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I. LIST OF DOCUMENTS TO BE RELIED UPON

Notice of Motion, *filed August 16, 2012*;

First Affidavit of Sandie Stoker, sworn August 15, 2012, *filed August 16, 2012*;

Second Affidavit of Sandie Stoker, sworn August 15, 2012, *filed August 16, 2012*;

Such other documents as counsel may advise.

II. LIST OF AUTHORITIES

TAB

1. *Order in Council 89/2011*.....A
2. *Manitoba Government and General Employees' Union v. The Honourable Edward Hughes*, 2012 MBCA 16.....B
3. *Newfoundland Telephone Co. v. Newfoundland (Board of Respondents of Public Utilities)*, [1992] 1 S.C.R. 623.....C
4. *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484.....D
5. *Hudson Bay Mining and Smelting Co. v. Cummings*, P.C.J., 2006 MBCA 98.....E
6. *Ed Ratushny, The Conduct of Public Inquiries: Law, Policy and Practice* (Toronto: Irwin Law Inc., 2009), pp. 286-287pp. 220, 222, 226, 286-287, 288-289, 291.....F
7. *Simon Ruel: The Law of Public Inquiries in Canada* (Toronto: Thomson Reuters Canada Ltd), 2010, pp. 48-50.....G
8. *Consortium Developments (Clearwater) Ltd. v. Sarnia(City)*,

[1998] 3 S.C.R. 3.....H

9. *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System)*, [1997] 3 S.C.R. 440.....I

10. *The Manitoba Evidence Act, sections 1, 87, 88(1), 93(1)*.....J

11. *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708.....K

12. *Clifford v. Ontario (Attorney General)* (2008), 90 O.R. (3d) 742.....L

III. POINTS TO BE ARGUED

1) Introduction

1. The Applicants support the Commission of Inquiry and will continue to provide full cooperation as contemplated in paragraph 8 of the Order in Council 89/2011. The Commission of Inquiry is in the best interests of children and families in Manitoba.

2. In order to ensure that this Inquiry results in the most helpful recommendations possible, thereby resulting in improvements to child welfare in Manitoba, the highest degree of disclosure is required. Full disclosure of relevant documents will enable the Commission to accomplish its mandate and will increase the likelihood of truly meaningful recommendations.

3. At the same time, the reputations of individuals and institutions within the child welfare system in Manitoba are on the line in this Inquiry. As such, a high degree of procedural fairness is owed to those who will be called to answer.

4. This motion is about those two interrelated things. The Applicants seek disclosure of the transcripts of interviews that the Commission has conducted with witnesses that are to be called to testify at the Inquiry hearing. The transcripts are inherently relevant and need to be produced to the parties to this Inquiry in order for procedural fairness to be achieved.

2) Factual Background

5. On or about March 23, 2011, the Lieutenant Governor in Council for the Province of Manitoba issued Order in Council No. 89/2011 which appointed the Respondent, the Honourable Edward (Ted) N. Hughes, OC, QC, LL.D (Hon) as Commissioner to inquire into the circumstances surrounding the death of Phoenix Sinclair.

First Affidavit of Sandie Stoker, sworn August 15, 2012 at para. 2

6. The Applicants received a grant of standing as a party to the Commission of Inquiry from the Respondent.

First Affidavit of Sandie Stoker, sworn August 15, 2012 at para. 7

7. On June 29, 2011, the Respondent issued an order approving the Commission's Rules of Procedure and Practice.

First Affidavit of Sandie Stoker, sworn August 15, 2012 at para. 8

8. On August 23, 2011, the Commission's Rules of Procedure and Practice were amended by the Respondent.

First Affidavit of Sandie Stoker, sworn August 15, 2012 at para. 10

9. The Commission's Amended Rules of Procedure and Practice require Commission Counsel to prepare Summaries of the expected testimony from

individuals whom Commission Counsel determines will be called as witnesses in the public hearings of the Commission of Inquiry.

The Commission of Inquiry's Amended Rules of Practice and Procedure, s. 23 (Ex. "G" to First Affidavit of Sandie Stoker)

10. The Commission's Amended Rules of Procedure and Practice also require the Commission to disclose all relevant, non-privileged documents in the possession of the Commission.

The Commission of Inquiry's Amended Rules of Practice and Procedure, s. 23 (Ex. "G" to First Affidavit of Sandie Stoker)

11. In accordance with section 9 of the *Order in Council 89/2011*, the Respondent, or counsel for the Respondent, may interview any person connected with the following matters:

- 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.

Order in Council 89/2011 (Tab A)

12. In accordance with section 9 of the *Order in Council 89/2011*, counsel for the Respondent ("Commission Counsel") has interviewed more than 83 individuals and 10,397 pages of Transcripts have been prepared reflecting the evidence and information provided by these individuals.

July 24, 2012 Transcript of Public Hearing of Transcript Motion, p. 46-48 (Ex. "L" to First Affidavit of Sandie Stoker)

13. However, at the time the Rules were put in place, the Applicants and all other parties and intervenors to the Commission of Inquiry had been told by Commission Counsel that Transcripts would not be created with respect to the pre-hearing witness interviews.

First Affidavit of Sandie Stoker, sworn August 15, 2012 at para. 11

14. The existence of these Transcripts was unknown to the Applicants until the month of April, 2012. Shortly after learning of their existence, the Applicants requested the production of the Transcripts from Commission Counsel.

