that the Authorities and ANCR will play in Phase 3 is providing details of the implementation of the

recommendations. We understand that the Commission will be inquiring as to whether the 'changes to the child welfare system after Phoenix Sinclair's death would have influenced the services delivered to Phoenix and her family'.

Another important role will be the 'provide relevant information to the Commissioner and to the public regarding the changes to the child welfare system and how they better protect Manitoba children, in light of the lessons learned from the facts of Phoenix's case. These opinions could change as a result of the Commission's finding of fact in Phase 1. It is thus imperative that the Authorities and ANCR be allowed to participate in Phase 1 to ensure the proper factual context is laid for the opinions and evidence we expect that they will provide in Phase 3.

> Therefore, Phases 1, 2 and 3 are inextricably intertwined and cannot be hived off into watertight compartments.
>
> We note that any decision in this regard will not affect the funding arrangement between the Government of Manitoba and the Authorities and ANCR."

And that ends the long quotation from Mr. Saxberg's letter of February 28th of 2012 in which he makes his request.

When speaking to that request for extended standing on March the 6th, 2012, a week or so after his letter, Mr. Saxberg acknowledged my initial basis for the joint standing and went on to say the following:

> "So what's changed since June of 2011? There are two points to make here.
>
> First, eight important phase 1 witnesses have been identified so far by the authorities and ANCR and the law firm of Darcy & Deacon will be acting for those eight

individuals, whose interests are aligned with the authorities' and ANCR.

Number 2 -- so that the first point, is the witnesses.

The second point really relates to the observation that the factual findings as to the services provided or not provided to Phoenix Sinclair are what will inform the appropriateness of the recommendations that were made and the implementation of those recommendations in the past and they, and the, those factual findings will also inform the recommendations that this inquiry makes. So therefore, really, the facts and the recommendations are two sides of the same coin. And as we say in our submission, they are inextricably intertwined and are not separable."

At those same proceedings, Mr. Saxberg indicated

that Mr. Rodgers, who, in Mr. Saxberg's words were:

> "... who's the CEO, or who was the CEO of Winnipeg CFS at the time of, that services were being provided to Phoenix Sinclair and her family, is a witness, one of those eight witnesses and he's also an instructing client, because at, at present, he is the CEO of the General Authority."

Based on those submissions, I granted the request for full standing by the holders of the joint grant in phase one of this inquiry.

On March the 7th, 2013, in response to my request for D'Arcy & Deacon's position in light of the letter from the Law Society, Mr. Saxberg wrote as follows:

> "The Authorities had no direct responsibility or involvement in providing services to Phoenix Sinclair and her family."

And then later he said, in that letter:

"... the Authorities/ANCR are not giving evidence or taking a position in Phase 1 of the Inquiry. These organizations wanted to participate in Phase 1 cross examinations to ensure that evidence relating to the current system was accurate.

The evidence of the Authorities/ANCR in the Phoenix Sinclair Inquiry is limited to the work done by the Authorities/ANCR to implement recommendations from the Reports and to provide evidence on the current functioning of the Child Welfare System.

After D'Arcy & Deacon LLP (the 'Firm') was formally retained by the Authorities/ANCR, it was approached by witnesses who did not feel comfortable with the choice of counsel available to them, i.e. counsel for the Department or counsel for the

> Union.
> Since the firm was acting for entitles that had 'no involvement in delivering the services to Phoenix Sinclair', the Firm's view was that we could also represent individual witnesses in Phase 1 of the Inquiry without the risk of a conflict arising."

Having observed Mr. Saxberg's participation in phase one over the past 45 days of testimony, however, it is clear that his cross-examination went beyond ensuring that "evidence relating to the current system was accurate".

Further, based on the evidence adduced at the public hearings to date, it is apparent that the interests of "those eight individuals" were not "aligned with the authorities and ANCR".

The conflict of interest that has occurred here was created by Mr. Saxberg who acted for the four entities to which I gave a joint grant of standing, one of which was the general authority, subsequently accepting retainers from individual witnesses who were or are in the employ of one of those four entities or their predecessors. Had the

retainers from the individual witnesses not been accepted by D'Arcy & Deacon, that firm would have been at liberty to act for the group of four without any suggestion of a conflict of interest.

As set out by the Law Society in its opinion:

> "... clients may always consent to representation notwithstanding a conflicting interest. That would require full disclosure to the clients of the nature of the conflicting interest, including the relevant circumstances and the reasonably foreseeable ways that the conflict of interest could adversely affect the client's interests. Where a lawyer continues representation with the consent of the affected clients, the lawyer will have satisfied the requirements of Rule 2.04 of the Code of Professional Conduct. Application of the principles articulated in Neil (supra) would import the further requirement

that after obtaining the clients' informed consent, the lawyer must reasonably believe that each client's representation will not be jeopardized."

Mr. Saxberg, in his letter to me of March the 15th, responding to the questions I posed to him at the end of the public session I held last week, confirms that he has complied with the professional obligations to inform his clients of his proposal to resolve the conflicts in their representation.

I see all the clients represented by Mr. Saxberg in respect to whom a conflict of interest has been identified were copied on his letters to me of March the 7th and 15th, 2013.

Returning to the events of June the 29th, 2011, I also, on that day, made the joint and single grant of standing after hearing submissions made by separate counsel acting for each of the authorities and ANCR, albeit counsel for the southern authority and ANCR were members of the same firm, D'Arcy & Deacon. After hearing those submissions, I was satisfied that the appropriate course was to join those applicants in a single grant of party status confining their participation to the second and

third phases of the inquiry as those phases were then described.

In doing so, I stated:

> "I see no reason why these four applicants should have separate standing. It is a clear instance where there should be a sharing of a single grant. The interest of the parties are not divergent in any substantial way."

This inquiry has proceeded for the last year and a half on this basis. Now, however, because of the conflict of interest which has been identified by virtue of Mr. Saxberg's representation of multiple clients, including the general authority, the ability of Mr. Saxberg to continue to act for the party which was made up of the three authorities and ANCR has been compromised. In his letter of March the 7th, Mr. Saxberg has acknowledged that he and his firm should no longer act for the general authority. As previously indicated, his proposal to address this conflict of interest includes requiring the general authority to obtain a grant of separate standing and new and separate counsel for the remainder of the

proceedings.

As the most practical way to resolve the conflicts of interest that have been recognized at this advanced stage of the hearings, I accept Mr. Saxberg's proposal regarding the representation of the general authority and order that it now be granted a single grant of standing as a party represented by new and separate counsel. The firm of Levene Tadman Golub have identified itself as having been retained to fulfill the role of counsel for the general authority.

In reaching this decision that I have today, I am satisfied that the conflict of interest concerns which I raised in February have been resolved in the manner which protects the interests of individual witnesses, parties with standing and the public.

In deciding as I have, the matter of cost that will arise as a result of it is a concern to me and one that I feel a responsibility to address.

I now read into the record an e-mail that Commission counsel wisely, and on her own initiative, sent to all counsel participating in the work of the Commission, including Mr. Saxberg, on May the 7th, 2012. That e-mail reads as follows:

Counsel, over the course of

carrying out our investigations and interviews a conflict of interest in the representation of two witnesses by the same legal firm has come to our attention. In that case, appropriately and consistent with the duties set out in our professional code of conduct, the counsel has withdrawn from acting for both witnesses. Separate representation has already been facilitated. In that regard, I remind counsel that if a witness needs separate representation, the costs of same, where necessary, are covered by the Government of Manitoba and Lynn Romeo can be contacted to discuss or counsel or a witness can speak with our office for assistance. I strongly urge counsel at this point to take a long hard look at the witnesses for whom you have indicated you are acting with an eye to

determining whether a conflict or potential conflict of interest exists. Are you able to provide the witness the necessary protection of their interests when they testify and are subjected to cross-examination? Are you certain you will not want to cross-examine or question a witness for whom you act based on the evidence of another witness for whom you act such that you cannot be said to be protecting the interests of both witnesses? I have no desire to interfere with individual choices of representation. As Commission counsel, however, it is important that I ensure the following:

1. The validity of the findings set out in the Commissioner's final report not be challenged, for example, on the basis of a subsequent determination of conflict of interest.

2. The fair and appropriate representation of witnesses who are called to testify at the public hearings, both with respect to the conduct of the inquiry and the procedural fairness which is afforded to them, that is, witnesses must feel free to testify as to the information they know safe in the knowledge that their interests are unequivocally protected by their counsel.

3. The public interest in hearing all relevant evidence is protected.

4. That the proceedings not be unnecessarily delayed by the discovery of a conflict which could have been determined and addressed in advance.

That concludes the e-mail sent by Commission counsel.

In my judgment, if Mr. Saxberg and those associated with him at D'Arcy & Deacon had taken the "long hard look" recommended by Commission counsel, they would

not have faced the difficulties that have plagued this Commission over recent weeks triggered by my intuition in the midst of hearing evidence that Mr. Saxberg and his firm may have been in a conflict as a result of representing their multitude of clients, an intuition that on examination has shown to be correct, the results of which, among other things, has been the necessity of splitting the joint grant of standing to the four entities.

We have already been delayed in the presentation of evidence and how much more time will be lost will be a matter for further discussion between Commission counsel and other counsel this morning.

I return to the matter of costs occasioned by the events I have reviewed this morning.

In responding to the questions I posed to Mr. Saxberg on Wednesday of last week, he has drawn my attention to a discussion that took place in the hearing room on June the 29th, 2011 immediately following my ruling that the joint grant would be made to the four entities to what is now parts two and three of this inquiry but not to phase one in which we are still engaged.

Terry Gutkin, who appeared that day as counsel for the general authority posed the following question and then continued with his remarks, and I quote from the transcript:

"What we seek from you, Mr. Commissioner, is clarification as to whether the grant of combined standing precludes the various authorities at ANCR from using different counsel to deal with different aspects of the recommendations that are intrinsic to their particular clients, the implementation of recommendations which may be unique to one authority and not to the other, if it's anticipated in your ruling, Mr. Commissioner, that there be one counsel, or that the, the roles of counsel can be split among the authorities, each addressing a particular issue and any cross-examination that may arise relevant only to that issue?

THE COMMISSIONER: But not necessitating more than one counsel participating at, at any one time?

MR. GUTKIN: I think that's

what we're getting at and that's what we're seeking clarification on. So that if my client, for example, has a particular set of recommendations or initiatives, or, or anything else relevant to the recommendations that is unique to it, its counsel, myself, would put forward that evidence and lead evidence on that point or suggest witnesses and, and be able to examine on that point. If there's overlapping recommendations and implementation of recommendations by the three authorities and ANCR, then we sort out who's going to deal with the evidence on that point.

THE COMMISSIONER: Well, what you, what you've put to me sounds reasonable. Certainly, we -- it would not be reasonable to have four counsel here participating and waiting for their turn. But if you're going to divide up the

work in some way, I, I can't see what, what, what the problem [would] be from my perspective."

And then later on, Mr. Gutkin said:

"... and, and I can tell you, Mr. Commissioner, we don't intend to have duplication or overlap, but it seems with the unique interests and you've heard a little bit about that yesterday, it may be useful to have each authority --

THE COMMISSIONER: In other words, divide the load?

MR. GUTKIN: That's right.

THE COMMISSIONER: I, I think that's reasonable and, and I, assuming, I take it from what you're saying, your, your client and the others that you're now associated with are likely to seek funding from the government?

MR. GUTKIN: Well, they are funded by the government, so

that's, that's, that's the unique issue here, whether --

THE COMMISSIONER: Yeah, the --

MR. GUTKIN: -- they'll do it through commission counsel, or do it on their own, I, I don't know the answer to that.

THE COMMISSIONER: No, but, but, but as, as, as long as the, there, there, if, if that is being sought and as you say, they are funding it anywhere, so I'm not trying to put the government in a position where if it decides on funding and -- but if there's funding anyway, but I'm not trying to put them in a position where they've got four bills to pay for the, for, for the same --

MR. GUTKIN: Nor do we envisage that.

THE COMMISSIONER: All right.

MR. GUTKIN: It would be an issue for extra funding more than

anything.

THE COMMISSIONER: Well, I think we're, I think our minds are ad idem and, and I would agree with, with what you want to propose in that regard.

MR. GUTKIN: Thank you, Mr. Commissioner."

That ends that part of the transcript.

I reference that exchange because it should form part of relevant documentation that I direct Commission counsel to assemble at an early date relating to the conflict of interest, to be forwarded to the Deputy Attorney General as a senior representative of the government of Manitoba. It is my belief that the events of recent weeks should be known by the government as it addresses not only funding issues going forward but also as it takes a retroactive look, as I believe it should, at the expenditures it has incurred to date and whether any of them would have been avoided had that "long hard look" been taken and, if so, whether it would be in the public interest to initiate recovery proceedings. A copy of Commission counsel's letter to the Deputy Attorney General should go to all participating counsel at the inquiry

including a list of the documentation being forwarded with the letter.

The list just referred to should include Mr. Saxberg's letter to the Commission on March the 7th and the letter from the law firm of Levene Tadman Golub to the Commission dated March the 15th. The firm advises that it is general counsel to the general authority and that it is prepared to assume the role of counsel to the general authority for the balance of the inquiry, assuming I make a separate grant to the general authority as I have just done this morning.

Those letters will be of interest to government because the funding implications that may arise in light of Mr. Saxberg's expression in the final paragraph at page 4 of his letter where he says:

> "... the role of new counsel would be limited to cross examination and closing argument. For these reasons, we are of the view that the above proposal will result in little if any delay to the Inquiry."

And the Levene Tadman Golub response, which reads:

"By way of clarification with respect to the final paragraph on page 4 of Mr. Saxberg's aforementioned correspondence, while the evidence of the General Authority in phase II is already in development (though not completed), the role of new counsel will not be limited only to cross-examination and closing argument. Should we be retained as counsel to the General Authority with respect to the Inquiry, we will take our full instructions from our client with respect to all matters. That having been said, we concur with Mr. Saxberg's opinion that the proposed solution to the issue of conflict of interest as it relates to the General Child and Family Services authority will result in little, if any, delay to the inquiry."

The only remaining matter relates to the future representation of D'Arcy & Deacon's clients Wilson, Fines, Carpenter and the witnesses primarily from Fisher River First Nation represented by Harold Cochrane of that firm. No suggestion of conflict has arisen by the continuing representation of them by D'Arcy & Deacon so I confirm that continued representation by D'Arcy & Deacon of those that I've identified, as well as its representation of the three entities of the now reduced joint grant of standing, namely the northern authority, the southern authority and ANCR.

That completes my decision on the conflict of interest matter that I undertook to deliver this morning. When we adjourn, I would ask counsel to meet with Commission counsel to endeavour to agree on a schedule for going forward and completing our assignment.

When we were last in session I suggested or identified April the 15th as the likely start-up date or as the start-up date. Now the firm that has come forward to assume responsibility for the general authority has indicated it sees a need for only a short delay and hopefully we can perhaps get this Commission back going perhaps as early as perhaps April the 8th, and I'm certainly hoping we can pick up at least one week in June. I'm aware that Mr. Gindin has a criminal trial in that month and he applied to the Court of Queen's Bench to have

it adjourned but was -- his request was declined, and so obviously we must respect the court, which I most certainly do, but I am hopeful we can pick up a week in June and then we can move forward with a schedule that will hopefully see us have everything completed some time in, in the month of March.

I, as I say all those things, I, I don't want to see us rush and miss evidence that should be heard by this Commission. I view phases two and three to be very important, particularly phase three, where I hope I will hear evidence to assist me in framing recommendations that will be to the benefit of present and future children of Manitoba, particularly those of aboriginal descent who are so disproportionally represented in the volume of children in care in this province and some other provinces across our country. Phase three will be the important part of this inquiry that will allow me to phrase recommendations that will be to the benefit of, of children in years to come, hopefully, in this province, and that is why I say, while I'm anxious to get this job done, I think this inquiry has gone on quite long enough, nonetheless there is important evidence to come and I don't want to rush through that part of the inquiry for sake of time because I'm anxious to hear the evidence in phase two and, in particular, in phase three for the reasons I've just said.

So that adjourns -- that completes everything I have to say today and we'll stand adjourned, and the office will announce the date of resumption which will be arrived at after consultation by the counsel here this morning with Commission counsel.

Anything else Madam Commissioner?

MS. WALSH: No, thank you.

THE COMMISSIONER: Or counsel. Thank you. All right. We'll adjourn for the day.

THE CLERK: Order.

(PROCEEDINGS ADJOURNED SINE DIE)

File No. CI 11-01-74144

THE QUEEN'S BENCH
Winnipeg Centre

IN THE MATTER OF: Section 76 of *The Child and Family Services Act*, C.C.S.M. c. C80

AND IN THE MATTER OF: Order in Council No. 89/2011 appointing the Honourable Edward (Ted) N. Hughes, OC, QC, LL.D (Hon.) as Commissioner to inquire into the circumstances surrounding the death of Phoenix Sinclair

BETWEEN:

COMMISSIONER OF THE INQUIRY INTO THE CIRCUMSTANCES SURROUNDING THE DEATH OF PHOENIX SINCLAIR,

Applicant,

– and –

THE GOVERNMENT OF MANITOBA, GENERAL CHILD AND FAMILY SERVICES AUTHORITY, FIRST NATIONS OF SOUTHERN MANITOBA CHILD AND FAMILY SERVICES AUTHORITY, INTERTRIBAL CHILD AND FAMILY SERVICES, THE OFFICE OF THE REGISTRAR OF THE COURT OF QUEEN'S BENCH OF MANITOBA, THE OFFICE OF THE CHIEF MEDICAL EXAMINER OF MANITOBA, THE OFFICE OF THE CHILDREN'S ADVOCATE OF MANITOBA and ANDREW J. KOSTER,

Respondents.

ORDER

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File No. **11092**

File No. CI 11-01-74144

THE QUEEN'S BENCH
Winnipeg Centre

THE HONOURABLE CHIEF JUSTICE JOYAL) Friday, the 21st day of October, 2011

IN THE MATTER OF: Section 76 of *The Child and Family Services Act*, C.C.S.M. c. C80

AND IN THE MATTER OF: Order in Council No. 89/2011 appointing the Honourable Edward (Ted) N. Hughes, OC, QC, LL.D (Hon.) as Commissioner to inquire into the circumstances surrounding the death of Phoenix Sinclair

BETWEEN:

COMMISSIONER OF THE INQUIRY INTO THE CIRCUMSTANCES SURROUNDING THE DEATH OF PHOENIX SINCLAIR,

Applicant,

– and –

THE GOVERNMENT OF MANITOBA, GENERAL CHILD AND FAMILY SERVICES AUTHORITY, FIRST NATIONS OF SOUTHERN MANITOBA CHILD AND FAMILY SERVICES AUTHORITY, INTERTRIBAL CHILD AND FAMILY SERVICES, THE OFFICE OF THE REGISTRAR OF THE COURT OF QUEEN'S BENCH OF MANITOBA, THE OFFICE OF THE CHIEF MEDICAL EXAMINER OF MANITOBA, THE OFFICE OF THE CHILDREN'S ADVOCATE OF MANITOBA and ANDREW J. KOSTER,

Respondents.

ORDER

THIS APPLICATION made by the Commissioner of the Inquiry into the Circumstances Surrounding the Death of Phoenix Sinclair ("the Commissioner") for an Order requiring the disclosure and production of documents pursuant to sections 76(3)(b) and 76(14) of *The Child and Family Services Act*, C.C.S.M.

c.C80 by the respondents was heard on Friday, the 21st day of October, 2011 at the Law Courts, 408 York Avenue, Winnipeg, Manitoba.

ON READING the Amended Notice of Application and the Affidavit sworn by Kathleen McCandless on September 28, 2011, and on hearing the submissions of counsel for the applicant and counsel for the respondents and for subjects of the records and on reading the Consents filed on behalf of the Respondents and on behalf of individuals who are the subject of the records:

THIS COURT ORDERS THAT:

(a) the respondents are required to disclose and produce to the applicant, Commission Counsel and Commission staff the records and information listed in Schedule "A", attached hereto ("the Records");

(b) the applicant, Commission Counsel and Commission staff are permitted to make use of the Records and information contained therein for the purposes of the Commission of Inquiry in the Circumstances Surrounding the Death of Phoenix Sinclair ("the Commission") and in accordance with Order in Council No. 89/2011, including but not limited to:

(i) disclosing and producing the Records and communicating the information contained therein, to the parties and intervenors with standing at the Commission and to potential witnesses; and

(ii) entering the Records and information contained therein, or portions of the Records and information contained therein, into evidence at the hearings of the Commission;

on such terms as may be decided by the Commissioner, and in accordance with the Amended Rules of Procedure and Practice

approved by the Commissioner and attached as Exhibit "B" to the Affidavit of Kathleen McCandless, sworn September 28, 2011;

(c) the affidavits of Alana Brownlee, sworn October 12, 2011, Gary P. Stelter, sworn October 12, 2011, Gale Britton, affirmed October 5, 2011, and Jeff Ramsay, affirmed October 12, 2011, are confidential, are to be sealed, and are not a part of the public record of this proceeding, pursuant to Section 77(1) of *The Court of Queen's Bench Act*, C.C.S.M. c.C280;

(d) the consents filed by or on behalf of individuals to whom the records relate, including the individuals to whom the Affidavits of Service referred to in (c) above relate, are confidential, are to be sealed and are not a part of the public record of this proceeding, pursuant to Section 77(1) of *The Court of Queen's Bench Act*, C.C.S.M. c. C280; and

(e) subject to any further order of this Court, the affidavits and consents referred to in (c) and (d) above shall remain sealed, in any event, until December 31, 2012; and

(f) should the parties seek to extend the terms of the sealing orders in respect of (c) and (d) above, the parties to this Application and/or the individuals to whom the records relate may bring this matter back before the Court.

December 2, 2011

C.J. JOYAL

JOYAL C.J.Q.B.

Schedule "A"

From the list of documents provided by the Government of Manitoba, Department of Family Services and Consumer Affairs or otherwise identified by the Government of Manitoba, Department of Family Services and Consumer Affairs:

46.	September, 2006	A Special Case Review in regard to the Death of Phoenix Sinclair – Andrew J. Koster and Billie Schibler
47.	September 18, 2006	Investigation into the Services Provided to Phoenix Sinclair – Department of Justice, Office of the Chief Medical Examiner
200.	Undated	Paper Child in Care File of Phoenix Sinclair (biological daughter of Samantha Kematch and Steven Sinclair)
201.	Undated	Paper Case File of XXXXX
202.	Undated	Paper Case File of XXXXX .
203.	Undated	Paper Case File of XXXXX
206.	Undated	Paper Case File and trial testimony of XXXXXX
208.	Undated	Paper Case File of XXXXXX
213.	April 27, 2000	Amended Petition and Notice of Hearing filed by Winnipeg Child and Family Services for XXXXXX
214.	June 21, 2000	Temporary Order of Guardianship of XXXXXX
223.	June 25, 2003	Petition and Notice of Hearing filed by the Director of Child and Family Services XXXXX
224.	August 19, 2003	Temporary Order of Guardianship
233.	March 24, 2006	Advisory Note prepared by Macdonald Youth Services' Program Development (Clinical) Department

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754.	Undated	Paper Child in Care File of XXXXX
756.	Undated	Phoenix Sinclair Correspondence File of the Child and Family Services Division (portions of which are confidential under subsection 76(3) of *The Child and Family Services Act*)
757.	Undated	Phoenix Sinclair Correspondence File of the Community Service Delivery Division, including Winnipeg Child and Family Services (portions of which are confidential under subsection 76(3) of *The Child and Family Services Act*)
758.	Undated	Phoenix Sinclair Correspondence File of the Department (portions of which are confidential under subsection 76(3) of *The Child and Family Services Act*)
759.	Undated	Place of Safety File of XXXXX
762.	Undated	Print out of CFSIS file of XXXXXX
764.	Undated	Print out of CFSIS file of XXXXX
765.	Undated	Print out of CFSIS file of XXXXXX
768.	Undated	Print out of CFSIS file of Phoenix Sinclair (biological daughter of Samantha Kematch and Steven Sinclair)
769.	Undated	Print out of CFSIS file of XXXXX
770.	Undated	Print out of CFSIS file of XXXXX
795.	Unknown	Documents in the possession of individuals, non-mandated agencies, or organizations who may have provided services to Phoenix Sinclair, XXXXXX, XXXXX, or other individuals who had contact with the Phoenix Sinclair case, over which we have control, if any, yet to be determined
796.	Unknown	Documents of mandated agencies stored

		on CFSIS relating to individuals who had contact with Phoenix Sinclair, XXXXX or XXXXX, if any, yet to be determined
797.	Unknown	Documents prepared by employees or former employees of Winnipeg Child and Family Services not included in the case files of Phoenix Sinclair, XXXXX or XXXXX, if any, yet to be determined
798.	Unknown	Documents provided to external reviewers who conducted investigations into the Phoenix Sinclair case, that are not currently in the possession of the Department or cannot currently be located
	Unknown	Child in Care File of XXXXX, per correspondence from counsel for the Department of Family Services and Consumer Affairs, September 27, 2011

From Intertribal Child and Family Services:

	Undated	XXXXX file in the possession of Intertribal Child and Family Services
	Undated	XXXXX and XXXXX file in the possession of Intertribal Child and Family Services

Documents identified by Commission Counsel:

	Undated	All child protection proceeding files and documents in the Manitoba Court of Queen's Bench relating to Phoenix Sinclair
	Undated	All documents in the possession of Andrew Koster relating to the report entitled A Special Case Review in Regard to the Death of Phoenix Sinclair and the investigation carried out for the purpose of said report
	Undated	All documents in the possession of the Office of the Chief Medical Examiner of Manitoba relating to the report entitled

		Investigation into the Services Provided to Phoenix Victoria Hope Sinclair
	Undated	All documents in the possession of the Office of the Children's Advocate of Manitoba with respect to Phoenix Sinclair and any documents of a systemic nature from 2000 to the present that are confidential pursuant to subsection 76(3) of *The Child and Family Services Act*
	Undated	All documents in the possession or control of the parties, intervenors, individuals, non-mandated agencies and organizations relating to the child welfare services provided or not provided to Phoenix Sinclair and her family

From the list of documents provided by First Nations of Southern Manitoba Child and Family Services Authority and the General Child and Family Services Authority: (see pp. 5 – 27)

AUTHORITIES / ANCR CONFIDENTIAL DOCUMENTS

Tab#	Begdoc#	Docdate	Source	Description	Author	Recip
1	ANCR00154	00/00/0000	ANCR Confidential	Changes for Children Recommendations		
2	ANCR00149	05/00/2006	ANCR Confidential	Joint Intake Response Unit Tier II Intake and Abuse Draft Supervision Policy		
3	ANCR00207	10/00/2006	ANCR Confidential	Client Contact by Tier II at JIRU		
4	ANCR00046	01/00/2008	ANCR Confidential	ANCR Transfer Statistics - January 2008 - Family Service Files		
5	ANCR00074	02/00/2008	ANCR Confidential	ANCR Transfer Statistics - February 2008 - Family Service Files		
6	ANCR00138	03/00/2008	ANCR Confidential	ANCR Transfer Statistics - March 2008 - Family Service Files		
7	ANCR00038	04/00/2008	ANCR Confidential	ANCR Transfer Statistics - April 2008 - Family Service Files		
8	ANCR00001	05/00/2008	ANCR Confidential	ANCR Transfer Statistics - May 2008 - Family Service Files		
9	ANCR00118	06/00/2008	ANCR Confidential	ANCR Transfer Statistics - June 2008 - Family Service Files		
10	ANCR00122	07/00/2008	ANCR Confidential	ANCR Transfer Statistics - July 2008 - Family Service Files		
11	ANCR00222	09/09/2008	ANCR Confidential	ANCR Transfer Statistics - September 2008 - Family Service Files		
12	ANCR00058	09/10/2008	ANCR Confidential	ANCR Transfer Statistics - September 2008 - Family Service Files		
13	ANCR00211	10/00/2008	ANCR Confidential	ANCR Transfer Statistics - October 2008 - Family Service Files		
14	ANCR00210	10/00/2008	ANCR Confidential	Client Contact by Tier II at ANCR		
15	ANCR00005	11/00/2008	ANCR Confidential	ANCR Transfer Statistics - November 2008 - Family Service Files		
16	ANCR00042	12/00/2008	ANCR Confidential	ANCR Transfer Statistics - December 2008 - Family Service Files		
17	ANCR00062	01/00/2009	ANCR Confidential	ANCR Transfer Statistics - January 2009 - Family Service Files		
18	ANCR00070	02/00/2009	ANCR Confidential	ANCR Transfer Statistics - February 2009 - Family Service Files		
19	ANCR00134	03/00/2009	ANCR Confidential	ANCR Transfer Statistics - March 2009 - Family Service Files		
20	ANCR00009	04/00/2009	ANCR Confidential	ANCR Transfer Statistics - April 2009 - Family Service Files		
21	ANCR00102	05/00/2009	ANCR Confidential	ANCR Transfer Statistics - May 2009 - Family Service Files		

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Tab#	Begdoc#	Docdate	Source	Description	Author	Recip
22	ANCR00126	06/00/2009	ANCR Confidential	ANCR Transfer Statistics - June 2009 - Family Service Files		
23	ANCR00114	07/00/2009	ANCR Confidential	ANCR Transfer Statistics - July 2009 - Family Service Files		
24	ANCR00090	09/00/2009	ANCR Confidential	ANCR Transfer Statistics - September 2009 - Family Service Files		
25	ANCR00218	09/09/2009	ANCR Confidential	ANCR Transfer Statistics - September 2009 - Family Service Files		
26	ANCR00230	11/00/2009	ANCR Confidential	ANCR Transfer Statistics - November 2009 - Family Service Files		
27	ANCR00238	11/00/2009	ANCR Confidential	ANCR Transfer Statistics - November 2009 - Family Service Files		
28	ANCR00078	12/00/2009	ANCR Confidential	ANCR Transfer Statistics - December 2009 - Family Service Files		
29	ANCR00141	01/00/2010	ANCR Confidential	ANCR Transfer Statistics - January 2010 - Family Service Files		
30	ANCR00054	02/00/2010	ANCR Confidential	ANCR Transfer Statistics - February 2010 - Family Service Files		
31	ANCR00098	03/00/2010	ANCR Confidential	ANCR Transfer Statistics - March 2010 - Family Service Files		
32	ANCR00086	04/00/2010	ANCR Confidential	ANCR Transfer Statistics - April 2010 - Family Service Files		
33	ANCR00013	04/01/2010	ANCR Confidential	ANCR Annual Report April 1, 2010 to March 31, 2011		
34	ANCR00037	04/01/2010	ANCR Confidential	ANCR February to December, 2007 Transfer Stats		
35	ANCR00106	05/00/2010	ANCR Confidential	ANCR Transfer Statistics - May 2010 - Family Service Files		
36	ANCR00130	06/00/2010	ANCR Confidential	ANCR Transfer Statistics - June 2010 - Family Service Files		
37	ANCR00110	07/00/2010	ANCR Confidential	ANCR Transfer Statistics - July 2010 - Family Service Files		
38	ANCR00082	08/00/2010	ANCR Confidential	ANCR Transfer Statistics - August 2010 - Family Service Files		
39	ANCR00214	09/00/2010	ANCR Confidential	ANCR Transfer Statistics - September 2010 - Family Service Files		
40	ANCR00226	10/00/2010	ANCR Confidential	ANCR Transfer Statistics - October 2010 - Family Service Files		
41	ANCR00208	11/00/2010	ANCR Confidential	Client Contact by Tier II at ANCR		
42	ANCR00234	11/00/2010	ANCR Confidential	ANCR Transfer Statistics - November 2010 - Family Service Files		

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Tab#	Begdoc#	Docdate	Source	Description	Author	Recip
43	ANCR00066	12/00/2010	ANCR Confidential	ANCR Transfer Statistics - December 2010 - Family Service Files		
44	ANCR00145	01/00/2011	ANCR Confidential	ANCR Transfer Statistics - January 2011 - Family Service Files		
45	ANCR00262	01/00/2011	ANCR Confidential	Draft ANCR Intake Program Manual		
46	ANCR00312	01/00/2011	ANCR Confidential	Draft ANCR Crisis Response Unit (CRU) Program Manual		
47	ANCR00286	01/00/2011	ANCR Confidential	ANCR Family Enhancement (FE) Program Manual		
48	ANCR00339	01/00/2011	ANCR Confidential	Draft ANCR After-Hours Unit (AHU) Program Manual		
49	ANCR00369	01/00/2011	ANCR Confidential	Draft ANCR Abuse Investigations Program Manual		
50	ANCR00050	02/00/2011	ANCR Confidential	ANCR Transfer Statistics - February 2008 - Family Service Files		
51	ANCR00243	02/00/2011	ANCR Confidential	ANCR Development Process Year 1 Status Report		
52	ANCR00094	03/00/2011	ANCR Confidential	ANCR Transfer Statistics - March 2011 - Family Service Files		
53	ANCR00203	04/00/2011	ANCR Confidential	ANCR Transfer Statistics - April 2011 - Family Service Files		
54	ANCR00187	05/00/2011	ANCR Confidential	ANCR Transfer Statistics - May 2011 - Family Service Files		
55	ANCR00242	05/05/2011	ANCR Confidential	Letter re: ANCR Development Process - Year 1 Status Report	[redacted]	[redacted]
56	ANCR00191	06/00/2011	ANCR Confidential	ANCR Transfer Statistics - June 2011 - Family Service Files		
57	ANCR00195	07/00/2011	ANCR Confidential	ANCR Transfer Statistics - July 2011 - Family Service Files		
58	ANCR00199	08/00/2011	ANCR Confidential	ANCR Transfer Statistics - August 2011 - Family Service Files		
59	GA03156	04/28/2006	GA Confidential	Winnipeg Child and Family Services Branch Internal Case Review - Phoenix Sinclair		
60	GA03490	00/00/0000	GA Confidential	Winnipeg CFS Special Case Review in Regard to the Death of Phoenix Sinclair		
61	GA03491	00/00/0000	GA Confidential	Winnipeg CFS Response to Internal Review - April 28, 2006		

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AUTHORITIES / ANCR CONFIDENTIAL DOCUMENTS

Tab#	Begdoc#	Docdate	Source	Description	Author	Recip
62	GA03511	00/00/0000	GA Confidential	Winnipeg CFS Special Case Review in Regard to the Death of Phoenix Sinclair		
63	GA03571	00/00/0000	GA Confidential	Winnipeg CFS Special Review in Regard to the Death of Phoenix Sinclair		
64	GA03645	00/00/0000	GA Confidential	Last page of E-Mail	[redacted]	
65	GA03751	00/00/0000	GA Confidential	Recommendations for the General Authority as Outlained in the Section 4 Review on the Death of Phoenix Sinclair		
66	GA03460	02/19/1997	GA Confidential	Intake Recording from January 29, 1997 to February 17, 1997	[redacted]	
67	GA03458	04/23/1997	GA Confidential	Intake Opening Summary for April 23, 1997	[redacted]	
68	GA03454	07/23/1998	GA Confidential	Opening Summary for July 23, 1998	[redacted]	
69	GA03451	08/17/1998	GA Confidential	Closing Summary from July 23, 1998 to August 17, 1998	[redacted]	
70	GA03455	08/17/1998	GA Confidential	Closing Summary from July 23, 1998 to August 17, 1998	[redacted]	
71	GA03440	04/19/2000	GA Confidential	Transfer Summary and Family Assessment from March 26, 1996 to May 1, 2000	[redacted]	
72	GA03433	04/24/2000	GA Confidential	Intake Transfer Summary from April 25, 2000 to April 28, 2000	[redacted]	
73	GA03428	05/01/2000	GA Confidential	Continued Summary of Services & Intervention from April 28, 2000 to May 1, 2000	[redacted]	
74	GA03431	05/01/2000	GA Confidential	Continued Summary of Service & Intervention from October 28, 2000 to May 1, 2000	[redacted]	
75	GA03430	09/11/2000	GA Confidential	Letter re: Phoenix bd. 23/4/00	[redacted]	[redacted]
76	GA03419	10/02/2000	GA Confidential	Case Summary from April 24, 2000 to September 13, 2000	[redacted]	
77	GA03417	07/03/2001	GA Confidential	Winnipeg CFS CRU Intake & AHU Form from for July 3 2001	[redacted]	[redacted]

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Tab#	Degdoc#	Docdate	Source	Description	Author	Recip
78	GA03413	07/15/2001	GA Confidential	254162 Continued	[redacted]	[redacted]
79	GA03408	07/16/2001	GA Confidential	Letter re: [redacted]	[redacted]	[redacted]
80	GA03398	08/16/2001	GA Confidential	Winnipeg CFS Case Summary	[redacted]	
81	GA03396	03/26/2002	GA Confidential	303594 Continued for March 26, 2002	[redacted]	
82	GA03367	07/05/2002	GA Confidential	North Abuse Intake Closing Summary from April 2, 2002 to July 5, 2002	[redacted]	
83	GA03395	06/26/2003	GA Confidential	401195 Continued	[redacted]	[redacted]
84	GA03373	06/27/2003	GA Confidential	Intake Opening/Transfer Summary from February 26, 2003 to June 27, 2003	[redacted]	
85	GA03384	06/27/2003	GA Confidential	Intake Opening/Transfer Summary from February 26, 2003 to June 27, 2003	[redacted]	
86	GA03201	07/02/2003	GA Confidential	Transcript [redacted]		
87	GA03718	10/02/2003	GA Confidential	Department of Justice Investigation [redacted]	[redacted]	[redacted]
88	GA03366	10/07/2003	GA Confidential	Place of Safety Closing Summary	[redacted]	
89	GA03362	10/10/2003	GA Confidential	Family Servicesw Family Closing Summary	[redacted]	

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AUTHORITIES / ANCR CONFIDENTIAL DOCUMENTS

Tab#	Begdoc#	Docdate	Source	Description	Author	Recip
90	GA03359	11/13/2003	GA Confidential	Family Servicesw Family Closing Summary	[redacted]	
91	GA03352	01/15/2004	GA Confidential	Winnipeg CFS CRU Intake & AHU Form for January 16, 2004	[redacted]	[redacted]
92	GA03355	01/16/2004	GA Confidential	439507 Continued	[redacted]	[redacted]
93	GA03345	02/13/2004	GA Confidential	Intake Closing Summary from January 21, 2004 to February 13, 2004	[redacted]	
94	GA03336	05/11/2004	GA Confidential	CRU Intake & AHU Form for May 11, 2004	[redacted]	[redacted]
95	GA03340	05/11/2004	GA Confidential	CRU Intake & AHU Form for May 11, 2004	[redacted]	[redacted]
96	GA03334	05/13/2004	GA Confidential	Closing Summary	[redacted]	
97	GA03335	05/13/2004	GA Confidential	Memo re[redacted]	[redacted]	[redacted]
98	GA03326	07/14/2004	GA Confidential	Intake Closing Summary from May 13, 2004 to July 15, 2004	[redacted]	
99	GA03332	07/14/2004	GA Confidential	Letter	[redacted]	[redacted]
100	GA03333	07/15/2004	GA Confidential	Letter	[redacted]	[redacted]
101	GA03320	12/01/2004	GA Confidential	521075 Continued from December 2, 2004 to December 3, 2004	[redacted]	[redacted]
102	GA03313	03/05/2005	GA Confidential	Winnipeg CFS CRU Intake & AHU Form (March 5, 2005 and March 7, 2005) from December 1, 2004 to March 9, 2005	[redacted]	[redacted]
103	GA03308	04/18/2005	GA Confidential	Community Early Intervention Program Closing Summary from February 10, 2005 to April 18, 2005	[redacted]	

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AUTHORITIES / ANCR CONFIDENTIAL DOCUMENTS

Tab#	Begdoc#	Docdate	Source	Description	Author	Recip
104	GA03470	07/21/2005	GA Confidential	Criminal Risk Assessment Criminal Name Check Evaluation Policy		
105	GA03318	09/09/2005	GA Confidential	542013 Continued for February 9, 2005	[redacted]	[redacted]
106	GA03241	03/09/2006	GA Confidential	List of File Recordings taken from CFSIS/Intake Module Regarding [redacted] for March 9, 2006 to March 15, 2006		
107	GA03280	03/09/2006	GA Confidential	Case Notes - [redacted] - WCFS013208 from March 9, 2006 to March 15, 2006	[redacted]	
108	GA03286	03/09/2006	GA Confidential	Case Notes - [redacted] - WCFS013194 from March 9, 2006 to March 12, 2006	[redacted]	
109	GA03211	03/10/2006	GA Confidential	Case Notes [redacted] - WCFS013122 from March 10, 2006 to March 16, 2006	[redacted]	
110	GA03213	03/10/2006	GA Confidential	Case Notes [redacted] - WCFS013208 from March 10, 2006 to March 14, 2006	[redacted]	
111	GA03713	03/12/2006	GA Confidential	Death of Phoenix Victoria Sinclair information		
112	GA03701	03/13/2006	GA Confidential	The General CFS Authority Background Information	[redacted]	
113	GA03289	03/13/2006	GA Confidential	Intake Summary - Brief		
114	GA03705	03/13/2006	GA Confidential	Route Slip		[redacted]
115	GA03706	03/13/2006	GA Confidential	The General CFS Authority Backgroud Information	[redacted]	
116	GA03740	03/13/2006	GA Confidential	Legal Status and Placement History for Phoenix Sinclair		
117	GA03646	03/14/2006	GA Confidential	E-Mail: Sinclair, Phoenix - Section 182-3	[redacted]	[redacted]
118	GA03684	03/14/2006	GA Confidential	E-Mail re: Sinclair, Phoenix - Section 182-3	[redacted]	[redacted]

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AUTHORITIES / ANCR CONFIDENTIAL DOCUMENTS

Tab#	Begdoc#	Docdate	Source	Description	Author	Recip
119	GA03681	03/14/2006	GA Confidential	E-Mail re: Sinclair, Phoenix - Section 182-3	[redacted]	[redacted]
120	GA03683	03/14/2006	GA Confidential	E-Mail re: Sinclair, Phoenix - Section 182-3	[redacted]	[redacted]
121	GA03680	03/14/2006	GA Confidential	E-Mail re: Sinclair, Phoenix - Section 182-3	[redacted]	[redacted]
122	GA03679	03/14/2006	GA Confidential	E-Mail re: Sinclair, Phoenix - Section 182-3	[redacted]	[redacted]
123	GA03292	03/14/2006	GA Confidential	Intake Summary - Brief		
124	GA03647	03/14/2006	GA Confidential	Death of a Child Not in Care Section 182.3	[redacted]	
125	GA03678	03/15/2006	GA Confidential	E-Mail re: Sinclair, Phoenix - Section 182-3	[redacted]	[redacted]
126	GA03677	03/15/2006	GA Confidential	E-Mail re: Sinclair, Phoenix - Section 182-3	[redacted]	[redacted]
127	GA03700	03/15/2006	GA Confidential	E-Mail re: Sinclair Review	[redacted]	[redacted]
128	GA03582	03/15/2006	GA Confidential	E-Mail re: Sinclair Review	[redacted]	[redacted]
129	GA03695	03/15/2006	GA Confidential	The General CFS Authority Case Review	[redacted]	
130	GA03699	03/15/2006	GA Confidential	Route Slip		[redacted]
131	GA03688	03/15/2006	GA Confidential	The General CFS Authority Internal Review	[redacted]	
132	GA03583	03/15/2006	GA Confidential	General CFS Authority Request for Internal Review and specific questions	[redacted]	[redacted]
133	GA03676	03/16/2006	GA Confidential	E-Mail re: Sinclair, Phoenix - Section 182-3	[redacted]	[redacted]
134	GA03210	03/16/2006	GA Confidential	Case Notes - [redacted] - WCFS013194 from March 16, 2006 to March 17, 2006	[redacted]	
135	GA03685	03/16/2006	GA Confidential	The General CFS Authority Updated Information	[redacted]	
136	GA03739	03/16/2006	GA Confidential	Facsimile	[redacted]	[redacted]
137	GA03675	03/17/2006	GA Confidential	E-Mail re: Sinclair, Phoenix - Section 182-3	[redacted]	[redacted]
138	GA03674	03/20/2006	GA Confidential	Memo	[redacted]	[redacted]

AUTHORITIES / ANCR CONFIDENTIAL DOCUMENTS

Tab#	Begdoc#	Docdate	Source	Description	Author	Recip
139	GA03672	03/21/2006	GA Confidential	Letter re: [redacted]	[redacted]	[redacted]
140	GA03712	03/30/2006	GA Confidential	Memorandum re: Child Death Notification	[redacted]	[redacted]
141	GA03243	04/03/2006	GA Confidential	Abuse Intake Services Transfer Summary completed March 24, 2005	[redacted]	
142	GA03670	04/03/2006	GA Confidential	Route Slip		[redacted]
143	GA03671	04/03/2006	GA Confidential	Action/Route Slip	[redacted]	[redacted]
144	GA03301	04/04/2006	GA Confidential	Intake Summary - Brief		
145	GA03667	04/04/2006	GA Confidential	Enquiry Intake Sheet		
146	GA03668	04/04/2006	GA Confidential	Undated Information	[redacted]	
147	GA03591	04/28/2006	GA Confidential	E-Mail re: Internal Case Review - Phoenix Sinclair	[redacted]	[redacted]
148	GA03590	04/28/2006	GA Confidential	E-Mail re: Internal Case Review - Phoenix Sinclair	[redacted]	[redacted]
149	GA03592	04/28/2006	GA Confidential	Winnipeg CFS Internal Case Review Phoenix Sinclair	[redacted]	
150	GA03589	05/01/2006	GA Confidential	E-Mail re: Internal Case Review - Phoenix Sinclair	[redacted]	[redacted]
151	GA03666	05/01/2006	GA Confidential	Letter re: Internal Case Review Phoenix Sinclair	[redacted]	[redacted]
152	GA03717	05/08/2006	GA Confidential	E-Mail re: [redacted]	[redacted]	[redacted]
153	GA03665	05/08/2006	GA Confidential	E-Mail re [redacted]	[redacted]	[redacted]
154	GA03664	05/09/2006	GA Confidential	E-Mail re: Phoenix Sinclair - Section 4 Review	[redacted]	[redacted]
155	GA03663	06/22/2006	GA Confidential	E-Mail re: Phoenix Sinclair Media Attention	[redacted]	[redacted]

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Tab#	Begdoc#	Dordate	Source	Description	Author	Recip
156	GA03561	09/00/2006	GA Confidential	A Special Case Review in Regard to The Death of Phoenix Sinclair	[redacted]	
157	GA03661	09/20/2006	GA Confidential	E-Mail re: Updated Advisory Notes	[redacted]	[redacted]
158	GA03660	09/21/2006	GA Confidential	E-Mail re: Updated Advisory Notes	[redacted]	[redacted]
159	GA03659	09/21/2006	GA Confidential	E-Mail re: Updated Advisory Notes	[redacted]	[redacted]
160	GA03658	09/21/2006	GA Confidential	E-Mail re: Updated Advisory Notes	[redacted]	[redacted]
161	GA03637	10/05/2006	GA Confidential	News Release titled CFS Authorities Complete Case Reviews		
162	GA03643	10/12/2006	GA Confidential	Letter re: Phoenix Sinclair (DOB: April 23, 2000, DOD: March 23, 2006)	[redacted]	[redacted]
163	GA03641	10/13/2006	GA Confidential	E-Mail News Release: Changes for Children Action Plan Outlined: $42 Million Initially Committed to Strengthening Child Welfare	[redacted]	[redacted]
164	GA03656	10/16/2006	GA Confidential	E-Mail re: Phoenix Sinclair - Internal Case Review	[redacted]	[redacted]

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165	GA03560	10/17/2006	GA Confidential	Letter re: Phoenix Sinclair (DOB: April 23, 2000; DOD: March 23, 2006)	[redacted]	[redacted]
166	GA03655	10/24/2006	GA Confidential	E-Mail re: Phoenix Sinclair - Section 4 Review	[redacted]	[redacted]
167	GA03654	10/25/2006	GA Confidential	E-Mail re: Phoenix Sinclair - Section 4 Review	[redacted]	[redacted]
168	GA03575	10/30/2006	GA Confidential	Crisis Response Unit (CRU) Child and Family All Nations Coordinated Response Network October 2006		
169	GA03492	11/03/2006	GA Confidential	Compilation of Review Recommendations (November 3, 2006)		
170	GA03504	11/03/2006	GA Confidential	Compilation of Review Recommendations (November 3, 2006)		
171	GA03484	11/09/2006	GA Confidential	Response to the Recommendations from the Internal Winnipeg CFS Review re Phoenix Sinclair Dated April 28, 2006		
172	GA03505	11/09/2006	GA Confidential	Winnipeg CFS Response to the Recommendations of the Review Completed by Andrew Koster Regarding the Death of Phoenix Sinclair		
173	GA03557	11/14/2006	GA Confidential	E-Mail re: CME Report - Phoenix Sinclair (DOB: April 23, 2000; DOD: March 23, 2006)	[redacted]	[redacted]
174	GA03556	11/14/2006	GA Confidential	E-Mail re: CME Report - Phoenix Sinclair (DOB: April 23, 2000; DOD: March 23, 2006)	[redacted]	[redacted]
175	GA03555	11/15/2006	GA Confidential	E-Mail re: CME Report - Phoenix Sinclair (DOB: April 23, 2000; DOD: March 23, 2006)	[redacted]	[redacted]

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Tab#	Begdoc#	Docdate	Source	Description	Author	Recip
176	GA03554	11/15/2006	GA Confidential	E-Mail re: CME Report – Phoenix Sinclair (DOB: April 23, 2000; DOD: March 23, 2006)	[redacted]	[redacted]
177	GA03653	11/16/2006	GA Confidential	Letter re: Phoenix Sinclair Case Reviews	[redacted]	[redacted]
178	GA03477	12/07/2006	GA Confidential	E-Mail re: Prior Contact Checks	[redacted]	[redacted]
179	GA03469	12/07/2006	GA Confidential	E-Mail re: Criminal Risk Assessment Policy	[redacted]	[redacted]
180	GA03532	12/14/2006	GA Confidential	OAG Report Audit of the CFS Division Child in Care Processes and Practices Action Plan		
181	GA03743	12/19/2006	GA Confidential	Letter re: Phoenix Sinclair (DOB: April 23, 2000, DOD: March 23, 2006)		[redacted]
182	GA03742	12/21/2006	GA Confidential	E-Mail re: Sinclair - response to CPB	[redacted]	[redacted]
183	GA03741	12/21/2006	GA Confidential	E-Mail re: Sinclair - response to CPB	[redacted]	[redacted]
184	GA03746	12/27/2006	GA Confidential	E-Mail re: Sinclair - response to CPB	[redacted]	[redacted]
185	GA03747	12/27/2006	GA Confidential	Letter re: Phoenix Sinclair (DOB: April 23, 2000, DOD March 23, 2006)	[redacted]	[redacted]
186	GA03479	01/03/2007	GA Confidential	Letter re: Phoenix Sinclair (DOB: April 23, 2000, DOD: March 23, 2006)	[redacted]	[redacted]
187	GA03569	03/00/2007	GA Confidential	Authorities Response to Recommendations - March 2007		
188	GA03570	03/00/2007	GA Confidential	Child and Family All Nations Coordinated Response (AMCR) Response to Recommendations - March 2007		
189	GA03565	04/02/2007	GA Confidential	Letter re: Phoenix Sinclair	[redacted]	[redacted]

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Tab#	Begdoc#	Docdate	Source	Description	Author	Recip
190	GA03574	04/02/2007	GA Confidential	Letter re: Phoenix Sinclair	[redacted]	[redacted]
191	GA03559	04/02/2007	GA Confidential	Letter re: Phoenix Sinclair and ANCR "going live"	[redacted]	[redacted]
192	GA03218	05/03/2007	GA Confidential	E-Mail re: Questions re Phoenix Sinclair Case	[redacted]	[redacted]
193	GA03221	05/03/2007	GA Confidential	E-Mail re: Questions re Phoenix Sinclair Case	[redacted]	[redacted]
194	GA03232	05/03/2007	GA Confidential	E-Mail re: Questions re Phoenix Sinclair Case	[redacted]	[redacted]
195	GA03238	05/03/2007	GA Confidential	E-Mail re: Questions re Phoenix Sinclair Case	[redacted]	[redacted]
196	GA03240	05/03/2007	GA Confidential	E-Mail re: Questions re Phoenix Sinclair Case	[redacted]	[redacted]
197	GA03216	05/07/2007	GA Confidential	E-Mail re: Questions re Phoenix Sinclair Case	[redacted]	[redacted]
198	GA03220	05/07/2007	GA Confidential	E-Mail re: Questions re Phoenix Sinclair Case	[redacted]	[redacted]
199	GA03231	05/07/2007	GA Confidential	E-Mail re: Questions re Phoenix Sinclair Case	[redacted]	[redacted]
200	GA03236	05/07/2007	GA Confidential	E-Mail re: Questions re Phoenix Sinclair Case	[redacted]	[redacted]
201	GA03239	05/07/2007	GA Confidential	E-Mail re: Questions re Phoenix Sinclair Case	[redacted]	[redacted]
202	GA03230	05/07/2007	GA Confidential	E-Mail re: Questions re Phoenix Sinclair Case	[redacted]	[redacted]
203	GA03228	05/07/2007	GA Confidential	E-Mail re: Questions re Phoenix Sinclair Case	[redacted]	[redacted]
204	GA03227	05/07/2007	GA Confidential	E-Mail re: Questions re Phoenix Sinclair Case	[redacted]	[redacted]
205	GA03235	05/08/2007	GA Confidential	E-Mail re: Questions re Phoenix Sinclair Case	[redacted]	[redacted]
206	GA03234	05/08/2007	GA Confidential	E-Mail re: Questions re Phoenix Sinclair Case	[redacted]	[redacted]
207	GA03226	05/08/2007	GA Confidential	E-Mail re: Questions re Phoenix Sinclair Case	[redacted]	[redacted]
208	GA03225	05/08/2007	GA Confidential	E-Mail re: Questions re Phoenix Sinclair Case	[redacted]	[redacted]
209	GA03224	05/08/2007	GA Confidential	E-Mail re: Questions re Phoenix Sinclair Case	[redacted]	[redacted]

