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

REPLY 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

I N D E X

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I. INTRODUCTION

1. This Reply Brief is supplementary to the Authorities/ANCR's Motion Brief dated April 11, 2012. Cross-examinations on affidavits have taken place and the media group and others who oppose the application have filed their Briefs. The purpose of this Brief is to reply to the evidence and submissions made since our initial Brief was filed. We also rely on the list of documents set out in MGEU's latest Brief.

II. *DAGENAIS/MENTUCK* – THE EVOLUTION OF THE TEST

2. It is common ground that the *Dagenais/Mentuck* test is the proper analysis to be used in determining the issues in this application. The test originated in the Supreme Court's decision in *Dagenais*. The Court in *Dagenais* was required to reconcile the accused's interest in a fair trial with society's interest in freedom of expression.

3. In *Mentuck*, the accused's right to a fair trial was not in issue. Instead, it was the Crown that sought a publication ban in order to protect the safety of police officers and preserve the efficacy of undercover police operations. The Supreme Court reconfigured the test to account for the different purpose for which the publication ban was sought and the different effects it would have. While in *Dagenais* the test was framed in the specific terms of the case, it became necessary to frame it more broadly in *Mentuck* so as to allow explicitly for consideration of the interests involved in that particular case.

4. In setting out the revised test in *Mentuck*, Justice Iacobucci acknowledged that the test will also require modification in future cases where differing rights and concerns are at stake:

> *Indeed, in those common law publication ban cases where only freedom of expression and trial fairness issues are raised, the test should be applied precisely as it was in Dagenais. For cases where concerns about the proper administration of justice other than those two Charter rights are raised, the present, broader approach, will allow these concerns to be weighed as well. There may also be other cases which raise interests other than the administration of justice, for which a similar approach would be used, depending of course on the particular danger at issue and rights and interests at stake.*
>
> ***R. v. Mentuck*, [2001] 3 SCR 442 at para. 33 [TAB 1]**

III. THE PARAMOUNTCY OF THE BEST INTERESTS OF CHILDREN

5. In any legal proceedings involving children, it is common ground that the "best interests of children" is the paramount consideration. This principle is enshrined in all of the relevant statutes in Manitoba:

The Child and Family Services Act **(SM 1985-86, c. 8) [TAB 2]**

> *Declaration of Principles*
>
> *The Legislative Assembly of Manitoba hereby declares that the fundamental principles guiding the provision of services to children and families are:*
>
> *1. The safety, security and well-being of children and their best interests are fundamental responsibilities of society.*
>
> *2. The family is the basic unit of society and its well-being should be supported and preserved.*
>
> *3. The family is the basic source of care, nurture and acculturation of children and parents have the primary responsibility to ensure the well-being of their children.*
>
> *4. Families and children have the right to the least interference with their affairs to the extent compatible with the best interests of children and the responsibilities of society.*
>
> ***....***
>
> *Best interests*
>
> *2(1) The best interests of the child shall be the paramount consideration of the director, an authority, the children's advocate, an agency and a court in all proceedings under this Act affecting a child, other than proceedings to determine whether a child is in need of protection, and in determining best interests the child's safety and security shall be the primary considerations*

The Child and Family Services Authorities Act **(SM 2002, c. 35) [TAB 3]**

> *Preamble:*
>
> *WHEREAS the safety, security and well-being of children and families is of paramount concern to the people of Manitoba…*

IV. *CHARTER* RIGHTS VS. THE BEST INTERESTS OF CHILDREN

6. The Manitoba Court of Appeal recently commented on the competing rights at stake in this application:

> *While freedom of the press should be given a very high level of protection, preservation of the efficacy of the child protection system is of at least equal importance.*
>
> ***Canadian Broadcasting Corp. v. Manitoba (Attorney General) et al.,*** **2008 MBCA 94 (CanLII), para. 31 [TAB 4]**

7. This is the starting point for the analysis in this case. Manitoba's highest court has said that, at a very minimum, preserving the child welfare system should be on equal footing with freedom of the press. It might very well be more important, but if not, it is at least as important. This principle sets the context for this Application.

8. From this starting point, we observe that the highest courts in Canada have repeatedly held that the best interests of children take precedence and are the paramount considerations for courts - even over *Charter* rights:

> *As the Court has reiterated many times, freedom of religion, like any freedom, is not absolute. It is inherently limited by the rights and freedoms of others. Whereas parents are free to choose and practise the religion of their choice, such activities can and must be restricted when they are against the child's best interests…*
>
> ***P. (D.) v. S. (C.) Droit de la famille - 1150 (SOQUIJ)*****, , [1993] 4 S.C.R. 141 (QL), para. 107 [TAB 5]**
>
> *It would seem to be self-evident that the best interests test is value neutral, and cannot be seen on its face to violate any right protected by the Charter. Indeed, as an objective, the legislative focus on the best*

interests of the child is completely consonant with the articulated values and underlying concerns of the Charter, as it aims to protect a vulnerable segment of society by ensuring that the interests and needs of the child take precedence over any competing considerations in custody and access decisions.