First Affidavit of Sandie Stoker, sworn August 15, 2012 at paras. 12-13

15. Commission Counsel informed the Applicants through their legal counsel that she would consider their request.

First Affidavit of Sandie Stoker, sworn August 15, 2012 at para. 14

16. On June 4, 2012, Commission Counsel informed the Applicants, through their legal counsel, that she would not be disclosing the Transcripts.

First Affidavit of Sandie Stoker, sworn August 15, 2012 at para. 15

17. Also on June 4, 2012, Commission Counsel indicated that any remaining procedural motions were to be filed no later than July 4, 2012 and that they would be heard on July 12, 2012.

First Affidavit of Sandie Stoker, sworn August 15, 2012 at para. 16

18. The Applicants subsequently filed a Notice of Motion and Brief with the Respondent on July 4, 2012, requesting an order compelling the production of the Transcripts (the "Transcript Motion").

First Affidavit of Sandie Stoker, sworn August 15, 2012 at para. 17

19. The Respondent adjourned the hearing date of the Transcript Motion to July 24, 2012.

First Affidavit of Sandie Stoker, sworn August 15, 2012 at para. 18

20. On July 19, 2012, Commission Counsel filed a Brief with the Respondent opposing the relief sought in the Applicants' Transcript Motion.

First Affidavit of Sandie Stoker, sworn August 15, 2012 at para. 19

21. All parties, intervenors and counsel for individual witnesses to the Inquiry were served with the Transcript Motion. No other parties, intervenors or individual witnesses filed any materials in opposition to the Transcript Motion.

22. On July 24, 2012, the Applicants filed a Reply Brief with the Respondent which raised the issue of an apprehension of bias existing with respect to the Respondent hearing and determining the Transcript Motion, given that his own counsel had taken an oppositional position on the matter.

First Affidavit of Sandie Stoker, sworn August 15, 2012 at para. 22

23. On July 24, 2012, oral argument was presented to the Respondent by counsel for the Applicants and Commission Counsel with respect to the apprehension of bias issue.

First Affidavit of Sandie Stoker, sworn August 15, 2012 at para. 23

24. On July 24, 2012, the Respondent ordered that no apprehension of bias existed with respect to him hearing and determining the Transcript Motion and proceeded to hear argument from Commission Counsel and counsel for the Applicants on the merits of the Transcript Motion.

First Affidavit of Sandie Stoker, sworn August 15, 2012 at para. 24

25. No other parties, intervenors or individual witnesses made any submissions in opposition to the Transcript Motion.

26. On August 1, 2012, the Respondent issued a written decision denying the relief requested by the Applicants in their Transcript Motion.

First Affidavit of Sandie Stoker, sworn August 15, 2012 at para. 25

27. On August 3, 2012, the Applicants wrote to the Respondent and requested that he state a case to this Court with respect to three issues, namely:

- a. Did an apprehension of bias exist with respect to the Respondent 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?

First Affidavit of Sandie Stoker, sworn August 15, 2012 at paras. 26-27

28. On August 8, 2012, the Respondent issued a written response to the Applicants refusing to state a case to this Court.

First Affidavit of Sandie Stoker, sworn August 15, 2012 at para. 28

3) **Argument**

a) **The Test for an Order Directing the Respondent to State a Case**

29. The within proceeding is governed by section 95 of *The Manitoba Evidence Act* which states as follows:

95(1) Where the validity of a commission issued under this Part or the jurisdiction of a Respondent appointed thereby or the validity of any decision, order, direction, or other act, of a Respondent appointed under this Part, is called into question by any person affected, the Respondents, 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.

95(2) Where the Respondents refuse to state a case, any person affected may apply to a judge of the court for an order directing the Respondents to do so.

95(3) Pending the decision of the stated case no further proceedings shall be taken by the commission.

95(4) No action shall be brought or other proceeding taken with respect to anything done, or sought to be done, by a Respondent or to restrain or interfere with, or otherwise direct or affect the conduct of any Respondent.

30. The role of a judge on a proceeding 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 this Court. Second, the judge determines if the applicant has shown that the case it proposes to be heard by the full Court is an arguable case that has a reasonable chance of success.

Manitoba Government and General Employees' Union v. The Honourable Edward Hughes, 2012 MBCA 16 at para 56 (Tab B)

31. For the reasons that follow, it is the position of the Applicants that they have met the requirements for an Order from this Court directing the Respondent to state a case with respect to all three issues put to the Respondent in the Applicant's letter of August 3, 2012.

b) Did an Apprehension of Bias Exist with Respect to the Respondent 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?

(i) Introduction

32. It is the Applicants' position that an apprehension of bias existed with respect to the Respondent hearing and determining the Applicant's Transcript Motion.

33. It is impossible to have a fair hearing or to have procedural fairness if a reasonable apprehension of bias has been established. If there has been a denial of a right to a fair hearing it cannot be cured. Procedural fairness is an essential aspect of any hearing. The damage created by an apprehension of bias cannot be remedied and the hearing, and any subsequent order resulting from it, is void.

***Newfoundland Telephone Co. v. Newfoundland Board of Respondents of Public Utilities*), [1992] 1 S.C.R. 623, at p. 25-26
(Tab C)**

34. Accordingly, whether or not an apprehension of bias existed with respect to the Respondent hearing the Applicants' Transcript Motion is clearly of great importance. Procedural fairness is an essential aspect of any and all hearings before the Respondent. If an apprehension of bias is established, procedural

fairness has therefore been denied to the Applicant. Subsequently, the order given by the Respondent with respect to the Transcript Motion is void.

