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COMMISSION OF INQUIRY INTO THE CIRCUMSTANCES  
SURROUNDING THE DEATH OF PHOENIX SINCLAIR

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The Honourable Edward (Ted) Hughes, Q.C.,  
Commissioner

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Transcript of Proceedings  
Public Inquiry Hearing,  
held at the Winnipeg Convention Centre,  
375 York Avenue, Winnipeg, Manitoba

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TUESDAY, FEBRUARY 26, 2013

## APPEARANCES

MS. S. WALSH, Commission Counsel

MS. K. MCCANDLESS, Associate Commission Counsel

MR. R. MASCARENHAS, Associate Commission Counsel

MR. S. PAUL, for Department of Family Services and Labour

MR. H. KHAN, for Intertribal Child and Family Services

MR. D. IRELAND, for Mr. Nelson Draper Steve Sinclair, and  
Ms. Kimberly-Ann Edwards

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2 PROCEEDINGS CONTINUED FROM FEBRUARY 7, 2013

3

4 THE CLERK: We're now on the record.

5 THE COMMISSIONER: There are presently three  
6 motions before me. The first brought by Mr. Gange on  
7 behalf of witnesses DOE 1, DOE 2, DOE 3 and DOE 4, dated  
8 the 5th of February, 2013, and which it was agreed would be  
9 argued today.

10 The relief sought in that motion is as follows:

11

12 "(a) That the Commissioner  
13 prohibit any form of publishing,  
14 broadcasting or otherwise  
15 communicating by television,  
16 internet, radio, in print or by  
17 any other means, the name, face or  
18 identity of witnesses DOE #1, DOE  
19 #2, DOE #3 and DOE #4;

20 (b) That the Commissioner order  
21 that witnesses DOE #1, DOE #2, DOE  
22 #3 and DOE #4 provide their  
23 testimony by means of video  
24 conference, the video portion of  
25 which shall be visible only to the

1 Commissioner and the audio portion  
2 of which will be audible in the  
3 hearing room;

4 (c) That the witnesses be  
5 referred to for the purpose of  
6 this hearing as DOE #1, DOE #2,  
7 DOE #3 and DOE #4;

8 (d) Such further and other relief  
9 as counsel may advise and the  
10 Commissioner may allow."  
11

12 The second motion, also brought by Mr. Gange on  
13 behalf of his witness DOE #3, is dated February the 13th,  
14 2013 in which the following relief is sought:

15  
16 "(a) That the Commissioner declare  
17 DOE #3 to be a Source of Referral;

18 (b) That the Commissioner  
19 prohibit any form of publishing,  
20 broadcasting or otherwise  
21 communicating by television,  
22 internet, radio, in print or by  
23 any other means, the name, face or  
24 identity of witness DOE #3;

25 (c) That the Commissioner order

1                   that witness DOE #3 provide her  
2                   testimony by means of video  
3                   conference, the video portion of  
4                   which shall be visible only to the  
5                   Commissioner and the audio portion  
6                   of which shall be audible in the  
7                   hearing room;

8                   (d) Such further and other relief  
9                   as counsel may advise and the  
10                  Commission may allow."

11

12                  The third motion is brought by Mr. Khan on behalf  
13                  of his client, the Intertribal Child and Family Services.  
14                  It is dated February 22nd, 2013, in which the following  
15                  relief is sought:

16

17                   "(1) That the Commissioner compel  
18                   DOE #3 to attend in person for the  
19                   cross-examination of her affidavit  
20                   filed and served in support of her  
21                   motion for a publication;

22                   (2) Such further and other relief  
23                   as counsel may advise and the  
24                   Commission may allow."

25

1           Rule 53 of our Rules of Procedure provides:

2

3           "Evidence on a motion may be given  
4           by affidavit. Where a party to  
5           the motion has served every  
6           affidavit on which the party  
7           intends to rely, the party may  
8           cross-examine the deponent of any  
9           affidavit served by a party who is  
10          adverse in interest to the  
11          motion."

12

13           So pursuant to that rule, Mr. Khan, on behalf of  
14          his client, is entitled to conduct the examination he  
15          requests, a request that was not formally made until last  
16          Friday.

17           Considering the interruption that this will cause  
18          in our schedule, one has to assume there are good and sound  
19          reasons for making the request. I am advised by Commission  
20          counsel that Messrs. Gange and Khan have worked out a  
21          process for the cross-examination which will be conducted  
22          later today. It is most unfortunate that these  
23          arrangements could not have been made earlier so as to  
24          allow for argument today on Mr. Gange's two motions. Had  
25          that been possible, it would have allowed for the

1 preparation of my ruling and we would have kept on schedule  
2 with the four days of sittings for next week.

3 That schedule is now not possible as my rulings  
4 on Mr. Gange's two motions are necessary before most of the  
5 witnesses scheduled for next week can testify.

6 The transcript of the cross-examination will have  
7 to be prepared, redacted and distributed prior to the  
8 presentation of submissions on the two motions. With Mr.  
9 Gange out of the jurisdiction after today, the presentation  
10 of the submissions cannot occur until his return on March  
11 the 11th. Submissions will be made commencing at 9:30 on  
12 that day, to be followed by my rulings and the calling of  
13 the remaining witnesses.