> ***Young v. Young*, [1993] 4 S.C.R. 3 (QL), para. 173 [TAB 6]**

While the state acknowledges the need for the timely resolution of a child's placement, the state, in seeking custody of the parent's child, engages the parent's section 7 Charter rights. These rights necessitate that the parents be able to participate properly and fully in the trial. However, the parents' Charter rights may come into conflict with the best interests of the child. While a balance between these two criteria is preferred, in the event that such a balance cannot be found, the best interests of the child must prevail.

> ***Children and Family Services for York Region v. H.C.*, 2008 CanLII 45823 (ON SC), para. 19 [TAB 7]**

Freedom of expression, even when raised high by the Canadian Charter of Rights and Freedoms, does not protect conduct that violates the best interests of the child.

> ***VandenElsen v. Merkley*, 2002 CanLII 53228 (ON SC), para. 9 [TAB 8]**

The courts have long held the view that they are the protector of children and that in matters involving children the welfare of the child is the paramount consideration. I do not consider that the framers of the Charter intended to upset that special role of the court nor the principle that the best interest of the child should prevail.

> ***M. (R.E.D.) v. Dir. Of Child Welfare*, 1986 CanLII 138 (AB QB), para. 64 [TAB 9]**

I am of course mindful in these child protection proceedings of the overriding consideration in this case, enshrined in section 2(1) of the Act, which is the best interests of the children. It must be weighed here against the public's right to an open courtroom.

> ***Director of Child and Family Services v. D.M.P. et al.*, 2009 MBQB 133 (CanLII), para. 20 [TAB 10]**

V. A RECONFIGURED *DAGENAIS/MENTUCK* TEST

9. This Inquiry, and more pertinently this Application, must not become an exception to the rule that the best interests of children are paramount. The ultimate goal of this Inquiry is to make recommendations in the best interests of the children of Manitoba.

10. In keeping true to the words of Justice Iacobucci in *Mentuck*, the test needs to be reconfigured in this instance to recognize that the best interests of the children of Manitoba are the paramount consideration. When the balancing test is performed in this case, the competing interests of *Charter* rights and the best interests of children do not begin on equal footing.

VI. CONFIDENTIALITY IS IN THE BEST INTERESTS OF CHILDREN

11. At the heart of *The Child and Family Services Act* is the concept of confidentiality. The confidentiality of the system furthers the best interests of children. In his decision regarding the CBC's request for access to the exhibits filed in the Tracia Owen Inquest, Provincial Judge Guy explained the importance of confidentiality:

> *[30] I think it is important although probably unnecessary to comment on the obvious importance the confidentiality would have in the Child and Family Services context. If the purpose of such a Department is to provide support, care and assistance to families in need from the problems of neglect, abuse, etc. surely full and candid disclosure is essential.*
>
> *[31] In fact, such disclosure and communication about a child in care was one of the major issues for examination in this Inquest. Would any family member reveal abuse or neglect issues without such a promise of confidentiality? I think not. In my view if such protection of confidentiality is not guaranteed and the legislation not complied with, the Department would be unable to fulfill its commitment with children and families in Manitoba.*
>
> *[32] Section 76 of the Child and Family Services Act is in effect the rules of the Department. If you disclose so we can help you we will protect those disclosures. In my view an essential component of family treatment.*

[35] In Histed v. Law Society of Manitoba, 2005 MBCA 106 at p. 7, Justice Steel says:

> *"Exceptions to the open court principle, where the possibility of serious harm or injustice to a person justifies a departure, includes situations where courts have identified social values of superordinate importance to society that justify curtailment of public accessibility."*

[36] I believe that this is such a situation. The social value of affording confidentiality with respect to Child and Family Services documentation is of superordinate importance to society that justifies curtailment of public accessibility.

[37] That social value should not be lost because of the documentation being filed as an exhibit in Fatality Inquiries Act hearings.

[41] In some case law presented on the motion there were examples of how the court controlled the use of an exhibit (which in my view confirms my position that the exhibit does not become public property simply by becoming an exhibit) by editing the material. In my view that approach would be impossible even if desirable in this case. The documentation covered years of this child's life and her family's life and in considerable detail. Editing would be impossible in my view.

