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

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SUPPLEMENTAL MOTION BRIEF OF INTERTRIBAL CHILD AND FAMILY SERVICES (ICFS)

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OVERVIEW

1. The law on publication bans and its application to this Commission of Inquiry has been extensively discussed during the publication ban hearings of July 4-6, 2012. At the conclusion of those hearings, this Inquiry has ruled and commented on the nature and purpose of public inquiries, the open court principle and the appropriate legal test to determine whether a publication ban should be granted.

2. There is a strong presumption against publication bans at a public inquiry. As already ruled by this Commission, the *Deganais/Mentuck* analysis requires that the reality of the risk be well-grounded in evidence. That risk cannot be merely speculative and must be supported by the evidence.

3. The Applicants simply do not meet the applicable standard for obtaining the remedy sought. The evidence before this Commission in support of the publication ban motion does neither identifies a serious risk nor establishes a connection between the publication of the Applicants' identities and a serious risk. To the contrary, the evidence establishes that the Applicants have not suffered sanctions of any kind as a result of prior publication of their identity during the criminal trial.

4. Sources of Referrals ("SOR's") are provided specific confidentiality protection under the Child and Family Services Act ("*CFS Act*"). That confidentiality has been extended to this Inquiry and only SOR's have been granted the extraordinary remedy of a publication ban in the public inquiry into the circumstances surrounding the death of Phoenix Sinclair.

5. The Applicant DOE #3 is not a Source of Referral ("SOR") as defined under the *CFS Act*. SOR status under the *CFS Act* is not discretionary and the Act provides clear criteria as to who meets that definition. Inherent in that definition is reporting with respect to a child who "is or might be in need of protection." DOE #3 simply does not meet this definition.

PART II - PUBLICATION BAN MOTION

6. The law on the issue of publication bans has already been extensively reviewed during the publication ban hearings of July 4-6, 2013. A brief review of the principles is provided below and ICFS otherwise relies on the principles and caselaw outlined in the Media Group's brief, previously filed with this Commission.

Dagenais / Mentuck test

7. The *Dagenais/Mentuck* test provides that discretionary action to limit freedom of expression/of the press in relation to judicial proceedings encompasses a broad variety of interests and that a publication ban should only be ordered when:

> (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

***R. v. Mentuck,* 2001 SCC 76 – Tab 17**

8. The burden of displacing the general rule of openness lies on the party making the application. This burden remains the same even if no party or intervener is present to argue the interests of the press and the public to free expression.

***R. v. Mentuck, Supra,* para. 38 – Tab 17**

The first Branch of the Degenais/Mentuck test

> "***such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk***"
>
> ***R. v. Mentuck*, 2001 SCC 76, para. 32 – Tab 17**

9. Three important elements are subsumed under the "necessity" branch:

    a. The risk in question must be a serious risk well grounded in the evidence. The evidentiary basis upon which an applicant for restricted publication relies, must go beyond a "general assertion" and must establish a very serious risk;

    b. The phrase "proper administration of justice" must be carefully interpreted so as not to allow the concealment of an excessive amount of information;

    c. The test requires the judge ordering the ban to consider not only whether reasonable alternatives are available, but also to restrict the ban as far as possible without sacrificing the prevention of the risk.

    ***R. v. Mentuck, Supra, paragraphs 34-36*, 39, 49 – Tab 17;**

10. The importance of a strong evidentiary basis cannot be overstated. It is precisely because the presumption that courts should be open and reporting of their proceedings should be uncensored is so strong and so highly valued in our society that the judge must have a convincing evidentiary basis for issuing a ban.

    ***R. v. Mentuck, Supra*, para. 39 – Tab 17**

11. The evidentiary basis upon which an applicant is for a publication ban relies, must go beyond a "general assertion" and must establish a very serious risk.

***Toronto Star Newspapers Ltd. v. Ontario,* [2005] 2 S.C.R. 188, par.10 – Tab 21**

The risks raised by the Applicants

12. The Applicants allege risk to their safety and well-being without the protection of a publication ban. Doe #3 further seeks a publication ban to protect the identity of DOE's #1 and #2.

Applicant's Motion's Brief, paragraph 3

13. The Applicants are concerned that they will suffer possible verbal or physical harassment if their identities are made public.

Affidavits of DOE's #1, #2, #3, each at paragraph 5

14. DOE's #1 and #3 are concerned of loss of their employment if their identities are made public.

Affidavits of DOE's #1 and #3, each at paragraph 5

15. The Applicants also have a general concern for their mental health, physical health and safety if they testify at the Inquiry without the protection of a publication ban.