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Tab#	Begdoc#	Docdate	Source	Description	Author	Recip
210	GA03223	05/14/2007	GA Confidential	E-Mail re: Questions re Phoenix Sinclair Case	[redacted]	[redacted]
211	GA03215	05/14/2007	GA Confidential	E-Mail re: Questions re Phoenix Sinclair Case	[redacted]	[redacted]
212	GA03219	05/14/2007	GA Confidential	E-Mail re: Questions re Phoenix Sinclair Case	[redacted]	[redacted]
213	GA03214	05/14/2007	GA Confidential	E-Mail re: Questions re Phoenix Sinclair Case	[redacted]	[redacted]
214	GA03568	03/27/2008	GA Confidential	E-Mail re: Phoenix Sinclair	[redacted]	[redacted]
215	GA03567	03/28/2008	GA Confidential	E-Mail re: Phoenix Sinclair	[redacted]	[redacted]
216	GA03566	05/29/2008	GA Confidential	E-Mail re: Phoenix Sinclair	[redacted]	[redacted]
217	GA03657	09/22/2008	GA Confidential	E-Mail re: Phoenix Sinclair	[redacted]	[redacted]
218	SA00002	00/00/0000	SA Confidential	Information on Phoenix Victoria Hope Sinclair		
219	SA00018	05/10/2000	SA Confidential	Letter re: Sinclair-Phoenix Victoria Hope	[redacted]	[redacted]
220	SA00001	07/12/2005	SA Confidential	Questions for ICFS and Answers received from [redacted]		
221	SA00011	07/14/2005	SA Confidential	Brief Services Contact Notes	[redacted]	
222	SA00015	03/06/2006	SA Confidential	Summary of Contacts [redacted]	[redacted]	

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Trb#	Regdoc#	Docdate	Source	Description	Author	Recip
223	SA00013	03/06/2006	SA Confidential	Case Notes-		
224	SA00023	03/12/2006	SA Confidential	Southern First Nations Network of Care Contact Record from March 12, 2006 to March 13, 2006		
225	SA00025	03/12/2006	SA Confidential	First Nations of Southern Manitoba CFS Authority Intake & Enquiry		
226	SA00026	03/13/2006	SA Confidential	First Nations of Southern Manitoba CFS Authority Intake Case Information		
227	SA00019	03/14/2006	SA Confidential	Facsimile		
228	SA00020	03/14/2006	SA Confidential	Report on contact with		
229	SA00017	03/15/2006	SA Confidential	Facsimile		
230	SA00012	03/17/2006	SA Confidential	Facsimile		
231	SA00014	03/17/2006	SA Confidential	Facsimile		
232	SA00007	03/20/2006	SA Confidential	Report to the Child Protection Branch		
233	SA00006	03/21/2006	SA Confidential	E-Mail re: Briefing		
234	SA01402	03/27/2006	SA Confidential	Fisher River Support Team March 27, 2006 to March 31, 2006		
235	SA00004	03/30/2006	SA Confidential	Office of the CME Information Request re: Child Death Notification		

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Tab#	Begdoc#	Docdate	Source	Description	Author	Recip
236	SA00005	03/31/2006	SA Confidential	Facsimile	[redacted]	[redacted]
237	SA01400	05/24/2006	SA Confidential	News Report "Expansion of Native Child-Welfare Powers On Hold" emailed with [redacted]	[redacted]	
238	SA00970	09/00/2006		A Special Case Review in Regard to the Death of Phoenix Sinclair	[redacted]	
239	SA00808	09/00/2006		Special Case Review in Regard to The Death of Phoenix Sinclair	[redacted]	[redacted]
240	SA00974	09/18/2006		Department of Justice Office of the Chief Medical Examiner Investigation into the Services Provided to Phoenix Victoria Hope Sinclair	[redacted]	
241	SA00003	09/20/2006	SA Confidential	E-Mail re: Notes	[redacted]	[redacted]
242	SA00085	00/00/0000	SA Confidential [redacted]	Case Addendum	[redacted]	
243	SA00295	00/00/0000	SA Confidential [redacted]	Case Notes "Wed or Thurs of last week [redacted]"		
244	SA00027	08/20/1998	SA Confidential [redacted]	Intake Opening Summary for August 20, 1998	[redacted]	
245	SA00028	01/18/2000	SA Confidential [redacted]	Case Summary	[redacted]	
246	SA00087	11/03/2000	SA Confidential [redacted]	Transfer Summary from November 3, 2000 to January 18, 2005	[redacted]	
247	SA00100	06/04/2001	SA Confidential [redacted]	Winnipeg CFS Court Summary for June 4, 2001	[redacted]	
248	SA00104	06/05/2001	SA Confidential [redacted]	248666 Continued for June 5, 2001	[redacted]	[redacted]
249	SA00098	09/02/2001	SA Confidential [redacted]	Winnipeg CFS CRU Intake & AHU Form for September 2, 2001	[redacted]	[redacted]

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Tab#	Begdoc#	Docdate	Source	Description	Author	Recip
250	SA00096	09/29/2001	SA Confidential [redacted]	268400 Continued for September 29, 2001	[redacted]	[redacted]
251	SA00097	12/22/2001	SA Confidential [redacted]	Winnipeg CFS CRU Intake & AHU Form for December 22, 2001	[redacted]	[redacted]
252	SA00204	04/27/2002	SA Confidential [redacted]	Psychological Assessment re: [redacted]	[redacted]	[redacted]
253	SA00094	08/01/2003	SA Confidential [redacted]	Winnipeg CFS CRU Intake & AHU Form for August 2, 2003	[redacted]	[redacted]
254	SA00077	05/08/2005	SA Confidential [redacted]	Case Notes [redacted] for May 8, 2005	[redacted]	
255	SA00107	05/08/2005	SA Confidential [redacted]	Case Notes [redacted] for May 8, 2005	[redacted]	
256	SA00280	06/00/2005	SA Confidential [redacted]	Intake Summary - Brief for June 20, 2005		
257	SA00291	06/06/2005	SA Confidential [redacted]	Field Appointment Notes for June 6, 2005		
258	SA00277	06/14/2005	SA Confidential [redacted]	Winnipeg CFS Case Notesw from June 14, 2005 to July 21, 2005	[redacted]	
259	SA00073	06/20/2005	SA Confidential [redacted]	Case Notes [redacted] from June 20, 2005 to June 21, 2005	[redacted]	
260	SA00075	06/20/2005	SA Confidential [redacted]	Case Notes [redacted] from June 20, 2005 to June 22, 2005	[redacted]	
261	SA00080	06/20/2005	SA Confidential [redacted]	Case Notes [redacted] from June 20, 2005 to June 21, 2005	[redacted]	

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Tab#	Begdoc#	Docdate	Source	Description	Author	Recip
262	SA00083	06/20/2005	SA Confidential [redacted]	Case Notes [redacted] from June 20, 2005 to June 22, 2005	[redacted]	
263	SA00183	06/20/2005	SA Confidential [redacted]	Winnipeg CFS After Hours Service Request	[redacted]	
264	SA00185	06/20/2005	SA Confidential [redacted]	Facsimile Confirmation	[redacted]	[redacted]
265	SA00284	06/20/2005	SA Confidential [redacted]	Intake Summary - Brief for June 20, 2005		
266	SA00286	06/20/2005	SA Confidential [redacted]	Case Notes- [redacted] for June 20, 2005	[redacted]	
267	SA00282	06/20/2005	SA Confidential [redacted]	Case Notes [redacted] for June 20 2005	[redacted]	
268	SA00287	06/22/2005	SA Confidential [redacted]	Intake Summary – Brief for June 20, 2005		
269	SA00292	06/23/2005	SA Confidential [redacted]	Field Appointment Notes for June 23, 2005	[redacted]	
270	SA00048	06/25/2005	SA Confidential [redacted]	Case Notes [redacted] from June 25, 2005 to June 27, 2005	[redacted]	
271	SA00071	06/25/2005	SA Confidential [redacted]	Case Notes [redacted] from June 25, 2005 to June 27, 2005	[redacted]	
272	SA00297	06/26/2005	SA Confidential [redacted]	Intake Summary - Brief for June 24, 2005		
273	SA00294	06/30/2005	SA Confidential [redacted]	Field Appointment Notes for June 30, 2005		
274	SA01508	07/06/2005	SA Confidential [redacted]	Photos (x25)		
275	SA00296	07/20/2005	SA Confidential [redacted]	Field Appointment Notes for July 20, 2005		
276	SA00042	08/19/2005	SA Confidential [redacted]	Case Notes - [redacted] for August 19, 2005	[redacted]	

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277	SA00070	08/19/2005	SA Confidential-	Case Notes - for August 19, 2005		
278	SA00300	08/19/2005	SA Confidential-	Facsimile re:		
279	SA00270	08/25/2005	SA Confidential-	Affidavit of		
280	SA00045	10/16/2005	SA Confidential	Case Notes - October 16, 2005		
281	SA00069	10/16/2005	SA Confidential-	Case Notes for October 16, 2005		
282	SA00304	10/16/2005	SA Confidential	Intake Summary - Brief for October 16, 2005		
283	SA00237	10/18/2005	SA Confidential-	Health Sciences Centre admittance form		
284	SA00231	10/18/2005	SA Confidential-	Health Sciences Centre Diagnostic Imaging Report - Left Foot		
285	SA00180	10/18/2005	SA Confidential	Case Notes from October 13, 2005 to October 18, 2005		
286	SA00227	10/19/2005	SA Confidential	Health Sciences Centre admittance form		
287	SA00228	10/19/2005	SA Confidential-	Health Sciences Centre Pediatric Triage Assessment		
288	SA00229	10/19/2005	SA Confidential	Health Sciences Centre Emergency Nursing Assessment		
289	SA00232	10/19/2005	SA Confidential-	Health Sciences Centre Physician's Order Sheet		
290	SA00233	10/19/2005	SA Confidential	Health Sciences Centre Consultant's Report		
291	SA00230	10/19/2005	SA Confidential	Health Sciences Centre Diagnostic Imaging Report - Ultrasound of Left Foot		
292	SA00262	10/20/2005	SA Confidential	Letter re:		
293	SA00173	11/21/2005	SA Confidential	Animikii Ozoson CFS Court Summary		

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294	SA00250	01/20/2006	SA Confidential [redacted]	Letter re: [redacted]	[redacted]	[redacted]
295	SA00030	01/23/2006	SA Confidential [redacted]	Aninikii Ozoson Child and Family Services Closing Summary from November 3, 2000 to December 13, 2005	[redacted]	
296	SA00186	01/23/2006	SA Confidential [redacted]	Child In Care Transfer Summary	[redacted]	
297	SA00164	02/20/2006	SA Confidential [redacted]	Case Notes for February 20, 2006	[redacted]	
298	SA00333	03/03/2006	SA Confidential [redacted]	Criminal Name Check fo[redacted]		
299	SA00330	03/06/2006	SA Confidential [redacted]	Facsimile	[redacted]	[redacted]
300	SA00331	03/06/2006	SA Confidential [redacted]	Memorandum re: [redacted]	[redacted]	[redacted]
301	SA00307	03/10/2006	SA Confidential [redacted]	Case Notes for March 10, 2006	[redacted]	
302	SA00240	03/21/2006	SA Confidential [redacted]	Health Sciences Centre Operative Report	[redacted]	
303	SA00191	03/27/2006	SA Confidential [redacted]	Letter re: [redacted]	[redacted]	[redacted]
304	SA00194	04/03/2006	SA Confidential [redacted]	Letter Summary re: [redacted]	[redacted]	
305	SA00196	04/04/2006	SA Confidential [redacted]	Health Sciences Centre Referral Notes from April 3, 2006 to April 4, 2006	[redacted]	

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306	SA00202	04/10/2006	SA Confidentia	Health Sciences Centre Caswe Notes from April 3, 2006 to April 10, 2006		
307	SA00318	05/05/2006	SA Confidential-	Case Notes May 5, 2006		
308	SA00149	05/25/2006	SA Confidential-	Child Welfare Involvement/Social History re:		
309	SA00310	06/19/2006	SA Confidential-	Case Notes - June 19, 2006		
310	SA00169	06/23/2006	SA Confidential	Letter re:		
311	SA00313	06/23/2006	SA Confidential-	Case Notes -		
312	SA00269	09/05/2006	SA Confidential	Letter re:		
313	SA00320	09/21/2006	SA Confidential	Animiki Ozoson DFS Updated Case Information from September 21, 2006 to November 22, 2006		
314	SA00171	12/05/2006	SA Confidential	Letter re:		
315	SA00218	02/14/2007	SA Confidential	Letter Report re:		

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316	SA01497	05/30/2007	SA Confidential	Psychological Assessment		
317	SA00052	09/19/2007	SA Confidential	Case Notes - from September 19, 2007 to October 16, 2007		
318	SA00118	09/20/2007	SA Confidential	Case Notes - from September 20, 2007 to October 16, 2007		
319	SA00117	10/02/2007	SA Confidential	Letter Report		
320	SA00116	10/04/2007	SA Confidential	Birth Alert Form for October 4, 2007		
321	SA01403	10/31/2007	SA Confidential	Assessment		
322	SA00050	11/24/2007	SA Confidential	Case Notes for November 24, 2007 (page 1 of 2 only)		
323	SA00136	11/24/2007	SA Confidential	Case Notes - from November 24, 2007 to November 27, 2007		
324	SA00049	06/20/2011	SA Confidential	Case Notes - from June 20, 2001 to June 21, 2011		
325	SA00145	06/20/2011	SA Confidential	Case Notes - from June 20, 2011 to June 21, 2011		
326	SA00039	08/29/2011	SA Confidential	Intake Summary - Brief from August 18, 2005 to August 1, 2005		

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327	SA00043	08/29/2011	SA Confidential-[redacted]	Intake Summary - Brief from October 16, 2005 to October 19, 2005		
328	SA00046	08/29/2011	SA Confidential-[redacted]	Intake Summary - Brief from June 24, 2005 to June 28, 2005		
329	SA00078	08/29/2011	SA Confidential-[redacted]	Intake Summary - Brief from June 20 2005 to June 22, 2005		
330	SA00081	08/29/2011	SA Confidential-[redacted]	Intake Summary - Brief from June 20, 2005 to June 22, 2005		
331	SA00105	08/29/2011	SA Confidential-[redacted]	Intake Summary - Brief from May 8, 2005 to May 9, 2005		
332	SA00108	08/29/2011	SA Confidential-[redacted]	Intake Summary Report from September 19, 2007 to October 16, 2007		
333	SA00128	08/29/2011	SA Confidential-[redacted]	Intake Summary Report from November 24, 2007 to November 27, 2007		
334	SA00137	08/29/2011	SA Confidential-[redacted]	Intake Summary Report from June 20, 2011 to June 21, 2011		

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APPROVED AS TO FORM:

MANITOBA JUSTICE, CIVIL LEGAL SERVICES SOA

Per: _____

Alan Ladyka,
Counsel for The Office of the Chief
Medical Examiner of Manitoba

APPROVED AS TO FORM:

AIKINS MACAULAY & THORVALDSON LLP

Per: _____

Ted E. Bock,
Counsel for The Office of the
Children's Advocate of Manitoba

APPROVED AS TO FORM:

MILLER THOMSON LLP

Per: _____

Robert England,
Counsel for Andrew J. Koster

APPROVED AS TO FORM:

GINDIN WOLSON SIMMONDS ROITENBERG

Per: _____

Jeff Gindin
Counsel for Kimberly-Ann Edwards
and Steven Sinclair

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GINDIN WOLSON SIMMONDS ROITENBERG

Per: _____
Jeff Gindin
Counsel for Kimberly-Ann Edwards
and Steven Sinclair

APPROVED AS TO FORM:

GANGE GOODMAN & FRENCH

Per: _____

William S. Gange
Counsel for three individuals who
are subjects of the Records

File No. CI 12-01-78010

THE QUEEN'S BENCH
Winnipeg Centre

IN THE MATTER OF: Section 76 of *The Child and Family Services Act,* C.C.S.M. c. C80

AND IN THE MATTER OF: Order in Council No. 89/2011 appointing the Honourable Edward (Ted) N. Hughes, OC, QC, LL.D (Hon.) as Commissioner to inquire into the circumstances surrounding the death of Phoenix Sinclair

BETWEEN:

COMMISSIONER OF THE INQUIRY INTO THE CIRCUMSTANCES SURROUNDING THE DEATH OF PHOENIX SINCLAIR,

Applicant,

– and –

FIRST NATIONS OF NORTHERN MANITOBA CHILD AND FAMILY SERVICES AUTHORITY,

Respondent.

CONSENT ORDER

Commission of Inquiry into the Circumstances Surrounding the Death of Phoenix Sinclair
1801 – 155 Carlton Street
Winnipeg, Manitoba R3C 3H8

Sherri Walsh
Commission Counsel

Telephone: (204) 945-8976
Fax: (204) 948-4415

File No. CI 12-01-78010

THE QUEEN'S BENCH
Winnipeg Centre

THE HONOURABLE CHIEF JUSTICE JOYAL) day, the 22nd day of June, 2012.

IN THE MATTER OF: Section 76 of *The Child and Family Services Act*, C.C.S.M. c. C80

AND IN THE MATTER OF: Order in Council No. 89/2011 appointing the Honourable Edward (Ted) N. Hughes, OC, QC, LL.D (Hon.) as Commissioner to inquire into the circumstances surrounding the death of Phoenix Sinclair

BETWEEN:

COMMISSIONER OF THE INQUIRY INTO THE CIRCUMSTANCES SURROUNDING THE DEATH OF PHOENIX SINCLAIR,

Applicant,

– and –

FIRST NATIONS OF NORTHERN MANITOBA CHILD AND FAMILY SERVICES AUTHORITY,

Respondent.

CONSENT ORDER

UPON THE APPLICATION of the Commissioner of the Inquiry into the Circumstances Surrounding the Death of Phoenix Sinclair, filed May 28, 2012.

ON READING the Notice of Application filed May 28, 2012, the Affidavit of Kathleen McCandless, sworn May 28, 2012, and upon noting the consents of the parties, through their counsel:

THIS COURT ORDERS THAT:

1. the Respondent is required to disclose and produce to the Applicant, Commission Counsel and Commission staff:

(a) all records in its possession or control that form part of the Cree Nation Child and Family Caring Agency's Child in Care file and/or Perinatal file as identified to the Commission in Exhibit "D" to the Affidavit of Kathleen McCandless; and

(b) all records in its possession or control relating to the child welfare services provided or not provided to Phoenix Sinclair and her family

("the Records");

2. the Applicant, Commission Counsel and Commission staff are permitted to make use of the Records and information contained therein for the purposes of the Commission of Inquiry in the Circumstances Surrounding the Death of Phoenix Sinclair ("the Commission") and in accordance with Order in Council No. 89/2011, including but not limited to:

(a) disclosing and producing the Records and communicating the information contained therein, to the parties and intervenors with standing at the Commission and to potential witnesses; and

(b) entering the Records and information contained therein, or portions of the Records and information contained therein, into evidence at the hearings of the Commission;

on such terms as may be decided by the Commissioner, and in accordance with the Commission's Amended Rules of Procedure and Practice approved by the Commissioner and attached as Exhibit "B" to the Affidavit of Kathleen McCandless, sworn September 28, 2011;

3. the Affidavit of Service of Jeff Ramsay, is confidential, is to be sealed, and is not a part of the public record of this proceeding, pursuant to Section 77(1) of *The Court of Queen's Bench Act,* C.C.S.M. c.C280; and

4. subject to any further order of this Court, the affidavit referred to in paragraph 3 above shall remain sealed, in any event, until December 31, 2012; and

5. should the parties seek to extend the terms of the sealing order in respect of paragraph 3 above, the parties to this Application and/or the individual to whom the Records relates may bring this matter back before the Court.

June 22, 2012

JOYAL C.J.Q.B.

APPROVED AS TO FORM AND CONTENT:

Commissioner of Inquiry into the Circumstances Surrounding the Death of Phoenix Sinclair, by his solicitor, consents to the Order in the form and content

Sherri Walsh
Commission Counsel
Commission of Inquiry into the Circumstances Surrounding the Death of Phoenix Sinclair

First Nations of Northern Manitoba Child and Family Services Authority, by its solicitor, hereby consents to the Order in the form and content

Kris Saxberg
Counsel for First Nations of Northern Manitoba Child and Family Services Authority

COMMISSION OF INQUIRY INTO THE CIRCUMSTANCES
SURROUNDING THE DEATH OF PHOENIX SINCLAIR

COMMISSIONER: E.N. (TED) HUGHES, OC, QC, LL.D (HON)

Ruling on Redactions

to be made from documents on the Commission Disclosure List and other related matters

December 2, 2011

1801 – 155 Carlton Street, Winnipeg, Manitoba R3C 3H8
Phone: (204) 945-7931; Facsimile: (204) 948-4415
E-mail: info@phoenixsinclairinquiry.ca
Website: www.phoenixsinclairinquiry.ca

RULING ON REDACTIONS

December 2, 2011

At the Commission's standing hearings on June 29, 2011, I granted party status to the following parties:

- The Department of Family Services and Consumer Affairs ("the Department");
- Manitoba Government and General Employees' Union ("MGEU");
- Intertribal Child and Family Services ("ICFS");
- The General Child and Family Services Authority, First Nations of Northern Manitoba Child and Family Services Authority, First Nations of Southern Manitoba Child and Family Services Authority, Child and Family All Nation Coordinated Response Network ("Authorities/ANCR"); and
- Ms. Kimberly-Ann Edwards and Mr. Nelson Draper Steve Sinclair.

I also granted intervenor status to the following parties:

- Assembly of Manitoba Chiefs ("AMC");
- Southern Chiefs' Organization Inc. ("SCO"); and
- University of Manitoba, Faculty of Social Work.

At the standing hearings, all parties and intervenors had the opportunity to provide comment on the Commission's Rules of Procedure and Practice ("the Rules"). The

Rules, which were approved and confirmed on June 29, 2011, and amended on August 23, 2011, set out the process by which the Commission's investigations and public hearings are to proceed. Commission Counsel also articulated at the standing hearings that, among the many documents that must be reviewed and referred to in the course of the Commission's work, are documents subject to statutory confidentiality pursuant to *The Child and Family Services Act*, C.C.S.M. c.C80 (the "CFSA documents"). This required the Commission to apply to The Court of Queen's Bench of Manitoba for an application pursuant to sections 76(3)(b) and 76(14)(a) requiring that the CFSA documents be disclosed and produced to the Commission, so that the Commission be permitted to make use of them in order to fulfill its mandate. Section 76(3) of *The Child and Family Services Act* ("the Act") specifically provides that a record of information in any form made under the Act is confidential and that no person shall disclose or communicate information from such a record to any person except in instances identified in the subsection. One of the exceptions identified is an order of a Court.

On the 21st of October 2011, The Honourable Chief Justice Joyal of the Court of Queen's Bench of Manitoba ordered that as Commissioner, I and Commission Counsel and staff be permitted to make use of the records of information made under the Act pertaining to circumstances surrounding the death of Phoenix Sinclair for the purposes of this Commission. That includes disclosing and producing such records and communicating the information in them to the parties and intervenors with standing at the Commission and to potential witnesses on such terms as I may decide and in accordance with the Rules of this Commission. Those of the Rules that have relevance are these:

Rule 10: The Commissioner will determine on what terms a party or intervenor may participate in the Inquiry, and the nature and extent of such participation.

Rule 17: All parties granted standing under Part II of these Rules shall, as soon as possible after being granted standing, produce to the Commission true copies of all documents in their possession or control having any bearing on the subject-matter of the Inquiry. Upon the request of Commission counsel, parties shall also provide originals of relevant documents in their possession or control for inspection.

Rule 18: Upon the request of Commission counsel, any intervenor granted standing under Part II of these Rules shall, as soon as possible after being granted standing, produce to the Commission true copies of all documents in their possession or control having any bearing on the subject-matter of the Inquiry. Upon the request of Commission Counsel, intervenors shall also provide originals of relevant documents in their possession or control for inspection.

Rule 19: All documents received by the Commission will be treated by the Commission as confidential, unless and until they are made part of the public record or the Commissioner otherwise directs. This does not preclude Commission Counsel from producing a document to a potential witness prior to the witness giving his or her testimony, as part of Commission Counsel's investigation, nor does it preclude Commission Counsel from disclosing such documents to the parties and intervenors to this Inquiry, pursuant to and subject to the terms and limitations described in paragraphs 27 and 28 below.

Rule 26: Unless the Commission orders otherwise, all relevant non-privileged documents in the possession of the Commission shall be disclosed to the parties and intervenors at a time reasonably in advance of the witness interviews and/or public hearings or within a reasonable time of the documents becoming available to the Commission.

Rule 27: Before documents are provided to a party, intervenor or witness by the Commission, he or she must undertake to use the documents only for the purposes of the Inquiry and to keep their contents confidential unless and until those documents have been admitted into evidence during a public phase of the Inquiry, and to abide by such other restrictions on disclosure and dissemination that the Commission considers appropriate.

> **Rule 28**: All documents provided by the Commission to the parties, intervenors and witnesses that have not been admitted into evidence during a public phase of the Inquiry, and all copies made of such documents, are to be returned to the Commission, in the case of witnesses on completion of their testimony, and in the case of parties and intervenors within seven days of the Commissioner issuing his final Report.

All parties, intervenors and presently identified witnesses, as well as their counsel and members of their staff, have signed and delivered to the Commission the undertaking required by Rule 27.

On or about November 4, 2011, in accordance with Rules 17 and 18, and the Order of Joyal C.J.Q.B., the parties and intervenors disclosed, and (for the most part) produced, to the Commission any documents in their possession or control having any bearing on the subject-matter of the Inquiry, which included the CFSA documents. Commission Counsel then reviewed all documents and compiled the Commission Disclosure List, which is comprised of those documents produced by parties, intervenors and witnesses that Commission Counsel have determined are relevant to the subject matter of the Inquiry. The list contains 1,738 documents and includes some that the Commission obtained on its own initiative, and where required and appropriate, in accordance with the Commission's subpoena power pursuant to section 88(1) of *The Manitoba Evidence Act*, C.C.S.M. c.E150. I am advised by Commission Counsel that most of these documents are multi-page, totalling several thousands of pages and filling approximately 50 four-inch binders. It is anticipated that further documents may be received and they will be reviewed, listed and distributed in the same manner as the 1,738 documents presently set out in the Commission Disclosure List. The List will be updated to include additions.

The Commission Disclosure List has been provided to all parties and intervenors. As well, counsel for three individuals who are subjects of certain of the CFSA documents has been made aware of those CFSA documents relating to his clients, which are contained in the Commission Disclosure List.

Mindful of the requirements of Rule 27 and appreciating the responsibility resting with me pursuant to the Order of the Court with respect to the terms of disclosure of the documents released to the Commission, Commission Counsel by written communication dated November 16, 2011 invited written submissions from counsel from all parties, intervenors and counsel for the three individuals "regarding any proposed redactions for categories or classes of information or individuals for the purposes of distributing documents…".

I received written submissions on redaction from counsel for the following parties or individuals:

- The Department;
- Authorities/ANCR;
- MGEU;
- ICFS;
- Ms. Kimberly-Ann Edwards and Mr. Nelson Draper Steve Sinclair; and
- The three witnesses who are subjects of certain CFSA documents.

I have decided that all documents set out in the Commission Disclosure List and any additions thereto ("the documents") should be disclosed and produced, through their counsel, to all parties and intervenors to this Inquiry. Likewise to potential witnesses by or through Commission Counsel (including the three referred to above) but confined in the case of potential witnesses to those of the documents that could bear on or have relevance to their expected evidence. Other than redactions that I am about to direct, I impose no other terms on disclosure and production. I have made that decision with the knowledge that all those to whom disclosure and production will be made have signed and filed with the Commission the undertaking required by Rule 27 which expressly provides that the recipients of the documents will use them only for the purposes of the Inquiry and will keep their contents confidential unless and until they have been admitted into evidence during a public phase of the Inquiry. As indicated above, the initial recipients of the documents are all members of the Bar of the Province of Manitoba who need no reminder from me of their professional responsibilities with respect to their receipt of confidential documents and the significance of the signed undertakings given by them, members of their staff and their clients.

With the strict provisions of *The Child and Family Services Act* pertaining to confidentiality being as I have indicated above and with the Order of the Court of Queen's Bench being known to all recipients of the documents, I have every confidence that the undertaking of confidentiality will be fully respected and I therefore decline to add any other terms of restriction on disclosure and production notwithstanding the requests made in that regard, by counsel for some of the parties as part of their written submissions addressing the matter of redaction. This ruling is without prejudice to a motion presently before me but adjourned *sine die* seeking to

prohibit publishing, broadcasting or communicating by other means, the identity of some witnesses when they appear at the public phase of the Inquiry.

Before addressing issues relating to redaction it is appropriate to emphasize, as Commission Counsel did in her November 16, 2011 communication that in listing the documents she adopted a broad definition of what she thought to be relevant for the purposes of the Inquiry but emphasizing that not all those listed will necessarily be determined to be relevant by the time the hearings commence. To that end, a commitment has been made by her to advise all parties, intervenors and counsel for witnesses (as applicable) on or about March 26, 2012, which witnesses she intends to call and the documents she intends to introduce through those witnesses.

I now turn to the matter of redaction. There seems to be unanimity that the identification of persons providing information to welfare authorities about child protection and safety issues ought to be prohibited. Provisions of *The Child and Family Services Act* which require reporting and provide statutory protection for those who have done so have been brought to my attention. Counsel for the three Authorities and ANCR and counsel for the Department of Family Services and Consumer Affairs/Winnipeg Child and Family Services have both correctly explained the rationale for a redaction order protecting identification of those coming within the "informant" category. The former said in his submission:

> Section 18(1) and 18(1.1) of the CFS Act makes it mandatory for anyone who has information that a child might be in need of protection to report that information to an agency or to a parent or guardian of the child. It is absolutely essential to the protection of children that such people are not discouraged in any way from coming forward with information.

> It is confirmed by section 18.1(2) and 18.3 of the CFS Act, which makes it an offence to disclose the identity of such an informant.
>
> There are strong public policy reasons to preserve the confidentiality of the identities of these individuals. The first is to alleviate any fear of reprisal. Many of the individuals who are being reported face issues such as violence, mental instability or illness. Many have criminal records or are involved in criminal activity or gangs.
>
> Another reason is because more often than not, the people who have information that a child is in need of protection are close friends or even family members of the ones they are reporting. These people are put in a very precarious position of potentially impugning those they are close to. If their identities are revealed, this could jeopardize relationships and family units.
>
> As a result of this reality, it is natural for people with negative information about dangerous people or people close to them to be apprehensive about sharing it. If their confidence in the child welfare system to keep their identities confidential is shaken, this could have a profound chilling effect on future sources of referral.

The latter said:

> As one can expect, the vast majority of informants will be known to the parent at issue. One of the primary objectives behind protecting informants is to prevent the possibility or reprisal, whether imagined or real, by a parent against an informant. Accordingly, for the purposes of this stage, it is our position that no one should know the identity of an informant. If the identity of an informant becomes known to the parties to the Inquiry, there may be a chilling effect that could dissuade other people from volunteering information about children who may be in need of protection.
>
> Even if there is no risk of immediate reprisal *per se*, there will no doubt be a negative impact on the relationship between a parent and the informant if the identity of the informant is known. It is reasonable to expect that a person will feel betrayed if a relative is seen to have "turned in" the parent to CFS and which may strain the relationship between the parent and the informant.

> All those impacts can be addressed through redaction of documents.

I agree and before distribution of the documents the identities of those determined by Commission Counsel as falling within the "informant" category will be redacted.

The next category where it is submitted redaction should occur relates to the identity of children who were 18 years or age or younger at the time a record was created. Where it can be avoided, identity protection should be afforded to those of that young age who were living in or were otherwise involved in a family setting that found its way into Child and Family Services records or other similar documents. One instance where it cannot be avoided is in the case of Phoenix Sinclair herself. Another is the two sons of the male participant in the murder of Phoenix Sinclair. They gave evidence at the criminal proceeding and their identity is known and cannot be protected. I direct that before the distribution of the documents, there be redacted, the names of all other children who Commission Counsel are able to identify as being 18 years of age or younger at the time of the creation of a record containing their names. I am mindful that prior to or during the public phase of the Inquiry it could become apparent that the identity of a child named in one or more of the documents is relevant to the work of the Inquiry and that a lifting of a redaction of that name should be considered. An application for such an order could be made to me on notice at an appropriate time.

I am advised by Commission Counsel that in a number of instances foster parents of children placed in their care are identified in the documents. In instances where such references are made to names that are without relevance to the mandate of this Commission, I

direct those names be redacted. Likewise with respect to the names of other individuals whose identity is not relevant.

If, when the documents are distributed, with the redactions made, there are concerns about matters relating to the results of the redaction process, counsel should be in communication with Commission Counsel. If there are any unresolved issues, they can be submitted to me for a resolution.

DATED at Winnipeg, Manitoba, this 2nd day of December, 2011.

E.N. (Ted) Hughes, O.C., Q.C., LL.D (Hon)
Commissioner

Citation: Manitoba Government and General Employees' Union v. The Honourable Edward Hughes, 2012 MBCA 16

Date: 20120216
Docket: AI 12-30-07730

IN THE COURT OF APPEAL OF MANITOBA

B E T W E E N:

THE MANITOBA GOVERNMENT AND GENERAL EMPLOYEES' UNION	)	***G. H. Smorang, Q.C.*** *and* ***J. B. Harvie*** *for the Applicant*
Applicant	)	
	)	***S. M. Walsh*** *for the Respondent*
- and -	)	
	)	***W. G. McFetridge*** *and* ***H. S. Leonoff, Q.C.*** *for the Attorney General of Manitoba*
THE HONOURABLE EDWARD HUGHES **in his capacity as Commissioner under** ***The Manitoba Evidence Act*** **and appointed pursuant to Order in Council No. 89-2011, dated the 23rd day of March, 2011**	)	*Chambers motion heard:* ***February 9, 2012***
Respondent	)	*Decision pronounced:* ***February 16, 2012***

FREEDMAN J.A.

OVERVIEW

1 The applicant union has standing as a party in an inquiry (the Inquiry) before the respondent, and has questioned the validity of the Inquiry and the jurisdiction of the respondent. It requested the respondent to state a case on the matter to the Court of Appeal, pursuant to provisions in *The Manitoba Evidence Act*, C.C.S.M., c. E150 (the *Act*). The respondent refused to do so. The applicant has now applied, pursuant to the *Act*, for an order requiring the respondent to state a case. For the reasons which follow, I decline to make the order.

BACKGROUND

2 The Lieutenant Governor in Council (the LGIC) enacted Order in Council 89/2011 (the OIC) on March 23, 2011, appointing the respondent as commissioner to inquire into certain matters relating to and arising out of the brief life and tragic death of Phoenix Sinclair. As the motion brief of the Attorney General of Manitoba (the AG) states:

> Phoenix Sinclair was born on April 23, 2000 and died in 2005. Throughout her short life, her family was involved with the child welfare system. Her mother and step-father were convicted of murder in respect of her death. ....

3 Shortly after her death, two reviews of the Manitoba child welfare system were conducted. One was an "external review" and the other was an "internal review." It appears that the latter was conducted pursuant to statutory provisions, the present version of which will be referred to below.

4 The Chief Medical Examiner also conducted an investigation into her death, pursuant to then s. 10(1) of what is now *The Fatality Inquiries Act*, C.C.S.M., c. F52 (the *FIA*).

5 In October 2006, the then Premier of the Province announced that an inquiry would be conducted into the circumstances surrounding the death of Phoenix Sinclair and the handling of her case by the child welfare system.

6 The criminal law process was not completed for several years. Thereafter, the LGIC enacted the OIC. It was enacted pursuant to the powers granted by s. 83 of the *Act* which is contained in Part V, entitled

"Respecting Commissioners Appointed For Public Inquiries." The section reads:

> **Appointment of commission**
> **83(1)** Where the Lieutenant Governor in Council deems it expedient to cause inquiry to be made into and concerning any matter within the jurisdiction of the Legislature and connected with or affecting
>
> . . . . .
>
> (c) the administration of justice within the province;
>
> . . . . .
>
> (f) any matter which, in his opinion, is of sufficient public importance to justify an inquiry;
>
> he may, if the inquiry is not otherwise regulated, appoint one or more commissioners to make the inquiry and to report thereon.
>
> [emphasis added]

7 The full OIC is attached hereto as Schedule A. The respondent was appointed:

> ... [T]o inquire into the circumstances surrounding the death of Phoenix Sinclair and, in particular, to inquire into:
>
> (a) the child welfare services provided or not provided to Phoenix Sinclair and her family under *The Child and Family Services Act* [C.C.S.M., c. C80];
>
> (b) any other circumstances, apart from the delivery of child welfare services, directly related to the death of Phoenix Sinclair; and
>
> (c) why the death of Phoenix Sinclair remained undiscovered for several months.
>
> . . . . .

8 The OIC requires the respondent to make recommendations "to better protect Manitoba children" and to take into account the implemented recommendations in prior reviews. It stipulates that:

> 3. To avoid duplication in the conduct of the inquiry and to ensure recommendations relevant to the current state of child welfare services in Manitoba, the commissioner must consider the findings made in the following reviews and the manner in which their recommendations have been implemented. He may give the reviews any weight, including accepting them as conclusive:
>
> (a) A Special Case Review In Regard To The Death Of Phoenix Sinclair, Andrew J. Koster and Billie Schibler (September, 2006)
>
> (b) Investigation into the Services Provided to Phoenix Victoria Hope Sinclair, Department of Justice, Office of the Chief Medical Examiner (September 18, 2006)
>
> (c) Strengthen The Commitment An External Review of the Child Welfare System, Michael Hardy, Billie Schibler and Irene Hamilton (September 29, 2006)
>
> (d) "Honouring Their Spirit", The Child Death Review: A Report to the Minister of Family Services and Housing, Province of Manitoba, Billie Schibler and James H. Newton (September, 2006)
>
> (e) Strengthening our Youth: Their Journey to Competence and Independence, A Report on Youth Leaving Manitoba's Child Welfare System, Billie Schibler, Children's Advocate, and Alice McEwan-Morris (November, 2006)
>
> (f) Audit of the Child and Family Services Division, Pre-devolution Child in Care Processes and Practices, Carol Bellringer, Auditor General (December, 2006).

9 The OIC requires that all reports made by the respondent "must be in a form appropriate for public release," and refers to certain matters that must

occur "[b]efore public hearings take place."

10 At the end of June 2011, the respondent granted standing to a number of persons or organizations, as parties or as interveners. Party standing was granted to the Department of Family Services and Consumer Affairs of the Government of Manitoba, and to the applicant, among others.

11 The presentation of evidence is scheduled to commence on May 23, 2012.

THE REQUEST TO STATE A CASE TO THE COURT OF APPEAL

12 On January 31, 2012, the applicant wrote to the respondent requesting that he state a case to this court. That request was based on s. 95(1) of the *Act*. The entire s. 95 reads:

> **Stated case for Court of Appeal**
> **95(1)** Where the validity of a commission issued under this Part or the jurisdiction of a commissioner appointed thereby or the validity of any decision, order, direction, or other act, of a commissioner appointed under this Part, is called into question by any person affected, the commissioners, upon the request of that person, shall state a case in writing to The Court of Appeal setting forth the material facts, and the decision of the court thereon is final and binding.
>
> **Order directing stated case**
> **95(2)** Where the commissioners refuse to state a case, any person affected may apply to a judge of the court for an order directing the commissioners to do so.
>
> **Proceedings stayed until case determined**
> **95(3)** Pending the decision of the stated case no further proceedings shall be taken by the commission.

> **Action or injunction not to lie against commissioner**
> **95(4)** No action shall be brought or other proceeding taken with respect to anything done, or sought to be done, by a commissioner or to restrain or interfere with, or otherwise direct or affect the conduct of any commissioner.
>
> [emphasis added]

13 Section 95 refers to two categories of matters that may be questioned by a person affected. One relates to the validity and jurisdiction of the commission itself; the other relates to the validity of decisions, orders, directions or acts of the commissioner. The applicant's request falls into the first category.

14 The applicant submitted to the respondent that under s. 83(1) of the *Act* an inquiry can only be established to inquire into certain matters "if the inquiry is not otherwise regulated." The applicant said that the subject-matter of the Inquiry was regulated by the provisions of *The Child and Family Services Act*, C.C.S.M., c. C80 (the *CFSA*) and the *FIA*, and that those statutes "provide for exactly the same inquiry" as set out in the OIC.

15 The applicant requested that the respondent state a case to the Court of Appeal on the following questions:

> a) Are the matters and obligations particularized in paragraphs 1 and 2 of Order in Council No. 89/2011 dated March 23, 2011 appointing The Honourable Edward (Ted) Hughes as commissioner to inquire into the circumstances surrounding the death of Phoenix Sinclair, an inquiry otherwise regulated by *The Child and Family Services Act*, C.C.S.M. c. C80 and *The Fatality Inquiries Act*, C.C.S.M. c. F52, as defined in section 83(1) of *The Manitoba Evidence Act*, C.C.S.M. c. E150?
>
> b) If the answer to question 1 is yes, in whole or in part, is the commission properly appointed and does the commissioner have

the jurisdiction to inquire into those particularized matters?

16 The respondent replied on February 3, 2012, stating that he had "given your request careful consideration and have decided to refuse to state a case." He also noted that ten months had elapsed since the Inquiry was established, that much work had been done in preparation for the hearings which were to commence on May 23, 2012, and that "[i]t is in the public interest that the timetable circulated to all counsel several months ago be maintained."

THE APPLICATION FOR AN ORDER DIRECTING THE COMMISSIONER TO STATE A CASE

17 Upon the respondent's refusal to state a case, the applicant filed a notice of motion in this court pursuant to s. 95(2) of the *Act*. That motion sought an order directing the respondent to state a case, in substantially the terms earlier proposed to the respondent. The notice of motion named only the respondent as a responding party.

18 The applicant filed a second notice of motion, expanding upon its first, describing that second notice as a "Notice of Constitutional Question." The next day the AG filed a notice of motion seeking intervener status. This was done because the matter that had been called into question under s. 95 fell into the first category described in para. 13 above, and it was considered appropriate that the AG, and not the respondent, defend the validity of the OIC and the jurisdiction of the respondent as commissioner.

19 The applicant objected to the participation of the AG at the hearing, although it stated it would have no objection to such participation at a

hearing on the merits before the full court if a case were to be stated. The applicant's view was that the AG had no status to participate at this stage.

20 In addition to counsel for the applicant, present at the hearing of the s. 95(2) motion were counsel for the AG, counsel for the respondent, counsel for the Attorney General of Canada, and a number of other counsel representing persons with party standing or intervener standing. The only counsel who indicated any position on the motion were counsel for the applicant and for the AG. Counsel for the respondent agreed that it was appropriate that the AG defend the validity of the OIC.

ISSUES

21 The issues to be decided may be summarized as follows:

1. Does the AG have status on the present motion?

2. What is meant by the word "shall" in the following phrase in s. 95(1) of the *Act*: "the commissioners … shall state a case …"?

3. What is the role of a judge of this court under s. 95(2) of the *Act*?

4. Has the applicant met the applicable standard entitling it to an order directing the respondent to state a case to this court?

Status of the AG on this motion

22 The applicant argued that the subject-matter of the Inquiry is regulated by other provincial laws, and the LGIC therefore had no authority to enact the OIC. What is challenged by the applicant is the validity of that executive

act. The AG is the chief law officer of the Crown, and, in my view, it is entirely appropriate that he assume the responsibility in this matter, and at this stage, for defending the validity of the act of the LGIC. He is far better placed than the respondent to present the case for the validity of the OIC. The AG has a real and direct interest in the matter before me.

23 The applicant properly identified the respondent as the party who should be named "respondent" in the present proceedings, since under s. 95(2), any order would be directed to him. But, in my opinion, the applicant could also have joined the AG as a party respondent, since the application for a stated case calls into question an enactment of the executive branch of government.

24 For that reason, I allowed counsel for the AG to make her submission in response to the submission of the applicant. As to status, either the AG should be added as a party respondent to these proceedings, or should be granted intervener status. On adding the AG as a party, see the judgment of this court in *Telecommunication Employees Association of Manitoba Inc. et al. v. Manitoba Telecom Services Inc. et al.*, 2007 MBCA 85, 214 Man.R. (2d) 284. Scott C.J.M. referred (at para. 67) to Rule 5.03(3) of the Queen's Bench Rules:

> **Power of court to add parties**
> **5.03(3)** The court may order that any person who ought to have been joined as a party or whose presence as a party is necessary to enable the court to adjudicate effectively and completely on the issues in the proceedings shall be added as a party.

25 He said (at paras. 68-70):

> The scope of these rules was recently considered by this court in **CTV Television Inc. v. R. et al.**, (2005), 201 Man.R. (2d) 38; 366 W.A.C. 38; 2005 MBCA 120, and **Greyhound Canada Transportation Corp. et al. v. Motor Transport Board (Man.)** (2006), 208 Man.R. (2d) 281; 383 W.A.C. 281; 2006 MBCA 140. The two decisions stand for the proposition that Queen's Bench Rule 5.03 is directed toward those who are an integral part of the lis, and not persons who arguably may have some kind of identifiable interest or common question with the other parties to the proceedings.
>
> In **Save The Eaton's Building Coalition v. Winnipeg (City) et al.** (2001), 160 Man.R. (2d) 236; 262 W.A.C. 236; 2001 MBCA 186, Helper, J.A., for the court, bluntly stated (at para. 44):
>
> > ... my review of the historical development of Rule 5.03(3) and the clear reading of the rule does not allow the court to add a party just because it may be convenient or just to do so. ...
>
> There, as with Fox and Singleton, the proposed parties' legal rights would not be affected by the outcome of the proceedings. Helper, J.A., concluded that Rule 5.03(3) was only available to "those who have a direct interest in the dispute before the court" (at para. 47).

26 I am satisfied that the AG represents the entity which has the most direct interest in the present matter. In the words of the Rule, his "presence as a party is necessary to enable the court to adjudicate effectively and completely on the issues."

27 The AG's position in correspondence with the applicant was that, since the OIC is, under *The Interpretation Act*, C.C.S.M., c. I80, a "regulation," he was entitled to be a party by virtue of s. 7(6) of *The Constitutional Questions Act*, C.C.S.M., c. C180. In light of my decision on this particular issue, I need not come to any conclusion on that position.

28 Had the motion for intervention not been filed (as counsel said, out of an abundance of caution), I would have ordered that the AG be added as a

party. However, since the AG has moved to be granted intervener status, it is appropriate that I grant that motion. While the applicant suggested that the AG's motion did not accord with the applicable Court of Appeal Rules on intervention (see Rule 46.1), I am satisfied that the motion does, in substance, satisfy the requirements of the rules.

29 Accordingly, the AG has status as intervener in these proceedings.

The meaning of "shall" in "the commissioners ... shall state a case ..."

30 The position of the applicant is that when the request was made to the respondent to state a case, the respondent had no option but to do so. It argued that:

> The word "shall" when used in legislation imposes an obligation, creates a prohibition or requirement and is always imperative. The person who "shall" do something has no discretion to decide whether or not to do it. When the word "shall" is used in legislation, the usual question for the Court to determine is not whether the action or prohibition on action is imperative, but what the consequences are for non-compliance.

31 The applicant relied on several authorities, including *The Interpretation Act* (at s. 15: "In the English version of an Act or regulation, "shall" and "must" are imperative and "may" is permissive and empowering."), and the decisions of this court in *J & R Property Management et al. v. Kenwell*, 2011 MBCA 5, 262 Man.R. (2d) 164, and *B.W. v. Child and Family Services of Winnipeg*, 2009 MBCA 95, 245 Man.R. (2d) 186.

32 The applicant described the respondent as having a "mandatory statutory obligation" to state a case, upon request by any person affected.

33 The AG responded that "the fundamental rule of statutory interpretation is that statutes should be interpreted ... in a manner that makes sense." It cited the unanimous decision of the Supreme Court of Canada in *Re Manitoba Language Rights*, [1985] 1 S. C. R. 721 (at para. 27):

> As used in its normal grammatical sense, the word "shall" is presumptively imperative. .... Parliament, when it used the word "shall" in s. 23 of the *Manitoba Act, 1870* and s. 133 of the *Constitution Act, 1867*, intended that those sections be construed as mandatory or imperative, in the sense that they must be obeyed, unless such an interpretation of the word "shall" would be utterly inconsistent with the context in which it has been used and would render the sections irrational or meaningless. ....

34 The AG said that if s. 95 is construed as requiring the respondent to state a case to the Court of Appeal every time a person affected requests that he do so, s. 95(2) would be meaningless. That section, it said, contemplates a refusal to state a case, so "shall," while imperative, is not mandatory.

35 In my opinion, it is an untenable interpretation of the *Act* that a case must be stated (with the consequential suspension of the entire work of a commission; see s. 95(3)), every time a party affected so requests, without regard to all relevant circumstances, including the justifiability of the request. Such an interpretation would be inconsistent with the object of the statutory provisions and the intention of the Legislature in enacting them, and could impose unjustified consequences seriously prejudicial to the work of a commission. The better view is that where used in s. 95(1), "shall" is directory and not mandatory.

36 The "golden rule" of statutory interpretation is that referred to as "Driedger's Modern Principle" (see Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham: LexisNexis Canada Inc., 2008) at 1 *et seq.*), namely, that "the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."

37 As has been said in numerous decisions, while "shall" imposes an obligation, the real question is to determine the consequences of failure to comply. In *B.W.*, Hamilton J.A. (at paras. 36-42) articulated a thorough explanation of the mandatory/directory question, which I will not repeat here. It was neatly encapsulated in her concurrent decision in *J.W.F. v. Child and Family Services of Western Manitoba*, 2009 MBCA 96, 245 Man.R. (2d) 176 (at para. 39):

> In **B.W.**, the court explains the difference between directory and mandatory statutory provisions and comments on the analysis that is required when interpreting the intent of the legislature in this regard. It is sufficient here to state that the crucial factors for this analysis are the object and purpose of the legislation and the effect of ruling the provision mandatory or directory. See **B.W.**, at para. 42. If mandatory, the non-compliance cannot be cured or disregarded, no matter the circumstances. If directory, it is within the discretion of the court whether the non-compliance should be disregarded or cured. See **B.W.**, at para. 46.

38 See also the comments of Rothstein J. in *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at paras. 73-75.

39 In *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344, McLachlin J., as she then was, wrote (at para. 42):

> .... This Court has since held that the object of the statute, and the effect of ruling one way or the other, are the most important considerations in determining whether a directive is mandatory or directory ....

40 In *B.W.*, Hamilton J.A. said (at para. 42):

> While the factors have been described in different ways in the case law, they consistently focus on the two considerations explained in **Blueberry**; the object and purpose of the legislation and the effect of ruling the provision mandatory or directory. The latter really focusses on the effect of automatic nullification if the provision is mandatory.

41 If the approach proposed by the applicant was correct, the result would be that the work of a commission could be brought to a halt, at any time, and from time to time, by any party affected who called into question any matter referred to in s. 95(1), even if there was little or no merit in that party's request for a stated case. It is not difficult to imagine that parties who are apprehensive about what a commissioner might report could seek to obstruct the proceedings by this method, perhaps on a repeated basis, and perhaps with little justification for the requests. The commissioner would have no choice under the *Act* but to state the case as requested and suspend all proceedings. In my view, that cannot have been the intention of the Legislature when it used the word "shall" in s. 95(1).

42 The object and purpose of s. 95(1) is to provide a mechanism whereby persons affected by a commission may question the commission's validity

and jurisdiction, or decisions, orders, directions or acts of the commissioner. In responding, the commissioner is entitled to evaluate the request for the stated case and to exercise judgment on its justifiability. To deny the commissioner that exercise of judgment would render him or her a mere automaton. That surely cannot be what was intended. Some evaluation of the justifiability of the request for a stated case is necessary.

43 The applicant requested a stated case on the basis that the subject-matter of the Inquiry was regulated by certain statutory provisions, which it identified. It stated in its request that it was not setting out its entire position. The respondent replied that he had given the matter careful consideration. Obviously he had evaluated the request for the stated case, and did not agree that the subject-matter of the Inquiry was otherwise regulated. In my view, that judgment was within his authority to exercise.

44 Applying the principles consistently stated in the jurisprudence, and considering the object of the statutory provisions and "the effect of ruling one way or the other" (*Blueberry* at para. 42), I am satisfied that the word "shall" in s. 95(1) should not be construed as mandatory, but as directory. Thus, the commissioner may refuse to state a case, in which event the person affected has the recourse provided by s. 95(2). That recourse has been sought in this case.

The Role of the Judge under s. 95(2)

45 The applicant argued that this section does not create an obligation on the part of an affected person "to obtain leave for … a stated case." It said that, "like any appellant where leave is not required, [it had] the right to have the stated case determined by a full panel" of the court. It relies on the

following dicta in the chambers decision of Steel J.A. in *Anderson et al. v. Manitoba et al.*, 2009 MBCA 129, 251 Man.R. (2d) 82 (at para. 20):

> The applicants have argued that the process of a stated case is so uncommon that there are no specific applicable rules, but this is not really correct. While the **Court of Appeal Act** and **Rules** do not specifically address the subject, a stated case is perhaps better described as "an appeal by way of stated case."

46 The applicant argued that I should peremptorily make the order sought, especially since the respondent gave no reasons for his refusal.

47 The AG responded that the role of the judge under s. 95(2) "cannot be to simply 'rubber stamp' the request of the affected party" and that the judge acts as a "gatekeeper." While leave is not required, the AG argues that the judge's role is like that of a chambers judge in a case where leave is required, determining whether it should be granted. That judge would typically consider whether the legal issue raised was important, and whether the applicant had made out a *prima facie* case.

48 In my view, the AG is correct. A stated case may be a form of appeal, but this particular stated case would come into being entirely through the operation of s. 95 of the *Act*. The *Act* must be read purposively. Just as the commissioner is entitled to evaluate the request for a stated case, for the reasons explained above, including the effect of s. 95(3), so, too, is the judge entitled to conduct such an evaluation. It would be anomalous, and incorrect, to find that the judge faced with a motion under s. 95(2) has less discretion and room for the exercise of judgment than a commissioner has when faced with a request under s. 95(1).