> ***Decision of Judge John Guy Re: Motion by Canadian Broadcast Corporation For Access to Exhibits Filed during the Inquest into the Death of Tracia Owen*** **Delivered the 6th day of July, 2007 [TAB 11]**

12. Judge's Guy's decision was upheld by the Court of Appeal in *Canadian Broadcasting Corp. v. Manitoba (Attorney General) et al.,* (supra, **TAB 4**).

VII. THE POTENTIAL HARM TO THE CHILD WELFARE SYSTEM

13. The substantial and unchallenged evidence of potential harm to the child welfare system was eloquently detailed by the MGEU in their latest Brief. We endorse those submissions.

14. While much good will come from this Inquiry, it is uncontested that there is the potential for the Inquiry to have unintended negative consequences for the efficacy of

the child welfare system and, in turn, the best interests of the children of Manitoba. We have a duty to do everything we can to mitigate these potential side effects.

15. The unchallenged evidence is that the media has a penchant for publishing sensational stories when it comes to coverage of child death reviews. The unchallenged evidence is that sensationalistic journalism will exacerbate the negative side effects that the Inquiry could have on the child welfare system.

16. It cannot be disputed that sensationalism has already occurred in the media's coverage of the Inquiry to date, and will continue. Cecil Rosner admitted as much on cross-examination **(page 88, Question 324-325):**

> *Q: You'd agree with me that this headline, this story, is an example of sensational journalism?* [Referring to the Sun's "Cowards" headline]
>
> *A: You know, I'm here to give you opinions in terms of -- or information in terms of my position with the CBC, so I feel a little bit uncomfortable commenting about editorial judgments made by other news organizations.*
>
> *Q: Well, I understand that it's uncomfortable to have to call down one of your colleague institutions. However, I think it's fair for me to ask for your confirmation that as a managing editor and someone who has years and years of experience in journalism, based on that to get your confirmation that is really a sensational headline.*
>
> *A: You could call it that.*

17. The public's reaction to the sensationalism is evidenced in the reader comments attached to the articles. It is clear from these reactions that the sensationalism has already provoked the very public reaction that the unchallenged evidence cautions against.

18. Moreover, Cecil Rosner also admitted on cross-examination that the efficacy of the child welfare system is not a major factor in the CBC's coverage of the Inquiry and that its coverage may cause harm to the child welfare system:

A: I don't think that's a primary objective of our reporting when it comes to these matters, to consider the efficacy of the [child welfare] *system.*

Q: And by efficacy I mean the well-being of the system. You don't want to hurt the system in covering the news on child protection cases?

A: We generally don't want to hurt individuals or institutions, but sometimes coverage of individuals and institutions can cause harm to those individuals and institutions.

Cross-Examination of Cecil Rosner, Page 34, Questions 134-135

Our principle responsibility is to find the truth out about important situations. If it transpires that by finding out the truth of an important situation some system is negatively affected, then that's not going to be a major factor in preventing our reporting the truth….

Cross-Examination of Cecil Rosner, Page 43, Questions 164

VIII. THE RESTRICTION SOUGHT IS MINIMAL

19. This point was also aptly made by the MGEU in their Brief and we endorse those submissions. The relief sought in this application will have absolutely no effect on the hearing itself.

20. The minimal nature of the restriction being sought is bolstered when one considers that this Inquiry is already going above and beyond in terms of access to information when compared to other proceedings involving child welfare.

21. There are at least two ways in which this Inquiry will allow greater access to media than is ordinarily the case in child protection matters. The first is that a video camera will be allowed to record every minute of the hearing. It is common ground that video cameras are not allowed in courts in Manitoba. It is further common ground that video cameras are not permitted at child death inquests in Manitoba either.

Cross-Examination of Cecil Rosner, Page 57, Question 231

22. Second, all in attendance will be given access to the public exhibits at the conclusion of each hearing date. A great deal of these exhibits will be CFS records that are subject to the confidentiality provisions of *The Child and Family Services Act*. The media's application for access to such exhibits in the Tracia Owen inquest was denied by Judge John Guy, which decision was upheld by the Manitoba Court of Appeal.

IX. THE MEDIA'S OWN PRACTICES AND POLICIES ON CONFIDENTIALITY

23. Just how minimal the restrictions sought are is illustrated by the media's own practices and policies when it comes to publishing identities.

24. There are many different circumstances where the media will not publish the identity of a person in a story pursuant to legislative restrictions:

a) Legislative bans such as those relating to adolescents or young offenders **(Cross-Examination of Cecil Rosner, page 63, Question 248)**;

b) Names or identities of victims of sex crimes **(Cross-Examination of Cecil Rosner, page 63, Question 249)**;

c) Names or identities of children or families subject to child protection proceedings **(Cross-Examination of Cecil Rosner, page 63, Question 250)**.

