

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

The Honourable Edward (Ted) N. Hughes, OC, QC, LL.D. (Hon),  
Commissioner

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**TRANSCRIPT OF PROCEEDINGS** before the Commission,  
held at the Winnipeg Convention Centre, 375 York  
Avenue, Winnipeg, Manitoba, on the 6th day of  
March, 2012.

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1 MARCH 6, 2012

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3 THE CLERK: You may be seated.

4 THE COMMISSIONER: Well, it's been some eight  
5 months since we've all been in session and I know that a  
6 lot has been going on over that period of time. Nobody is  
7 more anxious than I am to move this matter forward and get  
8 the public sessions underway, where we hear from the  
9 witnesses and I can deal with the mandate that's been given  
10 me, under the order in council.

11 I have asked commission counsel to give an  
12 outline to those that are here as to many of the things  
13 that have been going on in her office and as she has  
14 interfaced with counsel for the various parties over the  
15 last several months. I think it's important that we all  
16 understand that significant steps have been taken to move  
17 this forward. Perhaps not as fast as I might have liked,  
18 but I understand that due process must be applied every  
19 step of the way and what has been necessary has been done  
20 and we've now come to a point where hopefully, we can agree  
21 on the agenda that has been -- the timetable, rather, that  
22 has been set out and mid-year we can get underway with  
23 hearings. And other than a brief holiday break, move  
24 forward without interruption, towards the presentation of  
25 all of the evidence and the summations from counsel and  
26 then free me to write a report that is expected of me at  
27 the conclusion of these proceedings.

28 So with that, I would ask commission counsel to  
29 come to the microphone if she would, please.

30 MS. WALSH: Good morning, Mr. Commissioner. I  
31 thought we should start with introductions.

32 THE COMMISSIONER: Yes?

33 MS. WALSH: With me is my team of, of lawyers.  
34 We have increased in number since our last session. Derek

1 Olson, Kathleen McCandless. To my right, behind me,  
2 Elizabeth McCandless and Noah Globerman.

3 I would ask then that counsel for each of the  
4 parties and intervenors who are here stand and identify  
5 themselves and who they act for please, starting with Mr.  
6 Smorang, you're right up at the front.

7 MR. SMORANG: Morning, Mr. Commissioner, it's  
8 Smorang for the Manitoba Government Employees' Union. Mr.  
9 Ray will be here. He's having car trouble, but he should  
10 be here shortly.

11 THE COMMISSIONER: Fine, he'll join you at the  
12 table.

13 MR. MCKINNON: Good morning, Mr., Mr.  
14 Commissioner, Gordon McKinnon for the Department. With me  
15 is Sacha Paul.

16 THE COMMISSIONER: Thank you.

17 MS. VERSACE: Good morning, Mr. Commissioner,  
18 Versace for the University of Manitoba.

19 THE COMMISSIONER: Thank you.

20 MR. KHAN: Good morning, Mr. Commissioner, it's  
21 Khan for Intertribal and I'm here with James Benson.

22 THE COMMISSIONER: Thank you.

23 MR. SAXBERG: Morning, Mr. Commissioner, it's  
24 Kris Saxberg and Harold Cochrane and Bernas for the  
25 authorities and ANCR.

26 THE COMMISSIONER: Thank you.

27 MR. GINDIN: Good morning, Mr. Commissioner, Jeff  
28 Gindin, along with George Derwin and David Ireland for Kim  
29 Edwards and Steve Sinclair.

30 THE COMMISSIONER: Thank you.

31 MS. MCCULLOUGH-BUTCHART: Good morning,  
32 McCullough-Butchart with Bill Gange's office. We're  
33 representing a number of witnesses.

34 MR. KROFT: Jonathan Kroft for the Media Group.

1 I'm with Baillie Chisick from my office.

2 THE COMMISSIONER: Thank you.

3 MR. FUNKE: Good morning, Mr. Commissioner, Jay  
4 Funke here on behalf of the Assembly of Manitoba Chiefs and  
5 the Southern Chiefs' Organization. I'm accompanied this  
6 morning by our articling student, Erin Coyne.

7 THE COMMISSIONER: Thank you very much. Having  
8 been some time that, since we were all together, it's nice  
9 to get the faces straight and so I understand who the  
10 participants are and, and who each is representing.

11 So with that, I would ask commission counsel to  
12 give an outline as to proceedings that have taken  
13 place over the, the time period since we were last in  
14 session.

15 MS. WALSH: Thank you, Mr. Commissioner, and I'll  
16 just indicate that we have five specific items for today's  
17 agenda, starting as you've identified (phonetic), as, as  
18 you've identified by an update by me on the work that we've  
19 done since we were last in session and on our schedule,  
20 going forward.

21 Item 2 will be to hear the application by the  
22 authorities and ANCR, to extend their grant of standing.

23 Item 3 will be an application by the authorities  
24 and ANCR regarding a proposal to commence phase 1 of the  
25 inquiry with the case specific report writers.

26 Item 4 will be submissions by counsel for the  
27 media regarding the timetable for the hearing of the  
28 publication ban motions.

29 And Item 5 will be addressing witness interview  
30 schedules.

31 So starting with the update as to what we've been  
32 doing since we were last in session, our last public  
33 session took place on June 28th and 29th, at which time you  
34 heard applications for and determined the grants of

1 standing for participation in this inquiry.

2 By way of review, Mr. Commissioner, you granted  
3 full party standing as follows: The Department of Family  
4 Services and Consumer Affairs of the Government of the  
5 Province of Manitoba, the Manitoba Government and General  
6 Employees Union, Intertribal Child and Family Services, a  
7 single shared grant of standing to the First Nations of  
8 Northern Manitoba Child and Family Services Authority, the  
9 First Nations of Southern Manitoba Child and Family  
10 Services Authority, the General Child and Family Services  
11 Authority and the All Nations Coordinated Response Network,  
12 known as ANCR. That grant was limited, with respect to  
13 participation in phases 2 and 3 of the hearings. And a  
14 single grant of shared standing was also made to Steven  
15 Sinclair and Kimberly-Ann Edwards.

16 Intervenor standing was then granted to the  
17 University of Manitoba's Faculty of Social Work, to the  
18 Assembly of Manitoba Chiefs and to the Southern Chiefs'  
19 Organization.

20 The session on June 28th and 29th also allowed us  
21 to settle the Commission's rules of procedure and practice.  
22 Those rules were subsequently amended by your order of  
23 August 23 and they are on our commission website.

24 Mr. Commissioner, over the last eight months,  
25 commission staff, including both the legal team and the  
26 non-legal staff, have been working long hours to gather all  
27 of the relevant evidence which will allow us to conduct the  
28 public hearings in a fair, orderly and efficient manner.  
29 I'm pleased to report that they have been extremely  
30 productive and busy eight months.

31 As I advised at the end of the session on June  
32 29th, one of the unique aspects of this inquiry is the fact  
33 that many of the documents which were in the possession of  
34 various parties and which contain much of the information

1 which is the subject of this inquiry, including two of the  
2 reports that are listed in the order in council, are  
3 subject to statutory confidentiality under the provisions  
4 of the Child and Family Services Act of Manitoba. And this  
5 meant that the commission could not make use of those  
6 documents, or the information that was contained in those  
7 documents until we applied to the Court of Queen's Bench  
8 for an order allowing us to do so.

9           Accordingly, as I indicated last June, once the  
10 government's decision regarding funding of various  
11 participants was made and in accordance with our rules,  
12 parties and intervenors were to provide my office with a  
13 list of all the relevant documents, identifying which  
14 documents were subject to the statutory confidentiality I  
15 have mentioned and they were to do that by September 15th.  
16 I was advised that the funding arrangements with the  
17 government were completed on a timely basis, by August  
18 14th. In order to assist counsel in determining which  
19 documents they should identify to the commission, I held  
20 separate meetings on September 9th and 12th with counsel  
21 for each of the parties and intervenors to discuss the  
22 nature of the evidence I thought would be relevant for the  
23 commission to receive. I also discussed the role that I  
24 felt each party or intervenor could potentially play in  
25 assisting the work of the commission, including the nature  
26 of evidence their clients could offer.

27           Counsel complied with the September 15th deadline  
28 and provided me with lists of relevant documents,  
29 identifying which documents were subject to statutory  
30 confidentiality and this allowed my office to prepare the  
31 necessary application to the Court of Queen's Bench  
32 requesting that you, Mr. Commissioner, commission counsel  
33 and staff, be allowed to make use of those confidential  
34 documents and the information they contained.

1           The respondents to our application included any  
2 of the parties with standing who had indicated they had  
3 such confidential information and other entities, who we,  
4 as the commission, had determined were in possession of  
5 such documents, including the office of the Chief Medical  
6 Examiner, the officer of the Children's Advocate of  
7 Manitoba and the office of the Registrar of the Court of  
8 Queen's Bench.

9           We filed our application in the Court of Queen's  
10 Bench on September 28th, along with supporting affidavit  
11 material and an extensive brief on the law. We were given  
12 a hearing in front of the Honourable Chief Justice Joyal on  
13 October 21st, at which time Justice Joyal did grant an  
14 order which permitted you, commission counsel and staff to  
15 make use of the records and the information contained, for  
16 the purposes of the commission of inquiry and in accordance  
17 with the order in council. In particular, the order  
18 indicated that we were allowed to disclose and produce the  
19 records and communicate the information contained therein  
20 to the parties and intervenors with standing at the  
21 commission and to potential witnesses. And we were also  
22 allowed to enter the records and information contained  
23 therein, or portions of them, into evidence at the public  
24 hearings on such terms as you may decide, Mr. Commissioner  
25 and in accordance with our amended rules of procedure and  
26 practice.

27           After that order was granted, I held a meeting on  
28 October 24th at the commission offices which was attended  
29 by counsel for all the parties and intervenors. I provided  
30 them with a timetable outlining the significant deadlines  
31 for the steps in the proceedings that would allow us to  
32 commence the public hearings on May 23, 2012. And  
33 admittedly, Mr. Commissioner, it was an ambitious and tight  
34 timetable, but one which was necessary to maintain in order

1 to proceed, as I said earlier, in the most orderly, fair  
2 and expeditious manner.

3           The timetable provided that by November 4th, the  
4 parties and intervenors would provide my office with copies  
5 of all of the relevant documents that they had identified  
6 to us, including those documents which were the subject of  
7 Justice Joyal's order and in fact, on or about November  
8 4th, our office received over 30,000 pages of documents  
9 from the various parties, intervenors and other entities  
10 from whom we had sought disclosure. The Commission's  
11 lawyers reviewed those 30,000 pages plus, to determine  
12 which documents we, in fact, believed were relevant within  
13 the context of the terms of reference which established  
14 this inquiry. And keeping to the timetable, we created a  
15 master disclosure list, which we distributed on November  
16 16th to counsel for the parties and the intervenors. The  
17 list was 72 pages long. It set out 1,738 documents,  
18 including materials which had been provided to us by the  
19 parties and intervenors and materials that we had  
20 identified on our own as being relevant.

21           In my covering letter to counsel, in which I  
22 enclosed the master disclosure list, I reminded counsel  
23 that this list was for the purposes of distribution to  
24 counsel for the parties and intervenors only. It was not a  
25 matter of public record and that unless and until I had  
26 indicated an intention to rely on those documents at the  
27 public hearings, those documents would remain confidential,  
28 as part of our investigation.

29           I also advised counsel that they had an  
30 opportunity to make written submissions regarding any  
31 proposed redactions for categories or classes of  
32 information or individuals for the purposes of simply  
33 distributing the documents to the other counsel and I  
34 identified examples of such categories as sources of

1 referral or informants, as they're called under Section 18  
2 of the Child and Family Services Act, foster parents or  
3 minors. Submissions regarding redaction were to be sent to  
4 your attention, Mr. Commissioner, by November 25. Counsel  
5 were also asked to advise my office of the names of any  
6 potential witnesses by November 30th.

7 In keeping with the timetable, Mr. Commissioner,  
8 you provided your ruling on redaction on December 2nd,  
9 2011. And in your ruling, you'll recall that you  
10 determined that all of the documents which we had listed in  
11 our master disclosure list and any additions thereto,  
12 recognizing that disclosure is an ongoing process, as  
13 documents come to our attention, all those documents should  
14 be disclosed and produced through their counsel to the  
15 parties and intervenors. And in the case of potential  
16 witnesses, by or through commission counsel, but only with  
17 respect to those documents that have relevance to those  
18 particular witnesses.

19 You acknowledged, in making your decision, that  
20 all those to whom disclosure and production were to be made  
21 must sign a confidentiality undertaking, by which an  
22 individual expressly provides that the recipient of the  
23 documents will make use of them only for the Commission's  
24 purposes and will keep the contents confidential, unless  
25 and until they've been made public at the hearings.

26 And with that in mind, Mr. Commissioner, you did,  
27 indeed, provide that certain redactions should take place.  
28 There was yet unanimity in the submissions from counsel  
29 with respect to redacting the identity of persons who had  
30 provided information to child welfare authorities regarding  
31 child protection and safety issues, the Section 18 sources  
32 of referral or informants. So those, the identity of those  
33 individuals was ordered to be redacted.

34 You also determined that the identity of children

1 who were 18 or younger at the time that a record was  
2 created, should be redacted, unless to do so could not be  
3 avoided, such as, for example, of course, in the case of  
4 the identity of Phoenix Sinclair herself, or in the case of  
5 those who had already testified at the criminal proceedings  
6 and whose identity was already a matter of public record.

7 And finally, you ruled that the identity of  
8 foster parents and any individuals whose names were without  
9 relevance to the mandate of this commission should also be  
10 redacted.

