

1 APRIL 18, 2012

2

3 THE CLERK: You may be seated.

4 THE COMMISSIONER: Good morning.

5 MS. WALSH: Good morning Mr. Commissioner.

6 THE COMMISSIONER: I want to say a few things at  
7 the outset this morning. The decision to convene this  
8 session of the hearing was mine. It's now 13 months since  
9 this Commission was first established and I was appointed,  
10 and we've had a Commission staff that's been hard at work,  
11 over most of that period of time, and we have a schedule  
12 laid out for the hearings, and the commencement of giving  
13 evidence, as well as the hearing of the publication ban,  
14 and I am determined to keep on schedule.

15 I saw two matters that were unresolved that in my  
16 judgment were possible impediments to keeping on that  
17 schedule, and I had Commission counsel identify those two  
18 issues to all counsel in an e-mail on -- early week -- in  
19 the first week of April, and I indicated that I wanted them  
20 spoken to this morning. It happens that they now  
21 fortunately have both been resolved, one last week, and the  
22 second one last evening, that is in accordance with the  
23 information I have, and I believe that is correct.

24 I can tell you that I'm pleased that, that those  
25 two matters are resolved, but in that I am so determined to

1 keep on track, and have this Commission of Inquiry proceed  
2 on its schedule, that I will not again -- I will not  
3 hesitate to again convene such a meeting if I felt it was  
4 necessary to accomplish the goals of, of the Commission.

5 I want to say how well served I am by Commission  
6 counsel and her associates, being residence some distance  
7 from here I have to be of course kept advised as to the  
8 progress and what is going on, and I have received the  
9 utmost of cooperation and courtesy from Commission counsel.  
10 Commission counsel do not have an easy role to play in  
11 coordinating all that will go on here, and is going on here  
12 with the multiple number of counsel that are involved, all  
13 whom I know are giving this their best efforts to, to get  
14 on with this and make this a success, but I wanted to  
15 especially today to -- because there have been some  
16 questions raised as to why this session was necessary this  
17 morning I think I've told you why I consider it to be  
18 necessary, and I'm grateful that we're moving forward on  
19 the issues, but I do want to take this opportunity of  
20 expressing my appreciation for the coordinating work that  
21 Commission counsel are doing and I seek, and, and ask for a  
22 continuation of the cooperation of all counsel with  
23 Commission counsel so that we can proceed on schedule.

24 Now having said that, and having explained why we  
25 are here, lest anyone had any questions in their minds on

1 that issue, I want to say to counsel that are here for the  
2 various parties, and interveners, that if any of them have  
3 anything they'd like to speak to me now insofar as the  
4 scheduling issue is concerned, I would certainly be  
5 prepared to hear you. I will also give you the opportunity  
6 of speaking to any other matters that you would like to  
7 address that you see as being outstanding, and I know that  
8 Commission counsel before we conclude will be making some  
9 statement about issues that she sees as unresolved, and is  
10 working to get a resolution on, but specifically related to  
11 the matter of scheduling.

12 As you know we have the, the publication ban  
13 hearing set for I think -- I believe it's the 22nd and the  
14 23rd of May and then of course the commencement of evidence  
15 at the hearing is scheduled for the, the 4th of July, so if  
16 any counsel have any concerns about -- or any adjustments  
17 they feel they want to raise about the schedule I would, I  
18 would give them that opportunity to do that now.

19 MR. KROFT: Thank you Mr. Commissioner. Jonathan  
20 Kroft for the group of five media.

21 THE COMMISSIONER: Yes.

22 MR. KROFT: I got the nod from Commission  
23 counsel, who I have been speaking to quite regularly as I  
24 gather now you have, and she's been very courteous with me  
25 as well. I have a few things that I think could be

1 clarified today, and I thought I would talk about how I see  
2 the media issues unfolding, and what the, the challenges  
3 might be.