49 If the applicant's position was correct, one would expect that the *Act* would simply entitle a party whose request is refused by a commissioner to submit its stated case directly to a panel of the Court of Appeal for determination. There would be no need for any intermediate procedure before a single judge. Instead, the *Act* does require the present step, requiring the affected person to "apply" to a judge, which supports the AG's argument that what is to be exercised now is a "gatekeeper" function.

50 The only substantive judicial consideration of s. 95, so far as I am aware, is the decision of this court in *Johnson et al. v. Manitoba Police Commission et al.* (1978), 91 D.L.R. (3d) 535. An inquiry was established appointing the Manitoba Police Commission to inquire into certain matters. That inquiry was governed by Part V of the *Act* (in its then form) and by what was then s. 97, now s. 95. The plaintiffs objected on jurisdictional grounds to the Commission doing its work. The plaintiffs had moved in the Court of Queen's Bench for a stay of all proceedings until their claim, for a declaration that the Commission lacked jurisdiction, could be heard at a trial. The matter came to this court.

51 For a unanimous court Matas J.A. said, referring to a decision by Guy J.A. in chambers (at p. 538):

> In his judgment the learned Chambers Judge held that the proper procedure for the plaintiffs to have followed was that contemplated under s. 97 of the *Evidence Act*. ....

52 He then said (at p. 540):

> .... The appellants have not substantiated their allegations that a Court action must be substituted for the procedure which the Legislature has set out in s. 97.
>
> In my view, if the plaintiffs wish to challenge the jurisdiction of the Commission they may do so by asking the Commissioners to state a case to the Court of Appeal. Provision is made in s. 97(2) for application to a Judge of this Court for an order, if he is so minded, directing the Commissioners to state a case where there has been a refusal by them to do so. Pending a decision on the stated case, proceedings before the Commission are stayed.
>
> [emphasis added]

53 Manifestly, the conclusion that a judge of this court, on a motion under what is now s. 95(2), may, "if he is so minded," direct that a case be stated, is very strong support for the view I have expressed on this aspect of the matter, that the judge exercises a discretion and engages in a judicial evaluation of the applicant's position.

54 The law relating to leave applications, insofar as it explains the "gatekeeper" function of a chambers judge, is applicable by analogy. In those instances, an applicant must show that the issue it has raised is of some importance, and that the substantive argument it would advance to a full panel of the court has a reasonable chance of success. See, e.g., *Pelchat v. Manitoba Public Insurance Corp. et al.*, 2006 MBCA 90 (at para. 2):

> ....
>
> 2. The case must be one that warrants the attention of the court. ....
>
> 3. There must be an arguable case of substance; i.e., one with a reasonable prospect of success ....

55 Similarly applicable by analogy is the law relating to extensions of time, where, among other matters, an applicant typically must show that it has "an arguable case." See, e.g., *Clancy v. Harvey*, 2006 MBCA 123, 208 Man.R. (2d) 198. In that case, the applicant had (at para. 6):

> ... [D]ifficulty ... with the third element of the test for obtaining an extension of time (see, e.g., **Bohemier et al. v. CIBC Mortgages Inc.** (2001), 160 Man.R. (2d) 39; 262 W.A.C. 39; 2001 MBCA 161) and that is the requirement that he must show that he has an arguable ground of appeal. This element has been explained in a number of decisions in which it is made clear that the "arguable ground" factor means that the appeal must have some real merit. See **Branum v. Branum** (1998), 129 Man.R. (2d) 142; 180 W.A.C. 142 (C.A.), where Twaddle, J.A., said that an applicant must show "sufficient merit to the appeal to warrant the extension being granted" (at para. 9), and "[t]he test of merit does not require an applicant to show that the appeal will probably succeed. All the applicant need show ... is that the point or points to be argued have a reasonable chance of success" (at para. 11).

56 Thus, in my opinion, the role of the judge on an application such as this is to determine two matters. First, the judge determines if the applicant for the stated case has shown that the matter proposed to be determined is of some importance, warranting the attention of the court. If the work of a commission is to be suspended, that should only occur if the issue raised meets that standard. Second, the judge determines if the applicant has shown that the case it proposes be heard by the full court is an arguable case that has a reasonable prospect of success. Weak cases with little chance of success should not be sent for a hearing with the consequential suspension of the proceedings of a commission.

Has the applicant shown that it is entitled to the order requiring the respondent to state a case?

57 As indicated at the outset, I have concluded that the applicant has not met the applicable standard. Had I decided otherwise, I would be circumspect in this part of my reasons, since a decision on the merits of the stated case would be made in due course by a full panel of the court. In light of my decision on the application, I am less constrained.

58 In my opinion, the issue raised by the applicant is of sufficient importance to warrant the attention of the court. Section 83 has received, to my knowledge, no judicial consideration, and any analysis by the court of the concept of "otherwise regulated" would likely be of value in future cases. In my view, the first part of the test is met by the applicant.

59 The applicant's difficulty arises on consideration of whether its proposed stated case is an arguable case that has a reasonable chance of success. The applicant said that the subject-matter of the Inquiry is "otherwise regulated" within the meaning of s. 83. If that were so, the OIC should not have been enacted. The applicant said that certain provisions of the *CFSA* regulate that subject-matter:

> **Review after death of child**
> **8.2.3(1)** After the death of child who was in the care of, or received services from, an agency under this Act within one year before the death, or whose parent or guardian received services from an agency under this Act within one year before the death, the children's advocate
>
> (a) must review the standards and quality of care and services provided under this Act to the child or the child's parent or

guardian and any circumstances surrounding the death that relate to the standards or quality of the care and services;

(b) may review the standards and quality of any other publicly funded social services that were provided to the child or, in the opinion of the children's advocate, should have been provided;

(c) may review the standards and quality of any publicly funded mental health or addiction treatment services that were provided to the child or, in the opinion of the children's advocate, should have been provided; and

(d) may recommend changes to the standards, policies or practices relating to the services mentioned in clauses (a) to (c) if, in the children's advocate's opinion, those changes are designed to enhance the safety and well-being of children and reduce the likelihood of a death occurring in similar circumstances.

Purpose of review
8.2.3(2) The purpose of the review is to identify ways in which the programs and services under review may be improved to enhance the safety and well-being of children and prevent deaths in similar circumstances.

60 The *CFSA* also provides:

Report
8.2.3(3) Upon completing the review, the children's advocate must prepare a written report of his or her findings and recommendations and provide a copy of it

(a) to the minister;

(b) to the Ombudsman; and

(c) to the chief medical examiner under *The Fatality Inquiries Act*.

Children's advocate not to determine culpability
8.2.3(4) The report must not express an opinion on, or make a

determination with respect to, culpability in such a manner that a person is or could be identified as a culpable party in relation to the death of the child.

Report is confidential
8.2.3(5) The report is confidential and must not be disclosed except as required by subsection (3) or as permitted by subsection (6) or Part VI.

Summary of recommendations in annual report
8.2.3(6) The children's advocate's annual report under clause 8.2(1)(d) for a year may include a summary of the recommendations included in the reports made that year under this section.

61 The applicant said that the following provisions of the *FIA* also regulate the subject-matter of the Inquiry:

Inquiry as to deaths
7(5) Where a medical examiner or investigator learns of a death to which clause (9)(a), (b), (c) or (d) [death of a child] applies and the body is in the province, the medical examiner or investigator shall immediately take charge of the body, inform the police of the death and make prompt inquiry with respect to

(a) the cause of death;

(b) the manner of death;

(c) the identity and age of the deceased;

(d) the date, time and place of death;

(e) the circumstances under which the death occurred; and

(f) subject to subsection 9(2), whether the death warrants an investigation;

and shall submit an inquiry report on the above matters to the chief medical examiner and where the medical examiner or investigator decides that the death warrants an investigation, the medical

examiner or investigator shall provide the reasons for the decision.

Child's death to be reported to children's advocate
10(1) Upon learning that a child has died in Manitoba, the chief medical examiner must notify the children's advocate under *The Child and Family Services Act* of that death.

Reports to be given to children's advocate
10(2) If the children's advocate has jurisdiction to conduct a review under section 8.2.3 of *The Child and Family Services Act* in relation to the death of a child in Manitoba, the chief medical examiner must provide to the children's advocate, upon request,

(a) a copy of the medical examiner's report on the manner and cause of death; and

(b) a copy of the final autopsy report, if one has been ordered by the medical examiner and the children's advocate requires it for the review.

Reports are confidential
10(3) The information provided to the children's advocate under subsection (2) must not be used except for the purpose of a review and report under section 8.2.3 of *The Child and Family Services Act*, and must not be disclosed in that report except as necessary to support the findings and recommendations made in that report.

CME review of investigation report
19(1) Subject to subsection (3), upon receipt of an investigation report, the chief medical examiner shall review the report and determine whether an inquest ought to be held.

CME to direct holding of an inquest
19(2) Where the chief medical examiner determines under subsection (1) that an inquest ought to be held, the chief medical examiner shall direct a provincial judge to hold an inquest.

Ministerial direction for inquest
25 The minister may direct a provincial judge to conduct an inquest with respect to a death to which this Act applies.

Provincial judge to hold inquest
26(1) Where a direction is given by the chief medical examiner

under section 19 or by the minister under section 25, a provincial judge shall conduct an inquest.

Duties of provincial judge at inquest
33(1) After completion of an inquest, the presiding provincial judge shall

(a) make and send a written report of the inquest to the minister setting forth when, where and by what means the deceased person died, the cause of the death, the name of the deceased person, if known, and the material circumstances of the death;

(b) upon the request of the minister, send to the minister the notes or transcript of the evidence taken at the inquest; and

(c) send a copy of the report to the medical examiner who examined the body of the deceased person;

and may recommend changes in the programs, policies or practices of the government and the relevant public agencies or institutions or in the laws of the province where the presiding provincial judge is of the opinion that such changes would serve to reduce the likelihood of deaths in circumstances similar to those that resulted in the death that is the subject of the inquest.

62 The applicant argued that all other common law provinces have statutes described as, for example, "The Public Inquiries Act," dedicated to commissions which hold public inquiries, whereas Manitoba does not have any such statute. It said that the words "public inquiry" do not appear in the *Act* nor does the *Act* establish any process for public inquiries. So "inquiry" should be given its plain and ordinary meaning, namely, "a formal or judicial investigation into a matter of public concern" (Canadian Oxford Dictionary, 2d ed.).

63 The applicant argued that the two statutes it relied on already provide for a "formal or judicial investigation" into the various matters outlined in

the OIC, albeit (apart from inquests) a non-public investigation, and so the subject-matter of the OIC is "otherwise regulated" by those statutes.

64 Alternatively, the applicant said that if s. 83 of the *Act* permits a public inquiry such as is contemplated, then the provisions of the *FIA* dealing with inquests already provide for such a public process. It argued that the respondent's mandate "is no broader or more comprehensive than the mandate of a judge presiding at an inquest" under the *FIA*.

65 The AG said that there was no Manitoba legislation that regulated the broad range of issues required to be dealt with by the respondent. He did identify two instances where Manitoba has "otherwise regulated" matters which might become the subject of a public inquiry. These are *The Trade Practices Inquiry Act*, C.C.S.M., c. T110 and *The Gaming Control Act*, C.C.S.M., c. G5.

66 With respect, I think the applicant's argument misconceives the nature and purpose of the Inquiry and the underlying OIC.

67 It will be useful to recall the scope of the Inquiry created by the OIC and the mandate given to the respondent. The context of the Inquiry is the circumstances surrounding the death of Phoenix Sinclair. The respondent is required to inquire into those circumstances, and is required in particular to inquire into child welfare services provided or not provided to Phoenix Sinclair and her family, into any other circumstance related to her death, and into why her death remained undiscovered for several months.

68 Moreover, he is also required to report his findings, to make recommendations to better protect Manitoba children, to ensure that his

recommendations are relevant to the current state of Manitoba child welfare services, to consider the findings in the six reviews described in para. 3 of the OIC, and to consider the manner in which the recommendations in those reviews have been implemented.

69 He is further required to deliver a final report (and may deliver interim reports) and all reports are required to be in a form appropriate for public release. He may conduct interviews before public hearings are held.

70 The Inquiry hearings will be held in public (subject to the respondent's ruling otherwise in any particular instance). The OIC, enacted pursuant to Part V of the *Act*, headed, "Respecting Commissioners Appointed For Public Inquiries," contemplates public hearings. In his statement announcing the plans to establish a commission of inquiry, the Premier stated, among other matters: "The public has a right to know how a child could go missing for nine months without it being noticed …." The respondent's report will be for public consumption.

71 In this case the AG "is strongly of the opinion that it is in the public interest to hold this inquiry." The LGIC has decided that the Inquiry's process and result should be subject to public scrutiny and exposure, although that is not a necessary aspect of an inquiry that might be constituted pursuant to s. 83. I am satisfied that the LGIC may establish a public inquiry under s. 83. The scale and scope of such an inquiry is not confined to a formal or judicial investigation, and is limited only by the provisions of s. 83.

72 The AG argued forcefully, and I think correctly, that this Inquiry under s. 83 of the *Act* is intended to be of a different nature and scope than

any review, investigation or inquest (or any combination thereof) that has been or that might be conducted pursuant to any other statute.

73 The OIC imposes obligations on the respondent, as commissioner, going beyond those imposed on any person who might conduct any other review, investigation or inquest under the two statutes in question. The OIC is, as counsel said, "tailor-made" to suit the particular combination of factors that were felt to require public investigation and report. Those factors include some that must be dealt with at an inquest or an investigation under the *FIA*, some that must be dealt with in a review under the *CFSA* and some that are not required to be dealt with under either of those statutes.

74 Some examples will suffice to illustrate. The applicant relied on s. 8.2.3 of the *CFSA*. The only task that the Children's Advocate must perform, in a review under s. 8.2.3(1) of the *CFSA*, is under clause (a), to review standards and quality of care and services and circumstances surrounding the death relating thereto. The purpose of such review (ss. (2)) is to identify ways in which programs and services may be improved. Importantly, the report resulting from the review is to be confidential (ss. (5)) and must not be disclosed. The Children's Advocate has no power to issue a subpoena, unlike the respondent. Manifestly, such a review would not encompass many of the matters that the LGIC has determined must be examined and, in any event, such a review would not meet the need, identified by the executive branch of government, of satisfying the public's right to know.

75 An inquiry by a medical examiner under the *FIA* (s. 7(5)) must identify the cause and manner of death, other details related to the death, and

the circumstances under which the death occurred. A medical examiner has no power to issue a subpoena. A report is to be made to the Chief Medical Examiner (the CME). The CME must provide certain of the information to the Children's Advocate, in a case such as that of Phoenix Sinclair. That information must generally be kept confidential by the Children's Advocate. Any other review or investigation (apart from an inquest) that might be conducted under the *FIA* is private and limited in scope. Clearly, these provisions fall short of ensuring that there will be an inquiry into and report (let alone a public report) upon many of the matters which are the subject-matter of the OIC.

76 That brings me to the provisions of the *FIA* regarding inquests. The CME or the government minister responsible for the *FIA* may, in certain cases (such as Phoenix Sinclair's), direct that an inquest be held into a death. The inquest is conducted by a provincial judge, who has the power to issue subpoenas. An inquest is generally open to the public.

77 The mandate of the inquest judge (s. 33(1)(a)) is to report to the minister:

> ....
>
> ... [S]etting forth when, where and by what means the deceased person died, the cause of the death, the name of the deceased person, if known, and the material circumstances of the death;
> ....

78 There are no other matters on which the inquest judge must report. The applicant argued that inquest judges often submit reports which include wide-ranging recommendations (as permitted by s. 33(1)). The AG correctly observes that the only matters that are required and thus certain to

be reported upon are those stipulated in s. 33(1)(a) as set out above. An inquest judge may make recommendations which "would serve to reduce the likelihood of deaths in circumstances similar" (s. 33(1)(c)) to Phoenix Sinclair's, but there is no means under the *FIA* for the LGIC to ensure that that will be done. The terms of reference of an inquest are prescribed in and proscribed by the *FIA*. They cannot be supplemented by the LGIC.

79 It is noteworthy that in this particular case, some of the s. 33(1)(a) matters are already publicly known, as a result of the criminal trial and appeal.

80 An inquest is not a commission of inquiry. As was said recently in *Canadian Union of Public Employees (Toronto Civic Employees Union), Local 416 v. Lauwers*, 2011 ONSC 1317 (QL) (at para. 78):

> The Coroner appears to have determined to undertake a broad ranging inquiry into paramedics' right to strike. However, as noted in BADC v. Huxter, [(1992), 11 O.R. (3d) (Div. Ct.)], an inquest is not to be a Royal Commission or public inquiry. "A coroner's inquest is not the occasion for a roving investigation into general public concerns" ....

81 The LGIC has made it clear that it requires to know certain matters that would not have to be reported on by an inquest judge, such as the child welfare services provided (or not) and why the death remained undiscovered for several months. There could be no assurance that all the concerns and questions identified by the LGIC and set out in the OIC would be addressed by an inquest judge.

82 In comparison, the LGIC can, subject to s. 83, establish an inquiry with such jurisdiction as it thinks appropriate to the need. See Ed Ratushny,

The Conduct of Public Inquiries: Law, Policy and Practice (Toronto: Irwin Law Inc., 2009) (at p. 24):

> .... [A] commission of inquiry derives its jurisdiction not only directly from its statute but also, in a supplemental way, from its terms of reference. The *Inquiries Act* "delegates" to the government the power to define a commission's jurisdiction through an order in council. This enables the government to give each commission a different mandate tailored to the specific problem to be addressed. This elaboration on the powers granted by the Act has legal effect in specifying the jurisdiction of the commission.

83 In *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97, Cory J. commented on the unique nature of commissions of inquiry (at para. 60):

> .... As *ad hoc* bodies, commissions of inquiry are free of many of the institutional impediments which at times constrain the operation of the various branches of government. They are created as needed, although it is an unfortunate reality that their establishment is often prompted by tragedies ....

84 He quoted the observations of the commissioner into infant deaths in Toronto (at para. 63):

> .... They are not just inquiries; they are *public* inquiries .... I realized that there was another purpose to the inquiry just as important as one man's solution to the mystery and that was to inform the public. Merely presenting the evidence in public, evidence which had hitherto been given only in private, served that purpose. The public has a special interest, a right to know and a right to form its opinion as it goes along. [Emphasis in original.]

85 I am satisfied that there are fundamental differences between an inquest that might be conducted pursuant to the *FIA* and the Inquiry created

by the OIC. The most significant difference is in what must be answered, which in the case of an inquest is narrow, as it is dictated by the provisions of the *FIA*, whereas in the case of the Inquiry it is broad, as it is dictated by the policy decision of the LGIC as expressed in the uniquely created provisions of the OIC.

86 The only authority provided to me on what might be meant by "otherwise regulated" is the decision of the Ontario Court of Appeal in *Re Canadian Environmental Law Association et al. v. Pitura* (1981), 32 O.R. (2d) 605. Both parties cited *Pitura*, a case where the Ontario *Public Inquiries Act*, S.O. 2009 ch. 33 schedule 6, permitted the establishment of an inquiry if "the inquiry is not regulated by any special law." The court said (at pp. 606-7):

> There are no reported decisions on the meaning of "regulated by any special law"... but the purpose of the provision ... is reasonably apparent. Broadly speaking, an inquiry as contemplated by the *Public Inquiries Act, 1971* is a legal process the function of which is to secure information and, sometimes, recommendations. ....
>
> [emphasis added]

87 The underlined portion above, in my view, could properly be applied to an "inquiry" under s. 83 of the *Act*. A "legal process" is a more appropriate descriptor of such an inquiry, with its potentially very broad mandate, than the dictionary's "formal or legal investigation."

88 The court continued (at p. 607):

> .... If the subject-matter and scope of an inquiry under the *Public Inquiries Act, 1971* is one with respect to which some other legislation makes special provision then resort to the *Public Inquiries Act, 1971* is not possible. The reason for this is that the

> provisions in the special legislation dealing with such matters as who is to conduct such inquiry, his powers, and procedures and safeguards will generally be more appropriate to the matter at hand than those in the general statute, the *Public Inquiries Act, 1971*. ... [I]t would subvert the statutory scheme established by the "special law" to permit the creation of a commission under the *Public Inquiries Act, 1971* to occupy the field so as to pre-empt the inquiry provided for in the special law. ....
>
> [emphasis added]

89 As has been explained above, in my view, there are no provisions, whether procedural or substantive, in the *CFSA* or the *FIA* that are "more appropriate to the matter at hand" than the provisions in the OIC and the related provisions in the *Act*.

90 The court rejected the argument that the inquiry was regulated by "special law," saying (at p. 610):

> The present inquiry is a plain inquiry to obtain information and recommendations, and nothing more. The hearing provided for under the *Environmental Assessment Act, 1975* ... is clearly part of an adjudicative process, a process leading to a decision affecting rights or interests. In our view, s. 2 of the *Public Inquiries Act, 1971* should not be interpreted as preventing the Lieutenant-Governor in Council from causing an inquiry to be made into matters of public concern where the inquiry does not duplicate, or substantially duplicate, the legal process relating to the inquiry regulated by the alleged special law so that the purpose of the special law would be frustrated. ....
>
> [emphasis added]

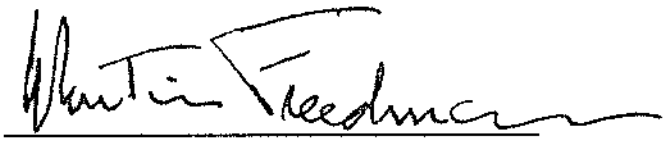
91 The Inquiry would not substantially duplicate the legal process of an inquest. Much of what an inquest judge would be mandated to ascertain has already been ascertained. Much, if not most, of what the respondent is

mandated to ascertain has not yet been ascertained, and could not be imposed on an inquest judge.

92 In summary, the subject-matter of the Inquiry is not "otherwise regulated" by either the *CFSA* or the *FIA*.

93 Thus, I conclude that the stated case that the applicant requests be decided by the Court of Appeal does not raise an arguable case and has no reasonable prospect of success.

94 I would dismiss the motion, with costs to the AG.



SCHEDULE A

MANITOBA

ORDER IN COUNCIL

DATE: **March 23, 2011**

ORDER IN COUNCIL NO.: **89/2011**

RECOMMENDED BY: **Minister of Justice**

ORDER

1. The Honourable Edward (Ted) N. Hughes, OC, QC, LL.D (Hon) is appointed as commissioner to inquire into the circumstances surrounding the death of Phoenix Sinclair and, in particular, to inquire into:

   (a) the child welfare services provided or not provided to Phoenix Sinclair and her family under *The Child and Family Services Act*;

   (b) any other circumstances, apart from the delivery of child welfare services, directly related to the death of Phoenix Sinclair; and

   (c) why the death of Phoenix Sinclair remained undiscovered for several months.

2. The commissioner must report his findings on these matters and make such recommendations as he considers appropriate to better protect Manitoba children, having regard to the recommendations, as subsequently implemented, made in the reports done after the death of Phoenix Sinclair, set out in paragraph 3.

3. To avoid duplication in the conduct of the inquiry and to ensure recommendations relevant to the current state of child welfare services in Manitoba, the commissioner must consider the findings made in the following reviews and the

manner in which their recommendations have been implemented. He may give the reviews any weight, including accepting them as conclusive:

(a) A Special Case Review In Regard To The Death Of Phoenix Sinclair, Andrew J. Koster and Billie Schibler (September, 2006)

(b) Investigation into the Services Provided to Phoenix Victoria Hope Sinclair, Department of Justice, Office of the Chief Medical Examiner (September 18, 2006)

(c) Strengthen The Commitment An External Review of the Child Welfare System, Michael Hardy, Billie Schibler and Irene Hamilton (September 29, 2006)

(d) "Honouring Their Spirit", The Child Death Review: A Report to the Minister of Family Services and Housing, Province of Manitoba, Billie Schibler and James H. Newton (September, 2006)

(e) Strengthening our Youth: Their Journey to Competence and Independence, A Report on Youth Leaving Manitoba's Child Welfare System, Billie Schibler, Children's Advocate, and Alice McEwan-Morris (November, 2006)

(f) Audit of the Child and Family Services Division, Pre-devolution Child in Care Processes and Practices, Carol Bellringer, Auditor General (December, 2006)

4. The commissioner may also consider any court transcripts and similar documents, which are not subject to a legal claim of privilege, and may give them any weight, including accepting them as conclusive.

5. The commissioner must perform his duties without expressing any conclusion or recommendation about civil or criminal liability of any person.

6. The commissioner must complete his inquiry and deliver a final report containing his findings, conclusions and recommendations to the Minister of Justice and Attorney

General by March 30, 2012. He may also give the Minister of Justice and Attorney General any interim reports that he considers appropriate to address urgent matters. All reports must be in a form appropriate for public release, but release is subject to *The Freedom of Information and Protection of Privacy Act* and other relevant laws.

7. Nothing in paragraph 1 limits the commissioner's right to request the Lieutenant Governor in Council to expand the terms of reference to cover any matter that he considers necessary as a result of information that comes to his attention during the course of the inquiry.

8. Government departments and agencies and other bodies established under the authority of the Manitoba Legislature must assist the commissioner to the fullest extent permitted by law.

9. Before public hearings take place, the commissioner may interview any person connected with the matters referred to in paragraph 1. On the commissioner's behalf, interviews may be conducted by counsel for the commissioner, either alone or in the commissioner's presence. If conducted alone, counsel must give the commissioner a transcript or a report of each interview. The commissioner may, in his discretion, rely on the evidence gathered in this manner.

10. The Minister of Finance may pay the following amounts from the Consolidated Fund, at the request of the Minister of Justice and Attorney General:

    (a) travelling and other incidental expenses that the commissioner incurs conducting his inquiry;

    (b) fees and salaries of any advisors and assistants employed or retained for the purpose of the inquiry;

    (c) any other operational expenditures required to support the inquiry.

11. This Order is effective immediately.

. . . . .

IN THE MATTER OF: Commission of Inquiry into the Circumstances Surrounding the Death of Phoenix Sinclair

MOTION BROUGHT BY: The General Child and Family Services Authority, First Nations of Northern Manitoba Child and Family Services Authority, First Nations of Southern Manitoba Child and Family Services Authority, and Child and Family All Nation Coordinated Response Network,

(the "Applicants")

DECISION

1. The Applicants request that I make an order:

    1. Compelling Commission Counsel to provide the Transcripts of witness interviews (the "Transcripts") conducted by the Commission to the parties and intervenors to this Inquiry upon request;

    2. In the alternative, allowing witnesses who consent to the release of their Transcripts to provide them to the parties and intervenors to this Inquiry upon request;

    3. That the parties and intervenors who request and receive the Transcripts undertake to use the Transcripts only for the purposes of this Inquiry and to return the Transcripts to the Commission within seven days of the Commissioner releasing his final Report;

    4. Such other orders as the Commissioner deems appropriate.

2. My initial interest was to learn the history and origin of the Transcripts of which the Applicants seek possession. In the brief filed in support, the following references appear:

    ...

    3. Commission Counsel has interviewed an unknown number of individuals. Exactly who was interviewed and what was said in the interviews have been audio recorded and it is also understood that Transcripts have been prepared for the great majority of these interviews.

    ...

> 5. Commission Counsel has indicated that she will be providing "Summaries" of the witness interviews for disclosure to the parties and intervenors. However, Commission Counsel has refused to disclose or allow access to the witness interview Transcripts (the "Transcripts"). Furthermore, these Summaries will only be provided for individuals whom Commission Counsel determines she will call as witnesses at the public hearings of the Inquiry.
>
> ...

3. Early in counsel's presentation, I sought his concurrence to have Commission Counsel place on the record the history and origin of the Transcripts that he was seeking. Her response was lengthy but bears repeating in full. Before I do that, it is useful to reproduce and briefly comment on the Commission's Amended Rules of Procedure and Practice that are recorded under the heading "Witness Interviews and Disclosure". They are numbers 21 to 29.

> 21. Commission counsel may interview persons believed to have information or documents bearing on the subject-matter of the Inquiry. The Commissioner may choose whether or not to attend an interview.
>
> 22. Persons interviewed by Commission counsel may choose to have legal counsel present during the interview, but are not required to do so.
>
> 23. If Commission counsel determines that a person who has been interviewed should be called as a witness in the public hearings referred to in paragraph 2, Commission counsel will prepare a summary of the witness' expected testimony, based on the interview ("Summary"). Commission counsel will provide a copy of the Summary to the witness before he or she testifies in the hearing. After the Summary has been provided to the witness, copies shall be disclosed to the parties and intervenors having an interest in the subject matter of the witness' evidence, on their undertaking to use it only for the purposes of the Inquiry, and on the terms described in paragraphs 27 and 28 below.
>
> 24. The Summary of a witness' expected testimony cannot be used for the purpose of cross-examination on a prior inconsistent statement.
>
> 25. Pursuant to section 9 of Order in Council 89/2011, if Commission counsel determines that it is not necessary for

a person who has been interviewed to be called as a witness, or if the person interviewed is not otherwise able to be called to testify at the public hearings referred to in paragraph 2, Commission Counsel may tender the Summary to the Commissioner at the hearing, and the Commissioner may consider the information in the Summary when making his final findings, conclusions and recommendations.

26. Unless the Commission orders otherwise, all relevant non-privileged documents in the possession of the Commission shall be disclosed to the parties and intervenors at a time reasonably in advance of the witness interviews and/or public hearings or within a reasonable time of the documents becoming available to the Commission.

27. Before documents are provided to a party, intervenor or witness by the Commission, he or she must undertake to use the documents only for the purposes of the Inquiry and to keep their contents confidential unless and until those documents have been admitted into evidence during a public phase of the Inquiry, and to abide by such other restrictions on disclosure and dissemination that the Commission considers appropriate.

28. All documents provided by the Commission of Inquiry to the parties, intervenors and witnesses that have not been admitted into evidence during a public phase of the Inquiry, and all copies made of such documents, are to be returned to the Commission, in the case of witnesses on completion of their testimony, and in the case of parties and intervenors within seven days of the Commissioner issuing his final Report.

29. The Commission may, upon application, release any party, intervenor or counsel in whole or in part from the provisions of an undertaking regarding the use or disclosure of documents or information.

These Rules were adopted after a full review and acceptance of them by all counsel, including counsel for the Applicants.

4. The remarks of Commission Counsel are as follows:

> MS. WALSH: The rule starting at rule 21 ... Deal with witness interviews and disclosure. So 21 provides:
>
> > Commission counsel may interview persons believed to have information or documents bearing on the subject-matter of the Inquiry. [and] The Commissioner may choose whether or not to attend an interview.
>
> Twenty-two:
>
> > Persons interviewed by Commission counsel may choose to have legal counsel present during the interview, but are not required to do so.
>
> THE COMMISSIONER: With, with respect to rule 21, I have not been present for any interviews.
>
> MS. WALSH: That's correct.
>
> And with respect to rule 22, many of the witnesses who we interviewed did not have counsel present, as was their choice. They were all advised of the option to have counsel and many of them chose not to.
>
> Rule 23 provides:
>
> > If Commission counsel determines that a person who has been interviewed should be called as a witness in the public hearings referred to in paragraph 2, Commission counsel will prepare a summary of the witness' expected testimony based on the interview ...
>
> That's called the summary.
>
> > Commission counsel will provide a copy of the Summary to the witness before he or she testifies in the hearing. After the Summary has been provided to the witness, copies shall be disclosed to the parties and intervenors having an interest in the subject matter of the witness' evidence, on their undertaking to use it only for the purposes of the Inquiry, and on the terms described in paragraphs 27 and 28 below.

And paragraph 24 provides that:

> The summary of a witness' expected testimony cannot be used for the purpose of cross-examination on a prior inconsistent statement.

So as this rule -- as the heading indicates, this rule relates to the disclosure, that is, with respect to pre-hearing interviews that are conducted, what disclosure will parties and intervenors receive of those interviews.

And I take a moment, Mr. Commissioner, and I'm going to give you the full process of how we proceeded, but I want to take a moment to indicate that the purpose of these interviews was not to create a transcript for disclosure. The purpose of the interviews was to inform the Commission as to its investigation in order to allow Commission counsel to marshal the evidence that would allow you to fulfill your mandate. And the process that we chose of how to conduct the interviews was done purposefully with an eye to ensuring that witnesses would feel comfortable and candid in speaking with us, and that is why the interviews were not conducted formally under oath or affirmation and there was never, in any situation, a formal court reporter present in the hearing room.

So initially, in terms of -- and, and with respect to these rules, Mr. Commissioner, as you know, the rules were circulated to all of the potential applicants for standing prior to the standing hearings and then at the standing hearings counsel for applicants made submissions to you, or had the opportunity to make submissions to you with respect to the content of those rules, and on the second day of the standing hearings, having taken into account those submissions, the rules were settled and agreed upon and you gave an order on June 29, 2011 confirming that agreement.

And so I think it's important to recognize that, in terms of process, our process has to be guided principally, in an inquiry, by fairness, and fairness is demonstrated, in large measure, by expectations. So the expectations in this case are based on two things. One, the rules, and the process for formulating those rules is as I've described, and the rules indicate -- they don't talk about, about how we will document our own internal investigations but they do indicate that with respect to disclosure, so that all counsel are put on the same footing with respect to evidence that will be adduced at the hearing, any witness who will be called to testify, a summary

of their evidence will be prepared and circulated to all counsel for parties and intervenors, and that's precisely the process we followed.

So, that's the first form of expectation that, to date, has been met.

The second way that expectations were created in this case with respect to fairness was by the assurance that you have made reference to, given by Commission counsel, whether by me or my colleague, Mr. Olson, to each and every witness prior to their asking -- prior to their being asked to open their mouths and say anything to us, the assurance that however their interview was documented, whether it was -- and I'll come back to this, whether it was by notes or by a recording which was sent out for transcription, that documentation was being made for internal purposes only. It would be shown to them so that they could make sure that they had answered accurately to see whether they needed to add anything, whether they wanted to clarify anything. And what we then told the counsel was that if -- or the witnesses, was that if we determined that we would want to call them to testify, then in accordance with our rules that I just read to you, we would prepare a summary of their evidence and that summary would be shown to them and then circulated to all counsel for parties and intervenors.

Now, and I'm going to, in a minute, I'm going to read to you some samples from the notes and recordings that we made of that assurance, so you can see what, what it was specifically that was said and what all the counsel present have heard me or my colleague say repeatedly.

So in terms of process of, of documenting the interviews, originally we thought, consistent with, quite frankly, what Commissioner Goudge did in his inquiry, we thought, well, the best way to keep matters informal, as I said, we didn't have people under oath, and what we thought was we would use the services of an associate counsel, such as my colleague, Mr. Globerman, to take notes of the interviews, and that's how we started. And we said, and I will give you an example of the assurance in a minute, but we gave the same assurance, that the notes were being prepared for internal Commission purposes, they'd be shown to the witness and/or their counsel, but they wouldn't be circulated and what would be circulated would be a summary of the witness' evidence if we determined they would be called to testify.

We soon determined that --

THE COMMISSIONER: Did they, did they see both the notes and the summary if you were going to call them?

MS. WALSH: Yes. Yes, the summaries have, have only been recently prepared. And yes, the summaries are all sent to the witness first. And our practice is we send them to the witness or their counsel, we tell them they have a week and then they're being sent out to all the other counsel.

And I can tell you that to date, 49 summaries have been sent to all counsel. There are 34 summaries which remain, that will be sent out by August 3rd. Then there are still eight interviews which have yet to take place, and so those interviews, the summaries of those interviews will be circulated to counsel before the end of August.

THE COMMISSIONER: And are those all phase one witnesses?

MS. WALSH: Not all of them. The, the majority of them are, but not every single one of them.

So in terms of the process, I'm going to tell you -- so in terms of the process, we started with, with associate counsel taking notes and we found that because of the size of this undertaking, and in order to make sure that we began the public hearings on a timely basis, it wasn't a good use of associate counsel's time to sit and take notes. There were many other tasks that we needed them to do. So then our office hired secretarial staff to sit and take notes. And what we determined -- and in most cases -- originally they were just taking notes and then they began to record the interviews and they took notes. And what we found is, because these secretaries were not familiar with the evidence, it was difficult for them to keep up with the note-taking and so then they had to go back and look at the -- listen to the audio form and, and type it up. So we determined that we really didn't need to have anyone present in the room. We were mindful of, of matters of delay, and so we thought the best thing would be to simply record the interview, no court reporter present, and send out the recording to be transcribed. And the Transcripts that come back from those interviews are not Transcripts in the normal legal sense. There's no court reporter present, so for instance there's no indication as to when something may be said on or off the record. We try to indicate who's speaking but it isn't always apparent to the transcriber. But these are for internal Commission purposes and we know what's being said, but they're not formal Transcripts in that sense.

So, that's the process. We started with an associate lawyer taking notes. We moved to a secretary taking notes; a secretary taking notes with an audio recording; a pure audio recording sent out to be transcribed and returned to us, always mindful, Mr. Commissioner, of matters of timing. And in fairness, whether it was merely notes that were taken or a transcript made from the audio recording, we provided that documentation of the interview to the witness and, if they had a lawyer, to their lawyer, as I said, so that they could see what it was they said, if they had wanted to add something, if they wanted to clarify something. We thought that was the fairest way to proceed. But they were told that those were only for their own look, for their own view and for our internal purposes, and they signed a confidentiality undertaking that said that they would not discuss with anyone any of the information that they received during communications with the Commission. And Commission -- and each counsel signed an undertaking saying they would not disclose any information they learned other than to their own client. So, that's what we have.

And what I'm advised is, we have a total of 1118 pages of interview notes and 9200 pages of the notes that are transcribed from the audio.

THE COMMISSIONER: What are those figures again?

MS. WALSH: So 1118 pages of transcribed notes and 9,279 pages of typed Transcripts from the audio recordings. So we have a total number of pages of 10,397.

And with respect to your question, yes, Mr. Commissioner, we have four, sometimes five, lawyers in our office who've been reviewing, split up, divided up the task of reviewing those pages to create the summaries. And the summaries, again --

THE COMMISSIONER: Was that the next step when -- you've, you've told me that you sent them to counsel or to the --

MS. WALSH: Witness.

THE COMMISSIONER: -- interviewee, if he or she didn't have counsel.

MS. WALSH: Right.

THE COMMISSIONER: And asked them to respond, and any changes or additions, and then I'm interested in knowing exactly what was your next step once that process was completed.

Then the next step was to create a summary of their evidence if we determined, upon reviewing their evidence and in the context of all the investigation in its entirety, if we determined that a given witness was going to be called to testify, then we prepared -- one of the five of us prepared a summary of their evidence, which then was sent to the witness or their counsel, and then a week later distributed to all counsel for parties and intervenors. So all counsel for parties and intervenors will receive summaries of every single witness whose evidence we expect to call at the hearing. And the, the summaries are fairly detailed. We were careful to ensure that if there was anything that differed, for example, from what was in the documents that were disclosed relating to that witness, that that be included in the summaries.

The purpose of the summaries is to ensure that everyone is advised as to the nature of the evidence so that to the extent possible there won't be surprises, and that's the intention of the rule, that's the purpose of the rule that relates to these summaries, and that's precisely the process that's been followed. And the summaries also indicate the disclosure numbers of the documents that are likely to be referred to by the witness in their evidence.

And in many instances, when we have sent a summary to counsel, they have made additions, things they think are something that we should add, and we include them, so that the summaries are as fulsome as possible.

Now, in terms of -- I wanted to give you some examples of the assurance that was given to witnesses at the outset of their interviews. And what I'd like to do is take a minute, because this is one of the main reasons that I have objected to disclosing the Transcripts. So I want to take a minute, I've given -- I have examples of assurances that were given and documented in the various forms that we documented the interviews over time.

So here is an example of interview notes that were taken by associate counsel who indicates:

> Explanation of Commission's mandate, explanation of note-taking reporting. Only for Commission's internal purposes. Notes will be used to make a summary and the summary will be disclosed to parties and their counsel. The summaries can't be used for cross-examination. We will get a copy of the notes to you and you will have a chance to review them and sign off on them.

So that's an example of an assurance that's documented by way of an associate counsel taking notes.

Then I have an example of the recording and documentation when we had a secretary taking notes and recording by way of audio. So I speak and I say:

> We create notes, I'm not calling it a transcript because it's not intended to be verbatim.

And this was March 9, 2012:

> We take notes of every witness who's interviewed. We type them up, we send them to the witness for the witness to verify, make sure that we've got everything accurate. Make any changes you want. You'll get that from our office and then you send it back.

The witness says: Okay. I go on:

> Those notes are internal for the Commission's purposes only. They're not going to be shared with anyone. If we determine that your evidence is evidence that we will make sure of, then we send a summary of your evidence to all of the lawyers for the parties and intervenors. And if you are called to testify, that summary would not be able to be used by a lawyer as a means of cross-examination. They couldn't say, you know, use it as a prior statement, like says, this says you said this and now today you're saying something different. So it's, again, just for -- so the notes are just for internal purposes for us. And if we prepare a summary, the summary does go to counsel but, again, it's just to make sure that everybody knows what the evidence is that we're calling.

Then I have an example of the assurance given to, in fact, one of Mr. Gindin's clients, and this was an instance where notes were taken by a secretary and there was an audio recorded. And so I start off:

> Thank you very much for coming in.

I said a few preliminary things:

> I am Commission counsel, my colleague is associate, senior associate Commission counsel. I act in the public interest so I don't represent anyone's point of view, and it's my job to get all of the evidence, wherever it comes from, whatever it looks like, out in front of the public, in front of the Commissioner, so that he can make some findings, some comments, a lot of comments, on what happened to Phoenix, and then make some recommendations so that we can try to prevent it from happening again.

Witness says: Okay. All right. I go on:

> To better protect Manitoba children. You'll see there's a little speaker here. Our discussion today is being recorded. It's only for our internal purposes so that you can see Annette [is our clerical person] is also taking notes, and that's also just for our internal purposes. And when I say that, I mean that no other lawyers, even, well, other than your own lawyer, is entitled to see these notes or listen to this tape.

The witness says: All right. I go on:

> Once the notes are typed up, they'll be sent to your lawyer for you to look at and make sure that we got it right, make any changes. You can sign them, say yes, this is an accurate, you know, copy of what I said. I'm not calling it a transcript because we're not saying it's word for word accurate.

Witness says: Yeah. I say:

> And then you send it back to us and then we've got it for our internal purposes. Ultimately, we'll prepare a summary of what every witness who we're going to call to testify at the public hearings is going to say, so that would include you, okay, and then that summary is what's sent to all the other lawyers so they see that, and your lawyer will get a summary of what everybody else is saying.

> And then finally, Mr. Commissioner, an example of what I said to a witness who was actually interviewed by video conference. Her lawyer was in the room. And it was purely recorded; there was no clerk or a lawyer taking notes. So I start off, and I say:
>
> > A bit of an explanation: There is a certain amount of repetition, which all the lawyers will attest to. I'm Commission counsel to the inquiry and my role is to adduce all the evidence, whatever it is, wherever it comes from, whatever perspective it comes from, for the benefit of the Commissioner, Ted Hughes, and the benefit of the public. So I don't have a specific perspective, I'm just fact-finding, and in the course of doing that I am interviewing just about everybody who touched or had contact with the family of Phoenix Sinclair, her father, her mother. And so as you know, your name comes up in the file through a brief interaction, and I wanted to ask you about that interaction. In terms of this process, this interview is being transcribed but only for our, that is, the Commission's internal purposes, so no one else will see it except for you and your lawyer and the staff at this Commission. The witness says, okay. If we determine that we need to call you to testify or that we will, in some way, rely on your evidence, then we will prepare a summary of your interview from today and send it out to all the counsel. If you do testify, that summary could not be used for the purposes of cross-examining you, so it couldn't be used as what we call a prior inconsistent statement. In other words, we're not -- you're not being sworn today and there isn't that level of formality.
>
> So I think that answers the question that you asked --
>
> THE COMMISSIONER: Yes.

5. In preparing for the hearing, it is apparent that Commission Counsel followed the procedure outlined in the Rules reproduced above. I was not in attendance at any of the interviews and I have left it to Commission Counsel to marshal the evidence and be ready to proceed on opening day, September 5, 2012. We now know the detail of how she has gone about her task. As I understand it, the Transcripts that the Applicants seek are the transcribed

pages of witness interviews in those instances where the interviews were recorded on an audio recording machine without the presence of a court reporter (counsel has advised his request does not relate to notes made by associate counsel nor secretarial staff). Thus, these documents are not transcripts as that term is generally understood in legal proceedings. One of the other significant differences is that the interviews were not conducted under oath or affirmation.

6. As a result of the explanation given by Commission Counsel, it is now clear as to the history and origin of the Transcripts sought by the Applicants. Let me summarize what I believe to be the significant details of the practice and procedure followed by Commission Counsel.

1) She conducted pre-hearing interviews with persons who were thought to be in a position to contribute, as a witness to the work of the Commission. Where represented by counsel, counsel was invited to attend;

2) The interviews were conducted in an environment of comfort for the interviewee where he or she would be encouraged to speak candidly and to that end, the interviews were not carried out under oath or affirmation nor in the presence of a court reporter; and

3) An assurance was given to each witness that:

    a) the recording of what they would say, would, once transcribed, be used for internal purposes only. The clarity of the assurance given is amply recorded in the remarks of Commission Counsel;

    b) they would be given the opportunity to review the transcribed document so as to clarify or add to what had been recorded; and

    c) Commission Counsel would then prepare a summary of the anticipated evidence of the witness and it would first be shown to the witness and then circulated to all counsel for parties and intervenors.

7. As well as the foregoing procedure followed by Commission Counsel embracing the requirements of Rule 23, it accords with accepted practice at public inquiries as reported on by Simon Ruel in his text *The Law of Public Inquiries in Canada* at pages 72 and 73 where he says:

> The power to issue a summons to compel the appearance of witnesses and the production of documents does not allow compelling witnesses to attend preliminary or preparation interviews with commission counsel or investigators. Such interviews can only be voluntary. Interviews should be conducted in the presence of counsel for the witness, if represented. An unrepresented witness who may be subject to allegations or findings or misconduct should be advised that he may wish to retain the services of counsel.
>
> Typically, interview notes would be made and transformed into statements or summaries of anticipated evidence or will says for those witnesses that would be called to testify. It is common practice to share those statements with witnesses for review and comments before finalization. Witness interviews may also be recorded and transcribed. Affidavits may also be prepared based on interviews for evidentiary purposes. Those options are at the discretion of the commissioner.
>
> ...
>
> The rules of procedure of commissions of inquiry will typically provide that parties with standing will be given advanced access to documents collected by the commission. Not all documents disclosed to a commission will be shared in advance. Discretion is left with commission staff to screen the documents and to communicate only those documents that are relevant to the mandate of the inquiry. Advanced access to documents will permit an efficient representation of parties' interests, avoid surprises and facilitate the overall functioning of the commission.
>
> ...
>
> The rules of procedure of commissions of inquiry will typically allow the advance sharing of summaries or statements of anticipated evidence or will says with the parties with standing. Again, the disclosure of witness statements would be made upon the parties' and their counsels' signature of an undertaking of confidentiality.

Such sharing of summaries has occurred here and undertakings of confidentiality were obtained by Commission Counsel from all counsel receiving the summaries.

8. The Applicants base their entitlement to the Transcripts on two grounds:

1) That Rule 26 of the Commission's Rules of Procedure and Practice require disclosure; and

2) The principles of natural justice and procedural fairness require disclosure.

9. I will, in reverse order, reference the submissions of counsel with respect to these grounds.

10. Counsel for the Applicants places great emphasis on Hudson Bay Mining and Smelting Co. v. Cummings P.C.J., 2006 MBCA 98 in advancing the second of the two grounds. In oral submission he said as recorded at pages 68 to 70 of the transcript of the Commission proceedings on July 24, 2012:

> MR. SCARCELLO: I hear you, and I just would like to point out, not sure if you've read the Manitoba Court of Appeal decision, the Hudson Bay v. Cummings decision. It's already dealt with this exact matter, where our Court of Appeal ruled that, there's an inquest, and the inquest counsel, counsel witness -- did witness interviews and certain promises of confidentiality were made to the witnesses, and after it was found out there were transcripts of these witness interviews, a motion was made to receive them. The Court of Appeal decided that those were relevant non-privileged documents and that they had to be disclosed. And that case is, of course, inquest, but it's, it's directly only point to this matter. It was a [sic] inquest into the death of a young man, and inquest judge was tasked with determining the circumstances surrounding this young man's death and then the judge was to make recommendations to ensure that a similar occurrence doesn't happen in the future. Is exactly what terms of reference, an order of council for this matter, are dealing with and it's those terms of reference that determine what is relevant in a proceeding. So we are bound by stare decisis in this decision in Manitoba.

THE COMMISSIONER: But that was relation to an inquest, which the rules of procedure with respect to which are, in the main, provided by statute, I think, whereas we're not governed by statute insofar as the procedure that, that takes place at a public inquiry. Isn't there a difference, and didn't Mr. Justice Freedman point that out in the occasion that this matter was already before him as a member of the Court of Appeal?

MR. SCARCELLO: The Hudson Bay decision they were disclosed pursuant to requirements of natural justice and procedural fairness. They are relevant non-privileged documents and they should therefore be disclosed, not in accordance with the rules. And I'll point out that that decision makes many comments about the commonalities between inquests and inquiries instead of distinguishing them. It's in our initial July 5th brief. Tab 3 is the Hudson Bay decision. If I could have you turn to page 13. There's a highlighted section right at the bottom. It's a footnote from Justice Steel where she states:

> "Fundamentally though, a public inquiry, like an inquest, is concerned with being a fair, fact-finding process, ..."

And that's what we're here today dealing with, is, is making sure this is a fair fact-finding process. And if you compare those two decisions, they both have exact same terms of reference and the same goals.

And at pages 81 and 82:

Now, the principles of natural justice and procedural fairness obviously apply to this proceeding. Supreme Court of Canada has, has said as much, our Court of Appeal has said as much. There's no issue there. We all know that. The issue is how much?

Now, you've received our position that we need full disclosure of all relevant documents, and I've explained to you why, that for you to meet your mandate you need to be able to hear our unique perspective on all of the evidence. But furthermore, if we, as parties with standing, we have a direct and substantial interest in the subject matter of this proceeding, if we're to be given all the procedural rights that we are entitled to, we have to receive full disclosure so we can participate meaningfully.

If the -- if all that is going to happen here is that the perspective of Commission counsel and her identification of what's relevant is put

> before you, then our participation at this stage is meaningless.
>
> THE COMMISSIONER: Is what?
>
> MR. SCARCELLO: Is meaningless, because we don't get to put our eyes on the documents. We're denied our right to fully participate in this matter.
>
> Now, set out in the brief, I'm not going to go through it in any great detail, but there's factors that you are to look at in determining how much disclosure should occur in order to be procedurally fair, and that's all before you. I'll point out this, like I said before, the Hudson Bay decision from the Manitoba Court of Appeal is directly on point; the same mandate was there, the same purpose of preventing a similar death in the future was there, and they determined that all relevant non-privileged documents, which included witness interview transcripts, had to be disclosed.

11. It is my belief that the foregoing recitations from counsel's oral submission fairly represents the basis on which he asserts that principles of natural justice and procedural fairness require disclosure of the Transcripts.

12. With respect to counsel's reliance on the first ground advanced by him, he points to and relies on Rule 26. He sees the Transcripts as being relevant and non-privileged documents in the possession of the Commission that must be disclosed to the parties and intervenors. Again referencing the Hudson Bay and Cummings decision counsel says at page 70:

> If the documents are relevant and non-privileged in the inquest decision, they are as well here.
>
> Now, to get into the details of why they're relevant, of course they're relevant. The Order in Council, at section 9, directs and allows the Commission and its counsel to interview witnesses in accordance with section 1 of the Order in Council which sets out the mandate of this inquiry. So any information that comes out of those interviews is clearly relevant because it is only within the confines and jurisdiction of this inquest (sic) as determined by section 1.
>
> Furthermore, if summaries are being prepared referencing the transcripts, the original document is obviously relevant.

He adds at page 72:

> The only thing that can prevent a relevant document from being produced to the parties at this inquiry is if it's covered by some form of privilege.

Counsel has advanced reasons why no privilege exists with respect to the disclosure of the Transcripts and concludes at page 81:

> So privilege cannot apply for these documents, in no way, shape or form, and they're clearly relevant. Therefore, in accordance with the rules that require the disclosure of relevant non-privileged documents, they should be disclosed.

and at page 89:

> We're saying that transcripts are relevant non-privileged information and we are entitled to receive them in accordance with rule 26.
>
> See, rule 23 deals with the creation of Commission counsel. Rule 26 deals with the actual information.

13. Addressing the second ground advanced by the Applicants, I decline to make an order compelling Commission Counsel to provide the Transcripts of the witness interviews conducted by her to the parties and intervenors in this Inquiry. I see no breach of the principles of natural justice and procedural fairness. Of prime importance is the context within which the Transcripts were prepared and what in fact they are, notwithstanding the descriptive name that has been given to them. Commission Counsel chose the process, as she was entitled to do, in order to be in compliance with Rule 23. She knew that for each witness to be called to testify, she had to prepare and circulate, as provided for in the Rule, a summary of the witness' expected testimony based on Commission Counsel's interview with that person. Ultimately, she found transcription of her conversation with the interviewees to be the most efficient way of allowing for the preparation of the summaries. It was understood from the day the Rules were adopted, with full participation and concurrence of counsel, that the preparation and delivery of summaries would be the method of acquainting all parties and intervenors of the evidence it was anticipated the witnesses would give. After listening to Commission Counsel in the hearing room last week, it

is apparent that she has done exactly what was expected of her. In my view, the Applicants have been denied nothing that the principles of natural justice and procedural fairness entitle them to.