35. Therefore, it is the position of the Applicants that the first part of the test is met. This is an important issue that warrants this Court's attention.

36. With respect to the second part of the test, namely whether the case the Applicants propose to be heard is an arguable case with a reasonable chance of success, it must be pointed out that this issue does not warrant any appellate deference. The standard of review is correctness. The sole question to be answered by this Court is whether an apprehension of bias existed or not.

R. v. S. (R.D.), [1997] 3 S.C.R. 484 at paras. 98-102 (Tab D)

37. For the reasons that follow, it is the position of the Applicants that they have an arguable case, with a reasonable chance of success, that an apprehension of bias existed with respect to the Respondent hearing and determining the Transcript Motion.

(ii) The Test for Apprehension of Bias

38. The principles of natural justice and procedural fairness apply to this Commission of Inquiry.

Hudson Bay Mining and Smelting Co. v. Cummings, P.C.J., 2006 MBCA 98 at para 91 ("Hudson Bay") (Tab E)

39. It is impossible to have a fair hearing or to have procedural fairness if a reasonable apprehension of bias has been established.

Newfoundland Telephone Co. v. Newfoundland (Board of Respondents of Public Utilities), [1992] 1 S.C.R. 623 (S.C.C.) at p. 25 (Tab C)

40. The test with respect to allegations of an apprehension of bias is as follows:

What would an informed person, viewing the matter realistically and practically - and having thought the matter through – conclude? Would she think that it is more likely than not that the decision maker, whether consciously or unconsciously, would not decide fairly?

Ed Ratushny, The Conduct of Public Inquiries: Law, Policy and Practice (Toronto: Irwin Law Inc., 2009) pp. 286-287, (“Ratushny”) (Tab F)

(iii) The Evidence Supporting an Apprehension of Bias

41. On April 15, 2011, the Respondent publicly stated the following with respect to the Commission Counsel:

- a. The Respondent appointed Commission Counsel;
- b. Commission Counsel assists the Respondent in carrying out his mandate;
- c. Commission Counsel acts on behalf of and under the instructions of the Respondent;
- d. Commission Counsel, in carrying out her role, is in effect an extension of the Respondent;
- e. Commission Counsel is in constant touch and communication with the Respondent;
- f. Commission Counsel is not to advance any particular point of view and has no interest in any particular outcome.
- g. Commission Counsel may assist the Respondent in writing the final report.

Transcript of Commission Press Conference, April 15, 2011

(Ex. “B” to First Affidavit of Sandie Stoker)

42. At the Standing Hearing on June 28, 2011, Commission Counsel herself publicly acknowledged that she acts in accordance to the instructions given by the Respondent.

***Transcript of June 28, 2011 Standing Hearing, page 10
(Ex. "C" to First Affidavit of Sandie Stoker)***

43. Furthermore, at the Standing Hearing on June 29, 2011, the Respondent also publicly acknowledged Commission Counsel's duty to maintain public confidence in the integrity and impartiality of the inquiry.

***Transcript of June 29, 2011 Standing Hearing, page 4
(Ex. "B" to First Affidavit of Sandie Stoker)***

44. These statements of both the Respondent and Commission Counsel are entirely consistent with the leading authorities on point. For example, Ruel in his text *The Law of Public Inquiries in Canada*, confirms that:

- a. Commission Counsel is, at all times, subject to the direction of the Respondent;
- b. Commission Counsel has no authority independent of the Respondent;
- c. Commission Counsel is an agent of the Respondent; and
- d. Commission Counsel is the alter ego of the Respondent.

***Simon Ruel: The Law of Public Inquiries in Canada
(Toronto: Thomson Reuters Canada Ltd), 2010, pp. 48-50 (Tab G)***

45. Furthermore, Ratushny, in his text *The Conduct of Public Inquiries, Law Policy and Practice*, says as follows:

- a. Commission Counsel acts on behalf of and under the instructions of the Respondent;

- b. Commission Counsel is an extension of the Respondent;
- c. Commission Counsel has a duty to be impartial;
- d. Every task undertaken by Commission Counsel must be infused with an impartiality inseparable in degree from that of the Respondent (emphasis added); and
- e. Commission Counsel is the Respondent's alter ego.

Ratushny, at p. 220 and 222 (Tab F)

(iv) Application of the Reasonable Apprehension of Bias Test

46. Given the foregoing, a reasonable person in this situation would know that:

- a. Commission Counsel was appointed by the Respondent;
- b. Commission Counsel was assisting the Respondent in carrying out his mandate;
- c. Commission Counsel was acting on behalf of, under and in accordance to the instructions of the Respondent;
- d. Commission Counsel was carrying out her role, which would necessarily include her role in opposing this motion, as an extension of the Commission itself;
- e. Commission Counsel was the alter ego of the Respondent;
- f. Commission Counsel was in constant touch with the Respondent who will be deciding this issue; and
- g. Commission Counsel was supposed to remain impartial.

47. This information would lead a reasonable person conclude that there was a real likelihood of bias and that the Respondent would not decide this matter fairly, given that his own counsel had filed written argument and was allowed to provide oral argument to him in opposition to the Applicants' Transcript Motion.

