

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

**BRIEF OF
POTENTIAL WITNESSES SOR#1, SOR#2, SOR#4, PHN and TM**

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I. INTRODUCTION AND FACTUAL BACKGROUND

1. In February 2012 five individuals referred to herein as “potential witnesses SOR#1, SOR#2, SOR#4, PHN and TM” were interviewed by counsel for the Commission of Inquiry into the Circumstances Surrounding the death of Phoenix Sinclair (the “Inquiry”). The five individuals are represented by counsel and counsel was present at the interviews. Potential witnesses SOR#1, SOR#2, SOR#4, PHN and TM all work or worked previously in the health care system within the Winnipeg Health Region. Potential witnesses SOR#1, SOR#2 and SOR#4 work or worked as medical social workers at the Health Sciences Centre. Potential witnesses PHN and TM worked within the “Population and Public Health” program; PHN as a Public Health Nurse, and TM as a Team Manager who as a portion of her duties supervised Public Health Nurses.

2. All five individuals have now been advised that they are likely to be called as witnesses at the Inquiry, and they have been advised, through legal counsel, of the approximate dates that they are likely to be called to testify. None of the potential witnesses have standing at the Inquiry, nor do their current or former employers, the Health Sciences Centre or the Winnipeg Regional Health Authority.

3. Counsel for potential witnesses SOR#1, SOR#2, SOR#4, PHN and TM was, some time before their interviews, served with a subpoena to produce various health records to the Inquiry.

4. Preparatory to the interviews with potential witnesses SOR#1, SOR#2, SOR#4, counsel was provided with documentation that was expected to be referred to in the interviews. Some of the documentation derived from health records that counsel for the potential witnesses had originally produced to the Inquiry. Where names had appeared in the original health records (either as authors or by reference), the names of SOR#1, SOR#2 and SOR#4 had been redacted in the copies made available to the potential witnesses and their counsel. In documentation derived from sources other than health records, similar redactions appeared. It is understood that these redactions were pursuant to the Ruling on Redactions of the Commissioner dated December 2, 2011, which held that the names of sources of referral/informants, minors, and foster parents be redacted for the purposes of disclosure of documents to the parties.

II. NOTICE OF MOTION

5. Pursuant to the Notice of Motion filed on behalf of potential witnesses SOR#1, SOR#2, SOR#4, PHN and TM, the following relief has been sought:

1. That prior to documents becoming publicly available in the context of the Inquiry, the Commissioner redact the names and other identifying information of SOR#1, SOR#2, SOR#4, PHN and TM.
2. That the Commissioner prohibit any form of publishing, broadcasting, or otherwise communicating by television, internet, radio, in print, or by any other means, the names and other identifying information of SOR#1, SOR#2, SOR#4, PHN and TM that may, notwithstanding paragraph 1 herein, be contained in documents produced at the Inquiry.
3. That the Commissioner prohibit any form of publishing, broadcasting, or otherwise communicating by television, internet, radio, in print, or by any other means at the Inquiry, the name, face or identity of SOR#1, SOR#2, SOR#4, PHN and TM.
4. That in his discretion, the Commissioner extend to SOR#1, SOR#2, SOR#4, PHN and TM any further considerations in respect of their comfort, safety and privacy that he determines ought reasonably to be extended to other witnesses at the Inquiry.
5. Such further and other relief as counsel may advise and the Commissioner may allow.

III. LIST OF DOCUMENTS TO BE RELIED ON

The following evidence will be relied on:

Affidavit of Regan Spencer, affirmed April 10, 2012; and
Affidavit of Lynda Tjaden, affirmed April 10, 2012.

IV. LIST OF POINTS TO BE ARGUED

A. Duty to Report and Statutory Provisions to Encourage Reporting

6. Other parties have submitted detailed briefs explaining the law on the topic of a publication ban, and the Commissioner is well aware of the legal considerations involved.

7. Counsel for SOR#5 and SOR#6 has submitted a brief detailing the special considerations applying to sources of referral/informants under *The Child and Family Services Act*. These arguments also apply to the position of potential witnesses SOR#1, SOR#2, SOR#4, PHN and TM. As indicated in the affidavits filed in support of their motion, potential witnesses SOR#1, SOR#2, SOR#4 were sources of referral in the instant case. Further, potential witnesses SOR#1, SOR#2, SOR#4, PHN and TM all work or worked in positions where by the nature of their job duties, they might reasonably be expected to become sources of referral, or "informants" within the meaning of the legislation.

8. The applicable sections of *The Child and Family Services Act*, C.C.S.M. c. C80 are as follows:

Reporting a child in need of protection

18(1) Subject to subsection (1.1), where a person has information that leads the person reasonably to believe that a child is or might be in need of protection as provided in section 17, the person shall forthwith report the information to an agency or to a parent or guardian of the child.

Duty to report

18(2) Notwithstanding the provisions of any other Act, subsections (1) and (1.0.1) apply even where the person has acquired the information through the discharge of professional duties or within a confidential relationship, but nothing in this subsection abrogates any privilege that may exist because of the relationship between a solicitor and the solicitor's client.