11 As the result of your ruling, Mr. Commissioner,  
12 the commission lawyers were required to go through the 1738  
13 documents, which were set out in our master disclosure  
14 list, containing almost 40,000 individual pages, to look  
15 for any of the information which needed to be redacted and  
16 then they physically had to redact, that is, black out, the  
17 references before the material could be scanned and  
18 distributed to counsel. And as you can imagine, that was  
19 an extremely time consuming process, but one which could  
20 only be done by lawyers who had an understanding of the  
21 subject matter of the documents. Again, Mr. Commissioner,  
22 my associate counsel worked long hours to ensure that  
23 disclosure could be distributed as quickly as possible.

24 Counsel for the parties and intervenors were  
25 provided with CDs containing disclosure in an electronic  
26 format, by our office, on December 22nd. And that  
27 disclosure contained most of the evidence which was of  
28 particular importance to the witness interviews. Evidence  
29 such as copies of the reports listed in the order in  
30 counsel, copies of the relevant Child and Family Services  
31 files, information from the RCMP, information from the  
32 office of the Chief Medical Examiner and transcripts from  
33 the child protection proceedings.

34 I had held a meeting at our office on December

1 19th, again, attended by counsel for all parties and  
2 intervenors, to confirm with them the contents of the CDs  
3 they were about to receive and the fact that this would  
4 enable them to prepare for the upcoming interviews of their  
5 respective clients, which, according to the timetable we  
6 had provided in the fall, were scheduled to take place  
7 December through March.

8           Of course, as you contemplated in your ruling,  
9 disclosure is an ongoing process and so further CDs  
10 containing additional disclosure were provided to counsel  
11 on January 24th and 31. So far, a total of 1802 documents  
12 have been provided to counsel, but as we told counsel at  
13 our meeting in December, the most relevant documents, for  
14 the purposes of individual witness interviews, were  
15 contained in the first CD we handed out in December.

16           So that's what we've been doing with respect to  
17 documentary disclosure, Mr. Commissioner.

18           With respect to witness interviews, since early  
19 December, the Commission's legal team has been spending  
20 many hours preparing for and conducting interviews of  
21 witnesses. This has included identifying and in many  
22 instances, locating potential witnesses, analyzing the  
23 evidence that has been gathered so far, determining which  
24 documents are relevant for respective witnesses and what  
25 questions should be put to those individuals. The  
26 preparation for each witness interview is quite extensive.

27           To date, we have interviewed over 70 witnesses.  
28 Those interviews have taken place over the course of  
29 approximately 55 days. The majority of those interviews  
30 have taken place in Winnipeg. However, two of our counsel  
31 spent three days last week in Fisher River, conducting  
32 interviews. And as you know, Mr. Commissioner, that would  
33 be the second time that the commission had attended Fisher  
34 River. You'll recall that we were up there in June to meet

1 with the chief and band council and members of the  
2 community.

3 The witnesses that we have interviewed so far  
4 include the writers of the reports listed in the order in  
5 council, friends and family of Phoenix Sinclair and her  
6 family, health care providers and other professionals who  
7 provided services to Phoenix Sinclair and her family, law  
8 enforcement officers and social workers employed with  
9 Intertribal Child and Family Services.

10 Throughout the last eight months, commission  
11 lawyers have been carrying out research on various legal  
12 and factual issues which are relevant to all phases of the  
13 inquiry. And I think it's important, in light of the  
14 applications that we're going to be hearing, Mr.  
15 Commissioner, just to remind the, the public and, and all  
16 here what the three phases have been identified as being.  
17 I identified them when we met in June at the outset of the  
18 standing hearings. Phase 1 is to review the factual  
19 matters that are dealt with in paragraph 1 of the order in  
20 council and that is for you to inquire into the  
21 circumstances surrounding the death of Phoenix Sinclair and  
22 in particular, to inquire into the child welfare services  
23 provided or not provided to Phoenix Sinclair and her family  
24 under the Child and Family Services Act, any other  
25 circumstances, apart from the delivery of child welfare  
26 services, directly related to the death of Phoenix  
27 Sinclair, and why the death of Phoenix Sinclair remained  
28 undiscovered for several months. So that's what is to be  
29 heard in phase 1 of the inquiry.

30 Phase 2 will be to hear from the writers of the  
31 reports listed in paragraph 3 of the order in council and  
32 any other report writers, writers of similar reports and to  
33 hear any other witnesses who have evidence with respect to  
34 matters of concern within the child welfare system, within

1 the context of the facts as we've identified them, the  
2 factual issues.

3 Phase 3 will be to hear about the changes that  
4 have been made to the child welfare system since Phoenix's  
5 death was discovered, including the implementation of the  
6 over 295 recommendations that were made in the reports  
7 listed in the order in council.

8 And as the parties and intervenors know, based on  
9 the work that we have carried out so far, including  
10 reviewing matters listed in many of those reports that are  
11 in the order in council, I have determined that in order to  
12 put you in the best position to make recommendations,  
13 having regard to the facts, to better protect Manitoba  
14 children, our inquiry should also look at the following  
15 systemic issues: (1) What are the circumstances,  
16 challenges and conditions which bring a vulnerable family  
17 and in particular, having regard to the facts of this case,  
18 an aboriginal family in Winnipeg, to come into contact with  
19 the child welfare system? And (2) What services, programs,  
20 departments, whether government or community-based, exist  
21 or ought to exist, outside the child welfare system to  
22 support such families and children?

23 This evidence will be heard in phase 3 of the  
24 inquiry and so part of our work to date has focused on  
25 gathering the evidence with regard to this aspect of the  
26 review, including identifying potential expert witnesses in  
27 that regard.

28 I've also been involved with a variety of  
29 procedural issues, including court proceedings. The most  
30 recent, of course, being the application which was filed by  
31 the MGEU in the Court of Appeal requesting that you be  
32 required to state a case to the Court of Appeal challenging  
33 the jurisdiction and validity of this inquiry. That motion  
34 was heard by Mr. Justice Freedman on February 9th and

1 Justice Freedman issued a decision on February 16th,  
2 dismissing the union's motion and the union has advised  
3 that it is not appealing that ruling.

4           Going forward, Mr. Commissioner, we have  
5 identified approximately 79 more individuals who will  
6 likely be interviewed, including, of course, many of the  
7 individuals who were directly involved in the delivery of  
8 child welfare services to Phoenix and her family.

9           In requiring individuals to meet with us to be  
10 interviewed, our office makes every effort to assist a  
11 witness' participation. We have tried to make our office  
12 as comfortable a space as possible and I am grateful for  
13 the participation of the witnesses who have met with us so  
14 far and for the anticipated participation of those who will  
15 meet with us in the weeks to come.

16           Now, the amended timetable which was circulated  
17 most recently, on February 1st, to counsel sets out a  
18 timeline for hearing any motions for publication bans or  
19 redaction with respect to the public hearing. And this  
20 timeline has remained essentially unchanged since the first  
21 timetable we issued in October. Counsel for the media  
22 group will be speaking to the timelines at item 4 of our  
23 agenda today.

24           The most significant change then, on this new  
25 timetable, which is on our website as well, is the new date  
26 for commencing the public hearings of the evidence. That  
27 date has been moved from May 23 to July 4 and that will be  
28 the commencement of phase 1 of the hearings and will run  
29 until August 3. We will take a one month break from the  
30 hearings and then return on September 4th and sit right  
31 through to December 19th, hearing the, what I expect will  
32 be the rest of phase 1 and then phases 2 and 3. We'll take  
33 a break after December 19th and resume on January 14th for  
34 two weeks, for you to hear closing submissions, Mr.

1 Commissioner.

2 Unless you have questions, I think we can proceed  
3 to the next agenda item.

4 THE COMMISSIONER: No, I think that's a very  
5 comprehensive review and it certainly makes it clear to the  
6 public who have an obvious interest in this matter that  
7 many things have been going on to move this forward over  
8 those months in commission, the office of commission  
9 counsel, but I know that in the offices of the other  
10 counsel that are here as well, who have given their  
11 cooperation to commission counsel, so that we can all move  
12 forward to the objective, to get this hearing formally  
13 underway and all of those numbers of witnesses that you  
14 have mentioned this morning in turn by turn, come on the  
15 witness stand here. And I think everyone's anxious to get  
16 to that point.

17 And you've indicated that July the 4th is now the  
18 target date. The move from May having been necessitated by  
19 developments that have occurred over recent weeks,  
20 understandable and, but I'm, I'm firm in the view that we  
21 must get started and, and it'll take an awful lot to move  
22 me off that July 4th start date.

23 Now, with having said that and you've indicated  
24 the agenda, I will say this, that as counsel are aware,  
25 there's an agenda item, number 6, any other matters and if  
26 anyone wants to respond or has a query for commission  
27 counsel about the outline she's given this morning or any  
28 other related matters, they would have the opportunity to  
29 do that before we adjourn this session.

30 So with that, let us move to item number 2, which  
31 is the application by the authorities and ANCR to extend  
32 grant standing per letter of, from their counsel, dated  
33 February 28th, 2012.

34 MS. WALSH: Thank you, Mr. Commissioner. We're

1 going to file as Exhibit 4, continuing with the list of  
2 exhibits that commenced at our last public session, the  
3 letter, which constitutes the application by the  
4 authorities and ANCR, dated February 28th, 2012.

5 THE COMMISSIONER: Yes.

6

7 **EXHIBIT 4: LETTER REGARDING**  
8 **APPLICATION AUTHORITIES AND ANCR,**  
9 **DATED FEBRUARY 28, 2012**

10

11 MS. WALSH: I've filed that with the clerk. You  
12 should have a copy in front of you.

13 THE COMMISSIONER: I have a copy.

14 MS. WALSH: And we'll hear from Mr. Saxberg.

15 THE COMMISSIONER: Yes.

16 MR. SAXBERG: Good morning, Mr. Commissioner.

17 THE COMMISSIONER: Morning, Mr. Saxberg.

18 MR. SAXBERG: It's Kris Saxberg for the  
19 authorities and ANCR. As I indicated earlier, we also have  
20 with us Harold Cochrane and Luke Bernas from Darcy &  
21 Deacon. They will be acting, along with myself, throughout  
22 the public proceedings.

23 So we have two matters before you. The first,  
24 which was set out in Exhibit 4, is an application by the  
25 authorities and ANCR to remove the restriction on standing  
26 that you, Mr. Commissioner, made when you granted standing  
27 as a party to the authorities and to ANCR on June 29th,  
28 2011. That limit was with respect to the following aspects  
29 of the inquiry; the factual circumstances surrounding the  
30 death of Phoenix Sinclair, the child welfare services  
31 provided or not provided to Phoenix Sinclair and her family  
32 and any other circumstances related to Phoenix Sinclair's  
33 death and how her death remained undiscovered for nine  
34 months.

1           Mr. Commissioner, it's our submission that your  
2 decision was premised on the assumption that neither the  
3 authorities nor ANCR had responsibility or involvement, or  
4 most importantly, would be acting for witnesses in any  
5 aspect of phase 1. And at page 13 of your oral decision,  
6 and that's in volume 2 of the transcripts, you also  
7 indicated when you -- you qualified your restriction,  
8 saying:

9  
10                   "I say that ..."

11  
12                   I.e. the restriction.

13  
14                   "... with the expectation that her  
15 life and death and the involvement  
16 of Phoenix and her family with the  
17 delivery of family welfare  
18 services will be, will be fully  
19 explored by the commission counsel  
20 and by those who had  
21 responsibility for her care and  
22 welfare. If circumstances should  
23 arise indicating that there is a  
24 need for the relaxing of that  
25 limitation, that can be dealt with  
26 [by the] by application to me at  
27 the appropriate time."

28  
29                   End of quote.

30                   And that's what brings us here today, our view  
31 that it's the appropriate time for such an application to  
32 be made.

33                   So what's changed since June of 2011? There are  
34 two points to make here.

1           First, eight important phase 1 witnesses have  
2 been identified so far by the authorities and ANCR and the  
3 law firm of Darcy & Deacon will be acting for those eight  
4 individuals, whose interests are aligned with the  
5 authorities' and ANCR.

6           Number 2 -- so that's the first point, is the  
7 witnesses.

8           The second point really relates to the  
9 observation that the factual findings as to the services  
10 provided or not provided to Phoenix Sinclair are what will  
11 inform the appropriateness of the recommendations that were  
12 made and the implementation of those recommendations in the  
13 past and they, and the, those factual findings will also  
14 inform the recommendations that this inquiry makes. So  
15 therefore, really, the facts and the recommendations are  
16 two sides of the same coin. And as we say in our  
17 submission, they are inextricably intertwined and are not  
18 separable.

19           So let me expand on the first point, with respect  
20 to the witnesses. As I said, there are eight witnesses  
21 that have been identified and they are known to commission  
22 counsel. She is aware of the importance of the evidence of  
23 those witnesses, so I'm, I'm not going to get into, even in  
24 a general way, to describe the evidence that's expected of  
25 these witnesses, other than to say that two of them were  
26 directly involved with the delivery of services to Phoenix  
27 Sinclair and decisions that were made with respect to  
28 whether that care would continue or not. They were  
29 involved in the intake aspect of the delivery of child  
30 welfare services.

31           Other important witnesses relate to the  
32 allegation that certain information was provided to other  
33 child welfare agencies and that that information, the  
34 allegation that that information should have been acted on

1 in some fashion. So there are witnesses that are going to  
2 be testifying with respect to those matters. They were  
3 employees of an agency that, at the time, was under the  
4 authority and regulation of the Southern Authority. Can  
5 also indicate that Mr. Jay Rodgers, who's the CEO, or who  
6 was the CEO of Winnipeg CFS at the time of, that services  
7 were being provided to Phoenix Sinclair and her family, is  
8 a witness, one of those eight witnesses and he's also an  
9 instructing client, because at, at present, he is the CEO  
10 of the General Authority.