4 I don't control all of them, so I'm not going to  
5 ultimately speak to the schedule of the bigger picture. I  
6 really don't have the bigger picture. The applicant's  
7 evidence I believe has -- was all filed by -- some time  
8 late last week. It is much more voluminous than I had  
9 anticipated and includes a number of I would say academic  
10 expert opinions with some as many as 40 other learned  
11 articles attached, also some opinion evidence that isn't --  
12 will be arguable as to whether it's properly admissible or  
13 not, so the first issue that came up on seeing much of that  
14 was issues of admissibility, what, what is admissible. In  
15 order to -- of course that could have been dealt with in  
16 two ways. One would have been for me to request a hearing  
17 in advance to deal with admissibility issues, which would  
18 have of course saved some time in terms of what response  
19 would have to be done in cross, but it might also make  
20 things longer because we would need two hearings and that  
21 would put squeeze on the other part of the schedule, so I  
22 have indicated to Commission counsel that I'm prepared to  
23 just argue the admissibility issues at the same time as the  
24 hearing on the merits, on the understanding of course that  
25 I'll be cross-examining on material without prejudice to

1 argue at the hearing that it's not admissible.

2 THE COMMISSIONER: I think that's reasonable.

3 MR. KROFT: In terms then of -- the, the next  
4 thing that I've noticed, and I have to tell you I haven't  
5 read all of -- certainly all of the exhibits and articles,  
6 and everything like that, but I've been able to go through  
7 it at a high level, all of it --

8 THE COMMISSIONER: Well then of course there's  
9 more than one motion.

10 MR. KROFT: Well, there's a number of motions --

11 THE COMMISSIONER: Yes.

12 MR. KROFT: -- and I, I can speak to that because  
13 -- well, I'll speak to that separately but just in terms of  
14 the, the evidence there are a number of things that are  
15 referred to in some of the affidavits that are not attached  
16 or matters that are raised that have not been attached as  
17 exhibits.

18 I have made some requests over the past week for  
19 information. I've got some, but mostly haven't got it yet,  
20 I'm not being critical of anybody on that. For example,  
21 and just to, to do give some context to this, there are of  
22 course issues raised with respect to, for example, safety  
23 of social workers is one of the arguments that you'll be  
24 hearing about, and I've asked for policies and procedures  
25 from each of the agencies involved, in terms of the safety

1 precautions and, and those kinds of things. I haven't got  
2 that material yet, and I will be needing that in a  
3 reasonable time prior to cross-examination in order to  
4 properly represent my clients, so there's going to be --  
5 that's an issue that I see. I, I will get, get through the  
6 material and get all of those requests out by the end of  
7 this week. I think I've got most of them out already.

8           There will need to be some cross-examinations.  
9 Again I'll, I'll try to limit them to the extent I can do  
10 so consistent with the interests of the people who I'm  
11 charged to represent. I haven't finished deciding -- if  
12 possible I'll see if I can get agreements from people so  
13 that there need not be cross-examinations, but I suspect  
14 there will be at least some cross-examinations. Some of  
15 those cross-examinations will be of people who do not  
16 reside in Winnipeg. I have already indicated two full  
17 weeks between now and the 22nd that I'm available to do  
18 those cross-examinations. I haven't heard back from most  
19 of the people. I have heard some back, and there's one  
20 problem so far with a witness' availability that I, I just  
21 got this morning, and I haven't seen if we can work through  
22 it, but there are issues that may arise in terms of the  
23 timing, and in that regard as well I know that you're going  
24 to need transcripts in order to deal with the matter  
25 ultimately, and Commission counsel has raised with me

1 issues about whether we'll have the transcripts in time,  
2 and, and whether -- how early we'll get the motion briefs  
3 in order to accommodate your needs, Mr. Commissioner.  
4 That's going to be tight, and again there are factors that  
5 I don't control so I, I really can't speak to dates, but  
6 it, it will be tight, and I'm hoping everybody will be  
7 flexible, and when I say that I'm going to include the  
8 Commission and the Commission counsel in the sense that  
9 maybe you'll be getting things that are not optimally, you  
10 know, on a time basis, and, and we'll have to decide --  
11 you'll have to decide whether we should adjust the schedule  
12 or, or burn the midnight oil, but I don't want to give the  
13 impression that it's going to be easy for, for any of us to  
14 do our jobs with the timing in question.