Affidavits of DOEs #1, #2, each at paragraph 6;

Affidavit of DOE #3, paragraph 7

The Evidence

16. The Applicants all rely on similar evidence of risk.

17. The Applicants state that testifying at the criminal trial was stressful and they were concerned of possible retribution as a result of their testimony.

Affidavits of DOE's #1, #2, #3, each at paragraph 2

18. Following the arrest of Wes McKay, the Applicants experienced instances of harassment from people that knew of their relation to Wes McKay.

Affidavits of DOE's #1, #2, #3, each at paragraph 3

19. The Applicants have been advised by their counsel that the Commission Office has been advised of threats of the safety of witnesses testifying at the Inquiry.

Affidavits of DOEs #1, #2, #3, each at paragraph 4

20. The Applicants DOE's #1, #2, and #3 have already testified at the criminal trial. They were not subject to a publication ban and their identities were widely publicized. Publication occurred in both print and digital media, as well as in two reported cases currently available on a public website known as CanLII.

Transcript of the cross-examination of DOE #3, pages 15 and 18

21. The identity of DOE's #1 and #3 has already been publicized in relation to this Inquiry. Their identities were disclosed during public hearings and documents

identifying them have been tendered into evidence and publicized on the Inquiry website.

See excerpts of transcript of Inquiry Hearings for January 16, 2013 – Tab 14;

Disclosure document 0779 – Tab 11;

Disclosure document 0781 – Tab 12;

Disclosure document 1802 – Tab 13.

22. There is currently no motion to seek a publication ban with respect to the criminal court file, nor are the Applicants seeking to have their identities redacted from existing websites in relationship to the criminal trial.

Transcript of the cross-examination of DOE #3, pages 16-18, 20

23. The Applicants' seek a publication ban only with respect to this Inquiry. The Applicants are not seeking to forbid references to the criminal matter or any other matter in which the Applicant's identities have already been publicized. The Applicants are seeking a permanent publication ban on anyone (media or individual members of the public) from communicating the identities of the Applicants in relation to this Inquiry.

Transcript of the cross-examination of DOE #3, pages 16 and 17

The risk is not sufficiently grounded in the evidence

24. The evidence simply does not connect the identification of the Applicants to serious risk. In fact, the evidence suggests the exact opposite – despite prior publication of their identities, there has been no incidences of harm or risk of harm associated with the publication of their identities.

No harm resulting from prior publication

25. There is no evidence that prior publication of their names with respect to the criminal trial resulted in a serious risk to the Applicants.

See affidavits of DOE's #1, #2, #3.

26. The only evidence of harm is that of "bullying and harassment" from people who knew of the Applicants' respective relationship with Wes McKay. Thish occurred after the arrest of Wes Mckay. The evidence is unclear as to the specifics of the "bullying and harassment." As the arrest occurred long before the criminal trial, it must be assumed that the people in question were already aware of the Applicants' relationship with Wes McKay and thus this treatment did not arise from the publication of their identities.

Affidavits of DOE's #1, #2, #3, each at paragraph 3

Risk of harm is subjective

27. It is not doubted that the Applicants are apprehensive about testifying given the circumstances of this case and their personal involvement. This Commission must, however, base its decision on the evidence before it. That evidence must be objective and reliable. The Applicants are aware of the high evidentiary standard in obtaining a publication ban and have had over 13 months to prepare and present such evidence to this Commission. It is respectfully submitted that the evidence in support of the motion for a publication ban is insufficient and does not meet the standards that have been applied by Canadian courts and by this Inquiry.

28. The Applicant DOE #3's concern arising from the alleged threat to all Inquiry witnesses is hearsay. At the time of swearing her affidavit, DOE #3 was unaware that the threat was treated as medium to low risk by the police or that no other incident arose from that threat. The concern raised by DOE #3 is speculative and not grounded in the evidence.

Affidavit of DOE #3, para. 4;

Transcript of the cross-examination of DOE #3, pages 21-23.

29. The concern regarding the loss of employment is without foundation. Firstly the loss of employment under these circumstances would be in breach of employment laws. Secondly, there is no reliable evidence that co-workers are not already aware of the Applicants' relationship with Wes McKay. Thirdly, there are no reasonable grounds for believing that the discovery of their relationship with Wes

McKay would result in verbal or physical harassment from co-workers, or loss of employment. There is no evidence of any past incidences of harassment arising from the publication of their identities.

Affidavits of DOE's #1, #3, each at paragraph 5

Transcript of the cross-examination of DOE #3, pages 12 and 13.

Existence of alternate means to address the Applicants' concerns

30. The Applicants must also satisfy this Commission that there are no reasonable alternative measures available to prevent the risk.