11 Now, these individuals fall under the auspices of  
12 the authorities and ANCR due to the fact that they were  
13 either employees of ANCR's predecessor in function, that  
14 is, they were workers at the intake, in the intake part of  
15 Winnipeg CFS, which is now ANCR. Or --

16 THE COMMISSIONER: And, and, and had contact with  
17 this family?

18 MR. SAXBERG: Yes, absolutely, important contact.  
19 And that was during the time peak, period of phase 1,  
20 obviously. Or, these employees were employees of agencies  
21 for which the authorities had the ultimate responsibility,  
22 or an authority. And that, I had earlier just referenced  
23 the witnesses for one of the agencies under the regulation  
24 of the Southern Authority. Or, they are now currently  
25 employees of the authorities or ANCR.

26 And I think it's important, in this case, to, to  
27 appreciate that there have been significant changes to the  
28 system. But from a simplified perspective, if you're  
29 looking at the function of intake services, child welfare  
30 services provided in Winnipeg, those services are still  
31 provided out of the same building, by many of the same  
32 people. The name of the organization has changed, but the  
33 function and many of the employees haven't. Those  
34 employees are testifying, will be testifying about

1 important matters at this inquiry, then they're going to go  
2 back to work for ANCR, which is one of the parties that we  
3 represent.

4           So in that sense, the fact that, for instance,  
5 with ANCR, that ANCR is the entity that's providing these  
6 services today and many of the employees that are there  
7 were providing the services during the time in question  
8 here, I can say, without being overly bold, that ANCR and  
9 the authorities are probably the best placed of any party  
10 in this inquiry to appreciate the evidence of phase 1, what  
11 happened and what didn't happen. And I think that it's,  
12 it's been made apparent, through the interview process,  
13 and, and just through the, the thought process, I suppose,  
14 of all counsel, as they're preparing for this hearing, that  
15 questions relating to phase 3 are going to have to be asked  
16 of the witnesses in phase 1. For instance, the witnesses  
17 will likely be asked, what was the standard that was in  
18 place at the time you were providing the services to  
19 Phoenix Sinclair? And have they changed? The second part,  
20 of course, interrelating phase 3 with phase 1. Or what was  
21 the policy in place --

22           THE COMMISSIONER: Yeah, although, in phase 1, we  
23 won't be getting into detail in, of the matters that are  
24 particularly relevant to phase 3, I would not think.

25           MR. SAXBERG: Well, I -- and I, I guess what I'm  
26 saying is I think that that will have to happen, at least  
27 to some degree. The witness -- if you have 37 witnesses  
28 that were the workers that provided services --

29           THE COMMISSIONER: Um-hum.

30           MR. SAXBERG: -- and made decisions, they're  
31 going to have to be asked, while they're on the stand, what  
32 the standards were --

33           THE COMMISSIONER: Um-hum.

34           MR. SAXBERG: -- and if they're changed, or what

1 the policies were and if they've changed. Or what the  
2 culture of the organization was and has it changed? Or  
3 what the workload was and has it changed? There's no party  
4 better placed, with respect to the knowledge of that  
5 information, than the authorities who mandate all of the  
6 agencies that delivery child welfare in Manitoba and of  
7 ANCR, that is solely responsible for intake in Winnipeg.

8 And, and a simpler way of putting is to say, who  
9 can ask the best questions of these witnesses in order to  
10 adduce the evidence that this commissioner is -- that you,  
11 sir, are going to need to make the best recommendations for  
12 children in this province? Who can ask the best questions,  
13 other than the party that's performing the function today?  
14 The party that is performing that intake function has the  
15 best information about what to ask these witnesses, what's  
16 relevant, what isn't?

17 It also, that also applies to the authorities.  
18 The authorities have taken a, a large chunk of what used to  
19 be the authority of the director of child welfare in this  
20 province. And it has been hived off to the authorities,  
21 who now perform that, that function, in some cases, in  
22 tandem with the director, but in other cases, exclusively.  
23 And I would make this observation, that for all of the  
24 reasons that the director, or the department, Mr.  
25 McKinnon's client, has been granted full standing, apply  
26 equally to the authorities. And I, I see absolutely no  
27 basis upon which there could be any distinction, in terms  
28 of their role in and responsibility for child welfare in  
29 Manitoba.

30 So all we're asking here is to remove the  
31 limitation on asking questions in phase 1. That's all  
32 we're asking for. It's not going to affect funding, it's  
33 not going to affect the arrangements that are already in  
34 place. It's not going to affect, or prejudice any other

1 party in this proceeding. And, and my understanding is you  
2 will hear no objection from any of the parties or  
3 intervenors to this application for increased standing.

4 It will not prolong the proceeding or add to it  
5 in any way whatsoever. I'd submit that it will speed it  
6 up, in that there will not have to be a request for leave  
7 to ask questions repeatedly.

8 THE COMMISSIONER: Well, we're certainly going to  
9 discourage repetitious cross-examination and, and what,  
10 what you're telling me is that, that to grant this will  
11 allow questions to be asked that will, will avoid  
12 lengthening and, and, and, and spreading out the time  
13 factor involved; is that what I hear you saying?

14 MR. SAXBERG: Yes, absolutely. And I can also  
15 tell you that, as counsel, we're working closely with MGEU  
16 and with the department and will ensure that there is no  
17 repetition, in terms of the, the questioning of witnesses.  
18 What I'm saying --

19 THE COMMISSIONER: Well, that, that, that's my  
20 point and, and I'm pleased to hear you say that.

21 MR. SAXBERG: Yeah. So as you know, Mr.  
22 Commissioner, the test is the test of whether there is a  
23 direct and substantial interest and I would put out there  
24 that the authorities, and ANCR, insofar as the intake  
25 function in Winnipeg, are really the primary respondents to  
26 this inquiry. It's those organizations that are going to  
27 be rolling up their sleeves, when this inquiry's done, and  
28 implementing what comes out of this inquiry. They're the  
29 party most affected, in terms of the work of this inquiry.  
30 And so, with that, there shouldn't be any restrictions on  
31 their involvement in any phase of this inquiry and we would  
32 ask that you reconsider your earlier decision.

33 THE COMMISSIONER: Thank you, Mr. Saxberg.  
34 commission counsel?

1 MS. WALSH: Mr. Commissioner, I haven't been  
2 advised that any counsel want to speak to the submission,  
3 but can we just confirm that?

4 THE COMMISSIONER: So that would appear to be so.

5 MS. WALSH: I have no objections, Mr.  
6 Commissioner, to the submission. It seems logical to me,  
7 so long, as you indicated, duplication in cross-examination  
8 is avoided and you will be alert to that throughout the  
9 proceedings, I'm sure.

10 THE COMMISSIONER: Yes, and I can understand what  
11 counsel has said about, in phase 1, some questions being  
12 asked that, that border on phases 2 and 3, but that's, it  
13 must be borne in mind that those are separate phases that  
14 are going to follow phase 1 and there may be some  
15 commingling in questions, as you've put, but we're not here  
16 intending to mesh them all into one phase. There will be  
17 distinct phases as counsel, commission counsel has outlined  
18 on the previous occasion.

19 Having said that, I've heard you. You've made a  
20 good point with respect to the, the clients that you  
21 represent, the workers in, at the authorities and, and at  
22 ANCR and I'm prepared to grant your request.

23 MR. SAXBERG: Thank you, Mr. Commissioner.

24 MS. WALSH: Mr. Commissioner, the third specific  
25 agenda item is again an application by the authorities and  
26 ANCR regarding a proposal to commence phase 1 of the  
27 inquiry with the case specific report writers and I  
28 will file, as Exhibit 5, the application dated March 1st,  
29 2012.

30 THE COMMISSIONER: Yes.

31 MS. WALSH: I think you have a copy of that  
32 there.

33 THE COMMISSIONER: I have.

34

1                           **EXHIBIT 5:        PROPOSAL    REGARDING**  
2                           **ORDER OF WITNESSES**

3  
4                    MS. WALSH:    We'll hear from Mr. Saxberg and then  
5 I'm advised that there are other counsel who want to speak  
6 to this matter and as always, I will provide any comments  
7 at the end.

8                    THE COMMISSIONER:    Right.

9                    All right, Mr. Saxberg?

10                   MR. SAXBERG:        Thank you, Mr. Commissioner.  
11 There's a belief that the primary function of this inquiry  
12 is to discover, uncover, or unearth, facts for the first  
13 time. The inference is that the government is not aware of  
14 the services which were or were not provided to Phoenix  
15 Sinclair and her family. That's not the case. The last  
16 child welfare services provided to Phoenix Sinclair and her  
17 family were seven years ago. She was murdered by her  
18 mother and her mother's boyfriend just a few months after  
19 those services were provided. The murder was not  
20 discovered until March of 2006. Almost immediately  
21 thereafter, numerous investigations and inquiries were made  
22 into the services provided or not provided to Phoenix and  
23 her family.

24                   Those investigations, along with a very important  
25 internal report, culminated in the six reports listed in  
26 the order in council. These reports were prepared by the  
27 top officers responsible for government accountability in  
28 this province. They were prepared by the watchdogs, the  
29 Chief Medical Examiner's office, the Children's Advocate,  
30 the Ombudsman, the provincial auditor, four external  
31 reports in total, external to the child welfare system.  
32 The agencies' files were reviewed, social workers were  
33 interviewed, at a time period much closer to the time in  
34 which the services were provided. Close to a thousand

1 pages of information's been produced and disseminated to  
2 government. And findings resulted, 295 recommendations out  
3 of those reports. All these reports were completed and in  
4 the hands of government before the end of 2006. The  
5 government accepted the findings of the reports and  
6 established a body to implement those recommendations.

7           Our clients, the authorities and ANCR, have been  
8 implementing these recommendations for six years, resulting  
9 in major changes to the way that child welfare services are  
10 delivered in Manitoba. Therefore, the belief that the  
11 facts aren't known about the services provided to Phoenix  
12 Sinclair or not provided, the fact, the belief that, that  
13 those facts are not known is simply incorrect. The facts  
14 are in the reports. Up until now, the government couldn't  
15 share the content of those reports. And Mr. Commissioner,  
16 you heard the reasons why earlier when, when commission  
17 counsel explained, with respect to the law regarding the  
18 confidentiality of the CFS records. However, with the  
19 establishment of this inquiry, Court of Queen's Bench  
20 order, it is now possible for the public to find out, to  
21 find out for the first time what government has known for  
22 years about the Phoenix Sinclair case and what government's  
23 been doing for the last six years in response to that  
24 information. And that is why we believe that the starting  
25 point for this inquiry must be those reports.

26           Now, it's understandable that it may not have  
27 been apparent when phases 1, 2 and 3 were formulated, of  
28 the importance of starting with the case specific report  
29 writers, it's understandable because this commission, as we  
30 heard, didn't receive those reports until recently, until  
31 months after the phases were formulated. With those  
32 reports in hand, I know the commission has benefited from  
33 all that information and used it, in terms of interviewing  
34 witnesses and interviewing the report writers themselves.

1 So the proposal -- and it's a proposal open for discussion.  
2 I know it's been characterized here as an application -- we  
3 had submitted this proposal to the parties with standing  
4 and as a matter of courtesy, to the intervenors and asked  
5 them what they thought about the proposal, as a, as a  
6 matter of discussion. And we raise it here, as a matter of  
7 discussion, with the commission. And the parties, as you  
8 know from Exhibit 5, there are three parties with full  
9 standing that consent and the other parties do not object,  
10 which may not be much of a distinction. The point is, the  
11 parties are on board with this and here's the reason,  
12 here's the proposal. It is that, that phase 1 commence  
13 with the report writers, in particular, the case specific  
14 reports and then proceed with the fact witnesses which are  
15 necessary to, to embellish upon the information and  
16 findings in those reports.

17 This proposal is not intended, nor will it in any  
18 way interfere or affect your power to call any witness on  
19 any subject relative to your mandate.

20 THE COMMISSIONER: But wouldn't, wouldn't my  
21 appreciation and understanding of those reports be much  
22 more meaningful if I'd heard the evidence that, that  
23 addresses (a), (b) and (c) under paragraph number 1 of the  
24 order in council, which is the intended phase 1, at this  
25 point? Aren't I going to be in a much better position to  
26 comprehend the, the, the findings, the recommendations,  
27 after I've heard the evidence that addresses the, the, the  
28 three items in point number 1 in the order in council? I  
29 want to hear that.

30 MR. SAXBERG: Yeah.

31 THE COMMISSIONER: Where am I going to get that  
32 information from to set the stage for me and to set the  
33 stage for the public, who want to know what went on here?

34 MR. SAXBERG: Well, I, I, I would respectfully

1 argue that, that it would work best the other way. The,  
2 the, these reports are easily understandable. They, they  
3 speak for themselves, they review, in very clear language,  
4 the services that were provided and were not provided and  
5 they review the factual matrix upon which their  
6 recommendations were based. It -- they alert the  
7 commission and the public to what's, what is important, in  
8 terms of what happened over the five years that services  
9 were provided or not provided. They provide the public and  
10 you, sir, with the opportunity to then focus on the  
11 important issues, the matters that, that leap out, the  
12 matters of consensus among the report writers, in terms of  
13 what went wrong here and what needs to be done to avoid it  
14 in the future.

15 THE COMMISSIONER: But I have to write a report  
16 that, that, that expresses my views of what went wrong here  
17 and surely, I have to hear the people who were, were  
18 delivering the front line services --

19 MR. SAXBERG: Yes.

20 THE COMMISSIONER: -- to set the stage for my  
21 appreciation of the content of those reports.

22 MR. SAXBERG: Right. And I'm not suggesting  
23 that, that one witness, that there be one less witness as a  
24 result of this proposal, not suggesting that at all. I'm  
25 just saying, why don't we start with having the whole story  
26 made available to the public, instead of it coming out  
27 piecemeal, without any context. Provide the whole story  
28 through the reports and the report writers, then get into  
29 the individuals, drill deeper into what happened and have a  
30 better appreciation of the events and their significance.