48. This is especially glaring given the evidence that Commission Counsel is an admitted extension of the Respondent and that she operates under the Respondent's instructions. As was articulated by The Law Reform Commission of Canada, and cited in Ratushny's aforementioned text, 'we all know that no man should be a judge in his own cause'.

Ratushny, at p. 226 (Tab F)

49. Accordingly, the Applicants have made out an arguable (if not overwhelming) case, with a reasonable chance of success, that an apprehension of bias existed with respect to the Respondent hearing and determining the Transcript Motion.

c) Do the Commission's Amended Rules of Procedure and Practice require the disclosure of witness interview transcripts to the Parties and Intervenors?

(i) Introduction

50. It is the position of the Applicants that the Commission's Amended Rules of Procedure and Practice require the disclosure of the transcripts.

51. The Respondent has refused to order disclosure of the Transcripts on the basis that the Transcripts are documents created by the Commission for its own internal purposes.

***Commissioner's Decision with Respect to the Transcript Motion,
paragraph 16 (Ex. "M" to First Affidavit of Sandie Stoker)***

52. It is the position of the Applicants that the Respondent has erred in law by applying the principles of "work product" or "litigation" privilege to the Transcripts in order to shield them from the disclosure requirements of its own rules.

53. Whether not the Respondent has erred in law by refusing disclosure of the transcripts is an important issue that warrants the attention of this Court. The effect of the refusal is to deprive the parties of relevant documents, which limits the ability of the parties to the Inquiry to meaningfully participate in the proceedings.

54. The importance of this issue is made even more apparent given that this Court has held on several occasions that the public interest is better served by as much disclosure as possible.

Hudson Bay, para. 103 (Tab E)

55. Accordingly, it is the position of the Applicants that the first part of the test is met.

56. With respect to the second part of the test, as was mentioned previously, it is the position of the Applicants that the Respondent erred in law by applying the principles of “work product” or “litigation” privilege to the Transcripts in order to shield them from the disclosure requirements of its own rules. Accordingly, when determining whether the Applicants have an arguable case with a reasonable chance of success, it must be kept in mind that the standard of review is correctness.

57. For the reasons that follow, it is the position of the Applicants that they have an arguable case, with a reasonable chance of success, that the Commission of Inquiry’s Amended Rules of Procedure and Practice require the disclosure of the Transcripts, and that no privilege exists to shield the Transcripts from disclosure.

58. The Amended Rules of Procedure and Practice require that all relevant non-privileged documents in the possession of the Commission be disclosed to the parties and intervenors.

***Commission of Inquiry Amended Rules of Procedure and Practice, Rule 26
(Ex. "G" to First Affidavit of Sandie Stoker)***

59. It is submitted that the Transcripts are both relevant and non-privileged documents in the possession of the Commission.

(ii) Relevance

60. Commission Counsel has interviewed numerous individuals on the exact subject matters that are the focus of this Inquiry, namely:

- 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.

Order in Council 89/2011, s. 9 (Tab A)

61. The evidence provided by these individuals as reflected in the Transcripts is therefore clearly relevant.

62. The relevance of the Transcripts is also apparent from the fact that Summaries are being prepared of the Transcripts and these Summaries can be tendered as evidence in accordance with the Rules without the need for calling the individual as a witness at the public hearing.

***Commission of Inquiry Rules of Procedure and Practice, Rule 26
(Ex. "G" to First Affidavit of Sandie Stoker)***

63. The relevance of the Transcripts is made even more apparent from the fact that section 9 of the *Order in Council 89/2011* allows the Transcripts as a

whole to be tendered as evidence without the need for calling the individual as a witness at the public hearing.

Order in Council 89/2011, s. 9 (Tab A)

(iii) Solicitor-Client Privilege

64. Commission Counsel has the primary responsibility for representing the public interest at the Inquiry. Commission Counsel does not represent any of the individuals that they have interviewed. Therefore, solicitor-client privilege cannot be said to cover the Transcripts.

***Commission of Inquiry Rules of Procedure and Practice, Rule 7
(Ex. "G" to First Affidavit of Sandie Stoker)***

(iv) Litigation Privilege

65. Litigation Privilege only applies to a document if that document was created for the dominant purpose of use in actual, anticipated or contemplated litigation. It is a product of the adversarial process and exists to provide a lawyer with a zone of privacy into which "opposing" adversarial parties cannot pry.

Hudson Bay at para. 35 (Tab E)

66. Litigation privilege cannot apply to transcripts of witness interviews conducted by Commission Counsel as Inquiries are not adversarial and Commission Counsel is not opposed in interest to any of the parties. This assertion is made apparent from the following legal principles and authorities:

- Public Inquiries are concerned with being fair, fact finding processes.

Hudson Bay at para. 38 (Tab E)

- Public Inquiries are inquisitorial rather than adversarial.

Consortium Developments (Clearwater) Ltd. v. Sarnia (City),

[1998] 3 S.C.R. 3 at para. 41, (Tab H)

- The Respondent of an Inquiry is to be impartial and independent.

Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System), [1997] 3 S.C.R. 440 at para. 31 (Tab I)

- Commission Counsel is engaged by the Commission itself and is an extension of the Respondent.

The Manitoba Evidence Act, s. 93(1) (Tab J)

Ed Ratushny, The Conduct of Public Inquiries: Law, Policy and Practice (Toronto: Irwin Law Inc., 2009) at p. 220 (Tab F)

- Commission Counsel has 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 Respondent's attention.

