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

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MOTION BRIEF OF INTERTRIBAL CHILD AND FAMILY SERVICES (ICFS)

BOOTH DENNEHY LLP
Barristers and Solicitors
Avocats et Notaires
387 Broadway
Winnipeg, MB R3C 0V5
Ph. (204) 957-1717
Fax. (204) 949-9232

HAFEEZ KHAN

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PART I – LIST OF DOCUMENTS AND AUTHORITIES TO BE RELIED UPON

1. Affidavit of Bobbi Rachelle Lee, affirmed February 22, 2013

Documents #2-12 are contained in the accompanying "Book of documents and authorities to be relied upon"

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PART II – OVERVIEW

1. The Applicants DOE #1, DOE #2, DOE #3 and DOE 4 have filed a motion for a publication ban. In addition, DOE #3 has filed a motion to be declared a Source of Referral ("SOR").

2. The motion(s) of Applicants DOE's #1, #2, and #3 fail on the grounds of *res judicata*. This Commission has already made a determination not to make confidential the identities of DOE's #1 and #2 as their identities cannot be protected and that their identities would not be made confidential during this Inquiry. By extension, the Commission's ruling applies to DOE #3.

3. This Commission has already made the determination that DOE #3 is not an SOR. SORs are required to be and have been identified by the Commission as their identities are confidential under *the Child and Family Services Act* (*CFS Act*). The identity of and all relevant documents relating to DOE #3 have already been disclosed to the parties. The Applicant DOE #3's motion for SOR status, by implication, is an allegation that this Commission has breached the *CFS Act*. ICFS states that no such breach has occurred because DOE #3 is not an SOR.

4. Counsel for the Applicant DOE #3 has refused to produce DOE #3 for cross-examination on her affidavit in the usual course (viva voce). ICFS has filed a motion to compel DOE #3 to appear for cross-examination. ICFS will make further written and oral submissions on the evidence after the cross-examination of DOE #3, if required. To make those submission on the evidence at prior to the cross-examination is a breach of procedural fairness and prejudicial.

PART III - RELEVANT FACTS

5. The Applicants DOE's #1, #2, #3, and #4 have filed a motion for a publication ban. DOE #4 has also filed a motion to be declared an SOR.

6. The Applicants are all represented by the same counsel.

7. On or about November 16, 201 The Commission invited the parties and counsel for the Applicants to make submissions with respect to redaction of the commission disclosure documents prior to their distribution to the parties.

8. The Applicants DOE #1 and #2 made submissions with respect to the redaction of commission disclosure documents.

DOEs #1 and #2 submissions on Redactions - Tab 1

9. On December 2, 2011, the Commissioner issued his Ruling on Redactions. Including among the information to be redacted from the commission disclosure documents were the names of children not relevant to the terms of the Inquiry, the names of Informants (SOR's), the names of children under the age of 18 years at the time a record was created, and the names of foster parents that are not relevant to the mandate of this Commission. In that Ruling, the Commissioner specifically excluded DOE's #1 and #2 from being redacted on the basis that their identity is known and cannot be protected.

Ruling on Redactions, December 2, 2011 page 9 – Tab 2

10. The Commission Disclosure documents were subsequently distributed to the parties in accordance with the Ruling on Redactions of December 2, 2011.

11. On or about December 20, 2011, the Commission publicized a revised timetable for the Inquiry, which announced a deadline of April 12, 2012 for all parties to file any motions with respect to publication bans or redactions for the purpose of evidence being entered into the records at the public hearings. Subsequent revised timetables were publicized on February 1 and 21, 2012, revising the deadline to April 11, 2012. On March 28, 2012, the Commission issued a Publication Ban and Redaction Hearing notice, revising the deadline to file motions to April 4, 2012.

Selected publicized timetables and Notice re: publication ban and redaction hearing - Tab 3

12. On April 4, 2012, counsel for the Applicants filed a motion for a publication ban on behalf of three other clients, identified by Commission Counsel as SOR's #5, #6 and #7. The Applicants did not file a motion for a publication ban or for SOR status.

13. The public hearing of submissions on redaction and publication bans was heard on July 4-6, 2012.

14. On July 6, 2012, counsel for the Applicant made oral submissions to the Commissioner in relation to his motion for a publication ban on behalf of SOR's #5, #6 and #7. During his submissions, counsel for the Applicants advised the Commissioner that the Applicants DOE's #1, #2, and #3 were not SOR's.

    Submission by Mr. Gange, in Transcript of Publication Ban/Redaction Motions Hearing, July 6, 2012, page 158, lines 9-12, at Tab 4

15. On July 6, 2012, the Commissioner ordered that the Ruling on Redactions of December 2, 2011 continue into the public phase of the Inquiry. No objections or additional submissions were made on this issue by any of the parties or by the Applicants.