25. Moreover, there are a number of circumstances where the media voluntarily chooses not to publish the names or identities of certain individuals:

a) A vulnerable person if his or her identity is not essential to an understanding of the facts of the story

26. The CBC's Journalistic Standards and Practices document contains a policy of not publishing the identities of such individuals **(Cross-Examination of Cecil Rosner, page 64, Question 255**).

27. It is submitted that the publication of the identity of social workers testifying at this Inquiry is not essential to enable the public to understand the facts of the story.

28. Cecil Rosner was asked on cross-examination to explain why publishing the identity of a witness might be essential to an understanding of the facts of a news story on this Inquiry. His explanation boiled down to the importance of knowing the identity of the witness so that the particular background or track record of the witness could be investigated.

29. Mr. Rosner, however, did acknowledge that there is a distinction between the media knowing the identity of a witness and publishing the identity **(page 82, Question 310)**. This distinction alleviates the concerns raised by Mr. Rosner. The media will know the identity of every witness that testifies, regardless of whether they are subject to a publication ban. This will enable the media to conduct whatever research on the backgrounds and track records of these witnesses that it deems necessary and report on the findings.

30. We are left with no evidence as to why the publication of identities is necessary. We are certainly without evidence, expert or otherwise, that it would benefit the child welfare system to publish identities.

b) Confidential Sources in Journalism

31. The media will voluntarily refrain from publishing the identities of their own sources. This is done in a variety of circumstances for a variety of reasons. Cecil Rosner discussed the criteria for not publishing the name of sources at various points of his cross-examination:

> *There are certain circumstances where if we can determine that there's a legitimate fear of severe repercussions, job loss, something substantial…* **(page 68, Question 272)**
>
> *It has to be serious, it has to be observable and it has to be something that's more than just a preference or a whim* **(page 70, Question 278)**

Where there is a fear of reprisal **(Exhibit #4 to the Cross-Examination of Cecil Rosner)**

32. It is submitted that the evidence of harm to social workers and to the system as a whole easily meets the criteria of the media's own voluntary policies and practices regarding the publication of identities. The restrictions sought by the applicants are aligned with these policies.

33. The legitimacy of the harm is perfectly encapsulated by the following public comment:

"Whoever was the caseworker that took that poor kid back should be shot"

Exhibit "C" to the Supplementary Affidavit of Janet Kehler, affirmed April 4, 2012

34. There is no greater example of a fear of reprisal than a death threat. This is a serious, observable and legitimate threat which justifies not publishing social worker identities by the media's own policies.

X. THERE WAS NO SOCIAL WORKER MISCONDUCT IN THIS CASE

35. It is apparent that there is an assumption being made by the public, perpetuated by the media, that there are social workers to blame for Phoenix Sinclair's tragic death. That is to say, the media expects that the Inquiry will reveal that social workers providing services to Phoenix Sinclair were incompetent or negligent. This assumption is revealed in some of the media coverage of the Inquiry to date:

Yes, it will also eventually reveal those who failed in the performance of their duties, or who allowed the pressures of the job to justify a lack of humanity.

Winnipeg Free Press article entitled "Children's advocate off base" published June 11, 2012 [TAB 12]

It's expected the inquiry will expose massive holes and incompetence within the child and family services system, something that will surely cause great political embarrassment and harm to the current government.

…

It's judgment day, people. And everyone who works in the system should have to account for their actions. If you screwed up, you should have to face the music, just like everybody else. After all, a little girl was tortured and killed here.

Winnipeg Sun article entitled "Union Just Shameful" published August 24, 2011 [Ex. "G" to the Supplementary Affidavit of Janet Kehler, affirmed April 4, 2012]

36. It is conceded that the assumption being made is a reasonable one to make. After all, the facts of how Phoenix was tortured and killed are absolutely gruesome. The horrific details would lead to an assumption that there must have been some major mistakes on the part of the child welfare system.

37. However, it is clear from the reports that have investigated in detail the child welfare services provided to Phoenix and her family that there simply was nothing that any one person did or did not do that led to such a horrible fate for Phoenix. Not a single individual employed in the child welfare system has been disciplined as a result of their work on this file. This Commission has not filed any notices of alleged misconduct (as that term is defined in inquiries such as this) to any of the social workers scheduled to testify.

38. The media is at a disadvantage at this point because they do not know what the report writers have concluded. They do not know that no employee was disciplined. It is submitted that once this reality is appreciated by the media, it will become clear that the publication of identities of social workers is not essential to give the public a complete understanding of the facts.

