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

MOTION BRIEF OF CANADIAN BROADCASTING CORPORATION, CTV WINNIPEG, GLOBAL WINNIPEG AND THE WINNIPEG FREE PRESS

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PART I - LIST OF DOCUMENTS TO BE RELIED UPON

1. Affidavit of Allison Lamontagne, sworn May 22, 2012 (filed)
2. Affidavit of Bruce Rivers, sworn/affirmed March 30, 2012 (filed by the ANCR)
3. Affidavit of Cecil Rosner, sworn May 9, 2012 (filed)
4. Affidavit of Cheryl Regehr, sworn/affirmed March 30, 2012 (filed by the ANCR)
5. Affidavit of Elizabeth McLeod, sworn April 3, 2012 (filed by the MGEU)
6. Affidavit of Evelyn Wotherspoon, sworn March 29, 2012 (filed by the MGEU)
7. Affidavit of Gwendolyn M. Gosek, sworn April 4, 2012 (filed by the Faculty of Social Work, University of Manitoba)
8. Affidavit of Janet Kehler, affirmed June 27, 2011 (filed by the MGEU)
9. Affidavit of Michael Bear, sworn May 11, 2012 (filed)
10. Affidavit of Scott Clark, affirmed April 4, 2012 (filed by the Canadian Union of Public Employees)
11. Affidavit of Shirley Cochrane, affirmed April 3, 2012 (filed by ICFS)
12. Affidavit of Shavonne Hastings, sworn May 10, 2012 (filed)
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19. Cross Examination of Shirley Cochrane, affirmed May 24, 2012 (filed)

20. 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 Motion Brief ("ANCR Motion Brief") (filed by the ANCR)

21. Intertribal Child and Family Services Motion Brief ("ICFS Motion Brief") (filed by ICFS)

22. Manitoba Government and General Employees' Union Motion Brief ("MGEU Motion Brief") (filed by the MGEU)

23. Supplementary Affidavit of Janet Kehler, affirmed April 4, 2012 (filed by the MGEU)

PART II – ARGUMENT

I. Introduction

1. The Applicants are current or former public servants who provide or provided child welfare service to the people of Manitoba and who have been called to testify during the public hearings of the Public Inquiry into the Circumstances Surrounding the Death of Phoenix Sinclair (the "**Inquiry**"). These individuals are referred to herein as ("**Professional Witnesses**").

2. The identities of the Applicants have not been disclosed, but each of the Applicants is represented by counsel who has submitted the names of the Applicants they represent to the Commission. The large majority of Applicants are represented by one of three firms, counsel to the Manitoba Government and General Employees' Union ("**MGEU**"), counsel to Intertribal Child and Family Services ("**ICFS**") or counsel to 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 (collectively "**ANCR**").

3. The Notice of Motion filed by each counsel on behalf of each of the Applicants requests slightly different relief. However, in essence, each of the Applicants seeks a permanent ban on the publication of their identities. It is not clear the degree to which the Applicants are seeking a ban on publication of details of their professional backgrounds or other information that could be used to ascertain identity.

4. Canadian Broadcasting Corporation ("**CBC**"), CTV Winnipeg ("**CTV**"), Global Winnipeg ("**Global**") and The Winnipeg Free Press ("**FP**") (collectively, the "**Media Group**") oppose the motions.

5. In addition to the motions related to publication of identities of Professional Witnesses, there are motions brought relating to the disclosure of identities of "**Sources of Referral**" ("**SOR Motions**"). In accordance with the submission made to Commissioner Hughes (the "**Commissioner**") at the hearing on April 18, 2012, in order to expedite the process, the Media Group will not be taking an active position on the SOR Motions but will reserve its right to move to set aside any publication ban if it turns out that the SOR played a material role other than being a source of referral. The Media Group will, however, oppose any application for an *in camera* hearing.

6. The principal issue on the motion is whether the Applicants have established a case for infringing upon the right of the media to publish and of the public to know the identities of Professional Witnesses. Alternative relief is sought by the Applicants to the applicability of the arrangements for video and audio recording to Professional Witnesses.

7. In support of their motion, the Applicants have filed evidence critical of the utility and effectiveness of post mortem inquiries into the deaths of children involved with the child welfare system. However, the issue on this motion is not whether the Government of Manitoba was correct in establishing the Inquiry or whether the holding of the Inquiry

will lead to negative consequences. The Inquiry has been established and an attempt by some of the Applicants to block it in the courts has failed.

8. The issue to be decided on this motion 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 requested interference with the *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (the "***Charter***").

9. The Applicants have elected not to tender any evidence about their respective personal circumstances. They have relied solely on general evidence about the role of professional child welfare staff in the child welfare system.

II. The "Open Court Principle"

A. Openness in Judicial Proceedings

> 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.

- ***Vancouver Sun, Re, 2004 SCC 43, para 25 - Tab 1, Media Group Authorities***

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 v. Quebec (Attorney General)*, 1988 CanLII 19 (SCC), [1988] 2 S.C.R. 712; *Edmonton Journal,* supra, at pp. 1339-40.

- ***Vancouver Sun, Re, supra, para 26 - Tab 1, Media Group Authorities***

B. The special importance of the media's right to attend and report upon judicial proceedings

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, at pp. 1339-40. Consequently, the open court principle, to put it mildly, is not to be lightly interfered with. (emphasis added)

- ***Vancouver Sun, Re, supra, para 26 - Tab 1, Media Group Authorities***

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.(emphasis added)

- ***Edmonton Journal (The) v. Alberta (Attorney General) [1989] 2 S.C.R. 1326, para 85 - Tab 2, Media Group Authorities***

C. Applicability of Open Court Principle to Public Inquiries

10. As public inquiries are judicial or quasi-judicial, the principles to be applied in terms of openness are the same as for court proceedings, which are governed by the common law and the *Charter.*

- ***British Columbia (Gove Inquiry into Child Protection in British Columbia) -- Applications for Access to and Copies of Police Interviews of V. Vaudreuil, [1995] B.C.J. No. 2661 - Tab 3, Media Group Authorities***

11. In fact, openness takes on a special importance in the context of a public inquiry.

> 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.
> >
> > (Jamie Cameron, "Comment: The Constitutional Domestication of our Courts -- Openness and Publicity in Judicial Proceedings under the Charter" in Philip Anisman)

- ***Phillips v. N.S. (Westray Mine Inquiry), [1995] 2 S.C.R. 97, para 117, per Cory, J - Tab 4, Media Group Authorities***

12. In *Phillips,* Justice Cory cited with approval the words of Mr. Justice Grange:

> … 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.] (pp. 137-138)

- ***Phillips, supra, para 63 - Tab 4, Media Group Authorities***

III. The *Dagenais/Mentuck* Test

13. It is common ground that the test that the Applicants must meet to justify a publication ban is the test set out in *Dagenais v. Canadian Broadcasting Corporation,* [1994] 3 S.C.R. 835 as modified in *R. v. Mentuck,* 2001 SCC 76. The test is often referred to as the *Dagenais/Mentuck* test.

- ***MGEU Motion Brief, para 19***
- ***ICFS Motion Brief, para 13***

14. The *Dagenais/Mentuck* test requires an applicant for a publication ban to demonstrate that:

> *(a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and*
>
> *(b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.*

- ***R. v. Mentuck, 2001 SCC 76, para 32 - Tab 5, Media Group Authorities***

IV. Evidentiary Issues

A. Introduction

15. The Media Group has filed Notices of Motion seeking to strike out portions of the affidavits filed on behalf of the Applicants (the "**Motions to Strike**").

16. The Media Group is seeking to expunge:

(a) Exhibit "B" to the Affidavit of Evelyn Wotherspoon;

(b) Portions of the Affidavit of Janet Kehler, June 27, 2011;

(c) Portions of the Affidavit of Elizabeth McLeod;

(d) Portions of the Affidavit of Bruce Rivers;

(e) Portions of the Affidavit of Shirley Cochrane;

(f) Portions of the Affidavit of Gwendolyn Gosek; and

(g) Portions of the Affidavit of Scott Clark.

17. The Motions to Strike identify the particular paragraphs of the affidavits that are not admissible and specify the grounds applicable to each paragraph.

18. The following section is an overview of the legal principles upon which the Media Group will rely in respect of the Motions to Strike.

B. Application of the rules of evidence to the motion for a publication ban

19. Although relaxed rules of evidence may apply in respect of the development of the recommendations at a public inquiry, a motion for a publication ban involves a

request to impair the rights of third parties pursuant to section 2(b) of the *Charter*. It is respectfully submitted that, when *Charter* rights are at stake, the rules of evidence should be applied regardless of whether the proposal to infringe rights is being determined by a court or a commissioner of a public inquiry.