Commission of Inquiry Rules of Procedure and Practice, Rule 7 (Ex. "G" to First Affidavit of Sandie Stoker)

67. Accordingly, Commission Counsel as an extension of the Respondent must be impartial, independent and non-adversarial. Much like Crown Counsel at an inquest, Commission Counsel performs a public duty which requires her to ensure that all available relevant evidence is presented in a fair, impartial and objective manner.

Hudson Bay at para. 57 (Tab E)

68. Given the foregoing, Commission Counsel does not have any adversarial parties against whom she must maintain a zone of privacy in order to facilitate adversarial preparation. There is no adversary here against whom Commission Counsel's work product needs to be protected.

69. This is similar, if not identical, to the situation in *Hudson Bay*, where this Court held that Crown Counsel at an inquest had to disclose witness interview transcripts to the parties at that inquest. In coming to this conclusion, Steel, J.A., held for the unanimous Court that inquests were non-adversarial and that the doctrine of litigation privilege was not applicable to non-adversarial processes (emphasis added).

Hudson Bay at para. 61 (Tab E)

70. Furthermore, even if litigation privilege could theoretically apply to Commission Counsel at an Inquiry, it can only apply to material that consists of preparatory work or notes on strategy and tactics. In other words, the product must be the result of an analysis of the mind.

Hudson Bay at paras. 59 and 62 (Tab E)

71. It cannot be said that the Transcripts at issue here are preparatory work or notes on strategy and tactics. Contrary to what the Respondent held, the Transcripts are not documents created by Commission Counsel for her own use and internal purposes. The Transcripts at issue must only contain information of a factual nature with respect to the very subject matter of the Inquiry, namely:

- 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.

72. The fact that either the Transcripts as a whole or the Summaries prepared in relation to the Transcripts can be filed as evidence before the Respondent

makes it even more apparent that the Transcripts can contain only relevant factual information.

73. Consequently, even if the doctrine of litigation privilege could apply to Commission Counsel, which it cannot, litigation privilege would not apply to the Transcripts due to the fact that they only contain factual information and are not the result of an analysis of the Commission Counsel's mind.

(v) Privilege on a Case-By-Case Analysis

74. It is acknowledged that in *Slavutych v. Baker et al.*, [1976] 1 S.C.R. 254, the Supreme Court of Canada determined that privilege can also apply on a case-by-case basis by reference to the four Wigmore criteria, namely:

1. The communications must originate in a confidence that they will not be disclosed;
2. This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties;
3. The relation must be one which in the opinion of the community ought to be sedulously fostered; and
4. The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

Hudson Bay at paras. 71 – 72 (Tab E)

75. Given that either the Transcripts or the Summaries can be filed before the Commission at the sole discretion of Commission Counsel, it is impossible to argue that the Transcripts originated in a confidence that they would not be disclosed. The individuals who were interviewed have absolutely no say as to which information is disclosed or not disclosed in the Summaries and additionally

have no say in whether the Summaries are tendered as evidence before the Commission.

76. Accordingly, any argument that the Transcripts are covered by case-by-case privilege fails at step one of the analysis. The communications could not have originated in confidence.

77. Furthermore, as was held in *Hudson Bay*, the “open, truth finding function of this Inquiry is more important than keeping this information confidential”. The parties to this Inquiry and the public at large are entitled to the fullest inquiry into the surrounding circumstances of Phoenix Sinclair’s death and disclosure of these Transcripts are of far greater importance than any need there may be to uphold a claim of privilege.

Hudson Bay at para. 81-82 (Tab E)

78. Therefore, any argument for case-by-case privilege applying to the Transcripts fails at step 4 of the Wigmore analysis as well.

79. Given the foregoing, it is plain and obvious that the Transcripts are relevant and non-privileged documents in the possession of the Commission. Consequently, they must be disclosed to the parties and intervenors pursuant to Rule 26 of the *Commission of Inquiry Rules of Procedure and Practice*.

d) Do the Principles of Natural Justice and Procedural Fairness Require Disclosure of the Transcripts?

(i) Introduction

80. It is the position of the Applicants that the principles of natural justice and procedural fairness require the disclosure of the transcripts.

81. Procedural fairness is an essential aspect of any hearing.

***Newfoundland Telephone Co. v. Newfoundland (Board of Respondents of Public Utilities)*, [1992] 1 S.C.R. 623, at pages 25-26
(Tab C)**

82. Accordingly, whether or not procedural fairness is being denied to the Applicants by the Respondent's decision denying the disclosure of the Transcripts is an important issue. If procedural fairness is denied to the Applicants, their ability and legal right to meaningfully take part in the Commission of Inquiry is denied.

83. Furthermore, as mentioned previously, the public interest is better served by requiring as much disclosure as possible.

Hudson Bay, para. 103 (Tab E)

84. Therefore, it is the position of the Applicants that the first part of the test is met. This is an important issue that warrants the attention of this Court.

85. With respect to the second part of the test, it is pointed out that a breach of a duty of procedural fairness is an error in law and the standard of review is therefore correctness.

Newfoundland and Labrador Nurses, para. 22 (Tab K)

86. Accordingly, the sole issue with respect to this matter is whether the principles of natural justice and procedural fairness require the disclosure of the Transcripts.

87. For the reasons that follow, it is the position of the Applicants that they have an arguable case, with a reasonable chance of success, that the disclosure of the Transcripts is required by the principles of natural justice and procedural fairness.