15           We will be filing some evidence. We expect -- I  
16 think it is unlikely that we'll be filing academic type of  
17 evidence, but we will be filing some responsive evidence.  
18 An example of the kind of evidence we might be filing are  
19 examples of other inquiries. For example -- and that of  
20 course will have to be provided.

21           I anticipate that we will be able to file our  
22 evidence by the beginning of May, by May 1st is my target.  
23 In some cases I haven't yet connected with the, the  
24 witnesses, but it's a research project as much as anything  
25 else, and we're working on it.

1 I'm available some days next week to actually  
2 start the cross-examinations. There is a rule that  
3 normally applies that I can't file evidence after the  
4 cross-examinations. It's another example of flexibility.  
5 If people insist on that rule then I have to delay the  
6 cross-examinations because I don't want to prejudice the  
7 right of my clients to have their evidence in in response.

8 You've raised the issue, Mr. Commissioner, about  
9 the fact that there are a number of motions. Broadly  
10 speaking they fall into two categories. There are the --  
11 say the, the professional witnesses seeking anonymity in  
12 terms of non-publication of their identities, and then  
13 there are sources of referrals or informant type  
14 applications. That's rough because there are some blends  
15 in some of the matters.

16 You'll appreciate of course that I'm representing  
17 only five of the media, this is a public interest matter  
18 for them, I don't have unlimited resources and I have had  
19 an opportunity to discuss with my client, and they're -- or  
20 my clients are not in a position to be the general funder  
21 of the media police for the inquiry. They have prioritized  
22 the issues that they're going to address and the priorities  
23 are going to be the applications for publication bans on  
24 identity of the professional witness, and I say  
25 professional, not social worker, because it's become



1 apparent from the material, and from things that have been  
2 changed between counsel that it's not just social workers,  
3 there's nurses, it's a me too, well if they get it so, so  
4 should I. I'll be arguing at the time this is going to be  
5 -- if those applications are successful one of the most  
6 private public inquiries we've ever seen in Canada, but  
7 I'll save that for argument at the hearing, but the bottom  
8 line it's professionals. There's other people who are  
9 saying me too. That's what we're going to focus on.

10 In addition there are some references in some of  
11 the applications to in-camera hearings, and we will be  
12 opposing in-camera hearings certainly based on the evidence  
13 that's been filed so far. The position will be the one  
14 that -- the informant applications we will not be  
15 consenting, but we will not be taking an active position,  
16 and I'll explain to you why that is. It's -- first of all  
17 it's a matter of just priority for the clients who I  
18 represent who are not all media, but five significant ones  
19 of course.

20 The other difficulty with that is that in order  
21 to properly contest those -- they're, they're quite  
22 personal, we would have to get disclosure of -- you know  
23 for example if it's a vulnerable witness who's relying on  
24 the vulnerability is -- a factor in the Mentuck test we'd  
25 need to know about that vulnerability. Now that will be

1 difficult and delay things, and so we're, we're prepared to  
2 take no position on the understanding that if the identity  
3 of somebody like that turns out in the course of the  
4 inquiry to be relevant to something other than just being a  
5 source of referral we would like to reserve the right to  
6 make application at that time to revisit the issue of --  
7 and so I use the ridiculous example of somebody who phoned  
8 one of the agencies later was found out to have been an  
9 abuser or, or had an active role, or something like that,  
10 and, and they took the position that because they made that  
11 phone call -- you know, they're, they're not to be treated  
12 like other witnesses, we'd want to speak to that.

13 THE COMMISSIONER: I follow you.

14 MR. KROFT: Okay. So those are the positions  
15 that we're, we're planning to take. I guess to finish off  
16 in terms of the -- and other people have an opportunity to,  
17 to raise issues that arise from these, but I am not clear,  
18 and, and I'm not sure that it's been discussed, as to the  
19 various roles of the various parties with respect to the  
20 publication ban and other media issues. I've raised it  
21 with Commission counsel.