14 I would like to ask all counsel to stay today  
15 behind, after we adjourn, and meet with Commission counsel  
16 to see if we can pick up some time as the witnesses in  
17 phases two and three are often busy people who have agreed  
18 to the allotted time and I would therefore very much like  
19 to get back on schedule.

20 One further matter to mention is a letter from  
21 Mr. Funke dated February 21st, 2013 written on behalf of  
22 his clients, the Assembly of Manitoba Chiefs and the  
23 Southern Chief Organization, who have intervenor status at  
24 this phase of the inquiry and standing as parties in phases  
25 two and three. He asks that the motion previously agreed



1 to be heard today be adjourned. He is aware of the second  
2 motion brought by Mr. Gange and was obviously made aware of  
3 Mr. Khan's motion with respect to the cross-examination of  
4 witness DOE #3. He indicates his intention to "observe"  
5 the examination of the witness on her affidavit while  
6 acknowledging he would not be a participant in the  
7 proceedings other than in the "observation" role.

8 Both of Mr. Gange's motions are adjourned until  
9 March the 11th. With Mr. Gange leaving the city for 10  
10 days after today, I am not prepared to interfere with  
11 today's scheduled cross-examination of DOE #3 on her  
12 affidavit, which Mr. Funke cannot attend because of his  
13 present absence from the city. However, he, along with all  
14 other counsel, will receive a copy of the redacted  
15 transcript of the cross-examination so instead of  
16 "observing", his opportunity will be to "read".

17 In no sense would it be in the public interest  
18 for me to rule otherwise than I just have with respect to  
19 Mr. Funke's request to be present to "observe" the  
20 examination.

21 That leads me to my final observation this  
22 morning. I have all counsel have one or more associate  
23 counsel at table with them. I expect that when absences of  
24 lead counsel are necessary, that better use will be made of  
25 "assisting" counsel. We all have a responsibility to move

1 the inquiry to its conclusion and I believe the adherence  
2 to that suggestion will assist us reaching that goal.

3 Now, those are the matters that I believe  
4 required our attention this morning. Before we adjourn, is  
5 there anything else that counsel, any counsel, wishes to  
6 speak to? Mr. Khan?

7 MR. KHAN: Yes, Mr. Commissioner, thank you very  
8 much. And I, I, I listened to your comments this morning.  
9 I just wanted to put on the record and make it clear that,  
10 Mr. Commissioner, there was an issue with respect to the,  
11 the ability to cross-examine the affiant. I did bring it  
12 to the Commission's attention and Mr., Mr. Gange and I did  
13 try to work it out. Ms. Walsh returned yesterday, spoke  
14 with both of us, and in the end I did somewhat reluctantly  
15 agree to cross-examine in the way that Mr. Gange has  
16 requested. So I really -- my client is very interested in  
17 maintaining the integrity of the, of the Commission was  
18 well as not causing delays, and I certainly hope that you,  
19 Mr. Commissioner, don't view this delay as, as the result  
20 of any of our actions or not.

21 THE COMMISSIONER: No. I assume that you've got  
22 a good and proper reason for making the request, and it has  
23 been granted.

24 MR. KHAN: And I can advise that I would have  
25 made a formal request had I thought that the Commission was

1 able to deal with it last week, but I was told that the  
2 Commission was not available to deal with it last week.

3 With respect to the schedule, there is an interim  
4 ban in place and we did proceed with a number of witnesses  
5 from Fisher River before we broke based on the interim ban.  
6 I think we can continue on that basis and not interrupt the  
7 schedule next week. The witnesses who are testifying next  
8 week are not Mr. Gange's clients, and if we continued on  
9 the basis of the interim ban that would, that would stop,  
10 at least help with any delays on the inquiry.

11 THE COMMISSIONER: Well, let me assure you, I  
12 wish you were correct, but I don't think that Commission  
13 counsel takes that view, and we'll ask Commission counsel  
14 to speak to that.

15 MR. KHAN: I --

16 THE COMMISSIONER: And if, if you and they can  
17 work something out, why, believe me, I'd be most pleased.  
18 But let's -- anything further you want to say before I ask  
19 Commission counsel to speak?

20 MR. KHAN: No. I wasn't aware that Commission  
21 counsel had that view. I, I assumed that were going to  
22 proceed on the 4th as scheduled.

23 THE COMMISSIONER: Well, let us hear Commission  
24 counsel on the point.

25 MS. WALSH: Mr. Commissioner, you're absolutely

1 correct that we did look at this very carefully based on  
2 the interim order that was made, and have determined that  
3 it, it really, given the nature of the evidence that would  
4 be adduced during that first week, both documentary  
5 evidence and oral testimony, it really would make Mr.  
6 Gange's issue moot or the opposition to it moot, and, and  
7 really would not be practical.

8 THE COMMISSIONER: Well, and that is, I take it,  
9 because reference would, that would have to be made to the  
10 one or more of the four DOEs.

