

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

RESPONDENT MOTION BRIEF OF THE UNIVERSITY OF MANITOBA
RE MOTION TO STRIKE THE AFFIDAVIT OF GWENDOLYN GOSEK

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PART I: DOCUMENTS TO BE RELIED UPON

1. Affidavit of Gwendolyn Gosek, sworn April 4, 2012.
2. Cross Examination of Gwendolyn Gosek, dated June 1, 2012.
3. Motion Brief of Canadian Broadcasting Corporation, CTV Winnipeg, Global Winnipeg and The Winnipeg Free Press (the "Applicant's Motion Brief").

PART II: LIST OF AUTHORITIES

- TAB 1 ***Dixon v. Canada***, [1997] 3 F.C. 169 (C.A.); leave to appeal refused,
[1997] S.C.C.A. No.505
- TAB 2 ***R. v. Mohan***, [1994] 2 S.C.R. 9 (S.C.C.) (QL)
- TAB 3 ***R. v. Abbey***, [1982] 2 S.C.R. 24 (S.C.C.) (QL)
- TAB 4 ***R. v. Marquard***, [1993] 4 S.C.R. 223 (S.C.C.) (QL)

PART III: POINTS TO BE ARGUED

A. Introduction

1. The University of Manitoba, on behalf of the Faculty of Social Work (the "Respondent"), has been granted intervenor status in the Phoenix Sinclair Inquiry.
2. Motions opposing the publishing, broadcasting or otherwise communication by television, internet, radio, in print, or by any other means the name, face or identities of social workers and other child welfare workers have been filed by counsel for the Manitoba Government Employees' Union ("MGEU"), by counsel for the Intertribal Child and Family Services ("ICFS") and by counsel for 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 Coodinated Response Network (collectively referred to as "the Authorities and ANCR"). The Respondent supports each of these motions for the reasons outlined in the moving parties' respective motion briefs.
3. In addition, on April 4, 2012, the Respondent filed the Affidavit of Gwendolyn Gosek ("Ms. Gosek"), sworn April 4, 2012, (the "Affidavit"), as an expert opinion in support of the publication ban.

4. Ms. Gosek expressed her opinion in the Affidavit as an expert in the area of the stresses that are existent on social workers and others working in child protection.

Cross Examination of Gwendolyn Gosek, page 2, lines 11 to 14.

5. The Canadian Broadcasting Corporation, CTV Winnipeg, Global Winnipeg and The Winnipeg Free Press (collectively the "Media Applicant") has moved for an Order that portions of the Affidavit of Gwendolyn Gosek, sworn April 4, 2012 and referenced in error in the Applicant's Notice of Motion as affirmed April 3, 2012, be struck on the basis that they offend the Rules of Evidence:

Objected To	Grounds
Paragraph 10	Hearsay; unqualified opinion
Paragraph 10(u), 2 nd sentence	Hearsay
Paragraph 10(v)	Reliance on undisclosed document
Paragraph 10(w)	Inadmissible opinion
Paragraph 10(x)	Inadmissible opinion
Paragraph 10(z), 2 nd and last sentences	Inadmissible opinion

7. The Applicant has challenged the evidence on the basis of:
- a. The exclusionary rule against hearsay; and
 - b. That Gwendolyn Gosek is not a properly qualified expert in the area of the stresses that are on social workers and others working in child protection, in that:
 - i. She does not have any experience working as a front line social worker or supervisor. She did work prior to 1997 as a support worker. Since then she has been an academic.

- ii. She has never held a position where she had the authority to apprehend children.
- iii. She does not have any experience testifying at an inquest or an inquiry.
- iv. She does not have any expertise in the field of journalism.

Applicant's Motion Brief, Appendix "D", paragraphs 3-7.

B. Respondent's Position

8. Commissions of inquiry are not subject to the strict rules of evidence that apply to a court of law.

Dixon v. Canada, [1997] 3 F.C. 169 (C.A.) at para.14; leave to appeal refused, [1997] S.C.C.A. No.505 – Respondent's Book of Authorities – Tab 1.

9. The Respondent submits that even under the strict rules of evidence, Ms. Gosek's evidence would constitute an expert opinion and be admissible.
10. With respect to paragraph 10 generally, the Respondent submits that Ms. Gosek is a properly qualified expert in the area of the stresses that are existent on social workers and others working in child protection, and the second-hand evidence contained in paragraph 10 is relevant to Ms. Gosek's opinion on what effect media publication of the names, faces and identities of child protection workers will have on social workers and others working in child protection, and should therefore be admissible.

11. With respect to paragraph 10(u), 2nd sentence, the Respondent submits that this evidence is relevant to Ms. Gosek's properly qualified expert opinion on what effect media publication of the names, faces and identities of child protection workers will have on social workers and others working in child protection, and should therefore be admissible.
12. With respect to paragraph 10(v), the Respondent is prepared to strike this paragraph from the affidavit.
13. With respect to paragraph 10(w), the Respondent submits that this paragraph expresses Ms. Gosek's properly qualified expert opinion on the effect that media publication will have on social workers and others working in child protection, and should therefore be admissible.
14. With respect to paragraph 10(x), the Respondent submits that this paragraph expresses Ms. Gosek's properly qualified expert opinion on the common concerns of students, social workers and others working in child protection, and should therefore be admissible.
15. With respect to paragraph 10(z), 2nd and last sentences, the Respondent submits that paragraph expresses Ms. Gosek properly qualified expert opinion on what effect media publication of the names, faces and identities of child protection workers will have on social workers and others working in child protection, and should therefore be admissible

C. Law

16. Under the strict rules of evidence, admission of expert evidence depends on the application of the following criteria:

- i. Relevance;
- ii. Necessity in assisting the trier of fact;
- iii. The absence of any exclusionary rule;
- iv. A properly qualified expert.