22 For example, if we are to conduct a cross-  
23 examination do we require notice to everybody, and does  
24 everybody get to participate, subjective to, I suppose the  
25 normal rules. Who gets to file material and speak, and I,

1 I don't have a strong view on that. This has to be the  
2 right answer, but in terms of scheduling and controlling  
3 the process, for example, do I have to make sure that our  
4 counsel are involved every time I set up a cross-  
5 examination. I don't know, and I think that that's  
6 something that should be clarified for everybody.

7 THE COMMISSIONER: I think you're likely going to  
8 hear Commission counsel say today that she has a list of  
9 things that require attention of counsel, and she will  
10 convene a meeting as she has from time to time in, in the  
11 Commission boardroom to deal with some of these matters,  
12 and I would think that that would be one that could be  
13 properly addressed at that time under those circumstances.

14 MR. KROFT: Okay. Well, I, I will leave it at  
15 that, but at some stage -- I don't have the mandate or  
16 capacity to be a quarterback for sort of the broader  
17 inquiry, and I'm concerned about having to set up five  
18 cross-examinations with however many counsel are, are  
19 present, and I may be looking for help from the office of  
20 the Commission counsel if, if it becomes a multi-party  
21 matter.

22 THE COMMISSIONER: Well, I'm, I'm not committing  
23 to that --

24 MR. KROFT: I appreciate that.

25 THE COMMISSIONER: -- but, but certainly

1 Commission counsel can take the lead in trying to sort the  
2 matter out.

3 MR. KROFT: Yes. Good. The other issue that I  
4 should put on the table, so that everything that I can  
5 think of is on the table, I have had some informal  
6 discussion with the Office of the Attorney-General in terms  
7 of a constitutional issue and, and I'll explain it to you  
8 because I -- we have legislation here, as you're familiar  
9 with, in other provinces, The Constitutional Questions Act,  
10 and there has to be certain notices when you're raising  
11 certain constitutional points.

12 One of the arguments that has been relied on by  
13 the applicants for the publication ban is, is based on what  
14 they say is a policy of the provincial government that is  
15 found by reading the sections in our Child and Family  
16 Services Act that relate to publication of witnesses in  
17 child protection hearings.

18 Now, nobody that I'm aware of is taking the  
19 position that that -- the section applies to this, it  
20 doesn't, quite, quite clearly on its face, but the argument  
21 that has been raised goes something like, well, they put  
22 that in the Child Protection proceedings and therefore that  
23 demonstrates an important public policy. We have a  
24 disagreement with the interpretation of that section, and  
25 particularly the question, does, does it apply to

1 professional witnesses, social workers who apprehend  
2 children, or is it meant only to apply to families and  
3 children, and we will be arguing in, in response to the  
4 argument that has been filed, and will be made by MGEU and  
5 others that that can't be what the section means because if  
6 it were it would be unconstitutional. I think you're --  
7 it's, it's a rule of interpretation that you need to  
8 interpret something to be consistent with the constitution.  
9 The alternative is that it's unconstitutional, don't need  
10 to deal with it today. I was concerned that I would need  
11 to tell the Attorneys-General under that Act, and should  
12 the provincial -- nobody has told me that's not necessary,  
13 and so in order for me to protect my ability to make those  
14 arguments I intend to give notice and it's up to them of  
15 course, the two Attorneys-General, I've gathered it would  
16 be more likely the provincial, whether they want to do  
17 anything about it or not, but I am going to be compliant  
18 with The Constitutional Questions Act, and there may be a  
19 response from the Attorney-General, or there may not be.

20 I don't think I have anything else to say.

21 THE COMMISSIONER: Well, let me just ask you  
22 this, Mr. Kroft then. I must say that your last point is  
23 an interesting one and I'll look, look at the relevant  
24 statute in, in Manitoba on that question as to where that -  
25 - such a dispute over the interpretation would actually go

1 for adjudication. The statute I guess addresses that, but  
2 I'll look at that.

