



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

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

Ruling on Redactions

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

December 2, 2011

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RULING ON REDACTIONS

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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