Mentuck

C. Opinion Evidence

Introduction – Opinion Evidence

20. The affidavits filed by some of the Applicants contain speculation and personal opinion/argument.

21. Since the law on publication bans requires that alleged risks to the administration of justice be non-speculative and well grounded in evidence, it is important to separate fact from opinion/argument and it is important that the Commissioner not rely upon opinions unless they come from people qualified to give them.

- ***R. v. Mentuck, supra, paras 34, 49 - Tab 5, Media Group Authorities***

22. The Media Group objects to the admissibility of the opinion evidence of people who are not qualified to provide that evidence. Alternatively, the Media Group will argue that such evidence should be given no weight.

23. In the case of each affiant who was cross examined, counsel clarified whether the witness was presented as an expert witness and identified the area of claimed expertise.

24. The affiants Bruce Rivers and Cheryl Regehr put forward by ANCR are both based in Toronto and were not cross examined. ANCR has not indicated whether or not both of these witnesses are being put forth as expert witnesses or their areas of expertise.

25. The following Appendices contain discussion of the qualifications and evidence of the following witnesses whose affidavits contain opinion evidence.

(a) Appendix “A” – Discussion of Evidence of Bruce Rivers;

(b) Appendix “B” – Discussion of Evidence of Cheryl Regehr;

(c) Appendix “C” – Opinion Evidence of Janet Kehler;

(d) Appendix “D” – Inadmissible Opinion Evidence of Gwendolyn Gosek, Shirley Cochrane and Elizabeth McLeod; and

(e) Appendix “E” – Expertise of Evelyn Wotherspoon in respect to Exhibit “B” to her Affidavit.

Law on admissibility of opinion evidence

26. In general, a witness may not give opinion evidence, but should be allowed to testify only to facts within his knowledge, observation, or experience.

- ***R. v. Collins (2001), 160 C.C.C. (3d) 85 at para 17 (Ont. C.A.) - Tab 6, Media Group Authorities***

27. An exception to this rule exists with respect to the testimony of witnesses who offer an opinion that requires special training or education to formulate. The admissibility of expert opinion evidence is determined according to the application of the following four criteria:

(a) necessity in assisting the trier of fact;

(b) relevance;

(c) a properly qualified expert; and

(d) the absence of any exclusionary rule that would be offended by the admission of the opinion.

- ***R. v. Mohan* (1994), 29 C.R. (4th) 242 (S.C.C.), Tab 7 - Media Group Authorities**

28. The burden rests on the party calling the evidence to establish that, on the balance of probabilities, the evidence satisfies the criteria outlined in *R. v*. *Mohan,* including reliability.

- ***R. v. Terceira (1998), 107 O.A.C. 15, 123 C.C.C. (3d) 1, [1998] O.J. No. 428 at para 45 (Ont. C.A.) aff'd [1999] 3 S.C.R. 866 – Tab 8, Media Group Authorities***

29. A report that is argument dressed up as opinion is not admissible.

- ***Smith v. Alwarid (1996), 1996 CarswellYukon 16 (Y.T.S.C.), [1996] B.C.W.L.D. 2181 - Tab 9, Media Group Authorities***
- ***B. v. Plint (1998), 56 B.C.L.R. (3d) 214, 23 C.P.C. (4th) 389) - Tab 10, Media Group Authorities***

30. The expert must possess special knowledge and experience going beyond that of the trier of fact.

- ***R. v. Mohan, supra, at paras 25 to 27 - Tab 7, Media Group Authorities***

31. The precise area of expertise of the witness must be defined and the witness should not be permitted to offer opinion evidence on matters beyond their established expertise.

- ***Vigoren v. Nystuen (2006), 2006 SKCA 47, 266 D.L.R. (4th) 634, 34 M.V.R. (5th) 160, [2006] 10 W.W.R. 223 at paras 67 - 74 - Tab 11, Media Group Authorities***

32. Expert opinion must remain objective and impartial. It should not come across as the views of an advocate.

- ***Fellowes, McNeil v. Kansa General International Insurance Co. [1998]; 37 C.P.C. (4th) 20, 40 O.R. (3d) 456 (On. Gen) at para 10 - Tab 12, Media Group Authorities***

D. Reliance on Hearsay Evidence

The Hearsay Rule

33. Hearsay evidence is presumptively inadmissible unless it falls under an exception to the hearsay rule, or indicia of reliability and necessity are established in a *voir dire*.

- ***R. v. Khelawon, [2006] 2 S.C.F. 787, 215 C.C.C. (3d) 161, 2006 SCC 57 - Tab 13, Media Group Authorities***
- ***R. v. Starr, [2000] 2 S.C.F. 144, 147 C.C.C. (3d) 449, 2000 SCC 40 - Tab 14, Media Group Authorities***

Applicants' reliance on second hand anonymous evidence from individuals seeking the publication ban

34. Frequently in publication ban cases, there is an interim publication ban protecting the information in issue to allow the applicant to provide the decision maker with the relevant circumstances.

- ***Reasons in Respect of an Application for Confidentiality Relating to the Identity of the Moving Party (28 November 2006), Decision of the Cornwall Public Inquiry (G. Normand Glaude, Commissioner), online: The Cornwall Public Inquiry <http://www.attorneygeneral.jus.gov.on.ca/inquiries/cornwall/en/hearings/rulings/pdf/Reasons_re_Identity_of_the_Moving_Party_en.pdf> - Tab 15, Media Group Authorities***

35. The Applicants in this case have elected not to rely on any personal circumstances of individual Applicants and have tendered no direct evidence. However, they attempt to indirectly put into evidence facts, opinions and concerns from unidentified persons through the affiants.

36. For example, in her affidavit Ms. Kehler refers to meetings with unnamed groups of union members who expressed speculative "concerns" about potential consequences of a public inquiry and/or the identification of social workers in the media. In cross examination, Ms. Kehler testified that most of the statements she was making about social workers came from informal and unrecorded meetings of the proposed beneficiaries of the order sought on behalf of MGEU social workers.

- ***Affidavit of Janet Kehler, paras 16, 17, 18, 25, 36, 38 and 48***
- ***Supplementary Affidavit of Janet Kehler, paras 8 and 9***
- ***Cross Examination of Janet Kehler, pages 37 to 38***

37. By tendering evidence of this nature, the Applicants attempt to introduce second hand information and opinions from unidentified sources whose expertise has not been established and who are not available for cross examination.

- ***Cross Examination of Shirley Cochrane, paras 15 to 21***

38. It is submitted that the hearsay evidence and opinion is not admissible and should carry no weight.

V. Response to Particular Allegations in Applicant Affidavits

A. Introduction

39. This section of the brief addresses some of the factual claims underlying the Applicants' arguments.

B. The identities of social workers are generally known to the community and social workers do not generally conceal their identities or their occupations

40. In paragraph 26 of her affidavit, Janet Kehler makes the statement that social workers make every attempt to keep the nature of their work private. The evidence has shown this statement to be incorrect.

41. The Manitoba Institute of Registered Social Workers lists the name of every registered social worker in Manitoba on its public website.

- ***Affidavit of Allison Lamontagne, May 22, 2012, at Exhibit "B"***

42. Many agencies, including Intertribal Child and Family Services post the names of their social workers and their areas of practice on their public web sites.

- ***Affidavit of Allison Lamontagne, May 22, 2012, at Exhibit "C"***

43. At least one agency has posted a staff picture on its website.

- ***Affidavit of Allison Lamontagne, May 22, 2012, at Exhibit "D"***

44. In cross examination, Ms. Kehler did not dispute any of the above facts, but admitted that she was not aware of the above facts when she swore her affidavit.

- ***Cross Examination of Janet Kehler, page 46, line 5***

45. Ms. Kehler was unable to point to any written policy to support the statements made in paragraph 26 of her affidavit.

- ***Cross Examination of Janet Kehler, pages 16 and 17***

46. Social workers wear name tags and hand out business cards with their names and contact information. They are required to identify themselves, their agency and the purpose of their visit when they attend upon clients.

- ***Affidavit Shavonne Hastings, para 5***
- ***Cross Examination of Shavonne Hastings, page 14, line 12***
- ***Affidavit of Michael Bear, para 7***

47. The identities of social workers are generally well known to the community.

- ***Cross Examination of Shirley Cochrane, page 20, line 14***
- ***Affidavit of Shavonne Hastings, paras 6 and 7***
- ***Affidavit of Michael Bear, para 8***
- ***Affidavit of Shirley Cochrane, para 7***

C. It is common in Manitoba and elsewhere in Canada to identify child welfare workers who are witnesses in legal proceedings involving infant deaths.

48. Child welfare workers are routinely identified without publication bans in inquests and other public proceedings relating to deaths, both in Manitoba and across Canada.