3 MR. KROFT: Yeah, I don't think, by the way, that  
4 there will be -- there's any likely scenario that you will  
5 be asked to declare something invalid --

6 THE COMMISSIONER: No.

7 MR. KROFT: -- and I'm, I'm not sure about the  
8 jurisdiction.

9 THE COMMISSIONER: I'm not sure I have the  
10 authority to do that.

11 MR. KROFT: Exactly. What you will be asked --  
12 someone is going to say, look, the government wants you to  
13 do this Commissioner Hughes, look what the statute says,  
14 and you will here me say that's not what the statute says,  
15 and if the statute says that it's unconstitutional so you  
16 shouldn't accept that argument, that's the context.

17 THE COMMISSIONER: I understand. Now, before you  
18 leave what I hear you saying is you're going to do your  
19 very best to, to be ready for the 22nd and the 23rd. Is  
20 there any need to, to look at back-up dates in, in the  
21 first half of June, for instance, in case that you can't  
22 get all of that cross-examining done when -- I know when we  
23 started this you didn't expect, and I didn't contemplate,  
24 that there would be witnesses out of the province, but  
25 there are and, and fair enough, but that -- there, there

1 are time factors involved and, and so on. Shall we leave  
2 it with the 22nd, as you see it, and, and if, if there's  
3 going to be some problem getting your, your examinations  
4 done, and the transcripts made available, we would look at  
5 it then, but I, I would -- I just wondered if there's any  
6 value in looking at a back-up date in the first half of  
7 June because I certainly want to get these hearings  
8 underway on the 4th of July.

9 Now, that's, that's something that we might just  
10 take a --

11 MR. KROFT: Yeah.

12 THE COMMISSIONER: When everyone has spoken this  
13 morning we might just take a break for 15 minutes and  
14 counsel might like to confer on that.

15 MR. KROFT: Yeah, I, I mean if, if -- I hesitate  
16 -- because I'm not -- my clients aren't a party to this,  
17 and I'm not privy to really the -- a big part of this  
18 picture I hesitate to speak about scheduling except to say  
19 that it's very tight, and that there's some things that --  
20 or, or it seems that I need to do that are contingent on  
21 other people doing other things, so I would say that there  
22 is a high probability -- you know, whether it's a  
23 probability or a possibility that I, I will not be  
24 comfortably ready to, to proceed on May 22nd, depending on  
25 what happens, at which point you may tell me, well, too

1 bad, and you'll have to do it even if you're not ready, and  
2 you don't have the evidence, or, or we would have to deal  
3 with it at that time, and taking your point it might be  
4 harder at that point to find dates in June, so it is  
5 something that I think is really a consideration.

6 THE COMMISSIONER: Thank you. I'll hear anyone  
7 else on scheduling and, and we might -- I'm going to  
8 suggest that we take a break and Commission counsel confer  
9 with counsel as to whether we should be looking for back-up  
10 dates in the first half of June.

11 Anyone else like -- thank you, Mr. Kroft, that  
12 completes your submission?

13 MR. KROFT: Yes.

14 THE COMMISSIONER: Thank you. Anyone else want  
15 to speak on that issue of scheduling? As I said I'll give  
16 you the chance to speak on any other things that you think  
17 are pertinent, but is there anyone else that wants to  
18 address the scheduling matter?

19 All right. If not Commission counsel do you want  
20 to take a break and deal with that issue now, and then --

21 MS. WALSH: Sure.

22 THE COMMISSIONER: -- after we get that resolved  
23 then we'll invite counsel to make any other comments on  
24 any, any other matter, and then you also will have some,  
25 some matters you want to put on the floor, and I'll give



1 you that opportunity, but we'll, we'll take a 15 minute  
2 break, or whatever you need if longer to confer on that,  
3 and if, if the decision is we'll hold to the 22nd, we think  
4 we can make it fair enough. On the other hand you heard  
5 Mr. Kroft and the problems he's got. It may be  
6 advantageous to see if there are two days the first half of  
7 June that people could be available if we're going to need  
8 them.

9 MS. WALSH: Good. Okay, thank you.

10 THE COMMISSIONER: We'll take that break now.  
11 Thank you.

12 THE CLERK: Order.

13

14 (BRIEF RECESS)

15

16 MS. WALSH: Mr. Commissioner, this was very  
17 productive. Good news and bad news. The good news we came  
18 to an agreement. Bad news I suppose in terms of I know  
19 you're anxious to get, get things moving subject to, to  
20 your input on this counsel have agreed to adjourn the dates  
21 of the publication ban motion to be heard on June 13th and  
22 14th.

