

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

MOTION BRIEF
of
**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**

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PART I

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Blood System)*, [1997] 3 S.C.R. 440 at para 31
- TAB 6** *The Manitoba Evidence Act*, s. 1, 87, 88(1), 93(1) and 96
- TAB 7** *Ed Ratushny, The Conduct of Public Inquiries: Law, Policy and Practice*
(Toronto: Irwin Law Inc., 2009) P. 220

PART II
POINTS TO BE ARGUED

Introduction

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

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

Facts

3. Commission Counsel has interviewed an unknown number of individuals. Exactly who was interviewed and what was said in the interviews is known only to those present at the interviews. It is understood that the interviews have been audio recorded and it is also understood that transcripts have been prepared for the great majority of these interviews.

4. In accordance with Section 9 of the Order in Council 89/2011, the subject matter of these interviews must be with respect to:

- a) The child welfare services provided or not provided to Phoenix Sinclair and her family under *The Child and Family Services Act*;
- b) Any other circumstances, apart from the delivery of child welfare services, directly related to the death of Phoenix Sinclair; and
- c) Why the death of Phoenix Sinclair remained undiscovered for several months.

5. Commission Counsel has indicated that she will be providing 'Summaries' of the witness interviews for disclosure to the parties and intervenors. However, Commission Counsel has refused to disclose or allow access to the witness interview transcripts (the "Transcripts"). Furthermore, these Summaries will only be provided for individuals whom Commission Counsel determines she will call as witnesses at the public hearings of the Inquiry.

6. Moreover, pursuant to the *Commission of Inquiry Rules of Procedure and Practice*, Commission Counsel may decide to simply tender particular Summaries to the Commissioner at the hearing without calling the particular witnesses and the Commissioner can consider these Summaries when making his final findings, conclusions and recommendations.

Order in Council 89/2011, s. 9

Commission of Inquiry Rules of Procedure and Practice, Rule 25

Argument

A. THE COMMISSION OF INQUIRY RULES OF PROCEDURE AND PRACTICE REQUIRES THE DISCLOSURE OF THE TRANSCRIPTS.

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

Commission of Inquiry Rules of Procedure and Practice, Rule 26

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

Relevance

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

- a) The child welfare services provided or not provided to Phoenix Sinclair and her family under *The Child and Family Services Act*,
- b) Any other circumstances, apart from the delivery of child welfare services, directly related to the death of Phoenix Sinclair; and
- c) Why the death of Phoenix Sinclair remained undiscovered for several months.

Order in Council 89/2011, s. 9

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

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

Commission of Inquiry Rules of Procedure and Practice, Rule 26

12. The relevance of the Transcripts is made even more apparent from the fact that section 9 of the *Order in Council 89/2011* allows the Transcripts as a whole to be tendered as evidence without the need for calling the individual as a witness at the public hearing.

Order in Council 89/2011, s. 9

Solicitor-Client Privilege

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

Commission of Inquiry Rules of Procedure and Practice, Rule 7

Litigation Privilege

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

*Hudson Bay Mining and Smelting Co. v. Cummings, P.C.J.,
2006 MBCA 98 at para 35 (“Hudson Bay”)*

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

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

Hudson Bay at para 38

- Public Inquiries are inquisitorial rather than adversarial.

*Consortium Developments (Clearwater) Ltd. v. Sarnia
(City), [1998] 3 S.C.R. 3 at para 41, Binnie J. delivering
the judgment of the Court*

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

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

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

The Manitoba Evidence Act, s. 93(1)

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

- Commission Counsel has the primary responsibility for representing the public interest at the Inquiry, including the responsibility to ensure that all matters that bear upon the public interest are brought to the Commissioner’s attention.

Commission of Inquiry Rules of Procedure and Practice, Rule 7

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

See Hudson Bay at para 57

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

18. This is similar, if not identical, to the situation in *Hudson Bay* where the Manitoba Court of Appeal held that Crown Counsel at an inquest had to disclose witness interview transcripts to the parties at that inquest. In coming to this conclusion, Steel, J.A., held

for the unanimous Court that inquests were non-adversarial and that the doctrine of litigation privilege was not applicable to non-adversarial processes (emphasis added).

Hudson Bay at para 61

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

Hudson Bay at paras 59 and 62

20. It cannot be said that the Transcripts at issue here are preparatory work or notes on strategy and tactics. The Transcripts at issue must only contain information of a factual nature with respect to the very subject matter of the Inquiry, namely:

- a) The child welfare services provided or not provided to Phoenix Sinclair and her family under *The Child and Family Services Act*;
- b) Any other circumstances, apart from the delivery of child welfare services, directly related to the death of Phoenix Sinclair; and
- c) Why the death of Phoenix Sinclair remained undiscovered for several months.

Order in Council 89/2011, s. 9

21. The fact that either the Transcripts as a whole or the Summaries prepared in relation to the Transcripts can be filed as evidence before the Commissioner makes it even more apparent that the Transcripts can contain only relevant factual information.