- ***Affidavit of Cecil Rosner, paras 6 to 14***
- ***Cross Examination of Evelyn Wotherspoon, page 24, line 17***
- ***Affidavit of Michael Bear, paras 12 and 13***
- ***Cross Examination of Shirley Cochrane, page 25, lines 17 to 25***
- ***Cross Examination of Janet Kehler, pages 47 and 48***

49. Ms. Kehler admits that she was not aware that it was the practice in Manitoba to identify social workers in child death inquests at the time she swore her affidavit suggesting otherwise.

- ***Cross Examination of Janet Kehler, page 48, line 20***

D. Social workers do not have any reasonable expectation that, if they testify in judicial proceedings about infant deaths, their names will be kept secret.

50. Social workers entering the field generally know and ought to know that their names may become public in connection with an incident or tragedy.

- ***Affidavit of Shavonne Hastings, para 16***
- ***Cross Examination of Shavonne Hastings, page 16, line 15***

51. While Ms. Kehler suggested in her affidavit that there were privacy rights belonging to social workers that would be infringed if their identities were made public when they testify, she admitted on cross examination that she had no basis for making that statement.

- ***Affidavit of Janet Kehler, 2011 para 17 and 26***
- ***Cross Examination of Janet Kehler, page 16, line 16***

52. In Paragraph 44 of her affidavit, Shirley Cochrane testified that social workers "understand that court proceedings are not open to the public and that their names as well as those of the families involved cannot be published by the media." However, on cross examination, Ms. Cochrane admits that social workers are identified without publication bans in child death inquests. She agrees that anyone who has experience with the system understands that if there is a death of a child in care their name may be made public. She does not tell her social workers otherwise.

- ***Affidavit of Shirley Cochrane, pages 25 to 26***

E. There is no evidence that connects identification of social workers to an increased risk of physical danger

53. It is part of the job of a social worker providing child and family services to deal with potentially volatile individuals. This can be and is managed through good training and by implementing appropriate policies and procedures. While there is a risk to social workers that must be managed, there are systems in place to manage this risk including careful risk assessment tools and protocols for attending with others and with police where there is a risk identified.

- ***Affidavit of Shavonne Hastings, paras 12, 13, 14 and 15***

- ***Cross Examination of Shavonne Hastings, page 11 line 16***

54. Shavonne Hastings, an experienced child welfare worker and supervisor testifies at paragraph 9 of her affidavit that she has not been involved in any circumstance and is not aware of any circumstance where the fact that the identity of the social worker was known in advance made any material difference to a volatile situation. She finds it difficult to imagine realistic circumstances where prior publication of an identity would make a material difference to the safety of a social worker in an intervention.

55. The Applicants tendered no evidence of any instance of a physical assault on any worker in the province and have tendered no evidence to establish the prevalence of this risk. Shavonne Hastings, a witness for the Media Group, had heard of two instances of a physical interaction involving a child welfare worker. In one instance a client threw a coffee cup at a child welfare worker. This occurred during a pre-scheduled appointment between a worker and a client who had an existing relationship with the social worker.

- ***Affidavit of Shavonne Hastings, para 11***

56. Shavonne Hastings testified that she has heard of one other incident of a physical encounter. The physical contact occurred even though the child welfare worker attended upon the client with four police officers. There was no evidence of any connection between the incident and prior identification of the social worker.

- ***Cross Examination of Shavonne Hastings, page 22, line 20***

57. There is thus no evidence linking the identification of social workers with an increased level of risk.

F. Alleged relationship between the identification of Professional Witnesses in the media and the risk of the negative consequences to the child welfare system relied upon by the Applicants

58. A number of the affidavits filed by the Applicants address the wisdom of holding public inquiries following the death of children involved in the child welfare system and describe potential negative outcomes.

59. The criticisms focus on many aspects of the process from the death of the child to the conduct of the Inquiry to the content and implementation of inquiry recommendations. This evidence simply does not demonstrate a causal connection between the publication of identities of Professional Witnesses and the risks the Applicants rely upon as the justification for the publication bans.

60. The Affidavits of Cheryl Regehr and Bruce Rivers in particular are directed to the issue of negative outcomes from holding public inquiries into the death of children. The evidence of Cheryl Regehr is discussed in further detail in Appendix “B” and the evidence of Bruce Rivers is further discussed in Appendix “A”.

61. Ms. Kehler and Ms. Cochrane provided evidence that many of the negative consequences that they suggest will be caused if they are unsuccessful on this motion have in fact already occurred, even though there has not been any media publication of the identity of Professional Witnesses. This evidence demonstrates the weakness of

the connection between the risks identified by the Applicants and the publication of the identity of Professional Witnesses.

- ***Affidavit of Janet Kehler, 2011 para 23***
- ***Cross Examination of Janet Kehler, page 56, line 3***
- ***Affidavit of Shirley Cochrane, paras 17, 19, 20***
- ***Cross Examination of Shirley Cochrane*, *page 12, line 1-9***

VI. Have the Applicants met the First Branch of the *Dagenais/Mentuck* test?

A. Standard required by Dagenais/Mentuck

62. The burden of displacing the general rule of openness lies on the party making the application.

- ***R. v. Mentuck, supra, para 38 - Tab 5, Media Group Authorities***

63. There must be a “serious, or a real and substantial risk” to the administration of justice.

- ***R. v. Mentuck, supra, para 34 - Tab 5, Media Group Authorities***

64. An applicant must demonstrate that disclosure of the information sought to be suppressed would “subvert the ends of justice or unduly impair its proper administration.”

- ***Toronto Star Newspapers Ltd. v. Ontario, 2005 SCC 41, para 4 - Tab 16, Media Group Authorities***

65. Judges should be cautious in deciding what can be regarded as part of the administration of justice.

- ***R. v. Mentuck, supra, para 35 - Tab 5, Media Group Authorities***

66. 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.

- ***R. v. Mentuck, supra, para 34 - Tab 5, Media Group Authorities Mentuck***

67. The reality of the risk must be well-grounded in the evidence. There must be a sufficient evidentiary basis from which the trial judge may assess the application and upon which he or she may exercise his or her discretion judicially. The absence of evidence opposed to the granting of a ban should not be taken as mitigating the importance of the right to free expression in applying the test.

- ***R. v. Mentuck, supra, para 34 - Tab 5, Media Group Authorities***

> It is precisely because the presumption that courts should be open and reporting of their proceedings should be uncensored is so strong and so highly valued in our society that the judge must have a convincing evidentiary basis for issuing a ban.

- ***R. v. Mentuck, supra, para 39 - Tab 5, Media Group Authorities***

68. The evidentiary basis upon which an applicant for restricted publication relies, must go beyond a “general assertion” and must establish a very serious risk.

- ***Toronto Star Newspapers Ltd. v. Ontario, supra, para 10 - Tab 16***

B. The Risks upon which the Applicants Rely

Introduction – Risk Categories

69. The Applicants allege that publication of the identities of Professional Witnesses will endanger the physical safety of Professional Witnesses, infringe their privacy and cause them stress (the "**Personal Risk Allegation**").

70. The Applicants further allege that publication of identities would endanger the efficacy of the child welfare system and thus children (the "**Systemic Risk Allegation**"). The Applicants principal argument on this point is that the Systemic Risk derives from the Personal Risk because if physical danger is increased, privacy is infringed or staff stress is increased job performance will suffer and staff will be less likely to take and remain in child welfare job positions.

71. The Applicants also argue that, if identities are published, social workers will be less inclined to come forward and cooperate with the Inquiry ("**Inquiry Risk Allegation**").

72. Finally the Applicants suggest that identification of Professional Witnesses could compromise client confidentiality (the "**Client Confidentiality Allegation**")

- ***MGEU Motion Brief, para 10***

C. Personal Risk Allegation

73. It is common ground that social workers providing front line child and family services do find themselves dealing with clients who are in emotionally charged

circumstances and there can be a risk of violence that must be managed. The evidence is also clear that there are effective systems to manage this risk that do not involve the infringement of *Charter* rights. There is simply no evidence to support the speculation that publication of the identities would increase any risk to physical safety.

- ***See paragraphs 53 to 56 above***

74. There is evidence suggesting that an infant death followed by a post mortem inquiry can cause stress to the professionals involved in the inquiry and even professional colleagues that are not involved. However, the evidence indicates that the stress is caused by a multitude of interrelated factors. There is no evidence that the publication of the names of the professionals testifying has any material impact on the stress.

- ***Appendix "B" - Discussion of Evidence of Cheryl Regehr, paras 3, 4, 8***
- ***Appendix "B" - Discussion of Evidence of Cheryl Regehr, para 5***

75. In any event, witness stress or privacy concerns are not sufficient to justify a restriction on the publication of the identity of a witness. In *R v. McIntyre* Dickson J., writing for the majority of Supreme Court, said as follows:

> Many times it has been urged that the `privacy' of litigants requires that the public be excluded from court proceedings. It is now well established, however, that covertness is the exception and openness the rule. Public confidence in the integrity of the court system and understanding of the administration of justice are thereby fostered. As a general rule the sensibilities of the individuals involved are no basis for exclusion of the public from judicial proceedings. The following comments of Laurence J. in R. v. Wright, 8 T.R. 293, are apposite and were cited with approval by Duff J. in *Gazette Printing Co. v. Shallow* (1909), 41 S.C.R. 339 at p. 359:

> Though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of courts of justice should be universally known. The general advantage to the country in having these proceedings made public more than counterbalances the inconveniences to the private persons whose conduct may be the subject of such proceedings.