31 Procedurally, it makes a great deal of sense,  
32 from a procedural fairness perspective. Because if you  
33 place these report writers after all of the hundred  
34 witnesses have testified and there's different information

1 that comes out of that process than the information that  
2 those report writers relied on, in making their  
3 recommendations, then they are at a, at a real, they're,  
4 those report writers are at a real disadvantage, unless  
5 they sat in this room and heard the evidence of all those  
6 witnesses and then could have time to formulate how they  
7 may have changed their report, or altered their  
8 recommendations. But they're not going to be in this room  
9 for that entire period. And so they are at an extreme  
10 disadvantage when they come to testify after all, the  
11 counsel that are cross-examining them are aware of a whole  
12 different, or aware of different facts and can put those to  
13 them.

14 THE COMMISSIONER: Have you canvassed them?

15 MR. SAXBERG: Yes, I, I have, I started the  
16 process. I have canvassed, only spoke to one of the expert  
17 report writers and the counsel advised that they're not  
18 taking a position on the matter.

19 THE COMMISSIONER: They're not what?

20 MR. SAXBERG: Not taking a position on the matter  
21 and that put --

22 THE COMMISSIONER: No, but you're, you're talking  
23 about them being the ones who are at a disadvantage?

24 MR. SAXBERG: Yes.

25 THE COMMISSIONER: But you haven't heard that  
26 from them?

27 MR. SAXBERG: As I said, I've, I've only  
28 contacted the one counsel for the Chief Medical Examiner's  
29 office report writer. It's, it's my submission that they  
30 are, that they're, that it's going to be unfair for them to  
31 be put on the stand as experts when, in reality, and I'm  
32 not saying they're not experts in, in their field, but in  
33 reality, they were tasked with a job six, over six years  
34 ago. The completed that function. They prepared reports.

1 Those reports were submitted to the government. The  
2 government accepted them. The government's relied on those  
3 reports.

4 THE COMMISSIONER: And you --

5 MR. SAXBERG: To bring --

6 THE COMMISSIONER: -- you want me to hear the  
7 people that they relied on in writing those reports after  
8 I've heard from them? That is, after I've heard from the  
9 report writers?

10 MR. SAXBERG: That's right, after the, the, the,  
11 the reports and the contents of the reports are presented  
12 in this inquiry, afterwards, there can follow all of the  
13 witnesses relating to all of the significant events --

14 THE COMMISSIONER: But, but their reports will be  
15 much more meaningful to me, if I've heard those witnesses  
16 outline the circumstances of the, of the three situations  
17 referred to in (a), (b) and (c) of point 1. Their reports  
18 will be much more meaningful to me when I've heard from  
19 those witnesses firsthand what went on here.

20 MR. SAXBERG: If I may, Mr. Commissioner, the,  
21 the three items that, that have been listed, the reports  
22 only deal with one. The reports do not -- the reports deal  
23 with (a), the child welfare services provided or not  
24 provided to Phoenix Sinclair. That's what they deal with.  
25 These other two items are new. These are the two items  
26 that haven't been looked into, haven't been investigated  
27 and those are other circumstances, apart from child  
28 welfare, that directly related to the death, number one,  
29 hasn't been looked at, there are no reports on that. There  
30 is going to be a lot of witnesses, I would presume, on that  
31 subject. They, in no way, relate to the report writers.  
32 They in no way need to precede the report writers.

33 And number two, why the death remained  
34 undiscovered for several months, no report on that. That's

1 a new matter for this inquiry. And there are going to be  
2 numerous witnesses with respect to that matter.

3           So it's only with respect to the child welfare  
4 services provided or not provided. And we're making the  
5 observation, while I'm on this order in council, that it's,  
6 the order in council is clear, in terms of its direction,  
7 that the Commissioner must consider these findings and we  
8 say that that's strong language, in light of other order in  
9 councils establishing inquiries that reference reports, but  
10 don't make it mandatory to consider them. And in this  
11 case, of course, it makes sense, since there was so much  
12 work and effort put into reviewing this matter, by, as I  
13 had said, the watchdogs of this province.

14           And then the order in council goes on to say, to  
15 avoid duplication, the reports have to be considered. And  
16 we make the trite observation that if the report writers  
17 follow all of the fact witnesses, there's no opportunity to  
18 avoid any duplication whatsoever. The -- and the, the  
19 order in council, of course, itself, also speaks to the  
20 issue of the Commissioner being able to accept findings in  
21 those reports as conclusive without calling any evidence.  
22 Well, there are going to be findings in those reports that  
23 are not in any way contested, that don't require viva voce  
24 evidence, that can be then accepted as a foundation, in  
25 terms of moving forward with the individual witnesses. So  
26 we make those comments in Exhibit 5 as to avoiding  
27 duplication. We, we say that it's in the public interest  
28 that these reports come out sooner, rather than later,  
29 that, that public not wait for three months of individual  
30 witness testimony before they see these reports that have  
31 been produced on the very subject matter. And we make the  
32 procedural observation that the timetable, the way that  
33 it's established, facilitates hearing the report writers  
34 first, then having a break to consider what findings will

1 be deemed conclusive, or what information does, or what  
2 witnesses are necessary and more important than others, in  
3 light of, in light of those reports and the findings within  
4 them.

5 THE COMMISSIONER: But, but insofar as the facts  
6 are concerned, as to what went on, you're telling me that  
7 at that stage I'll have to rely on what the potential  
8 witnesses for here previously told the report writers?

9 MR. SAXBERG: Well, it's only fair for those  
10 witnesses, as well, that they're aware of what the report  
11 writers said about what they did, in the context of  
12 providing or not providing services. That information's  
13 out there. It's been out there for six years and the  
14 government's relied on it and acted on it. And so it, it's  
15 a, a matter of procedural fairness as well that that  
16 information's out there and then it's built upon. Then  
17 you, as we, we had said, drill deeper into the issues as to  
18 why a certain worker made a certain decision at a certain  
19 time.

20 THE COMMISSIONER: But I want to know what that  
21 decision was before I give consideration to the, the report  
22 writer's assessment and recommendation relating to it. I  
23 want to hear what, what, what, what, what went on.

24 MR. SAXBERG: And --

25 THE COMMISSIONER: And I think the public wants  
26 to hear that --

27 MR. SAXBERG: Absolutely, and --

28 THE COMMISSIONER: -- and phase 1 would produce  
29 that and then we would look at those recommendations and,  
30 and avoid duplication by seeing where, where, where  
31 repetition is not required.

32 MR. SAXBERG: Well, if the report writers are  
33 only being tendered with respect to their recommendations,  
34 then -- and you're not --

1 THE COMMISSIONER: Oh, I'm not saying that.

2 MR. SAXBERG: -- considering their facts --

3 THE COMMISSIONER: I, I'm not saying that. But  
4 I'm saying that their recommendations are an important part  
5 of their reports, but their full reports are before the  
6 commission, or will be before the commission.

7 MR. SAXBERG: I think that it -- I just want to  
8 make sure that we're very clear that we're not in any way  
9 attempting to limit or reduce the number of witnesses or  
10 the evidence that this commission hears. All we're saying  
11 is there are all these reports on the subject matter. We  
12 should start with them. We start with them and then we  
13 proceed to expand on their contents and we hear from all  
14 the witnesses that informed them and, and that becomes a  
15 fair process for those witnesses and for the report writers  
16 and, and in my humble submission, a logical approach.

17 Thereafter, there are these other, the two other  
18 areas, which are not the subject of the report writers and  
19 all those fact witnesses would necessarily follow the  
20 report writers, because the, because the report writers  
21 didn't make any recommendations based on those, on (b) and  
22 (c) being the non-welfare, child welfare related factors.

23 THE COMMISSIONER: Well, I can tell you, I think  
24 I will be substantially disadvantaged by not hearing them  
25 first. You say they're going to be heard, but I think I'll  
26 be at a great disadvantage in appreciating the contents of  
27 those reports, when they're spoken to by the writers, if I  
28 hadn't heard the participants in providing the care to this  
29 child and this family.

30 MR. SAXBERG: And I, I have your point, sir, and  
31 I, I would just make the observation that the report  
32 writers won't have had the luxury of hearing those fact  
33 witnesses that, that you're saying is helpful to you.  
34 Those report writers won't have, have had that, so how can

1 they testify about how their reports would be different?  
2 Unless they all are required to attend every day of  
3 sittings of this inquiry.

4 THE COMMISSIONER: Well, but you're, you're  
5 telling me they've interviewed the same people; is that  
6 what I hear you saying?

7 MR. SAXBERG: Well, not, not -- well, they've --  
8 some. There's, there's overlap, obviously, there's -- I'm  
9 not saying every single individual that's on the list of  
10 the commission here was interviewed by a report writer. I,  
11 I doubt that's the case. But some of them were, there's no  
12 doubt. Some of the report writers just did a file review.  
13 For instance, the internal report is a very important  
14 report. It's the first one --

15 THE COMMISSIONER: Which one?

16 MR. SAXBERG: The internal report.

17 THE COMMISSIONER: Yes.

18 MR. SAXBERG: It's not listed as one of the six.

19 THE COMMISSIONER: Um-hum.

20 MR. SAXBERG: It's a very important report. It's  
21 a file review. That's where the report writer reviews all  
22 of the documents in, in the files of CFS relating to the  
23 services provided or not provided. And then provides  
24 information on what's there and, and, and commentary on the  
25 services provided or not provided. So there were no  
26 interviews in that case. But that report's extremely  
27 helpful to everybody to understanding the evidence of the  
28 witnesses that follow. I, I know from my, just from my own  
29 preparation for this inquiry, I started with the reports, I  
30 read the reports, then I understood what the significance  
31 of the witnesses were. And I understand that commission  
32 counsel interviewed in that same way, interviewing the  
33 report writers first. Because that information informs us  
34 about the witnesses that are going to be testifying. It's

1 a roadmap. It's a, it's a heads up. And, and I don't  
2 believe it works the other way around, where the fact  
3 witnesses are the heads up to what the report writers are  
4 saying.

5 I think we've had a, we've had a --

6 THE COMMISSIONER: Fair exchange.

7 MR. SAXBERG: -- yeah, so I'll think I'll, I'll  
8 stop at that point, subject to any questions.

9 THE COMMISSIONER: Thank you, well, I'll  
10 certainly hear others on the point.

11 Commission counsel, do you know who wants to  
12 participate?

13 MS. WALSH: I do, Mr. Commissioner. I thought  
14 perhaps we'll go in the order of seniority. And in that  
15 regard, I might just add that I did provide this notice,  
16 this application, Exhibit 5, to the report writers or their  
17 counsel, since it did have the potential to affect the,  
18 their evidence. I was advised by all of them that they  
19 would, of course, defer to your ability to control your own  
20 process and, and decide the order of witnesses. Only at  
21 two of the report writers, or of the reports listed in the  
22 order in council are specific to Phoenix Sinclair. So for  
23 example, the reports listed at subparagraph 3(c), (d) and  
24 (e), are not with, were not made with respect to the  
25 circumstances of, of Phoenix's life and death.

26 I was advised as well, however, by counsel for  
27 Mr. Koster, Mr. England, who is in Toronto, that he did not  
28 think it was a logical way to proceed. And I have been  
29 advised of a similar position by counsel for Ms. Schibler,  
30 that is, Mr. Brodsky, who is here today and who will speak  
31 to the matter. And after that, I believe there is one  
32 other counsel, counsel for the AMC and SCO, who wants to  
33 speak to the matter.

34 THE COMMISSIONER: Well, I think probably, we

1 should hear first from any counsel who support the, Mr.  
2 Saxberg's application. He called it something else, but I  
3 forget what it was, but I think it is --

4 MS. WALSH: I have --

5 THE COMMISSIONER: -- it has to be an  
6 application.

7 MS. WALSH: -- I, I haven't been advised that  
8 anyone wants to speak to that issue, Mr. Commissioner.

9 THE COMMISSIONER: Mr. Smorang?

10 MR. SMORANG: Mr. Commissioner, I don't wish to  
11 repeat anything Mr. Saxberg's said. We do support his  
12 proposal. Just a couple of comments.

13 Certainly, no one is suggesting that you would  
14 be, in any way, shape or form, prohibited, prevented, or  
15 constrained, in terms of asking for witnesses to be brought  
16 forward at any stage in this proceeding. That's absolutely  
17 clear. Nor, quite frankly, would we have any basis to, to  
18 make that submission. So you'll make the decision,  
19 obviously.

20 It, it's probably trite to say that this is  
21 not -- what we are entering into is not a trial, in the  
22 formal sense, such as would appear in civil or criminal  
23 court. In other words, there is no burden or standard  
24 proof, there is no formality to the evidence must be before  
25 you before you make a finding. You can, through the order  
26 in council, consider evidence firsthand, second hand, third  
27 hand. And, and that's fine, that's what this, this matter  
28 and this inquiry is, is set up to, to run like.

29 But what Mr. Saxberg says that I think I ought to  
30 bear consideration by you is that there are many, many  
31 facts, that we now know about, because we have now been  
32 given these reports, that are not unknown and that, quite  
33 frankly, are not in dispute. And there may be many facts  
34 that you do not need to drill deeper into that are

1 contained in the reports that we have now had the  
2 opportunity to read and consider and, and gain knowledge  
3 and insight from. And so to avoid duplication, there may  
4 not be that need to, to drill deeper and there may not be  
5 that need to call witnesses from A through Z. And so I  
6 would suggest that it may well be that by proceeding in the  
7 manner Mr. Saxberg suggests, we will be able to dispense  
8 with some witnesses. We've heard some numbers this  
9 morning. We've heard that commission counsel has  
10 interviewed 70 and that they have 79 more to interview. My  
11 math tells me that's one short of a hundred and fifty  
12 witnesses that we currently plan to hear from in 20 days.  
13 I've never done that. I've never done half of that.  
14 Probably never done a quarter of that. And so, I don't --  
15 you know, we're all in early days. We're all trying to  
16 work together as best we can to get this thing going.  
17 We're all pushing in that direction. But I don't see us  
18 being able to put together a hundred and fifty witnesses in  
19 July at all.