    Excerpt from Transcript Publication Ban/Redaction Motions Hearing, July 6, 2012, pages 182-185 – tab 5

    Ruling on Publication Ban, July 12, 2012, at paragraphs 154 and 155 – Tab 6

16. On February 5, 2013, the Applicants filed and served a motion for a publication ban, returnable February 6, 2013.

17. On February 6, 2013, the Applicants motion for a publication ban was adjourned to February 26, 2013.

18. On February 7, 2013, at the conclusion of the day's witness testimonies, the Inquiry Hearings were adjourned for the "Inquiry Break" to March 4, 2013.

19. On February 13, 2013, the Applicant DOE #3 filed and served a motion for SOR status, returnable February 26, 2013.

PART IV - WRITTEN ARGUMENTS

RES JUDICATA PRECLUDES THE MOTIONS

20. With respect to DOE's #1, #2, and #3, this Commission has already ruled on the relief they are seeking in their motion(s). The issues are thus moot.

21. The doctrine of *res judicata* is described in ***Glenko, infra***:

> *Res judicata* has two distinct forms: issue estoppel and cause of action estoppel. Donald J. Lange, in his leading text, *The Doctrine of Res Judicata in Canada*, 2d ed. (Markham: LexisNexis Canada Inc., 2004), explains the differences (at pp. 1-2):
>
> …. issue estoppel means that a litigant is estopped because the issue has clearly been decided in the previous proceeding, and cause of action estoppel means that a litigant is estopped because the cause has passed into a matter adjudged in the previous proceeding.
>
> .....
>
> .... The best early pronouncement of the meaning of *res judicata* by the Supreme Court of Canada is in the 1893 decision in *Farwell v. R.* [(1894), 22 S.C.R. 553 at 558]. King J. defined the general meaning, respectively, of both cause of action estoppel and issue estoppel, stating:
>
> Where the parties (themselves or privies) are the same, and the cause of action is the same, the estoppel extends to all matters **which were, or might properly have been, brought into litigation**. Where the parties (themselves or privies) are the same, but the cause of action is different, the estoppel is as to matters which, having been brought in issue, the finding upon them was material to the former decision.

***Glenko Enterprises Ltd. v. Keller*, 2008 MBCA 24, para. 32 – Tab 7**

22. For issue estoppel to apply, the following three requirements must be satisfied.

i. the same question has been decided in both actions;

ii. the judicial decision which is said to create the estoppel was final; and

iii. the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

***Glenko, supra,* para. 33 – Tab 7**

23. The test for issue estoppel is a substantive issue test where the decision affects substantive rights of the parties in respect of a matter bearing upon the merits of the cause of action, as distinct from some collateral matter. This can be readily seen in decisions in interlocutory proceedings. A decision is final in nature because it finally disposes of a substantive right raised between the parties which may or may not be determinative of the entire action.

***MacKinnon v. National Money Mart Co.*, [2009] B.C.J. No. 468 (C.A.) at par. 78, 80 – Tab 8**

24. Where the first motion is based on inadequate material, issue estoppel will apply to a second motion based on more complete material.

***R. v. Martin*, [2008] O. J. No. 1596 (S.C.J.) at par. 10, 12 – Tab 9**

25. In deciding what questions were decided by the first proceedings, the court is entitled to look not only at the formal judgment but also at the pleadings and the history of the proceedings (***Pratt v. Johnson*** (1958), 16 D.L.R. (2d) 385 (S.C.C), at 399.

***CLE Owners Inc. et al v. Wanlass et al.*, 2004 MBQB 43 – Tab 10**

26. With respect to the publication ban motion, all three requirements for issue estoppel are met.

27. An examination of the pleadings in the redaction ruling compared with the present motion clear show that two motions deal with the same matter and that the Commission is asked to decide the same question.

28. The Commissioner clearly put his mind to the issue of confidentiality with respect to DOE's #2 and #3. At page 9 of Ruling on Redactions, the Commission states:

> Where it can be avoided, identity protection should be afforded to those of that young age who were living in or were otherwise involved in a family setting that found its way into Child and Family Services records or other similar documents. One instance where it can not be avoided is in the case of Phoenix Sinclair herself. **Another is the two sons of the male participant in the murder of Phoenix Sinclair. They gave evidence at the criminal proceeding and their identity is known and can not be protected**.

Ruling on Redactions, December 2, 2011 – Tab 2, page 9

29. For the Applicants to be successful in the publication ban motion, they had to have been successful in obtaining a favourable redaction ruling. It is impossible to obtain a publication ban if redaction (of identity) of the commission documents to be made public during the Inquiry is denied, as is the case in this matter.

30. The Applicants DOE #1 and #2 did make submissions with respect to the Ruling on Redactions of December 2, 2011. This Commission denied their application to be redacted from the documents. Their application for confidentiality has thus already been denied.