- ***Attorney General of Nova Scotia v. MacIntyre, [1982] 1 S.C.R. 175, at p. 185 - Tab 17, Media Group Authorities***

76. These same principles apply to public inquiries. In *Episcopal Corporation of the Diocese of Alexandria - Cornwall v. Cornwall Public Inquiry* the Ontario Court of Appeal dismissed an application for a ban on the publication of a witness. The Court held that the name of the witness seeking anonymity was relevant to the mandate of the Commission. Sharpe, J.A. stated at paragraph 47 as follows:

> Even if it were possible for the Commission to conduct certain fact-finding investigations by using a moniker to identify the employee, one must have regard to the fact that this is a public inquiry called to clear the air in a community long troubled by rumors, innuendoes, and allegations of secrecy and cover-up…his identity cannot be viewed as a mere detail that is not germane to the Inquiry. A central purpose of this Commission is to facilitate the public's understanding of the institutional response to the allegations made against well known individuals, including the employee, prominent in this community and whose names have already been in the public eye in relation to this very controversy. (emphasis added)

- ***Episcopal Corporation of the Diocese of Alexandria - Cornwall v. Cornwall Public Inquiry, 2007 ONCA 20, para 15 - Tab 18, Media Group Authorities***

D. Systemic Risk Allegation

77. The Systemic Risk Allegation is mostly a derivative from the Personal Risk Allegation. The Applicants speculate that, if witnesses are identified it might increase

the stress upon them and that stress might in turn decrease their job performance or cause them to leave the profession.

78. The articles cited by the experts make it clear that social worker stress and job performance depend on a multitude of variables. There is no evidence connecting the risks identified by the Applicants with the publication of the identities of Professional Witnesses or that the publication of that information has ever had significant systemic consequences, let alone that a child or family has ever been harmed.

79. The Affidavits of Mr. Rivers and Ms. Regehr address in considerable detail the Systemic Risk Allegation based on experience in Ontario in the 1990's. They do not address the connection between the publication of identities of Professional Witnesses and the Systemic Risk Allegation. Attached as Appendices "A" and "B" is a discussion of their evidence and some of the authorities to which they refer.

80. In fact, the evidence suggests that the feared potential negative outcomes arising out of the death of Phoenix Sinclair and the Inquiry have more to do with the publication of insufficient information than the publication of too much information. The evidence of Shirley Cochrane on cross examination indicates that the concerns of her agency are mainly due to a lack of accurate information about the Phoenix Sinclair case.

81. In fact, Ms. Cochrane testified that her workers felt frustrated that they were not permitted to release more information at the time the incidents occurred and felt

betrayed by the Southern Authority because it failed to reach out to the public through the media earlier.

- ***Cross Examination of Shirley Cochrane, pages 29 to 30***

82. Ms. Cochrane is confident that her community is capable of understanding the accurate facts if it is allowed to have them. She testified that her agency does not object to the community knowing the truth about the circumstances surrounding Phoenix Sinclair's death and that she is confident that the community will come to a fair and rational conclusion if it has the truth.

- ***Cross Examination of Shirley Cochrane, pages 12 to 14***

83. If the Applicants' argument were accepted, it would justify publication bans in judicial proceedings for all sorts of professions including firefighters, police officers, physicians, nurses, emergency room staff and other helping professions.

E. Inquiry Risk Allegation

84. The affidavit material speculates that publication of the names of Professional Witnesses could deter Professional Witnesses from coming forward, but that is unsupported conjecture. It could equally be argued that the publication of names of Professional Witnesses will encourage other professionals to come forward. There is no evidence either way. The Commission has the power to subpoena witnesses with required evidence who are not prepared to come forward.

F. Client Confidentiality Allegation

85. The Applicants suggest that if Professional Witnesses are identified in the media, and if a member of the public sees and remembers the occupation of the Professional Witness from the media, then if that member of the public later sees the Professional Witness in contact with a client, the member of the public may deduce that the client is accessing Child Welfare Services

- ***MGEU Motion Brief, para 10***
- ***Affidavit of Elizabeth McLeod, para 16***

86. It is respectfully submitted that to state the argument is to demonstrate how far it is from meeting the *Dagenais/Mentuck* threshold for the justification of an interference with freedom of expression about important public policy issues. The same argument would preclude identification of a wide range of Professional Witnesses in all sorts of judicial proceedings. It is speculative and remote.

G. Existence of alternate means to address the Applicants' concerns

87. To meet the first branch of the *Dagenais/Mentuck* test it is not enough to prove a serious risk of harm to the administration of justice. The Applicant must also satisfy the tribunal that there are no reasonable alternative measures available to prevent the risk.

- ***R. v. Mentuck, supra, para 35 - Tab 5, Media Group Authorities***

88. The evidence filed by the Applicants includes articles containing many recommendations for addressing the negative consequences they speculate will be caused by the public inquiry process. It is significant that these authorities upon which

the Applicants rely do not suggest restrictions on publication are an appropriate remedy for the feared negative outcomes.

- ***Cross Examination of Gwendolyn Gosek, pages 63 and 64***

89. The Commissioner has the authority to control the proceedings before him. He has the authority to issue interim reports if required and he will write the report and recommendations.

90. To the extent that the Applicants concerns about negative outcomes constitute real risks to the administration of justice, the Commissioner has the tools to address the risks. He can ensure that the hearings are fair and that the witnesses have the opportunity to provide full and accurate information. He can ensure that the Inquiry is conducted with decorum and respect. His report will be the authoritative commentary on what has occurred and how the province should move forward. That report will be public. If the Applicants fear that the true facts of the case are not available to the public, the Commissioner has the means to ensure they are fairly presented. If there has been unfair or inaccurate criticism, the Commissioner has the means to set the record straight.

H. Conclusion - The First Branch of the Dagenais/Mentuck Test

91. To succeed on the motion, the Applicants need to demonstrate a “convincing evidentiary basis” of a real and substantial risk that the publication of the identities of Professional Witnesses testifying at the Inquiry would cause. The material before the

Commissioner consists of general and speculative assertions of possible negative outcomes, some of which the Applicants say have already occurred. At best the Applicants have proved that media coverage of the death of a child and a subsequent inquiry, inquest or investigation is one of many factors that has been connected with some negative outcomes in the past. This is not the sort of very serious risk that must be established to justify interfering with *Charter* rights.

- ***R. v. Mentuck, supra, para 39 - Tab 5, Media Group Authorities***
- ***Toronto Star Newspapers Ltd. v. Ontario, supra, para 10 - Tab 16, Media Group Authorities***

92. The evidence before the Commissioner further indicates many alternative ways to address the concerns identified by the Applicants that do not require without the interference with *Charter* rights of the public. The existence of these alternatives precludes a publication ban under the *Dagenais/Mentuck* test.

VII. Have the Applicants met the Second Branch of the *Dagenais/Mentuck* test - Proportionality?

A. Introduction

93. To justify a publication ban, the Applicant must demonstrate that the benefit of the reduction in risk outweighs the negative effects the ban will have on the rights and interests of the public, including the effects on the right to free expression and the efficacy of the administration of justice.

- ***R. v. Mentuck, supra, para 32 - Tab 5, Media Group Authorities***

B. Proportionality - the Negative Impact of the Ban Requested

94. The Applicants have submitted that it is not necessary for the public to know the identity of or identifying information about Professional Witnesses and that an order prohibiting publication of the identities of Professional Witnesses and any identifying information amounts to a “minimal restriction.”

- ***ICFS Motion Brief, para 34***
- ***MGEU Motion Brief, para 13***

95. The Applicants submission is contrary to the law and the evidence that has been tendered in this motion.

96. In *Edmonton Journal* Justice Wilson discusses the reasons underlying the open court principle, explaining:

> The one most frequently advanced, and certainly the one with the deepest roots in the history of our law, stresses the importance of an open trial for the evidentiary process. As Cory J. notes, Blackstone stressed that the open examination of witnesses "in the presence of all mankind" was more conducive to ascertaining the truth than secret examinations: see Blackstone's Commentaries on the Laws of England (1768), vol. III, c. 23, at p. 373. Subsequently, in his Rationale of Judicial Evidence (1827), vol. 1, Jeremy Bentham explained at p. 522 that:
>
> > The advantages of publicity are neither inconsiderable nor unobvious. In the character of a security, it operates in the first place upon the deponent; and, in a way not less important ... upon the judge.
>
> Wigmore wrote extensively on the requirement that judicial proceedings be open to the public (Wigmore, Evidence, vol. 6 (Chadbourn rev. 1976), s. 1834) and noted (at pp. 435-36) that:
>
> > Its operation in tending to improve the quality of testimony is two-fold. Subjectively, it produces in the witness' mind a disinclination to falsify; first, by stimulating the instinctive responsibility to public opinion, symbolized in the audience, and ready to scorn a demonstrated liar; and next, by inducing the fear of exposure of subsequent falsities through disclosure by informed persons who may chance to be present or to hear of the testimony from others present.

