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

SUPPLEMENTAL MOTIONS BRIEF ON BEHALF OF POTENTIAL WITNESSES DOE #1, DOE #2, DOE #3 AND DOE #4

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I. Developments since the first Motions Brief was Filed in this Matter:

1. A motion was filed on or about February 5, 2013 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. On February 6, 2013, the Commission set the motion to be heard on February 26, 2013 at 10:00 a.m.

2. A second motion, also returnable on February 26, 2013, was filed on or about February 13, 2013 on behalf of potential witness DOE #3. That motion seeks the further relief that DOE #3 be declared a source of referral pursuant to the the *Child and Family Services Act* on the basis that they reported to a child care agency that Phoenix Sinclair was or had been abused.

3. On February 19, 2013, Mr. Jay Funke, counsel for the Assembly of Manitoba Chiefs ("AMC") and the Southern Chiefs' Organization Inc. ("SCO"), who have been granted intervenor status at this Inquiry, advised that his clients had

instructed him to oppose the two motions set to be heard on February 26, 2013. Mr. Funke requested an adjournment of the motions on the basis that neither he nor anyone else from his office would be available to attend the February 26, 2013 hearing.

4. On February 22, 2013, Mr. Hafeez Khan, counsel for Intertribal Child and Family Services ("ICFS"), a party standing at this Inquiry, filed a motion and supporting material seeking that DOE #3 attend in person for cross-examination on their affidavit filed in this matter.

5. Mr. Hafeez Khan has also advised that his client is opposing both motions previously set to be heard on February 26, 2013.

II. The AMC and the SCO ought not to be Granted Intervenor Status in Respect of these Particular Motions

6. The circumstances of this case do not warrant the granting of intervenor status to Mr. Funke's client's in respect of the motions presently before the Commission. An adjournment on the basis of Mr. Funke's absence is therefore not warranted.

7. Queen's Bench Rule 13.01 reads (**Tab 1**):

> **Motion for Leave**
>
> **13.01(1)** Where a person who is not a party to a proceeding claims,
> (a) an interest in the subject matter of the proceeding;
> (b) that the person may be adversely affected by a judgment in the proceeding; or
> (c) that there exists between the person and one or more of the parties to the proceeding a question of law or fact in common with a question in issue in the proceeding;

the person may move for leave to intervene as an added party.
Order

13.01(2) On the motion, the court shall consider whether the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding and the court may add the person as a party to the proceeding and may make such order for pleadings and discovery as is just.

8. It is submitted that, even if Mr. Funke is able to demonstrate that his clients have an "interest" in the outcome of the motions, the Commission should, in any event, exercise its discretion to not permit the AMC and the SCO to intervene.

9. In *Mr. Pawn Ltd. v. Winnipeg (City)*, [1999] 2 W.W.R. 531 (Man. Q.B.) (**Tab 2**), Madam Justice Steele (as she then was) stated:

> ...where the intervenor is unable to clearly delineate for the court how its submissions will be useful and different from those of the other parties, the motion for intervention should be denied.

10. As well, a fact scenario not unlike that presently faced by this Commission was considered in *Greyhound Canada Transportation Corp. v. Motor Transport Board*, 2006 MBCA 140 ("*Greyhound*") (**Tab 3**). In that case, Greyhound Canada Transportation Corp. ("Greyhound") filed a motion seeking leave to appeal a decision of the Motor Transport Board (the "Board"). The Burntwood RHA ("the RHA") sought leave to intervene at the hearing of that motion. At the time, the RHA already had standing as "a member of the public entitled to make submissions at the public hearings" of the overarching Board proceedings.

11. Hamilton, J.A., writing for the Manitoba Court of Appeal, found that while the RHA had "interest in the subject matter" of Greyhound Canada's applications and its participation would not unduly delay or prejudice the determination of the

leave motion, its motion to intervene at the hearing of the motion was not to be allowed.

12. The RHA argued that it would bring "the voice of the public" to the hearing. The court held that while the RHA may have an interest in the outcome of the motion, it has "not demonstrated that its submissions will be useful or different from the arguments of the Board as to why leave to appeal should be denied".

13. Mr. Khan intends to make submissions on behalf of ICFS on February 26, 2013. Mr. Funke has produced no evidence whatsoever in support of the proposition that any submissions that might be made by the AMC and/or the SCO will be useful or different from those expected to be made by Mr. Khan. On this basis, the AMC and the SCO should not be granted intervenor status at the hearing of these motions. It is therefore submitted that the Commission ought to proceed with the February 26, 2013 hearin, notwithstanding Mr. Funke's absence.

III. There is no Bar to a Publication Ban

14. Mr. Khan submits that persons for whom the publication ban is sought have already been identified at the criminal trials of Karl Wesley MacKay and Samantha Kematch, as well as at the Inquiry herein.

15. It is submitted that same should be of no consequence in determining if a publication ban should be made at this time.

16. The Ontario Court of Appeal in *R. v. Morin*, 1997 CarswellOnt 400 ("*Morin*") (**Tab 4**) quoted with approval the decision of Dupont, J. in *R. v. McArthur* (1984),

13 C.C.C. (3d) 152 (Ont. H.C.) ("*McArthur*") at paras. 10-12. In *McArthur*, Mr. X had previously testified in criminal proceedings through which his identity was disclosed. In determining that Mr. X's identity ought not to be disclosed at the re-trial, Donnely, J. stated:

> The real effect of the publication of [X's] identity following his testimony was to jeopardize his safety. His experience went far beyond embarrassment and humiliation. [X] is an important witness in a serious criminal trial. By the nature of his testimony, it will draw extensive media coverage. His actual experience supports his expressed concerns. [X] testified that he would give evidence on the retrial more comfortably if his identity was not to be published. Although the particular neighbours have moved and [X] no longer works at Ontario Hydro, there is a reasonable expectation of continuing risk if his testimony at the retrial is publicized under his name. There was no sufficient change of circumstances demonstrated to support a belief that a similar societal aversion will not recur. The issue does transcend [X's] self-interest and does affect the administration of justice, warranting departure from the established rule of full publication.

17. It is submitted that this principle is applicable in respect of DOE #1, DOE #2, DOE #3 and DOE #4. It is true that the identities of the persons whose identities are now sought to be protected have been previously disclosed. Notwithstanding same, it has been demonstrated there is a reasonable expectation that each of those persons may face certain risk if their identities remain unprotected at this stage. The administration of justice as a whole will benefit substantially if these witnesses are permitted to testify under conditions that will remove fear from external threats.

IV. *Res Judicata* does not Apply

18. The principle of *res judicata* has no application whatsoever in the context of this Inquiry.

V. Conclusion

19. It is submitted therefore that the Commission ought to grant the publication bans and Source of Referral status sought in the within motions. As well, DOE #3 ought not to be compelled to attend in person for cross-examination on their Affidavit.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of February, 2013.

William S. Gange, counsel for DOE #1,
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