88. The principles of natural justice and procedural fairness apply to inquiries.

Hudson Bay at para. 91 (Tab E)

Commission of Inquiry into the Blood System at para. 57 (Tab I)

89. Although there can be no finding of liability or blameworthiness, the findings of fact and the conclusions of the Commission may well have an adverse impact upon the reputation of a witness or a party to the Inquiry. Moreover, the truth-seeking function of the Inquiry is enhanced when parties given standing have an opportunity to effectively prepare.

Hudson Bay at para. 91 (Tab E)

(ii) The Content of Procedural Fairness

90. The content of procedural fairness is contextual and dependant upon the nature of the particular hearing.

Hudson Bay at para 94 citing with approval Baker v.

Canada (Minister of Citizenship and Immigration), [1999]

2 S.C.R. 817 at para. 22 (“Baker”) (Tab E)

91. There are five factors which are used to determine the content of the duty of procedural fairness in a particular context. They are:

1. The nature of the decision being made and the process followed in making it;
2. The nature of the statutory scheme and the role of the decision within the statutory scheme;
3. The importance of the decision to the individual affected;
4. The legitimate expectations of the person challenging the decision; and
5. The choice of procedure made by the agency itself.

Hudson Bay at para 95 citing Baker at paras. 23-27 (Tab E)

92. It should be pointed out that the Respondent's decision with respect to the Transcript Motion makes no mention of these factors and, accordingly, fails to apply them to the facts of this case. This was an error of law.

(iii) Factor 1 - The Nature of the Decision Being Made and the Process Followed in Making it

93. The more the process resembles judicial decision-making, the more likely it is that procedural protections closer to the trial model will be required by the duty of fairness.

Hudson Bay at para. 95 citing Baker at paras. 23-27 (Tab E)

94. The context within which this Inquiry will be heard is quite similar to the judicial process. For example, the Respondent is defined as a "court" by *The Manitoba Evidence Act*. The Respondent conducts the Inquiry in public. Relevant evidence is heard, and parties apply to have standing and can be represented by counsel. Witnesses can be subpoenaed, examined and cross examined. Counsel for parties and intervenors can make submissions to the Respondent on legal and procedural issues.

The Manitoba Evidence Act, s. 1 and 88(1) (Tab J)

Commission of Inquiry Rules of Procedure and Practice, Rules 8-13 and 30-38 (Ex. "G" to First Affidavit of Sandie Stoker)

95. Although the decision of the Respondent does not determine specific rights or liabilities of participants, the Respondent is able to receive evidence on a wide scope of matters which could affect professional or personal reputations.

Amended Rules of Procedure and Practice, Rules 47-49 (Ex "G" to First Affidavit of Sandie Stoker)

96. The Respondent has the same protection and privileges as are by law given to the judges of the Court of Queen's Bench in the case of any action

brought against him for any act done or omitted to be done in the execution of his duty.

The Manitoba Evidence Act, s. 87 (Tab J)

97. The similarities between this Inquiry and a judicial process suggest that a high duty of fairness applies.

(iv) Factor 2 - The Nature of the Statutory Scheme and the Role of the Decision Within the Statutory Scheme

98. Greater procedural protections will be required when no appeal procedure is provided within the statute or when the decision is determinative of the issue.

Hudson Bay at para. 95 (Tab E)

99. This Inquiry is the last stage into the investigations surrounding the death of Phoenix Sinclair and is not subject to appeal.

Hudson Bay at para. 97 (Tab E)

100. This consideration suggests that a high duty of fairness applies to this Inquiry.

(v) Factor 3 - The Importance of the Decision to the Individual Affected

101. This Inquiry's broad purpose is to provide recommendations to prevent further child deaths. Therefore, the Inquiry is of great importance as it has the potential to greatly affect the lives of members of the public generally.

Hudson Bay at para. 97 (Tab E)

102. Given that the Applicants themselves are responsible for providing child welfare services to families and children in Manitoba, any recommendations that flow from this Inquiry will have a great effect on the Applicants and how they

provide these services. Accordingly, the Inquiry is of great importance to the Applicants.

103. Furthermore, the reputations of the Applicant entities and their individual employees are at stake. It is common ground that this Inquiry has and will continue to attract a high degree of media and public attention. The spotlight will be shined upon the witnesses called to testify. Their personal and professional reputations are on the line on a mass public stage. This is made most evident by the media articles covering the Inquiry and the reader comments attached thereto as evidence in the Second Affidavit of Sandie Stoker:

***Second Affidavit of Sandie Stoker, sworn August 15, 2012 at
paragraphs 4-7***

104. It is of utmost importance that the entities and individuals who will face this spotlight are afforded the greatest opportunity possible to prepare for and respond to allegations made about them by other witnesses. This can only be achieved by allowing them to access the Transcripts.

105. The Witness Summaries are deficient in providing the detail necessary for the entities and individuals with their reputations on the line to adequately prepare and respond to comments and allegations made about them. This issue will be discussed in further detail below beginning at paragraph 128.

106. Where professional reputations are at stake, it is essential that procedural fairness is demonstrated.

Commission of Inquiry into the Blood System at para. 55 (Tab J)

107. These considerations suggest that a high duty of fairness applies to this Commission of Inquiry.

(vi) Factor 4 - The Legitimate Expectations of the Person Challenging the Decision

108. As discussed above, the Commission's Rules of Procedure and Practice require disclosure of all relevant, non-privileged documents in the possession of the Commission to the parties and intervenors. Accordingly, the parties and intervenors have legitimate expectations that these relevant and non-privileged Transcripts will be disclosed.