- ***Edmonton Journal (The) v. Alberta (Attorney General), supra, para 85 - Tab 2, Media Group Authorities***

97. Courts in Canada have therefore consistently resisted applications that suppress the names or identities of witnesses. *In F. P. Publications (Western) Limited v. Conner Prov.J.* the Manitoba Court of Appeal rejected an attempt to allow witnesses to testify *in camera* to protect their identities. The Court cited the dictum of Lord Atkinson in *Scott v. Scott*, [1913] A.C. 417 at 463 (H.L.):

> The hearing of a case in public may be, and often is, no doubt, painful, humiliating, or deterrent both to parties and witnesses, and in many cases, especially those of a criminal nature, the details may be so indecent as to tend to injure public morals, but all this is tolerated and endured, because it is felt that in public trial is to found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect.

- ***F. P. Publications (Western) Limited v. Conner Prov.J. 1979 MBCA, para 15 - Tab 19, Media Group Authorities***

98. In the *F.P. Publications (Western) Ltd*. case, Huband, J. for the Manitoba Court of Appeal stated:

> There is nothing unusual about reluctant witnesses. There are enormous numbers of witnesses in both civil and criminal disputes who find it embarrassing, inconvenient, damaging, even dangerous, to testify. Yet there are few known cases where the court has protected a witness from such hazards by clothing the witness with the anonymity of a closed courtroom.

- ***F. P. Publications (Western) Limited v. Conner Prov.J., supra, para 38 - Tab 19, Media Group Authorities***

99. Gwendolyn Gosek is a social work professor and academic at the University of Manitoba whose affidavit was filed in support of the Applicants' motion. Ms. Gosek's

testimony in cross examination demonstrates the relevance of the identity and background of the Professional Witnesses seeking the publication ban.

100. Ms. Gosek testified that, when choosing whether to rely on sources of information relating to social work and in life, it is important to know the source of the information, their experience and their education. Ms. Gosek testified commencing at page 13, line 15 as follows.

> 51 Q Yes. And is it also important to know if people have a particular axe to grind, if, for example, there is evidence of conflict of interest, that would be something you would want to know in evaluating on whether or not to rely on some information; is that right?
>
> A Absolutely. That is why I stated up front where my personal biases come from. Because I believe that we all bring biases to the table.
>
> 52 Q So that is sort of a, I guess a universal statement about everybody, one way or another?
>
> A I would say so. We bring our personal experiences.
>
> 53 Q And the way we have to deal with that in our search for the truth, is to just make sure we understand that, and understand the biases; is that right?
>
> *A To the best of our ability.*

- ***Cross Examination of Gwendolyn Gosek, page 10, line 32 to page 12, line 46***

101. Ms. Gosek pointed out that certain identifying information can be relevant to the assessment of information provided by social workers. She points out that even the faculty from which a social worker graduates can have an influence on their approach and behavior.

- ***Cross Examination of Gwendolyn Gosek, page 21, line 4 to page 22, line 5***

102. Mr. Rosner, Managing Editor for the Canadian Broadcasting Corporation ("**CBC**") Manitoba, disagreed with counsel's suggestion on cross examination that a restriction on publication of identity was a "minimal restriction." His evidence was that whether the restriction was minimal or major would depend upon the facts of the particular circumstance. He testified that "there could be all kinds of circumstances in which the public would not be well-served by not knowing the identity of particular individuals and he provided a number of examples..

- ***Cross Examination of Cecil Rosner, page 82 - 85, page 85, lines 5 and 6***

C. Proportionality - The Alleged Benefit of the Ban Proposed

103. In weighing the benefit of a proposed publication ban the court must not only consider the objective of the ban but also its likely actual effects.

- ***Dagenais v. Canadian Broadcasting Corporation, [1994] 3 S.C.R. 835 , para 95 – Tab 20, Media Group Authorities***

104. If the proposed ban will result in only partial achievement of its object the test requires the court to consider the effects that will actually result from the ban in weighing it against the infringement of freedom of expression.

- ***Dagenais, supra, paras 92 and 93 - Tab 20, Media Group Authorities***

The consequences sought to be prevented have already occurred

105. The evidence of Janet Kehler and Shirley Cochrane shows that many of the risks identified by the Applicants have already occurred. Even if there were real risks, the ban would be only partially effective.

- ***Affidavit of Janet Kehler, June 27, 2011, para 23***
- ***Cross Examination of Janet Kehler, page 56, line 3***
- ***Affidavit of Shirley Cochrane, paras 17, 19, 20***
- ***Cross Examination of Shirley Cochrane, page 12, lines 1 to 9***

The proposed publication ban will not likely prevent the identities of Professional Witnesses from being known in the relevant communities

106. Shirley Cochrane, the Executive Director of ICFS did not know one way or the other if members of her community were already aware of the identities of the Applicants associated with ICFS. However, she acknowledges that the members of her community have a particular interest in the Inquiry and assumes that a number of community members will attend the proceedings. She is not seeking to prevent them from communicating with their friends and neighbors and acknowledges that they will be free to talk about all the things that go on in the hearing room.

- ***Cross Examination of Shirley Cochrane, page 19, line 16***

107. Ms. Cochrane's evidence demonstrates the reality that the order sought by the Applicants will not result in the suppression of the identities of the Professional Witnesses. Unless the ban were to apply to prevent conversations, emailing, blogging, face book communication and tweets by interested parties and community activists, the likely effect of the proposed ban will be to prohibit professional journalists from

incorporating the information into their coverage while allowing the information to filter out piecemeal through the blogosphere and the rumor mill.

D. The ban may have negative consequences to Professional Witnesses

108. The Applicants appear to anticipate that the Commissioner may be critical of some of them. If it were the case that a small number of Professional Witnesses are criticized, and if the identities of those few are not disclosed, the criticism might leave a cloud over all of the Professional Witnesses and other agency staff.

E.

E. The Relevance of section 75(2) of the Child and Family Services Act

109. It is common ground that section 75(2) of the *Child and Family Services Act* has no direct application to the Inquiry proceedings. However the affidavits and briefs filed by the Applicants argue that the policy behind section 75(2) supports a publication ban.

- ***Affidavit of Janet Kehler, 2011 para 26***
- ***MGEU Motion Brief, paras 51 and 52***

110. The Media Group submits that:

(a) Section 75(2) of the *Child and Family Services Act,* properly interpreted, cannot and does not apply to prevent the publication of the identities of Professional Witnesses, such as social workers, in proceedings under the *Child and Family Services Act*; and

(b) Even if section 75(2) of the *Child ad Family Services Act* did prevent publication of the identities of Professional Witnesses testifying in proceedings under that Act, it does not evidence any general policy

imperative that Professional Witnesses are not subject to testifying as all other professionals in other proceedings.

111. The Media Group agrees that the words of section 75(2) of the *Child and Family Services Act* could be interpreted to preclude publication of the names of the staff employed by the state to enforce and administer the *Child and Family Services Act*, the staff who wield the state's power to apprehend children from their parents. However, that interpretation would render the provision unconstitutional.

112. A statutory publication ban is an interference with the freedom of expression guaranteed by section 2(b) of the *Charter* and can only be justified under section 1 of the *Charter* if it meets the requirement of the *Oakes* test.

- ***Dagenais, supra, 875 to 879 - Tab 20, Media Group Authorities***

113. The identities of Professional Witnesses are published in Manitoba and throughout Canada in a variety of proceedings. While other provinces have provisions restraining publication of the identities of children and clients involved with the child welfare system, these restrictions do not apply to professional staff.

- ***Child, Youth and Family Enhancement Act, RSA 2000, c C-12, s. 126.2(1) - Tab 21, Media Group Authorities***
- ***Child and Family Services Act R.S.O. 1990, c C -11., s. 45(8) - Tab 22, Media Group Authorities***

114. It is respectfully submitted that the permitted publication of the identities of Professional Witnesses in Canada indicates that a restriction on the publication of the

names of Professional Witnesses is not required and would therefore not meet the *Oakes* test.

115. Where a broad interpretation of a statute would render a statutory provision unconstitutional, the Courts will interpret the statute in a manner that is consistent with the constitutional principles. For example, courts have interpreted the publication ban in section 648(1) of the *Criminal Code of Canada* (matters occurring outside the presence of the jury) to only apply to certain types of information, thus preserving the constitutional validity of the section.