31. All parties, including the Applicants, were given proper notice and were required to file their motion for a publication ban by April 4, 2012. Counsel for the Applicants was in fact present during the publication ban hearings (on behalf of other clients seeking a publication ban) – no request for a publication ban was made by the Applicants, and the Applicants did not object to the continuation of the Ruling on Redaction of December 2, 2011.

32. The second requirement for issue estoppels has been met. The Ruling on Redactions of December 2, 2011 and its subsequent continuation on July 6, 2012 is a final decision. The decision was meant to be conclusive and apply to the Inquiry proceedings.

33. The third requirement for issue estoppels is met. The parties are the same as the parties to this current motion.

This Commission has already determined that DOE #3 is not an SOR

34. This Commission has already established that it is legally bound to the confidentiality provisions under the *CFS Act* – both the general confidentiality provisions under s.76 and to the SOR specific confidentiality provisions under s.18 of the *CFS Act*. Failure to abide by this legislation is a breach of the law.

35. This Commission was required to identify the SOR's prior to disclosing of the documents to the parties and public hearings. Failure to do so would have been a breach of section 18.3 of the *CFS Act*. Identification and classification of SOR's was determined by Commission Counsel at the early stages of this Inquiry.

36. The Applicant's own counsel has confirmed that DOE #3 is not an SOR. During the publication ban hearings, while making representations on behalf of other clients for a publication ban (SOR's #5, #6, and #7), the Applicant's counsel states:

> Thank you, Mr. Commissioner. My name is Bill Gange. I, I will be attending the Commission of Inquiry from time to time on behalf of perhaps as many as seven different people. Three of those are identified as SOR number 5, number 6, and number 7. **The other four individuals are not sources of referral**, but I will see you from time to time, God willing.
>
> **Submission by Mr. Gange, in Transcript of Publication Ban/Redaction Motions Hearing, July 6, 2012, p.158, line 9-12 – Tab 4**

37. It is submitted that the requirements for issue estoppels are met with respect to the motion for SOR status.

38. Firstly, the question before the Commissioner has already been decided. Furthermore, DOE #3 had ample opportunities to raise this issue including two invitations by the Commission (the first with respect to the Ruling on Redaction, and the second with respect to the publication ban hearings). As per ***Glenko*** at paragraph 33, issue estoppels extends to all matters which were, or might properly have been, brought into litigation. The deadline for motions on publication bans and redactions was April 4, 2012.

39. The second requirement for issue estoppel is also clearly met. The determination of SOR status is final. The *CFS Act* requires finality of such decisions.

40. The third requirement for issue estoppels to apply is also met. The parties are the same.

41. It is accordingly submitted that the motions of DOE's #1, #2, #3 have already been decided and are now moot.

ARGUMENTS ON THE SOR AND PUBLICATION BAN MOTIONS

42. ICFS has been denied its right to cross-examine DOE #3 in the usual course and has filed a motion for an order compelling DOE #3 to attend a *viva voce* cross-examination on her affidavit. As such, ICFS cannot make substantive arguments on the evidence and its application to the law with respect to either the SOR motion or the publication motion. It reserves it's right to make written and oral arguments on the evidence after the cross-examination of DOE #3.

Motion for SOR status

43. Subject to the comments at paragraph 42, above, it is submitted that the Applicant DOE #3 does not meet the definition of a "Source of Referral" or "Informant" as defined in *the Child and Family Services Act*.

Motion for a Publication Ban

44. The law on publication bans has already been extensively argued during the publication ban motions held on July4-6, 2012.

45. This Commission has already commented extensively on the nature of public Inquiries and the open court principle. This Commission has commented that it is from a perspective of openness that a motion for a publication ban should be approached and determined.

Ruling on Publication Ban, paras. 85-93 – Tab 6

46. This Commission has already determined the *Degenais/Mentuck* analysis to be the proper test in determining whether a publication ban should be granted.

Ruling on Publication Ban, paras. 94-98 – Tab 6

47. A detailed review of the relevant law is provided in the brief of the Media Group, previously filed with the Inquiry with respect to the publication ban hearing of July 4-6, 2012 and available on the Inquiry website. ICFS relies on the relevant case law and principles, as reviewed in the Media Group's brief, with specific reference to pages 10, 23, 24, 26, 32, 33, 34, 36, and 43.

48. Subject to the comments at paragraph 42, above, it is submitted that the Applicants do not meet the requirements of the *Dagenais/Mentuck* test.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 22nd DAY OF FEBRUARY, 2012.

HAFEEZ KHAN

Booth Dennehy LLP
387 Broadway Avenue
Winnipeg, MB R3C 0V5

Counsel for Intertribal Child and Family Services