***R. v. Mentuck*, *Supra*, para. 35 – Tab 17**

31. The Applicants seek the most extreme ban available to witnesses testifying at this Inquiry; this remedy has only been provided to those whose identities are protected under law. The risk raised by the Applicants, if accepted by this Commission, does not require such an extreme remedy.

32. This Commission has inherent jurisdiction over its own process and must restrict the ban as far as possible without sacrificing the prevention of the risk. The risk raised by the Applicants relates to the publication of their identities; no evidence is provided that explains why *viva voce* testimony cannot be provided.

The First Branch of the Dagenais/Mentuck Test has not been met

33. The Applicants are seeking to interfere with *Charter* rights and must demonstrate a "convincing evidentiary basis" of a real and substantial risk arising out of the publication of their identities. The evidence before this Commission simply falls far below the applicable standard. The Applicants are already publicly-known; their identities have already been widely publicized. The identity of two of the Applicants has already been disclosed during the course of the Inquiry hearings. Despite this publicity, the Applicants have not tendered any evidence of harm or risk associated with past publicity. The concern of risk is not grounded in the evidence.

The Second Branch of the *Dagenais/Mentuck* test

> **"*the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.*"**
>
> ***R. v. Mentuck, Supra, para. 32* – Tab 17**

34. The onus is on the Applicants to demonstrate that the benefit of the reduction in risk outweighs the negative effects the ban will have on the rights and interests of the public, including the effects on the right to free expression and the efficacy of the administration of justice.

> ***R. v. Mentuck, Supra*, para 32. – Tab 17**

35. Courts in Canada have consistently resisted applications that suppress the names or identities of witnesses. *In F. P. Publications (Western) Limited v. Conner Prov. J.* the Manitoba Court of Appeal rejected an attempt to allow witnesses to testify *in camera* to protect their identities. The Court cited the dictum of Lord Atkinson in *Scott v. Scott*, [1913] A.C. 417 at 463 (H.L.):

> The hearing of a case in public may be, and often is, no doubt, painful, humiliating, or deterrent both to parties and witnesses, and in many cases, especially those of a criminal nature, the details may be so indecent as to tend to injure public morals, but all this is tolerated and endured, because it is felt that in public trial is to found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect.
>
> ***F. P. Publications (Western) Limited v. R.* 1979 CarswellMan 128, para. 15 – Tab 18**

36. The Court later stated in *F. P. Publications (Western) Ltd.*:

> There is nothing unusual about reluctant witnesses. There are enormous numbers of witnesses in both civil and criminal disputes who find it embarrassing, inconvenient, damaging, even dangerous, to testify. Yet there are few known cases where the court has protected a witness from such hazards by clothing the witness with the anonymity of a closed courtroom.

***F. P. Publications, Supra*, para. 38 – Tab18**

37. This Commission must also consider the nature of the evidence to be tendered by the witness seeking a publication ban. This includes whether the credibility of the witness may be called into question.

***R. v. N.S.*, 2012 SCC 72 – Tab 19**

Effectiveness of the publication ban

38. In weighing the benefit of a proposed publication ban the court must not only consider the objective of the ban but also its likely actual effects.

***Dagenais v. Canadian Broadcasting Corporation*, [1994] 3 S.C.R. 835, para. 95 – Tab 20**

39. If the proposed ban will result in only partial achievement of its object the test requires the court to consider the effects that will actually result from the ban in weighing it against the infringement of freedom of expression.

***Dagenais, Supra*, paras. 92 and 93 – Tab 20**

40. The effectiveness of a publication ban under these circumstances is questionable. The identities of the Applicants are already widely publicized and are easily accessible. The identities of DOE's #1 and #3 have already been publicly disclosed during the course of the Inquiry hearings. The criminal court file is available to the public. The Applicants are not seeking a ban from disclosing evidence or information available with respect to the criminal trial, nor are they seeking that their identities be redacted from currently-available documents on the internet. The evidence given at this Inquiry will be very similar to the evidence and information that already forms a part of the public record.

41. More importantly, this Commission has already acknowledged that the identity of DOEs #1 and #2 are publicly known and cannot be protected. In the Ruling on Redactions, December 2, 2012, at page 9, this Commission stated:

> "The next category where it is submitted redaction should occur relates to the identity of children who were 18 years of age or younger at the time a record was created. Where it can be avoided, identity protection should be afforded to those of that young age who were living in or were otherwise involved in a family setting that found its way into Child and Family Services records or other similar documents. One instance where it cannot be avoided is in the case of Phoenix Sinclair herself. **Another is the two sons of the male participant in the murder of Phoenix Sinclair. They gave evidence at the criminal proceeding and their identity is known and cannot be protected.**"

Ruling on Redaction – ICFS Book of Authorities, page 9 – Tab 2

42. It is submitted that this Commission's rationale for not granting a publication ban to DOE's #1 and #2 logically extends to DOE #3.