14. Commission Counsel has explained her reasons for giving all potential witnesses the assurance that the Transcripts would be retained in confidence. Each person interviewed was made aware of Commission Counsel's responsibility to prepare and circulate a summary of what the witness was expected to communicate at the public session. In my judgment, the assurance given by Commission Counsel was an entirely reasonable and understandable one and it would be grossly unfair to her, as it would be to those given the assurance, for me to now order the distribution of the Transcripts to all parties and intervenors. To do so would, at least to those interviewed, bring the credibility of this Inquiry into question and could very well result in far less communication and candidness when the witness takes the stand, believing that he or she had been deceived by Commission Counsel.

15. Further, I do not agree that Hudson Bay v. Cummings is, as counsel suggests "on point" and that it reached a result that I am either required or ought to follow.

> Firstly, in the Hudson Bay v. Cummings the proceeding being considered by the Court of Appeal was an inquest and not a public inquiry. The differences between a public inquiry and an inquest are considerable. That was made quite clear by Freedman J.A. of the Manitoba Court of Appeal when an issue relating to this Inquiry was before him earlier this year. See M.G.E.U. v. Hughes, 2012 MBCA 16. A commission of inquiry has much more latitude and discretion in determining the process that the commission is going to follow. The commissioner can create his own rules for the hearings and "is the master of his own procedure. [He] is not required to adopt the procedural rules of the civil court system in order to achieve fairness. Tribunals are not courts, and are fully entitled to streamline their disclosure procedures in keeping with their objective to provide a timely and cost-effective adjudication of the rights of the parties." (Clifford vs. Ontario (Attorney

> General) (2008) 90 OR (3d) 742 at paragraph 10). Conversely, an inquest conducted pursuant to *The Fatality Inquiries Act* is prescribed narrowly by statute, and the presiding judge who hears evidence in a formal courtroom, does not have the discretion to formulate his own rules in the way that a commissioner of a public inquiry is able to do.
>
> Secondly, in the Hudson Bay v. Cummings case there is no indication that summaries or will say statements were ever offered or provided to counsel of the parties with standing. In my view, the provision for the summaries in this public inquiry negates the need for the production of transcripts. While in the Hudson Bay v. Cummings case the court ordered the disclosure of transcripts that were ready and available, it noted in paragraph 10 that different circumstances could indicate a different result.
>
> Thirdly, the court in Hudson Bay v. Cummings noted that there was no evidence that the comments made to Crown counsel in the interviews were made with the expectation by those who were interviewed that they would be kept confidential. As we know, the very opposite occurred in the interviews conducted by Commission Counsel.

16. This brings me to a consideration of the reliance of the Applicants on Rule 26 as authority for its entitlement to a disclosure order with respect to the Transcripts. I said at the time and continue to be of the view that Rule 26 was put in place to cover documents received by the Commission and not documents created by it or for its own internal purposes. Rules 21 to 24 exclusively address the disclosure of information obtained through the pre-hearing interview process. The reference to documents in Rule 26 is to information received by the Commission in writing or similar form and not information created by the Commission for its own internal purposes.

17. I appreciate that Rule 26 is prefaced with the words "Unless the Commission otherwise orders…". Notwithstanding that at the time of the hearing I indicated I was prepared to invoke the use of that proviso, I have decided it is unnecessary to do so because of the conclusion I have reached and recorded in paragraph 16. For that reason Rule 26 is not a basis on which the Applicants are entitled to an order from me compelling Commission Counsel to provide the Transcripts to them and accordingly I decline the request to so order.

18. I also decline to make an order allowing witnesses who consent to the disclosure of the Transcripts to proceed to do so to other parties, intervenors or their counsel. Such an order would lift the confidentiality ban that each witness has agreed to in written form. In making my decision, I have been influenced by the following three factors which, when taken together, indicate to me that the principles of natural justice and procedural fairness will be best honoured and served by proceeding to the September 5, 2012 opening day of presentation of evidence on the basis understood by all parties and intervenors and agreed to by them at the time of the finalization of the Commission's Amended Rules of Procedure and Practice. Those factors are:

1) The confusion that will arise for witnesses unrepresented by counsel, given the assurance communicated to them by Commission Counsel at the time of interview and also arising from the terms of the confidentiality undertaking signed by them;

2) The lack of consistency of disclosure, or perhaps better described as the unevenness that will arise from the fact that:

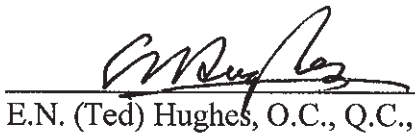
    a) For about half of the interviews, no Transcripts exist; and

    b) there is already an indication that some witnesses have expressed concerns about disclosure of their Transcripts; and

3) The time-consuming redaction process that each Transcript would have to undergo and which can only be carried out by a commitment of resources in the office of Commission Counsel.

18. The final matter for my attention is the position taken on the Applicants motion by counsel for Kim Edwards and Steve Sinclair who spoke in support of the application for disclosure of the Transcripts. His reason was unique to his situation. He has seen only two Transcripts, those of his two clients, whom he likely correctly described as having "the greatest personal interest but the least amount of information" of all participants. He points out that counsel for Manitoba Government Employees' Union could have up to 35 Transcripts and counsel for the Department of Family Service and Labour could have up to 15. He describes it as being "unfair" that the amount of disclosure you get depends upon how many clients you have. I appreciate his point but I do not see it as reflecting unfairness. No counsel has seen or had possession of any Transcript other than that relating to his or her client. No counsel has seen the Transcript of the interview of anyone else's client nor Transcripts relating to unrepresented witnesses. Presumably, each client has been in full and complete discussions with his or her own counsel and has fully communicated to counsel the evidence that he or she is in a position to contribute to the Inquiry. Counsel's access to the client's Transcript was for the purpose of determining whether any changes or additions were required before preparation of the summary. When all of these factors are taken into consideration, I do not see the presence of the unfairness of which counsel speaks even though his numbers appear to be correct.

DATED at Winnipeg, Manitoba, this 1st day of August, 2012.



E.N. (Ted) Hughes, O.C., Q.C., LL.D (Hon)
Commissioner

Citation: The Southern First Nations Network of Care et al. v. The Honourable Edward Hughes, 2012 MBCA 83

Date: 20120907
Docket: AI 12-30-07838

IN THE COURT OF APPEAL OF MANITOBA

BETWEEN:

THE SOUTHERN FIRST NATIONS NETWORK OF CARE, THE GENERAL CHILD AND FAMILY SERVICES AUTHORITY, THE FIRST NATIONS OF NORTHERN MANITOBA CHILD AND FAMILY SERVICES AUTHORITY and CHILD AND FAMILY SERVICES ALL NATIONS COORDINATED RESPONSE NETWORK (THE "AUTHORITIES AND ANCR")	)	***K. M. Saxberg*** *and* ***S. C. Scarcello*** *for the Applicants*
Applicants	)	***S. M. Walsh*** *and* ***D. M. Olson*** *for the Respondent*
- and -	)	*Chambers motion heard:* ***August 28, 2012***
THE HONOURABLE EDWARD HUGHES, in his capacity as Commissioner under The Manitoba Evidence Act and as appointed pursuant to Order in Council No. 89-2011, dated the 23rd day of March, 2011	)	*Decision pronounced:* ***September 7, 2012***
Respondent	)	

MARC M. MONNIN J.A.

1 This is an application under s. 95(2) of *The Manitoba Evidence Act*, C.C.S.M., c. E150 (the *Act*), for an order directing the Commissioner in the Commission of Inquiry into the circumstances surrounding the death of Phoenix Sinclair (the Inquiry) to state a case to be heard by a panel of this court. The respondent, The Honourable Edward Hughes, is the Commissioner (the Commissioner) appointed to conduct the Inquiry.

2 The applicants, The Southern First Nations Network of Care, The General Child and Family Services Authority, The First Nations of Northern Manitoba Child and Family Services Authority (the Authorities) and the Child and Family Services All Nations Coordinated Response Network (the ANCR), are agencies involved in child protection and care throughout Manitoba and have standing before the Inquiry as parties. The issue to which the stated case relates is the Commissioner's decision not to order disclosure of transcripts of interviews that the Inquiry's counsel have conducted with witnesses in preparation for public hearings which commenced September 5th.

3 I have concluded that the applicants have satisfied the requirement to show that the matter which they seek to appeal by stated case is of sufficient importance to warrant a review by a panel of this court and has a reasonable chance of success. Given that decision, I must be circumspect in discussing the strength and validity of the arguments advanced by the applicants. Within that restriction, I will attempt to outline briefly the reasons for my concluding that a case should be stated.

Background

4 Order in Council No. 89/2011 dated March 23, 2011, appointed the respondent as a Commissioner to inquire into:

> ... [T]he circumstances surrounding the death of Phoenix Sinclair and, in particular, to inquire into:
>
> (a) the child welfare services provided or not provided to Phoenix Sinclair and her family under *The Child and Family Services Act*;

> (b) any other circumstances, apart from the delivery of child welfare services, directly related to the death of Phoenix Sinclair; and
>
> (c) why the death of Phoenix Sinclair remained undiscovered for several months.

5 The Commissioner is tasked to report his findings on these matters and to make such recommendations as are considered appropriate to better protect children in Manitoba.

6 Paragraph 4 of the Order in Council allows the Commissioner to "consider any court transcripts and similar documents, which are not subject to a legal claim of privilege, and may give them any weight" as he wishes to, "including accepting them as conclusive." The Commissioner must not express any conclusion or recommendation about the civil or criminal liability of any person.

7 Paragraph 9 of the Order in Council gives the Commissioner the ability to interview any persons connected with the matter:

> Before public hearings take place, the commissioner may interview any person connected with the matters referred to in paragraph 1. On the commissioner's behalf, interviews may be conducted by counsel for the commissioner, either alone or in the commissioner's presence. If conducted alone, counsel must give the commissioner a transcript or a report of each interview. The commissioner may, in his discretion, rely on the evidence gathered in this manner.

8 Commission counsel was appointed on April 15, 2011. Applications for standing at the inquiry were heard and ruled upon by June 29, 2011.

9 The Inquiry's rules of procedure and practice were issued on June 29, 2011, and amended on August 23, 2011.

10 For the purpose of this application, the relevant provisions of the rules are as follows:

> 3. In these Rules:
>
> (i) "Commission counsel" refers to counsel appointed by the Commissioner and retained by the Government of Manitoba to act as Commission counsel, and includes any associate counsel or junior counsel appointed by "Commission counsel" with the approval of the Commissioner and under the authority of Commission counsel's retainer;
>
> (ii) the term "documents" is intended to have a broad meaning, and includes the following forms: written, electronic, audiotape, videotape, digital reproductions, photographs, maps, graphs, microfiche and any data and information recorded or stored by means of any device;
>
> (iii) "intervenor" refers to a person granted status as an intervenor by the Commissioner pursuant to paragraph 9;
>
> (iv) "party" refers to a person granted full or partial standing as a party by the Commissioner pursuant to paragraph 8; and
>
> ....
>
> 21. Commission counsel may interview persons believed to have information or documents bearing on the subject-matter of the Inquiry. The Commissioner may choose whether or not to attend an interview.
>
> 23. If Commission counsel determines that a person who has been interviewed should be called as a witness in the public

hearings referred to in paragraph 2, Commission counsel will prepare a summary of the witness' expected testimony, based on the interview ("Summary"). Commission counsel will provide a copy of the Summary to the witness before he or she testifies in the hearing. After the Summary has been provided to the witness, copies shall be disclosed to the parties and intervenors having an interest in the subject matter of the witness' evidence, on their undertaking to use it only for the purposes of the Inquiry, and on the terms described in paragraphs 27 and 28 below.

24. The Summary of a witness' expected testimony cannot be used for the purpose of cross-examination on a prior inconsistent statement.

25. Pursuant to section 9 of Order in Council 89/2011, if Commission counsel determines that it is not necessary for a person who has been interviewed to be called as a witness, or if the person interviewed is not otherwise able to be called to testify at the public hearings referred to in paragraph 2, Commission Counsel may tender the Summary to the Commissioner at the hearing, and the Commissioner may consider the information in the Summary when making his final findings, conclusions and recommendations.

26. Unless the Commission orders otherwise, all relevant non-privileged documents in the possession of the Commission shall be disclosed to the parties and intervenors at a time reasonably in advance of the witness interviews and/or public hearings or within a reasonable time of the documents becoming available to the Commission.

11 As noted by the Commissioner in his reasons for decision, the rules were adopted after review and acceptance of them by all counsel, including counsel for the applicants in this motion.

12 Under the provisions of *The Child and Family Services Act*, C.C.S.M., c. C80, child welfare records are protected from disclosure and may not be

disclosed without a court order. Such a court order was obtained on October 21, 2011. In November 2011, the Commissioner announced that Commission counsel would, in light of the availability of child welfare records, review such documentation and interview the witnesses who had provided child welfare services to or had contact with Phoenix Sinclair and her family.

13 Commission counsel and her colleagues proceeded to interview witnesses. The method that was followed at the outset, which had been discussed with counsel for the parties, was that notes would be taken by interviewing counsel of what the witnesses said. From the notes would be prepared summaries of witnesses' testimony. Copies of the summaries, after review by the witness, would be disclosed to the parties having an interest in the subject-matter as well.

14 It soon became apparent to Commission counsel that note-taking would not be sufficient to achieve the timelines set by the Inquiry. Secretarial staff were freed up to take notes instead of Commission counsel. However, given that they were not familiar with the subject matter of the evidence, it was difficult for them to keep up their note-taking. They had to resort to recording the interviews and transcribing the recordings afterwards. Eventually, that led to recording all interviews and transcripts being prepared for all witnesses thereafter. As explained by Commission counsel, these were not transcripts in the legal sense as there was no court reporter present, nor were the interviews conducted with the witnesses under oath.

15 Whether the interviews took place with associate counsel taking notes

or by an audio-recording being made, all witnesses were advised that the interviews were for the purpose of informing Commission counsel of the evidence they required in order to prepare for the hearing. Witnesses were told that the notes or recording, or transcripts made of them, would not be made available to other parties, although a summary of their evidence would be prepared, shown to them and then circulated to other parties to the Inquiry.

16 At some time in March or April 2012, the applicants became aware of the fact that Commission counsel were recording the interviews and having the recordings transcribed, with each witness then certifying the transcript as being accurate. In early May 2012, counsel for the applicants indicated to Commission counsel that they believed the transcripts should be produced to parties and intervenors. Commission counsel, after considering the request, eventually responded on June 4, 2012, denying the request to produce. On the same day, the Inquiry set a deadline of July 4, 2012, for the filing of any procedural motions.

17 On July 4, 2012, the applicants brought a motion requesting the production of any transcripts of witness interviews conducted by the Inquiry, or, in the alternative, allowing witnesses who consented to the release of their transcripts to the parties and intervenors to do so.

18 Commission counsel filed a brief opposing the relief sought by the applicants. In her brief, Commission counsel objected to the request as, in her view:

a) the request was contrary to the Inquiry's rules of procedure

and practice;

b) it was contrary to the principles of fairness and not in the public interest; and

c) granting the request would cause significant delays and unnecessary costs.

19 No other party or intervenor opposed the relief requested by the applicants. Two individuals, who have standing as parties, supported the request. The matter was argued before the Commissioner, and by a written ruling of August 1, 2012, the Commissioner denied the request.

20 Two days later, on August 3, 2012, the applicants wrote to the Commissioner requesting that a case be stated to the Manitoba Court of Appeal. On August 8, 2012, the Commissioner replied, refusing the stated case, and the applicants brought this motion on August 16, 2012.

Preliminary Issue with Respect to Apprehension of Bias

21 Prior to the hearing of the motion requesting disclosure of the transcripts, counsel for the applicants filed a reply brief raising a preliminary issue, arguing that, since Commission counsel took a position opposing the motion, there was a reasonable apprehension of bias established with respect to the Commissioner. The applicants argued that, given the role of Commission counsel, the function carried out by her and the requirement for her to remain impartial, the fact that she took a position would lead a reasonable person to conclude that there was a real likelihood that the Commissioner could not decide the matter fairly.

22 The relief requested at the hearing, on this issue, was for Commission counsel's material to be withdrawn and not be considered by the Commissioner. The Commissioner rejected that request summarily.

The Decision on the Substantive Motion

23 The Commissioner set out the applicants' request as follows, namely, that he make an order:

> ...
>
> 1. Compelling Commission Counsel to provide the Transcripts of witness interviews (the "Transcripts") conducted by the Commission to the parties and intervenors to this Inquiry upon request;
>
> 2. In the alternative, allowing witnesses who consent to the release of their Transcripts to provide them to the parties and intervenors to this Inquiry upon request;
>
> 3. That the parties and intervenors who request and receive the Transcripts undertake to use the Transcripts only for the purposes of this Inquiry and to return the Transcripts to the Commission within seven days of the Commissioner releasing his final Report;
>
> ....

24 After reviewing the rules of procedure of the Inquiry, the Commissioner set out the explanation by Commission counsel of how the interview procedures had changed from a note-taking exercise to a transcript exercise, stating that, to him, it was apparent that Commission counsel had followed the procedure outlined in rule 26 of the Inquiry's rules of procedure and practice.

25 The Commissioner was of the view that the applicants based their entitlement to disclosure of the transcripts on two grounds, namely:

a) that the transcripts were required to be disclosed by virtue of the principles of natural justice and procedural fairness; and

b) that disclosure was required by rule 26 of the Inquiry's rules of procedure and practice.

26 Dealing with the first ground, he found no breach of the principles of natural justice and procedural fairness by not granting disclosure of transcripts. In his view, once the context within which the transcripts were prepared was understood, including that they were, in fact, prepared in the place of Commission counsel's note-taking function, it was clear that they were created as part of Commission counsel's role in compliance with rule 23. The applicants were therefore not denied anything that they should have expected to receive. Furthermore, and more importantly, since Commission counsel had given all potential witnesses the assurance that the transcripts would be retained in confidence, he concluded that it would be unfair to her for the Inquiry to now order the distribution to all parties and intervenors. In his view, to do so would bring the credibility of the Inquiry into question and potentially result in far less candidness if witnesses took the stand believing that Commission counsel had deceived them.

27 As to the argument that this court's decision in *Hudson Bay Mining and Smelting Co. v. Cummings, P.C.J.*, 2006 MBCA 98, 208 Man.R. (2d) 75, required disclosure, he distinguished the case on the following basis:

a) that the *Hudson Bay* decision was in relation to an inquest and not a public inquiry;

b) a public inquiry operated under its own rules of procedure and could adopt those necessary to provide a timely and cost effective adjudication of the rights of the parties;

c) in *Hudson Bay* there was no indication that summaries were ever offered or provided to counsel or parties of standing; and

d) in *Hudson Bay* there was no evidence that the comments of witnesses were made with the expectation that they would be kept confidential, as compared to the manner in which the interviews were conducted by Commission counsel in this case.

28 As to the second ground, namely reliance on rule 26, which provides that all relevant and non-privileged documents in the possession of the Inquiry are to be disclosed unless the Inquiry orders otherwise, he dismissed the argument on the basis that rule 26 was to cover documents received by the Inquiry and not documents created by it or for its own internal purpose.

29 As to the alternative request for relief, being an order to allow witnesses who consented to the disclosure of their transcripts to other parties to do so, the Commissioner declined to make such an order. His view was that such an order would lift the confidentiality ban to which each witness had agreed. He was influenced by the following three factors, which, taken cumulatively, indicated to him that the principles of natural justice and procedural fairness would be best served by following the method of

presentation of evidence on the basis understood by all parties:

a) he was of the view that confusion would arise for unrepresented witnesses, given the assurance of confidentiality communicated to them by Commission counsel;

b) there would be a lack of consistency in disclosure given that for a number of the interviews, no transcripts existed and there was an indication that some witnesses had expressed concerns about disclosure of their transcripts; and

c) there would be a time-consuming redaction process for each transcript depleting resources of the commission counsel's office.

30 He also noted that the two individuals who supported the application and had only received their own transcripts, compared to the substantial number for other parties (35 for the Manitoba Government Employees' Union and 15 for the Department of Family Services and Labour), would not be treated unfairly since no counsel had seen the transcript of anyone else's clients.

Request for Stated Case

31 The applicants requested that the Commissioner state a case addressing the following issues:

a. Did an apprehension of bias exist with respect to the Commissioner hearing and determining the Authorities and ANCR's motion requesting the disclosure of witness interview transcripts when Commission Counsel had taken an oppositional position on the record?

b. Do the Commission's Amended Rules of Procedure and Practice require the disclosure of witness interview transcripts to the Parties and Intervenors?

c. Do the principles of natural justice and procedural fairness require the disclosure of witness interview transcripts to the Parties and Intervenors?

32 In a decision delivered by letter dated August 8, 2012, the Commissioner declined to do so. The Commissioner articulated his view that he had no difficulty reaching the decisions he did and was unable to conclude that the request to state a case was justifiable.

Hearing of this Application

33 At the hearing of this application before me, Commission counsel appeared, but advised me that her instructions were not to make a submission or file written material. The Commissioner's position with respect to the matters at issue were indicated to be set out in his reasons for denying the applicants' motion for disclosure and his letter refusing to state a case. Commission counsel offered to answer any questions, but otherwise did not make submissions. She did advise me that some witnesses indicated a concern with their transcripts being made available to others.

Role of Judge of Court of Appeal under s. 95

34 Section 95 of the *Act* provides as follows:

Stated case for Court of Appeal
95(1) Where the validity of a commission issued under this Part or the jurisdiction of a commissioner appointed thereby or the validity of any decision, order, direction, or other act, of a commissioner

> appointed under this Part, is called into question by any person affected, the commissioners, upon the request of that person, shall state a case in writing to The Court of Appeal setting forth the material facts, and the decision of the court thereon is final and binding.
>
> **Order directing stated case**
> **95(2)** Where the commissioners refuse to state a case, any person affected may apply to a judge of the court for an order directing the commissioners to do so.
>
> **Proceedings stayed until case determined**
> **95(3)** Pending the decision of the stated case no further proceedings shall be taken by the commission.
>
> **Action or injunction not to lie against commissioner**
> **95(4)** No action shall be brought or other proceeding taken with respect to anything done, or sought to be done, by a commissioner or to restrain or interfere with, or otherwise direct or affect the conduct of any commissioner.

35 This is the second time that an application has been brought under s. 95(2) for an order directing the Commissioner in this particular Inquiry to state a case. The previous decision is that of my colleague Freedman J.A. in *Manitoba Government and General Employees' Union v. Hughes*, 2012 MBCA 16, 275 Man.R. (2d) 256 (*MGGEU*).

36 In that case, the applicant union, which had standing as a party to the Inquiry, questioned the validity of the Inquiry and the jurisdiction of the Commissioner. The Commissioner refused to state a case and the matter came before this court by means of an application under s. 95(2).

37 The applicant in *MGGEU* sought to have this court conclude that the use of the word "shall" in s. 95(1) should be construed as mandatory and not

directory. My colleague Freedman J.A. concluded otherwise and found that the Commissioner had the discretion to evaluate the request for the stated case and to exercise his judgment on its justifiability. A party who is dissatisfied with that decision, namely not to state a case, then has the recourse provided by s. 95(2).

38 Freedman J.A. was of the view, with which I agree, that, under s. 95(2) of the *Act*, just as the Commissioner has a discretion to exercise when a request is made for him to state a case, a judge of the Court of Appeal must also engage in a judicial evaluation of the applicant's position before exercising a discretion. In that sense, a chambers judge performs a "gatekeeper function" and the law relating to leave applications is applicable by analogy, as is the law relating to the extension of time. He then concluded that (at para. 56):

> ... [T]he role of the judge on an application such as this is to determine two matters. First, the judge determines if the applicant for the stated case has shown that the matter proposed to be determined is of some importance, warranting the attention of the court. If the work of a commission is to be suspended, that should only occur if the issue raised meets that standard. Second, the judge determines if the applicant has shown that the case it proposes be heard by the full court is an arguable case that has a reasonable prospect of success. Weak cases with little chance of success should not be sent for a hearing with the consequential suspension of the proceedings of a commission.

39 Therefore, my role in this decision is not to evaluate whether or not the Commissioner's decision will ultimately be upheld, but only whether or not the issue advanced by the applicants raises a matter of some importance and that the arguments present an arguable case that has a reasonable

prospect of success.

Analysis

A. Reasonable Apprehension of Bias

40 I have concluded on this ground that the applicants have not satisfied me that they have a reasonable prospect of success. While I recognize that the issue of the role of Commission counsel is an important one, I am not satisfied that the taking of a position on a motion before the Commissioner would lead a reasonable, well-informed party to reach the conclusion that the Commissioner could not reach a fair decision on the matter.

41 The evidence which the applicants claim support their allegation of a reasonable apprehension of bias relates simply to the fact that Commission counsel is appointed by the Commissioner, assists him in carrying out his mandate and acts throughout the Inquiry on behalf of and on the instructions of the Commissioner. There is no doubt that Commission counsel has an obligation to maintain public confidence in the impartiality of the Inquiry and can be viewed in some respects as the alter ego of the Commissioner.

42 However, that does not mean that Commission counsel is required to act as an adjudicator, namely, to take a neutral role in all decisions which the Commissioner must make. In fact, the contrary is the case. Commission counsel is to provide the Commissioner with her best advice on what the law provides or what fairness dictates. In my view, she was entitled, in accordance with her role and responsibilities, to advise the Commissioner of the context within which the transcripts were created, the assurances she

gave to witnesses, and what the consequences of disclosure of the transcripts would be. For her to conclude that they should not be disclosed is appropriate in regards to the performance of her duties. It is consistent with the role of Commission counsel.

43 It would be no different if, during the course of hearing, she were to take a position on a procedural matter such as, for example, the appropriateness of a question she were to formulate in the examination of the witness. It is not to be expected that the Commissioner would invariably rule in her favour nor would her position and his ruling lead to the conclusion that there was a reasonable apprehension of bias. Such is the situation on this motion.

44 For these reasons I would not direct that the Commissioner state a case with respect to the first matter raised in the notice of motion.

B. Disclosure of the Witness Interview Transcripts

45 The next two questions for which the applicants seek an order for the Commissioner to state a case require consideration of whether the principles of natural justice and procedural fairness or the Inquiry's rules of procedure require the disclosure of the witness interview transcripts to the parties and intervenors. I will deal with those two matters jointly as they are interrelated.

46 As discussed earlier, I am of the view that a case should be stated with respect to the issue of disclosure.

47 At the core of the dispute between Commission counsel and the

applicants is the creation of the transcripts. Commission counsel's position, accepted by the Commissioner, is that the transcripts are nothing more than a substitute for the notes of counsel from which all parties were expecting summaries to be prepared. Only the summaries were contemplated to be provided and then only for those individuals who were interviewed and who were actually to become witnesses at the hearing.

48 The applicants' position is that the creation of transcripts for all those interviewed is something which was not contemplated by the parties or dealt with by the rules. The applicants argue that the existence of transcripts certified by the witnesses and interviewees places different dimensions on the use that can be made of such documents at the hearing.

49 Counsel for the applicants argue that there is significant difference between a transcript and a summary, although they do not challenge the accuracy of the summaries provided. They submit that the ability to review the transcripts would allow assessment of aspects of the witnesses' evidence which is not fully disclosed in the summary and a review of those parts which may have been omitted by the summary-making process for different reasons. In their submission, since the information contained therein is not privileged and is relevant, it is in the interests of procedural fairness that it should be disclosed.

50 Commission counsel confirmed that the transcripts were the basis of the preparation of the summaries and, while the transcripts were not intended to be used by her office (nor for any of other parties for that matter) for purposes of cross-examination, they would be used to frame and

"inform" the evidence of the witnesses.

51 This court, in *Hudson Bay*, found that copies of interview transcripts prepared by Crown counsel when they interviewed potential witnesses were required, under the principle of procedural fairness, to be produced as they were relevant, non-privileged documents. The Commissioner seeks to distinguish *Hudson Bay* on the premise that the Inquiry's own rules of procedure are involved, summaries are available and an assurance of confidentiality was given.

52 The response by the applicants is that, whatever the rules the Inquiry has chosen to follow, they must be subject to the requirements of procedural fairness. The summaries are insufficient when compared to the transcripts in terms of achieving procedural fairness. As to the assurance of confidentiality, they say that it was a limited one which does not meet the tests set out in the jurisprudence to maintain the need for non-disclosure.

53 In my view, the applicants have raised an issue which is one of importance. The transcripts appear to be documents of a similar nature to those this court has found to be subject to disclosure under principles of procedural fairness in a case bearing a strong similarity to what was before the Inquiry. As well, consequences of not dealing with the issue at this time open the Inquiry's work to potential challenge at a later time (see *Chrétien v. Canada (Ex-Commissioner, Commission of Inquiry into the Sponsorship Program and Advertising Activities)*, 2008 FC 802, [2009] 2 F.C.R. 417).

54 Secondly, the argument advanced by the applicants that procedural fairness requires the disclosure, notwithstanding the rules under which they

are created, is one that may require an assessment of whether the claim for confidentiality survives under the *Wigmore* test. It is not a frivolous position and, whether it will be successful or not, deserves to be considered by a panel of this court.

55 I would therefore grant the request that the Commissioner be directed to state a case with respect to those two issues.

Alternative Relief

56 The motion before the Commissioner proposed an alternative means of dealing with the request, namely, that those witnesses who consented to share their transcripts with other parties and intervenors, be allowed to do so. The Commissioner denied that alternative relief. It does not form part of the motion before me. The Commissioner gave his reasons why he did not wish to proceed in that fashion. The parties may wish guidance from the panel on whether such a method would achieve procedural fairness. I leave it to the Commissioner to add anything he wishes in that respect in the stated case.

Delay

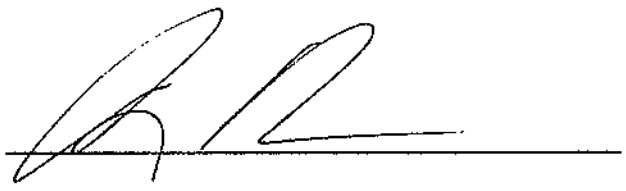
57 The notice of motion requests that I grant an interim order directing that the Inquiry continue its proceedings while the stated case was being heard and determined. At the hearing of the motion, counsel for the applicants recognized that the wording of s. 95(3) would not permit such an order. This interpretation was not challenged by Commission counsel, and I am of the view that I am unable to make such an order in light of the clear wording of s. 95(3).

58 I recognize that, by granting the request for a stated case, the public hearings, which have commenced, will have to be adjourned until after a decision. That is regrettable, but, in my view, necessary in order to have an important issue determined in a manner which will not jeopardize the future determinations of the Inquiry.

59 I have not reached this conclusion lightly. I appreciate the necessity to have the important matters before the Inquiry determined with dispatch, but I must reach the conclusion mandated by the legislation, the facts before me and the relevant jurisprudence.

60 After discussions with the Chief Justice, I can assure the parties that immediately upon receipt of the stated case from the Commissioner, this court will move as expeditiously as possible to have the matter heard and determined in the shortest time possible. Dates are available in October for hearing of this matter if the applicants and Commission counsel are able to arrange for the material to be prepared by that time.

61 I make no order as to costs, but leave that for determination by the panel of the court.



J.A.

Citation: The Southern First Nations Network of Care et al. v. The Honourable Edward Hughes, 2012 MBCA 99

Date: 20121022
Docket: AI 12-30-07838

IN THE COURT OF APPEAL OF MANITOBA

Coram: Chief Justice Richard J. Scott
Madam Justice Freda M. Steel
Madam Justice Barbara M. Hamilton

BETWEEN:

THE SOUTHERN FIRST NATIONS NETWORK OF CARE, THE GENERAL CHILD AND FAMILY SERVICES AUTHORITY, THE FIRST NATIONS OF NORTHERN MANITOBA CHILD AND FAMILY SERVICES AUTHORITY and CHILD AND FAMILY SERVICES ALL NATIONS COORDINATED RESPONSE NETWORK (THE "AUTHORITIES AND ANCR")	)	***K. M. Saxberg*** *and* ***S. C. Scarcello*** *for the Appellants*
	)	***S. M. Walsh*** *and* ***S. Ruel*** *for the Respondent*
	)	***J. J. Gindin*** *and* ***D. A. Ireland*** *for the Intervenors N. Sinclair and K. Edwards*
Appellants	)	
- and -	)	***R. D. Buchwald*** *and* ***N. D. M. Hamilton*** *for the Intervenor D. De Gale*
THE HONOURABLE EDWARD HUGHES, in his capacity as Commissioner under The Manitoba Evidence Act and as appointed pursuant to Order in Council No. 89-2011, dated the 23rd day of March, 2011	)	*Appeal heard:* ***October 9, 2012***
Respondent	)	*Judgment delivered:* ***October 22, 2012***

STEEL J.A.

Introduction

1 This appeal comes before the court as a stated case by The

See 2012 MBCA 83

Honourable Edward Hughes, the Commissioner appointed to conduct a Commission of Inquiry into the circumstances surrounding the brief life and tragic death of Phoenix Sinclair (the Commission). After the Commissioner declined the appellants' request to state a case to the Court of Appeal regarding his refusal to order the disclosure of the transcribed witness interviews by Commission counsel (the transcripts), the appellants obtained an order from a judge of this court directing the Commissioner to state a case on the following two questions (see *The Southern First Nations Network of Care et al. v. The Honourable Edward Hughes*, 2012 MBCA 83):

1. Do the Commission's Amended Rules of Procedure and Practice require the disclosure of witness interview transcripts to the Parties and Intervenors?

2. Do the principles of natural justice and procedural fairness require the disclosure of witness interview transcripts to the Parties and Intervenors?

2 The Commissioner consequently prepared a stated case with respect to these two questions.

The Parties and the Intervenors

3 The appellants, The Southern First Nations Network of Care, The

General Child and Family Services Authority, The First Nations of Northern Manitoba Child and Family Services Authority (the Authorities) and the Child and Family Services All Nations Coordinated Response Network (the ANCR), are agencies involved in child protection and care throughout Manitoba and have standing before the Commission as parties. The appellants argue that disclosure of the transcripts is required pursuant to the Commission's own Rules of Procedure and Practice and pursuant to the principles of natural justice and procedural fairness.

4 The respondent, as noted above, is the Commissioner appointed to conduct the Commission of Inquiry, whose decision refusing to order the disclosure of the transcripts brings the issue before this court.

5 The intervenors Nelson Draper Steve Sinclair (Steve Sinclair) and Kimberly-Ann Edwards have standing before the Commission as parties and support the appellants' request for disclosure of the transcripts. Steve Sinclair is the natural father of Phoenix Sinclair, and Kimberly-Ann Edwards was a principal caregiver to Phoenix Sinclair during much of her short life. The intervenor Debbie De Gale is expected to be a witness at the Commission and objects to disclosure of the transcript of her interview with Commission counsel.

Background

6 On March 23, 2011, the Lieutenant Governor in Council issued Order in Council No. 89/2011 (the OIC) appointing the respondent as

Commissioner for the Commission. The OIC was issued pursuant to s. 83 of *The Manitoba Evidence Act*, C.C.S.M., c. E150 (the *MEA*). Among other tasks, the Commissioner is required to inquire into and report on the following matters (para. 1 of the OIC):

> (a) the child welfare services provided or not provided to Phoenix Sinclair and her family under *The Child and Family Services Act*;
>
> (b) any other circumstances, apart from the delivery of child welfare services, directly related to the death of Phoenix Sinclair; and
>
> (c) why the death of Phoenix Sinclair remained undiscovered for several months.

7 The Commissioner is also to make such recommendations as are considered appropriate to better protect children in Manitoba (para. 2 of the OIC).

8 Paragraph 4 of the OIC allows the Commissioner to "consider any court transcripts and similar documents, which are not subject to a legal claim of privilege, and may give them any weight" as he wishes, "including accepting them as conclusive."

9 Paragraph 9 of the OIC allows the Commissioner, or his counsel, to interview any persons connected with the matter. It states as follows:

> Before public hearings take place, the commissioner may interview any person connected with the matters referred to in paragraph 1. On the commissioner's behalf, interviews may be conducted by counsel for the commissioner, either alone or in the commissioner's presence. If conducted alone, counsel must give the commissioner a transcript or a report of each interview. The commissioner may, in his discretion, rely on the evidence gathered in this manner.

10 The full OIC is attached hereto as Schedule A.

11 Commission counsel was appointed on April 15, 2011, to assist the Commissioner, and applications for standing were granted on June 29, 2011. The Commission's Rules of Procedure and Practice (Commission Rules) were prepared by Commission counsel in consultation with the Commissioner, and all parties and intervenors were invited to review the proposed Commission Rules and make submissions prior to their issuance. After hearing submissions and comments, and with the parties' consent, the Commission Rules were issued on June 29, 2011. They were further amended on August 23, 2011, to deal with the procedure on motions before the Commissioner.

12 For the purpose of this stated case, the relevant provisions of the Commission Rules are as follows:

> 3. In these Rules:
>
> (i) "Commission counsel" refers to counsel appointed by the Commissioner and retained by the Government of Manitoba to act as Commission counsel, and includes any associate counsel or junior counsel appointed by "Commission counsel" with the approval of the Commissioner and under the authority of Commission counsel's retainer;
>
> (ii) the term "documents" is intended to have a broad meaning, and includes the following forms: written, electronic, audiotape, videotape, digital reproductions, photographs, maps, graphs, microfiche and any data and information recorded or stored by means of any device;
>
> (iii) "intervenor" refers to a person granted status as an intervenor by the Commissioner pursuant to paragraph 9;

(iv) "party" refers to a person granted full or partial standing as a party by the Commissioner pursuant to paragraph 8; and

(v) "person" means an individual, group, government, agency or other entity.

16. The Commissioner may consider any court transcripts and similar documents, which are not subject to a legal claim of privilege, and may give them any weight, including accepting them as conclusive.

21. Commission counsel may interview persons believed to have information or documents bearing on the subject-matter of the Inquiry. The Commissioner may choose whether or not to attend an interview.

23. If Commission counsel determines that a person who has been interviewed should be called as a witness in the public hearings referred to in paragraph 2, Commission counsel will prepare a summary of the witness' expected testimony, based on the interview ("Summary"). Commission counsel will provide a copy of the Summary to the witness before he or she testifies in the hearing. After the Summary has been provided to the witness, copies shall be disclosed to the parties and intervenors having an interest in the subject matter of the witness' evidence, on their undertaking to use it only for the purposes of the Inquiry, and on the terms described in paragraphs 27 and 28 below.

24. The Summary of a witness' expected testimony cannot be used for the purpose of cross-examination on a prior inconsistent statement.

25. Pursuant to section 9 of Order in Council 89/2011, if Commission counsel determines that it is not necessary for a person who has been interviewed to be called as a witness, or if the person interviewed is not otherwise able to be called to testify at the public hearings referred to in paragraph 2, Commission Counsel may tender

> the Summary to the Commissioner at the hearing, and the Commissioner may consider the information in the Summary when making his final findings, conclusions and recommendations.
>
> 26. Unless the Commission orders otherwise, all relevant non-privileged documents in the possession of the Commission shall be disclosed to the parties and intervenors at a time reasonably in advance of the witness interviews and/or public hearings or within a reasonable time of the documents becoming available to the Commission.

13 On December 2, 2011, a court order was obtained which allowed the Commissioner and his counsel to obtain confidential child welfare records for the purpose of the Commission. After reviewing those records for relevance, and redacting certain information, the records were subsequently released to the parties and intervenors.

14 Commission counsel proceeded to interview potential witnesses in order to prepare for the public hearings. The method initially followed, as discussed with counsel for the parties, was that Commission counsel would take handwritten notes of the interviews with the witnesses. However, it quickly became apparent that the note-taking procedure was too time-consuming, so other methods were tried. Secretarial staff were assigned to take notes instead, but this too did not work well. In the end, Commission counsel used an audio recording machine to record all remaining interviews, and the recordings were then transcribed. These recorded interviews were informal; there was no court reporter present, nor were the witnesses under oath during the interview.

15 Whether the interviews were recorded by handwritten notes or by

machine, all witnesses were advised that the interviews were for the purpose of informing Commission counsel of their evidence in order to prepare for the hearing. Witnesses were given assurances that the notes, recordings or transcriptions of the recordings were for the use of Commission staff only, although a summary of their evidence would be prepared, shown to them and then circulated to the parties and intervenors, as required by Commission Rule 23.

16 In fact, Commission counsel first sent the handwritten notes and/or transcripts to the witnesses or their counsel so that they could review them and suggest changes or additions. Some witnesses were asked to confirm the accuracy of the handwritten notes and/or transcripts. After receiving feedback, Commission counsel then prepared witness summaries, which were sent to the witnesses (or their counsel if they had one) for any suggested changes or additions. For the most part, suggested changes were incorporated into the final versions of the summaries, which were then provided to the parties and intervenors.

17 In March or April 2012, prior to receiving summaries of the witnesses' interviews, the appellants first became aware that Commission counsel were recording the interviews and having the recordings transcribed, and they requested production of the transcripts. Commission counsel declined.

18 On June 29, 2012, Commission counsel began to distribute witness summaries to parties and intervenors. Seventy-seven witness summaries had been distributed as of September 13, 2012, representing the vast majority of

witnesses expected to testify in the first phase of the Inquiry.

19 On July 4, 2012, the appellants filed a motion with the Commissioner for an order compelling Commission counsel to disclose the transcripts or, alternatively, for an order allowing willing witnesses to disclose their own interview transcripts to the parties and intervenors.

20 The motion was heard by the Commissioner on July 24, 2012. The appellants argued that they were entitled to disclosure of the transcripts on two grounds: (1) by virtue of Rule 26 of the Commission Rules, which provides that all relevant and non-privileged documents in the possession of the Commission are to be disclosed; and (2) by virtue of the principles of natural justice and procedural fairness. Commission counsel opposed the motion. On August 1, 2012, the Commissioner issued a decision denying the appellants' request. See Commission of Inquiry into the Circumstances Surrounding the Death of Phoenix Sinclair, *Commissioner's Decision on Preliminary Motion re Witness Interview Transcripts* (August 1, 2012), online: http://phoenixsinclairinquiry.ca/pdf/commissioner_decision.pdf (last accessed October 18, 2012).

Commissioner's Decision on Disclosure of Transcripts

21 With respect to the appellants' argument that Commission Rule 26 required disclosure of the transcripts, the Commissioner determined that Commission Rule 26 concerned documents received by the Commission, rather than documents created by the Commission for its own internal purposes. The Commissioner was of the view that Commission Rules 21-24

exclusively addressed how information obtained through the pre-hearing interview process would be disclosed.

22 With respect to the appellants' argument that disclosure of the witness interview transcripts was required pursuant to the principles of natural justice and procedural fairness, the Commissioner indicated that he saw no breach of fairness. In his view, it was clear that Commission counsel used the recording and transcription process in place of the note-taking process so as to more efficiently prepare the summaries required by Commission Rule 23. He also noted that the Commission Rules were adopted with the participation and concurrence of all parties and intervenors, and was of the view that it was understood by all that the method of acquainting parties and intervenors with the anticipated evidence would be accomplished by the preparation and delivery of summaries.

23 Furthermore, since Commission counsel had given all potential witnesses the assurance that the interview transcripts would not be distributed to the parties or intervenors, the Commissioner concluded that it would be unfair to Commission counsel and those potential witnesses to order the distribution of the interview transcripts to the parties and intervenors. In his view, this would bring the credibility of the Commission into question and might impede candour when the witnesses testified.

24 The Commissioner also rejected the contention that disclosure of the transcripts was mandated by this court's decision in *Hudson Bay Mining and Smelting Co. v. Cummings, P.C.J.*, 2006 MBCA 98, 208 Man.R. (2d) 75, distinguishing the case on the following bases:

1. that the *Hudson Bay* decision concerned an inquest and not a public inquiry, and that there were considerable differences between the two, especially with respect to the latitude and discretion in determining their own process, rules and procedures;

2. in *Hudson Bay* there was no indication that summaries or "will says" were ever offered or provided to counsel or parties with standing; and

3. in *Hudson Bay* there was no evidence that the comments of witnesses were made with the expectation that they would be kept confidential.

Analysis

Question One: Do the Commission's Amended Rules of Procedure and Practice require the disclosure of witness interview transcripts to the Parties and Intervenors?

25 The relevant OIC provisions and Commission Rules are set out above, and include OIC paras. 4 and 9, and Commission Rules 21, 23-26.

26 It is the position of the appellants that the Commission Rules require the disclosure of the transcripts. They submit that Commission Rule 26 requires that all relevant non-privileged documents in the possession of the Commission be disclosed to the parties and intervenors and that the transcripts are "documents" within the definition of documents in Commission Rule 3(ii).

27 It is the position of the Commissioner that deference should be

accorded to an administrative body's interpretation of its own enabling legislation and applicable subordinate enactments and rules with which it has particular familiarity; consequently, the standard of review for his interpretation of the Commission Rules is reasonableness. He submits that his conclusion that Commission Rule 26 did not cover the transcripts and that Rules 21-24 exclusively addressed the disclosure of information obtained through the pre-hearing interview process was a reasonable interpretation of the Commission Rules.

28 I agree with the Commissioner that the standard of review is one of reasonableness and that the Commissioner is entitled to considerable deference in the interpretation of the Commission Rules. See *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7 at para. 26, [2011] 1 S.C.R. 160; *Anderson et al. v. Manitoba et al.*, 2010 MBCA 113 at para. 66, 262 Man.R. (2d) 96; *Darcis et al. v. Manitoba et al.*, 2012 MBCA 49 at paras. 31-36, 280 Man.R. (2d) 160; and *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at paras. 30, 34, [2011] 3 S.C.R. 654.

29 In his decision, the Commissioner explained why he had come to the conclusion that Commission Rule 26 was not applicable, and why Commission Rule 23 did not include disclosure of the interview transcripts. He explained (at para. 16):

> .... Rule 26 was put in place to cover documents received by the Commission and not documents created by it or for its own internal purposes. Rules 21 to 24 exclusively address the disclosure of information obtained through the pre-hearing interview process. The reference to documents in Rule 26 is to information received by the

> Commission in writing or similar form and not information created by the Commission for its own internal purposes.

30 I find that the Commissioner's decision to the effect that Rule 26 does not apply to the transcripts is a reasonable interpretation. Consequently, I would answer "No" to the question:

> Do the Commission's Amended Rules of Procedure and Practice require the disclosure of witness interview transcripts to the Parties and Intervenors?

For the same reasons, Commission Rule 16 would not be applicable to the transcripts, as argued by the intervenors Steve Sinclair and Edwards.

<u>Question Two:</u> Do the principles of natural justice and procedural fairness require the disclosure of witness interview transcripts to the Parties and Intervenors?

31 It is the position of the appellants that the principles of natural justice and procedural fairness require the disclosure of the transcripts. They submit that the content of procedural fairness is contextual and dependent upon the nature of the particular hearing. They argue that the process followed by a commission of inquiry bears strong similarities to the judicial process and, further, that the importance of the Commission's recommendations and the possible effect on reputations require a high degree of procedural fairness.

32 They argue that the parties and intervenors did not agree to a process whereby the transcripts would be prepared but not disclosed to the parties, resulting in only Commission counsel being able to use the transcripts to prepare for the hearings. They also assert that the witness summaries are inadequate in that they do not provide the detail necessary for the parties and intervenors to prepare adequately for the hearings; in the result, they do not meet the high level of procedural fairness required. They are entitled, they say, to the "best evidence," namely, the transcripts.

33 The Commissioner agrees that the content of procedural fairness is indeed contextual and dependent upon the nature of the particular hearing, but argues that the contextual factors in this case indicate that a much lower level of procedural fairness is required than that proposed by the appellants. In this regard, the Commissioner submits that commissions of inquiry are quite different from judicial decision-making, as commissions of inquiry do not come to legal determinations, are investigatory in nature, and are given wide latitude with respect to the establishment of their own process and procedures.

34 Furthermore, the Commissioner argues that, although reputational interests may be affected, the level of procedural fairness must be balanced with other important considerations, including efficiency and cost-effectiveness, so as to complete the Commission's important public mandate in a timely, but fair, manner. Finally, the Commissioner submits that since it was the expectation of all that only summaries of the witness interviews would be disclosed, the Commission's choice in determining the method of recording witness interviews should be respected. The Commissioner,

therefore, submits that the disclosure procedures in this instance were consistent with the most stringent of disclosure standards required in proceedings such as this, and that, therefore, the requirements of procedural fairness have been more than met.

35 I agree that it is not correct terminology to discuss the duty of procedural fairness in terms of the standard of review analysis. See *2127423 Manitoba Ltd. v. Unicity Taxi Ltd. et al.*, 2012 MBCA 75 at para. 11, 280 Man.R. (2d) 292. Whether procedures are fair depends on the circumstances of the case. Therefore, instead of discussing the standard of review, the court must ascertain whether the Commission's procedures are procedurally fair in light of the five well-established *Baker* factors, which explain the content of the duty of procedural fairness. See *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817. In *Friesen (Brian Neil) Dental Corp. et al. v. Director of Companies Office (Man.) et al.*, 2011 MBCA 20, 262 Man.R. (2d) 197, the five *Baker* factors were described as (at para. 75):

> 1. the nature of the decision being made and process followed in making it;
>
> 2. the nature of the statutory scheme and the terms of the statute pursuant to which the body operates;
>
> 3. the importance of the decision to the individual or individuals affected;
>
> 4. the legitimate expectations of the person challenging the decision; and
>
> 5. the choices of procedure made by the agency itself.

36 Also see *Hudson Bay* at para. 95. It should be noted that, as stated in *Baker*, these five factors are not exhaustive.

37 The court must examine these factors not abstractly, but based on the actual facts in this case. As all counsel agreed, the factors are contextual and dependent upon the nature of the particular hearing. See *Baker* at para. 21, *Unicity Taxi* at para. 15, and *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159 at 181-82.

38 As well, the level of disclosure required by the duty of procedural fairness varies along a spectrum, depending on a consideration of the five factors outlined above. In this regard, see Sara Blake, *Administrative Law in Canada*, 5th ed. (Markham: LexisNexis Canada Inc., 2011), where she states (at p. 37):

> The extent of disclosure varies along a spectrum. At one end is simply a requirement that the person be told verbally the gist of the factual subject and the nature of the decision to be made. Further along the spectrum is the requirement to give advance written notice of the nature of the decision to be made and the key facts upon which it will be based. To that requirement may be added the requirement to disclose the evidence to be presented to the decision maker. At the far end of the spectrum, the party may be entitled to review all relevant information (except privileged material) including material which will not be submitted to the decision maker.

39 Balancing all of these factors in the context of this case, I would answer question two in the negative as well. For the reasons that follow, I conclude that procedural fairness, in this instance, is satisfied by the provision of detailed, meaningful summaries of the witnesses' evidence and,

therefore, the disclosure of the transcripts is not required. I note that, in addition to the summary of an individual witness's expected evidence, Commission counsel included a list of documents likely to be referenced in that witness's examination-in-chief. Furthermore, at the request of some counsel, Commission counsel has identified the specific page numbers of documents which are likely to be referred to by a particular witness.

40 The parties never expected to receive more than summaries of the witness's evidence. They were fully involved in the development of the Commission Rules and made no objection to the disclosure being provided by way of summaries.

41 It is true that it was initially contemplated that junior Commission counsel would take notes of the witnesses' interviews and use those notes to produce summaries. As this turned out to be administratively impractical, the change was made to tape the interviews and then prepare transcripts.

42 In my opinion, whether junior Commission counsel took notes of an interview, an assistant took shorthand, or a verbatim transcript was recorded is irrelevant to the central issue of the parties' legitimate expectations. They always expected to receive summaries of the expected testimony of the witnesses, and this is what happened.

43 The request for only the transcripts is puzzling. If the summaries are not sufficient, why are the parties not also requesting the handwritten notes taken before audio taping was instituted? Besides the 85 interviews documented by transcribed recordings totalling 11,762 pages, there are 80

interviews documented by notes totalling 1,141 pages (41 interviews were recorded, but never transcribed).

44 However, as readily conceded by Commission counsel, it is critical that the summary be not only adequate, but meaningful. Similar to a "will say" statement in criminal matters, the summary must set out the anticipated evidence of the witness. It must be sufficiently detailed to allow counsel for the parties to prepare their lines of questioning, keeping in mind that the Commission Rules do not permit counsel to cross-examine on the summaries. Indeed, in his book *The Law of Public Inquiries in Canada* (Toronto: Thomson Reuters Canada Ltd., 2010), one of the counsel for the Commission, Simon Ruel, equates summaries with "will says" or "statements of anticipated evidence." He states (at p. 73):

> The rules of procedure of commissions of inquiry will typically allow the advance sharing of summaries or statements of anticipated evidence or will says with the parties with standing. ....
>
> [emphasis added]

45 An example of the rationale for detailed summaries is described in an article by Commissioner Justice Dennis O'Connor, "The Role of Commission Counsel in a Public Inquiry" (2003) 22: Advocates' Soc. J. 9 (QL) (at paras. 18-19):

> .... [T]here is a huge advantage to having commission counsel thoroughly interview the witnesses and prepare very detailed witness statements for two reasons. First, there should be no surprises to others who are involved in the process. The proceeding is entirely investigatory and not adversarial. Nothing is gained by surprise, and there is a danger of unfairness if witnesses are examined on areas in

> the evidence for the first time in the midst of the public hearing. Because of the media attention that often accompanies a public inquiry, the potential for unfairly damaging a witness's reputation must always be kept in mind.
>
> The second reason that witnesses should be thoroughly interviewed and detailed witness statements prepared is that doing so will likely significantly shorten the time taken in the actual hearings. When it is understood in advance what a witness's evidence is likely to be, the examinations of commission counsel and the cross-examiners tend to get to the point much more quickly.

46 In oral argument, Commission counsel indicated that counsel for the appellants did not request more detailed summaries before the motion for disclosure, now before this court, was commenced. Notwithstanding, Commission counsel Ms Walsh advised that if the summaries already provided were not sufficiently detailed, she was willing to work with counsel for the appellants and the intervenors to provide further information, but no such request had yet been made. Nor had the issue been presented squarely to the Commissioner, other than in the context of their motion requesting disclosure of all the transcripts. Moreover, Commission counsel argued, while this court was told in argument that the summaries lacked sufficient detail, no particulars of that lack of detail were provided. Therefore, Commission counsel argued, a decision that the summaries are not sufficient to fulfill the duty of procedural fairness in this case is not only premature, but also speculative.