20 THE COMMISSIONER: No, I, I think I'd have to  
21 agree with you.

22 MR. SMORANG: And so the other logic to Mr.  
23 Saxberg's proposal, it seems to me, is it allows us, in  
24 July, to dig into those report writers' work, to, to have  
25 them come forward, to talk about what they did, who they  
26 talked to, what they saw, what facts are not in dispute.  
27 Then we have a month --

28 THE COMMISSIONER: But those, those report  
29 writers aren't the people that, that worked with this  
30 family.

31 MR. SMORANG: They are not. And, and we will  
32 hear from every person who worked with this family that  
33 needs to be called, but there may well be, in that month of  
34 August, an opportunity for commission counsel, in

1 cooperation with counsel for the parties, to say, you know,  
2 there are lots of facts we now have before the  
3 Commissioner, that he has a good grip on, that do not need  
4 to be repeated. We don't need this witness. We don't need  
5 that witness. Maybe a hundred and forty-nine comes down to  
6 a hundred. I don't know. We won't know until we try it.  
7 But it just seems to me that to treat this as a trial, that  
8 is, you start with the first witness and you  
9 chronologically work through the last witness, because the  
10 standard of proof requires you to do that, we do not have  
11 that requirement and I would suggest to you that efficiency  
12 and getting this thing done would, would point towards what  
13 Mr. Saxberg suggests in this matter, get, get the report  
14 writers done in July. Consider the witness list in August  
15 and then let's start in September with the witnesses we  
16 really do need to hear from, so that we can drill deeper  
17 where deeper drilling is, is obviously necessary.

18 So those are just my brief comments. It seem,  
19 makes sense to us and, and we support it.

20 THE COMMISSIONER: Thank you, Mr. Smordin (sic).

21 MR. KHAN: Hi, Mr. Commissioner, it's Khan for  
22 Intertribal.

23 THE COMMISSIONER: Yes.

24 MR. KHAN: With respect to the proposal, one of  
25 the reasons, if you may recall, that Intertribal sought  
26 standing was that of course, because the, the tragedy  
27 occurred in our jurisdiction, the agency and the community  
28 in general, has been subject to a fair amount of criticism  
29 and, and I believe we'll find out during the inquiry, false  
30 allegations that, that we were, both the agency and the  
31 community, were somehow responsible for this, for this  
32 tragedy.

33 The, the -- my client doesn't oppose to the  
34 proposal. The reason we don't oppose is the reports really

1 absolve Intertribal of some sort of any, if I can quote,  
2 wrongdoing. And so, from our perspective, this would help  
3 to, help to clear the air of, of what's occurred and then  
4 from that, you know, of course, as Mr. Saxberg discussed,  
5 we can look further into the details. So our consent is,  
6 is based mainly from that perspective.

7 THE COMMISSIONER: Thank you, Mr. Khan.

8 MR. KHAN: Thank you.

9 THE COMMISSIONER: All right. Eventually, I want  
10 to hear from commission counsel, but is there anyone else  
11 that wants to speak in support of the, of the proposal?  
12 And if not, are there those who would like to speak in  
13 opposition to it?

14 MS. WALSH: Mr. Commissioner, as I indicated, I  
15 was advised by Mr. Brodsky and then by Mr. Funke, that they  
16 wanted to address that issue.

17 THE COMMISSIONER: All right. Who'd like to go  
18 first; Mr. Brodsky?

19 MR. BRODSKY: I can be very brief, Mr.  
20 Commissioner. I was not asked, except through commission  
21 counsel, what the position was of Billie Schibler, who was  
22 the child advocate at the time the reports were, at time,  
23 at the time of the untimely demise of Phoenix Sinclair and  
24 the, and was responsible for the majority of the reports  
25 that you will be considering, by virtue of the order in  
26 council.

27 I can tell you that I'm not going to repeat the  
28 questions that you put, the propositions that you put to  
29 counsel, because I agree with them. In my respectful  
30 submission, to ask my client, who was the child advocate at  
31 the time, what did you rely on, would be a repetition --  
32 not a repetition, a production of hearsay and a collection  
33 of stories and interviews that she conducted and it would  
34 be, in my respectful submission, unnecessary, in view of

1 the fact that the inquiry itself is going to be dealing  
2 with those same interviews and recommendations. In my  
3 respectful submission, to consider the findings in the  
4 report and the recommendations, without discussing the  
5 implementation, or timetable for the implementation, and to  
6 require a re-attendance, is to require a re-attendance.  
7 It's not that my client objects to re-attending once,  
8 twice, or thrice, and I'm not going to usurp the function,  
9 nor does my client, of commission counsel, who does know  
10 the position of the various parties and the witnesses. In  
11 my respectful submission, with regard to a previous  
12 speaker, this witness, my client, Billie Schibler, the  
13 former Child Advocate, is not trying to direct the  
14 commission, is not trying to say when she should or  
15 shouldn't be heard. She's just trying to say it's more  
16 logical to assess the weight, and that's the term I see  
17 from Exhibit 5, the weight to be given to a report, when  
18 you have the facts and the background on which these  
19 reports were, were made. It makes sense, in that fashion,  
20 because it doesn't -- it, it allows you to know what  
21 happened, who saw what, who said what, what the guidelines  
22 were and then to say, and then the report took into account  
23 those things, or didn't take into account these things.  
24 The weight can only be assessed once you know those  
25 matters.

26 I have to say that I'm not -- I shouldn't say --  
27 I, I was about to say and I apologize for it, I'm not  
28 interested in duplication. What I'm interested in is  
29 getting the commission, having the commission decide the  
30 case in an appropriate way. If it takes longer or it takes  
31 shorter, it's the findings of the commission that we're  
32 most interested in and I think you're, Mr. Commissioner,  
33 you have my point.

34 THE COMMISSIONER: I have, Mr. Brodsky, thank

1 you.

2 MR. FUNKE: Good morning, Mr. Commissioner.

3 THE COMMISSIONER: Yes?

4 MR. FUNKE: As indicated earlier, I'm here on  
5 behalf of both the AMC and the SCO at this inquiry, each of  
6 whom you have previously granted standing as intervenors.

7 AMC and the SCO, together, represent the combined  
8 leadership of all 65 First Nation --

9 THE COMMISSIONER: Just put that mic up, will  
10 you, a bit?

11 MR. FUNKE: Certainly.

12 THE COMMISSIONER: Thank you.

13 MR. FUNKE: As I was saying, the AMC and the SCO,  
14 together, represent the combined leadership of all 65 First  
15 Nations in Manitoba, who, in turn, represent the tens of  
16 thousands of First Nation families living in these  
17 communities and throughout the province.

18 Based on the latest annual report released by the  
19 provincial child protection branch, there are currently  
20 9,500 children in care in Manitoba, 75 percent of which are  
21 aboriginal. As a result, it's trite to say that any  
22 recommendations that you make, following the conclusion of  
23 this inquiry, will have a disproportionate impact on these  
24 communities and families. I've therefore been tasked by my  
25 clients with demanding a transparent and fulsome  
26 examination of the circumstances surrounding this tragic  
27 incident.

28 The three authorities and ANCR have made an  
29 application, or in the words of Mr. Saxberg, introduced a  
30 discussion in their letter of March the 1st, which has been  
31 filed as an exhibit before you, requesting that the  
32 commission commence phase 1 by calling the report writers,  
33 so as to avoid duplication in the conduct of this inquiry.  
34 They have stated three main reasons for the request, which

1 I'll deal with in order. First, they suggest that  
2 proceeding in this fashion will afford you, Mr.  
3 Commissioner, the greatest opportunity to avoid duplication  
4 between the reviews and the conduct of this inquiry. They  
5 argue that in order to avoid this duplication, the first  
6 step must be to consider the existing body of work before  
7 expanding or drilling deeper into the matter at hand. And  
8 that unless the inquiry begins with the report writers, it  
9 will be impossible for you, Mr. Commissioner, to avoid  
10 duplication during the public hearing portion of the  
11 inquiry, or phase 1.

12           The problem with this argument is that it  
13 misinterprets the direction given to you, Mr. Commissioner,  
14 under the order in council creating this inquiry. In order  
15 to avoid duplication of the conduct of your inquiry, you  
16 have been directed to consider the findings made in those  
17 six reviews and the matter in which their recommendations  
18 have been implemented. You have not been directed to  
19 consider the examination into the facts of the matter  
20 conducted by the authors of those six reports. Nor have  
21 you been instructed to substitute their assessments of  
22 those facts for your own. Nor is there anything in the  
23 language contained in the order in council which would  
24 suggest that your inquiry into the factual circumstances of  
25 this matter, as set out in the terms of reference, should  
26 be confined to only those facts not previously examined by  
27 the authors of those reports. And yet, that seems to be  
28 what is being suggested by Mr. Saxberg, on behalf of his  
29 clients.

30           The direction contained in the order in council  
31 to avoid duplication is, in my respectful submission, not  
32 only quite clear, but also limited, insofar as it relates  
33 to the findings and recommendations of those reviews.  
34 Moreover, although you must consider those findings, you

1 are not bound to accept them, as the order in council  
2 specifically provides you with the discretion to give them  
3 any weight you deem appropriate, which can include, but  
4 does not require, accepting them as conclusive.

5           One might ask how you are to evaluate those  
6 findings if you are precluded from an independent  
7 evaluation of the facts in evidence that the authors of  
8 those reviews relied upon.

9           Their second argument is that proceeding in the  
10 manner that they have suggested is in the public interest.  
11 They argue that the public has a right to be informed of  
12 these proceedings at the first opportunity, those  
13 proceedings being examination and findings in the reports,  
14 and that this will make it easier for the public to  
15 understand the issues being explored when the fact  
16 witnesses then testify.

17           Our clients take the contrary position. We  
18 submit that it will make the findings of the review writers  
19 and their recommendations easier to evaluate or appreciate  
20 if the public is first afforded an opportunity to hear and  
21 understand the complete facts of the matter, so that they  
22 have a context, as do you, within which to place those  
23 findings. Moreover, the public has an interest in hearing  
24 that evidence first hand, which they may be denied, should  
25 the inquiry proceed in the manner suggested.

26           Third, they suggest, as a matter of procedural  
27 fairness, the evidence of the report writers should precede  
28 an examination of the facts that were not addressed by the  
29 authors of those reports or reviews.

30           Again, we take the contrary position. It's our  
31 submission that the parties and commission counsel will be  
32 afforded a more effective opportunity to question the  
33 report writers once the full examination of the facts has  
34 been concluded, as any differences in the evidence the

1 authors relied upon, or further facts not available to them  
2 at the time that their reviews were completed can then be  
3 put to the authors of those reports and they are afforded  
4 an opportunity to consider those facts and whether those  
5 changes would affect their opinions, findings or  
6 recommendations.

7           If you, Mr. Commissioner, are to properly assess  
8 what weight to assign these findings and recommendations,  
9 it must not be limited to the understanding of the facts in  
10 evidence held by the authors at the time that they wrote  
11 their reports, but rather, in light of the full  
12 circumstances uncovered by this inquiry.

13           Finally, and perhaps most importantly, the  
14 perception of prejudice must be avoided in this matter.  
15 And if the inquiry were to start with the findings of the  
16 previous reviews, the danger, in my submission, is that it  
17 may lead to the impression, in the public eye, that the  
18 findings of fact that underpin any recommendations made by  
19 you, Mr. Commissioner, were tainted or coloured by the  
20 opinions, findings, or recommendations contained in the  
21 reviews that you considered before undertaking what is  
22 intended to be an independent examination of the facts of  
23 this case.

24           In closing, I submit, had the province intended  
25 to so limit your discretion in this regard, they would have  
26 specifically indicated as such in the order in council.  
27 They did not.

28           Subject to any questions or comments you have,  
29 Mr. Commissioner, those are my submissions.

30           THE COMMISSIONER: Thank you, very much, Mr.  
31 Funke.

32           Now, commission counsel, I think maybe it's time  
33 to take a mid-morning break and then you're going to speak  
34 to this matter, I take it; are you?

1 MS. WALSH: Yes, Mr. Commissioner.

2 THE COMMISSIONER: Well, I think perhaps this is  
3 a convenient time to take a 15 minute break and we'll hear  
4 from you and then there are other matters on the agenda as  
5 well.

6 MS. WALSH: Yes, thank you.

7 THE CLERK: Order, all rise.

8

9 (BRIEF RECESS)

10

11 THE COMMISSIONER: Ms. Walsh?

12 MS. WALSH: Mr. Commissioner, as you know, as  
13 Commission counsel, one of the roles that I fulfill is to  
14 act in the public interest in conducting this inquiry. And  
15 one of the functions of commission counsel, as we have  
16 identified in the past, is to gather all of the evidence  
17 which is necessary for you to fulfill your mandate, as  
18 given to you by the order in council. And so that is the  
19 context in which I make the following remarks concerning  
20 the proposal that has been put forward.

21 With respect, Mr. Commissioner, in that context,  
22 I do see some problems with the proposal that, in fact, to  
23 proceed in that way would not be consistent with the terms  
24 of reference set out in the order in council, nor would it  
25 allow for the most fair and orderly determination of the  
26 conduct of the hearings of the commission.

27 In June of last year, when I defined the scope of  
28 this inquiry, I indicated that consideration must be given  
29 to the first three paragraphs of the order in council. And  
30 as I stated in June, paragraphs 2 and 3 of the order in  
31 council must be read in light of the wording of paragraph  
32 1, which, of course, relates to the factual matters which  
33 you must review.

34 In my submission, Mr. Commissioner, the

1 duplication which you are to avoid in, is in making  
2 recommendations which duplicate the 295 plus  
3 recommendations which have already been made, as we've  
4 heard, through the reports listed in the order in council.  
5 I note as well, and counsel for the AMC has touched on  
6 this, that the order in council says you may give the  
7 reviews any weight, including accepting them as conclusive.  
8 But the corollary of that, of course, is that you are free  
9 not to give them any weight at all. However, Mr.  
10 Commissioner, unless and until you hear the factual  
11 evidence which paragraph 1 of the order in council requires  
12 you to look at, unless you hear that firsthand, it will be  
13 impossible for you to determine what weight to give the  
14 findings and recommendations in those reviews listed in  
15 paragraph 3 of the order in council.