PART IV - MOTION FOR SOR STATUS

The definition of a "Source of Referral"and relevant provisions of the CFS Act

43. A Source of Referral is a person who, because a reasonable belief that a child is or might be in need of protection, is under a legal obligation to report the information to an agency, parent or guardian of the child. Apart from the general confidentiality provisions under ss. 75 and 76 of the *CFS Act* (applicable to all information/records/witnesses), the informant has limited and specific confidentiality protection only against the family of the child in need of protection and against the person who is believed to have caused the child to be in need of protection. Failure to report a child in need of protection is an offence; disclosure of the identity of the informant to the family of that child or the person who is believed to have caused the child to be in need of protection is also an offence.

Reporting a "child in need of protection"

44. Sections 18(1) of the *CFS Act* creates the legal obligation to report a child believed to be 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.

45. An essential element of the definition of a SOR is a "child in need of protection". A *child in need of protection* is defined at s.17 of the *CFS Act*:

> 17(1) For purposes of this Act, a child is in need of protection where the life, health or emotional well-being of the child is endangered by the act or omission of a person.
>
> 17(2) Without restricting the generality of subsection (1), a child is in need of protection where the child
>
> (a) is without adequate care, supervision or control;
>
> (b) is in the care, custody, control or charge of a person
>
> (i) who is unable or unwilling to provide adequate care, supervision or control of the child, or
>
> (ii) whose conduct endangers or might endanger the life, health or emotional well-being of the child, or
>
> (iii) who neglects or refuses to provide or obtain proper medical or other remedial care or treatment necessary for the health or well-being of the child or who refuses to permit such care or treatment to be provided to the child when the care or treatment is recommended by a duly qualified medical practitioner;
>
> (c) is abused or is in danger of being abused, including where the child is likely to suffer harm or injury due to child pornography;
>
> (d) is beyond the control of a person who has the care, custody, control or charge of the child;
>
> (e) is likely to suffer harm or injury due to the behaviour, condition, domestic environment or associations of the child or of a person having care, custody, control or charge of the child;
>
> (f) is subjected to aggression or sexual harassment that endangers the life, health or emotional well-being of the child;
>
> (g) being under the age of 12 years, is left unattended and without reasonable provision being made for the supervision and safety of the child; or
>
> (h) is the subject, or is about to become the subject, of an unlawful adoption under *The Adoption Act* or of a sale under section 84.

Confidentiality protection for SOR's

46. For the obvious policy reasons as described in the Ruling on Redaction, section 18.1(2) of the *CFS Act* provides specific confidentiality protections to SOR's in addition to the general confidentiality provisions of ss. 75 and 76 of the *CFS Act*.

See Ruling on Redactions, December 2, 2011, pages 7- 9.

47. Section 18.1(2) reads:

> 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.

48. "Family" is defined under s.1(1) of the CFS Act as:

> **"family"** means a child's parent, step-parent, siblings, grandparent, aunt, uncle, cousin, guardian, person *in loco parentis* to a child and a spouse or common-law partner of any of those persons.

49. SOR's otherwise enjoy the same confidentiality protections provided to potential individuals/information under the *CFS Act*, primarily at sections 75 and 76.

50. Section 75 of the *CFS Act* gives confidentiality protection against the public to all witnesses at CFS trials:

> 75(1) **All proceedings** under Parts II, III and V, other than a proceeding under *The Summary Convictions Act*, **shall be closed to the general public but shall be open to representatives of the press,** radio and television unless the court, on application, is satisfied that the presence of such representatives would be manifestly harmful to any person involved in the proceedings.
>
> 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**.

51. Section 76 and more specifically s. 76(3) gives broad confidentiality protection to all records/information obtained or created under the *CFS Act*.

> **See CFS Act (excerpts) - Tab 15**

52. The specific confidentiality protection given to an SOR under the *CFS Act* is limited only to the family of the child or the person causing the protection concern. This specific confidentiality protection no longer applies if the SOR testifies at a CFS trial (see s.18.1 *CFS Act*) at which point confidentiality is governed by s.75, which applies to all witnesses at CFS proceedings. As such, if an SOR is testifying in a CFS proceeding, his/her identity is disclosed.