47 This court has already noted that the utilization of the summary disclosure process assumes sufficient detail is provided to fulfill the requirements outlined in the quote from Commissioner O'Connor. Having

so decided, it is not for this court to oversee the conduct of the Inquiry by determining the degree of detail that must be provided in each and every summary. That is for the Commissioner to decide on a case-by-case basis. He is entitled to significant deference regarding his process. While the Commission's procedures must, of course, be procedurally fair, as a general rule, a tribunal is the master of its own procedure and is entitled to streamline its disclosure procedures in keeping with its objective to expedite the hearing process. See *Clifford v. Ontario (Attorney General)* (2008), 90 O.R. (3d) 742 at para. 10 (Div. Ct.), rev'd on other grounds 2009 ONCA 670, 98 O.R. (3d) 210).

48 In addition, questions remain as to the relevance of all the material being requested. Given the wide-ranging nature of the interviews, it is expected that parts of the interviews will not be pertinent to the Inquiry. Nor, it would seem, has a decision been made that all of the witnesses interviewed will be called at the Inquiry. For example, in its factum, the appellants refer to transcripts that Commission counsel conducted "with prospective witnesses."

49 The appellants rely heavily on the case of *Hudson Bay*. They argue that this Inquiry is on all fours with *Hudson Bay* and, therefore, disclosure of the transcripts is mandated here, as it was there.

50 The issue in *Hudson Bay* was whether transcripts of interviews conducted by Crown counsel in preparation for an inquest under *The Fatality Inquiries Act*, C.C.S.M., c. F52 (the *FIA*), were privileged and, if not, whether disclosure of the transcripts was required. In that decision, the

court determined that the transcripts were not privileged, and that the standard of procedural fairness required in an inquest required disclosure to the parties with standing in the factual circumstances of that case.

51 I do not agree that our decision here is governed by *Hudson Bay* for several reasons.

52 First, the *Hudson Bay* case involved an inquest. This is a public inquiry. While *Hudson Bay* notes that some of the goals of the two are similar and that both are concerned with being fair fact-finding processes, differences were also explained. In particular, in *Hudson Bay*, the court stated, "unlike inquests, inquiries are not limited to merely death-related matters" (at para. 38), and further stated (at n. 1):

> Public inquiries are a different matter, although they may have some goals similar to inquests. .... For the most part, the [Canadian public inquiries] legislation permits inquiries into broad matters of public concern. ....

53 These differences are evident when comparing the legislation. The legislation governing inquests is the *FIA*; the relevant legislation for commissions of inquiry is contained in Part V (ss. 83-96) of the *MEA*. Neither *Act* provides detailed procedural rules. However, it is clear that there is a difference in the scope of the investigation required in each case.

54 Under the *FIA,* inquests are assigned to a judge who must determine the material circumstances of the death, including the cause, manner and circumstances of the death, the identity and age of the deceased, and the date, time and place of death. The judge is not required to do anything

more, although he or she may recommend changes in provincial programs, policies, legislation or practices if he or she is of the opinion that such changes could reduce the likelihood of similar deaths (s. 33(1)).

55 Under the *MEA*, on the other hand, a commission of inquiry is assigned to an independent commissioner to inquire into those defined matters which the Lieutenant Governor in Council believes to be of sufficient public importance and which are not otherwise regulated (s. 83(1)). A commissioner's particular mandate and powers are granted by way of a specific Order in Council. This endows the commission with a broad mandate and allows commissioners a wide discretion within the terms of reference regarding the scope of inquiry, and the process to be followed. This difference in scope and authority impacts on the balance between procedural fairness and effectiveness. The public interest is not served by inquiries that take years to complete.

56 More crucial than the difference in legislation are the factual differences. In *Hudson Bay*, no summaries of the interviews by Crown counsel were provided or offered to the other parties. There had been no discussion as to rules in this regard. There were no assurances given directly to the witnesses in *Hudson Bay* that the transcripts were for internal purposes only. There was no agreement in *Hudson Bay* that the transcripts or summaries would not be used for cross-examination purposes.

57 As to relevance, in the *Hudson Bay* case, the transcripts at issue related to witnesses that Crown counsel had already decided were going to testify. There were concerns about conflicting evidence and an

evidentiary vacuum in some instances.

58 Also significant is the difference in scope between this Inquiry and the *Hudson Bay* inquest. In *Hudson Bay*, a total of 23 witnesses testified, but at the time the motion for the transcripts was brought, 12 witnesses had already testified. The question of statutorily confidential information did not arise nor was the necessity to redact material raised. The transcripts in question were ready and there were no summaries prepared or contemplated. One of the reasons that the transcripts were ordered to be produced was that it was more expeditious than the preparation of summaries at that point in the inquest. In fact, as stated (at para. 110):

> Although counsel for [Manitoba's Workplace Safety & Health Division (Mines Branch)] indicated she would be satisfied with "will says," someone would have to review all the transcripts and prepare the "will says." I do not believe that is an expeditious way to proceed in this particular case. "Will says" can be produced if the evidence is not available in a convenient format (that is, there are privileged parts to it) (see **Johal** [*R. v. Johal*, [1995] B.C.J. No. 1271 (S.C.) (QL)], at paras. 7-10). Here, I have already held that the entire interview is not privileged and the interviews have already been transcribed. Therefore, I believe that the appropriate remedy would be for the inquest judge to order disclosure of the actual transcripts. It may be otherwise in different circumstances. The order of disclosure may be subject to such terms and conditions as may be agreed upon by the parties and, if necessary, ordered by the inquest judge.

59 In contrast, this is a wide-ranging public inquiry with three separate phases. There have been approximately 154 potential witnesses interviewed. Some potential witnesses have been interviewed more than once and some interviews were conducted in group settings. A total of 46,000 pages of

material have already been reviewed line by line to delete confidential information and disclosed. The transcripts in dispute constitute another 11,000 pages, representing 85 interviews, which, Commission counsel argues, would, if disclosed, have to be reviewed line by line to delete confidential information before they could be released. We were told that at least 77 summaries have already been prepared.

60 Besides relying on the *Hudson Bay* case itself, the appellants also submit that both the *Driskell Inquiry* (Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell, *Report* (Winnipeg: The Commission, 2007) online: http://www.driskellinquiry.ca/index.html (last accessed October 18, 2012)) and the *Taman Inquiry* (Commission of Inquiry into the Investigation and Prosecution of Derek Harvey-Zenk, *Report* (Winnipeg: Department of Justice, 2008) online: http://www.tamaninquiry.ca/ (last accessed October 18, 2012)) felt bound by this court's *Hudson Bay* decision and, consequently, allowed for the disclosure of pre-hearing witness interview transcripts.

61 The *Driskell Inquiry* rules of procedure (accessible online: http://www.driskellinquiry.ca/pdf/rulesprocedurepractice.pdf, last accessed October 18, 2012) were finalized April 4, 2006, prior to the release of the *Hudson Bay* decision (released September 15, 2006). The *Taman Inquiry* rules of procedure (accessible online: http://www.tamaninquiry.ca/pdf /taman-rules_of_procedure_and_practice.pdf, last accessed October 18, 2012) were finalized after *Hudson Bay* was decided. However, in the initial proceedings before the Taman Commissioner, Taman Commission counsel indicated that the rules of procedure were modelled on those used in other

commissions of inquiry, and adapted somewhat from the *Driskell Inquiry*.

62 Interestingly, the rules of the *Driskell Inquiry* and the *Taman Inquiry* allowed commission counsel a choice of disclosing the witness transcript or a summary. If the witness was to be called, the rules stated that "Commission counsel will prepare a statement of the witness's anticipated evidence or a transcript of their interview," and it would be provided to the witness for review and then disclosed to the parties. If the witness was not going to be called, then the rules stated that "Commission counsel will provide the parties with a transcript of the interview, if available, or a summary of the relevant information provided by that person."

63 Next, the appellants argue that, at the very least, those witnesses who consent could have their transcripts released to the rest of the parties. They submit that as professional witnesses, they can be trusted to delete any confidential information that is contained in their own transcripts. However, I do not think it is appropriate for Commission counsel to delegate that duty. By order dated December 2, 2011, Chief Justice Joyal of the Court of Queen's Bench determined that the Commissioner and Commission staff could make use of statutorily confidential records and the information contained therein for the purposes of the Inquiry, including disclosing and communicating the information to the parties and intervenors on such terms as would be determined by the Commissioner. By the terms of this order, therefore, it is the Commission's responsibility alone to determine what records and information will be disclosed to the parties and intervenors.

64 After receiving written submissions from the parties and intervenors

with standing, the Commissioner ruled that the following redactions should be made to the records and the information contained therein: the identification of informants providing information to child welfare authorities about child protection and safety matters; the identity of children who were under 18 years of age; and the names of foster parents or other individuals, if their identities are irrelevant to the Commission's mandate. See Commission of Inquiry into the Circumstances Surrounding the Death of Phoenix Sinclair, *Ruling on Redactions* (December 2, 2011), online: http://phoenixsinclairinquiry.ca/rulings/ruling_redactions.pdf (last accessed October 18, 2012).

65 As submitted by Commission counsel, the transcripts can be expected to contain some of the confidential information redacted from the documents because some of it will be information about that which the witnesses have personal knowledge. In recounting their experiences during the informal witness interviews and on the understanding that the interview was for internal Commission purposes only, it is readily understandable that discussion would ensue relating to irrelevant facts as well as and references to persons unconnected to the mandate of the inquiry. Moreover, inevitably there were informants in this case whose identity it would not be in the public interest to disclose.

66 While the Commissioner is not permitted to express any conclusion or recommendation about the civil or criminal liability of any person (para. 5 of the OIC), the Commissioner is entitled to make findings of misconduct pursuant to Commission Rules 47-49. A finding of misconduct carries with it potential personal and professional consequences. This is especially so

given the brutal murder of this young child which has rightly attracted wide public attention.

67 I do not wish to minimize the emotional, mental and reputational impact this matter has had on the parties and intervenors. "Persons involved in public inquires, even if they are not the primary subject of examination, may become victims of 'collateral damage'" (Ruel at p. 131).

68 In this regard, the following comments of Cory J. in *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System)*, [1997] 3 S.C.R. 440 are pertinent (at para. 55):

> The findings of fact and the conclusions of the commissioner may well have an adverse effect upon a witness or a party to the inquiry. .... It is true that the findings of a commissioner cannot result in either penal or civil consequences for a witness. .... Nonetheless, procedural fairness is essential for the findings of commissions may damage the reputation of a witness. For most, a good reputation is their most highly prized attribute. It follows that it is essential that procedural fairness be demonstrated in the hearings of the commission.

69 To that end, I agree with counsel for the appellants that a significant degree of procedural fairness is owed to those who are called to testify because of the potential impact on the witnesses' reputations and careers.

70 But there must be some balance. This is not a trial. The parties and intervenors are not entitled to perfection or even a *R. v. Stinchcombe*, [1995] 1 S.C.R. 754, level of disclosure, as mandated in criminal proceedings. Procedural fairness must be balanced with the need for an inquiry to be thorough, rigorous, expeditious, efficient, timely and effective in the public

interest. Justice delayed is justice denied. I also agree with the statements of Justice Teitelbaum in *Chrétien v. Canada (Ex-Commissioner, Commission of Inquiry into the Sponsorship Program and Advertising Activities)*, 2008 FC 802, [2009] 2 F.C.R. 417 (at para. 54):

> This is not to say, however, that the content of fairness is necessarily more stringent where there is a risk that one's reputation may be negatively affected. As I stated in *Addy v. Canada (Commission and Chairperson, Commission of Inquiry into the Deployment of Canadian Forces in Somalia)*, [1997] 3 F.C. 784 (T.D.) "the possible and purported damage to the applicants' reputations must not trump all other factors and interests" (*Addy*, at paragraph 50). In determining the standard of fairness, it is necessary to "balance the risks to an individual's reputation and the social interests in publication of a report" (*Addy*, at paragraph 61). Likewise, the risks to an individual's reputation must be balanced with the social interest in permitting the commission to conduct its inquiry and to inform and educate the public about the matter or conduct under review.

71 There is one essential undertaking that is the linchpin of this decision. In support of their argument that the transcripts should be disclosed, the appellants expressed great concern that the Commission Rules, together with para. 9 of the OIC, allow for summaries to be tendered as evidence without the need for calling the individual as a witness at the public hearing, and that the transcripts or reports of the interviews can be relied on by the Commissioner in rendering his final report. So, for example, Rule 25 allows Commission counsel to "tender the Summary to the Commissioner at the hearing, and the Commissioner may consider the information in the Summary when making his final findings, conclusions and recommendations."

72 In addition, para. 9 of the OIC states:

> Before public hearings take place, the commissioner may interview any person connected with the matters referred to in paragraph 1. On the commissioner's behalf, interviews may be conducted by counsel for the commissioner, either alone or in the commissioner's presence. If conducted alone, counsel must give the commissioner a transcript or a report of each interview. The commissioner may, in his discretion, rely on the evidence gathered in this manner.

73 In response to this concern, two undertakings were given by Commission counsel, in the factum and in oral argument; that the Commissioner would not rely on the power given to him in para. 9 of the OIC and that, except for two witnesses whose evidence is uncontested, the Commission expects to call all witnesses to testify in person at the public hearings. For further clarity, in paras. 22-23 of the Commission's factum it is stated that:

> 22. .... The Commission expects to call all witnesses to testify in person in public hearings, thus making the use of that Rule unnecessary. ....
>
> 23. The Commissioner has made clear that all witness evidence will be tendered in the public hearings. He will not be informed of that evidence in advance and will not consider transcriptions of pre-hearing interviews. ....

74 At the hearing of the stated case, one of the intervenors, Debbie De Gale, who argued against the disclosure of her interview transcript, asked to file an affidavit before the court as an addition to the stated case. This was opposed by counsel for the appellants. Counsel for the Commission took no position. After hearing argument, we reserved decision. Given

these reasons, it is unnecessary to deal with the question of the admission of that affidavit.

75 In addition, given these reasons, it is unnecessary to deal with the issues of confidentiality and privilege raised by some of the parties and intervenors.

76 Finally, I would like to add a few comments regarding the role of all counsel in public inquiries. This is not intended as a criticism of any of the counsel in these proceedings, but rather to give guidance as to what this court expects from counsel going forward.

77 Rule 7 of the Commission Rules indicates that Commission counsel's role is to assist the Commissioner to ensure the orderly conduct of the Inquiry, and that Commission counsel will have the primary responsibility for representing the public interest at the Inquiry, including the responsibility to ensure that all matters that bear upon the public interest are brought to the Commissioner's attention. In the *Stevens Inquiry* (Commission of Inquiry into the Facts of Allegations of Conflict of Interest Concerning the Honourable Sinclair M. Stevens, *Report* (Ottawa: Minister of Supply and Services Canada, 1987)), Commissioner Parker addressed the proper role of commission counsel in such proceedings, stating (as quoted in Ed Ratushny, *The Conduct of Public Inquiries: law, policy, and practice* (Toronto: Irwin Law Inc., 2009) at 220):

> .... I am satisfied that his or her task is to ensure that all of the evidence, all of the issues, and all possible theories are brought forward to the Commission. In this context, counsel's obligation is most often described as the duty to be impartial.

78 In the *Toronto Computer Leasing Inquiry* (Toronto Computer Leasing Inquiry/Toronto External Contracts Inquiry, *Report* (Toronto: City of Toronto, 2005)), Commissioner Bellamy delineated the impartiality of commission counsel in this way in her ruling of October 15, 2003 (as quoted in Ratushny at pp. 221-22):

> Impartiality on the part of commission counsel is not to be confused with a lack of rigour and vigilance in seeking the truth. Commission counsel must still act forcefully whenever necessary to overcome resistance that could obscure truth. This persistence is particularly important wherever the transparency of public inquiries motivates resistance on the part of those with something to hide. What makes commission counsel's role unique is that they must take into consideration the public interest, the interests of all parties, and furthermore, must explore conscientiously all plausible explanations and outcomes regardless of whose interests are advanced. We have now reached a point in the evolution of commission counsel's role where it can be confidently asserted that every task they undertake must be infused with impartiality inseparable in degree from that of the commissioner.

79 I agree with this view of the role of commission counsel. It is commission counsel who has the primary responsibility to vigorously and completely represent the public interest, including the interests, issues and theories of all parties. In order to do so, commission counsel needs to foster effective communication with all of the parties to the Inquiry. By way of illustration, the parties may be able to shed light on information not initially thought to be relevant or suggest additional fields of inquiry. Conversely, commission counsel should ensure that relevant information is getting to the parties on a timely basis, and should be available to discuss issues

with other counsel.

80 Parties granted standing in a commission of inquiry need to be aware of the wide scope of commission counsel's mandate, and should be able to trust and rely upon commission counsel to fulfill that role. As stated by Ratushny (at p. 257):

> .... The parties granted standing have a "substantial and direct interest" in some aspect(s) of the inquiry's terms of reference. But commission counsel responsible for marshalling the evidence and managing the hearings represents the public interest with respect to all aspects. No other person has the same comprehensive and intimate knowledge of all of the evidence and witnesses and their interrelationships. ....

81 Counsel for parties and intervenors with standing should endeavour to assist commission counsel by communicating any issues that are of concern to them and their clients. This will greatly assist commission counsel in effectively bringing forward the interests, issues and theories of all parties in the public interest. While the courts are available to remedy a breach of procedural fairness, it is important that counsel work together toward the common goal of facilitating the important work of a commission of inquiry.

82 An atmosphere of fairness, openness and cooperation among all parties will not only contribute to the smooth functioning of the hearings, but to the ultimate goal of this Inquiry, which is the better protection of and service to the children in care in the Province of Manitoba.

Conclusion

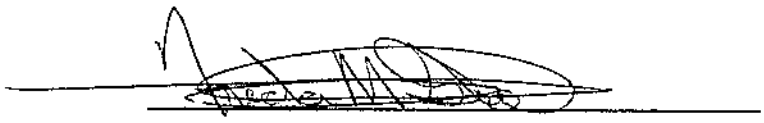
83 Consequently, for the reasons given, I would answer the two questions in the stated case as follows:

1. Do the Commission's Amended Rules of Procedure and Practice require the disclosure of witness interview transcripts to the Parties and Intervenors?

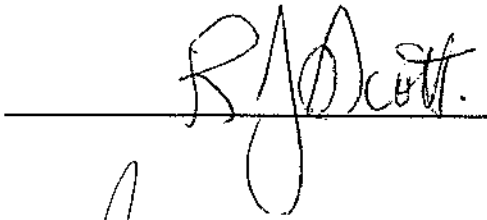
   No.

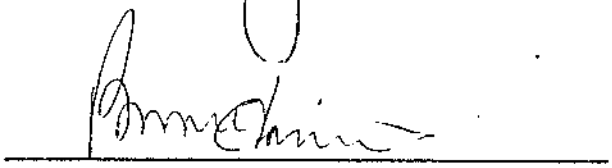
2. Do the principles of natural justice and procedural fairness require the disclosure of witness interview transcripts to the Parties and Intervenors?

   No.



J.A.

I agree:  C.J.M.

I agree:  J.A.

Schedule A

MANITOBA

ORDER IN COUNCIL

DATE: **March 23, 2011**

ORDER IN COUNCIL NO.: **89/2011**

RECOMMENDED BY: **Minister of Justice**

ORDER

1. The Honourable Edward (Ted) N. Hughes, OC, QC, LL.D (Hon) is appointed as commissioner to inquire into the circumstances surrounding the death of Phoenix Sinclair and, in particular, to inquire into:

   (a) the child welfare services provided or not provided to Phoenix Sinclair and her family under *The Child and Family Services Act*;

   (b) any other circumstances, apart from the delivery of child welfare services, directly related to the death of Phoenix Sinclair; and

   (c) why the death of Phoenix Sinclair remained undiscovered for several months.

2. The commissioner must report his findings on these matters and make such recommendations as he considers appropriate to better protect Manitoba children, having regard to the recommendations, as subsequently implemented, made in the reports done after the death of Phoenix Sinclair, set out in paragraph 3.

3. To avoid duplication in the conduct of the inquiry and to ensure recommendations relevant to the current state of child welfare services in Manitoba, the commissioner must consider the findings made in the following reviews and the manner in which their recommendations have been implemented. He may give the reviews any weight, including accepting them as conclusive:

   (a) A Special Case Review In Regard To The Death Of Phoenix Sinclair, Andrew J. Koster and Billie Schibler (September, 2006)

   (b) Investigation into the Services Provided to Phoenix Victoria Hope Sinclair, Department of Justice, Office of the Chief Medical Examiner (September 18, 2006)

   (c) Strengthen The Commitment An External Review of the Child Welfare System, Michael Hardy, Billie Schibler and Irene Hamilton (September 29, 2006)

   (d) "Honouring Their Spirit", The Child Death Review: A Report to the Minister of Family Services and Housing, Province of Manitoba, Billie Schibler and James H. Newton (September, 2006)

   (e) Strengthening our Youth: Their Journey to Competence and Independance, A Report on Youth Leaving Manitoba's Child Welfare System, Billie Schibler, Children's Advocate, and Alice McEwan-Morris (November, 2006)

   (f) Audit of the Child and Family Services Division, Pre-devolution Child in Care Processes and Practices, Carol Bellringer, Auditor General (December, 2006)

4. The commissioner may also consider any court transcripts and similar documents, which are not subject to a legal claim of privilege, and may give them any weight, including accepting them as conclusive.

5. The commissioner must perform his duties without expressing any conclusion or recommendation about civil or criminal liability of any person.

6. The commissioner must complete his inquiry and deliver a final report containing his findings, conclusions and recommendations to the Minister of Justice and Attorney

General by March 30, 2012. He may also give the Minister of Justice and Attorney General any interim reports that he considers appropriate to address urgent matters. All reports must be in a form appropriate for public release, but release is subject to *The Freedom of Information and Protection of Privacy Act* and other relevant laws.

7. Nothing in paragraph 1 limits the commissioner's right to request the Lieutenant Governor in Council to expand the terms of reference to cover any matter that he considers necessary as a result of information that comes to his attention during the course of the inquiry.

8. Government departments and agencies and other bodies established under the authority of the Manitoba Legislature must assist the commissioner to the fullest extent permitted by law.

9. Before public hearings take place, the commissioner may interview any person connected with the matters referred to in paragraph 1. On the commissioner's behalf, interviews may be conducted by counsel for the commissioner, either alone or in the commissioner's presence. If conducted alone, counsel must give the commissioner a transcript or a report of each interview. The commissioner may, in his discretion, rely on the evidence gathered in this manner.

10. The Minister of Finance may pay the following amounts from the Consolidated Fund, at the request of the Minister of Justice and Attorney General:

    (a) travelling and other incidental expenses that the commissioner incurs conducting his inquiry;

    (b) fees and salaries of any advisors and assistants employed or retained for the purpose of the inquiry;

    (c) any other operational expenditures required to support the inquiry.

11. This Order is effective immediately.

AUTHORITY

Subsection 83(1) and section 96 of *The Manitoba Evidence Act*, C.C.S.M. c. E150, state in part:

Appointment of commission
83(1) Where the Lieutenant Governor in Council deems it expedient to cause inquiry to be made into and concerning any matter within the jurisdiction of the Legislature and connected with or affecting

...

(c) the administration of justice within the province;

...

(f) any matter which, in his opinion, is of sufficient public importance to justify an inquiry;

he may, if the inquiry is not otherwise regulated, appoint one or more commissioners to make the inquiry and to report thereon.

Power to make rules
96 The Lieutenant Governor in Council may make provision, either generally in regard to all commissions issued and inquiries held under this Part, or specially in regard to any such commission and inquiry, for

(a) the remuneration of commissioners and persons employed or engaged to assist in the inquiry, including witnesses;

(b) the payment of incidental and necessary expenses; and

(c) all such acts, matters, and things, as are necessary to enable complete effect to be given to every provision of this Part.

COMMISSION OF INQUIRY INTO THE CIRCUMSTANCES
SURROUNDING THE DEATH OF PHOENIX SINCLAIR

The Honourable E.N. (Ted) Hughes, O.C., Q.C., LL.D (Hon),
Commissioner

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Ruling on Publication Ban

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Thursday, July 12, 2012

Appearances

Ms. S. Walsh **Ms. K. Mccandless**	Commission Counsel Associate Commission Counsel
Mr. G. Mckinnon	Department of Family Services and Consumer Affairs (now known as the Department of Family Services and Labour)
G. Smorang, Q.C.	Manitoba Government and General Employees' Union
Mr. K. Saxberg	General Child and Family Services Authority, First Nations of Northern Manitoba Child and Family Services Authority, First Nations of Southern Manitoba Child and Family Services Authority, and Child and Family All Nation Coordinated Response Network
Mr. H. Khan	Intertribal Child and Family Services
Mr. J. Gindin **Mr. D. Ireland**	Ms. Kimberly-Ann Edwards and Mr. Nelson Draper Steve Sinclair
Mr. J. Funke **Ms. J. Saunders**	Assembly of Manitoba Chiefs and Southern Chiefs Organization Inc.
Mr. G. Juliano **Ms. M. Versace**	University of Manitoba, Faculty of Social Work
Ms. V. Rachlis	SOR #1, SOR #2, SOR #4, PHN and TM
Mr. S. Paul	SOR #3
Mr. W. Gange	SOR #5, SOR #6 and SOR #7
Mr. J. Kroft **Ms. B. Chisick**	Canadian Broadcasting Corporation, CTV Winnipeg, Global Winnipeg and Winnipeg Free Press

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COMMISSION OF INQUIRY INTO THE CIRCUMSTANCES
SURROUNDING THE DEATH OF PHOENIX SINCLAIR

I. Introduction

1. The applicants, Manitoba Government and General Employees' Union (MGEU), The General Child and Family Services Authority, First Nations of Northern Manitoba Child and Family Services Authority, First Nations of Southern Manitoba Child and Family Services Authority and Child and Family All Nation Coordinated Response Network (Authorities/ANCR), and Intertribal Child and Family Services (ICFS), are parties with full standing in this inquiry. They have filed motions seeking publication bans for certain witnesses at the public hearings of this inquiry. While each of MGEU, Authorities/ANCR, and ICFS filed their own motions, at the conclusion of oral submissions on these motions, the applicants reached a consensus as to the specific relief they have sought. The applicants have asked for:

> An order prohibiting any form of publishing, broadcasting, or otherwise communicating by television, internet, radio, in print or any other means the name and/or image of any witness who is or was a social worker, and the name of any social worker identified in documents produced at the inquiry.

2. MGEU and ICFS also asked, in the alternative, that I grant an order prohibiting video or audio recording or broadcasting of testimony of social workers at the inquiry.

3. The Commission's media and communications protocol, which has applied to date, provides that in the absence of any orders restricting access, this inquiry's hearings will be open

to the public. Audio and video recording and broadcasting of the inquiry's proceedings, including live streaming, will be permitted.

4. The applicants' primary concern is that the public receiving information about this inquiry through the media not learn the name or see the image of a witness to whom the requested order would apply. In argument, counsel for the MGEU acknowledged that, if I were to grant the order it seeks, it would not be possible to prevent members of the public in attendance at the hearings from discussing or otherwise communicating the name of a witness called at the hearing.

5. In addition to the motions brought by the applicants, a number of other motions were brought, which I will address later in these reasons.

6. The applicants' motions are opposed by: a media consortium comprised of Canadian Broadcasting Corporation, CTV Winnipeg, Global Winnipeg, and The Winnipeg Free Press (the Media Group); by Ms. Kimberly-Ann Edwards and Mr. Nelson Draper Steve Sinclair (Edwards and Sinclair), who together have full party standing in this inquiry; and by Assembly of Manitoba Chiefs and Southern Chiefs' Organization Inc. (AMC/SCO), who each have a grant of intervenor standing in this inquiry, but who are represented by the same counsel.

7. The University of Manitoba, an intervenor in this inquiry, has made submissions in support of the applicants' motions.

8. It is accepted among all counsel on these motions that the appropriate analysis for me to apply in determining whether or not to grant the orders sought is *Dagenais/Mentuck.* Considerable will be said later in this decision about the application of this analysis.

9. The position of the applicants, in summary, is that a publication ban is necessary to protect the functioning of the child welfare system and the best interests of children. The position of those who opposed these motions is that the evidence does not establish that a publication ban is necessary to prevent a risk to the system or to children because no risk has been established, and that the nature of a public inquiry requires full disclosure.

II. The Evidence Filed by the Applicants and Respondents

A. General

10. A number of affidavits were filed by the applicants and by the Media Group on these motions. Cross-examinations on some of those affidavits have also taken place.

11. The Media Group filed a number of motions to strike portions of some of the affidavits filed by the applicants, and in one case, to strike the entire affidavit of Evelyn Wotherspoon, a witness brought forward by the MGEU. I have considered the motions brought by the Media Group, however, for the purposes of this application I have decided to consider all of the evidence filed. That said, whether the evidence filed meets the evidentiary requirements of the *Dagenais/Mentuck* analysis is another question altogether, and is the central question on these motions, which I will review later in these reasons.

12. Provided below is an overview of the affidavit evidence filed.

B. By the Applicants

1. MGEU

(a) Affidavit of Janet Kehler affirmed June 27, 2011

13. Ms. Kehler is a staff representative with MGEU and has held this position since 2006. She was previously employed in child welfare. In her first affidavit, she states that the social workers are strongly opposed to any television cameras used to broadcast their identity and testimony due to concerns about privacy, safety in the workplace, stress, morale, and the potential deterrence of other social workers coming forward to give evidence.

14. Ms. Kehler also states that publication would impact on social workers' ability to provide protection and services to children and families. She states that social workers deal with high risk and potentially violent situations, and that they often receive threats of violence and death threats. Since Phoenix's death came to light, stress is high and morale is low among social workers. Some clients of social workers have mentioned Phoenix in the course of speaking with the social workers.

15. Ms. Kehler also states that there are personal privacy implications in publishing workers' names, and that social workers attempt to make the nature of their work as private as possible. If identified, Ms. Kehler states that:

- Families may attempt to avoid social workers
- Families may incorrectly assume that their worker was responsible for Phoenix's death

- There is a potential for lack of cooperation by collateral agencies upon which social workers rely

16. She further states that there are policy reasons to protect the privacy of workers, found in s.75 of *The Child and Family Services Act*, and notes that there are restrictions on disclosure of information and identity of any person involved in child welfare proceedings.

(b) Affidavit of Janet Kehler affirmed April 4, 2012

17. Ms. Kehler's second affidavit attaches articles from online news reports, along with comments left by individuals in response to those articles, some of which are very critical of the MGEU and/or social workers. Ms. Kehler states that the media have allowed comments on their websites that are sensational.

18. Ms. Kehler states that she is concerned that social workers who testify may be unfairly painted with the same brush. She is extremely concerned for the safety and well-being of the workers involved in the more contentious and sensitive aspects of Phoenix Sinclair's file. She states that many workers do not recall the services that they provided; therefore, they cannot provide explanations for their actions and it is unfair that they might be criticized.

(c) Affidavit of Evelyn Wotherspoon sworn April 13, 2012

19. Ms. Wotherspoon has a BSW in Social Work and an MSW in Social Work (Clinical Social Work, Family Therapy). She is currently in private practice as a clinical consultant, as a Specialist in Infant Mental Health. She provided an opinion to counsel for the MGEU, which is attached to her affidavit. She states that she would be hard pressed to give an example of substantial improvements resulting from a fatality inquiry. If the real objective of the inquiry is

to prevent future tragedies, exposing front-line professionals to public censure is not the way to do it. She states that it will have a chilling effect on professionals.

20. The MGEU also filed an affidavit from Elizabeth McLeod. Ms. McLeod is the President of the Manitoba Institute of Registered Social Workers (MIRSW) and has held this position since June 2010. She is employed in Brandon, Manitoba, as a Manager in the Child and Adolescent Treatment Centre. Ms. McLeod states that confidentiality is a core practice of social work. The Board of the MIRSW passed a motion to support the MGEU's motion to prohibit the media from identifying social workers. Identifying social workers would interfere with their ability to provide anonymous service, and might serve to identify an individual as someone receiving services from a social worker if the fact that a person is a social worker is made known.

2. *Authorities/ANCR*

(a) Affidavit of Bruce Rivers sworn/affirmed March 30, 2012

21. Mr. Rivers holds an MSW. He was employed as the Executive Director of the Children's Aid Society of Toronto (Toronto CAS) from 1988 to 2004. He is now the Executive Director of Covenant House Toronto.

22. Mr. Rivers' evidence is that Toronto CAS was directly involved with approximately six to eight coroner's inquests that occurred in Ontario in the mid to late-1990s. There were other inquests that occurred around that time, as well as the Child Mortality Task Force, all of which resulted in major reform to Ontario's child welfare system. There was increased public attention around that time, the result of which was reactive response from the public and an increase in the

number of referrals to child welfare agencies based on suspicion. There was also the result of a dramatic spike in the number of children in care and a shortfall of foster parents and caregivers.

23. Mr. Rivers states that the increased public attention resulted in a pattern of staff leaving child welfare, moving out of province or moving to other employment in which they perceived there to be less risk. There was difficulty retaining staff at Toronto CAS, particularly at the intake/investigative level. The public attention on the child welfare system sent a "chill" through Toronto CAS, which then suffered from higher workloads and increased paperwork.

24. As a result of the public scrutiny and attention accompanied by the inquests, and the consequential policy shifts, a number of unintended consequences were suffered by the Toronto CAS and the child welfare system as a whole, and those consequences were detrimental. He states that similar things occurred in British Columbia after the Gove Inquiry; it led to a spike in the number of children apprehended.

(b) Affidavit of Cheryl Regehr sworn/affirmed March 30, 2012

25. Ms. Regehr is the Vice-Provost of Academic Programs for the University of Toronto, and a professor in the Factor-Intenwash Faculty of Social Work. She holds an MSW, and a PhD in the field of Social Work.

26. Her program of research has two components: (1) competency in professional practice; and (2) examining aspects of recovery from trauma in diverse populations, including child welfare workers. She has researched public inquiries into child welfare. Ms. Regehr has also studied the impact of post-mortem inquiries on paramedics, firefighters and police officers.

27. She has published a paper entitled "Inquiries into Deaths of Children in Care: The Impact on Child Welfare Workers and their Organization", in *Children and Youth Services Review*, Vol. 24, No.11, pp.641-644. The paper was based on qualitative and quantitative research. The participants said the inquiry process was highly stressful, and media attention intensified the distress of the workers subject to the review. The degree of media coverage of a critical event was significantly associated with the level of post-traumatic stress symptoms in the workers.

28. Among the articles referred to by Ms. Regehr is an academic article written by David Chenot entitled "The Vicious Cycle: Recurrent Interactions Among the Media, Politicians, the Public and Child Welfare Services Organizations" *Journal of Public Child Welfare*, 5, 167-184, where he points to media coverage creating a heightened sense of fear, dread and danger about the safety of children and a subsequent climate of mistrust concerning child welfare agencies in the eyes of the public. In a 2011 article by Gerald Cradock entitled "Thinking Goudge" (*Current Sociology*, Vol. 59(3)), it is said that while "naming and shaming" professionals in child welfare may provide benefits, its effects on individuals and the profession can be corrosive.

29. Ms. Regehr also refers to: a 2009 article about a high profile case in Ireland where a newspaper provided contact information for workers, and there were threats made against those workers; and a 2005 article on child welfare in the US that concludes that the cycle of media attention, inquiries and policy reform does not improve services.

30. Ms. Regehr concludes that there is strong support from research that media coverage produces a variety of negative outcomes: distress in workers, decreased commitment to the job; and negative impacts on the personal lives of workers and their families.

3. ICFS

(a) Affidavit of Shirley Cochrane affirmed April 3, 2012

31. Ms. Cochrane is the Executive Director of ICFS, which is located in Fisher River, and has been in this position since 1994. She has been employed in the child welfare system for 24 years.

32. Ms. Cochrane states that ICFS provided brief and routine service to Phoenix Sinclair's stepbrothers. Phoenix Sinclair was not in the care of ICFS at any time prior to or at the time of her death. Notwithstanding this fact, ICFS received criticism from the public, and comments from clients, that ICFS was responsible for Phoenix's death. The impact of Phoenix's death was immediate and harsh on the Fisher River community.

33. Ms. Cochrane states that her staff have concerns that the public will not trust ICFS, that clients will become resistant to ICFS during apprehensions, and publicity will impact ICFS' staff ability to maintain relationships with families.

34. Ms. Cochrane states that media articles on the inquiry have made her concerned for staff safety. After pre-hearing interviews conducted by Commission counsel, one ICFS employee required assistance home and one needed time off work. She says that this was the case notwithstanding that Commission counsel was consistently courteous to the witnesses.

35. ICFS workers are often subject to threats of violence, have been physically assaulted, and fear an increased risk if they are identified because families will associate them with Phoenix.

36. Ms. Cochrane states that it is important for workers to build relationships with families, collaterals, the community, and foster parents. She is concerned that if workers are identified, these relationships will be undermined because the community members will assume that the workers are responsible for Phoenix's death. Sources of referral are essential to protecting children, and foster placement is essential to the child welfare system.

37. Ms. Cochrane further states that privacy and confidentiality are at the heart of the child welfare system. Ensuring privacy is an important factor in attracting and retaining social workers. Ms. Cochrane believes that ICFS would have difficulty hiring staff if there was a possibility that their names could be published.

C. By the University of Manitoba

(a) Affidavit of Gwendolyn M. Gosek sworn April 4, 2012

38. The University of Manitoba has filed an affidavit from Ms. Gosek in support of the MGEU's motion. Ms. Gosek holds a BSW, an MSW and is currently a PhD student in the field of Social Work. She is a faculty member in the Faculty of Social Work at the University of Manitoba. As part of her academic research and studies, she has reviewed a number of articles relating to child protection workers and the stresses they encounter.

39. Ms. Gosek's affidavit states that studies have shown that social workers choose their profession based on a desire to help others. The field of child welfare has evolved into a complex environment that demands well-educated, highly skilled and committed workers. Social workers perform their duties in a highly stressful environment, and the end result of their working conditions is a work environment that is crisis-oriented. She states that in recent

decades, there has been a change in legislation, policies and practices resulting in a shift to a narrow focus on protecting children from severe abuse and neglect.

40. Ms. Gosek states that high turnover rates have been an ongoing concern and burnout and stress are the number one reason that child welfare workers leave employment. She states that the research shows that a child welfare inquiry becomes all-consuming as the workers review and question every aspect of the process. During the inquiry process, workers are re-exposed to trauma stimuli. Other child welfare staff undergo scrutiny of their agency and feel guilt by association. The media tend to sensationalize traumatic events. During the process of an inquest, the social work profession is under intense siege resulting in degradation to its image and a lack of public support.

41. Ms. Gosek states that a review of the literature supports the need to preserve anonymity. Publication of names would only serve to intensify negative outcomes for child welfare professionals.

42. The Media Group filed a motion to strike portions of Ms. Gosek's affidavit, however, in oral submissions counsel for the Media Group did acknowledge that Ms. Gosek's evidence was an example of evidence from a "true expert in the field."

D. By the Respondents

1. The Media Group

43. The Media Group have filed affidavits in opposition to the applicants' motions. The respondents, Edwards and Sinclair, and AMC/SCO have not filed any affidavits in response.

(a) Affidavit of Michael Bear sworn May 11, 2012

44. Mr. Bear is the Chief of Staff for the Southern Chiefs Organization Inc. He was Executive Director of Southeast Child and Family Services (SECFS) from 2004 to 2008. He was Deputy Children's Advocate for Manitoba from 1999 to 2004, and from 1993 to 1999 was a case worker for Cree Nation Child and Family Services.

45. Mr. Bear states that SECFS implemented staff photo identification for all staff, for introduction to clients and collaterals. He believes that all CFS workers in the field are required to carry photo ID cards. Social workers in small communities and on reserve are typically known as such to the people in the community. He states that agencies must always take precautions with clients in the field. Attempting to keep staff identity unknown was not a useful risk management tool. He cannot recall any physical attack on staff of SECFS while he was employed as Executive Director.

46. Mr. Bear states that during his term as Executive Director of SECFS, Tracia Owen, a First Nations youth from a community within SECFS jurisdiction, committed suicide while in care. There was a public inquest as a result, and Mr. Bear and other staff testified. There was no order restricting publication at the Owen Inquest. Mr. Bear attached the report of Judge John Guy on the Inquest as an Exhibit to his affidavit.

47. Mr. Bear states that he did not perceive any negative impact of the inquest process on the ability of his staff to continue to provide services.

(b) Affidavit of Shavonne Hastings sworn May 10, 2012

48. Ms. Hastings is Director of Operations for Nisichawayasihk Cree Nation Family and Community Wellness Centre (NCN CFS) for Winnipeg and Brandon, and has held that position since 2009. She was employed as a social worker for Winnipeg CFS from 2001 to 2005, and did intake and front line protection work. As Director of NCN CFS, she oversees a staff which includes nine social workers.

49. In all agencies in which she has been associated, social workers were issued photo identification, indicating the worker's name and agency. Social workers in small communities and on reserve are typically known as such to the community. In Winnipeg, social workers are typically assigned to a particular area and are often known to the community in that area. Often these workers do not need to identify as such because they are already recognized as social workers by the community.

50. Ms. Hastings states that yelling, harsh language and risk of violence are common in apprehension situations. She has not been involved with and is not aware of any situation where knowledge of a worker's identity in advance made any material difference in a volatile situation. She is aware of one instance where there was a safety concern on the part of the agency/worker, and in such a case, the agency has security measures it can implement. She has never been physically assaulted in the course of her work.

51. Ms. Hastings states that CFS agencies have policies in place to manage the risk of violent behavior. Where she has worked, social workers attend in teams of two where they have a concern about risk. If there is cause for concern, workers may attend with police officers. It is

the job of a social worker to deal with potentially volatile individuals, and this can be managed with good training and appropriate policies.

52. Ms. Hastings states that she has no expectation that she will exercise her functions without the public knowing who she is. In Manitoba, agencies have established "critical incident teams" whose role it is to assist and counsel workers who face difficult situations.

(c) Affidavit of Allison Lamontange sworn May 22, 2012

53. Ms. Lamontagne is a legal assistant employed by the firm representing the Media Group. Ms. Lamontagne attaches the following to one of her affidavits:

- A list of names of all registered social workers, found on the MIRSW website;
- A list of names of ICFS workers, from the ICFS website;
- A list of names of Central Manitoba CFS workers, from the CMCFS website;
- A list of names of Peguis CFS workers, from the Peguis CFS website; and
- A list of names of Sandy Bay CFS workers, from the Sandy Bay CFS website.

(d) Affidavit of Cecil Rosner sworn May 9, 2012

54. Mr. Rosner is the Managing Editor of CBC Manitoba, and has held this position since 2004. He oversees the news and journalism conducted by CBC in Manitoba. Mr. Rosner sets out a number of public inquiries and inquests in Manitoba where professional witnesses, social workers among them in some cases, have testified without a publication ban, including the following:

- The Sophia Schmidt Inquest
- The Patrick Redhead Inquest
- The Tracia Owen Inquest
- The Taman Inquiry
- The Driskell Inquiry
- The Inquest into Pediatric Cardiac Surgery in Manitoba

55. Mr. Rosner deposes that social workers testified without a restriction on publication in the Schmidt Inquest, the Redhead Inquest, and the Owen Inquest. Mr. Rosner also cites examples from inquests and inquiries outside of Manitoba where identities of professional witnesses were made known.

56. Mr. Rosner also states that in Manitoba, the Taman Inquiry, the Sophonow Inquiry, the Driskell Inquiry, and the Aboriginal Justice Inquiry had video feeds. He states that the practice of permitting video coverage of public inquiries is not unique to Manitoba, and cites a number of examples from out of province, most recently, the Missing Women's Inquiry in British Columbia.

III. Positions of the Applicants and Respondents

A. The Applicants

1. MGEU

57. The MGEU argues that there are legislative and policy reasons for protecting the identity of social workers and cites the procedure provided for by statute for child protection proceedings as an example. The MGEU argues that publication would have a "serious and detrimental impact" on social workers' ability to perform their day-to-day functions.

58. The MGEU argues that social workers perform their duties in dangerous situations and often receive threats. Since Phoenix's death was discovered in 2006, social workers have suffered public scrutiny and criticism and some have been criticized by clients who have referenced the Phoenix Sinclair tragedy.

59. The MGEU argues that social workers attempt to keep their work as private as possible. If they are recognized, it is possible that they will face greater aggression or negative attitudes from families due to the misperception that they were responsible for or involved in Phoenix's death. Publication of social workers' names or images will make their work more difficult in terms of building trust with children and families. This will make it harder for social workers to do their jobs and consequently, children will be at risk.

60. The MGEU argues that child protection proceedings are closed to the public, and this reflects a policy reason for keeping information confidential. In the case of *CBC v. Manitoba (Attorney General)*, 2008 MBCA, the Court of Appeal denied the CBC access to child and family services records filed as exhibits in an inquest. MGEU has taken the position that

inquests and inquiries have the same fundamental principles and goals and in oral submissions placed much reliance on the *CBC v. Manitoba (Attorney General)* decision.

61. The MGEU further argues that it is seeking a minimal restriction on the freedom of expression. Counsel for the MGEU argued that there would be no effect on the public hearings themselves if I were to grant the order it seeks. Counsel argued that the risks to the child welfare system and to children will be reduced by such an order, as it will reduce the magnitude of public discussion and blame placed on social workers.

62. Counsel for MGEU argued that the media is primarily interested in the sensationalization of stories and the laying of blame on social workers. He argued that this Commission has the power to decide whether the best interests of children are served by not allowing the social workers who will be called as witnesses in this inquiry to be "pilloried" in the media.

2. Authorities/ANCR

63. The Authorities/ANCR argue that, based on the evidence of Ms. Regehr, media attention to a child death review intensifies distress suffered by workers and causes staff to leave the field of child protection. As well, it may cause workers to err on the side of caution, causing a spike in the number of children admitted into care, as was the case in Ontario during the time period referenced by Mr. Rivers in his affidavit. Increased negative media attention causes difficulty in the recruitment and retention of child welfare staff. A publication ban will serve to mitigate these consequences because it will reduce the sensationalistic aspect of the media coverage.

64. The Authorities/ANCR further argue that they have serious concerns about the sensational media coverage of the inquiry on the child welfare system. Media coverage of child

death reviews often involves sensationalistic stories and media are usually very critical. This creates a "vicious cycle" in which the work becomes restrictive and employees become angry and frustrated at what they cannot do to serve clients.

65. Counsel for the Authorities/ANCR argued that this Commission is a "derivative" of child protection proceedings. It is argued that because the *Dagenais/Mentuck* analysis is contextual, and the context of this inquiry is child welfare matters, this inquiry must do everything it can to maintain confidentiality.

66. Counsel for the Authorities/ANCR argued that the order sought is "extremely minimal" and that in terms of the Commission's work, there is "zero restriction". It is argued that a publication ban will be less deleterious than would be publication of names and images. Further, each social worker will be in the hearing room for all present to see and hear. Counsel for the Authorities/ANCR argues that the reason why anonymity of social workers is so important is because there is expert evidence showing that in other jurisdictions, inquiries attract sensational media coverage. When the media "name and shame" social workers, this radiates distress throughout the child welfare system, which then leads to direct harm to children. The reason that a publication ban will reduce a risk to children is because there will not be this radiated distress, which creates a chill on the child welfare system.

3. ICFS

67. ICFS argues that publication of the names of social workers will put children and families at risk. ICFS argues that the media do not have unfettered access to court documents or unrestricted publication of court proceedings, and that generally the provisions of *The Child and Family Services Act*, C.C.S.M. c.C80 require confidentiality.

68. ICFS further argues that to publish the names/identities of social workers would pose a "serious risk to the child and family services system" because:

- The public would be hesitant to contact child protection workers known to have been involved with Phoenix Sinclair, or to expose themselves to the stigma of being involved with the child and family services system.
- Families currently involved with child welfare agencies would become withdrawn and resistant to cooperation with those agencies.
- Child and family services agencies will suffer in their abilities to recruit and retain qualified social workers.
- Social workers' job performance will suffer due to stress, low morale and increased apprehensions of children.
- The risk of violence when apprehending children would increase.

69. Counsel for ICFS argued that there has been a misconception among some members of the public that ICFS was somehow responsible for Phoenix Sinclair's death. ICFS does not want the name and a face of a social worker to be associated with that misconception.

70. It is argued on behalf of ICFS that a ban on publication of names of social workers would not hinder the inquiry's mandate, and that the determining factor when applying the *Dagenais/Mentuck* analysis is "the best interests of the child."

B. The University of Manitoba

71. The University of Manitoba is not an applicant on these motions but is supportive of the relief sought by those who have brought the applications. The affidavit of Ms. Gosek provides that social workers encounter many stresses on the job, which is derived from a number of factors: high caseloads, high turnover, traumatic events and the risk of personal violence. Inquiries and inquests are a source of stress. The position of the University is that this inquiry can accomplish its mandate without adding to the stress that social workers already experience.

C. The Respondents

1. The Media Group

72. The Media Group relies on the "open court principle" as articulated by the Supreme Court of Canada cases of *Re Vancouver Sun*, 2004 SCC 3 (para.25), and *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 (para.85). It is argued that openness takes on a special importance in the context of a public inquiry.

73. It is argued that, on the evidence adduced by the applicants, at best, the applicants have proved that media coverage of the death of a child and a subsequent inquiry are factors that are connected with or that have been shown to be connected with negative outcomes in previous instances. To the extent that the applicants have concerns about negative outcomes as a result of the inquiry, the Commissioner can ensure fairness in the hearings, and can ensure that the witnesses have the opportunity to present full and accurate information.

74. The Media Group argues, in making reference to much of the evidence filed in support of these applications, that the issue on this motion is not whether the Government was correct in

establishing this public inquiry; the issue is whether the applicants have demonstrated that the publication of their identities will cause serious and unavoidable harm to the administration of justice that outweighs the damage caused by the interference with s.2(b) *Charter* rights. Counsel for the Media Group argued that what the applicants want to do is control the tone and content of the public discussion of this inquiry.

75. The Media Group points out that professional witnesses are regularly named in inquests; therefore, s.75(2) of *The Child and Family Services Act* (which has been cited by the applicants as a policy reason for non-publication) cannot have been intended as a policy statement that social workers should not be identified. Section 75(2) provides as follows:

> **Reporting not to identify persons involved**
>
> 75(2) No press, radio or television report of a proceeding under Part II, III or V shall disclose the name of any person involved in the proceedings as a party or a witness or disclose any information likely to identify any such person.

76. The *CBC v. Manitoba (Attorney General)* case upon which the applicants rely involved an inquest in which professional witnesses, including social workers, were named.

77. It is acknowledged by the Media Group that front line workers provide services in circumstances where there can be a risk of violence; however, there is no evidence to support what has been described as "speculation" that publication of names of social workers would increase any risk to safety. There is evidence that an inquiry into a child death can cause stress to the professionals involved. The Media Group argues that there is no evidence that publication of identities of those individuals had any material impact on the stress.

78. The Media Group has argued that identity is not a "mere detail," and that identities are particularly important when dealing with public servants exercising state power. In oral submissions, counsel for the Media Group pointed to the evidence from the cross-examination on the affidavit of Ms. Gosek as support for the argument that background and identity are important to put into context the information that is being provided. In *Episcopal Corporation of the Diocese of Alexandria-Cornwall v. Cornwall Public Inquiry*, 2007 CarswellOnt 112 (Ont.C.A.), the Court of Appeal upheld the Commissioner's refusal to grant a publication ban on the identity of a witness, on the basis that the witness' name was relevant to the mandate of the inquiry.

79. The Media Group further argues that the evidence adduced shows that social worker stress and job performance depend on a multitude of factors; there is no evidence connecting the risks identified by the applicants with the publication of identities or showing that publication of that information has ever had significant systemic consequences.

2. Edwards and Sinclair

80. Edwards and Sinclair argue that a publication ban would be contrary to the public interest. Their counsel argues that this inquiry should be public in every sense of the word. A climate of unnecessary secrecy in the inquiry will foster feelings of public resentment and distrust. They submit that the determination of the motions comes down to one question: Does the evidence clearly demonstrate that the health and safety of Manitoba children will be placed at increased risk if the names and faces of social workers are published by the media?

81. Edwards and Sinclair argue that there is no evidence of such a risk; and that the applicants have sought to establish the risk through conjecture and second hand anonymous

evidence. The degree of difficulty and inherent risk in the social work profession remains regardless of whether or not these witnesses are identified. They also argue that the open court principle is magnified when evidence is given at a public inquiry; that while counsel for the Authorities/ANCR has argued that the status quo in child welfare matters is confidentiality, the status quo in public inquiries is publicity. The death of Phoenix Sinclair cries out for transparency and public scrutiny.

3. AMC/SCO

82. AMC/SCO argue in their brief, and in oral submissions, that ultimately it is the public that has an obligation to ensure that services are provided to children and families in a manner that promotes the safety, security, well-being and best interests of children. As a result, the public must be fully informed. In order to ensure the full and proper accountability of the child welfare system, it is essential that the public be able to make a thorough, fair and informed evaluation of the manner in which services are provided.

83. AMC/SCO also argue that First Nations people have unique rights and responsibilities with respect to the delivery of child welfare services. They must be afforded an opportunity to examine the circumstances under which the services to Phoenix Sinclair and her family were delivered. They need to be able to make a full, fair and informed evaluation of the testimony tendered at the inquiry, and a publication ban and a restriction on recording and broadcasting will limit that opportunity to those who can attend the hearing room.

84. AMC/SCO point out in their brief that the applicants have not provided evidence pertaining to the respective personal circumstances of each of the potential witnesses sought to be covered by the publication ban. The grounds upon which the applicants rely in support of a

ban cannot be asserted in the abstract, but must be supported by particularized grounds relating to the risks sought to be avoided. They say that the evidence filed fails to meet the rigourous standard required by the authorities. The social workers called to testify in this inquiry will be required to sacrifice their own privacy interests, as would any other witness in an open court proceeding. In this case, however, they are being called in furtherance of their duties as public servants, and as such they are ultimately accountable to the public. Concealing the identity of social workers would only serve to invite further mistrust among the public and would undermine the legitimacy of the inquiry.