- ***R. v. Stobbe 2011 MBQB 293 - Tab 23 - Media Group Authorities***

116. Regardless of the interpretation of the section 75(2) of the *Child and Family Services Act*, the names of Professional Witnesses are routinely named in inquests in Manitoba and available for publication. Section 75(2) cannot therefore be interpreted as an expression of general policy in respect of proceedings beyond those to which section 75(2) applies.

- ***Affidavit of Cecil Rosner, paras 6 to 14***
- ***Affidavit of Michael Bear, paras 12 to 13***
- ***Cross Examination of Michael Bear, page 40, line 7***
- ***Cross Examination of Shirley Cochrane, pages 25 and 26***
- ***Cross Examination of Janet Kehler, page 47, line 3***
- ***Cross Examination of Evelyn Wotherspoon, pages 17, 18 and 24***

117. It is critical to recall that the present motion does not raise the issue of the publication of the names of children or clients. This motion deals with the publication of

the identities of employees of the state authorized to use the powers and resources of the state to intervene in the lives of citizens, even on a non-consensual basis.

118. The Media Group respectfully submits that discussions in cases addressing confidential information about children and clients is not applicable to the issue of identification of Professional Witnesses. Indeed, in *Canadian Broadcasting Corp. v. Manitoba* 2008 MBCA, a case upon which the Applicants rely, the identities of social workers, doctors, nurses, support workers and mental health professionals were published in the inquest report and there was no restriction on publication of the information.

- ***Canadian Broadcasting Corp. v. Manitoba, 2008 MBCA 94 - Tab 21, Media Group Authorities***

F. The Applicants have not met the second branch of the Dagenais/Mentuck Test

119. In declining to order a publication ban on the operational methods of undercover police officers, Mr. Justice Iacobucci speaking for the Supreme Court commented as follows.

> In my view, a publication ban that restricts the public's access to information about the one government body that publicly wields instruments of force and gathers evidence for the purpose of imprisoning suspected offenders would have a serious deleterious effect. There is no doubt as to how crucial the role of the police is to the maintenance of law and order and the security of Canadian society. But there has always been and will continue to be a concern about the limits of acceptable police action. The improper use of bans regarding police conduct, so as to insulate that conduct from public scrutiny, seriously deprives the Canadian public of its ability to know of and be able to respond to police practices that, left unchecked, could erode the fabric of Canadian society and democracy.

- ***R. v. Mentuck, supra, para 51 - Tab 5, Media Group Authorities***

120. The Professional Witnesses in this case are the government employees who have the authority to apprehend children and make other decisions that can seriously impact upon the lives of individual Canadians. It is respectfully submitted that the concerns expressed by Mr. Justice Iacobucci are applicable in the present case.

121. One of the issues in *R. v. Mentuck* was whether there should be a publication ban on the identities of undercover police officers. In that case there was a general objection to the publication of identities of undercover officers and a specific concern about officers who were currently in the field and who might be in danger if they were identified before they concluded the current cases.

- ***R. v. Mentuck, supra, para 56 - Tab 5, Media Group Authorities***

122. The Supreme Court upheld a one year publication ban on the identities, but refused to permit a permanent ban or any ban on publication of the identities of undercover police officers generally.

> *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.*

- ***R. v. Mentuck, supra, para 58 - Tab 5, Media Group Authorities***

123. It is respectfully submitted that these comments also apply to the present motion.

124. It is therefore respectfully submitted that, even if the Applicants had satisfied the first branch of the *Dagenais/Mentuck* test, the publication ban they seek is unlikely to have any material practical effect on the speculated risks and does not meet the proportionality requirement.

VIII. The Requested Order is too Broad

125. If the *Dagenais/Mentuck* test is met in a particular case, the judge is required to restrict the order as far as possible without sacrificing the prevention of the risk.

- ***R. v. Mentuck, supra, para 35 - Tab 5, Media Group Authorities***

126. The publication ban requested would apply to Professional Witnesses regardless of the frequency of their current interaction with children and families. In fact the order sought would even apply to Professional Witnesses who have retired from the child welfare system. It would apply not only to Professional Witnesses who testify about their personal involvement in the Sinclair case, but also to those who are testifying purely on issues of general public administration and policy in connection with potential recommendation. The publication ban would be indefinite.

127. The Applicants have elected not to provide the Commissioner with sufficient personal information to allow him to tailor any order to meet the *Mentuck* requirement.

128. It is therefore respectfully submitted that the Applicants have failed in their onus to establish an evidentiary base for an order that constitutes the least restrictive means to prevent the risks anticipated from publication.

IX. Recording and Broadcasting Testimony given by Professional Witnesses Workers

129. The Media protocol that has been established for the Inquiry (subject to the result of this motion) contemplates a fixed pool video camera with an audio feed with protocols to ensure that the proceedings of the Commission are not disrupted.

A. Media Arrangements for Publication Ban and Redaction Hearings to be held on June 12th - 14th and June 19th, 2012

130. This protocol is consistent with the practice in Manitoba and throughout Canada for the conduct of public inquiries.

- ***Affidavit of Cecil Rosner, paras 24 and 25***

131. While there is a long and established history of video recording of the proceedings of public inquiries, the law and procedures for filming courtroom proceedings are still developing in Canada. There is television coverage of the Supreme Court of Canada. There have been instances where cameras were permitted in courts such as in *HMTQ v. Cho et al.* and *R. v. Squires*, but there have also been instances where applications to have cameras present in court proceedings have been denied such as in *R. v. Pilarinos, Re Brian Lloyd Sinclair and R . James.* The law respecting cameras in the courts is not settled.

- ***HMTQ v. Cho et al. [2000] B.C.K. No 1561 (B.C. S.C.) - Tab 22, Media Group Authorities***
- ***R. v. Squires [1992] CarswellOnt 121 - Tab 23, Media Group Authorities***
- ***R. v. Pilarnios [2001] B.C.J. No 1936 (B.C. S.C.) - Tab 24, Media Group Authorities***
- ***Re Brian Lloyd Sinclair Inquest, 2010 MBPC 18 - Tab 25, Media Group Authorities***
- ***Graham James (Oral decision, March 19, 2012, Carlson, J.) - Tab 26, Media Group Authorities***

132. This difference between the Canadian practice in public inquiries as opposed to courts was noted by Preston J in his decision not to permit the filming of an inquest when he distinguished between inquests and inquiries saying: “I have no intention of turning this inquest into a *de facto* inquiry.”

- ***Re Brian Lloyd Sinclair Inquest*, *supra, para 56 - Tab 25***

133. The Applicants are seeking an order that this Public Inquiry deviate from the usual practice in public inquiries. It is submitted that this attempt to restrict the normal reporting practices typically available in public inquiries amounts to an interference with freedom of expression and should be determined using the framework established in *Dagenais* and *Mentuck.*

134. Although there is an established history in Canada of videotaping Public Inquiries, the Applicants have provided no evidence that there have been serious adverse effects to the administration of justice.

135. There is, however, evidence demonstrating the positive effects of allowing the public to view and hear testimony, not just read about it. As stated by Gwendolyn Gosek, faculty member at the University of Manitoba, Faculty of Social Work, the ability to observe body language, tone of voice and non-verbal cues is important to evaluating information that is being given. In fact, the Faculty of Social Work teaches its students the importance of observing the non-verbal cues as part of its communications courses. If audio and video coverage is cut off, this important information will not be available to those who cannot attend the Inquiry personally.

- ***Cross Examination of Gwendolyn Gosek, pages 15 to 17***

136. According to Janet Kehler, the majority of families that come into contact with the Child Welfare System are First Nations families. A great number of First Nations families live in remote communities in the province of Manitoba. The statistics published in the Manitoba, Family Services and Consumer Affairs, *Annual Report 2010 - 2011* illustrate Ms. Kehler's point in numeric form.

- ***Cross Examination of Janet Kehler, page 25, line 19 and page 27, line 20***
- ***Affidavit of Allison Lamontagne, Exhibit "A"***

137. Because many of the people most affected by the matters before the Inquiry live in remote communities, transparency and access will be negatively impacted if there is an order restricting the usual practice of making video and audio evidence available to the community.

138. In light of the absence of evidence that the practice of providing video and audio access in public inquiries has caused harm, and taking into account the evidence that such coverage will convey important information to people who are practically precluded from attending the hearings, it is respectfully submitted that the request to impose special restrictions for the testimony of Professional Witnesses be denied.

X. Conclusion

139. The Applicants argue that the publication ban is required in order to prevent the media from publishing sensational stories and criticizing agencies. They support their argument by impugning the motives of the media.