39. The Authorities and ANCR would not oppose a publication ban that allowed for the media to make an application during the public hearings should they feel that the identity of a specific witness needs to be published for an essential understanding of the facts, as the media proposes with respect to Sources of Referral witnesses.

XI. THE CONDUCT AT ISSUE IS NOT DIRECTLY RELATED TO THE DEATH OF PHOENIX SINCLAIR

40. The conduct of the professional witnesses in other recent Manitoba inquiries was directly related to the event which resulted in the calling of an Inquiry. For example, in the Taman Inquiry, police constable Derek Harvey-Zenk rear-ended and killed Crystal Taman. Harvey-Zenk was charged with impaired driving causing death, refusing a breathalyzer test, dangerous operation of a motor vehicle causing death, and criminal negligence causing death. A plea bargain was struck whereby Harvey-Zenk pled guilty to dangerous driving causing death (a lesser charge) and the other charges were dropped. Public outcry over the plea and allegations that the investigation had been botched led to that Inquiry. Professional witnesses were directly responsible for the botched investigation and were called to answer for same.

41. Another example is the Sophonow Inquiry. Thomas Sophonow was wrongfully convicted of the murder of Barbara Stoppel. The public outcry was over the wrongful conviction. The wrongful conviction was as a result of improper conduct of the investigation of the death and prosecutorial misconduct in the criminal proceedings. There was a direct connection between the improper conduct and the event which caused the public outcry.

42. Such is not the case here. This Commission will not hear evidence that the actions or omissions of any single social worker were directly related to the tragic murder of Phoenix Sinclair by her mother and step-father.

XII. CONCLUSION

43. The best interests of the children of Manitoba should be the paramount consideration in this Application. The balancing that is required to be done does not begin with a balanced scale. The best interests of children take precedence over the minimal infringement of the *Charter* right to freedom of the press. So long as the restrictions on this *Charter* right serve the best interests of children and are as minimal as possible to accomplish this goal, the restrictions should be implemented. All steps to

reduce the exacerbation of the negative consequences of child death inquiries must be implemented because that is in the best interests of children.

44. The evidence in this Application suggests that the avoidance of sensationalistic journalism is in the best interests of children and that the restrictions sought are a minimal infringement on the freedom of the press. The restrictions will not hinder the media's ability to tell the story and are aligned with the media's own policies on non-publication of identities of confidential sources.

XIII. THE AUTHORITIES/ANCR'S POSITION REGARDING SOR'S

45. We understand that the SOR's are seeking to testify off-site with their names and faces hidden. In our view, this may go further than what is necessary to promote the efficacy of the child welfare system and the best interests of children.

46. The reason for this position relates to the fact that there are serious procedural fairness issues related to SOR's testifying off-site. Some of these witnesses will be challenged with respect to their credibility. That is to say, there will be questions as to whether some of these witnesses are even SOR's at all. Did they personally disclose what they say they disclosed to CFS? It will be necessary for the witness to be present in open court for a fair and proper cross-examination to be done.

47. Although the procedure proposed by the Commission for SOR testimony may go further than is necessary, we do not oppose it to the extent that a witness is found to qualify as an SOR. It is best to err on the side of strict confidentiality.

48. However, we are of the view that not all of the witnesses who claim to be SOR's are in fact SOR's. To date, the Commission has not provided the parties with the identities of the individuals who are claiming to be SOR's. As such, we are unable at this time to identify which SOR number we are challenging.

49. It is submitted that v*oir dires* ought to take place prior to their testimony to determine whether the individuals who claim to be SOR's are in fact SOR's. To the

extent the Commission determines they are not, those witnesses ought not to be afforded the treatment that actual SOR's receive.

XIV. REMEDIES SOUGHT

With Respect to Social Workers:

50. The MGEU, ICFS and the Authorities/ ANCR are all seeking the same relief. We have taken the liberty of jointly drafting a revised media protocol document, which simply revises the one that was already released by the Commission. We have highlighted in grey the areas that we have changed and have attached the document to this Brief at **TAB 13**. These changes reflect the relief that the applicants are seeking with respect to social worker witnesses that would be subject to the publication ban.

With Respect to SOR'S:

51. It is submitted that the Commissioner ought to provide the parties with the identities of the individuals claiming to be SOR's. If any party takes issue with the claim that an individual is an SOR, a *voir dire* should be held at the outset of the witness's testimony to determine the issue. Any individual who is determined to be a SOR will be subject to the restrictions proposed by the Commission.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of June, 2012.

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

REPLY 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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