16 This inquiry, in its review of factual  
17 circumstances surrounding the death of Phoenix Sinclair, is  
18 a unique and distinct process, separate from the process  
19 followed by any of the writers of the reports which are  
20 listed in the order in council. And this was most clearly  
21 articulated recently by Mr. Justice Freedman in his reasons  
22 for decision which he issued on February 16th. Quoting  
23 from paragraph 72 of the reasons for decision, he  
24 states:

25

26 "... this Inquiry under s. 83 of  
27 the Act is intended to be of a  
28 different nature and scope than  
29 any review, investigation or  
30 inquest ..."

31

32 THE COMMISSIONER: What paragraph is that?

33 MS. WALSH: Seventy-two, Mr. Commissioner.

34 THE COMMISSIONER: Go ahead.

1 MS. WALSH:

2

3 "... (or any combination thereof)  
4 that has been or that might be  
5 conducted pursuant to any other  
6 statute."

7

8 That was at paragraph 72.

9 THE COMMISSIONER: Yes, I have it.

10 MS. WALSH: And then further, at paragraph 84 of  
11 his decision --

12 THE COMMISSIONER: Yes?

13 MS. WALSH: -- Justice Freedman, quoting the,  
14 quoted the following observations about public inquiries,  
15 which were made by the commissioner into infant deaths in  
16 Toronto, as cited in a text by Ratushny on the conduct of  
17 public inquiries as follows:

18

19 "... They are not just inquiries;  
20 they are public inquiries ... I  
21 realized that there was another  
22 purpose to the inquiry just as  
23 important as one man's solution to  
24 the mystery and that was to inform  
25 the public. Merely presenting  
26 the evidence in public, evidence  
27 which had hitherto been given only  
28 in private, served that purpose.  
29 The public has a special interest,  
30 a right to know and a right to  
31 form its opinion as it goes  
32 along."

33

34 And so I submit, Mr. Commissioner, that not only

1 is it important for you to hear the factual evidence first  
2 hand, but one of the most important functions of this  
3 inquiry is to allow the public to hear that evidence first  
4 hand.

5 To the extent that the facts, which you are  
6 mandated by the order in council to inquire into have been  
7 reviewed by report writers, whether through speaking with  
8 witnesses, or for the most part, by simply reviewing  
9 documentary evidence, allowing that evidence to be heard in  
10 the public sphere does not only not amount to duplication,  
11 but represents one of the most significant aspects, I  
12 believe, of the mandate with which you are charged.

13 Further, as counsel for the authorities himself  
14 stated in the application he filed, which was Exhibit 4, to  
15 extend his grant of standing, the matters raised in phases  
16 1, 2 and 3 of this inquiry are inextricably intertwined and  
17 it is therefore crucial that the authorities and ANCR have  
18 standing with respect to phase 1, so that they may ensure  
19 that the factual underpinnings that relate directly to the  
20 recommendations are properly before the commission.

21 This reference to the importance of factual  
22 underpinnings takes me to the next point as to why, with  
23 respect, I think there is a problem with proceeding with  
24 the proposal as we've heard it. To have the report writers  
25 testify as to their findings and recommendations and be  
26 subjected to cross-examination on those findings and  
27 recommendations before they have been given an opportunity  
28 to hear all of the evidence which we intend to adduce,  
29 would, I submit, be unfair both to the report writers and  
30 to the individuals whose actions they are reviewing,  
31 primarily the employees of the child welfare agencies which  
32 provided services to Phoenix Sinclair and her family. And  
33 it impairs your ability, Mr. Commissioner, to assess what  
34 weight to give the findings and recommendations of those

1 report writers.

2           For example, as has been identified, it may well  
3 be that once all the evidence is adduced through the direct  
4 evidence of various witnesses, many of whom were not  
5 interviewed by the report writers, or interviewed to the  
6 same extent as my office is conducting interviews, the  
7 writers' opinions and findings, and recommendations, may,  
8 in fact, change and it simply makes no sense, either as a  
9 matter of practicality or fairness, to hear the report  
10 writers' conclusions and recommendations before having  
11 heard first hand all of the evidence which you must  
12 consider.

13           Also, by hearing the, by commencing the hearings  
14 with the conclusions of reviewers whose process was  
15 distinct and less comprehensive than the process which we  
16 intend to follow, there is a potential, as has been  
17 identified, to create a misapprehension of the facts, an  
18 unfair pre-judgment of the evidence, both from your  
19 perspective, Mr. Commissioner, and the perspective of the  
20 public. So while I appreciate the parties' concern that  
21 you avoid duplication and that we proceed as expeditiously  
22 as possible, with respect, I think the only way for you to  
23 fulfill the mandate that has been given to you is to start  
24 the public hearings by hearing the direct evidence of those  
25 individuals who are involved in the circumstances  
26 surrounding the death of Phoenix Sinclair. And it may be  
27 that the 150 witnesses that we plan on interviewing as part  
28 of our investigation will not, in fact, all be called. We  
29 will have regard to economies of evidence to avoid  
30 duplication.

31           THE COMMISSIONER: But isn't it a fact that some  
32 of those 150 relate to other phases than phase 1? For  
33 instance, the report writers themselves?

34           MS. WALSH: Yes, that's true as well.

1 THE COMMISSIONER: There are some who are lumped  
2 into that large figure --

3 MS. WALSH: That's right.

4 THE COMMISSIONER: -- that, that --

5 MS. WALSH: That's right.

6 THE COMMISSIONER: -- would not be phase 1  
7 witnesses?

8 MS. WALSH: That's correct. So phase 1 is not  
9 going to contain the testimony of a hundred and fifty  
10 witnesses in any event. And --

11 THE COMMISSIONER: I, I agree with Mr. Smorang,  
12 it's a, it's a real challenge to, to do phase 1 in the time  
13 we've allotted and I don't know, I, I'd be prepared to come  
14 back in August to finish, but I'm sure I'd get some  
15 objections from the crowd for that, but --

16 MS. WALSH: I would agree.

17 THE COMMISSIONER: -- we, we, we will get there,  
18 whether it's, if we have to go into September, but --

19 MS. WALSH: Well, that actually is the plan, Mr.  
20 Commissioner. We don't intend for phase 1 to finish --

21 THE COMMISSIONER: -- if, if --

22 MS. WALSH: -- in July.

23 THE COMMISSIONER: -- indeed, the, I, I reject  
24 this proposal --

25 MS. WALSH: Mr. Commissioner --

26 THE COMMISSIONER: -- if, if, if, if the proposal  
27 were to be accepted, of course, we'd be in a different  
28 timeframe with all of the witnesses.

29 MS. WALSH: Yes, and, and it, it is not  
30 contemplated that phase 1 will finish in July, by the end  
31 of July. As I said, this morning at the outset, for going  
32 forward, we'll start phase 1 in July. We break for August  
33 and then we come back in September and go right through to  
34 the middle of December, finishing phase 1 and moving on to

1 phases 2 and 3. I, I can't imagine that we would complete  
2 phase 1 in the month of July.

3           So with respect, as well, Mr. Commissioner, to  
4 the concern that was raised that the report writers will  
5 not have had the opportunity to hear all the evidence, our  
6 transcripts are going to be available. They're going to be  
7 made public on our website on a regular basis, I think  
8 probably within two weeks of the testimony. The evidence  
9 can also be heard immediately following proceedings at our  
10 offices, because it's all being digitally recorded. I have  
11 been advised by at least one report writer that they intend  
12 to actually sit through all of the hearings. And in any  
13 event, as a matter of fairness, I would put the evidence of  
14 the witnesses that's relevant to the report writers to them  
15 before I ask them to comment. And similarly, during the  
16 course of pre-hearing interviews and then when they're  
17 testifying, any of the workers about whom the reports have  
18 been written will have an opportunity to see what the  
19 report writers said about their conduct.

20           Unless you have any questions --

21           THE COMMISSIONER: No.

22           MS. WALSH: -- Mr. Commissioner, I have no  
23 further comments.

24           THE COMMISSIONER: Thank you. Does anyone want  
25 to respond to anything that's been said?

26           Well, if not, I'm going to deal with this matter  
27 at this time. I, I, my views are quite fixed, having heard  
28 everything that has been said, and I, I see no point in, in  
29 making a reservation.

30           I have been entrusted, by the government, with  
31 conducting a public inquiry. And while the other reports  
32 had been written that have been enumerated in paragraph 3  
33 of the order in council, the government, in its wisdom,  
34 deemed that not to be sufficient for its purposes on, on

1 behalf of the residents of this province and therefore  
2 ordered a public inquiry, naming me as the commissioner,  
3 to, to inquire into the circumstances surrounding the death  
4 of Phoenix Sinclair and in particular, to inquire into,  
5 amongst other things, the child welfare services provided  
6 or not provided to Phoenix Sinclair and her family under  
7 the Child and Family Services Act. And the next provision  
8 in the order says that, that I must report my findings on  
9 these matters that I've just referenced, and others, and  
10 make such recommendations as I consider appropriate to  
11 better protect Manitoba children, having regard to the  
12 recommendations as subsequently implemented, made in the  
13 reports done after the death of Phoenix Sinclair, set out  
14 in paragraph 3. So that is the responsibility that I hold,  
15 is to, is to make a series of recommendations that I  
16 consider to better protect Manitoba children.

17           And having that responsibility, I feel that, that  
18 I must hear the factual background with respect to, to the  
19 care provided or not provided to this child and this family  
20 in order for me to put the reports that have been written  
21 in their proper perspective. I, I, I, I not only make this  
22 ruling because I feel it's the way that we must conduct  
23 this, in order that I can do the job that has been assigned  
24 to me by the government of Manitoba, but I am mindful of  
25 the public interest and that, that the public wants to  
26 know, it would seem to me, what the circumstances are with  
27 respect to those services provided or not provided and the  
28 witnesses will come forward. And once we've heard that  
29 evidence, then I will be in a much better position to  
30 evaluate those six reports and, and the recommendations  
31 and, and I, I think that, that duplication can best be  
32 avoided by proceeding with phase 1, as has been intended  
33 for the last several months, and moving through that and on  
34 to the other phases. And that is the most expeditious way

1 and will put me in the best interest to meet the  
2 responsibilities that have been vested in me under the  
3 order in council.

4 Certainly no harm in the proposal coming forward,  
5 it, it came at the, at the ninth hour, so as to speak, in  
6 that we've been adjourned for eight months and this  
7 appeared last week, but nonetheless, there was an  
8 entitlement to put the proposal before us, but it is not  
9 one that I find favour with and we will proceed with the  
10 three phases as initially announced by commission counsel  
11 some eight months ago.

12 MS. WALSH: Thank you, Mr. Commissioner, that  
13 takes us to item number 4 --

14 THE COMMISSIONER: Yes?

15 MS. WALSH: -- on our agenda, which is the  
16 submission by counsel for the media group, with respect to  
17 the timetable for the hearing of the publication bans.

18 THE COMMISSIONER: Yes, Mr. Kroft?

19 MR. KROFT: Thank you, Mr. Commissioner. You,  
20 you, you may accuse me of reading too much into things, but  
21 I detuct (phonetic), detected this morning a subtle hint  
22 that the commission is somewhat enthusiastic about keeping  
23 that July 4th start date.

24 THE COMMISSIONER: Yes.

25 MR. KROFT: And so I commence by saying I'm not  
26 going to ask you to change it. Hopefully, that will reduce  
27 the anxiety for the rest of what I have to say, which won't  
28 take long. I represent a group of media, CBC, CTV, Global,  
29 the Winnipeg Free Press and the Winnipeg Sun. I've heard  
30 the comments this morning from yourself and from various  
31 participants, including commission counsel, that this is a  
32 public inquiry and of course, my clients are some of the  
33 vehicles by which that will be so.

34 Their particular interest today is with respect

1 to the possibility that there would be motions brought to  
2 limit the constitutional rights under Section 2(b) for the  
3 purposes of other social values that will be argued and the  
4 question is, is really how the media can -- the media has  
5 stepped up, this media group, without public funding, so  
6 far, in order to play the role of informing this commission  
7 about what the law is and to, to, to, to play the other  
8 side, if you like, of what is an important decision you're  
9 going to have to make. Particularly important in light of  
10 what you said about the importance of publicity and the  
11 importance that this be a public matter and perceived thus.  
12 And they, they, they are stepping up and they will do their  
13 best to, to play that role. I'm hoping that will be  
14 helpful both to the commissioner and to commission counsel,  
15 in particular, because the Supreme Court has made it very  
16 clear that where there are unrepresented other sides in  
17 these sorts of motions, a fairly heavy onus falls upon the,  
18 the commissioner, or the judge and, and, and to some  
19 degree, the Crown, or the, the commission counsel to play  
20 that role. And so maybe your August won't be quite so  
21 squeezed as a result of the efforts of the media to try to  
22 assist in this process.

23 THE COMMISSIONER: Thank you.

24 MR. KROFT: So the, the issue is the timing of  
25 having --

26 THE COMMISSIONER: We, we still have Mr.  
27 Smorang's motion before us, do we, do we not? Yes.

28 MS. WALSH: No. Oh, oh, I'm sorry.

29 MR. KROFT: Sorry, I, I, I -- well, well, you've,  
30 you've raised the, the, the important question. I don't  
31 know whether he'll have to make another application or not.  
32 I expect he will, but I've been advised by Mr. Smorang that  
33 he does intend to bring, if, if, if it's not that motion, a  
34 similar motion and the, the, the challenge that I see is to

1 try to find a way that the media can reasonably fulfil its  
2 role without interfering unduly with the timing that you  
3 would really like to follow.