- ***ANCR Motion Brief, paras 9, 10, 11 and 25***
- ***MGEU Motion Brief, para 31***

140. The Applicants also argue that the Commission should censor coverage of the Inquiry in order to control the content and tone of public discussion

- ***Supplementary Affidavit of Janet Kehler, paras 31 to 36***

141. In essence, the Applicants are asking the Commission, a branch of government, to censor media reports about the testimony of government employees with the objective of controlling the content and tone of reports and public discussion on issues that all parties agree are of vital public interest. In making this argument, the Applicants are, in essence, suggesting that the Commissioner manage public debate and public perception in relation to the Inquiry by using the power of the state to restrict the flow of information to the public.

142. This is not an approach that is consistent with the fundamental values enshrined in section 2(b) of the *Charter*. The approach consistent with democratic values was articulated by Mr. Justice Brandeis of the United States Supreme Court in 1927 in Whitney v. California:

> *"If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence."*

ALL OF WHICH IS RESPECTFULLY SUBMITTED this ____ day of June, 2012.

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PART III – LIST OF AUTHORITIES TO BE RELIED UPON

1. *Vancouver Sun (Re)*, 2004 SCC 43, [2004] 2 SCR 332

2. *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326

3. British Columbia (Gove Inquiry into Child Protection in British Columbia) – Applications for Access to and Copies of Police Interviews of V. Vaudreuil

4. *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97

5. *R. v. Mentuck*, [2001] 3 S.C.R. 442, 2001 SCC 76

6. *R. v. Collins* (2001), 160 C.C.C. (3d) 85 (Ont. C.A.)

7. *R. v. Mohan*, [1994] 2 S.C.R. 9

8. *R. v. Terceira (1998), 107 O.A.C. 15, 123 C.C.C. (3d) 1, [1998] O.J. No. 428 (Ont. C.A.) aff'd [1999] 3 S.C.R. 866 R. v. Terceira*, [1999] 3 S.C.R. 866

9. *Smith v. Alwarid* (1996), 1996 CarswellYukon 16 (Y.T.S.C.), [1996] B.C.W.L.D. 2181

10. *B. v. Plint* (1998), 56 B.C.L.R. (3d) 214, 23 C.P.C. (4th) 389)

11. *Vigoren v. Nystuen* (2006), 2006 SKCA 47, 266 D.L.R. (4th) 634, 34 M.V.R. (5th) 160, [2006] 10 W.W.R. 223

12. *Fellowes, McNeil v. Kansa General International Insurance Co.* [1998]; 37 C.P.C. (4th) 20, 40 O.R. (3d) 456 (On. Gen)

13. *R. v. Khelawon*, [2006] 2 S.C.F. 787, 215 C.C.C. (3d) 161, 2006 SCC 57

14. *R. v. Starr*, [2000] 2 S.C.F. 144, 147 C.C.C. (3d) 449, 2000 SCC 40

15. Reasons in Respect of an Application for Confidentiality Relating to the Identity of the Moving Party (28 November 2006), Decision of the Cornwall Public Inquiry (G. Normand Glaude, Commissioner), online: The Cornwall Public Inquiry <http://www.attorneygeneral.jus.gov.on.ca/inquiries/cornwall/en/hearings/rulings/pdf/Reasons_re_Identity_of_the_Moving_Party_en.pdf>

16. *Toronto Star Newspapers Ltd. v. Ontario*, [2005] 2 S.C.R. 188, 2005 SCC 41

17. *Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175, at p. 185

18. *Episcopal Corporation of the Diocese of Alexandria-Cornwall v. Cornwall Public Inquiry*, 2007 ONCA 20

19. *F. P. Publications (Western) Limited v. Conner Prov.J.* 1979 MBCA

20. *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835

21. *Child, Youth and Family Enhancement Act*, RSA 2000, c C-12, s. 76(9)

22. *Child and Family Services Act* R.S.O. 1990, c C -11., s.16.2(1)

23. *R. v. Stobbe* 2011 MBQB 293

24. R. v. Pilarnios [2001] B.C.J. No 1936 (B.C. S.C.)

25. *Re Brian Lloyd Sinclair Inquest, 2010 MBPC 18*

26. Graham James (Oral decision, March 19, 2012, Carlson, J.)

APPENDIX "A"

Discussion of Evidence of Bruce Rivers

1. Mr. Rivers argues that, in the Ontario cases upon which he comments, the death of children in care followed by inquests put the child welfare system "out of balance", resulting in the apprehension of more children and a greater load on the system.

2. Bruce Rivers describes his observations in Ontario following 6 to 8 coroners inquests into child deaths in Ontario which took place in the late 1990's and proceedings of a Child Mortality task force during the same period.

- ***Affidavit of Bruce Rivers, paras 3 and 9***

3. In paragraphs 14 to 16 of his affidavit Mr. Rivers testified that the public attention flowing from the inquests and the task force, together with changes in the law flowing from the inquests and task force resulted in a greater number of reports of children in need of protection, more children taken into care. In paragraphs 17 through 25 he suggests that the increased pressure and public scrutiny on the system led to more difficulty recruiting social workers, foster parents and volunteers and made it more difficult to raise funds.

4. Mr. Rivers connects negative outcomes to the entire process of surrounding the deaths, inquests, task force, recommendations and resulting legal changes. His

evidence does not connect the identification of Professional Witnesses to the negative outcomes.

5. In his affidavit Mr. Rivers does suggest a connection between the "public scrutiny" of the child welfare system associated with the inquest and task force processes and the increased work load and pressure on the system.. However, an article he wrote in 2002 provides a different perspective on the strength of the link between public scrutiny and increased pressure on the Ontario system he describes. Mr. Rivers' article "Reporting and beyond: current trends in child abuse and neglect call for broader reforms" is attached as Exhibit "A" to the affidavit of Allison Lamontagne sworn May 11, 2012.

6. In his article Mr. Rivers analyzes why there was a greater demand on the child welfare system in the period following the inquests and task force. Mr. Rivers reports in his article that there was, in fact, a "dramatic increase" in substantiated child abuse and neglect cases in Ontario during the relevant period of time and that there was also a rise in the complexity and severity of problems being experienced by children. He concludes that the increase in child maltreatment investigations in Ontario was "primarily driven by neglect and exposure to domestic violence." While he mentions greater awareness and public scrutiny in his article, he identifies other factors as the more important cause of the increased workload.

7. Mr. Rivers' affidavit does not support the Applicants' argument that the only reasonable means to avoid harm to children and families in the Inquiry is to issue a publication ban on the identities of Professional Witnesses.

APPENDIX "B"

Discussion of Evidence of Cheryl Regehr

1. Cheryl Regehr is a Toronto social worker and professor who conducted research into the effect of two public inquiries relating to deaths of children in the care of child welfare which took place in the late 1990's, the Child Mortality Task Force and a coroner's inquest into the 1997 death of five week old Jordan Heikamp. In the latter case, a child welfare social worker was charged with criminal negligence causing death, but was ultimately acquitted. Ms. Regehr published her results in an article which she attaches as Exhibit "B" to her affidavit.

- ***Affidavit of Cheryl Regehr, sworn/affirmed March 30, 2012, paras 5, 6 and 7***

2. In her article, Ms. Regehr's expresses the following general opinion of inquiries as follows.

> *"Inquiries are a means for government to demonstrate concern for an issue and to appease the public (Hill, 1990). Inquiries themselves have taken on a tone of moral righteousness. The motto of the Chief Coroner's Office for Ontario for instance reads "We speak for the dead." Broad statements recommending sweeping changes on the basis of dramatic cases can therefore not be questioned in this climate of might and right. research was directed at the impacts of the public inquiries she studied on the child welfare workers."*

3. Ms. Regehr points out in her article that her study was to investigate the impact of the death <u>of a child in the care of the CAS and the impact of subsequent inquests, internal investigations and public inquiries</u> on workers in a child welfare agency. The study involved a questionnaire to the staff of the Children's Aid Society of Toronto and

interviews of a smaller group of individuals selected from the 33% of staff who responded to the survey and agreed to be interviewed.

4. Ms. Regehr found that the most emotionally distressing aspect was the death of a child.

- ***Affidavit of Cheryl Regehr, sworn/affirmed March 30, 2012, para 10***

5. Ms. Regehr's work shows that there are many other stressors in connection with the death of a child in care and a subsequent inquest, which she lists in the following table.

Table 2
Factors Contributing to Distress

Personal Distress
The trauma of a child death *Re-exposure to traumatic stimuli* *All-consuming nature of inquiries (emotional and work related)* *Criticism of personal and professional integrity* *Isolation*
Radiated Distress
Empathy for colleagues undergoing review *Scrutiny of agency* *Guilt by association* *Restrictive guidelines for practice*
Weakened Public Support
Negative and extensive press coverage *Hostile public reactions* *Tainting of the agency and its workers*

6. Although not dealt with in her original article, Ms. Regehr reports in paragraph 14 of her affidavit that she re-analyzed her data from her earlier study and found that the amount of media coverage of an event was associated with higher levels of stress. However, she reports in paragraph 15 of her affidavit that a similar analysis of data from a different study showed no correlation between media coverage and stress.