IV. Analysis

A. The Law

1. The Nature and Purpose of Public Inquiries

85. S. Ruel notes at page 97 of his text, *The Law of Public Inquiries in Canada*, (Toronto: Thomson Reuters Canada Limited, 2010), that as a starting point, unless the publicity of proceedings is mandated under legislation, a government may create an inquiry that will not be public or will only be partially public. However, once an inquiry is created with no specified limitation on publicity, as is the case here, the inquiry should presumptively proceed in public. That said, the general power of the Commissioner to control his proceedings will include the discretionary authority to make appropriate orders where necessary to protect the rights of those affected by the inquiry, including ordering an *in camera* hearing, a publication ban, or other

confidentiality order.[1] Such confidentiality measures will need to be carefully tailored and restricted as much as possible in order to preserve the freedom of the press.[2]

86. E. Ratushny points out, in his text, *The Conduct of Public Inquiries* at page 331 (Toronto: Irwin Law Inc., 2009) that the very nature and purpose of an inquiry lends even greater weight to the presumption of openness in relation to the administration of justice which has been reinforced by the principle of freedom of expression under the *Charter*.

87. Justice Cory's decision in *Phillips v. Nova Scotia (Commissioner, Public Inquiries Act)*, 1995 CarswellNS 15 (S.C.C.), is often cited for its commentary on the nature and purpose of inquiries. In that case, the inquiry at issue was the Westray Inquiry, which was called after an explosion caused the death of 26 miners. The Nova Scotia government had ordered an inquiry immediately after the incident. Concerns arose because criminal proceedings were ongoing at the time of the inquiry. The issue before the Supreme Court of Canada became whether a stay of proceedings ought to be ordered with respect to the inquiry while the criminal proceedings against two former managers were ongoing. A majority of the Supreme Court of Canada, in a judgment written by Sopinka J., allowed the appeal from the Court of Appeal's decision ordering a stay of proceedings. Perhaps the most quoted passages from that decision are from Cory J.'s concurring reasons, at paragraphs 73 to 75, which highlight the public importance of inquiries:

> One of the primary functions of public inquiries is fact-finding. They are often convened, in the wake of public shock, horror, disillusionment, or scepticism, in order to uncover "the truth". Inquiries are, like the judiciary, independent; unlike the judiciary, they are often endowed with wide-ranging investigative powers. In following their mandates, commissions of inquiry are, ideally, free from partisan loyalties and better able than Parliament or the legislatures to take a long-term view of the problem presented. Cynics decry public inquiries as a means used by

[1] Ruel, p.98
[2] Ruel, pp. 101-102, 104

the government to postpone acting in circumstances which often call for speedy action. Yet, these inquiries can and do fulfil an important function in Canadian society. In times of public questioning, stress and concern they provide the means for Canadians to be apprised of the conditions pertaining to a worrisome community problem and to be a part of the recommendations that are aimed at resolving the problem. Both the status and high public respect for the commissioner and the open and public nature of the hearing help to restore public confidence in not only the institution or situation investigated but also in the process of government as a whole. They are an excellent means of informing and educating concerned members of the public.

This important characteristic was commented upon by Ontario Supreme Court Justice S. Grange following his inquiry into infant deaths at the Toronto Hospital for Sick Children:

> I remember once thinking egotistically that all the evidence, all the antics, had only one aim: to convince the commissioner who, after all, eventually wrote the report. But I soon discovered my error. They are not just inquiries; they are *public* inquiries ... I realized that there was another purpose to the inquiry just as important as one man's solution to the mystery and that was to inform the public. Merely presenting the evidence in public, evidence which had hitherto been given only in private, served that purpose. The public has a special interest, a right to know and a right to form its opinion as it goes along.

(S.G.M. Grange "How Should Lawyers and the Legal Profession Adapt?" in A. Paul Pross, Innis Christie and John A. Yogis, eds., *Commissions of Inquiry* (Toronto: Carswell, 1990), 151, at pp.154-55.)

The public inquiry has been even more broadly characterized as serving a particular "social function" within our democratic culture:

... a commission ... has certain things to say to government but it also has an effect on perceptions, attitudes and behaviour. Its general way of looking at things is probably more important in the long run than its specific recommendations. It is the general approach towards a social problem that determines the way in which a society responds to it. There is much more than law and governmental action involved in the social response to a problem. The attitudes and responses of individuals at the various places at which they effect the problem are of profound importance.

What gives an inquiry of this kind its social function is that it becomes, whether it likes it or not, part of this ongoing social process. There is action and interaction ... Thus this instrument, supposedly merely an extension of Parliament, may have

a dimension which passes beyond the political process into the social sphere. The phenomenon is changing even while the inquiry is in progress. The decision to institute an inquiry of this kind is a decision not only to release an investigative technique but a form of social influence as well.

(Gerald E. Le Dain, "The Role of the Public Inquiry in our Constitutional System", in J. Ziegel (ed.) *Law and Social Change* (1973) 79, at p. 85.) [emphasis added]

88. And, Cory J., at paragraph 128:

Open hearings function as a means of restoring the public confidence in the affected industry and in the regulations pertaining to it and their enforcement. As well, it can serve as a type of healing therapy for a community shocked and angered by a tragedy. It can channel the natural desire to assign blame and exact retribution into a constructive exercise providing recommendations for reform and improvement. In the wake of the Sick Children Hospital Inquiry conducted by Justice Grange it was written:

> Imagine that the public had no access to the proceedings of the lengthy and costly Grange Inquiry into the deaths of babies at Toronto's Sick Children's Hospital, and was informed at the end of its vague conclusion that some babies had been killed by an unknown or unnamed individual. Such a conclusion to the state's failure to solve a string of murders deeply troubling to the population, after extensive investigation, prosecution and inquiry procedures, would have been entirely unacceptable. The Grange Inquiry was open, however, and one of the virtues of the exercise in openness was that the public became privy to the problems the state faced in trying to solve the mysterious deaths and could assess the efficacy of the state's actions. Where different phases of the proceedings are closed or where information about them is censored, the public's ability to judge the functioning of the system, rate the government's performance and call for change is effectively removed. [Footnote omitted.]
>
> (Jamie Cameron, "Comment: The Constitutional Domestication of our Courts — Openness and Publicity in Judicial Proceedings under the Charter" in *The Media, the Courts and the Charter*, Philip Anisman and Allen M. Linden, eds. (Toronto: Carswell, 1986), 331, at pp.340-41.)

2. The Open Court Principle

89. The principles to be applied in determining whether to restrict public or media access to the inquiry arise out of cases interpreting the "open court" principle. The long-standing open court principle is reflected in s.2(b) of the *Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11, which provides:

> **2.** Everyone has the following fundamental freedoms:
>
> ...
>
> *(b)* freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication

90. There is a significant amount of jurisprudence from the Supreme Court of Canada on the open court principle. In *Vancouver Sun, Re*, *supra*, at paragraphs 23 to 26, Iacobucci and Arbour JJ. stressed its importance:

> This Court has emphasized on many occasions that the "open court principle" is a hallmark of a democratic society and applies to all judicial proceedings: *MacIntyre v. Nova Scotia (Attorney General)*, [1982] 1 S.C.R. 175, (S.C.C.), at p. 187; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 (S.C.C.), at paras. 21-22; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 (S.C.C.). "Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over-emphasized": *Edmonton Journal*, *supra*, at p. 1336.
>
> The open court principle has long been recognized as a cornerstone of the common law: *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, *supra*, at para. 21. The right of public access to the courts is "one of principle ... turning, not on convenience, but on necessity": *Scott v. Scott*, [1913] A.C. 417, (U.K. H.L.), *per* Viscount Haldane L.C., at p. 438. Justice is not a cloistered value": *Ambard v. Attorney General for Trinidad & Tobago*, [1936] A.C. 322 (Trinidad & Tobago P.C.), *per* Lord Atkin, at p. 335. "[P]ublicity is the very soul of justice. It is the keenest spur to exertion, and the surest of all guards

against improbity": J.H. Burton, ed., *Benthamiana or, Select Extracts from the Works of Jeremy Bentham* (1843), p. 115.

> Public access to the courts guarantees the integrity of judicial processes by demonstrating "that justice is administered in a non-arbitrary manner, according to the rule of law": *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, *supra*, at para. 22. Openness is necessary to maintain the independence and impartiality of courts. It is integral to public confidence in the justice system and the public's understanding of the administration of justice. Moreover, openness is a principal component of the legitimacy of the judicial process and why the parties and the public at large abide by the decisions of courts.
>
> The open court principle is inextricably linked to the freedom of expression protected by s.2(b) of the *Charter* and advances the core values therein: *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, *supra*, at para. 17. The freedom of the press to report on judicial proceedings is a core value. Equally, the right of the public to receive information is also protected by the constitutional guarantee of freedom of expression: *Ford c. Québec (Procureur général)*, [1988] 2 S.C.R. 712, (S.C.C.); *Edmonton Journal, supra*, at pp. 1339-40. The press plays a vital role in being the conduit through which the public receives that information regarding the operation of public institutions: *Edmonton Journal*, *supra*, at pp. 1339-40. Consequently, the open court principle, to put it mildly, is not to be lightly interfered with.

91. Cory J., in *Edmonton Journal v. Alberta (Attorney General), supra*, at paragraph 85, commented on the importance of the role that the media play in allowing the public to access court proceedings:

> ...It is exceedingly difficult for many, if not most, people to attend a court trial. Neither working couples nor mothers or fathers house-bound with young children would find it possible to attend court. Those who cannot attend rely in large measure upon the press to inform them about court proceedings - the nature of the evidence that was called, the arguments presented, the comments made by the trial judge - in order to know not only what rights they may have, but how their problems might be dealt with in court. It is only through the press that most individuals can really learn of what is transpiring in the courts. They as "listeners" or readers have a right to receive this information. Only then can they make an assessment of the institution. Discussion of court cases and constructive criticism of court proceedings is dependent upon the receipt by the public of

> information as to what transpired in court. Practically speaking, this information can only be obtained from the newspapers or other media.

92. Most recently, in *Canadian Broadcasting Corporation v. Canada (Attorney General)*, 2011 SCC 2, Deschamps J., for the Supreme Court of Canada, commented at paragraphs 1 to 2 of the decision:

> The open court principle is of crucial importance in a democratic society. It ensures that citizens have access to the courts and can, as a result, comment on how courts operate and on proceedings that take place in them. Public access to the courts also guarantees the integrity of the judicial process inasmuch as the transparency that flows from access ensures that justice is rendered in a manner that is not arbitrary, but is in accordance with the rule of law.
>
> The right to freedom of expression is just as fundamental in our society as the open court principle. It fosters democratic discourse, truth finding and self-fulfillment. Freedom of the press has always been an embodiment of freedom of expression. It is also the main vehicle for informing the public about court proceedings. In this sense, freedom of the press is essential to the open court principle...

93. It is against this backdrop, and paying particular attention to Cory J.'s comments in *Phillips*, *supra*, that an open inquiry can serve as a type of healing therapy for a community shocked and angered by a tragedy and affording the opportunity for the formulation of constructive recommendations, in this instance, to better protect Manitoba children, that any order restricting access to this inquiry must be considered.

3. The Dagenais/Mentuck Analysis

94. The Supreme Court of Canada has held that the *Dagenais/Mentuck* analysis applies to all discretionary orders that limit freedom of expression and freedom of the press in relation to legal proceedings: *Toronto Star Newspapers Ltd. v. Ontario,* 2005 SCC 41, para. 7. The applicants and

respondents to these motions have agreed that this is the analysis to be applied by me in adjudicating on the relief requested by the applicants.

95. The *Dagenais/Mentuck* analysis provides that a publication ban may only be ordered when:

> i. such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonable alternative measures will not prevent the risk; and
>
> ii. the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right to a fair trial, and the efficacy of the administration of justice.[3]

96. In *R. v. Mentuck*, it was recognized that the test should be applied in a case-specific manner. *R. v. Mentuck* is also clear as to the evidentiary standard in applications such as those before me. The onus lies on the party seeking to displace the general rule of openness. There must be a convincing evidentiary basis for issuing a ban. Paragraph 34 of *R. v. Mentuck* makes clear the type of evidence that is required in order to displace the general rule:

> ...One required element is that the risk in question be a serious one, or, as Lamer C.J. put it at p. 878 in *Dagenais*, a "real and substantial" risk. That is, it must be a risk the reality of which is well-grounded in the evidence. It must also be a risk that poses a serious threat to the proper administration of justice. In other words, it is a serious danger sought to be avoided that is required, not a substantial benefit or advantage to the administration of justice sought to be obtained.

97. The court in *R. v. Mentuck* recognized that there may be cases that raise interests other than the administration of justice, for which a similar approach would be used (see, e.g., *Sierra Club of Canada v. Canada (Minister of Finance*, 2002 SCC 41). In the motions before me, the

[3] *Dagenais v. Canadian Broadcasting Corp.*, 1994 SCC 102, para. 77; *R. v. Mentuck*, 2001 SCC 76, para. 32.

applicants argue that the "serious risk" sought to be prevented relates to the best interests of children and the functioning of the child welfare system.

98. The applicants must demonstrate that disclosure of information sought to be suppressed would "subvert the ends of justice or unduly impair its proper administration" (*Toronto Star Newspapers Ltd. v. Ontario*, *supra*, para.4). The evidentiary basis must establish a very serious risk (*Toronto Star*, *supra*, para.10). The open court principle is to be displaced only where social values of superordinate importance require protection: *MacIntyre v. Nova Scotia (Attorney General)*, [1982] 1 S.C.R. 175, pp.186-187.

99. The *Dagenais/Mentuck* analysis is meant to be applied in a "flexible and contextual manner": (*Toronto Star, supra*, para.8).

100. As noted by Dardi J. in *X. v. Y.*, 2011 BCSC 943, at paragraph 22, "the authorities establish that the standard is not one of mere convenience or expediency; in order to displace the public interest in an open-court process, an applicant must provide cogent evidence to support the alleged necessity for anonymity."

101. Counsel for the Authorities/ANCR argued in oral submissions that due to the subject matter of this inquiry, the onus should be reversed in this case. That is, that due to the fact that this inquiry will examine the child welfare system, in which they say the "status quo" is confidentiality, the onus should be on the media to show why disclosure is necessary, rather than on the applicants to show why a restriction on openness is necessary. I disagree. The onus and standard in this case has been clearly stated by the Supreme Court in *R. v. Mentuck*, and I have not been pointed to any authority that would indicate otherwise.

102. Further, on October 21, 2011, the Commission obtained an order from the Court of Queen's Bench of Manitoba, pursuant to s.76(3) and s.76(14) of *The Child and Family Services Act*, C.C.S.M. c.C80, requiring disclosure and production to the Commission of all relevant documents created under that *Act*. The order clearly states that the Commission may enter the documents, and the information contained in those documents, into evidence at the public phase of the hearing, in accordance with any order I might make.

103. Counsel for the applicants, and in particular, counsel for the MGEU and Authorities/ANCR relied heavily on the decision of the Manitoba Court of Appeal in *Canadian Broadcasting Corp. v. Manitoba (Attorney General)*, *supra*, in their oral submissions. I wish to make some comments on that decision. That case involved an application by the media for access to certain Child and Family Services records, which had been entered as exhibits at in inquest pursuant to *The Fatality Inquiries Act*, C.C.S.M. c.F52. The inquest judge in that case denied the media's application for access. This decision is distinguishable from the matter before me on a number of grounds. First, we are here dealing with a public inquiry, not an inquest. There are significant differences between these two proceedings, which was noted most recently by Freedman J.A. in *M.G.E.U. v. Hughes*, 2012 MBCA 16 (In Chambers). Secondly, the motions before me relate to a requested ban on naming social workers in the media, not on the issue of access to Child and Family Services documents. I note that the names of professionals, including social workers, were published in the report which arose out of the inquest at issue in the *Canadian Broadcasting Corp. v. Manitoba (Attorney General)* decision. As I noted above, the Commission has obtained an order from the Court of Queen's Bench permitting the use by the Commission of documents and the information therein. Finally, it is clear from that decision that the Manitoba Court of Appeal endorsed the application of the *Dagenais/Mentuck* analysis in determining whether

to grant access to the documents at issue - which militates against the argument that there should be some sort of reverse onus in this case. At paragraph 38, R.J. Scott C.J.M. stated:

> As the Supreme Court noted in *Dagenais* itself, "publication bans should not always be seen as a clash between two titans - freedom of expression for the media versus the right to a fair trial for the accused" (p.881); rather, it is a question of determining firstly whether a ban of some sort is necessary to guard the fairness of the trial and, if so, to strike the right balance "between the salutary and deleterious effects of a publication ban" (at p.884), keeping in mind that there should be as minimal an interference as possible with the public's right to know what is going on with their courts.

4. The "Best Interests of the Child"

104. Counsel for ICFS remarked that in the case of *Winnipeg Child and Family Services v. K.L.W.*, [2000] 2 S.C.R. 519 it was held that the apprehension of a child violates a parent's s.7 *Charter* rights. Counsel says that notwithstanding that that is the case, the courts in child protection matters are not bound by the strict rules of evidence and procedure. Actual proof of harm is not required when the best interests of children are engaged. What this demonstrates is a heightened importance placed on the best interests of the child and the obligation of the courts to protect children from harm.

105. I have every regard for the provisions of *The Child and Family Services Act*, C.C.S.M. c.C80, and what it stands for. There can be no doubt that the best interests of children and the protection of children are values of superordinate importance in our society. I also take into account, however, the clear principles set out in *Dagenais/Mentuck* and subsequent cases, including the comments by R.J. Scott C.J.M. in *Canadian Broadcasting Corp. v. Manitoba (Attorney General), supra*. The *Dagenais/Mentuck* analysis involves a balancing exercise. It also requires that the reality of the risk be well-grounded in evidence. This is the evidentiary

standard upon which I must assess the applicants' motions; I decline to relax the evidentiary standard in these circumstances.

V. Application of the *Dagenais/Mentuck* Analysis to these Motions

A. Analysis of the First Branch to the Motions

1. General

106. An initial question to be decided on these motions is whether the evidence filed by the applicants has established that a publication ban on the name and image of social workers is necessary in order to prevent a serious risk to child welfare system or the best interests of children, because reasonable alternative measures will not prevent the risk.

107. The applicants have identified concerns about: risks to the safety of workers in the course of performing their duties and the consequent impact on the child welfare system; a general concern about the effect that the inquiry will have on the system; and privacy concerns of the witnesses, as the risks sought to be avoided by a publication ban. If there was evidence of serious risks to personal safety that would be caused by publication of the identities of social workers, those types of risks would likely meet the threshold of a "serious risk" contained in *Dagenais/Mentuck.* The same would likely be the case if publication was shown to cause a serious risk to the functioning of the child welfare system or harm to the best interests of children.

108. The key question is whether or not the evidence demonstrates that there are such risks. Of note is the fact that no social worker who will be called to testify has provided direct evidence on these applications. I will assess the risks by category.

2. The Risks

(a) Privacy Risk

109. An assertion of a privacy interest generally will not be sufficient to justify a ban. If that were the case, any person who would prefer not to be named in the media would be entitled to a publication ban on the basis of a general right to privacy. In order to succeed in obtaining an order for anonymity in the media due to a risk to privacy interests, the applicants would need to show some serious risk as a result of identification over and above discomfort or embarrassment.

110. What the authorities suggest is that the fear that a witness or party might be subjected to, for example, embarrassment, will not trump the right of the public and media to have access to information. Some greater risk is required in order to justify restricting s.2(b) rights.

111. Where there is significant evidence of a potential for harm arising out of the publication of a witness' identity, a publication ban may be ordered. In *R. v. Morin*, 1997 CarswellOnt 400 (Ont. C.A.), for example, the issue was whether the name of Guy Paul Morin's prison cellmate ought to be made public during the course of the inquiry established to review the proceedings against Mr. Morin. The cellmate's identity had been concealed at trial and the Commissioner for the inquiry ruled that he was bound by the continued publication ban. Mr. Morin applied to have the publication ban lifted. The Ontario Court of Appeal dismissed the application. The Court referred to the reasons of the trial judge in Mr. Morin's second trial, for the imposition of the ban, at paragraphs 8 to 11:

> The trial judge summarized the evidence of Mr. X, in part, as follows:
>
> > ...[X] returned to work a day after testifying at Mr. Morin's trial in January of 1986. On that day his assistant foreman threatened to

> kill [X] if [X] attempted to speak to him…Upon returning to work, he was subjected to constant harassment by fellow Hydro employees, some of whom he had known while in jail, ending only with the termination of his Hydro employment in May of 1988…
>
> …
>
> In January of 1988, [X], because of this continuing pressure, reported to the emergency division of Oshawa Hospital… According to [X], Dr. Khan, who did not testify, diagnosed his condition as a nervous breakdown.
>
> …

Donnelly J. quoted with approval from *R. v. McArthur* (1984), 13 C.C.C. (3d) 152 (Ont. H.C.) (per Dupont J.), as follows:

> The court is not here dealing with an application for the exclusion of the press and or the public from the courtroom. This trial is to proceed in a usual public manner with one exception being that requested in the application, and which is restricted to the issue of whether the identity of certain of the witnesses to be called should be kept from the public knowledge for the reasons outlined earlier. This case must be distinguished from those where the court is asked to restrain publication of names where not to do so would create embarrassment, humiliation, or even financial loss. Under most of such circumstances, the rights of complete public disclosure is paramount.
>
> …
>
> The real effect of the publication of [X]'s identity following his testimony was to jeopardize his safety. His experience went far beyond embarrassment and humiliation.

112. The Court of Appeal weighed the competing interests in the case and found that the right of the public to be fully informed about the criminal prosecution of Mr. Morin and the inquiry proceedings was complete save and except the cellmate's identity, which amounted to a minimal impairment to the inquiry.

113. Although the evidence filed by MGEU provides that social workers attempt to keep their work as private as possible, the evidence filed by the media shows that the names of many social workers can be found on CFS agency websites, and Jewish CFS posts photographs of its workers as well.

114. While child protection proceedings under s.75 of *The Child and Family Services Act*, C.C.S.M. c.C80, are closed to the public and witnesses are not named, this inquiry is not a child protection proceeding. If s.75(2) was indicative of a general policy to keep the identity of social workers private, which has been argued by the applicants, the identities of social workers would never be made known in other proceedings. It is clear that is not the case. There is evidence from the Media Group showing that social workers and other professional witnesses have been identified in the context of inquests under *The Fatality Inquiries Act*, C.C.S.M., c.F52. Indeed, the fact that social workers have been identified in inquests was conceded by counsel for the Authorities/ANCR in argument.

115. In her affidavit, Shirley Cochrane also gave evidence that privacy and confidentiality are important to the child welfare system. In the cross-examination on her affidavit by counsel for the Media Group, she acknowledged that her community (Fisher River) knows the social workers who are part of the community. She also acknowledged that her agency posts the names and positions of its staff on a public website.

116. The evidence filed by the Media Group on the issue of privacy indicates that many social workers carry photo identification, and in small communities and reserves, child protection workers are generally known to the community. In the cross-examination on her affidavit, Janet Kehler said that when she affirmed her affidavit (in which she discussed social workers

attempting to keep the nature of their work as private as possible), she was not aware that some child welfare agencies posted names and positions of workers on their websites.

117. The nature of the evidence that the social workers will be called to give relates to the services they provided to Phoenix Sinclair and her family. The evidence adduced by the Media Group relating to the wide availability on the Internet about staff of child welfare agencies does not appear to establish that social workers are entitled to privacy generally as a result of their professional status. Rather, it appears that the fact that a person is employed as a social worker can be accessed publicly, via the Internet, for some agencies.

118. This fact, combined with the role of social workers in this inquiry, which will be to (1) speak about the services they provided in their professional capacity as public servants; and (2) to assist in making recommendations to improve the child welfare system, weighs against finding that they are entitled to anonymity in the media on the basis of a privacy interest.

(b) Personal Safety Risk

119. The evidence filed in these motions indicates that there are risks involved in child protection work. In order to justify a publication ban on the identity of social workers called to testify at the inquiry, the applicants would need to demonstrate not that their work is inherently dangerous or risky, but rather that naming the social workers who provided services to Phoenix Sinclair and her family will create a risk to their safety that could not be otherwise managed with reasonable measures.

120. In her affidavit, Shavonne Hastings gave evidence that there is a risk of violence in apprehension situations, which must be managed. Where there are safety concerns in the context

of provision of child welfare services, the agency has security measures it can implement. In the cross-examination on her affidavit by counsel for ICFS, her evidence was that she has always had the understanding that should anything have "gone wrong" on her case load, as a public servant, she would be accountable for a decision that she had made. She recalled approximately 10 occasions in the course of her work where there have been safety concerns, involving threats, including threats of violence on a couple of occasions. She had heard of one occasion where a worker had been physically assaulted when attending at the home of a client along with four police officers.

121. There has been no direct evidence from any of the applicants that would make the necessary link between identifying social workers in the media and increased risks to their personal safety. The case law indicates that there would need to be much stronger and more direct evidence of risks to personal safety than what has been filed in order to justify a publication ban on that basis. There is evidence filed by the applicants which speaks generally to social workers being concerned about their safety, but there is no evidence of specific incidents or statistics pointing to an increased risk to safety as a result of publicity. The nature of the evidence that has been offered is that some families have referenced the Phoenix Sinclair tragedy to some social workers in the course of their dealings with those families. Again, I would note that no direct evidence was offered by any individual social worker being called to testify in this inquiry as to his or her personal circumstances.

122. The comments of Iacobucci J., in *R. v. Mentuck, supra*, are of assistance in understanding the degree of risk that is required in order to justify an indefinite ban on publicizing identity. In that case, the Supreme Court of Canada unanimously upheld a publication ban on the names of police officers who were involved in undercover operations at the time, because it would

compromise those current operations. The ban was to last for a period of one year. The Court declined to allow the publication ban to last indefinitely, with Iacobucci J. commenting for the Court at paragraph 58:

> I disagree, however, with the appellant's request that the ban be made indefinite. As a general matter, it is not desirable for this, or any, Court to enter the business of permanently concealing information in the absence of a compelling reason to do so. The appellant suggests that the officers would be in physical danger if their identities were ever revealed. This is not a substantial enough risk to justify permanent concealment. All police officers are subject to the possibility of retributive violence from criminals they have apprehended and other persons who bear them grudges or ill-will. In rare cases, this may result in tragic events, and while all efforts must be deployed to prevent such consequences, a free and democratic society does not react by creating a force of anonymous and unaccountable police. I do not find that these officers are at a substantially greater risk than other police officers. Given a showing on the record of a future case that a specific group of officers indeed suffers a grave and long-term risk to life and limb, a permanent or extended ban would be considered.

123. Without any convincing or specific evidence of an increased safety risk to the social workers resulting from publication of their names in the media, I cannot accept that there is a serious risk to the personal safety of any worker that would necessitate anonymity in the media.

(c) Systemic Risks

124. Bruce Regehr and Cheryl Rivers both gave evidence in their affidavits indicating that the public scrutiny arising as a result of a child death review has negative effects on social workers, and links child death reviews with problems of retention of social workers in the field of child protection work, and with increased apprehensions. Janet Kehler and Shirley Cochrane gave evidence to the effect that social workers will suffer from stress and morale issues as a result of publicity.

125. It may be the case that public inquiries into child deaths have some negative consequences on the child welfare system. However, in order to justify a publication ban on the names of social workers, the applicants would need to demonstrate that the publication of workers' names and images in the media will cause a serious risk to the child welfare system or the best interests of children that could not otherwise be managed with reasonable measures.

126. None of the affidavits filed by the applicants provide evidence making the necessary link between the publication of workers' identities and a risk to the system. It appears therefore to be speculative to say that publication of names causes a risk, whether to the administration of justice, or some other important interest.

127. On the issue of harm to the system, in the cross-examination on Ms. Kehler's affidavit by counsel for Edwards and Sinclair, Ms. Kehler gave evidence that would indicate that the risks that are cited by the applicants have already manifested themselves. For example, stress has already increased among workers, as a result of publications in the media in which no workers were named. Part of the stress was the result of all workers being painted with the same brush, and part of the stress was from the fact that a child had died.

128. In the cross-examination on the affidavit of Ms. Gosek by counsel for the Media Group, Ms. Gosek's evidence was that a number of articles talk about inquiries, but they do not address directly the issue of restricting publication as a remedy for social worker stress. In response to questions in cross-examination by counsel for Edwards and Sinclair, Ms. Gosek agreed that there are many reasons for the turnover rate in child protection work.

129. The applicants have adduced evidence in this case, including social science evidence, indicating that inquiries have some negative effects. However, that evidence does not make the

necessary link between identification of social workers in the media and a serious risk to the child welfare system or the best interests of children.

(d) Conclusion

130. The evidence adduced by the applicants, including the social science and expert evidence, does not show that publication of names or images of social workers in the media: (1) will subject them to greater personal safety risk than if they were anonymous in the media; or (2) will cause a serious risk to the child welfare system or to the best interests of children.

131. On the initial question of whether the evidence filed establishes that a publication ban is required to prevent a serious risk to the child welfare system or to the best interests of children, I do not find that any such risk has been established. The link I have referred to is not there.

132. Therefore, the request by the applicants for an order prohibiting any form of publishing, broadcasting, or otherwise communicating by television, internet, radio in print or any other means the name and/or image of any witness who is or was a social worker, and the name of any social worker identified in documents produced at the inquiry, is denied.

B. Analysis of the Second Branch to the Motions

1. General

133. If there was sufficient evidence to establish a risk to the child welfare system or the best interests of children, in accordance with the first branch of *Dagenais/Mentuck*, the analysis would move to an examination of whether the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the

effects on the right to free expression and the efficacy of the administration of justice. I have not found such a "serious risk" but I nonetheless thought it useful to make the following observations and record my views with respect to them.

2. The Salutary and Deleterious Effects

134. Part of the balancing exercise required by *Dagenais/Mentuck* requires assessing the value of revealing the social workers' identities. In the context of an inquiry, there is an even greater presumption of openness because one of the goals of an inquiry is "provide the means for Canadians to be apprised of the conditions pertaining to a worrisome community problem and to be a part of the recommendations that are aimed at resolving the problem" (per Cory J. in *Phillips*, *supra*, para.73).

135. The salutary effects of a publication ban would arguably be that the privacy of the social workers remains intact. To the extent that there might be evidence that does not reflect well on the work of a particular social worker (although I make no such finding at this stage), that social worker might not suffer the same embarrassment or effect on his or her reputation as would be the case if his or her identity is revealed. The applicants have argued that the ban will have a salutary effect on the child welfare system and the best interests of children, but I have found no evidence in that regard.

136. The applicants have argued that what they are seeking amounts to a "minimal" restriction on the freedom of expression. That is because the Commission will hear evidence from witnesses and any person attending the hearing room will see the witnesses.

137. Of importance is that in this inquiry, the public will be educated about a system which is often shrouded in secrecy. Central to this inquiry is the question of why a young child was dead for nine months before the authorities (child welfare and others) became aware. Exactly who played a role in Phoenix's life, through the provision of child welfare services and otherwise, is not a trivial part of Phoenix's story.

138. In addition, there has been evidence filed by the applicants, and which has come out in cross-examinations, showing that some members of the public have been under a misapprehension as to which individuals or agencies provided services to Phoenix and her family. This is particularly the case with respect to the evidence of Shirley Cochrane. There has been a concern noted in the evidence filed that all social workers will be "painted with the same brush" in this inquiry. In my view, if the identity of the social workers who had actual involvement with Phoenix remains confidential, it will not serve to clear up any of those misconceptions. Concealing their identities could, in fact, serve to perpetuate them. And, while a ban might help to protect the privacy of an individual worker who might be viewed unfavourably by the public, there would continue to be a risk that any child protection worker could be painted with that same brush when the particular worker is not identified. I find that the identity of social workers who will testify is valuable information to the inquiry, and to the public.

139. Ms. Kehler provided evidence that some social workers may be reluctant to come forward to assist this Commission if they know that their names will be published in the media. The expectation of this Commission is that as both professionals and public servants, all social workers called to testify will fulfill the duties and responsibilities that rest with them in those respective capacities.

140. The public hearings of this inquiry will be run in such a way as to ensure fairness to all of the witnesses, in order to ensure that full and accurate information is provided to this Commission and to the public. The comments of R.J. Sharpe J.A. in the decision in *Episcopal Corp. of the Diocese of Alexandria-Cornwall v. Cornwall Public Inquiry Commissioner, supra,* at paragraph 16, are helpful in the context of this inquiry as they speak to the expectation on the ability of the public to understand the information that is provided to them. In that case, there was a request in an inquiry for a publication ban on the identity of a witness who had been acquitted of sexual abuse charges. The Commissioner had refused to grant a publication ban, a decision that was upheld on review by the Ontario Court of Appeal:

> The Commissioner had found that the employee had been the subject of media attention during and after his trial when his identity had been exposed to the public. At that time, the employee enjoyed his employer's support and the support of his parish. The Commissioner also found that the employee had failed to provide medical evidence to substantiate the detrimental effect he claimed disclosure of his identity would have on his health. The Commissioner found that one could not presume that the public would ignore reminders of the employee's acquittal and jump to unfair or unfounded conclusions about him. The Commissioner indicated that the appellant could object to evidence on the ground of relevance or ask for publication bans in relation to specific allegations not germane to the examination of the institutional response to the allegations.

141. Finally, I wish to comment on the efficacy of the requested ban. The nature of the ban requested by the social workers, if granted, would result in an inequality among members of the public in their access to information about the inquiry. That is, the social workers are not asking that the hearing room be closed to the public. Those members of the public who are able to attend will be able to learn the identity of the social workers and, as acknowledged by counsel for the MGEU, would be able to communicate what they learned in the hearing room, including

via the Internet. This in turn raises the question of whether the requested ban would be effective in any event (*Dagenais,* supra, paragraphs 93 to 94).

3. Conclusion

142. Even if I had found that a publication ban was necessary to prevent a serious risk to the child welfare system or to the best interests of children, which I have not, the evidence does not establish that the salutary effects of a publication ban would outweigh its deleterious effects in any event.

VI. Audio and Video Recording and Broadcasting in the Inquiry

A. The Position of MGEU and ICFS

143. The MGEU and ICFS have asked in their motions (in the alternative) for an order prohibiting audio and video recording and broadcasting of the testimony of social workers.

144. The MGEU sets out its position on cameras in inquiries at paragraphs 86 to 125 of its brief. The MGEU takes the position that there is no s.2(b) *Charter* right to audio and video recording and broadcasting of the inquiry, and relies heavily on the decision in *R. v. Pilarinos*, 2001 BCSC 1332. The MGEU further argues that it is not necessary for the media to have such access in order for the inquiry to fulfill its mandate.

B. The Position of the Respondents

The Media Group takes the position that to restrict the normal reporting practices typically available in inquiries amounts to an interference with the freedom of expression. AMC/SCO have

argued that to restrict media in the manner requested will limit the number of people who will be able to access the inquiry proceedings.

C. Analysis

145. *R. v. Pilarinos,* upon which the MGEU relies, is not consistent with the more recent case law on this issue. In particular, in the recent decision by the Supreme Court of Canada in *CBC v. AG (Canada), supra*, Deschamps J. found that filming in the hallways of courthouses, and audio broadcasting of court proceedings was "expressive activity" pursuant to s.2(b). The Media Group points out that there is evidence, from the cross-examination on the affidavit of Ms. Gosek, demonstrating that the ability to observe body language, tone of voice, and non-verbal cues is important to evaluating information that is being given. The Media Group points out that there is a long and established history of recording inquiry proceedings. The Media Group argues that to deviate from this practice would be a violation of the freedom of expression.

146. The MGEU relies on the decision of Preston Prov. J. in *Re Sinclair Inquest*, 2010 MBPC 18, in support of its position that there is no s.2(b) *Charter* right to televise this inquiry. That case involved an application by the media to televise an inquest under *The Fatality Inquiries Act*, C.C.S.M. c.F52, which is a sitting of the Provincial Court. Different considerations apply in deciding the issue of whether to televise court proceedings versus inquiry proceedings. As the Media Group notes in its brief, the difference in practice between public inquiries and court proceedings was noted by Preston Prov. J. in that case. In denying the application, the learned judge expressed the sentiment that he did not wish to turn the inquest into a "*de facto* inquiry," and relied, in part, on the distinction between inquests and inquiries in dismissing the media's application.

147. Freedman J.A., in *M.G.E.U. v. Hughes*, *supra*, also comments on the unique, and public, nature of this inquiry, at paragraphs 70 to 73:

> The Inquiry hearings will be held in public (subject to the respondent's ruling otherwise in any particular instance). The OIC, enacted pursuant to Part V of the *Act*, headed, "Respecting Commissioners Appointed for Public Inquiries," contemplates public hearings. In his statement announcing the plans to establish a commission of inquiry, the Premier stated, among other matters: "The public has a right to know how a child could go missing for nine months without it being noticed ...." The respondent's report will be for public consumption.
>
> In this case the AG "is strongly of the opinion that it is in the public interest to hold this inquiry." The LGIC has decided that the Inquiry's process and result should be subject to public scrutiny and exposure, although that is not a necessary aspect of an inquiry that might be constituted pursuant to s.83. I am satisfied that the LGIC may establish a public inquiry under s 83. The scale and scope of such an inquiry is not confined to a formal or judicial investigation, and is limited only by the provisions of s.83.
>
> The AG argued forcefully, and I think correctly, that this Inquiry under s.83 of the *Act* is intended to be of a different nature and scope than any review, investigation or inquest (or any combination thereof) that has been or that might be conducted pursuant to any other statute.
>
> The OIC imposes obligations on the respondent, as commissioner, going beyond those imposed on any person who might conduct any other review, investigation or inquest under the two statutes in question. The OIC is, as counsel said, "tailor-made" to suit the particular combination of factors that were felt to require public investigation and report. Those factors include some that must be dealt with at an inquest or an investigation under the *FIA*, some that must be dealt with in a review under *The Child and Family Services Act* and some that are not required to be dealt with under either of those statutes.

148. Given the foregoing, I accept that audio and video recording and broadcasting of this inquiry's proceedings is "expressive activity" protected by s.2(b) of the *Charter*. In determining whether or not to make an order prohibiting such activity the analysis to be applied is again *Dagenais/Mentuck*, taking into account the evidence filed by the parties as to the particular risks associated with recording and broadcasting workers' testimony. This analysis is always context-

specific, as noted earlier, and therefore in this case would need to take into account the function of public inquiries, as noted by Cory J. at paragraphs 73 to 75 of *Phillips, supra*, as noted above.

149. The Media Group has filed evidence showing that the majority of families that come in to contact with the child welfare system are First Nations families. They argue that because many of the people affected by this inquiry live in remote communities, access will be negatively affected if there is an order restricting audio and video broadcasting.

150. This issue was discussed in the case of *Aboriginal Peoples' Television Network v. Canada (Human Rights Commission)*, 2011 FC 810, a judicial review by Lutfy C.J. of the Federal Court of the refusal of the Canadian Human Rights Tribunal to allow a camera access to its proceedings. The proceedings in question involved a complaint filed by the Assembly of First Nations and the First Nations Child and Family Caring Society, alleging that the inequitable funding of child welfare services on First Nations reserves amounted to discrimination. The tribunal did touch on the aboriginal community's interest in being able to observe the proceedings and the barriers that would make it impossible for most members of the community to travel to Ottawa to observe the hearing, but then concluded that the exclusion of cameras from the hearing room was necessary to ensure that the publicity of the hearings would not undermine their integrity. Lutfy C.J. found that the tribunal's decision was made without regard to the evidence before it, and in sending it back for the tribunal's reconsideration, commented at paragraph 14:

> There was little affidavit evidence before the tribunal regarding any of the potential negative impacts of filming the proceedings. The Attorney General provided one affidavit from a Litigation Case Manager with the Department of Indian Affairs and Northern Development. Her affidavit stated that the government's witnesses had all "expressed concern" about their testimony being videoed and televised. Their primary concern was that if their testimony was taken out of context, it would portray them in a negative light and damage their working relationships with First Nations persons and agencies. None of the

> proposed witnesses expressed concern that their testimony would be affected by the presence of a camera, or otherwise expressed any concerns relating to the fairness of the hearing. None of the potential witnesses were named, and no evidence was provided directly from them regarding their concerns.

151. The concerns raised in that case are similar to the concerns expressed by Ms. Kehler in her affidavit, in which she explains the reasons why some social workers have concerns about their testimony being broadcast. However, as in *APTN, supra*, none of those social workers has provided any affidavit evidence to this inquiry regarding their concerns; those concerns have been expressed by way of hearsay evidence from Ms. Kehler. This is not a risk which is well-grounded in the evidence, which is what is required under *Dagenais/Mentuck.*

D. Conclusion

152. A public inquiry is meant to educate and inform the public and it follows that permitting broadcasting of the inquiry proceedings would serve to fulfill that aspect of the inquiry's mandate. Were I to restrict audio and video recording and broadcasting of the social workers' testimony in this inquiry, the result would be an inequality among members of the public in access to information about the proceedings. I cannot justify the requested restriction on media access in the absence of convincing evidence that broadcasting the testimony of social workers will cause a serious risk as required by *Dagenais/Mentuck.* I therefore decline to grant the relief requested in the alternative by MGEU and ICFS, for the same reasons I have declined to grant the primary relief sought.

VII. Other Motions

153. In addition to the motions filed by the applicants above, a number of other motions were filed. Included among these motions are motions filed on behalf of individuals identified by Commission Counsel as sources of referral/informants (SORs). The motions are as follows:

A. Department of Family Services and Labour ("the Department")

154. The Department has filed a motion seeking the following relief:

> That the Commission redact from documents produced at the inquiry the names and other identifying information of:
>
> a. Sources of Referral
>
> b. Minors, if their identity is irrelevant to the inquiry
>
> c. Foster parents

155. On December 2, 2011, after receiving written submissions from counsel for the parties and intervenors, I made my Ruling on Redaction which required that certain information be redacted from Commission Disclosure prior to distribution to the parties and intervenors to this inquiry. The Department's motion is essentially a request that that ruling be continued into the public phase of this inquiry, so that the documents entered into evidence at the inquiry contain the same redactions as have already been made by Commission counsel. No objection was made by any party or intervenor to the Department's motion in oral submissions, and as a result, and for the reasons set out in my December 2, 2011 ruling, I made the order requested at the time of counsel's presentation.

B. SOR #1, SOR #2, SOR #4, PHN and TM

156. A motion was filed by counsel for the Winnipeg Regional Health Authority (WRHA) on behalf of witnesses identified as SORs #1, #2, #4, as well as on behalf of two individual witnesses who are not identified as SORs, PHN and TM. The motion seeks the following relief:

1. An order redacting the names or other identifying information of SOR #1, #2, #4, PHN and TM from documents produced at the inquiry.

2. An order prohibiting any form of publishing, broadcasting, or otherwise communicating by television, internet, radio, print or any other means the names and other identifying information of SOR #1, #2, #4, PHN and TM.

3. That the Commissioner extend to the witnesses referred to above any other considerations regarding the comfort, safety, privacy that he determines ought to be reasonably extended to other witnesses at the inquiry.

157. In her oral submission, counsel for the WRHA asked that while the hearing room may be open to the public during the testimony of these witnesses, SORs #1, #2, and #4 not be referred to by name during the hearing. With respect to PHN and TM, she indicated that the relief sought by Authorities/ANCR, and ICFS would be appropriate.

C. SOR #3

158. A witness identified by Commission Counsel as SOR #3 filed a motion, through her counsel, for an order prohibiting any form of publishing, broadcasting or otherwise communicating by television, internet, radio, in print, or by any other means, the name, face or

identity of SOR #3. While the Notice of Motion filed also asked that all members of the public be excluded from the hearing room during the testimony of SOR #3, in oral submissions counsel for SOR #3 clarified that the public and the press may see the witness.

D. SOR #5, SOR #6, SOR #7

159. Counsel for witnesses identified by Commission Counsel filed a motion as SOR #5, SOR #6, and SOR #7, filed a motion for:

1. An order prohibiting any form of publication, broadcasting or otherwise communicating by television, internet, radio, print or any other means, the name, face, or identity of SOR #5 , SOR #6, and SOR #7; and

2. That the Commissioner exclude all members of the public from the hearing room during the testimony of SOR #5 and #6, or any other order the Commissioner may see fit to protect the identity of these witnesses.

E. Analysis

1. SOR #1, SOR #2, SOR #3, SOR #4, SOR #5, SOR #6, SOR #7

160. Each of these individuals has been identified by Commission Counsel as an informant/source of referral as that term is used in *The Child and Family Services Act*, C.C.S.M. c.C80, in the context of this inquiry, and none of these individuals has consented to the disclosure of their identity.

161. Section 18 of *The Child and Family Services Act*, C.C.S.M. c.C80 is a mandatory provision that applies to all members of society. It requires any person who has information that a child is in need of protection to report the information to an agency. Pursuant to s.18.1(2):

> 18.1(2) Except as required in the course of judicial proceedings, or with the written consent of the informant, no person shall disclose
>
> (a) the identity of an informant under subsection 18(1) or (1.1)
>
> (i) to the family of the child reported to be in need of protection, or
>
> (ii) to the person who is believed to have caused the child to be in need of protection; or
>
> (b) the identity of an informant under subsection 18(1.0.1) to the person who possessed or accessed the representation, material or recording that is or might be child pornography.

162. The Media Group is not taking issue with a publication ban on the identities of SORs, but does reserve its right to bring an application for publication of identity if the evidence reveals that a particular witness played a material role apart from being an SOR. None of the parties to this inquiry or on these motions has indicated any opposition to the motions brought by the SORs (subject to the qualification by the Media Group as above).

2. PHN and TM

163. Counsel for PHN and TM argues that the reasons for treating PHN and TM like the SORs are "no less compelling" than for the SORs. Those reasons flow from the "critical nature of the services PHN and TM provide." Affidavits from Regan Spencer and Linda Tjaden have been filed in support.

164. Ms. Spencer is the Director of Social Work at the Health Sciences Centre, where approximately 70 social workers report to her. The medical social workers in the Women's Health Program at HSC are aware of their professional duty to report concerns that a child may be in need of protection. Once those social workers make a report, they become "sources of referral" deserving of protection under *The Child and Family Services Act*, C.C.S.M. c.C80.

165. Ms. Tjaden is Director of Public Health for the WRHA. Public Health Nurses (PHNs) provide services to mothers and families in the pre-natal and post-partum period. Services are voluntary. Part of the services that the PHNs provide are home visits. Ms. Tjaden states that these visits are key. Sometimes the PHN will identify certain risk factors within the home, and they are aware of their legal duty to report any child protection concerns. TM provided supervision to the PHN in this case. Ms. Tjaden is concerned that publication has the potential to destabilize the critical trust relationship between PHNs and clients. Publication of the identities of the PHN and TM in this case could potentially jeopardize the protection afforded to SORs.

166. It is argued that with respect to PHN and TM, they work in positions where, due to the nature of their duties, they could be informants. Persons in their positions report child protection concerns with some frequency.

167. Counsel for PHN and TM has taken the position that as potential sources of referral, PHN and TM should be entitled to the same protections as SOR #1, #2 and #4.

F. Decision

168. I find that it is appropriate to grant to each of the SORs the relief they seek and therefore grant the orders sought by each of SOR #1, SOR #2, SOR #3, SOR #4, SOR #5, SOR #6, and SOR #7.

169. With respect to PHN and TM, there is no evidence that either of PHN or TM acted as informants/sources of referral in the particular circumstances to be examined in this inquiry. The argument that they might, due to the nature of their professional duties, become informants/sources of referral at some point and are therefore entitled to anonymity, is not persuasive, nor does it appear that any "serious risk" has been identified in the evidence to justify a publication ban as is required under *Dagenais/Mentuck*. By this logic, any person who may become a source of referral in the course of his or her professional duties should always be entitled to a publication ban based on the potential that he or she may report a child in need of protection at some point in the future - regardless of the reason why he or she is being called as a witness in a proceeding. I therefore decline to grant the relief sought by PHN and TM.

DATED at Winnipeg, Manitoba, this 12th day of July, 2012.

E.N. (Ted) Hughes, O.C., Q.C., LL.D. (Hon)
Commissioner

COMMISSION OF INQUIRY INTO THE CIRCUMSTANCES
SURROUNDING THE DEATH OF PHOENIX SINCLAIR

The Honourable Edward (Ted) Hughes, Q.C.,
Commissioner

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Transcript of Proceedings
Public Inquiry Hearing,
held at the Winnipeg Convention Centre,
375 York Avenue, Winnipeg, Manitoba

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TUESDAY, MARCH 12, 2013

MARCH 12, 2013

PROCEEDINGS CONTINUED FROM MARCH 11, 2013

THE COMMISSIONER: Two motions are before me. The first is a motion filed on behalf of witnesses identified as DOE #1, DOE #2, DOE #3 and DOE #4. The relief sought in the first motion is for an order, one, that I prohibit any form of publishing, broadcasting or otherwise communicating by television, internet, radio, in print or by any other means the name, face or identity of witnesses DOE #1, DOE #2, DOE #3 and DOE #4.

Two, that I order that DOE #1, DOE #2, DOE #3 and DOE #4 provide their testimony by means of video conferencing, the video portion of which shall be visible only to me and the audio portion of which shall be audible in the hearing room.

And three, that the witnesses be referred to, for the purpose of this hearing, as DOE #1, DOE #2, DOE #3 and DOE #4.

After filing the motion for a publication ban on behalf of DOES #1, #2, #3 and #4, counsel for DOE #3 filed a further motion to have DOE #3 declared a source of referral, SOR, in the context of this inquiry, along with a request for a publication ban with respect to DOE #3's testimony in the same form as requested in the first

motion.

The two motions are opposed by Intertribal Child and Family Services, ICFS, and the Assembly of Manitoba Chiefs and the Southern Chiefs Organization, AMC/SCO.

ICFS has filed affidavit evidence in response and counsel for ICFS conducted a cross-examination on the affidavit of DOE #3. Counsel for the AMC/SCO attended the cross-examination. The transcript of the cross-examination has been filed with the Commission.

ICFS and AMC/SCO have filed briefs in opposition to the two motions filed. The media group has not taken any position with respect to the two motions before me.

Each of DOES #1, #2, #3 and #4 has provided direct evidence in support of the first motion. In their affidavits they set out the concerns they have should their identity be made known when they are called to testify in this inquiry. The affidavit evidence is as follows:

(a) Affidavit of DOE #1

DOE #1 is the son of Wes McKay. He testified at the criminal trial of Wes McKay and Samantha Kematch. DOE #1 was 12 years old at the time that he observed Phoenix Sinclair with Wes McKay and Samantha Kematch. DOE #1 found testifying at the criminal trial very stressful. Following the arrest of Wes McKay for the murder of Phoenix Sinclair, he experienced harassment from people who knew he was a

child of Wes McKay. DOE #1 is currently employed and no one connected with his employment is aware that he is related to Wes McKay. DOE #1 states that he has serious concerns that his mental health, physical health and safety may be affected if he has to testify at the inquiry without a publication ban.

(b) Affidavit of DOE #2

DOE #2 is a child of Wes McKay and testified at the criminal trial of Wes McKay and Samantha Kematch. As his counsel, Mr. Gange, mentioned in his oral submissions, DOE #2 is a brother of DOE #1. DOE #2 was 14 years old at the time that he observed Phoenix Sinclair with Wes McKay and Samantha Kematch. DOE #2 found testifying at the criminal trial very stressful. Like DOE #1, DOE #2 has always said that he experienced harassment from people who knew he was a child of Wes McKay. DOE #2 is currently attending school and his evidence is that no one connected with his schooling is aware that he is related to Wes McKay. DOE #2 believes that his mental health, physical health and safety may be affected if he has to testify at this inquiry without a publication ban.

(c) Affidavit of DOE #3

DOE #3 is the mother of DOE #1 and DOE #2. She was in a common-law relationship with Wes McKay for approximately seven years. DOE #3 testified at the

criminal trial of Wes McKay and Samantha Kematch, which she found very stressful as she was concerned about possible retribution that might result to her because of her testimony. DOE #3 states, like DOE #1 and DOE #2, that following the arrest of Wes McKay for the murder of Phoenix Sinclair, she experienced instances of bullying and harassment from people that knew of her relationship to Wes McKay. DOE #3 is currently employed and no one at her place of employment is aware of her relationship to Wes McKay. She is very concerned about the health and safety of DOE #1 and DOE #2 as they suffer, from time to time, from anxiety and depression. DOE #3 also states that she has serious concerns that her mental health, physical health and safety may be affected if she has to testify at the inquiry without the protection of a publication ban.

In cross-examination on her affidavit conducted by Mr. Khan, counsel for ICFS, DOE #3 gave evidence that she is concerned about the possibility of losing her job if her employer was to learn of her former relationship with Karl Wesley McKay.

(d) The affidavit of DOE #4

DOE #4 is a child of Wes McKay and has four children under the age of 10 who do not know that their grandfather was convicted of the murder of Phoenix Sinclair. DOE #4 does not wish to have this information

made known to them at this time. DOE #4 further states:

> "When Wes McKay was charged with the murder of Phoenix Sinclair I experienced harassment from people who knew that Wes McKay was my father. As a result, I do not tell people that I am a child of Wes McKay."

As well, at paragraphs 6 and 7 of the affidavit, she states:

> "I have very, very serious concerns that if I am identified during my testimony at the inquiry, my children will experience instances of harassment, bullying, verbal and physical assaults. I require a publication ban to protect my own safety and to prevent my children from being put at risk as a result of my appearance at the inquiry."

There is also before me the affidavit of Kalyn Bomback. In support of the second motion for a declaration that DOE #3 is a source of referral, counsel for DOE #3 has filed the affidavit of Kalyn Bomback, a lawyer employed by his firm. The affidavit attaches an excerpt of a document which is a record of a phone call that DOE #3 made to a Child and Family Services worker employed by ICFS on March 6, 2006. The document references DOE #3 as the "referral source" and identifies that the issue presented by DOE #3 to the ICFS worker was the physical abuse of a five-year-old female.

