

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.

24

25 (PROCEEDINGS CONCLUDED)



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

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

Transcript of Proceedings
Public Hearing
held at 1801 - 155 Carlton Street, Winnipeg,
Manitoba

APRIL 18, 2012