7. Ms. Regehr provides no information at all about whether there are incremental effects of publishing the identities of Professional Witnesses or as to whether those affects are negative or positive.

8. However Ms. Regehr does report that stress and distress was suffered by workers who did not testify and who were not even involved in the case under examination. This suggests that non-publication of identities of Professional Witnesses will not likely avoid the stress and distress she identifies.

9. Ms. Regehr points out in her article that appropriate support from management and colleagues is an important mitigating factor, suggesting that there are management tools for dealing with stress other than seeking to interfere with freedom of expression. There are thus ways to manage stress other than by infringing *Charter* rights.

10. Ms. Regehr reports in paragraph 17 and following of her affidavit that the stressful effects of a death and a post mortem review are similar in for police officers firefighters and paramedics. If the evidence of Ms. Regehr's supported a publication

ban on the identities of Professional Witnesses in this case, it would equally support bans for police officers, firefighters and paramedics and similar public service providers.

APPENDIX "C"

Opinion Evidence of Janet Kehler

1. Ms. Kehler was not put forward as an expert. Nonetheless she expresses a number of opinions and arguments on matters requiring expertise. The Notice of Motion to strike portions of Ms. Kehler's affidavits specifies the portions of the affidavits to which the Media Group objects.

- ***Cross Examination of Janet Kehler, page 2 line 12***

2. Ms. Kehler is an employee of the Manitoba Government Employee Union which is providing counsel to about 28 of the Applicants who are MGEU members. While she is a social worker by training, she has been out of the field for six years and is not a registered social worker.

- ***Affidavit of Janet Kehler, para 1***
- ***Supplementary Affidavit of Janet Kehler, para 2***
- ***Cross Examination of Janet Kehler, page 2 line 16***

3. On cross examination Ms. Kehler was not familiar with the written policies and procedures of the child welfare agencies involved in this matter in respect of many issues dealt with in her affidavit.

- ***Cross Examination Janet Kehler, page 38, line 17 to page 41, line 7***

4. Ms. Kehler, in her capacity as a representative of the MGEU, has publicly advocated against a public inquiry into the circumstances of the death of Phoenix Sinclair.

- ***Cross Examination of Janet Kehler, page 5, line 14; page 7, line 14***

5. Ms. Kehler has committed herself to opposing a public review of the facts of the Phoenix Sinclair case and has taken a public position against increasing accountability measures in respect of the child welfare system.

- ***Cross Examination of Janet Kehler, page 8, line 5; page 5, line 19***

6. It is respectfully submitted that Ms. Kehler's affidavit contains significant amounts of "argument dressed up as opinion" which should not be admitted into evidence or given any weight. Indeed Ms. Kehler admits that her affidavit contains a number of statements based on nothing but her personal opinion or her personal assumptions.

- ***Cross Examination of Janet Kehler, page 45, para 11; page 53, line 1; and page 49, line 17***

APPENDIX "D"

Inadmissible Opinion Evidence of, Shirley Cochrane, Gwendolyn Gosek, Elizabeth McLeod and Scott Clark

Shirley Cochrane

1. Shirley Cochrane has not been qualified as an expert.

- ***Cross Examination of Shirley Cochrane, page 3, line 23***

2. Because Ms. Cochrane has not been qualified as an expert, her opinions expressed in paragraphs 24, 32, 42 and 44 of her affidavit is inadmissible or should be given no weight.

Gwendolyn Gosek

3. Gwendolyn Gosek has been put forwardas an expert with respect to the stresses that are on social workers involved in the provision of services to clients in the child welfare system.

- ***Cross Examination of Gwendolyn Gosek, page 2, lines 8 to 20***

4. Ms. Gosek does not have any experience workingas a front line social worker or supervisor. She did work prior to 1997 as a support worker. Since then she has been an academic

- ***Cross Examination of Gwendolyn Gosek, page 2, lines 21-25, page 3, line 8***

5. Ms. Gosek has never held a position where she had the authority to apprehend children.

- ***Cross Examination of Gwendolyn Gosek, page 6, line 25***

6. Ms. Gosek does not have any experience testifying at an inquest or a public inquiry.

- ***Cross Examination of Gwendolyn Gosek, page 3, lines 11-14***

7. Ms. Gosek does not have any expertise in the field of journalism.

- ***Cross Examination of Gwendolyn Gosek, page 39, line 25***

Elizabeth McLeod

8. Elizabeth McLeod is the president of the Manitoba Institute of Registered Social Workers ("MIRSW").

- ***Affidavit of Elizabeth McLeod, para 1***

9. Ms. McLeod has not been qualified as an expert. As such, the opinion evidence that she gives in paragraphs 4 and 16 of her affidavit are inadmissible or should be given no weight.

Scott Clark

10. Scott Clark is a Staff Representative with the Canadian Union of Public Employees (CUPE).

- ***Affidavit of Scott Clark, para 1***

11. Mr. Clark has not been qualified as an expert. As such his opinion with respect to the relationships between Teaching Support Workers and their clients is inadmissible or should be given no weight.

- ***Affidavit of Scott Clark, paras 5 and 6***

12. Furthermore, Mr. Clark's opinion as to the impact of publication of the identities of Teaching Support Workers is inadmissible or should be given no weight.

- ***Affidavit of Scott Clark, para 7***

APPENDIX "E"

Expertise of Evelyn Wotherspoon in respect to Exhibit "B" to her Affidavit

1. Ms. Wotherspoon provided a report which was attached to her affidavit as Exhibit "B" (the "Wotherspoon Report"). It is the position of the Media Group that she is not qualified to give opinion evidence on the issues she addresses in the Report.

2. Ms. Wotherspoon was put forward as a witness capable of providing expert evidence on the potential hazards and possible benefits of exposing the identities of social workers who have been called to testify.

- ***Affidavit of Evelyn Wotherspoon, Exhibit "B", page 1***

3. The Wotherspoon Report argues that the results of inquiries into child deaths in jurisdictions other than Manitoba have not resulted in "substantial improvements for children." Ms. Wotherspoon presents her opinion that these "disappointing results" are explained by certain lessons learned from psychological research on human error in the fields of aviation, medicine, the military, and in the financial sector.

4. On cross examination Ms. Wotherspoon defined her area of expertise as being in the area of "child maltreatment with a specialization in infant and toddler maltreatment." She admits that she is not an expert in adult psychology and has not done any experimentation or published any articles in the field. Ms. Wotherspoon has no

personal expertise in the field of adult decision making or human error and relied on literature she has read.

- ***Cross Examination of Evelyn Wotherspoon, page 4, line 5***

5. On cross examination Ms. Wotherspoon could not remember the qualifications of the authors of the material upon whom she relied. When the qualifications of the two of the authors were put to her, she acknowledged that they were journalists who had written popular psychology books. Ms. Wotherspoon did not know if the authors had any training in psychology at all.

- ***Cross Examination of Evelyn Wotherspoon, page 2, line 19; page 2, line 13; page 4, line 2; page 5, line 21; page 6, line 18 and page 6, line 1***

6. Ms. Wotherspoon has never been personally involved in an inquiry or inquest, nor has she ever had a management position in an agency involved in an inquiry or inquest.

- ***Cross Examination of Evelyn Wotherspoon, page 11, line 6 and page 12, line 3***

7. Although Ms. Wotherspoon expresses opinions about the role and conduct of the media, she admits to having absolutely no expertise in journalism.

- ***Wotherspoon Report, page 3***
- ***Cross Examination of Evelyn Wotherspoon, page 12, line 5***

8. Ms. Wotherspoon comes to this case as an advocate. In her home jurisdiction of Alberta Ms. Wotherspoon has been a public critic of the Alberta Government's plan to

create a Quality Assurance Council to investigate deaths and injuries that occur in child welfare practices. The plan was based on the recommendation of a panel of experts. Ms. Wotherspoon wrote a column in a Calgary newspaper expressing her concerns with the Quality Assurance Council, even though she had not read the report of the panel recommending it and was not familiar with their reasoning. Somewhat ironically, she testified that she expressed her opinions about the recommendations of the expert panel and the government of Alberta relying upon the information she obtained from the media reports.

- ***Cross Examination of Evelyn Wotherspoon, page 14, line 4; page 16, line 17 and page 17, line 3***

9. So far as Ms. Wotherspoon is aware, the Government of Alberta has changed its plans notwithstanding the arguments she has put forth.

- ***Cross Examination of Evelyn Wotherspoon, page 15, line 5***

10. The Media Group submits that the Wotherspoon Report is not admissible opinion evidence. In the alternative, if it is admitted, it should be considered as an individual's lay opinion and argument and be given no weight.