There is also before me the affidavit evidence filed by ICFS, being the affidavit of Bobbie Rachelle Lee, filed in opposition to the two motions. The affidavit attaches a number of exhibits, including news reports created at the time of the criminal proceedings against Karl Wesley McKay and Samantha Kematch. Those news reports refer to DOES #1, #2 and #3 by name. Ms. Lee's affidavit also attaches an excerpt of DOE #3's testimony at the criminal proceedings and records of a phone call that DOE #3 made to the Winnipeg Police Service on March the 6th, 2006 in which DOE #3 advised the police that her sons may have witnessed a murder that occurred on the Fisher River Reserve.

I now return to the arguments advanced by the

applicants and respondents on the two motions before me. In his brief and in oral argument, counsel for DOES #1, #2, #3 and #4 has argued on behalf of his clients that a publication ban is necessary to protect his clients' own safety and wellbeing. He argues that his clients have legitimate concerns that revealing their identity in the context of these proceedings will subject them to certain risks.

In the context of the application to have DOE #3 declared a source of referral, counsel has also argued that the evidence shows that DOE #3 is, in fact, an SOR and ought to have been identified as such early in the course of the inquiry. Counsel for DOE #3 further argues that because DOE #3 is an SOR, she is entitled to certain protections pursuant to the Child and Family Services Act, CCSM Chapter 80, which I will discuss in further detail later in these reasons.

Counsel for ICFS focuses his client's main opposition to these motions on an argument that the matters are res judicata. The doctrine of res judicata generally holds that a litigant is estopped from bringing forth an issue or cause of action on a matter that has already been decided in a previous proceeding. Counsel for ICFS clarified that his argument with respect to res judicata was not applicable to DOE #4.

Counsel for ICFS has also argued that DOES #1, #2, #3, #4 have failed to meet the legal test establishing the basis for a publication ban. He argued that the identity of DOES #1, #2, #3 and #4 is already known as a result of their testimony at the criminal trial. Counsel for ICFS further argued that DOE #3 is not an SOR or informant as defined in the Child and Family Services Act.

Counsel for AMC/SCO supported the submission of counsel for ICFS and placed great emphasis on his position that DOE #3 is not a source of referral under the Child and Family Services Act.

I will address each of these points in turn but will begin by addressing the argument that has been advanced that these matters a res judicata.

The doctrine of res judicata is described by the Manitoba Court of Appeal in Glenko Enterprises v. Keller, 2008 M.B.C.A. 24, and I quote:

> "Res judicata has two distinct forms: issue estoppel and cause of action estoppel. Donald J. Lange, in his leading text, The Doctrine of Res Judicata in Canada, 2nd ed. (Markham: LexisNexis Canada Inc., 2004),

explains the differences (at pp. 1-2):

> .... issue estoppel means that a litigant is estopped because the issue has clearly been decided in the previous proceedings, and cause of action estoppel means that a litigant is estopped because the cause has passed into a matter adjudged in the previous proceeding."

ICFS argues that DOES #1, #2 and #3 are estopped from bringing their motion based upon the application of the issue estoppel form of res judicata.

In Glenko, the Manitoba Court of Appeal held that in order for issue estoppel to apply, the following three requirements must be satisfied:

> "(1) the same question has been decided in both actions;
> (2) the judicial decision which is said to create the estoppel was final; and
> (3) the parties to the judicial

> decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised ..."

ICFS argues that all three requirements for issue estoppel have been satisfied with respect to the publication ban. ICFS' argument is that my ruling on redactions dated December 2, 2011 dealt with the same matter that I am being asked to decide in this motion for a publication ban by DOES #1, #2 and #3. Essentially, they argued the same question has been decided in both actions.

The purpose of my ruling on redactions on December the 2nd, 2011, was to deal with certain classes or categories of information that ought to be redacted prior to having the documents distributed internally amongst counsel for the parties and intervenors in this Commission. This was not a determination of what information was to ultimately make its way into the public record. This is further evidenced by the fact that subsequent to my ruling on redactions I received and adjudicated upon motions for publication bans brought by some of the parties to this inquiry, which I heard in July of 2012 and for which I gave a ruling on July 12th, 2012. This included a motion for a publication ban on the identity of social workers brought

by counsel for them.

These previous publication ban motions were requests for a ban on any form of publication or broadcasting of the identity of any social worker called to testify as a witness in the public hearing phase of the inquiry. This was a separate process which dealt with a different question than that dealt with in my ruling on redactions. ICFS' argument, therefore, fails to note the distinction between the two separate processes.

Counsel for ICFS also argued that either one or both of my rulings on redactions of December 2, 2011 and my adjudication of July 11, 2012 on these earlier motions amount to a final decision which was meant to be conclusive and applied to the inquiry proceedings. They also argue that the applicants had an opportunity to apply for a form of a confidential status at any time of my ruling on redactions and the publication ban hearing and they failed to do so.

Mr. Gange, in his submissions, argued that the matter could not have been decided because none of DOES #1, #2 and #3 made any application for a publication ban either in July of 2012 or at any other time. I agree with counsel for the applicants. No application for confidentiality was brought on behalf of DOES #1, #2 and #3 in regards to either my ruling on redactions or my ruling on publication

ban. The matter was, therefore, not adjudicated nor was a decision given. As such, it cannot be said that the matter was decided and it follows that no final determination could have been made. For these reasons, I find that the doctrine of res judicata does not apply to the motion for a publication ban brought by the applicants.

The respondent also argues that res judicata applies to the motion by DOE #3 in which she seeks to be declared a source of referral. For reasons set out below, I do not need to rule on that issue.

I now turn to the arguments advanced by the applicants and respondents on the substantive issues in these motions, first with respect to the motion for a publication ban brought on behalf of DOES #1, #2, #3 and #4 and then to the motion declaring DOE #3 an SOR and the relief sought as a result of it.

My analysis of the substantive arguments in the motion filed by DOES #1, #2, #3 and #4 for a publication ban requires that I conduct what has become known as the Dagenais/Mentuck analysis.

In my ruling on publication bans of July 12th, 2012, I set out the legal test that applies in the case of a request for a publication ban as follows, and I quote:

> The Supreme Court of Canada has

> held that the Dagenais/Mentuck analysis applies to all discretionary orders that limit freedom of expression and freedom of the press in relation to legal proceedings, Toronto Star Newspapers Ltd. v. Ontario 2005 S.C.C. 41, paragraph. 7.

The applicants and respondents to these motions have agreed that this is the analysis to be applied by me in adjudicating on the relief requested by the applicants. The Dagenais/Mentuck analysis provides that a publication ban may only be ordered when

(1) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonable alternative measures will not prevent the risk; and

(2) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the rights to free expression, the right to a fair trial and the efficacy of the administration of justice.

I went on to say in my July ruling as follows:

> "In R. v. Mentuck it was recognized that the test should be applied in a case-specific manner. R. v. Mentuck is also clear as to the evidentiary standard in applications such as those before me. The onus lies on the party seeking to displace the general rule of openness. There must be a convincing evidentiary basis for issuing a ban. Paragraphs 34 of R. v. Mentuck makes clear the type of evidence that is required in order to displace the general rule:"

And the court in that instance said this:

> "...One required element is that the risk in question be a serious one or, as Lamer C.J. put it at p. 878 in Dagenais, a 'real substantial' risk. That is, it must be a risk the reality of which is well-grounded in the

> evidence. It must also be a risk that poses a serious threat to the proper administration of justice. In other words, it is a serious danger sought to be avoided that is required, not a substantial benefit or advantage to the administration of justice sought to be obtained."

The court, in R. v. Mentuck recognized that there may be cases that raise interest other than the administration of justice for which a similar approach would be used, see, e.g., Sierra Club of Canada v. Canada (Minister of Finance), 2002 S.C.C. 41.

All counsel appearing here are in agreement that the Dagenais/Mentuck is the appropriate analysis to apply in determining whether DOES #1 to #4 ought to be granted the publication bans they seek. The Dagenais/Mentuck analysis is meant to be applied in a flexible and contextual manner.

In considering the context in which each of DOES #1, #2, #3 and #4 will be called to give evidence, I would note that these individuals are not being called to give evidence about work performed in the course of a public

duty, unlike the social workers who applied for a publication ban in July of 2012. DOES #1, #2, #3 and #4 are being called to testify in their personal capacities as a result of their familial association with Karl Wesley McKay. DOE #1 and DOE #2 were children during the time they saw Karl McKay and Samantha Kematch interact with Phoenix Sinclair.

I also note that in contrast with the evidence that was tendered on behalf of the social workers in their application for a publication ban last July, each of DOES #1, #2, #3 and #4 has provided their own firsthand affidavit evidence in support of their motion. The nature of this evidence was summarized by their counsel in his brief as follows:

> "2. The four witnesses all have a connection with Wes McKay. Three are his children. One is a former common-law spouse. Certain of the witnesses may provide evidence that comments to a limited extent upon the child welfare system. The main purpose of their evidence will be, however, to comment upon the relationship of Phoenix

> Sinclair with Wes McKay and Samantha Kematch. It is expected that their evidence will help the Commissioner appreciate to a greater degree the life of Phoenix Sinclair during the final few months of her life.
>
> 3. The application is brought by all of the witnesses with respect to their own safety and well-being. In addition, witness DOE #4 brings the application as a result of a parent's concern to protect their own children."

Each of these witnesses has raised a concern about health and safety risks resulting from publication of their identities in the context of this inquiry. DOE #4 has raised a concern about potential risk to her children. I accept that as stated in paragraph 111 of my ruling on publication bans of July 12th, 2012 that where there is significant evidence of a potential for harm arising out of the publication of a witness' identity, a publication ban may be ordered. See R. v. Morin 1997 Carswell Ontario 400. A risk to personal health or safety is the type of "serious

risk" sufficient to fulfill the first branch of the Dagenais/Mentuck analysis.

Based on the direct affidavit evidence before me, I find that there is a risk to the personal health and/or safety that could result from revealing the identities of DOES #1, #2, #3 and #4 to the public in the context of their inquiry testimony.

Each of the witnesses has given their own evidence that they have previously experienced instances of harassment as a result of their connection to Karl Wesley McKay. I find that their concerns that they might be subject to further instances should they be identified in this most public inquiry are legitimate. I further accept, as was suggested by counsel for the applicants in his oral submissions, that these four witnesses have been damaged by their association with Karl Wesley McKay and to subject them to publicity in this inquiry would be to victimize them further.

The second branch of the Dagenais/Mentuck analysis requires that I examine whether the salutary effects of a publication ban outweigh the deleterious effects on the rights and the interests of the parties and the public, including the effects on the rights of free expression and the efficacy of the administration of justice. The salutary effect of the ban being sought by

DOES #1, #2, #3 and #4 is a reduction in the potential risk to their health and safety, as previously identified. These individuals will also be able to carry on their daily lives, their employment and schooling without the stigma of being widely known as a relative of Karl Wesley McKay.

The potential deleterious effects of the bans sought are reduced by the fact that for each of these witnesses their specific relationship to Karl Wesley McKay and all aspects of their evidence, other than their identities, will be fully reported on. The only thing that the public will not see is these individuals' names and images. I disagree with the submissions of counsel for ICFS that this is an extreme ban. This evidence of DOES #1, #2, #3 and #4 will be fully reported on as will their familiar association with Karl Wesley McKay. I therefore find that the salutary effects of the publication ban outweigh any of its deleterious effects.

The law of this country as it is enacted and applied has, as it should, a tough side to it. That was displayed by the verdict of the jury and the sentencing by the trial judge that sent Karl Wesley McKay and Samantha Kematch to prison for the rest of their lives, denying them the liberty and the freedom enjoyed by law-abiding citizens. That same law, as it is enacted and applied, also has, as it should, a compassionate side. That I

believe has been displayed in the reasoning I have expressed in concluding that the two requirements of the Dagenais/Mentuck test have been met and satisfied, thus allowing me to grant, as I now do, a publication ban for each of DOES #1, #2, #3 and #4 on the terms requested in the first motion, terms that are deemed to include the points advanced yesterday by Mr. Kroft when addressing the inquiry as counsel on behalf of certain media outlets.

A consequence of what I have just ordered is that reference to the names of any of these individuals will need to be redacted from documents to be entered into evidence at the public hearings of this inquiry. Counsel for ICFS has pointed out that there are some instances in which the names of some of the individuals have already been entered in the public record at this inquiry. I would direct Commission counsel to ensure that those documents are redacted as well to reflect my decision.

Given my decision on the first motion, I do not find it necessary to make the determination as to whether DOE #3 is a source of referral. I make the following comment, however: The arguments advanced by ICFS and AMCO/SCO in opposition to this motion centred around the fact that at the time that DOE #3 made a telephone call to ICFS in March 2006, Phoenix was already unfortunately deceased. As I understand their argument, the protections

afforded to sources of referral as found in Section 18 of the Child and Family Services Act do not apply when a person makes a report to an agency about a child who is no longer alive. I do have a concern about interpreting the provisions of the Child and Family Services Act narrowly, given that part of the Commission's mandate is to inquire into why the death of Phoenix Sinclair remained undiscovered for nine months. It was seen that such a narrow interpretation would not serve to encourage reporting cases such as Phoenix's to the appropriate authorities. This may well be something that I will address when I make recommendations in my final report on these proceedings.

Commission counsel can now make the necessary arrangements to have DOES #1 to #4 testify in accordance with the procedure I have sanctioned today. The timetable for that to occur will be circulated to Commission counsel subsequent to the directions I will deliver at 2:00 p.m. tomorrow in this room on the conflict of interest issue that is before me for resolution.

So that completes the proceedings for today, I believe. Commission counsel, is there anything else?

MS. WALSH: No, Mr. Commissioner.

THE COMMISSIONER: All right. We'll stand adjourned, then, till two o'clock tomorrow when I'll deal

with the other matter, as just indicated.

(PROCEEDINGS ADJOURNED TO MARCH 13, 2012)

441/2011
No. .....

ORDER IN COUNCIL

ORDER

1. Paragraph 6 of Order in Council 89/2011 is amended by striking out "March 30, 2012" and substituting "March 30, 2013".

2. This Order is effective immediately.

AUTHORITY

Subsection 83(1) and section 96 of *The Manitoba Evidence Act*, C.C.S.M. c. E150, state in part:

Appointment of commission
83(1) Where the Lieutenant Governor in Council deems it expedient to cause inquiry to be made into and concerning any matter within the jurisdiction of the Legislature and connected with or affecting

...

(c) the administration of justice within the province;

...

(f) any matter which, in his opinion, is of sufficient public importance to justify an inquiry;

he may, if the inquiry is not otherwise regulated, appoint one or more commissioners to make the inquiry and to report thereon.

Power to make rules
96 The Lieutenant Governor in Council may make provision, either generally in regard to all commissions issued and inquiries held under this Part, or specially in regard to any such commission and inquiry, for

...

(c) all such acts, matters, and things, as are necessary to enable complete effect to be given to every provision of this Part.

BACKGROUND

The commissioner appointed by Order in Council 89/2011 to inquire into the circumstances surrounding the death of Phoenix Sinclair has requested a 12-month extension of time to complete the inquiry and deliver a final report to the Minister of Justice and Attorney General.

Justice
Initiating Department/Agency
Authorized Officer
Approved by:
Civil Service Commission
Finance
Approved as to form:
Name
Legislative Counsel Office — Initials
Bilingual: ☒ Yes ☐ No

RECOMMENDED:
Minister of Justice

APPROVED BY EXECUTIVE COUNCIL:
Presiding Member

ORDERED:
Lieutenant Governor
December 07, 2011
Date

Administrator

N° 441/2011

DÉCRET

DÉCRET

1. Le paragraphe 6 du décret 89/2011 est modifié par substitution, à « le 30 mars 2012 », de « le 30 mars 2013 ».

2. Le présent décret prend effet immédiatement.

Justice
Ministère ou organisme d'origine
Fonctionnaire autorisé
APPROUVÉ PAR
Commission de la fonction publique
Finances
APPROUVÉ QUANT À LA FORME PAR
Nom
Bureau du conseiller législatif — Paraphe

DISPOSITION HABILITANTE

Le paragraphe 83(1) et l'article 96 de la *Loi sur la preuve au Manitoba*, c. E150 de la *C.P.L.M.*, prévoient notamment ce qui suit :

« Nomination de commissaires
83(1) Lorsque le lieutenant-gouverneur en conseil juge à propos de faire instituer une enquête sur toute affaire relevant de la compétence de la Législature et touchant ou ayant trait, selon le cas :

[...]

c) à l'administration de la justice dans la province;

[...]

f) à toute affaire qui, de son avis, est d'une importance publique suffisante pour justifier une enquête,

il peut, s'il n'est pas prévu d'enquête par ailleurs, nommer un ou plusieurs commissaires pour conduire l'enquête et en faire rapport.

[...]

Règles
96 Le lieutenant-gouverneur en conseil prend des dispositions, soit générales relativement à toutes les commissions qui sont délivrées et à toutes les enquêtes qui sont tenues sous le régime de la présente partie, soit spécifiques à leur égard, pour les affaires suivantes :

[...]

c) les actes, les affaires et les choses qui sont nécessaires afin d'assurer l'application de toutes les dispositions de la présente partie ».

JUSTIFICATION

Le commissaire nommé par le décret 89/2011 pour enquêter sur les circonstances du décès de Phoenix Sinclair a demandé une prolongation de 12 mois afin de terminer son enquête et de remettre un rapport au ministre de la Justice et procureur général.

RECOMMANDATION :
Ministre de la Justice

APPROUVÉ PAR LE CONSEIL EXÉCUTIF :
Président

FAIT PAR :
~~Lieutenant-gouverneur~~
7 décembre 2011
Date

Administrateur

PSF 40F – 29040
2002

1/1

23/2013

No. .....

ORDER IN COUNCIL

ORDER

1. Paragraph 6 of Order in Council 89/2011, as amended by Order in Council 441/2011, is amended by striking out "March 30, 2013" and substituting "September 30, 2013".

2. This Order is effective immediately.

AUTHORITY

Subsection 83(1) and section 96 of *The Manitoba Evidence Act*, C.C.S.M. c. E150, state in part:

Appointment of commission
83(1) Where the Lieutenant Governor in Council deems it expedient to cause inquiry to be made into and concerning any matter within the jurisdiction of the Legislature and connected with or affecting

...

(c) the administration of justice within the province;

...

(f) any matter which, in his opinion, is of sufficient public importance to justify an inquiry;

he may, if the inquiry is not otherwise regulated, appoint one or more commissioners to make the inquiry and to report thereon.

Power to make rules
96 The Lieutenant Governor in Council may make provision, either generally in regard to all commissions issued and inquiries held under this Part, or specially in regard to any such commission and inquiry, for

...

(c) all such acts, matters, and things, as are necessary to enable complete effect to be given to every provision of this Part.

BACKGROUND

The commissioner appointed by Order in Council 89/2011 to inquire into the circumstances surrounding the death of Phoenix Sinclair has requested a 6-month extension of time to complete the inquiry and deliver a final report to the Minister of Justice and Attorney General.

Justice

Initiating Department/Agency

Authorized Officer

APPROVED BY:

Civil Service Commission

Finance

APPROVED AS TO FORM:

Name

Legislative Counsel Office Initials

BILINGUAL: ☒ YES ☐ NO

RECOMMENDED: Acting

Minister of Justice

APPROVED BY EXECUTIVE COUNCIL:

Presiding Member

ORDERED:

Lieutenant Governor

January 17, 2013

Date

PSF 40 – 29040
June 2007

N° 23/2013

DÉCRET

DÉCRET

1. Le paragraphe 6 du décret 89/2011, modifié par le décret 441/2011, est modifié par substitution, à « le 30 mars 2013 », de « le 30 septembre 2013 ».

2. Le présent décret prend effet immédiatement.

Justice

Ministère ou organisme d'origine

Fonctionnaire autorisé

APPROUVÉ PAR :

Commission de la fonction publique

Finances

APPROUVÉ QUANT À LA FORME PAR :

Nom

Bureau du conseiller législatif Paraphe

DISPOSITION HABILITANTE

Le paragraphe 83(1) et l'article 96 de la *Loi sur la preuve au Manitoba*, c. E150 de la *C.P.L.M.*, prévoient notamment ce qui suit :

« **Nomination de commissaires**
83(1) Lorsque le lieutenant-gouverneur en conseil juge à propos de faire instituer une enquête sur toute affaire relevant de la compétence de la Législature et touchant ou ayant trait, selon le cas:

[...]

c) à l'administration de la justice dans la province;

[...]

f) à toute affaire qui, de son avis, est d'une importance publique suffisante pour justifier une enquête,

il peut, s'il n'est pas prévu d'enquête par ailleurs, nommer un ou plusieurs commissaires pour conduire l'enquête et en faire rapport.

[...]

Règles
96 Le lieutenant-gouverneur en conseil prend des dispositions, soit générales relativement à toutes les commissions qui sont délivrées et à toutes les enquêtes qui sont tenues sous le régime de la présente partie, soit spécifiques à leur égard, pour les affaires suivantes :

[...]

c) les actes, les affaires et les choses qui sont nécessaires afin d'assurer l'application de toutes les dispositions de la présente partie ».

RECOMMANDATION : suppléant

Ministre de la Justice

JUSTIFICATION

Le commissaire nommé par le décret 89/2011 pour enquêter sur les circonstances du décès de Phoenix Sinclair a demandé une prolongation de 6 mois afin de terminer son enquête et de remettre un rapport au ministre de la Justice et procureur général.

APPROUVÉ PAR LE CONSEIL EXÉCUTIF :

Président

FAIT PAR :

Lieutenant-gouverneur

17 janvier 2013

Date

PSF 40F – 29040
2002

1/1

190/2013
No. .....

ORDER IN COUNCIL

ORDER

1. Paragraph 6 of Order in Council 89/2011, as amended by Orders in Council 441/2011 and 23/2013, is amended by striking out "September 30, 2013" and substituting "December 15, 2013".

2. This Order is effective immediately.

AUTHORITY

Subsection 83(1) and section 96 of *The Manitoba Evidence Act*, C.C.S.M. c. E150, state in part:

Appointment of commission
83(1) Where the Lieutenant Governor in Council deems it expedient to cause inquiry to be made into and concerning any matter within the jurisdiction of the Legislature and connected with or affecting

...

(c) the administration of justice within the province;

...

(f) any matter which, in his opinion, is of sufficient public importance to justify an inquiry;

he may, if the inquiry is not otherwise regulated, appoint one or more commissioners to make the inquiry and to report thereon.

Power to make rules
96 The Lieutenant Governor in Council may make provision, either generally in regard to all commissions issued and inquiries held under this Part, or specially in regard to any such commission and inquiry, for

...

(c) all such acts, matters, and things, as are necessary to enable complete effect to be given to every provision of this Part.

BACKGROUND

The commissioner appointed by Order in Council 89/2011 to inquire into the circumstances surrounding the death of Phoenix Sinclair has requested a further extension of time to complete the inquiry and deliver a final report to the Minister of Justice and Attorney General.

RECOMMENDED:

Minister of Justice

APPROVED BY EXECUTIVE COUNCIL:

Presiding Member

ORDERED:

Lieutenant Governor

June 12, 2013
Date

PSF 40 – 29040
June 2007

190/2013
N° .....

DÉCRET

DÉCRET

1. Le paragraphe 6 du décret 89/2011, modifié par le décret 441/2011 et le décret 23/2013, est modifié par substitution, à « le 30 septembre 2013 », de « le 15 décembre 2013 ».

2. Le présent décret prend effet immédiatement.

[redacted]

DISPOSITION HABILITANTE

Le paragraphe 83(1) et l'article 96 de la *Loi sur la preuve au Manitoba*, c. E150 de la *C.P.L.M.*, prévoient notamment ce qui suit :

« **Nomination de commissaires**
83(1) Lorsque le lieutenant-gouverneur en conseil juge à propos de faire instituer une enquête sur toute affaire relevant de la compétence de la Législature et touchant ou ayant trait, selon le cas:

[...]

c) à l'administration de la justice dans la province;

[...]

f) à toute affaire qui, de son avis, est d'une importance publique suffisante pour justifier une enquête,

il peut, s'il n'est pas prévu d'enquête par ailleurs, nommer un ou plusieurs commissaires pour conduire l'enquête et en faire rapport.

[...]

Règles
96 Le lieutenant-gouverneur en conseil prend des dispositions, soit générales relativement à toutes les commissions qui sont délivrées et à toutes les enquêtes qui sont tenues sous le régime de la présente partie, soit spécifiques à leur égard, pour les affaires suivantes :

[...]

c) les actes, les affaires et les choses qui sont nécessaires afin d'assurer l'application de toutes les dispositions de la présente partie ».

JUSTIFICATION

Le commissaire nommé par le décret 89/2011 pour enquêter sur les circonstances du décès de Phoenix Sinclair a demandé une prolongation afin de terminer son enquête et de remettre un rapport au ministre de la Justice et procureur général.

RECOMMANDATION :
Ministre de la Justice

APPROUVÉ PAR LE CONSEIL EXÉCUTIF :
Président

FAIT PAR :
Lieutenant-gouverneur
12 juin 2013
Date

PSF 40F – 29040
2002

1/1

Children in Care and Child Maltreatment in Manitoba: What Does Research From the Manitoba Centre for Health Policy Tell Us, and Where Do We Go From Here?

Marni D. Brownell, PhD

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Senior Research Scientist, Manitoba Centre for Health Policy

University of Manitoba

Paper prepared for Phase III, Phoenix Sinclair Inquiry

Children in Care and Child Maltreatment in Manitoba: What Does Research From the Manitoba Centre for Health Policy Tell Us, and Where Do We Go From Here?

Background on the Manitoba Centre for Health Policy and Research in Child Welfare

The Manitoba Centre for Health Policy (MCHP) is a research unit within the Department of Community Health Sciences, in the Faculty of Medicine at the University of Manitoba. MCHP houses the Population Health Research Data Repository (hereafter referred to as the Repository), which is a comprehensive collection of administrative, registry, survey and other databases primarily comprising residents of Manitoba. The Repository was developed to describe and explain patterns of health care and profiles of health and illness, but in the past decade has expanded to include information about services and programs from other departments. This has enabled inter-sectoral research in areas such as health care, education, and social services. MCHP acts as a steward of the information in the Repository for government agencies, RHAs and clinicians. Any project using Repository data must comply with all confidentiality and privacy policies, and must receive prior approvals from the Faculty of Medicine's Research Ethics Board, the government's Health Information Privacy Committee, and the data custodians. All person-level data held in the Repository are de-identified, containing no names or complete addresses. Linkages are possible through the use of an encrypted unique personal identifier. Data are only linked temporarily for the approved projects. Some database information goes back almost 40 years, for the entire population of Manitoba. More detailed information about the MCHP Repository and research using the Repository can be found in Roos & Shapiro (1995; 1999) Roos et al.(2005; 2008) Roos & Nicol (1999), and Brownell et al. (2002).

The Repository consists of databases grouped into six domains: Health, Education, Social, Justice, Registries, and Database Support Files (a detailed listing of the databases within these domains can be found in Table A1 in the Appendix). The Health domain holds records for virtually all contacts with the provincial health care system, the Manitoba Health Services Insurance Plan (including physicians, hospitals, and pharmaceutical prescriptions) of all individuals registered to receive universal health benefits in Manitoba. The Education domain consists of Manitoba grade school and high school (kindergarten through grade 12) records containing enrolment and progress in school, assessments for all children in Grade 3, Grades 7/8, and Grade 12, and course marks for Grades 9 through 12. The Social domain includes program data from Healthy Child Manitoba including Families First screening and evaluation, Healthy Baby program data and scores on the Early Development Instrument (EDI), as well as other social service data such as Income Assistance and Child and Family Services.

At MCHP we have used data in the Repository to study the outcomes for children in care (also referred to as foster care and out-of-home placement). In Brownell et al. (2010), we examined education and social outcomes for youths who had one or more of the following three risk factors: being a child of a teen mom, experiencing poverty (i.e., living in a family that received income assistance for at least 2 months between the time the child was 10 and 17 years), and being involved with Child and Family Services (i.e., being in care or receiving protection/support services[1] at any time between the time the child was 10 and 17 years). This study looked at four different outcomes for youths: completion of high school, completion of 8

[1] Protection services are provided when a child is seen as in need of protection because his/her health or emotional well–being is endangered; these services do not entail removal of the child from the home. Families can also receive voluntary support services, which are services that the family requests to aid in the resolution of family matters. "Protection" and "support" are distinct categories of services, but because these distinctions are often blurred, they were combined (as "receiving services from CFS") for this analysis.

or more credits in grade 9 (which is a predictor of high school completion (Brownell et al., 2012; King et al., 2007)), receipt of income assistance as a young adult, and giving birth as a teen (females only). We found that for youths whose only risk factor was receiving services from CFS, 57.2% of them completed high school within 7 years of entering grade 9. This is compared to 81.9% of youths with none of the three risk factors. For youths receiving services from CFS who also had lived in families receiving income assistance, only 28.3% completed high school within 7 years of entering grade 9. For youths involved with CFS who also had a teen mom, 38.5% completed high school, and for youths with all three risk factors only 15.8% of them completed high school.

For the other outcomes studied we found similar results: youths receiving services from CFS had poorer outcomes than youths without any risk factors, and the more risk factors they had, the poorer the outcomes. 60.4% of the youths involved with CFS earned 8 or more credits in grade 9 compared to 83.4% of youths with no risk factors. With one additional risk factor, the percent dropped to 30.1% or 41.2% (depending on the risk factor) and with all three risk factors only 20.2% of the youths earned 8 or more credits in grade 9. Whereas only 1.2% of youths with none of the risk factors received income assistance as young adults (18-19 years), 9% to 33.5% (depending on the number of risk factors) of youths involved with CFS received income assistance as young adults. When looking only at the female population of youths, only 2.1% of females with none of the risk factors gave birth during their teens, compared to 10.7% to 44.5% (again, depending on the number of risk factors) of females involved with CFS.

Recognizing that there may be other influences associated with the three risk factors examined in this study, that may be contributing to the poorer outcomes of youths involved with CFS, we conducted multivariate regression analyses to control for the following: age, intellectual disability, emotional behavioural disorder, number of children in the family, area-level SES, area-level percent of Aboriginal residents, mother's marital status and sex. Even once these factors were controlled for, large (and statistically significant) differences in outcomes remained between outcomes for youths with none of the risk factors and outcomes for youths involved with CFS. Thus, the educational and social outcomes of youths who have been in care are poorer than for youths who have not been in care. It should be noted that it is difficult to determine from these analyses whether being in care or the circumstances leading to being in care (or a combination of both) resulted in the poorer educational and social outcomes.

We are not the first to demonstrate poorer outcomes for children in care. Indeed, educational achievement of children in care has long been a concern (Fanshel & Shinn, 1978), particularly since adolescents emancipated from the child welfare system often leave with little to no financial resources, community connections or help from family, making educational achievement that much more important (Tweddle, 2007). Research has indicated that children in care are more likely to struggle in school (Blome, 1997; Burley & Halpern, 2001; Goerge et al., 1992; Scherr, 2007). A large proportion of such children (a) receive special education services (Goerge et al., 1992; Zetlin et al., 2003), (b) have a high rate of absenteeism (Kortenkamp & Ehrle, 2002; Scherr, 2007), (c) are more likely to be suspended or expelled (Kortenkamp & Ehrle, 2002), (d) score 15 to 20 per cent below their peers on state-wide achievement tests (Burley & Halpern, 2001), (e) are much less likely to graduate (Blome, 1997; Burley & Halpern,

2001), and (f) are likely to repeat at least one grade (Sawyer & Dubowitz, 1994; Burley & Halpern, 2001).

In the Manitoba Child Health Atlas Update (Brownell et al., 2008), rates of hospitalization were compared for children 0 to 17 years of age who had been or were in care in 2001/02-2003/04 to those who had not been in care during this time period. Markedly higher hospitalization rates were found for children in care, at almost 3 times higher than rates for children not in care. Some of the most notable differences were for mental disorders, with children in care having hospitalization rates over 10 times higher than children not in care, hospitalizations related to pregnancy and childbirth (i.e., teen births), with children in care having hospitalization rates almost 6 times higher than children not in care, and injuries, with children in care having hospitalization rates over 3 times higher than children not in care.

Work has also been done using the MCHP Repository to study not only rates of hospitalizations, but physician visits, suicide attempts and suicides by children in care compared to children not in care in Manitoba (Katz et al., 2011). This study selected children who were 5 to 17 years of age and who were in care for the first time for at least 30 days between 1997/98 and 2005/06. Children of the same age who had not been in care were used for comparisons. Children in care had almost twice as many hospitalizations, 14% more physician visits, over twice as many suicide attempts and three-and-a-half times the rate of suicide compared to children not in care. These results were found even once additional factors had been controlled for, including age, sex, socioeconomic status, parental psychopathology, and presence of a

psychiatric disorder. This study found that length of time in care and the number of placements did not have a substantial impact on the outcomes.

Katz et al. (2011) also looked at these same outcomes for children in care both before and after they were taken into care, where the "before" period looked at outcomes that occurred in the two-year period prior to the date of the first placement in care, and the "after" period looked at outcomes that occurred on or after the date the child was placed into care until the end of the study period. They found that attempted suicides, admissions to hospital and physician visits were all significantly lower in the period after entering care than the period two years before the placement. The rate of suicide was 73% lower, the rate of hospital admissions was 32% lower and the rate of physician visits was 11% lower in the period after entry into care.

Given that our research at MCHP, and studies elsewhere, has demonstrated that outcomes are poorer for children in care compared to children not in care, it is important to know how many children in Manitoba are affected. According to the Manitoba Family Services and Consumer Affairs (now Manitoba Family Services and Labour) Annual Report for 2010/11, there were 9,432 children in care on March 31, 2011 (Manitoba Family Services and Consumer Affairs, 2011). There were approximately 286,000 children 0 to 17 years of age living in Manitoba in December 2009 (most recent year of data available) according to a report by MCHP (Brownell et al., 2012), which would mean that just over 3% of children 0 to 17 in Manitoba were in care on March 31, 2011. The actual number of children who were in care at any point during that fiscal year was likely higher, since there would be children who went into care sometime in the fiscal year but were no longer in care on March 31, 2011. Brownell et al. (2012)

calculated the prevalence[2] of children 0 to 17 years of age in care in Manitoba in 2006/07-2008/09 using data from the Child and Family Services Information System (CFSIS) and found that 4% of children had been in care at any time over that period. This is likely an underestimate as not all CFS agencies consistently enter data into CFSIS. When looking over time, the numbers are even greater: by the age of 7 years, 7.5% of Manitoba children have been in care at some time in their lives (Gilbert et al., 2012).

It should be noted that not all children in Manitoba are at the same risk of going into care. Northern Manitoba (in this case, in the former RHAs of Nor-Man, Burntwood and Churchill) has tended to have higher prevalence of children in care than other areas of the province, although in the most recent time period available for analysis, prevalence in the North was not different from the rest of the province (Brownell et al., 2012). This is likely due to incomplete reporting to CFSIS during this time period. Looking only at children in urban areas, where reporting to CFSIS is not problematic, there is a large difference across neighbourhoods, with children from the areas with the lowest income having a prevalence of 14.1% compared to 0.3% in areas with the highest incomes (Brownell et al., 2012). Of note is the fact that 85% of the children in care in Manitoba are Aboriginal (Manitoba Family Services and Consumer Affairs, 2011).

Manitoba has some of the highest rates of children in care in the world. In a study of out-of-home care across several countries, Thoburn (2007) identified Canada as having some of the highest rates in the world, and Manitoba's rate of children in care is one of the highest in Canada (Canadian Child Welfare Research Portal, 2010). In a comparison across 6 countries, Gilbert et

[2] Prevalence refers to the percent of children in care over a given period of time. Each child is counted only once over the time period.

al. (2012) found that rates of out-of-home placements for children up to 10 years of age were 10 times higher in Manitoba than in Western Australia.

Given the generally poorer outcomes experienced by children in care discussed above, having high rates of out-of-home placements is of concern. Of course, it is difficult to tell from the research presented whether the poorer outcomes experienced by children in care are the result of being in care itself, or the factors that led to the children being in care. There are currently no controlled trials comparing outcomes for children in care to outcomes for children in families receiving intensive home support (Gilbert et al., 2012), which would help to determine the impact of out-of-home care itself. What this means is that thousands of Manitoba children are being placed in care each year, with little evidence that this intervention is effective and will result in the best possible outcomes for the children. In at least some instances, out-of-home placements may actually indicate inadequate funding for preventive or supportive interventions that would allow the child to remain in the home, rather than being an option of last resort after these other interventions have been tried and failed. The large number of children in care in Manitoba also raises questions about the sustainability of providing high quality foster care (Gilbert et al., 2012; O'Donnell et al., 2008).

Public Health Approach to Child Maltreatment

To address not only the potential unsustainability of a quality foster care system, but also the fact that it is likely that only a fraction of children experiencing some form of maltreatment come to the attention of child protection agencies, a public health approach to child abuse and neglect has been advocated (Gilbert et al., 2012; O'Donnell et al., 2008; Gilbert, Woodman &

Logan, 2012). This public health approach would theoretically reduce the risks for child maltreatment, thereby also reducing the need for removing children from their families and homes and placing them into care. A public health approach involves primary, secondary and tertiary prevention strategies, or what are sometimes referred to as upstream, midstream and downstream approaches (McKinlay, 1998). In the field of population and public health, the analogy used to describe these approaches to health and health care involves a dangerous highway with a steep cliff, off of which cars loaded with passengers are continually falling. A downstream approach would suggest building a hospital at the bottom of the cliff to treat the victims; a midstream approach may involve erecting a sign on the highway to warn drivers about the upcoming cliff; whereas an upstream approach would change the environment (in this case the highway) so that drivers are no longer placed at risk (e.g., re-route the highway away from the cliff). While all three approaches or strategies are necessary in promoting health, there has been a disproportionate emphasis on downstream approaches, as opposed to whole population upstream approaches (McKinlay, 1998). The same can be said for child welfare, where the emphasis has been on child protection (downstream) rather than universal prevention (upstream) (O'Donnell et al., 2008; Gilbert, Woodman & Logan, 2012).

In order to understand how a public health approach to child maltreatment would work, it is important to try to understand what factors cause an adult to abuse and/or neglect a child. Belsky (1993) stressed that child abuse and neglect are likely caused by multiple factors at multiple levels including individual, familial, community, and societal levels. Individual (child-level) factors associated with child maltreatment include low birth weight and short gestation, disabilities and chronic health problems, difficult temperaments, and learning and behavioral

difficulties (Sherrod et al., 1984; Spencer et al., 2006; Sprang et al., 2005; Sullivan & Knutson, 2000; Trocmé et al., 2003). Family (parent-level) factors include adolescent parenting, lone-parent status, parents' social isolation, parental mental health problems such a depression, substance abuse, intimate partner violence, parents' own history of child maltreatment and/or lack of positive parenting experiences during childhood (Black et al., 2001; Chaffin et al., 1996; Corse et al., 1990; DePaul & Domenech, 2000; Ekéus et al., 2004; Gilbert et al., 2009; Kelleher et al., 1994; Sidebotham & Golding, 2001; Trocmé et al., 2003). Community characteristics include neighborhood poverty, unemployment, poor housing conditions, higher residential mobility, less extensive social networks , lower levels of social cohesion, and more social isolation (Coulton et al., 1995; Coulton et al., 1999; Drake & Pandey, 1996; Garbarino & Sherman, 1980; Garbarino & Kostelny, 1992; Gilbert et al., 2009; Jack, 2004; Whipple & Webster-Stratton, 1991). Societal factors include not only those related to degree of poverty, such as economic circumstances, but also societal attitudes toward physical punishment and violence (Durrant, 2006). Research at MCHP confirms that many of these factors are significant predictors of infants entering care in Manitoba, including financial difficulties, being in a lone-parent family with no social support, and maternal alcohol or drug use during pregnancy (Brownell et al., 2011).

What are the arguments in favor of a public health approach? Firstly, the current approach of detection, through notifications and investigations, and removal of children to foster care leads to a chronically over-burdened system (O'Donnell et al., 2008). Estimates suggest that 4 to 16% of children are physically abused each year, and 10% are neglected or psychologically abused (Gilbert et al., 2009). Only a fraction of this number of cases is currently

investigated; policies that suggest enhanced detection as a means to address child maltreatment will certainly increase the current burden on the system. Resources steered toward better detection and protection take away from other areas, such as in-home supports and prevention programs. The recent follow-up of the Auditor General's Report (Office of the Auditor General Manitoba, 2012) illustrates this strain on resources and the resulting need to prioritize some services over others. In response to criticisms that recommendations to improve reporting to CFSIS have gone unaddressed, Family Services Minister Jennifer Howard claimed that the government chose to hire more social workers, rather than invest in more computers (Winnipeg Free Press, September 28, 2012). The intent of a public health approach that focuses on upstream (preventive) interventions is to reduce the occurrence of child maltreatment in the first place.

The second argument in favor of a public health approach relates to the fact that only a fraction of child maltreatment cases come to the attention of child protection authorities (O'Donnell et al., 2008; Gilbert, Woodman & Logan, 2012). Indeed, some suggest that cases of child maltreatment that come to the attention of child protection agencies and/or involve police investigations represent only the tip of the iceberg of child abuse and neglect, with the majority of cases going unreported or unknown (PHAC, 2010; Trocme et al., 2005). Thus, regardless of policies such as mandatory reporting by all professionals who have contact with children, detection and reporting of all possible maltreatment is implausible. Universal programming aimed at improving parenting and family functioning could potentially reduce child abuse and neglect, not only for those families that might eventually come in contact with child protection agencies, but also those who won't. A review by Gilbert et al., (2009) documents the long-term

serious consequences of child maltreatment, including not only the extreme and obvious cases of child deaths, but long-term mental and physical health concerns, substance abuse and criminal activity. Programs that reduced child abuse and neglect at the population level would thus have far reaching benefits, for children and their families, as well as society at large.

A third argument in favor of a public health approach to child maltreatment involves economic costs. The old adage "an ounce of prevention is worth a pound of cure" has been demonstrated in numerous early childhood development programs that target high risk children (for example, the Perry Preschool Program (see Schweinhart et al., 2005); the Abecedarian Program (see Campbell et al, 2012; Muenning et al., 2011; Pungello et al., 2010) and the Chicago Parent-Child Centers (see Reynolds & Temple, 2008). For example, the Perry Preschool Program, an intensive 2-year program targeting disadvantaged children and involving both high-quality preschool programming and home visits, has followed participants for over 40 years and estimated that more than $16 has been saved for every $1 spent, due to increases in education, employment and incomes and decreases in welfare and justice system costs (Schweinhart et al., 2005). There is little cost effectiveness research in the area of child maltreatment (see for example Meadows et al., 2011); however a study estimating the costs of developing a public health system for delivering population-wide parenting interventions suggest substantial savings could be achieved (Foster et al., 2008).

While arguments that involve economic savings are always appealing, society has a moral obligation to protect children from abuse and neglect in the first place (O'Donnell et al., 2008; Gilbert, Woodman & Logan, 2012). Reading et al., (2009) take this argument one step

further and claim that society has a legal right to protect children from maltreatment, and suggests using the United Nations Convention on the rights of the child (UNCRC) as a framework for addressing child maltreatment, including preventing its occurrence. Canada became a signatory to the UNCRC in 1990 and ratified it in 1991, and as such is bound to it by international law (Wikipedia, nd). Reading et al. point out that the rights-based approach can compliment the public health approach, providing "a legal instrument for implementing policy, accountability, and social justice, all of which enhance public-health responses." (p. 332). Providing support to parents is laid out in the UNCRC in Article 18.2:

> *For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.* (p. 5, United Nations, 1989)

As Blackstock (2007) points out, Aboriginal children, who are disproportionately represented in the child welfare system in Canada, are more often taken into care for reasons of neglect than abuse, and this neglect is associated with at least two factors that are largely out of the parents' control: poverty and poor housing. Blackstock calls for the enhancement of "family support services to keep children safely at home, accompanied by sustained investments in community development efforts targeted at poverty eradication and substance misuse" (p. 76) and her call is reinforced by the UNCRC.

Conclusions

The knee-jerk response to severe child abuse and individual deaths, like the case of Phoenix Sinclair, is moral outrage and a need to punish not only the perpetrators of the abuse, but also "the system" that allowed the abuse to occur. Policy responses often revolve around detection and punishment rather than focusing on developing and implementing interventions to improve conditions for children (Gilbert, Woodman & Logan, 2012). But such interventions are necessary in order to reduce and prevent child maltreatment.

What would such interventions look like? A public health approach would involve preventive strategies at multiple levels, from upstream approaches such as social policies affecting all children and their families to midstream targeted approaches for families and children at risk, through to downstream approaches involving child protection in cases of severe maltreatment.

Social policies at the upstream level could involve legislation against corporal punishment (Gilbert et al., 2009), extended parental leave programs, ensuring access to low cost, quality child care, economic reforms that reduce the gap between rich and poor (see for example Marmot et al., 2009), and a guaranteed annual income (see for example Forget, 2011). Parenting programs with a universal component (for example Triple P – see Prinz et al., 2009) are also examples of upstream interventions that could reduce child maltreatment at the population level. The benefit of universal, upstream programs is that they have the potential not only to prevent child maltreatment, but to enhance family functioning and child outcomes at the population level (O'Donnell et al., 2008). Midstream approaches could include targeted home visiting programs, mental health strategies and services, programs that address domestic violence, and substance

abuse programs. Even with extensive and effective prevention programs, downstream or tertiary responses to severe child maltreatment will likely always be necessary. In these cases, it is important that the decisions on how to treat severe child maltreatment are based on the best possible evidence for effective care and outcomes, which may involve intensive family-centred interventions or removal of the child from the home.

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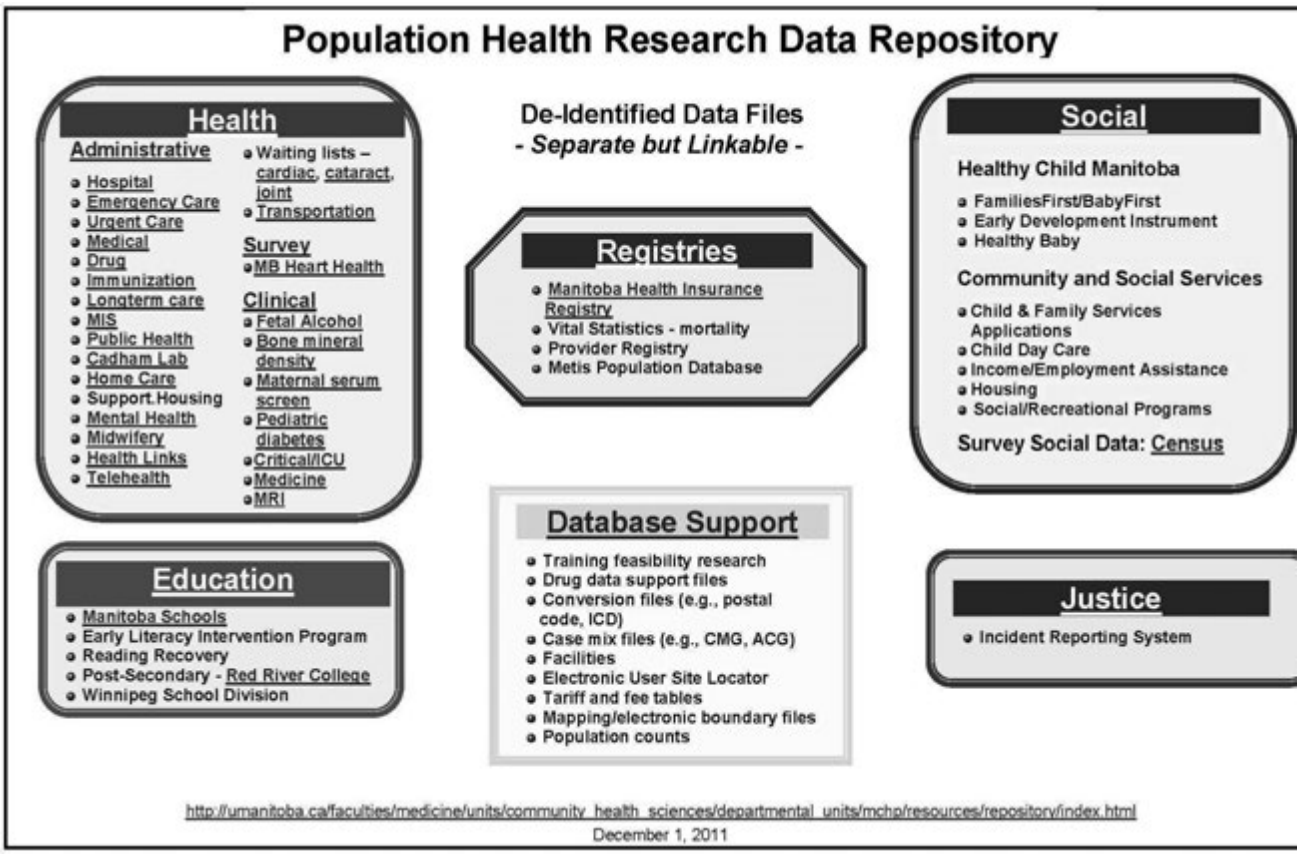
Wikipedia http://en.wikipedia.org/wiki/Convention_on_the_Rights_of_the_Child#Canada

Winnipeg Free Press, Editorial. *Tracking Children*, September 28, 2012

Zetlin A, Weinberg L, Kimm C. (2003). Are the educational needs of children in foster care being addressed? *Children and Schools, 25*(2), 105-119.

Appendix

Table A1:



SUPPORTING ALL CHILDREN TO REACH THE MOST VULNERABLE
Report to the Commission of Inquiry into the Circumstances Surrounding the Death of Phoenix Sinclair
Kerry McCuaig, Atkinson Centre/University of Toronto

New technologies confirm that infancy and early childhood are the first and most critical phases of human development. Who our parents are, our health at birth and how we live, eat and play as young children all have an impact on the developing brain and biological systems, establishing lifelong trajectories for learning, health and behaviour.

In the *Early Years Study 3*[1], we update the social, scientific and economic rationales for public investments in early childhood and advocate for publicly funded early education for every child. The research is unambiguous—high quality early education is advantageous for all children as it delivers benefits for society. For children living in disadvantaged circumstances, quality early education can innoculate against adversity and is capable of changing life outcomes. Yet this most influencial period of human development is also the most neglected by public policy. Unlike any other life period, there is no systematic intersection between public programs and preschool-aged children. Programs exist, but they are poorly resourced and lack coherent delivery and oversight. In this paper I recommend that governments address this deficit by better using existing resources to more effectively support young children and to create a foundation for service expansion.

Experiences in early childhood have lifelong consequences

The young child's brain is acutely vulnerable to its environment. If the early experiences are fear and stress, especially if these are overwhelming and occur repeatedly, then the neurochemical responses become the primary architects of the brain. Trauma scrambles the neurotransmitter signals that play key roles in telling growing neurons where to go and what to connect to. Children exposed to chronic and unpredictable stress—including harsh, cold and chaotic parenting, or witnessing the abuse of other family members or the constant, prolonged and unresolved fighting between parents—will suffer deficits in their ability to learn. IQ will be lower—in itself another risk factor for conduct problems and mental illness.[2]

Protracted stress in early childhood influences the size of the brain. The limbic system of the brain (governing emotions) is 20–30 percent smaller and tends to have fewer synapses. The hippocampus (responsible for memory) is also smaller. Both of these stunted developments are thought to arise from the toxic effects of cortisol.[3] Chronic stress is associated with higher levels of cortisol. Sustained high cortisol

[1] McCain, M.N., Mustard, F. & McCuaig, K. (2011). *Early years Study 3, Making decisions, taking action*. Toronto: Margaret and Wallace McCain Family Foundation.
[2] Hoskin, G. & Walsh, I. (2005). *The WAVE Report 2005. Violence and what to do about it.* London: WAVE Trust; Perry, B.D., Pollard, R.A., Blakley, T.L., Baker, W.L. & Vigilante, D. (1996). Childhood Trauma, the Neurobiology of Adaptation and Use-dependent Development of the Brain: How States become Traits. *Infant Mental Health Journal*, Vol. 16, No.4, Winter 1995, 271-291.
[3] Bremner, J.D., Vythilingam, M., Vermetten, E., Southwick, S.M., McGlashan, T., Nazeer, A., et al (2003). MRI and PET Study of Deficits in Hippocampal Structure

levels during the vulnerable growth years increase activity in the brain structure involved in vigilance and arousal.[4] For such children, even slight stressors will unleash a new surge of stress hormones. This in turn contributes to hyperactivity, anxiety and impulsive behaviour.[5]

Adolescence is another developmental period highly vulnerable to toxic stress. The prefrontal cortex, which regulates judgment, impulse control, planning and decision-making, is the slowest part of the brain to develop and continues evolving into the mid-20s. Stress prompts the emotional brain to take over, leading to bad decisions and volatile behaviour. The prolonged development of the "emotional" brain is why the teen years are incompatible with parenting.

Adversity in early childhood manifests itself almost immediately as aggression in the preschooler;[6] poor academic performance and greater school drop out rates; pregnancy, risky behaviour; substance abuse and mental health problems among adolescents and young adults;[7] obesity and type 2 diabetes in adults in their forties; cancers and heart disease manifesting in the fifties and sixties; and early onset dementia in seniors.[8] All of these conditions come with a cost. It is clear that failing children during their early years is very expensive.

The transformative influence of quality early education programs

The most important influence on human development is the family. The best outcomes are found for children born to nurturing parents with the means to support them. Children's health, their parents'—particularly the mother's—educational attainment and the family's socioeconomic status are the primary influencers. The most significant non-family variables are participation in quality preschool education

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and Function in Women with Childhood Sexual Abuse and Posttraumatic Stress Disorder. *American Journal of Psychiatry, 160*, May 2003, 924-932; Teicher, M.H. (2000). Wounds That Time Won't Heal: The Neurobiology of Child Abuse. *Cerebrum, 2*, 4.

