

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

**MOTIONS BRIEF ON BEHALF OF
POTENTIAL WITNESS DOE #3**

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. A motion has been filed on behalf of potential witnesses DOE #1, DOE #2, DOE #3 and DOE #4 for a publication ban on the basis that such an order is necessary to prevent a serious risk to the proper administration of justice.
2. This motion, made by potential witness DOE #3, is supplemental to the proper risk motion. DOE #3 ought to have been identified early in this process as a source of referral. As a source of referral, she would be entitled to the protection of *The Child and Family Services Act* (the “Act”). She was not identified as a source of referral and as a result, this motion has been filed.
3. The affidavit material filed in support of this motion contains an excerpt from an agency’s file material. The material shows that on March 6, 2006, DOE #3 made a phone call that was taken by agency worker Randy Murdock. Mr. Murdock recorded the phone call on the agency form entitled “REFERRAL SOURCE

INFORMATION". The form discloses that DOE #3 reported abuse committed by Carl Wesley McKay against a 5 year old female child.

4. DOE #3 qualifies as an informant under Section 18.1(1) of the Act. Special consideration ought to be provided to the position of the applicant because of the legislative protection provided for steps taken in performance of duties that arise pursuant to the Act.

5. Section 17 of the Act details circumstances whereby a child is in need of protection. Section 18 of the Act is a mandatory provision that applies to all members of society. It requires any person who has information that a child is in need of protection to report the information to an agency. Section 18 is an usual provision in the Canadian legislative scheme. It is a mandatory provision that requires a person to take action. It also makes it an offence for an individual to fail to report information as required under Section 18. Although there are other examples of mandatory provisions in our legislation, generally speaking, Canadian law does not make it mandatory to report an offence and, furthermore, does not make it an offence to fail to report an offence.

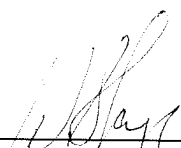
6. The applicant drew to the attention of child and family service workers the abuse suffered by Phoenix Sinclair. Had it not been for the telephone call made by DOE #3 it is not known whether or not the death of Phoenix Sinclair would ever have been discovered.

7. Pursuant to Section 18.1(2), no person shall disclose the identify of an informant, except as required in the course of judicial proceedings. It is submitted that the key phrase in Section 18.1 is “as required”. It is submitted that there is no requirement for this Inquiry to identify the applicant.
8. It is further submitted that the identification of the applicant in this Inquiry would serve no useful purpose. It would, in fact, weaken the child protection system rather than achieving the proper goal of strengthening the system. It is likely that the identification of the applicant would discourage people from abiding by their responsibilities under the Act.
9. In reviewing the two-pronged test set out in Dagenais/Mentuck, the applicant takes the following position:
 - a. the applicant has a right to rely upon the confidentiality protections afforded by Section 18.1 of the Act. Disclosure of her name and requiring her to testify in public would result in the loss of the protection that any informant is entitled to rely upon in fulfilling one’s obligations under the Act. To remove the protection of Section 18.1 results in a significant alteration of an individual’s role in the protection of children. There are no alternative

measures that prevent the risk to the proper protection of an informant and therefore to the proper administration of justice; and

- b. there is no advantage to be gained for the interests of the public, the right to free expression, or the efficacy to the administration of justice by disclosing the identify of the applicants or by requiring the applicants to testify in public.
10. It is submitted therefore that the Commission ought to grant the motion made by DOE #3, by declaring that the applicant is a Source of Referral, by ordering that the identity of the applicant not be disclosed and by ordering that the applicant be permitted to testify in private.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 14th day of February,
2013.



William S. Gange, counsel for DOE #3
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