4           And I, I have three suggestions that I, I think  
5 will allow that to happen. I, I say I think because I  
6 don't really know what the applications are and who else is  
7 going to bring them and so, to some degree, this is  
8 speculative. If, if Mr. Smorang were to see the  
9 constitutional light, for example, and withdraw his motion,  
10 then, of course, none of this would be relevant at all.

11           But I'm assuming that there will be some  
12 applications. My three suggestions are intertwined and,  
13 and, and are as follows. And I've discussed, on, on the  
14 timing issue, with commission counsel, with others, that  
15 the media group is going to have to have sufficient time to  
16 respond to evidence filed. And, and just to remind you,  
17 there's been a fair bit of Supreme Court authority on, on  
18 these issues. The tough job is not going to be, I expect,  
19 figuring out what the law is, but applying the law. And  
20 one of the principles that's been laid out very clearly is  
21 that people seeking to restrict rights of freedom of  
22 expression and access to information about the court  
23 proceedings, or commission proceedings, they have an onus  
24 to provide evidence and my friends know that who would be  
25 bringing this evidence. And I've had some informal  
26 discussions with them and in, in the case of Mr. Smorang,  
27 I've actually seen at least the affidavit that he tendered  
28 before, which includes some expert evidence. And that's  
29 the particularly difficult thing to deal with. If we only  
30 see that kind of evidence on April 5th, the, the current  
31 timetable that would, would, would require us to respond by  
32 April 16th, I mean, quite frankly, whether it's five days  
33 or even two weeks, to identify an expert, retain, have them  
34 review the material, I mean, it's just not going to happen.

1 So, I, I've been directing my mind to, well, how can we  
2 make it happen to meet the July 4th deadline? And, and  
3 hence my few suggestions are, from a timing point of view,  
4 the current schedule can accommodate a, a two week instead  
5 of a five day window to file responding evidence.

6 THE COMMISSIONER: Now, I have your e-mail --

7 MR. KROFT: Yes.

8 THE COMMISSIONER: -- to Ms. Walsh and I think  
9 she circulated it to other counsel; did you not?

10 MR. KROFT: Correct.

11 THE COMMISSIONER: So --

12 UNIDENTIFIED PERSON: I don't have it.

13 THE COMMISSIONER: -- is that correct?

14 MS. WALSH: Yes.

15 THE COMMISSIONER: Yes. So are you, are you  
16 going to take us through your proposal?

17 MR. KROFT: I can do, I, I can do that.

18 THE COMMISSIONER: No, no, if that's not what you  
19 wish to do, you do what --

20 MR. KROFT: Yeah.

21 THE COMMISSIONER: -- you do what you want to do.  
22 I just wanted to find out if that's where you were going.

23 MR. KROFT: Yes, that's, that -- the, the first  
24 of my three suggestions and the intertwined suggestions,  
25 are that the proposal be amended as set out in that e-mail.  
26 And the principal change is to add another two weeks to the  
27 whole process, which is allocated to giving some more time  
28 for the media group to file any responding evidence.

29 THE COMMISSIONER: Yes.

30 MR. KROFT: Everything else just cascades from  
31 that. And there may be some tweaks required because of  
32 people's schedules, I don't know. But commission counsel  
33 and I discussed it. I don't think she's got an objection  
34 or a concern that that won't work.

1           In order for that to work, I will lead two other  
2 things. One is a cooperation from my friends, who plan to  
3 bring the motion in -- motions and, and by that I mean, to  
4 the extent that they're relying on complex or expert  
5 evidence, to share, even in draft and on a without  
6 prejudice basis, the evidence in advance so that we can  
7 work in parallel, instead of in sequence. I, I know you  
8 can't order that and I'm saying that because I, I've been  
9 discussing with some who have been very cooperative. But I  
10 will need that in order to have a reasonable opportunity to  
11 provide the position, the assistance to counsel that my  
12 clients want to provide. And counting on that, and with  
13 the two weeks, I, I think we can give it the old college  
14 try to meet that deadline.

15           The third request I would have though is at an  
16 appropriate time after the deadline for filing the  
17 applications, that means at a time when we know what we're  
18 dealing with, that we at least pencil in an opportunity to  
19 get back together when we know what we're dealing with and  
20 allow us to make sure that the timetable is still  
21 reasonable.

22           I, I don't want to ask for any other changes,  
23 because it, it may be speculative, but I don't want to  
24 commit myself to something and then find out that I, I have  
25 an impossible task and I can't provide the assistance that  
26 you're going to require to make some calls that you're  
27 going to need to make.

28           That's my submission.

29           THE COMMISSIONER: All right. Thank you. We, we  
30 may call on you further as we work our way through this,  
31 but I, I, I have your points and I thank you.

32           MS. WALSH: Mr. Commissioner, I'm not aware as to  
33 whether anyone else wants to speak to this.

34           THE COMMISSIONER: Do you want to speak to this,

1 Mr. Smorang?

2 MR. SMORANG: Sure. I received a telephone  
3 message yesterday from Mr. Kroft. We did not connect. I  
4 called him back this morning and we only connected in the  
5 hearing room. I received no e-mail from anybody about this  
6 matter. If one was sent to Mr. Ray, that's possible, but  
7 certainly wasn't sent to me.

8 THE COMMISSIONER: Mr. Ray of your firm?

9 MR. SMORANG: Mr. Ray of my firm.

10 THE COMMISSIONER: Is that where it went? Yes?

11 MS. WALSH: Yes. Our scheduling coordinator sent  
12 an e-mail on February 28th to all counsel, including Mr.  
13 Ray, who is Mr. Smorang's partner and whom we have been  
14 advised is the point of contact, that's who we're to  
15 communicate with. So that's where the e-mail went.

16 MR. SMORANG: I think, in fairness, Ms. Walsh  
17 will agree that some e-mails have gone to Mr. Ray, some of  
18 gone to me that should have gone to Mr. Ray. In any event,  
19 I didn't know before this morning that the e-mail existed.

20 THE COMMISSIONER: I, I, I, I hear you.

21 MR. SMORANG: At any rate, I guess my first  
22 observation is that I don't see this as the kind of issue  
23 that needs to be debated and ultimately ruled upon by you  
24 today. I think we can work and have continued to work  
25 together to make sure that the media motion is dealt with.  
26 I was surprised to hear Ms. Walsh to say that my media  
27 motion's not before you. Maybe she just didn't --

28 MS. WALSH: No, no, I, I thought -- I'm sorry, I  
29 thought the commissioner was speaking to something else. I  
30 didn't --

31 MR. SMORANG: Okay.

32 MS. WALSH: -- I, I misspoke.

33 MR. SMORANG: The media motion that I filed back  
34 last year, as I have understood it, is going to be heard on

1 May 10th and 11th. I think even under Mr. Kroft's -- I,  
2 well, I haven't seen the, the changes, so maybe he's  
3 proposing to push that back, I don't know.

4 THE COMMISSIONER: He is proposing, I think, that  
5 that go back to May 24th and 25th.

6 Is that not correct, Mr. Kroft?

7 MR. KROFT: Yes.

8 MR. SMORANG: All right. Well, I guess my  
9 suggestion at this point is that I think counsel can work  
10 this out.

11 THE COMMISSIONER: Okay.

12 MR. SMORANG: Nobody's suggesting that we delay  
13 the start of the inquiry on July 1st, 4th. Obviously,  
14 we're going to need to give each other time to marshal our  
15 evidence and any evidence in response. I've had no trouble  
16 working with Mr. Kroft, nor, I think, aside from my  
17 inability to see the constitutional light, has he had any  
18 problem with me. So I suggest we just defer this issue and  
19 if there's a problem, we can, we can seek your guidance.

20 THE COMMISSIONER: That, that, I think if, if  
21 that -- is there anybody else wants to speak to this?

22 Well, if not, that sounds like a very amicable  
23 way of dealing with it and I guess the commission counsel  
24 could be conduit if, if need be. And if I, if we, there's  
25 any need to reassemble, why, we can do that, but I, I, I  
26 think that's, you've made a reasonable proposal, Mr. Kroft,  
27 and I've heard Mr. Smorang, accept the basis of it, that  
28 you'll work together and try to get the thing worked out  
29 and, and those dates that are in your memorandum and  
30 counsel will make that available to you, that e-mail, Mr.  
31 Smorang.

32 MR. SMORANG: Yes.

33 THE COMMISSIONER: We'll tentatively hold on that  
34 schedule, subject to the, what's worked out and you'll be

1 party to know what's going on and you can keep me informed.  
2 If I'm needed back, I'll be here.

3 MS. WALSH: Yes, Mr. Commissioner, we've  
4 certainly, I'm prepared to facilitate any meetings, as  
5 we've done in the past, between counsel, to facilitate  
6 this. I think that's a smart way of proceeding and there  
7 may, in fact, be other motions, other than the motion  
8 that's already filed by the MGEU in this regard. And so  
9 as, as that becomes clear, then we'll continue to have our  
10 discussions about the timing.

11 THE COMMISSIONER: And there's a time for the  
12 date of any other motions to be filed; is there not?

13 MS. WALSH: April 11th, yes.

14 THE COMMISSIONER: April 11th.

15 MS. WALSH: Yes, yes, that deadline has not  
16 changed.

17 THE COMMISSIONER: No.

18 MS. WALSH: So --

19 THE COMMISSIONER: But it, there's no question  
20 that Mr. Smorang's application or motion, as you may call  
21 it, is, is just adjourned sine die and is before me to come  
22 forward at the date it's agreed upon?

23 MS. WALSH: Yes, and, and both Mr. Smorang's  
24 motion and the affidavit that he filed in support are still  
25 on our website. And I understand there may be some  
26 supplemental material by way of a brief, but --

27 THE COMMISSIONER: I have them --

28 MS. WALSH: -- yes.

29 THE COMMISSIONER: -- on my desk.

30 MS. WALSH: Yeah.

31 THE COMMISSIONER: Yes, Mr. Kroft?

32 MR. KROFT: Mr. Smorang's suggestion is fine. I,  
33 I'm making a bit of a broader suggestion. I'm using this  
34 opportunity to do it. Which is for other counsel who might

1 be considering participating in these motions, particularly  
2 in the sense of filing evidence. While the deadline is  
3 April 11th, if we're moving forward cooperatively and  
4 trying to get to that July 4th date, it would be helpful  
5 for me, even as I mentioned, on a without prejudice basis,  
6 to get a heads up, especially if there's going to be  
7 evidence filed of a complex nature, so that we don't miss  
8 on that July 4th date by running into a problem. So I'm,  
9 I'm hoping that all counsel will be as cooperative as Mr.  
10 Smorang has been and, and some of the other folks I've  
11 talked to.

12 THE COMMISSIONER: Well, I'm sure they've all  
13 heard you and I think from the cooperation and the speed  
14 displayed here up until this point, I suspect it'll be  
15 forthcoming.

16 MR. KROFT: Thank you.

17 MS. WALSH: Yes, and, and in that regard, Mr.  
18 Commissioner, to the extent that I have been made aware by  
19 various counsel of the potential for filing such motions,  
20 I've been keeping them apprised of the scheduling issues  
21 and, and the need to give advice on that regard, in that  
22 regard, as soon as possible.

23 THE COMMISSIONER: Right.

24 MS. WALSH: So the final item of a specific  
25 nature on the agenda is simply to discuss the issue of the  
26 witness interview scheduling.

27 Mr. Commissioner, as I indicated earlier, the  
28 anticipated timetable which we provided to counsel on  
29 October 21st was necessarily a, a tight timeline. Due to  
30 various court proceedings which have taken place, however,  
31 our schedule has had to be revised, including the  
32 scheduling of the witnesses, which is fine. These things  
33 happen. And so our chief administrative officer has done a  
34 great deal of work communicating with counsel to prepare

1 and then revise the witness interview schedules. I am  
2 advised that respective counsel have received new schedules  
3 for the witness interviews. That's the pre-hearing  
4 interviews and that the witnesses will be issued subpoenas  
5 consistent with the process that we had followed with many  
6 other witnesses. But there may be counsel who want to  
7 speak to this issue.

8 THE COMMISSIONER: All right. Are there any  
9 counsel that want to speak to the scheduling of witnesses?

10 Correspondence has gone out to counsel as to  
11 your, the, the schedule; I take it?

12 MS. WALSH: It has. The actual schedules have  
13 been provided.

14 THE COMMISSIONER: Yeah.

15 MS. WALSH: Yes. And, I mean, this is not the  
16 only opportunity. Someone can speak with me at any point,  
17 obviously, but --

18 THE COMMISSIONER: Yes.

19 MS. WALSH: -- the, the schedule, the purpose of  
20 the schedule is to ensure that we proceed with our revised  
21 commencement date of July the 4th.

22 THE COMMISSIONER: And if there's any small  
23 adjustments, why, they can be accommodated, hopefully, but  
24 generally --

25 MS. WALSH: Yes.

26 THE COMMISSIONER: -- speaking, you've laid out  
27 the schedule as to way it's to work from here on in?

28 MS. WALSH: Yes, and I'm advised by our  
29 scheduling coordinator that she has taken into account  
30 various witness and counsel's holidays and, and other  
31 schedules, to the extent possible.

32 THE COMMISSIONER: Right. All right. Are we  
33 through with that matter on the agenda?

34 Mr. Ray?

1           MR. RAY: Yes, Mr. Commissioner, good morning.  
2 We did, in fact, receive a revised witness schedule. As  
3 you know, we represent approximately 30 of the social  
4 workers that we anticipate will have to be interviewed or  
5 perhaps testify at these proceedings. At approximately  
6 6:30 last night, I received a revised schedule indicating  
7 that there's a fairly onerous schedule in April that  
8 commission counsel intends to impose for interviewing  
9 social workers. And of course, I recognize the, the great  
10 amount of work that my learned friend and her office has  
11 before her, in terms of reviewing documents and  
12 interviewing a number of witnesses. The difficulty is is  
13 that from a practical standpoint, since last May, I have  
14 been the primary person, if not the only person in our  
15 office, conducting witness interviews, reviewing documents  
16 in order to prepare these people for interviews and to  
17 prepare them for giving testimony before you.