S.M. 1989-90, c. 3, s. 4; S.M. 1996, c. 4, s. 3; S.M. 2008, c. 9, s. 4.

Identity of informant

18.1(2) Except as required in the course of judicial proceedings, or with the written consent of the informant, no person shall disclose

- (a) the identity of an informant under subsection 18(1) or (1.1)
 - (i) to the family of the child reported to be in need of protection, or
 - (ii) to the person who is believed to have caused the child to be in need of protection; or
- (b) the identity of an informant under subsection 18(1.0.1) to the person who possessed or accessed the representation, material or recording that is or might be child pornography.

Retaliation against informant prohibited

18.1(3) No person shall dismiss, suspend, demote, discipline, harass, interfere with or otherwise disadvantage an informant under section 18.

S.M. 1989-90, c. 3, s. 5; S.M. 2008, c. 9, s. 5.

9. Persons practicing professions that are governed by professional licensing bodies, and who fail to report information that a child may be in need of protection, may be susceptible to a report by the Director of Child and Family Services and proceedings before their governing bodies:

Reports regarding professionals, etc.

18.2(1) Where the director has reasonable grounds to believe that a person has caused a child to be in need of protection or has failed to report information in accordance with section 18, the director may report the matter to the body or person that governs the professional status of the person or certifies, licenses, or otherwise authorizes or permits the person to carry on his or her work or occupation.

10. The protection of the identity of an informant in Part 3 of the legislation extends to legal (child protection) proceedings under Part 3 of *The Child and Family Services Act*. Although such legal proceedings are open to the media, they are closed to members of the public, and Section 75 contains a statutory "publication ban" in respect of the name and identifying information of any person involved in the proceeding as a witness:

Reporting not to identify persons involved

75(2) No press, radio or television report of a proceeding under Part II, III or V shall disclose the name of any person involved in the proceedings as a party or a witness or disclose any information likely to identify any such person.

11. It is trite to say that *The Child and Family Services Act* provides a legislative framework for the protection of children. Within that framework, there are provisions designed to encourage and support the reporting of concerns that a child may be in need of protection. It is submitted that the circumstances surrounding potential witnesses SOR#1, SOR#2, SOR#4 fall squarely within the protection of the legislation. Further, by the very nature of the work done by potential witnesses SOR#1, SOR#2, SOR#4, PHN and TM, and the fact that persons in these positions report child protection concerns with some frequency (as detailed in the affidavits of Regan Spencer and Lynda Tjaden), it is respectfully submitted that the Commissioner ought in his discretion to make the order requested.

B. Redactions

12. Reference is made to the Notice of Motion filed by the Department of Family Services and Consumer Affairs (the "Department"), asking the Commissioner for an Order, *inter alia*, that:

"Prior to documents becoming publicly available in the context of the Inquiry, the Commissioner redact the names and other identifying information of:

(a) sources of referral/informants ..."

13. Essentially the Department has asked the Commissioner to continue the effect of the Ruling on Redactions of the Commissioner dated December 2, 2011 as the Inquiry moves into the next stage, public hearings.

14. Should the Commissioner grant the Department's motion, such Order would respond to the relief requested, in relation to redactions, in the instant motion by potential witnesses SOR#1, SOR#2, and SOR#4.

15. The affidavit of Lynda Tjaden explains the nature of the work done by Public Health Nurses. While PHN and TM have not initially been identified as specific sources of referral, the affidavit of Lynda Tjaden, filed on behalf of potential witnesses PHN and TM, explains the circumstances within which Public Health Nurses and those that supervise them become sources of referral in child protection matters. The reasons for treating PHN and TM in like manner to previously identified sources of referral are no less compelling than for potential witnesses SOR#1, SOR#2, and SOR#4. These reasons flow both from the critical nature of the

services PHN and TM provide in the Population and Public Health program; as well as from what is submitted is the statutory purpose behind Sections 18 and 18.1 of *The Child and Family Services Act*: the protection of children.

C. Conclusion and Order Sought

16. It is respectfully submitted that there is no requirement to identify potential witnesses SOR#1, SOR#2, SOR#4, PHN and TM, either in the documentation tendered into evidence at the Inquiry, nor in any form of publishing, broadcasting, or otherwise communicating the names, faces or any other identifying information of these potential witnesses. In the alternative, if the Commissioner feels that justice would be served by permitting the media to report the evidence of these witnesses and apply some kind of a label to the witnesses, in order to preserve the ability of the Population and Public Health program and the Health Sciences Centre to deliver needed services and establish the trust of their clients, these witnesses request that the Commissioner direct that they be referred to by a generic label such as "health care professional."

17. Other witnesses have specifically requested that accommodations be made to allow them to testify in private. Potential witnesses SOR#1, SOR#2, SOR#4, PHN and TM respectfully request that the Commissioner consider their position and make an appropriate order, in his discretion, to accord any further considerations for their comfort, safety and privacy that he determines ought reasonably to be extended to other witnesses at the Inquiry, keeping in mind their professional roles detailed in the affidavit material.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11th day of April, 2012.



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