[4] Barnett, W.S. (1996). *Lives in the balance: Age-27 benefit-cost analysis of the High Scope Perry Preschool Program* (Monographs of the HighScope Educational Research Foundation, 11), Ypsilanti, MI: HighScope Press; Eisler R. & Levine, D.S. (2002). Nurture, Nature, and Caring: We Are Not Prisoners of our Genes. *Brain and Mind, 3*(1), *9-52.*

[5] Incubated in Terror: Neurodevelopmental Factors in the Cycle of Violence. In J.D. Osofky (ed.) *Children, Youth and Violence: Searching for Solutions.* Guilford Press: New York; Hart, J., Gunnar, M. & Cicchetti, D. (1996). Altered Neuroendocrine Activity in Maltreated Children Related to Symptoms of Depression. *Development and Psychopathology, 8*, 201-214. doi:10.1017/S0954579400007045.

[6] Hay, D.F. (2003). Aggression as an Outcome of Early Childhood Development: Comments on Tremblay, Keenan, and Ishikawa and Raine. In R.E. Tremblay, R.G. Barr & R. DeV. Peters (eds.) *Encyclopedia on Early Childhood Development* [online]. Montreal, Quebec: Centre of Excellence for Early Childhood Development, 1-4. Retrieved from www.child-encyclopedia.com/documents/HayANGxp- Aggression.pdf.

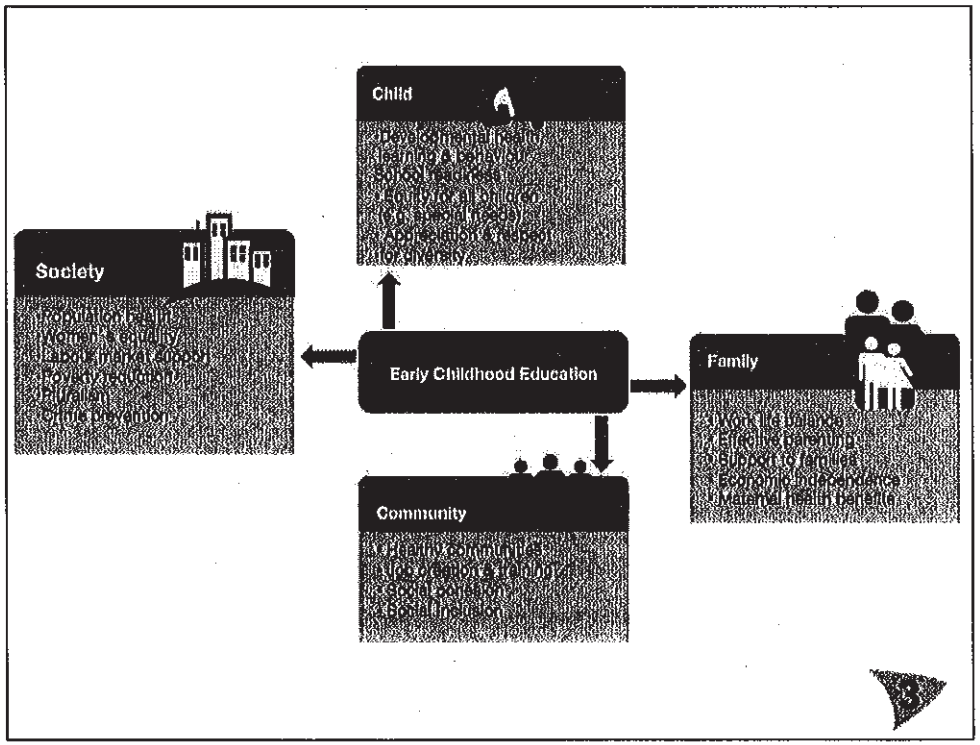
[7] Shonkoff, J.P. & Garner, A.S. (2011). Committee on Psychosocial Aspects of Child, and Family Health Committee on Early Childhood Adoption. The lifelong effects of early childhood adversity and toxic stress, *Pediatrics.* Retrieved from pediatrics.aappublications.org/content/early/2011/12/21/peds.2011-2663.abstract

[8] Johnson, R.C. & Schoeni, R.F. (2011). Early-life Origins of Adult Disease: National Longitudinal Population-based Study of the United States. *American Journal of Public Health, 101*(12), 2317-2324. Retrieved from www.ncbi.nlm.nih.gov/pubmed/22021306

and the quality of primary education. Of these two variables, the effects of preschool are most enduring. Quality early education appears to compensate for poor primary education.[9]

Consistent attendance in good early childhood programs is associated with an enhanced ability to self-regulate. Self-regulation is a biological response that is established in early childhood. It reflects the ability to adapt one's emotions, behaviours and attention to meet the demands of a given situation. It includes the ability to take into account one's own thoughts and those of others. Research is showing that self-regulation may be far more important than IQ in determining the grades children achieve in school, how often they go to class, how much time they spend on homework, how aggressive they are and how vulnerable they are to unfavourable behaviours.[10] Children acquire the capacity to self-regulate through relationships, first with parents and other primary caregivers, and then with other children and adults.

Early childhood education programs support children's ability to develop self-regulatory systems, improve well-being, help create a foundation for lifelong learning and make learning outcomes more equitable.[11] But early education has other benefits: it is a means of liberating mothers to go to work; it reduces poverty; it supports the productivity of the emerging labour force; it is a preventive measure against future health and social costs; and is an opportune time to intervene against family dysfunction and inequalities that are passed down from generation to generation. Early education is also foundational for social cohesion and is an indicator of a more just society.



Children's rights

A more recent discourse, influenced by the UN Convention on the Rights of the Child (United Nations, 1989), argues for a children's rights agenda as the firmest platform for developing public policy. A children's rights agenda within early childhood policies and practices is a

[9] Melhuish, E. (2011). Preschool Matters, *Science, 333*, 299-300.
[10] Shanker, S. & Downer, R. (2012). Enhancing the Potential in Children (Epic). In Denise Hevey (ed.), *Policy Issues in the Early Years*. New York: Sage Publications.
[11] Geoffroy, M.C., Côté, S., Giguère, C., Dionne, G., Zelazo, P.D., Tremblay, R.E., Boivin, M. & Séguin, J.R. (2010). Closing the gap in academic readiness and achievement: The role of early childcare. *Journal of Child Psychology and Psychiatry,* 1359-1367.

relatively new concept, particularly in Anglo-American countries. It requires a paradigm shift in public and professional attitudes. Young children are no longer viewed as passive recipients of services, beneficiaries of protective measures or objects of social experiments. They are not the chattels of families, the clients of agencies or capital for economic growth, but are in themselves fully human with capacities to communicate and contribute.

Respecting young children's rights challenges the deficit model of early interventions where children are identified by their problems and singled out for treatment. Instead, the focus is on children's assets. Parents are integrated into programs out of respect for the intimate knowledge they bring of their child. Communities are involved and celebrated for their values, traditions and sustainability.[12]

Universal access to ECE

A children's rights agenda is reflected in more universal approaches to ECE provision. Researchers and policy-makers often argue that compelling need and scarce resources provide a rationale for targeting public ECE investment to children from disadvantaged homes. Poverty does increase children's chances of delayed development, but it is not the only factor. Most provinces determine children's readiness for school learning during kindergarten using the Early Development Instrument (EDI). Kindergarten teachers use the EDI to assess children on scales related to their social, emotional, cognitive and physical development. Countrywide data show that more than one in four children arrive at kindergarten with vulnerabilities that make them more likely to fail in school.[13] Children who have trouble coping in kindergarten are less likely to graduate from high school or go on to post-secondary education.[14] As adults, they are more likely to fail in their personal relationships and have difficulties finding steady work. They are also more likely to become sick, addicted or depressed.[15] While poverty increases children's risk of vulnerability, not all children from low-income families experience difficulties. In fact, the largest numbers of vulnerable children come from middle- and upper-income households where the majority of children reside.[16]..

Poor children do face a string of disadvantages that middle-class children may not encounter, but there remains room for concern for middle-class children. The learning gap between children from middle-income families and those born to the affluent is just as big as the gap

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[12] Blackstock, C., Clarke, S., Cullen, J., D'Hondt, J. & Formsma, J. (2004). *Keeping the Promise: The Convention on the Rights of the Child and the Lived Experiences of First Nations Children and Youth.* First Nations Child and Family Caring Society of Canada. Retrieved from www.fncaringsociety.com/sites/default/files/docs/KeepingThePromise.pdf.

[13] Offord Centre for Child Studies. (n.d.). *School readiness to learn national SK cohort results: Based on the Early Development Instrument data collection for senior kindergarten students in Canada*, Spring *2008.* Shonkoff, J.P. & Garner, A.S. (2011). Committee on Psychosocial Aspects of Child, and Family Health Committee on Early Childhood Adoption. The lifelong effects of early childhood adversity and toxic stress, *Pediatrics.* Retrieved from pediatrics.aappublications.org/content/early/2011/12/21/peds.2011- 2663.abstract.

[15] Johnson, R.C. & Schoeni, R.F. (2011). Early-life Origins of Adult Disease: National Longitudinal Population-based Study of the United States. *American Journal of Public Health, 101*(12), 2317-2324. Retrieved from www.ncbi.nlm.nih.gov/pubmed/22021306

[16] Janus, M. & Duku, E. (2007). The school entry gap: Socioeconomic, family, and health factors associated with children's school readiness to learn. *Early Education and Development, 18*(3), 375–403.

that separates middle- and lower-income groups. Middle-class children, particularly boys,[17] drop out of school at alarming rates and with lifelong consequences.[18] Nor does income protect children from learning disabilities, nor from the adverse effects of family violence.

It is difficult to attain the promised benefits of ECE investments without a universal outlook. Labour market enhancements, gender equity, poverty reduction, secondary school graduation rates and the economic benefits these bring do not occur without a critical mass of participation. Moreover, a universal platform with specialized outreach to marginalized populations has been found to be more effective at reaching at-risk groups than targeted approaches, which are inevitably under-resourced and vulnerable to shifting political priorities.

What contributes to quality in early childhood programs?

Quality ECE programs have common principles, approaches and tools that guide practice. There is recognition that children's earliest experiences matter deeply. Educators are reflective practitioners, sensitive to children and knowledgeable about how they develop. Skilled educators match their interactions and responses to what is required to best assist children's learning. They provide children with scaffolding, the kind of assistance that helps children to reach further than would be possible unassisted.[19] A planned curriculum, anchored by play, best capitalizes on children's natural curiosity and exuberance to learn.

ECE programs providing rich opportunities for play allow children to act beyond their age and daily behaviour. As a result, they gain a greatly strengthened capacity for self-regulation. Play, particularly make-believe play, is paramount in the early childhood context for the development of self-regulation. Make-believe play is rich in collaborative dialogues and development-enhancing consequences. As soon as children have the skills to engage in pretense, warm and involved adults can join in and scaffold their play. Through play, preschoolers practise and solidify symbolic schemes. They master fears and anxieties, and as an avenue for exploring social roles, play helps them to gain skills and acquire culturally-valued competencies.[20]

Culturally responsive programming

Diversity, equity and inclusion are prerequisites for learning in early childhood programs. Children grow up with a strong sense of self in environments that support children's full participation and promote attitudes, beliefs and values of equity and democracy. Preconceived

[17] Gilmore, J. (2010). *Trends in Dropout Rates and the Labour Market Outcomes of Young Dropouts.* Ottawa, ON: Labour Statistics Division, Statistics Canada.
[18] Serbin, L., Temcheff, C., Cooperman, J., Stack, D., Ledingham, J. & Schwartzman. A. (2011). Predicting family poverty and other disadvantaged conditions for child rearing from childhood aggression and social withdrawal: A 30-year longitudinal study. *International Journal of Behavioral Development, 35,* 97-106.
[19] Berk, L. & Winsler, A. (1995). *Scaffolding children's learning: Vygotsky and early childhood education.* Washington DC: National Association for the Education of the Young Child.
[20] Florez, I. R. (2011). Developing Young Children's Self-Regulation through Everyday Experiences. *Young Children,* NAEYC, Washington, DC.

notions about children's ethnocultural backgrounds, gender, ability or socioeconomic circumstances create barriers that reduce engagement and equitable outcomes.[21]

Measuring learning for Aboriginal children have largely focused on the classroom and have not sufficiently reflected knowledge acquired through experiential learning, including learning from Elders, traditions, ceremonies, family and the workplace.[22] Aboriginal early childhood programs that are built on the culture of families and community and that are controlled by First Nations contribute to the preservation of First Nations' culture.[23]

Aboriginal and non-Aboriginal early childhood settings require programming that values Aboriginal languages and culture. It is one thing to know and value one's own culture; it is another to have others know and value it. In much of Canada, Aboriginal content in preschool and school settings, where it exists, is targeted to Aboriginal children.[24] New Zealand provides a different approach. Based on recognition of two founding peoples, the Māori and the colonists, and the need for a common understanding of the islands' history, traditions and values, New Zealand developed a blended curriculum that is mandated for *all* preschool settings. The *Te Whāriki/Early childhood curriculum* (Ministry of Education, 1996) (*Te Whāriki* translates from the Māori language as "a woven mat for all to stand on") has five strands that shape outcomes for children: Belonging, Well-Being, Exploration, Communication and Contribution.

The principles and strands of *Te Whāriki* are enshrined in legislation (Amendment to the Education Act, 2008). Close connections have been developed between the curriculum framework, children's assessment and processes for teachers' self-evaluations. Government-funded professional development helps educators to understand and promote sociocultural learning.[25] The Northwest Territories is now leading a territorial initiative to create an integrated early learning framework, which incorporates Aboriginal and European cultures.

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[21] Bernhard, J., Freire, M. & Mulligan, V. (2004) *Canadian Parenting Workshops*. Toronto, ON: Chestnut; Center for Community Child Health; Policy Brief No 11 2008: Rethinking the transition to school: Linking schools and early years services. (2008). Melbourne, VIC: Author; Robinson, K. & Diaz, C. (2006). *Diversity and Difference in Early Childhood Education: Issues for theory and practice,* Bertkshire, England: Open University Press.

[22] Ball, J. (2008). Promoting equity and dignity for Aboriginal children in Canada, *IRPP Choices, 14*(7); Canadian Council on Learning. (2007). Redefining How Success is Measured in First Nations, *Inuit and Métis Learning*, Ottawa, ON: Author; Fearn, T. (2006). *A Sense of Belonging: Supporting Healthy Child Development in Aboriginal Families.* Toronto, ON: Best Start: Ontario's Maternal, Newborn and Early Childhood Development Research Centre.

[23] Greenwood, M. (2006). Children Are a Gift to Us: Aboriginal-Specific Early Childhood Programs and Services in Canada. *Canadian Journal of Native Education 29*(1), 12-28; Native Council of Canada. (1990). *Native Child Care: The Circle of Care.* Ottawa: Author.

[24] The exception is the Northwest Territories where officials are developing a new curriculum approach for use in all early years' settings that combines the cultural and linguistic contributions of the nine aboriginal and the European communities.

[25] Meade, A. & Podmore, V. (2010). Caring and Learning Together: A case study of New Zealand. *Early Childhood and Family Policy Series n° 16*, Paris, France: UNESCO.

Modern families, outdated policies

Modern families are raising young children in circumstances that are significantly more complex, and for many, more stressful than in the past. Internationally, public policy is responding to help families transition to the technical, social and economic changes. Driven by the growing and sustained presence of mothers in the labour force, the need for a knowledge-based workforce, combatting family poverty, demographic patterns and the scientific evidence, policy-makers are reshaping their responses to focus on the early years.

Canadian policy-makers have been slower to follow suit. The Organization for Economic and Co-operative Development (OECD)[26] reports that Canada spends the lowest amount per child on early years programming among all the industrialized countries. As a result, most Canadian children participate in universal preschool much later than their European counterparts and have the lowest rate of access to child care and intervention services.

Not only is Canada's public investment well below international benchmarks, our service delivery systems are chaotic. Across the country, much of children's programming is still divided into three distinct streams: education, child care and family supports. All promote the healthy development of children as a primary goal, yet they have no, or little, interaction. There are pockets of innovation and increased levels of investment, but service overlap prevails alongside large gaps. Each stream has its own bureaucracy, culture and mandate based on a narrow range of needs. The result is service silos. Reducing family stress and improving outcomes for children require a greater public commitment, but new investments must be accompanied by smart decisions about program and system design if the transformative effects of investing in early childhood are to be realized.

The OECD review found that in jurisdictions where the policy and delivery of education, child care and related supports are divided, similar challenges prevail:

- Coverage is sparse
- Not all families receive the services they are eligible for
- Service location and affordability are barriers
- Services hours and parents' work schedules often conflict
- Families with multiple needs have difficulty fitting services together
- Families lose needed services as children age or their circumstances change

Service providers are also challenged:

- There is no on-going contact with families during children's early years
- Inflexible mandates and funding criteria leave providers unable to provide cohesive support
- Services are funded on the basis of outputs rather than outcomes, making it difficult to tailor services to families' diverse needs and circumstances

[26] *Starting Strong.* (2006). The OECD provides economic and social analysis for the governments of its member states. Starting Strong is the most comprehensive examination of early childhood education and care delivery ever undertaken. It took eight years to complete and involved 15 countries.

- Services are typically treatment-focused, rather than prevention- or promotion-focused, and are unable to adapt to emerging needs
- It is difficult to attract and retain qualified staff[27]

Noting our fragile patchwork of early childhood services, the OECD encouraged decision-makers to "build bridges between childcare and kindergarten education, with the aim of integrating ECE both at ground level and at policy and management levels" (OECD 2004, Canada Country Note, p. 6). Despite the 2007 cancellation of the federal/provincial early learning and care agreements, provinces have acted on the advice. Even in the short period since the release of the *Early Childhood Education Report* (www.earlyyearsstudy3.ca) in November 2011, much has evolved.

- New Brunswick became the first jurisdiction with a legislative and regulatory framework combining oversight for education, child care, family supports and intervention services. Its 0 to 8 years strategy extends early intervention services into the primary grades. Child care and family support services districts now mirror those for schools and are overseen by the same regional directors.
- Nova Scotia has established an early years' office in the Department of Education and has released the results of province-wide consultations to renew its early childhood service policies.
- Quebec's premier has committed to full-day preschool for all 4-year-olds and to eliminate wait-lists for child care.
- Ontario has released a discussion paper seeking sector/public input into new approaches to improve child care quality, oversight and access.
- Newfoundland has partnered with Memorial University to conduct a feasibility study of ECE integration and has instituted scheduled budget increases that tie child care operating funding to parent fees.
- Prince Edward Island continues to build on its Preschool Excellence Initiative with the development of its new *Early Learning and Childcare Act* and the alignment of its preschool and kindergarten curriculum approaches, supported by province-wide professional development for its ECE workforce.
- British Columbia is preparing *Play Resource* for primary teachers that builds on the provincial Early Learning Framework.
- Saskatchewan is exploring a single integrated unit within Department of Education for its early childhood programs.
- Alberta's Education and Human Services departments are working toward an ECEC framework. Grant McEwen University and Mount Royal University are developing a provincial curriculum framework.
- The early childhood sectors in Manitoba and British Columbia have formally proposed moving child care into their respective education departments.[28]
- The three territories are developing a joint early years curriculum framework embedding Aboriginal and European perspectives and cultures. The NWT has also worked with the Offord Centre – the developer of the EDI – to create another developmental domain which includes cultural awareness.

Four provinces and two territories have now combined oversight for their education and care services. Prince Edward Island and New Brunswick have also merged their child and family support programs. Successful service delivery requires more than co-locating services in the same department. It requires a common policy framework with defined goals, benchmarks and timelines and an appropriately

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[27] These same challenges were noted in the September 2009 paper prepared for the Child Welfare Intersectoral Committee, Promoting Health Child Development Work Team. *The Challenge of integrated Children's Services in Manitoba*.

[28] For more information about provincial/territorial ECEC policy developments, see www.oise.utoronto.ca/atkinson/Resources/Policy_Monitor/index.html.

resourced infrastructure to support quality, sustainability and accountability. Without a coherent framework, new investments are less effective for the child, fail to address family needs and waste public resources.

The following chart shows the steps provinces are taking to address service fragmentation.

	NL	BC	NS	NB	QC	ON	MB	SK	AB	BC
ECEC under common department/ministry	Under discussion	Y	Under discussion	Y	Y*	Y		Y		
[illegible]		Y		Y		Y		Under discussion		
Common ECEC policy framework		Y		Y	Y		Y			
[illegible]				Y		Under discussion				

*Quebec schools are responsible for out of school programs for children 5–12 years old. McCuaig, Bertrand & Shanker (2012)

Integrated program delivery and its impact on family/child function

Researchers have found that parents whose children attend early education programs that are integrated and connected to their school are much less stressed than their neighbours whose children are in the regular jumbled system.[29] Reducing parental stress matters. Stress disrupts parents' ability to manage their own conduct, leaving them with fewer resources to regulate their children's behaviour. The more harried the parents, the less likely they are to engage positively with their children. Chronic stress drips down on children influencing academic and other developmental outcomes.

Extensive evaluations of integrated service delivery, including Sure Start in the UK,[30] Communities for Children in Australia,[31] Toronto First Duty,[32] the Atlantic Children's Centres[33] and Better Beginnings, Better Futures in Ontario[34] found children in neighbourhoods with

[29] Toronto First Duty. (2009). *Research findings from Phase 2 of Toronto First Duty and their implications for full day learning in Ontario.* Toronto: Atkinson Centre Society and Child Development.

[30] Siraj-Blatchford, I. & Siraj-Blatchford, J. (2009). *Early years knowledge review 3: Improving development outcomes for children through effective practice in integrating early years services.* London, UK: Centre for Excellence and Outcomes in Children and Young People's Services (C4EO).

[31] Edwards, B., Wise, S., Gray, M., Hayes, A., Katz, I., Misson, S., Patulny, R. & Muir, K. (2009). *Stronger Families in Australia study: the impact of Communities for Children*, Commonwealth of Australia, Canberra.

[32] Toronto First Duty. (2008). *Toronto First Duty: Lessons from the TFD research.* Retrieved from http://www.toronto.ca/firstduty/tfd_research_summary.pdf.

integrated children's services showed better social development,[35] more positive social behaviour and greater independence/self-regulation compared with children living in similar areas without an integrated program. Less use was made of emergency health, justice and child welfare services.[36] When mandated and resourced to connect with every family in their catchment area, integrated early childhood programs reach families across the socioeconomic spectrum. Integrated service delivery enhances the effectiveness of intervention programs[37] and appears to play a preventive role in reducing aggressive behaviours.[38]

Modelling ECE integration

Some provinces have developed small-scale models to develop processes and identify barriers to service integration. Elements of each have since been scaled up into public policy. Toronto First Duty began as a partnership between the City of Toronto, the Toronto District School Board, Public Health and community partners. The unique teacher/ECE team, play-based curriculum and extended day programming options are now imbedded in Ontario's *Education Act* and govern the roll-out of full-day kindergarten for all four- and five-year-olds.

Smart Start in Prince Edward Island brought together CHANCES, a multi-site ECE and family support agency, with the school district, public health nursing and post-secondary institutions. Its seamless program continuum from birth through to formal schooling informed the province's Preschool Excellence Initiative, which is transforming private preschools into a publicly-managed ECE system.

New Brunswick's Early Childhood Development Centres model the coordinated delivery of child care, family supports and special needs interventions from school settings. Their learnings are reflected in the new legislation and a three-year, $38-million action plan, *Putting Children First*, which integrates early childhood services with the schools.[39]

The Kettle Stoney Point First Nations are collaborating with the Margaret and Wallace McCain Family Foundation and the Martin Aboriginal Education Initiative to combine their many programs and initiatives into a seamless birth to high school continuum of education and family

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[33] Morrison, W., Peterson, P. & Morrison, R. (2012). *Year 2 Report: New Brunswick Early Childhood Centres*, Health and Education Research Group, University of New Brunswick. Retrieved from http://www.mwmccain.ca/year-2-research-report-nb-early-childhood-centres.

[34] Peters. R.D., Nelson, G., Petrunka, K., Pancer, S.M., Loomis, C., Hasford, J., Janzen, R., Armstrong, L. & Van Andel, A. (2010). *Investing in our future: Highlights of Better Beginnings, Better Futures Research findings at Grade 12*. Kingston, ON: Better Beginnings, Better Futures Research Coordination Unit.

[35] Centre for Community Child Health. (2011). *Policy brief 21: Evidence-based practice and practice-based evidence: What does it all mean?* Melbourne, AU: The Royal Children's Hospital.

[36] Peters. R.D., Nelson, G., Petrunka, K., Pancer, S.M., Loomis, C., Hasford, J., Janzen, R., Armstrong, L. & Van Andel, A. (2010). *Investing in our future: Highlights of Better Beginnings, Better Futures Research findings at Grade 12*. Kingston, ON: Better Beginnings, Better Futures Research Coordination Unit.

[37] Morrison, W., Peterson, P. & Morrison, R. (2012). *Year 2 Report: New Brunswick Early Childhood Centres*, Health and Education Research Group, University of New Brunswick. Retrieved from http://www.mwmccain.ca/year-2-research-report-nb-early-childhood-centres.

[38] Côté, S., Pingault, J.-B., Boivin, M., Japel, C., Nagin, D., Xu, Q., Zoccolillo, M., Junger, M. & Tremblay, R.E. (2010). Pre-school education services and aggressive behavior: A preventive role in vulnerable families. *Psychiatry Science Human Neurosciences*, 77-87.

[39] www2.gnb.ca/content/gnb/en/news/news_release.2012.06.0506.html.

supports with a focus on literacy.[40]

The Lord Selkirk Park Childcare Centre has partnered wi th Healthy Child Manitoba and Red River College to implement the Abecedarian approach to program delivery. The Abecedarian approach is based on a scientific study conducted in North Carolina during the 1970s. Highly-trained educators, skilled at working with marginalized communities, focus on promoting literacy and language development in both children and parents. Initiated in April 2012, the Lord Selkirk program is too new to assess results, but early observations suggest multiple benefits as parents are able to train, seek work and receive medical treatment while their children participate in enriched programming. The young adult findings from the original study demonstrate that important, long-lasting benefits were associated with early and regular participation in the program.

Two models of integrated service delivery using the school as hub

The following are two examples of integrated childhood service delivery, which are part of schools. The Toronto First Duty model (2000–2012) was delivered in both inner city and suburban schools and included highly disadvantaged to affluent families. Its goal was to maximize opportunities for children's healthy development as it supported parents to work or study and enhanced their parenting capacities. Attempts to scale up the model are now in progress across Ontario.[41] The Doveton example is new. Instituted in January 2012 in Melbourne, Australia, it focuses on breaking intergenerational poverty and reducing childhood maltreatment. It employs a unique outreach program that tracks every child from birth. Both models operate with no additional funding beyond the norm for the service partners. However by integrating staffing, resources, administration and facilities, the school, public health, municipal and community partners are able to serve more families with higher quality programs—in the ways they want to be served—for the same cost as traditional "siloed" program delivery.

The building blocks for integrated programming

Demonstrating the possible...early leaders **Smart Start (PEI)** **ECD Centres (NB)** **BBBF (ON)** **KSPFN (ON)** **Toronto First Duty**	• Single identity combining education, child care, early intervention, parenting supports • Single funding envelope • Play-based curriculum and pedagogical approach • Common program policies and practices • Core staff team of responsive educators • Seamless participation • Full-day, half-day, regular part-time and occasional • Child and family focus • Parent engagement in children's early development and learning • Universal—all children and families can participate • Cultural inclusion and identity

Source: McCuaig, Bertrand & Shanker (2012)

[40] http://www.mwmccain.ca/martin-aboriginal-education-initiative/

[41] Pascal, C. (2009). *With our best future in mind: Implementing early learning in Ontario. Report to the Premier by the special advisor on early learning*. Toronto, ON: Queen's Printer of Ontario.

The Toronto First Duty model begins with pre- and post-natal information and nutrition resources and parent–child activities that encourage parents to choose appropriate behaviour guidance strategies and to read and talk more with their children. As children progress through play-groups to enroll in the flexible program for preschoolers and onto kindergarten and primary school, they and their families have continuous access to supports such as health screening, special needs interventions and links to family counselling and employment, immigration and housing services.

Surveys note that parents using the integrated program view the school as the centre of child and family services, and are more likely to feel empowered to talk to their child's educator and to help their child learn at home than their counterparts in neighbourhoods with traditional service delivery. This capacity building worked for parents across the socioeconomic spectrum.[42]

The Doveton Learning Centre in Melbourne, Australia serves a highly vulnerable population. Only 30 percent of adults have graduated high school and only 14 percent have full-time employment. Violence, substance abuse and other mental health issues fuel intergenerational poverty. Evaluations shows 55 percent of children arrive at kindergarten vulnerable on one or more domains,[43] compared to 10 percent nationally. By high school, 84 percent of students perform below expectations compared to 3 percent of their peers. The learning centre is part of the neighbourhood school and oversees an integrated and shared case management system that starts with the families developing learning plans for their children. Through this process, parents identify and seek supports to improve their own parenting capacities. The centre's activities include:

- An on-campus high quality early learning program, supported playgroups, early literacy, after-school and other specific programs with a prenatal to adolescence focus
- On-site health and intervention programs
- Adult education and support groups
- Support to access offsite therapies and programs

Doveton aims for ongoing contact with every family in their catchment area (2,000 children). Health, housing and social agencies inform the school when new families move into the community. Families using the school's programs are also a source for identifying their new neighbours. This ensures that every child and family is registered at birth. Parent volunteers introduce new families to the centre and its programs. Public health nurses visit every new mother within 10 days of giving birth. An additional nine visits for vaccinations and assessments are scheduled to 42 months. If appointments are not kept, public health nurses and/or early educators conduct home visits to

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[42] Corter, C., Janmohamed, Z. & Pelletier, J. (Eds.). (2012). *Toronto First Duty Phase 3 Report.* Toronto, ON: Atkinson Centre for Society and Child Development, OISE/University of Toronto.

[43] Vulnerability is determined by teacher assessments at kindergarten using the Early Development Instrument which measures children's readiness for the school environment in five domains: physical health and well-being; social competence; emotional maturity; language and cognitive development; and communication skills and general knowledge in relation to developmental benchmarks rather than curriculum-based ones.

encourage families to use the school's programs..

STRATEGIES THAT MAKE A DIFFERENCE IN EARLY CHILDHOOD AND BEYOND

Creating an early childhood system linked to public education was introduced in *Early Years Study 2* (2007) and built upon in *Early Years Study 3* (2011). Since then, many reports have envisioned children entitled to rich preschool opportunities. Building on the tremendous assets Canadians have in our public education systems, they argue for the transformation of elementary schools into child and family centres, welcoming infants to adolescents and operating year-round. The proposal is based on considerable international evidence that indicates education is the logical base to grow an early childhood system. Education is unambiguous. It is about children—all children. With education there is no need to reinvent the wheel. It already comes with a strong infrastructure: financing, training, curricula, data, evaluation and research. Joining early education and care with schools, both on-the-ground and at the systems level, avoids the wasteful expense of service duplications. Stable funding allows for the planning of and building in of quality assurances.

Canadians invest heavily in their schools, yet they are largely underused. Transforming schools into year-round vibrant family centres would have the added advantage of maintaining the public's trust in education.

A common policy framework for education, child care and family support services is a prerequisite to developing a systemic approach to early childhood program delivery. It doesn't negate the need for new investments, but it does ensure that existing investments are used more effectively and that new money supports the intended outcomes. Getting there requires saying goodbye to legislative, administrative and funding silos, and leaving territorial and professional jealousies behind. All the elements exist in the hodgepodge of child care, public health, education and family support services to create a *system* that can that can contribute to children's happiness and our collective futures.

1. **Implement strategies that support integrated early childhood service delivery from prenatal through the school system at the policy, governance and delivery level.**

   Families with young children need public, non-stigmatizing spaces within their neighbourhoods to call their own. Rather than a place separating children from the world, schools as community learning centres celebrate children, giving them a sense of grounded identity from birth. This promotes social cohesion and breaks down the isolation, which is a breeding ground for neglect, abuse and violence.

2. **Develop a tracking protocol to provide at least one additional intersection between young children and public agencies.**

   In Manitoba, children are registered at birth and all residents receive a personal health identification number (PHIN). The PHIN is also used to track childhood immunization. Children next come into public contact when they enrol in the school system, usually at age 5. Research finds a strong correlation between children who do not receive their well-baby medical care, family function and later developmental vulnerabilities.[44] PHIN tracking

[44] Pierce, T., Bolvin, M., Frenette, E., Forget-Dubois, N., Dionne, G. & Tremblay, R.E. (2010). Maternal self-efficacy and hostile-reactive parenting from infancy to toddlerhood. *Infant Behavior and Development,* 149-158.

could flag whether children have been vaccinated. Much like the Doveton example, outreach from public health and family support programs could identify families, connecting them to community resources as required.

3. **Integrate Aboriginal knowledge into early childhood curriculum frameworks for use in all early childhood settings.**

   Winnipeg is home to most Manitobans, and Winnipeg has the highest population of Aboriginal peoples of any Canadian urban centre. Promoting a shared understanding of Manitoba's founding peoples—Aboriginal and colonists—and their history, traditions and values is essential to social cohesion. The optimal place to build cross-cultural understanding is in early childhood settings. The Northwest Territories is developing a curriculum model for early childhood settings worth considering. While not immediately transferrable to Manitoba, (New Zealand has one first peoples where Manitoba has many), New Zealand's *Te Whāriki*/Early childhood curriculum also provides lessons for culturally inclusive programming.

Appendix A

WHAT THE RESEARCH SAYS

Large-scale longitudinal studies indicate that regular and prolonged attendance in quality early education and care programs supports children's health outcomes and provides a foundation to academic learning and social competencies.

- ***Effective Preschool and Primary Education (EPPE)***

EPPE is the largest study in Europe on the effects of preschool education on children's intellectual, social and behavioural development. The 3000 children in the study were randomly selected at age 3 from 141 preschool settings in England. At the core of the study is a developmental profile for each child, drawn from cognitive, language, social and behavioural assessments taken at ages 3, 5, 6, 7, 10 and 16. A sample of children with no preschool experience was also included.

The longitudinal design of the study provides sound evidence on the impact of different types and amounts of preschool provision after taking into account children's characteristics and their home background. It was found that children growing up in integrated program areas:

- Had lower BMIs than children in non-integrated areas
- Experienced better physical health
- Had less contact with child welfare and justice agencies
- Made more cognitive and social/behavioural progress compared to those who remained at home
- Had higher vocabulary and numeracy scores at age 5

Both quality and duration of preschool were important for children's development. Every month of preschool after age 2 was linked to better cognitive development and improved independence, concentration and sociability.

The positive effects were also associated with maternal well-being and family functioning for mothers residing in program areas in comparison with those in non-program areas. Mothers residing in program areas reported:

- Providing a more cognitively stimulating home learning environment for their children
- Providing a less chaotic home environment for their children
- Experienced greater life satisfaction and less social isolation
- Engaged in less harsh discipline

Case studies showed that children made better progress in preschools that viewed educational and social development as complementary.

A similar study in Northern Ireland showed children who attended high quality preschools were 2.4 times more likely in English, and 3.4 times more likely in mathematics, to attain the highest grade at age 11 than children without preschool.

EPPE concludes that three elements lead to educational success:

- Good home learning environment
- Good preschools for longer duration
- Good primary schools

Those children with all three elements will out-perform those with two, who will out-perform those with one, who will out-perform those with none, all other things being equal.[45]

Nested within the broader EPPE study was an examination of the effect of preschool settings on children requiring special educational needs supports during preschool or upon entry to school. Findings show a correlation between resilience during school years and self-regulation at school entry. Self-regulation in turn was highly linked to the quality of the preschool environment.[46]

- ***Better Beginnings, Better Futures (BBBF)***

Canada's largest and longest running study (est. 1993) on the influence of programs on children, Better Beginnings, Better Futures (BBBF), looked at eight communities—five focused on children from birth to 4 years of age (the younger child sites), and the other three on kindergarten-aged children to 8 years of age (the older child sites). Sites received a grant averaging $580,000 each year over five years (1993–97) to enrich programming for children, parents and/or neighbourhoods. Each site selected its own interventions, which varied over the course of the study.

A sample of children from each site was selected to study the impact of the interventions at a community level. Long-term positive effects were found for the children who lived in communities with enriched programming for 4- to 8-year-olds, but not for those in the younger child site communities. The positive outcomes actually strengthened over time in the older child sites, as seen in measures collected when children were in grades 3, 6, 9 and 12. Children in the BBBF communities used health, special education, social services, child welfare and

[45] Siraj-Blatchford, I. & Siraj-Blatchford, J. (2009) *Improving Children's Attainment through a Better Quality of Family-based Support for Early Learning,* London, Centre for Excellence and Outcomes; Siraj-Blatchford, I., Sylva, K., Taggart, B., Sammons, P., Melhuish, E.C. & Elliot, K. (2003) *The Effective Provision of Preschool Education (EPPE) Project: Technical paper 10 – Intensive case studies of practice across the foundation stage,* London, DfES/Institute of Education
Sylva, K., Melhuish, E.C., Sammons, P., Siraj-Blatchford, I. & Taggart, B. (2004) *Provision of Preschool Education (EPPE) Project: Final report,* London, DfES/Institute of Education.

[46] Anders, Y., Sammons, P., Taggart, B., Sylva, K., Melhuish, E. & Siraj-Blatchford, I. (2011). The influence of child, family home factors and preschool education on the identification of special educational needs at age 10 . *British Educational Research Journal*, 37, 421-441.

criminal justice services less than those in the control neighbourhoods. The reduction in the use of special education services alone saved more than $5,000 per child by grade 12.[47] The benefits are dramatic because they are recouped during childhood and represent benefits that accrue at a community level, and therefore have direct application for scaled up policies.

Why did younger children receive no lasting benefits from the interventions, while older children did? One explanation is that the modest project investment per child did not provide enough intensity for younger children.[48] Program spending in the older children's sites was on top of investments already made for every child via the school system. Schools offer a universal platform so that enriched supports reach all children, while no equivalent service is available for children during their preschool years.

- ***NICHD Study of Early Childcare (U.S.)***

The NICHD followed 1,300 children across the U.S. from birth through their preschool years and into adolescence. It found that higher quality child care was linked to:

- pre-academic skills
- language skills

Conversely, children's experiences in low quality centres were linked to problem behaviors. The more hours spent in poor child care, the more problems.[49]

- ***National Child Development Study (NCDS)***

The NCDS study examined the effect of preschool on a random sample of children born in 1958 in the UK. Controlling for child, family and neighbourhood, the study found long-lasting effects from participation, including better cognitive scores at 7 and 16 years. In adulthood, preschool was found to increase the probability of good educational qualifications and employment and better earnings at age 33.[50]

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[47] Peters. R.D., Nelson, G., Petrunka, K., Pancer, S.M., Loomis, C., Hasford, J., Janzen, R., Armstrong, L., Van Andel, A. (2010). *Investing in our future: Highlights of Better Beginnings, Better Futures Research findings at Grade 12*. Kingston, ON: Better Beginnings, Better Futures Research Coordination Unit.

[48] Corter, C. & Peters, R. D. (2011). Integrated early childhood services in Canada: Evidence from the Better Beginnings, Better Futures (BBBF) and Toronto First Duty (TFD) projects. In R. E. Tremblay, R. G. Barr, R. D. Peters, & M. Boivin (Eds.), *Encyclopedia on Early Childhood Development*. Montreal, QC: Centre of Excellence for Early Childhood Development.

[49] Vandell, D., Belsky, J., Burchinal, M., Steinberg, L., Vandergrift, N. & the NICHD Early Child Care Research Network. (2010). Do effects of early child care extend to age 15 years? Results from the NICHD Study of Early Child Care and Youth Development. *Child Development, 81*(3), 737-756.

[50] Goodman, A. & Sianesi, B. (2005). Early education and children's outcomes: How long do the impacts last? *Fiscal Studies*, 26, 513-548. Retrieved from http://www.ifs.org.uk/docs/ee_impact.pdf.

- ***PISA results for 2009***

PISA is an international assessment of the reading, science and mathematical literacy of 15-year-old students in OECD countries. It takes place in three-year cycles, monitoring changes in student achievement and other features of the education system over time. The 2009 results showed 15-year-olds who had attended preschool were on average a year ahead of those who had not. PISA also suggests that preschool participation is strongly associated with reading at age 15 in countries that sought to improve the quality of preschool education and provide more inclusive access to preschool education.

The relationship between preschool and performance at age 15 is strongest when:

- A larger percentage of the population attend preschool
- Duration is two or more years prior to compulsory schooling
- Preschools have smaller pupil-to-teacher ratios
- More per child is spent on preschool

The OECD's report on PISA results concludes: "The bottom line: Widening access to pre-primary education can improve both overall performance and equity by reducing socioeconomic disparities among students, if extending coverage does not compromise quality."[51]

- ***France's école maternal system***

In France, preschool is available to children from age 3 years, and most children attend. Analysis showed that preschool leads to higher income in later life and reduces socioeconomic inequalities. Children from less advantaged backgrounds benefit more from preschool than those from advantaged background. Duration also matters. In all income groups, children who attended preschool for three years did better than those attending for two years, who did better than those attending for one year. [52]

[51] Pisa in Focus 2011/1: *Does participation in pre-primary education translate into better learning outcomes at school?* Paris: OECD. Retrieved from www.pisa.oecd.org.dataoecd/37/0/47034256.pdf.

[52] OECD Country Note, *Early Childhood Education and Care Policy in France.* Directorate for Education, OECD, February 2004.

- ***Selected examples of meta-analysis reviews linking ECE to cognitive and social development***

Study	Methodology	Findings
Burger, K. (2010). How does early childhood care and education affect cognitive development? An international review of the effects of early interventions for children from different social backgrounds. *Early Childhood Research Quarterly, 25*(2), 140-165.	Systematic review to assess the effects of various preschool programs on cognitive development and impact for children from different social backgrounds. Randomized trials were generally conducted with small samples and at a single site only. The majority of studies had a quasi-experimental design that investigated the impact of naturally occurring variations in different types of interventions. Birth cohort studies and large-scale representative surveys provided data on a wide range of information. The studies typically compared children who had experienced some form of early intervention to those with none, while trying to control for other important background characteristics that could influence development.	Program intensity and duration were considered. The vast majority of recent early education and care programs had considerable positive short-term effects and somewhat smaller long-term effects on cognitive development. In relative terms, children from socioeconomically disadvantaged families made as much or slightly more progress than their more advantaged peers. Despite benefits, early childhood education and care cannot entirely compensate for developmental deficits due to unfavourable learning conditions in disadvantaged milieus.
Camilli, G., Vargas, S, Ryan, S. & Barnett, S. (2010). Meta-analysis of the effects of early education interventions on cognitive and social development. *Teachers College Record.*	A meta-analysis of 123 comparative studies of early childhood education interventions. Each study provided a number of contrasts, defined as the comparison of an intervention group of children with an alternative intervention or no intervention group.	Significant effects were found for children who attended preschool prior to kindergarten. Although the largest effect sizes were observed for cognitive outcomes, preschool (regular part-time and full-time delivery) was also found to impact children's social skills and school progress. Specific aspects that were positively correlated with gains included teacher-directed instruction and small-group instruction. Provision of additional services tended to be associated with negative gains. A host of original and synthetic studies have found positive effects for a range of outcomes, and this pattern is clearest for outcomes related to cognitive development.
Barnett, S. (2010). Universal and targeted approaches to preschool education in the United States. *International Journal of Child Care and Education Policy*, Volume 4, Number 1.	A meta-analysis based on the results of 120 studies carried out over five decades. The analysis compared targeted approaches to the universal provision of preschool.	Substantial positive cognitive benefits were found for all children who attend preschool prior to entering kindergarten. Positive results were also found for children's social skills and school progress. The study concludes that universal public preschool education would reach more children in low-income families, as well as children from middle- and higher-income families, and might actually improve program effectiveness, particularly through peer

		effects. While a universal approach would cost more than a targeted approach, it is likely to produce benefits that exceed the additional costs.
Gorey, K. (2001). Early childhood education: A meta-analytic affirmation of the short- and long-term benefits of educational opportunity. *School Psychology Quarterly, 16*(1), 9-30.	A meta-analysis of the effectiveness of early childhood educational program studies. The study examined integrated results across 35 preschool experiments and quasi-experiments.	Preschool effects on standardized measures of intelligence and academic achievement were statistically significant, positive and large, even after 5–10 years. 7–8 of every 10 preschool children did better than the average child in a control or comparison group. Cumulative incidences of an array of personal and social problems were statistically significant and substantially lower over a 10- to 25-year period for those who had attended preschool (e.g., school drop out, welfare dependence, unemployment, poverty, criminal behaviour).

Source: McCuaig, Bertrand & Shanker, S. (2012)[53]

[53] McCuaig, K., Bertrand, J. & Shanker, S. (2012). *Trends in Early Education and Child Care*. Toronto, ON: Atkinson Centre for Society and Child Development, OISE/University of Toronto.

Appendix B

ECONOMIC BENEFITS OF ECE

Early childhood education is economic development, and the research shows it is economic development with a very high public return. The economic rationale for investing in early childhood programming is gathered from three types of analyses: longitudinal data quantifying the human capital benefits and reduced health and social costs for children who attend preschool; economic modelling forecasting the payback from the enhanced labour productivity of working mothers; and studies examining the early childhood sector itself and its multiplier effects on economies.

- ***ECE as human capital development***

Validation of the human capital approach is heavily influenced by three U.S. longitudinal studies on the impact of preschool education on children from disadvantaged backgrounds. The participants were largely African-American children deemed to be at-risk because of low family income; mothers' age, educational attainment and lone-parent status; and neighbourhood livability.

Ypsilanti's Perry Preschool (initiated in 1962), the Abecedarian study in North Carolina (1972) and the Chicago Child-Parent Centers (1967) have tracked their original cohorts for up to four decades. Each study was unique, but all provided a group program emphasizing parent involvement and the development of literacy skills. Child-to-staff ratios were low and educators had university level training in early childhood education.

FIGURE 4.1 **Cost-benefit findings from three major longitudinal studies involving disadvantaged children attending preschool in U.S. urban areas**

	Abecedarian	Chicago Child-Parent Centers	Perry Preschool
Year began	1972	1967	1962
Location	Chapel Hill, NC	Chicago, IL	Ypsilanti, MI
Sample size	104	1,539	123
Intervention group	50	1,286	58
Design	Random control	Children who only attended full-day kindergarten	Random control
Participants' ages	6 weeks–5 years and 6–8 years	Ages 3–9 years	Ages 3–4 years
Program schedule	Full-day/year-round	Half-day/school year	Half-day/school year
Average time in program per child	5 years	18 months	2 years
Additional interventions to preschool	• Enriched programming in elementary grades • Health and family supports	• Full-day kindergarten • Health and family supports • Enriched programming in early elementary grades	• Health supports • 1.5 hour home visit once a week
Age last assessed	21 years	28 years	40 years
Costs per child	$13,900/yr	$7,428/child	$15,166/yr
Benefits calculated	$143,674	$83,511	$258,888
Return on each $1 spent	$4:$1	$10:$1	$17:$1

Sources: Barnett, W. S., & Masse, L. N. (2007); Schweinhart, L. J., et al. (2005); Temple, J. A. & Reynolds, A. J. (2007); Reynolds, A. J., Temple, J. A., Ou, S., et al. (2011).

Assessed over time, the preschool groups showed greater on-time secondary school graduation, higher college attendance, increased earnings and more prosocial conduct as adults compared to the control groups. For children born to mothers who never finished high school, high school completion rates were roughly 10 percent higher and rates of substance abuse and felony charges were roughly 10 percent lower than for children in the studies who did not attend preschool. The outcomes were

particularly pronounced for male participants[54] who developed better cognitive habits and improved impulse control.

The Chicago and Abecedarian studies included samples of children who attended both preschool and enriched school programming. Others participated only in preschool or only in enriched schooling. The most consistent and enduring outcomes were from preschool participation.

The benefits of preschool were quantified by comparing the original costs of the program per child to their adult behaviour, including employment earnings, taxes paid, social welfare used and criminal justice costs incurred. The studies considered only the financial returns for participants as they entered youth and adulthood.

- ***Canadian Cost-Benefit Analyses of ECE***

The first Canadian analysis of the economic payoffs of early education came in 1998 when economists calculated the impact of providing publicly funded educational childcare for all children aged 2–5 years.[55] The net cost of $5.2 billion annually (in 1998 CDN dollars) was premised on an overall parental contribution of 20 percent, with individual fees scaled to income.

The authors determined the benefits at $10.6 billion. About $4.3 billion was foreseen for children in improved school readiness, graduation levels and future earnings. The majority, and the most immediate, dividends ($6.24 billion) went to mothers. Affordable, available child care would allow women to work and shorten their stay out of the labour market following the birth of their children, and would permit them to move from part-time to full-time work. This would afford women more financial independence, increasing their lifetime earnings and decreasing personal and family poverty.

- ***ECE as local economic development***

ECE plays a multifaceted role in regional economies: as an economic sector in its own right with facilities, employees and consumption from other sectors; as labour force support to working parents; and for the long-term economic impact it has on the next generation of workers.[56]

Prentice (2004, 2007) analyzed the economic impact of Winnipeg's 620 childcare facilities. She found that for every child care job, 2.15 others were created or sustained. Child care also allows mothers and fathers to work. Parents with children in child care earn an estimated $715 million per year.[57] Overall, every $1 invested in child care provided an immediate return of $1.38 to the Winnipeg economy and $1.45 to Canada's economy.

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[54] Reynolds, A.J., Temple, J.A., Ou, S., Arteaga, I.A. & White, B.A.B. (2011). School-based early childhood education and age-28 well-being: Effects by timing, dosage, and subgroups. *Science, 333*(6040), 360–364. Retrieved from http://www.sciencemag.org/content/333/6040/360

[55] Cleveland, G. & Krashinsky, M. (1998). *Benefits and costs of good child care: The economic rationale for public investment in young children.* Toronto, ON: Child Care Resource and Research Unit, University of Toronto.

[56] Prentice, S. & McCracken, M. (2004). *Time for action: An economic and social analysis of childcare in Winnipeg.* Winnipeg, MB: Child Care Coalition of Manitoba.

[57] Ibid.

In 2007, Prentice also analyzed the child care sector in a rural, northern and Francophone region of Manitoba. Those studies identified higher returns, with every $1 of spending producing $1.58 of economic effects. In contrast to the Winnipeg report, Prentice found a lower employment multiplier: every two child care positions created 0.49 other jobs.[58]

- ***ECE as economic stimulus***

Released on the heels of the 2008 collapse of the financial markets when governments were looking for stimulus projects, economist Robert Fairholm showed how investing in educational child care was a hands-down winner.

- **Biggest job creator:** Investing $1 million in ECE would create at least 40 jobs, 43 percent more jobs than the next highest industry and four times the number of jobs generated by $1 million in construction spending.
- **Strong economic stimulus:** Every dollar invested in ECE increases the economy's output (GDP) by $2.30. This is one of the highest GDP multipliers of all major sectors.
- **Tax generator:** Earnings from increased employment would send back 90 cents in tax revenues to federal and provincial governments for every dollar invested, meaning investment in child care virtually pays for itself.

The study concludes that investments in early childhood programming pay for themselves, in both the immediate and longer-term, with a $2.54 payback for every dollar spent after accounting for all benefits and costs over the immediate to longer-term.[59]

- ***Quebec's no-cost ECE strategy***

Approximately 69 percent of children 0–12 years of age attend Quebec's low-cost early childhood and after-school services ($7/day). Economist Pierre Fortin's analysis of Quebec's system focused on the economic impacts due to changes in the mothers' labour force behaviour. His work examined:

- Who is working because low-cost ECE is available?
- How much tax revenue are they bringing in?

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[58] Prentice, S. (2007a). *Franco-Manitoban childcare: Childcare as economic, social, and language development in St.Pierre-Jolys*. Winnipeg, MB: Child Care Coalition of Manitoba; Prentice, S. (2007b). *Northern childcare: Childcare as economic and social development in Thomson.* Winnipeg, MB: Child Care Coalition of Manitoba; Prentice, S. (2007c). *Rural childcare: Childcare as economic and social development in Parkland.* Winnipeg, MB: Child Care Coalition of Manitoba.

[59] Fairholm, R. (2009) Literature review of socioeconomic effects and net benefits of ECEC labour market – Understanding and addressing workforce shortages in early childhood education and care (ECEC) project, Ottawa, CA: Child Care Human Resources Sector Council; Fairholm, R. (2009). Estimates of workforce shortages – Understanding ad addressing workforce shortage in early child education and care (ECEC) project, Ottawa, CA: Child Care Human Resources Sector Council; Fairholm, R. & Davis, J. (2010). Early learning and care impact analysis, for the Atkinson Charitable Foundation.

- How much less are they drawing on income-tested family benefits?

Fortin's analysis found that in 2008, 70,000 more Quebec women were at work and their presence could be attributed to low-cost preschool. This meant a 3.8 percent boost in women's employment and a 1.8 percent increase in total provincial employment. Adjusting for hours of work and the productivity of the new entrants, he calculated their labour added 1.7 percent to Quebec's GDP. Quebec mothers paid $1.5-billion annually in taxes, and because their earnings raised their family income, they drew lower levels of income-tested government transfers and credits, with both the federal and Quebec governments benefitting.

Overall, Fortin estimated that for every public dollar spent on early education, the Quebec government gets back $1.05 in increased taxes and reduced family payments, while the federal government gets 44 cents for, in Fortin's words, "doing nothing." Fortin's analysis also challenges claims that Quebec's early years investments would be better targeted to low-income families. While not discounting that better efforts could be made to facilitate the inclusion of children from disadvantaged circumstances, Quebec has a greater percentage of children from low-income homes attending preschool than any other province, including provinces where public funding is solely targeted to the poor.[60]

[60] Fortin, P., Godbout, L. & St-Cherny, S. (2012). *Impact of Quebec's universal low fee childcare program on female labour force participation, domestic income, and government budgets.* Working Paper 2012/02, Université de Sherbrooke.