23 THE COMMISSIONER: Yes, that's, that's the 13th  
24 and 14th, that's Wednesday, Thursday, that's fine.

25 MS. WALSH: Right, right, and that will then give

1 everyone enough time to have the appropriate affidavit  
2 evidence filed, cross-examinations done, transcripts  
3 prepared, and briefs and, and transcripts of cross-  
4 examinations filed in our offices, and we didn't discuss  
5 this but they should all be filed in our offices by the  
6 week before so by the 6th of June we should have all the  
7 material in our office, if, if that's --

8 THE COMMISSIONER: Yes, that's --

9 MS. WALSH: -- fine with you.

10 THE COMMISSIONER: And, and I'm just -- you know,  
11 I'll have to consider it when I've heard it all, and, and -  
12 - but certainly it allows me to get the -- a decision out  
13 before we convene in July. How much ahead of time we'll  
14 just have to see.

15 MS. WALSH: Yes, and I, I appreciate it gives you  
16 a bit of a tight schedule in order to make your  
17 determination, but we'll -- you'll have to take a look at  
18 your calendar and determine when you'll deliver your  
19 ruling, and, and we'll let counsel know.

20 THE COMMISSIONER: Yeah.

21 MS. WALSH: I would think we could tell them by  
22 the end of this week as to when you'll deliver your ruling.

23 THE COMMISSIONER: I'll -- yes, I'll, I'll give  
24 that some thought and attention.

25 MS. WALSH: Okay, thank you. Just a couple of

1 other matters.

2 I, I know that a commission of inquiry is, is a  
3 unique proceeding and every Commission has its own set of  
4 rules of procedure and practice. I will send out a notice  
5 to counsel just reminding them of some of our, our rules of  
6 procedure and practice just so that we confirm that we are  
7 all operating under the, the same provisions, and just to  
8 ensure that matters run smoothly.

9 The only other thing I wanted to remind counsel  
10 about while we're all here is that because I have been  
11 advised that various parties have further disclosure that  
12 they want to provide to us to review and determine whether  
13 it will become added to the Commission's disclosure to  
14 provide to all parties and interveners I have asked that  
15 that further disclosure be provided by the end of this week  
16 to our offices. We'll have to review it, determine its  
17 relevance, and whether -- and to what extent it's subject  
18 to your ruling on redactions and it has to be redacted  
19 before it's sent out, and similarly it has come to our  
20 attention that there are some further documents which are  
21 subject to the confidentiality under section 76 of the  
22 Child and Family Services Act, and regarding which we will  
23 need to bring an application before the Court of Queen's  
24 Bench, similar to the one that we brought in the fall, and  
25 we have asked counsel to provide us with notice of those

1 documents immediately, and certainly by the end of this  
2 week, so just that reminder just to keep us going. July  
3 the 4th is not that far away so.

4 THE COMMISSIONER: Right.

5 MS. WALSH: And that concludes anything that I  
6 have to say, Mr. Commissioner.

7 THE COMMISSIONER: All right. Thank you. I'll  
8 just see if any other counsel wish to raise any matter  
9 before we adjourn for the day.

10 Anyone else like to address any points that are a  
11 concern to them?

12 Well if not I thank you all for attending. I  
13 know there was some question is this really necessary. I  
14 think it's been worthwhile. We, we know we're on track and  
15 I understand the, the movement of that date considering the  
16 issues and the volume that counsel have to deal with by way  
17 of those affidavits and cross-examinations, so you've come  
18 up with dates that will allow us to get the, the hearing  
19 over, and give me time to make a reasoned decision, and  
20 then proceed we will, so I thank you all for your  
21 cooperation this morning.

22 MS. WALSH: Thank you.

23 THE CLERK: Order.

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(PROCEEDINGS CONCLUDED)



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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 Hearing  
held at 1801 - 155 Carlton Street, Winnipeg,  
Manitoba

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APRIL 18, 2012