***R. v. Mohan*, [1994] 2 S.C.R. 9 at para.17 – Respondent’s Book of Authorities – Tab 2.**

17. The Applicant has not challenged the relevance of the evidence or the necessity of Ms. Gosek’s evidence in assisting the trier of fact.

C.1 Exclusionary Rule: Hearsay

18. Expert witnesses may testify to their opinion on matters involving their expertise, and may also, incidentally, base their opinions upon hearsay.

***R. v. Abbey*, [1982] 2 S.C.R. 24 at p.14 – Respondent’s Book of Authorities – Tab 3.**

19. An expert witness, like any other witness, may testify as to the veracity of facts of which he has first-hand experience, but this is not the main purpose of his or her testimony. An expert is there to give an opinion. And the opinion more often than not will be based on second-hand evidence.

***R. v. Abbey*, [1982] 2 S.C.R. 24 at p.15 – Respondent’s Book of Authorities – Tab 3.**

20. The value of an opinion may be affected to the extent to which it may rest on second-hand source material, but that goes to the weight and not to the receivability in evidence of the opinion, which opinion is not evidence of the truth of the information but evidence of the opinion formed on the basis of that information.

***Wilband v. The Queen*, [1967] S.C.R. 14 at p.21, quoted in *R. v. Abbey*, [1982] 2 S.C.R. 24 at p.15 – Respondent’s Book of Authorities – Tab 3.**

21. Thus, an expert opinion based on second-hand evidence is admissible, if relevant.

***R. v. Abbey*, [1982] 2 S.C.R. 24 at p.16 – Respondent’s Book of Authorities – Tab 3.**

C.2 Properly Qualified Expert

22. A “properly qualified expert” is a witness “who is shown to have acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify.

***R. v. Mohan*, [1994] 2 S.C.R. 9 at para.27 – Respondent’s Book of Authorities – Tab 2.**

23. The only requirement for the admission of the expert opinion is that the expert witness possess special knowledge and experience going beyond the trier of fact.

***R. v. B eland*, [1987] 2 S.C.R. 398 at p.415, quoted in *R. v. Marquard*, [1993] 4 S.C.R. 223 at para.35 – Respondent’s Book of Authorities – Tab 4.**

24. The admissibility of such expert evidence does not depend upon the means by which that skill was acquired. As long as the court is satisfied that the witness is sufficiently experienced in the subject-matter at issue, the court will not be

concerned with whether his or her skill was derived from specific studies or by practical training, although that may affect the weight to be given to the evidence.

Sopinka, Lederman and Bryant, *The Law of Evidence in Canada* (1992), at pp.536-537, quoted in *R. v. Marquard*, [1993] 4 S.C.R. 223 at para.35 – Respondent’s Book of Authorities – Tab 4.

D. Application

25. Ms. Gosek has acquired special or peculiar knowledge in the area of the stresses that are existent on social workers and others working in child protection through her work as a support worker in the child welfare system, through her independent research as an academic, through her in-class discussions with child protection workers in the classes she teaches for the University of Manitoba, and through her personal relationships with child protection workers.

Affidavit of Gwendolyn Gosek, Exhibit “A”.

Cross Examination of Gwendolyn Gosek, page 3, lines 24 to 25 and page 4, lines 1 to 24, page 9, lines 9 to 18.

26. Ms. Gosek has personal experience as a support worker in the child welfare system through her employment with the Ma Mawi Wi Chi Itata Centre, where she worked directly with families who were, in the majority, connected to child welfare.

Affidavit of Gwendolyn Gosek, Exhibit “A”, page 14.

Cross Examination of Gwendolyn Gosek, page 6, lines 6 to 10.

27. As a published academic, Ms. Gosek has researched the literature relating to the practice of social work and the stresses that exist on people practicing in the area of child welfare.

Cross Examination of Gwendolyn Gosek, page 8, lines 21 to 25 and page 9, lines 1 to 2.

28. As a University instructor, Ms. Gosek has held numerous talking circles with students, many of whom are child protection workers, whereby they have expressed their concerns about their careers, their experiences and their expectations with respect to practicing in area of child welfare.

Affidavit of Gwendolyn Gosek, paragraphs 4 to 6, and Exhibit "A";

Cross Examination of Gwendolyn Gosek, page 72, lines 6 to 25, page 73, lines 20 to 25, and page 74, lines 1 to 4.

29. Ms. Gosek's personal relationships with child protection workers have also given her insight into the stresses experienced by child protection workers.

Cross Examination of Gwendolyn Gosek, page 9, lines 9 to 18.

30. As a result, Ms. Gosek has acquired special knowledge and experience going beyond the trier of fact in the area of the stresses that are existent on social workers and others working in child protection so as to qualify her as an expert in this area.
31. As an expert, Ms. Gosek is entitled to give her opinion based on not only her first-hand experiences, but also on the second-hand source material that she has reviewed as it is relevant to the motion.

PART IV: CONCLUSION

32. Commissions of inquiry are not subject to the strict rules of evidence that apply to a court of law.
33. The Respondent submits that even under the strict rules of evidence, Ms. Gosek is a properly qualified expert in the area of the stresses that are existent on social workers and others working in child protection, in that she has acquired special knowledge and experience going beyond the trier of fact in this area.
34. The Respondent further submits that the second-hand evidence contained in her affidavit is relevant to Ms. Gosek's opinion on what effect media publication of the names, faces and identities of child protection workers will have on social workers and others working in child protection, and should therefore be admissible.
35. As such, the Applicant's motion to strike portions of Ms. Gosek's affidavit should be denied, with the exception of paragraph 10(v) which the Respondent would agree to strike.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 22nd day of June, 2012.



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