

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

**MOTIONS BRIEF ON BEHALF OF
POTENTIAL WITNESSES DOE #1, DOE #2, DOE #3 and DOE #4**

GANGE GOODMAN & FRENCH

Barristers & Solicitors
760 - 444 St. Mary Avenue
Winnipeg, MB R3C 3T1
William S. Gange
(204) 953-5401
File No. 15737 WSG

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1. This is an application for a publication ban to prohibit the publishing, broadcasting or otherwise communicating by any means the name, face or identity of four witnesses.
2. The four witnesses all have a connection with Wes McKay. Three are his children. One is a former common-law spouse. Certain of the witnesses may provide evidence that comments to a limited extent upon the child welfare system. The main purpose of their evidence will be, however, to comment upon the relationship of Phoenix Sinclair with Wes McKay and Samantha Kematch. It is expected that their evidence will help the Commissioner appreciate to a greater degree the life of Phoenix Sinclair during the final few months of her life.

3. The application is brought by all of the witnesses with respect to their own safety and well-being. In addition, witness DOE #4 brings the application as a result of a parent's concern to protect their own children.

4. The concerns raised by the applicants would be legitimate concerns raised by anyone connected to a person who would murder an innocent child such as Phoenix Sinclair.

Jurisdiction

5. The Commissioner has the inherent jurisdiction to make the order sought as necessarily incidental to the carrying out of his functions pursuant to Order in Council 89/2011.

6. The Commissioner has considered the issue of a publication ban in his ruling dated July 12, 2012 (the "Publication Ban Order").

7. The Commissioner conducted a thorough review of the law in the Publication Ban Order. The Commissioner adopted the Dagenais/Mentuck analysis, which requires that such an order is necessary to prevent a serious risk to the proper administration of justice and that the salutary effects of the publication ban outweigh the deleterious effects on the rights and interest of the parties and the public.

8. The evidence of the applicants is that they have experienced harassment in the past as a result of their relationship to Wes McKay and that they have a well grounded fear for their safety should their names be publicized. In addition, one applicant has a serious concern of the risk to their children should the applicant be required to be identified. The further evidence based upon information and belief is that there has been a threat made against witnesses to this Inquiry.

9. At paragraph 107 of the Publication Ban Order, the Commissioner stated:

If there was evidence of serious risks to personal safety that would be caused by publication of the identities of social workers, those types of risks would likely meet the threshold of a “serious” risk contained in Dagenais/Mentuck.

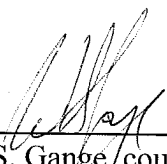
10. It is submitted that the applicants satisfy the first part of the Dagenais/Mentuck analysis.

11. The second part of the Dagenais/Mentuck analysis is a consideration of the competing interests in balancing the right of an individual to privacy against the open court principle. In this regard, reference should be made to the evidence provided by the SORs at this Inquiry. The SORs have testified anonymously. They were subject to cross-examination by counsel. Their evidence was reported upon by the media.

The only restriction was that their names were not disclosed and their photographs were not published.

12. The method employed in obtaining the evidence of the SORs permitted a full and fair account of their testimony, while protecting the anonymity of the witnesses.
13. The same method of testifying would satisfy the second part of the Dagenais/Mentuck test
14. The applicants submit therefore that the Commissioner has the jurisdiction to order a publication ban with respect to their testimony. The evidence establishes a serious risk. The method suggested to permit the applicants to testify anonymously would satisfy the balancing act required.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day fo February, 2013.



William S. Gange, counsel for the applicants
GANGE GOODMAN & FRENCH
760 - 444 St. Mary Avenue
Winnipeg, MB R3C 3T1
William S. Gange - (204) 953-5401