Offence to fail to report or to disclose identity of SOR

53. Section 18.3 of the *CFS Act* makes it an offence to fail to report a child in need of protection and to disclose the identity of an informant to the family of the child or the person who is believed to have caused the child to be in need of protection:

> 18.3 **Where a person**,
>
> (a) through an act or omission of the person, causes a child to be a child in need of protection as provided in section 17;
>
> (b) fails to report information as required under section 18;
>
> (c) **discloses the identity of an informant in contravention of subsection 18.1(2)**; or
>
> (d) dismisses, suspends, demotes, disciplines, harasses, interferes with or otherwise disadvantages an informant in contravention of subsection 18.1(3);
>
> **the person is guilty of an offence** and is liable on summary conviction to a fine of not more than $50,000. or imprisonment for a term of not more than 24 months, or both.

54. Accordingly, it is an offence to fail to report that a child is or might be in need of protection and it is an offence to disclosure the identity of an SOR to the family of the child or to the person who is believed to have caused that child to be in need of protection.

Duty to report the death of a child

55. The duty to report the death of a child lies in *The Fatality Inquiry Act*.

56. Section 6(1) of *The Fatality Inquiries Act* reads:

> **Reporting deaths**
>
> 6(1) A person who is a witness to or has knowledge of a death to which clause 7(9)(a), (b), (c) or (d) applies shall immediately report the death to a medical examiner, an investigator or to the police.

57. Section 7(9)(a(ii) and (d) provide:

> 7(9) Subsection (5) applies to a death where …
>
> (a) the deceased person died…
>
> (ii) by an act of suicide, negligence or homicide…
>
> (d) the deceased person is a child.

58. *The Fatality Inquiries Act* does not give confidentiality protection to informants.

It is not an offence for failing to report a death.

59. The duty to report the death of a child thus lies in *The Fatality Inquiries Act* and not in the *CFS Act*.

Doe #3 does not meet the definition of an SOR

60. DOE #3 reported the death of a child. This was reported to both the agency and to the Winnipeg Police Service. There is no question that the authorities were contacted to disclose the murder of a child. DOE #3 believed that the child was murdered; this is what was reported.

> **Cross examination of DOE #3, page 6, line25; page 7, lines 1-10, 17-25; page 8-9;**
>
> **Affidavit of Kalyn Bomback, sworn, 13th February, 2013, Exhibit "A";**
>
> **Affidavit of Bobbi Rachelle Lee, affirmed February 22, 2013, Exhibits "B", "C" and "D".**

61. Accordingly, DOE #3 is simply not an SOR under the *CFS Act*, but rather an informant of a murder pursuant to s.6(1) of the *Fatality Inquiries Act*. Sections 18 and 18.1 of the *CFS Act* do not apply with respect to DOE #3.

62. This interpretation is in accordance with the policy rationale for the special confidentiality protection afforded to SOR's under the *CFS Act*. This Commission, in its Ruling on Redactions, applied the law and underlying policy rationale in determining that DOE #3 is not an SOR. After reviewing the policy rationale for providing confidentiality to SOR's this Commission stated:

> I agree and before distribution of the documents the identities of those determined by Commission Counsel as falling within the "informant" category will be redacted.
>
> **Ruling on Redactions, December 2, 2011, page 9 – Tab 2**

63. DOE #3 was subsequently not identified by this Commission Counsel as an SOR; the Applicants' identities were not redacted prior to the distribution of the Commission Disclosure Documents (whereas the identities of SOR's were redacted).

64. It is submitted that Commission Counsel made the correct assessment on the status of DOE #3 as a non-informant under the *CFS Act*. DOE #3 does not meet the definition of an SOR under the *CFS Act*. This determination should not be reversed.

PART V - CONCLUSION

65. This Commission, like any tribunal or court, must make its determination based on the evidence before it and in accordance with the relevant law. The law is clear in that the onus is on the individual seeking the publication ban to provide clear and convincing evidence of a serious risk to the administration of justice. Such clear and convincing evidence has not been provided to this Commission. On this basis alone, the motion for a publication cannot succeed.

66. The motion for SOR status is inconsistent with the law. SOR status under the *CFS Act* is not discretionary; the *CFS Act* defines an SOR and provides specific confidentiality protection only to those individuals who meet that definition. DOE #3 does not meet this legal definition.

67. Lastly, this Commission has already made determinations on the issues now being re-raised by the Applicants. This Commission has already turned its mind to whether a publication ban can/should be issued for DOE's #1, #2, and #3. This Commission ruled that their identities cannot be protected. Equally, this Commission has already determined that DOE #3 is not an SOR. Those determinations were made in December, 2011. The issues have been settled.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 7th DAY OF MARCH, 2013.

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