18           And that's not a problem because I'm available  
19 every day, except for two in March, and have been available  
20 for December, January and a great part of February. I'm  
21 also available for the most part of April. What -- we're  
22 running into problems and we haven't had an opportunity to  
23 discuss this with commission counsel at great length, but  
24 one of the anticipated problems is the schedule now  
25 contemplates four witnesses per day, in separate rooms,  
26 being interviewed by two people from our office. At this  
27 point in time, we don't have, our office, that is, the  
28 resources to be in two different rooms, interviewing two  
29 different people and to prepare those witnesses again,  
30 through a separate person in our office, if one was  
31 available, to have that interview conducted in that  
32 process.

33           I'm available and I'm available almost every day  
34 and I can certainly provide my schedule to, to the

1 commission and I, and I have done that. But to do four  
2 witnesses a day in the way currently being contemplated is  
3 going to be, well, at this point, it's not going to be  
4 possible, because I can only be in one place at the same  
5 time.

6 THE COMMISSIONER: So how many, how many days  
7 does that present a problem for?

8 MR. RAY: Well, as I say, Mr. Commissioner, I  
9 just received the, the schedule, the revised schedule  
10 yesterday. I've indicated to commission counsel that I'm  
11 available for every day but two in March.

12 THE COMMISSIONER: Well, we're, we're -- the,  
13 this is going to happen in April.

14 MR. RAY: I appreciate that and that's, and, and  
15 I'm available for the, for the greater part of, in April,  
16 with the exception of the first week and two other days.  
17 So my suggestion was that we do as many people in March as  
18 possible and if, at a conservative rate of two per day --

19 THE COMMISSIONER: April you mean?

20 MR. RAY: Well, March or April. I, I'm entirely  
21 available in March and --

22 THE COMMISSIONER: Well --

23 MR. RAY: -- I'm somewhat --

24 THE COMMISSIONER: -- there --

25 MR. RAY: -- available in April.

26 THE COMMISSIONER: -- I, I have a copy of that  
27 letter and a lot of the witnesses were going to be away in  
28 March.

29 MR. RAY: Some, some of the witnesses will be  
30 away, away in March and if -- and part of the problem is  
31 proceeding to interview witnesses in chronological order is  
32 really more the problem than is their availability. If  
33 witnesses are not interviewed in chronological order, then  
34 I anticipate this will be much easier to schedule.

1 THE COMMISSIONER: Well, do you want to get into  
2 detail of your, of your letter here, or do you want to --

3 MR. RAY: No.

4 THE COMMISSIONER: -- break for 15 minutes and  
5 see if the, you can work this out?

6 MR. RAY: Mr. Commissioner, my, my, my suggestion  
7 was originally going to be that we try to provide, or work  
8 out scheduling conflicts absent this type of a forum and,  
9 and together with commission counsel. I wasn't proposing  
10 to have the schedule resolved before you today, but I, you  
11 know, it's been put on the agenda. I'm simply raising,  
12 from our standpoint, some of the practical problems that  
13 exist in effectively having to redo work through someone  
14 else in our office, if that's, in fact, possible, that I've  
15 already done and have someone else attend witness  
16 interviews to, to do work that I've done and to prepare  
17 witnesses that I've prepared and who may -- are not  
18 familiar with the case otherwise.

19 THE COMMISSIONER: Ms. Walsh?

20 MS. WALSH: Mr. Commissioner, I'm, I don't see  
21 much value in having a, a lengthy public debate on witness  
22 scheduling. I did bring it to the attention of counsel,  
23 the fact that schedules have now been sent out and that  
24 witnesses will be subpoenaed. Because there have been many  
25 weeks of discussions and of course, we did have a, a  
26 witness schedule which then had to be revised because of  
27 the court proceedings, which were entitled to be taken.  
28 And as a result, we have other witnesses who were scheduled  
29 for March, many of whom were scheduled long ago, or ones  
30 that we have filled in.

31 In terms of, of duplicating, I mean, I'm, I'm  
32 happy to accommodate Mr. Ray and, and his clients to the  
33 extent possible and I believe that's what our scheduling  
34 coordinator has done. If we don't duplicate, if we don't

1 double up on, on lawyers interviewing, the only result is  
2 that it takes that much longer and we probably won't be  
3 able to start in July. So that's, that's the only thing.

4 Of the, the days that have duplication, there are  
5 13 full days that we've looked at. The days of  
6 duplication, there are two half days and three full days.  
7 So perhaps we can work out those. But as I said, at a  
8 certain point, Mr. Commissioner, we simply have to, having  
9 taken into account holiday schedules, which our scheduling  
10 coordinator has done, we simply have to say this is our  
11 schedule, this is what we have to do. So, failing that, as  
12 I said, I, I think we'll probably have to start later,  
13 which, you know, we're, we're able to do.

14 THE COMMISSIONER: Well --

15 MS. WALSH: So it's, it's, it's no, no more  
16 obtuse than, than that. It's just a matter of, of bodies  
17 and time.

18 THE COMMISSIONER: -- we're, we're in this  
19 position because we got -- and, and understandably,  
20 sidetracked by court proceedings which were fairly taken.  
21 No, no, no criticism of that, but that's put us in this  
22 position. And so you had to readjust your schedule, as I  
23 understand it, because of the days that were lost and you  
24 were told that while that court proceeding was pending  
25 there would be no interviews.

26 MS. WALSH: Yes.

27 THE COMMISSIONER: That's what you relayed to me.  
28 Well, if that is correct, then we've got to pick up this  
29 and, and pick up the time. I, I don't want to be  
30 unreasonable with counsel.

31 MR. RAY: If I --

32 THE COMMISSIONER: I notice, I notice, at the  
33 moment, the, the schedule has, you're, you're interviewing  
34 Mr. Ray's clients going on until Friday, May the 4th.

1 MS. WALSH: Yes.

2 THE COMMISSIONER: Where are you for resources if  
3 we were to take one more, add one more week onto that?

4 MS. WALSH: Every week that we add on makes it  
5 less likely to start July the 4th. We might have to start  
6 July the 11th. There -- in addition to all the witness  
7 interviews, we've asked various counsel for large amounts  
8 of information, much of which is still outstanding, that we  
9 need to receive. And then once we've finished all the  
10 witness interviews, as we've indicated in our rules of  
11 procedure, we are going to provide all of the counsel with  
12 will says, or summaries of all of the evidence of the  
13 witnesses that we intend to call to testify. So we're  
14 going to need time to provide all of that information.  
15 There's a huge amount of preparation just to, to get ready  
16 for the hearings themselves, once we've finished conducting  
17 the interviews. So that's why, you know, it looks like,  
18 okay, well, you're start, finishing May the 1st, you're not  
19 starting until July, but there's an awful lot to be done in  
20 the meantime.

21 So you know --

22 THE COMMISSIONER: Well --

23 MS. WALSH: -- I don't know what else to say.  
24 I'm, I'm sorry.

25 MR. RAY: I just want to mention one thing, Mr.  
26 Commissioner. You, you mentioned the court proceedings.  
27 The, the court proceedings, the period the court proceeding  
28 occurred, we had our, you know, witnesses that our office  
29 represents, we had 13 scheduled between February 2nd and  
30 February 16th, which is the date that Justice Freedman  
31 issued his decision. There was no request on behalf of our  
32 office to cancel any witness interviews subsequent to  
33 issuing his decision. And there was multiple witness  
34 interviews that were scheduled for the end of February that

1 were cancelled, I assume because of counsel's, commission  
2 counsel's willingness or desire to interview people in  
3 chronological order. I can't speak to that, I don't know  
4 why they were cancelled, but I, you know, I had the end of  
5 February, subsequent to Justice Freedman's decision,  
6 available for witness interviews and I also had, as I say  
7 again, all of March.

8 In addition to the, part of the problems with  
9 scheduling in April, Mr. Smorang is obviously going to be  
10 engaged with Mr. Kroft and perhaps others in the  
11 examination and cross-examination on affidavits, as it  
12 relates to the media motion. So effectively, Mr. Smorang  
13 would be double or triple booked on, on that issue. So  
14 it's not an unwillingness. I can definitely indicate that  
15 we are, we want to get this done as much as anybody. It's  
16 a resources issue and, and I don't know what to say, other  
17 than that we, we're, we're trying to cooperate with  
18 commission counsel, but that's why my schedule is entirely  
19 open in March, but for two days.

20 THE COMMISSIONER: Well, but look, lot of your  
21 clients weren't available in, in those dates in March. As  
22 I understand it, there, there, there were so many  
23 unavailable that it was decided it would be awkward to try  
24 to get your, your, your clients to start during that month.

25 MR. RAY: I --

26 THE COMMISSIONER: Am I, am I wrong in that  
27 understanding?

28 MR. RAY: -- my position is, is yes, because --  
29 and I've, in fact, I've offered to commission counsel to  
30 have my, my assistant do the scheduling for them if they  
31 would simply provide me with their dates that they are  
32 available. The problem, Mr. Commissioner, is that if, if  
33 the commission counsel is insisting on conducting  
34 interviews in chronological order, then it will be more

1 awkward to schedule. I can certainly indicate that.

2           If there's no insistence on interviewing in  
3 chronological order, then I don't see it as being a  
4 problem. Certainly not from my availability. And, and at  
5 the very least, as I indicated to commission counsel  
6 previously, even if we did 10 days of interviews with a  
7 conservative rate of two witnesses per day, that's 20  
8 witnesses done in March. So I don't know, and, and I, I, I  
9 don't know what their availability is in March to conduct  
10 interviews. I've, I've offered and I've indicated  
11 repeatedly that we're available to do them. If they're  
12 entirely fully booked every day, then I guess that's,  
13 that's what we're dealing with, but I don't, certainly  
14 don't want it to be indicated that it's entirely due to  
15 unavailability of myself or witnesses, because, because  
16 that's not the case.

17           THE COMMISSIONER: Do you see a solution, Ms.  
18 Walsh?

19           MS. WALSH: Well, I mean, it's unfortunate that  
20 this has become a matter of some debate, publicly. I,  
21 quite frankly, don't see what the relationship between  
22 chronological order and availability of counsel to  
23 duplicate interviews, or double up on interviews is. So I  
24 don't think that the chronological order makes a  
25 difference.

26           I think all that we do is --

27           THE COMMISSIONER: Your, I take it your office is  
28 fully booked with interviews for March; is that --

29           MS. WALSH: Yes.

30           THE COMMISSIONER: -- correct?

31           MS. WALSH: Yes, we are.

32           THE COMMISSIONER: So you're not --

33           MS. WALSH: And many of those have been, have  
34 been booked since December of last year.

1 THE COMMISSIONER: -- so you're not, your office  
2 is not available to do them in March?

3 MS. WALSH: That's right. And as you've pointed  
4 out, most of, many of those witnesses we want to interview  
5 had indicated that they weren't available in March and  
6 that's what our scheduling coordinator took into account.  
7 I mean, I think all we can do is try to work with the April  
8 month and see how far that takes us. And if it doesn't  
9 give us enough time to begin on a timely basis, we'll go  
10 from there.

11 THE COMMISSIONER: Well, if, if -- I, I don't  
12 want people being interviewed under subpoena when they are  
13 without counsel.

14 MS. WALSH: Right.

15 THE COMMISSIONER: I just don't want to have to  
16 see that happen in here.

17 MS. WALSH: I agree.

18 THE COMMISSIONER: So if we have to, to take that  
19 week in May, that, that, then we'll have to do that. And  
20 if that backs us up a, a week beyond the 4th of July, well,  
21 I guess it has to and if that happens, I think I'll be  
22 having you put out a canvas who's available for the last  
23 half of August. But I won't impose that today. I'm just  
24 throwing that out as -- we, we booked August off because we  
25 were going to, we thought we were starting much earlier  
26 than we are and it seems now that that's, that's a long  
27 time to be off. But I appreciate people have their own  
28 holiday plans and I, I, I'm conscious of that and, and I  
29 have my own in the first two weeks of August, so I, I  
30 shouldn't be so selfish to say I want you all back the last  
31 two weeks. So, but we, that's one thing we can look at.  
32 But we may have to take that week in May if this isn't  
33 otherwise resolved.

34 MR. RAY: I, I can indicate that, I don't have my

1 diary with me, Mr. Commissioner, but I'm otherwise  
2 available in May because I've indicated, I've known for  
3 quite some time that we're going to be proceeding in May.

4 THE COMMISSIONER: Okay. Well --

5 MS. WALSH: Sounds good.

6 THE COMMISSIONER: -- we'll leave it there.

7 MS. WALSH: Thank you.

8 MR. RAY: Thank you.

9 THE COMMISSIONER: Okay. Now, the last agenda is  
10 any other matters to be raised, I think; am I correct?

11 MS. WALSH: Yes. I'm not advised of any, but  
12 there may be some.

13 THE COMMISSIONER: No, it would appear not. So  
14 that means we're stand adjourned at, on a tentative  
15 timetable, until what date?

16 MS. WALSH: May the 10th --

17 THE COMMISSIONER: Right.

18 MS. WALSH: -- would be the hearing of the -- no,  
19 well, we've, we've changed the May the 10th --

20 THE COMMISSIONER: That's May the 24th.

21 MS. WALSH: -- May the 24th, yes.

22 THE COMMISSIONER: Yes, May the 24th.

23 MS. WALSH: Right.

24 THE COMMISSIONER: All right. And if we're  
25 needed before them, we'll be here.

26 MS. WALSH: Thank you, Mr. Commissioner.

27 THE COMMISSIONER: Thanks, everybody, for the  
28 cooperation this morning. Thank you.

29 THE CLERK: Order.

30

31 (EXCERPT CONCLUDED)

**CERTIFICATE OF TRANSCRIPT**

I hereby certify the foregoing to be a true and accurate transcript of proceedings to the best of my skill and ability.

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PAMELA M. MOORE