



D'ARCY & DEACON LLP
BARRISTERS AND SOLICITORS



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

Exhibit #5

REFERENCE NO.
116822-0001

March 1, 2012

Via E-Mail to: swalsh@hillco.mb.ca

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

Dear Ms. Walsh:

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Re: Phoenix Sinclair Inquiry – Proposal regarding order of Witnesses

We are writing in response to the Notice to Counsel that was issued by the Commission on February 21, 2012. The Notice advised that the Commissioner is convening a public session on March 6, 2012 to provide an opportunity for the parties to raise preliminary matters or motions.

The proposal is to commence Phase 1 of the Inquiry with the case specific report writers and then proceed with the fact witnesses. This proposal is not intended (nor will it) interfere with or affect the Commissioner's power to call any witness on any subject relative to his mandate. Our reasons for this request are set out below.

It is our collective view that proceeding in this fashion will provide the Commissioner the greatest opportunity to avoid duplication between the reviews and the Inquiry. Paragraph 3 of the Order in Council mandating this Commission of Inquiry states that to avoid duplication in the conduct of the inquiry the commissioner must consider the findings made in the six reviews listed. He may give the reviews any weight, including accepting the findings in the reviews as conclusive.

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The Lieutenant Governor in Council has recognized that a great deal of work was put into those reviews and that they contain a substantial amount of information and insight that will be valuable to the Inquiry. Parenthetically, we note that other Orders in Council establishing Inquiries reference reviews but do not call for mandatory consideration, as is the case here.

It follows logically that in order for the Commission to "avoid duplication" the first step in its proceedings must be to consider the existing body of work before proceeding to expand and/or "drill deeper" into the matters at hand during the evidence phase of the Inquiry.

Proceeding in this manner is in the public interest. The public has a right to be informed of the findings made by the report writers at the first opportunity, and this will make it easier for the public to understand the issues being explored when fact witnesses testify.

The current contemplated procedure, which involves the fact witnesses testifying before the report writers, will make it impossible for the Commissioner to follow the direction of avoiding duplication during the Public Hearing portion of the Inquiry. In order to ensure that duplication is avoided, the Commissioner must first know what has already been done. This can only occur if the first step in the Inquiry is the public consideration of the reports by the Commissioner.

Another point is that there are several issues and factual inquiries that were not directly covered by the reviews (i.e. the 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) and therefore the evidence relative to these matters should follow the testimony of the report writers as a matter of procedural fairness.

Fortunately, the amended timetable for the Inquiry conveniently provides for the ability to alter the Commission's order of proceedings to ensure a more efficient and effective process. The amended timetable for the Inquiry has witness testimony scheduled to commence on July 4th and continue until August 3rd, following which the Commission will break until September 4th. Witness testimony is scheduled to continue until December 19th.

Since the consideration of the reports is likely a matter that can be completed during the July hearing dates, it makes sense to commence with this self contained portion of the Inquiry in July. This will allow the Commissioner to consider the evidence in the reviews and the testimony of the report authors during the break. The

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Commissioner can also during this time off make a determination as to what weight he will give to the reports and determine what amount of duplication can be avoided during the next portion of the Inquiry.

It is our firm belief that proceeding in this manner is in the public interest as it will result in a more efficient and expedient Inquiry process, which will more fully accord with the intention of the Lieutenant Governor in Council as reflected in the Order in Council.

Position of the other parties and intervenors

This submission is being put forward late because it was circulated to the parties a week ago and we were hoping to secure everyone's position prior to filing the submission. We can advise at this time that Intertribal Child and Family Services and the Manitoba Government Employees Union consent to the proposal.

The Department of Family Services and Consumer Affairs, Kimberley-Ann Edwards, Steve Sinclair and The University of Manitoba, Faculty of Social Work, have all advised us that they have no objection to the proposal.

Due to the time constraints, counsel for the Assembly of Manitoba Chiefs and the Southern Chiefs Organization has not yet received instructions.

Yours truly,

D'ARCY & DEACON LLP

Per:



KRIS M. SAXBERG

KMS:cw