109. Furthermore, as parties to the Inquiry, the within Applicants are substantially and directly interested in the Inquiry. The failure to disclose all relevant documents to a party with standing prevents that party from participating as it is entitled to in an Inquiry and prevents the evidence from being fully and properly explored.

Hudson Bay at para. 98 (Tab E)

110. There are strong expectations that Commission Counsel will elicit the truth by presenting relevant materials in a disinterested, dispassionate, neutral and non-adversarial manner.

111. Furthermore, there are expectations from the Commission's own rules that Commission Counsel has the primary responsibility for representing the public interest at the Inquiry. The public interest is best served by as much disclosure as possible.

***Commission of Inquiry Rules of Procedure and Practice, Rule 7
(Ex. "G" to First Affidavit of Sandie Stoker)***

Hudson Bay at para 103 (Tab E)

112. All of these considerations suggest that a high duty of fairness applies to this Inquiry.

(vii) Factor 5 - The Choice of Procedure Made by the Agency Itself

113. The fact that the Commission has chosen in its Rules to require the disclosure of all relevant, non-privileged documents suggests that a high duty of fairness applies to this Inquiry.

(viii) Conclusion on the Content of Procedural Fairness Required in this Instance

114. This Inquiry is a fact-finding exercise that is attempting to determine the circumstances surrounding the death of Phoenix Sinclair and to make recommendations so as to prevent a reoccurrence.

115. In proceedings such as this, the evidence should be as complete and accurate as possible in order to ensure that the Commission is able to fulfill its mandate. It is also required to ensure that the Inquiry is thorough, fair and timely.

116. Furthermore, it is submitted that the public's interest necessarily includes the best interests of children in Manitoba. Accordingly, the best interests of children in Manitoba are also served by as much disclosure as possible.

117. Given all of the foregoing, the requirements of procedural fairness at this Inquiry should include the disclosure of all relevant, non-privileged materials in the possession of the Commission. This necessarily includes the Transcripts.

118. This conclusion accords with the trend in both criminal and civil litigation towards greater disclosure, which is particularly appropriate in Inquiries given that disclosure is done in a better search for the truth.

Hudson Bay at para. 101 (Tab E)

119. This conclusion also accords with this Court's decision in *Hudson Bay*. In that decision, this Court was faced with determining nearly the exact same issue and factual scenario that is presented in this matter.

120. The nature of the inquest in *Hudson Bay* was to determine the circumstances that led to the death of an individual and to make recommendations about what, if anything, could have been done to prevent similar deaths from occurring in the future.

Hudson Bay at para. 7 (Tab E)

121. The nature of the inquest at issue in *Hudson Bay* is nearly identical to the nature of this Inquiry, where the Respondent is asked to look into the circumstances surrounding the death of Phoenix Sinclair and to make recommendations as he considers appropriate to better protect Manitoba children.

Order in Council 89/2011, s. 1-2 (Tab A)

122. Steel, J.A., in her decision for the unanimous Court in *Hudson Bay*, relied on nearly identical factors and analysis as presented herein in concluding that procedural fairness required the disclosure of witness interview transcripts as relevant and non-privileged documents to the parties of the inquest.

Hudson Bay at para. 100 (Tab E)

123. The same Order should follow in this instance.

(ix) Response to the Respondent's Decision

124. A few further comments are warranted with respect to the Respondent's reasons for decision.

125. The Respondent has based his decision (that the principles of natural justice and procedural fairness do not require the disclosure of the Transcripts) on a number of grounds. They include:

- a. The Witness Summaries provide enough procedural fairness for the Applicants to become acquainted with the evidence it is anticipated the witnesses will provide;

Decision with Respect to the Transcript Motion, paragraph 13
(Ex. "M" to First Affidavit of Sandie Stoker)

- b. Commission Counsel had assured the interviewed witnesses that the Transcripts would not be disclosed and this assurance was necessary to ensure that the witnesses provided a full account of their evidence;

Decision with Respect to the Transcript Motion, paragraph 14
(Ex. "M" to First Affidavit of Sandie Stoker)

- c. The Respondent can create his own rules and "is the master of his own procedure"; and

Decision with Respect to the Transcript Motion, paragraph 15
(Ex. "M" to First Affidavit of Sandie Stoker)

- d. The Applicant, and all other parties and intervenors, agreed to the Rules.

Decision with Respect to the Transcript Motion, paragraph 13
(Ex. "M" to First Affidavit of Sandie Stoker)

(x) The Witness Summaries do Not Provide Enough Procedural Fairness

126. With respect, to say that the parties to the Inquiry had enough materials via the Witness Summaries such that additional relevant documents need not be

produced is without legal foundation. This Court has previously stated that “the issue is the relevance of the materials, not the amount of materials”.

Hudson Bay at para 105 (Tab E)

127. Accordingly, if the Transcripts are relevant, which they clearly are, they must be produced.

128. In any event, as already mentioned, the Witness Summaries are deficient to meet the high level of procedural fairness that is required to be provided to the parties at this Inquiry.

129. The miniscule size of the Witness Summaries compared to the length of the Transcripts and the expected duration of the witnesses’ testimony creates a presumption that significant detail is missing from the Witness Summaries.