Order in Council 89/2011, s. 9

Commission of Inquiry Rules of Procedure and Practice, Rule 26

22. Consequently, even if the doctrine of litigation privilege could apply to Commission Counsel, which it cannot, litigation privilege would not apply to the

Transcripts due to the fact that they only contain factual information and are not the result of an analysis of the Commission Counsel's mind.

Privilege on a Case-By-Case Analysis

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

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

See Hudson Bay at paras 71 - 72

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

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

26. Furthermore, as was held in *Hudson Bay*, the "open, truth finding function of this Inquiry is more important than keeping this information confidential". The parties to this

Inquiry and the public at large are entitled to the fullest inquiry into the surrounding circumstances of Phoenix Sinclair's death and disclosure of these Transcripts are of far greater importance than any need there may be to uphold a claim of privilege.

Hudson Bay at para 81-82

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

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

A. The principles of natural justice and procedural fairness require the disclosure of the Transcripts.

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

Hudson Bay at para 91

Commission of Inquiry into the Blood System at para 57

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

Hudson Bay at para 91

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

Hudson Bay at para 94 citing with approval Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817 at para 22 (“Baker”)

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

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

Hudson Bay at para 95 citing Baker at paras. 23-27

1. The nature of the decision being made and the process followed in making it

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

Hudson Bay at para 95 citing Baker at paras. 23-27

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

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

*Commission of Inquiry Rules of Procedure and Practice,
Rules 8-13 and 30-38*

35. Although the decision of the Commissioner does not determine specific rights or liabilities of participants in a manner similar to a court, the Commissioner is able to receive evidence on a wide scope of matters which could affect professional or personal reputations.

Commission of Inquiry Rules of Procedure and Practice, Rules 47-49

36. The Commissioner has the same protection and privileges, in case of any action brought against him for any act done or omitted to be done in the execution of his duty, as are by law given to the judges of the Court of Queen's Bench.

The Manitoba Evidence Act, s. 87

37. Given the foregoing, the context in which this Inquiry is being heard is quite similar to a judicial process which suggests that a high duty of fairness applies to this Inquiry.

2. The nature of the statutory scheme and the role of the decision within the statutory scheme.

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

Hudson Bay at para 95

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

See Hudson Bay at para 97

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

3. The importance of the decision to the individual affected.

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

See Hudson Bay at para 97

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

4. The legitimate expectations of the person challenging the decision.

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

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

Hudson Bay at para 98

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

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

Commission of Inquiry Rules of Procedure and Practice, Rule 7

Hudson Bay at para 103

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

5. The choice of procedure made by the agency itself.

48. As mentioned above, the Commission has already chosen in its rules to require the disclosure of all relevant, non-privileged documents in the possession of the Commission to the parties and intervenors. This suggests that a high duty of fairness applies to this Inquiry.

Conclusion Re: The Content of Procedural Fairness Required in this Instance

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

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

51. It begs repeating that Commission Counsel represents the public interest and that the public interest is better served by as much disclosure as possible.

Commission of Inquiry Rules of Procedure and Practice, Rule 7

Hudson Bay at para 103

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

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

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

Hudson Bay at para 101

55. This conclusion also accords with the Manitoba Court of Appeal's decision in *Hudson Bay*. In that decision, the Manitoba Court of Appeal was faced with determining nearly the exact same issue and factual scenario that is presented in this matter, which is whether the requirements of procedural fairness at an inquest should include the disclosure of relevant, non-privileged materials in the possession of Crown Counsel.

56. It should be noted that the nature of the inquest in *Hudson Bay* was to determine the circumstances that led to the death of an individual and to make recommendations about what, if anything, could be done to prevent similar deaths from occurring in the future.

Hudson Bay at para 7

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

Order in Council 89/2011, s. 1-2

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

Hudson Bay at para 100

59. The same order should follow in this instance.

PART III
NATURE OF REMEDY SOUGHT

60. It is respectfully submitted that the Commissioner make an order compelling the disclosure of the Transcripts to the parties and the intervenors.

61. It is also submitted that the same rules respecting the use of the Summaries in the public hearing of this Inquiry should also apply to the Transcripts.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4th day of July, 2012.



HAROLD COCHRANE / KRIS SAXBERG /
LUKE BERNAS
D'ARCY & DEACON LLP
Barristers and Solicitors
2200 – One Lombard Place
Winnipeg, MB R3B 0X7
Telephone: 204-942-2271

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D'ARCY & DEACON LLP
Barristers and Solicitors
2200 – One Lombard Place
Winnipeg, Manitoba
R3B 0X7

HAROLD COCHRANE / KRIS SAXBERG / LUKE BERNAS / SHAWN SCARCELLO

Telephone: 204-942-2271
Facsimile: 204-943-4242

Our File No. 116822 0001