11 MS. WALSH: Yes. Throughout, throughout the, the  
12 evidence that we --

13 THE COMMISSIONER: The, throughout the  
14 questioning?

15 MS. WALSH: Yes.

16 THE COMMISSIONER: And the presentation of  
17 documents?

18 MS. WALSH: Correct. Yeah, so we certainly did  
19 look at it with a view to being pragmatic but it really, it  
20 really doesn't, doesn't work.

21 THE COMMISSIONER: No, that's the information  
22 that Commission counsel gave me yesterday, Mr. Khan. If  
23 you think you can convince them otherwise I'd be a very  
24 happy man.

25 MR. KHAN: Well, I thought I could convince them

1 otherwise --

2 THE COMMISSIONER: But you, you heard --

3 MR. KHAN: -- but ...

4 THE COMMISSIONER: -- her argument.

5 MR. KHAN: I did. Again, I -- my client really  
6 doesn't -- we prefer to proceed as, as scheduled. I can  
7 advise, and I'm sure everyone understands, it's been, just  
8 like it's been on every other witness, my clients -- my --  
9 the witnesses that I represent would really like to come,  
10 testify and, and not have this hanging over their heads  
11 anymore.

12 The, the motions filed by Mr. Gange deals, in my  
13 view, mainly with their, their testimony in terms of  
14 whether they can be identified during their testimony and  
15 the form of their testimony. Given the fact that we've  
16 already proceeded with the interim ban and we've had to  
17 make references to Mr., Mr. Gange's clients in terms of  
18 DOEs 1 and 4, mean, my client, I can advise, is, is more  
19 than happy to proceed, recognizing that it may possibly  
20 prejudice, you know, my client's position with respect to  
21 the motion, but we would like to proceed as scheduled.  
22 Like I said, I don't expect this will, will, will sway  
23 Commission counsel on the point but I, I wanted to put it  
24 on the record.

25 MS. WALSH: Well, effectively, Mr. Commissioner,

1 all of the witnesses for next week will be referring to any  
2 number of, any or all of those witnesses, and so we will  
3 proceed as a Commission with an effective publication ban  
4 without the benefit of, of your having been able to hear  
5 argument and make an adjudication. So that is the problem.

6 THE COMMISSIONER: Well, look --

7 MS. WALSH: It was one thing to, to finish off  
8 that last week in February before the break just to finish  
9 one or two witnesses.

10 THE COMMISSIONER: I'm going to adjourn for 15  
11 minutes and, and ask counsel to confer. And if you need  
12 longer to take a look at the other point I made about  
13 whether there's any dates we can pick up along the way, why  
14 take the time for that, too. But we'll adjourn for 15  
15 minutes or such further time as you require to see if you  
16 can put your heads together. I, I understand what you're  
17 both saying but I, I, I think we have a problem that can't  
18 be overcome, but if you can work one out, a solution out,  
19 that will be just fine with me.

20 MS. WALSH: Thank you.

21 THE COMMISSIONER: So let's take that  
22 adjournment.

23 MS. WALSH: Thank you.

24

25 (BRIEF RECESS)

1 THE CLERK: All right. We've back on record.

2 MS. WALSH: Thank you. So Mr. Commissioner, we  
3 haven't been able to get around next week's adjournment of,  
4 of evidence but what we are able to do is probably pick up  
5 days in April. In other words, we would sit Fridays in  
6 April in order to recover the time loss so that ultimately  
7 we'll finish on the same timelines in May that we  
8 anticipated. And I've spoken, actually, was very nice that  
9 Ms. Christianson-Wood, who is scheduled to testify later  
10 this month, was here today and she's already spoken with  
11 her lawyer and looked at her schedule, and she's willing to  
12 move her testimony around to accommodate some of the phase  
13 one evidence. So I think that, in the end, we should be on  
14 track.

15 THE COMMISSIONER: Well, that's good to know  
16 because I think we all are working towards that completion  
17 of the submissions on the 31st of May.

18 MS. WALSH: I think everybody is and will do what  
19 they can, yes.

20 THE COMMISSIONER: Well, that's good to know that  
21 everyone will cooperate to the point where we likely can  
22 get where we want to get when we want to get there.

23 MS. WALSH: Yes.

24 THE COMMISSIONER: Okay. So then that means that  
25 we will commence our next sitting at 9:30 on Monday, the

1 11th of March, and the, Mr. Gange's two motions will be  
2 argued at that time, and I'll get -- I'll read the  
3 materials that are now available in, or that come in, and  
4 hopefully overnight I'll be able to put some rulings  
5 together so I can make them first thing the next morning,  
6 if that's possible. That will be my objective. And then  
7 we can move forward with those witnesses that week, or  
8 whoever you have --

9 MS. WALSH: Yes.

10 THE COMMISSIONER: -- scheduled.

11 MS. WALSH: Good. Thank you.

12 THE COMMISSIONER: All right. Well, thank you  
13 for the cooperation of everybody, and we'll proceed on that  
14 basis.

15 MS. WALSH: Thank you.

16

17 (PROCEEDINGS ADJOURNED TO MARCH 11, 2013)