Second Affidavit of Sandie Stoker, sworn August 15, 2012 at para. 2

130. The examples of the vague allegations and statements made in the Witness Summaries (as set out in paragraph 3 of the Second Affidavit of Sandie Stoker) further evidence the inadequacy of the Witness Summaries in achieving procedural fairness with so many reputations at stake.

(xi) The Commission Counsel’s “assurance” Cannot Prevent the Applicant from Receiving its Legal Right to a Procedurally Fair Hearing

131. The only way that the Transcripts, as relevant documents, cannot be produced, is if they are subject to a legal claim of privilege. As was set out above, this argument is without legal foundation. No form of privilege attaches itself to the Transcripts.

132. What is clear is that Commission Counsel should not have provided this assurance given that she legally could not abide by it. However, whatever effect

that has on the Commission Counsel cannot be used as a legal excuse to ignore the procedural rights of the Applicants.

133. Furthermore, there is absolutely no evidence that any of the witnesses would not have fully cooperated with the Commission with respect to providing a full account of their evidence in the witness interviews. Any suggestion to the contrary is pure speculation.

134. In any event, that argument itself is without legal foundation and was rejected by this Court in *Hudson Bay*.

Hudson Bay at paras. 19 and 83 (Tab E)

(xii) The Respondent Can Create his Own Rules, but they Must be Procedurally Fair

135. It is readily conceded that the Respondent can create his own rules and is the master of his own procedure. However, in exercising the power to create his own rules, the Respondent must be procedurally fair. This power cannot be used as a vehicle to ignore his duty to be procedurally fair to the Applicants.

136. In his reasons for decision, at paragraph 15, the Respondents relied on *Clifford v. Ontario (Attorney General)* (2008), 90 O.R. (3d) 742 (**Tab L**).

137. Two comments regarding that case must be made. First, it must be understood that the proceeding in *Clifford* involved a motion that was brought by one party seeking full oral discovery of witnesses under oath prior to the hearing

Clifford at para. 10 (Tab L)

138. It was not, as the case is here, in response to a request for full pre-hearing disclosure of all relevant non-privileged documents. In fact, Justice Molloy held that the request was not granted since the pre-hearing disclosure process of exchanging all relevant documents was fair and reasonable in the circumstances.

Clifford at paras. 9-11 (Tab L)

139. Accordingly, the *Clifford* decision is supportive of the argument that the Applicants have made, namely that the pre-hearing disclosure process must include the exchange of all relevant documents in order to be fair and reasonable.

140. The second comment that needs to be made is that, even if the Commission is the master of its own procedure, the Commission's power in this respect is subordinate to its duty and the requirements with respect to the principle of fairness.

Ratushny, pp. 288-289 (Tab F)

(xiii) The Applicant Never Agreed to Not Receiving the Transcripts

141. The Applicants reiterate that the Commission's Rules state that the Commission will disclose all relevant and non-privileged documents. The Transcripts are relevant, non-privileged documents. That is what was agreed to.

142. Furthermore, at the time the Rules were prepared, it was not known that Transcripts would ever be in existence. Agreeing to receive Witness Summaries was not done in exchange of the Applicants' rights to receive all relevant, non-privileged documents.

143. Finally, rules of procedure are not legally binding and are subordinate to the duty of fairness. Since fairness is a jurisdictional requirement, it cannot be satisfied by the consent of the parties. Procedural fairness requires the disclosure of the Transcripts.

Ratushny at p. 286 and 291 (Tab F)

144. For all the foregoing reasons, it is the position of the Applicants that it has made out an arguable case, with a reasonable chance of success, that natural justice and procedural fairness require the disclosure of the Transcripts.

4) Remedies Sought

145. The Applicants request that this Court order the Respondent to state a case with respect to the three previously identified issues; namely:

- a. Did an apprehension of bias exist with respect to the Respondent 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?

146. The Applicants also request an Interim Order from this Court declaring that the Commission proceedings may continue while this motion and the stated case proceed.

147. Section 95(3) of the *Manitoba Evidence Act* states as follows:

95(3) Pending the decision of the stated case no further proceedings shall be taken by the commission.

148. All parties to the Inquiry agree that it is essential that the Inquiry hearing begins as scheduled on September 5, 2012. Accordingly, this Court ought to exercise its jurisdiction to declare that, notwithstanding section 95(3), the Inquiry may proceed during the determination of the stated case should it not be fully determined by September 5, 2012.

149. Although the Applicants acknowledge the risk of losing procedural fairness by having the hearing commence without disclosure of the Transcripts, the importance of proceeding with the Inquiry hearing as scheduled is crucial. As such, the Applicants are prepared to proceed concurrently with the stated case and the Inquiry hearing in the event that the decision on the stated case is not rendered prior to September 5, 2012.

150. Moreover, it is believed that many of the witnesses currently scheduled to testify in the first weeks of the Inquiry did not have their witness interviews transcribed. This alleviates some of the concern.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 16th day of
August, 2012

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IN THE COURT OF APPEAL

IN THE MATTER OF: **The Commission of Inquiry into the
Circumstances Surrounding the Death of Phoenix
Sinclair (the “Commission of Inquiry”)**

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”),**

Applicants,

- and -

**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**

Respondent.

APPLICATION UNDER Section 95(2) of *The Manitoba Evidence Act*, C.C.S.M. c.
C225 and Rule 43.1 of *The Court of Appeal Rules*, Man. Reg. 555/88

**SUBMISSION OF THE APPLICANTS
IN SUPPORT OF THE MOTION**

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