



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

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

Transcript of Proceedings
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1 JULY 5, 2012

2 CONTINUED FROM JULY 4, 2012

3

4 THE COMMISSIONER: Mr. Saxberg, I, I think I'm
5 going to have to hold you to the half hour you said you
6 would likely be. We've got a lot of counsel who haven't
7 been heard from yet, and we've got quite an agenda to get
8 through by five o'clock tomorrow, so I'll give you the half
9 hour, and turn it to you now.

10 MR. SAXBERG: Thank you, Mr. Commissioner. It's
11 -- I'll do my best. I think I have some important points
12 to make today, and -- so I will try to stay within the half
13 an hour.

14 THE COMMISSIONER: I'm afraid, I'm afraid you're
15 going to have to.

16 MR. SAXBERG: I'm going to talk about three areas
17 by way of outline. I just want to make sure that the
18 Commission has our point on why social worker anonymity is
19 so important, so as not to damage the efficacy of the child
20 welfare system and harm children.

21 I'm going to talk about that first, and then I'm
22 going to talk about the extremely minimal nature of this
23 restriction, and I'm going to compare it to the media's own
24 self-imposed restrictions on identifying witnesses in their
25 stories, and then finally I'm going to address the point

1 that I believe is, is really the matter that is driving the
2 media's opposition here, and that is that someone is going
3 to get away without being held accountable if their name is
4 not disclosed, and then I'm going to answer your questions,
5 which I had written down, and I have a brief answer to
6 them. One in particular pertaining to my client, the
7 employer of many of the witnesses that will be
8 testifying --

9 THE COMMISSIONER: Go ahead and get on with it.

10 MR. SAXBERG: Thank you. The reason why social
11 worker anonymity is so important is we have seen in other
12 instances where a public hearing dealt with the murder of a
13 child that the State was unable to prevent. We've seen
14 that in those other public hearings, in other
15 jurisdictions, that those inquiries attract sensational
16 media coverage, for whatever reason.

17 Without impugning any particular paper or
18 television station the bottom line is we've seen that in
19 other jurisdictions, in similar public inquiries, the media
20 sensationalizes the story, so what we are about to go
21 through here is not a new story. As I say we've seen this
22 movie before, and it has a bad ending.

23 The bad ending is when you name and shame social
24 workers because they weren't able to prevent a family
25 situation like this, where a family murders a child, and

1 there's sensational coverage, it radiates distress
2 throughout the system. That radiated distress amongst the
3 social workers that are in the field leads to direct harm
4 to children. We've already seen --

5 THE COMMISSIONER: Just, just tell me how. You
6 said radiated -- the radiated distress --

7 MR. SAXBERG: Yes.

8 THE COMMISSIONER: -- leads to harm to children,
9 and --

10 MR. SAXBERG: Absolutely.

11 THE COMMISSIONER: -- I want to know how.

12 MR. SAXBERG: Okay. And that's the affidavit of
13 Bruce Rivers is the best place to look for the direct
14 uncontested evidence on that point, and if you'll turn then
15 to my selected documents.

16 THE COMMISSIONER: Yes.

17 MR. SAXBERG: Okay. And tab 14, please.

18 THE COMMISSIONER: Yes.

19 MR. SAXBERG: I've highlighted some passages,
20 we're looking at paragraph 16.

21 Now, Mr. Rivers was the executive director of the
22 Children's Aid Society in Toronto during the period where
23 there was significant media coverage of some high profile
24 child deaths, and, and inquests, and then a task force
25 related to them.

1 He's testified about the significant fundamental
2 effects of that media coverage on his Child and Family
3 Services Agency, and he's testified to that in a sworn
4 affidavit which was not cross-examined on.

5 The first thing he says, and I think the biggest
6 point, is direct harm to children and families is --
7 paragraph 16.

8
9 "These changes along with child
10 protection worker's growing
11 aversion to taking risks and
12 erring on the side of safety also
13 resulted in a dramatic spike in
14 the number of children admitted
15 into care."

16
17 That's the first impact that you always see when
18 there's been a public inquiry into a death of a child that
19 the State couldn't prevent, and that's, by the way, what
20 seems to have happened in B.C. and maybe within your
21 personal experience working in the government at the time
22 of the Gove Inquiry, and, and then being familiar with the
23 aftermath. There it's reported, and you make mention of it
24 in your report, that there was a spike in the number of
25 apprehensions as a result of the public scrutiny and media

1 attention associated with the Gove Inquiry.

2 THE COMMISSIONER: But how is granting anonymity
3 to the social workers going to control that?

4 MR. SAXBERG: Well, it's easy, and I'll -- if I
5 can -- I'll show you by way of a concrete example.

6 If you turn to tab number 24, the media coverage.

7 THE COMMISSIONER: Yes.

8 MR. SAXBERG: This was the Lindor Reynold's
9 article that we looked at the other day.

10 THE COMMISSIONER: Yes, I have it.

11 MR. SAXBERG: It's -- I'm -- I assert to you,
12 respectfully, that this is extremely sensational. It's the
13 kind of article and coverage that they're talking about in
14 the academic literature that always seems to accompany
15 these kinds of public inquests. Unfair, blaming of social
16 workers and you'll see at paragraph number 5, quote:

17

18 The murder of Kematch --

19

20 Sorry, I'll start again. Quote:

21

22 The murder trial of Kematch and
23 McKay dealt only with the
24 sickening abuse they rained down
25 upon the child. It is up to an

1 inquiry to determine who else
2 aided and abetted the couple in
3 their depraved actions.
4

5 And I've read to you from this article, and I, I
6 would ask that you read it to get the flavor to see -- that
7 we're already seeing the kind of coverage that, that is
8 referred to in those reports. Here's the direct link.

9 Now put a name in this story. Now you put a
10 social worker's name in this about aiding and abetting in a
11 murder, and you have named and shamed those social workers,
12 the social worker that you're talking about. When you do
13 that and it's -- and the, the coverage is unfair, and
14 overblown, and I'm saying that the reason we're predicting
15 that is because it's happened elsewhere, and the academics
16 have recorded it, and we've put all that evidence before
17 you, so it's not speculation.

18 When that happens, and, and any other worker
19 working in the child protection field in Manitoba sees that
20 story, that's what -- the reaction of that worker is going
21 to be the effect of radiated distress. They're going to
22 see what's happened to their co-worker, or maybe the person
23 that sits beside them at the -- at ANCR, performing the
24 intake function, receiving calls from sources of referral,
25 indicating that a child may be in risk. They may be

1 sitting beside that person on a day to day basis, and they
2 see what they go through, and how they've been unfairly
3 treated, and that their name's attached to an
4 over-sensationalized story like that, and I tell you it
5 changes the way they're going to work.

6 THE COMMISSIONER: Changes what?

7 MR. SAXBERG: The way they're going to work, and
8 that's what Mr. Rivers' entire affidavit is about. He's
9 the executive director of a major agency in Toronto that
10 lived this. We have been -- as I said we've seen this
11 movie, and Mr. Rivers is testifying that it has a bad
12 ending, and so what he is saying then is that the naming
13 and shaming of social workers, in unfair media stories,
14 results in the first increase in apprehensions.

15 Well, how does that harm children?

16 There is -- in terms of the work that's done by
17 the province, the State, in interfering in families, and
18 protecting children, the most intrusive of course is an
19 apprehension. To take a child away from their family, and
20 if the media coverage, because the names are allowed to be
21 reported, results in more apprehensions, and apprehensions
22 that wouldn't otherwise have occurred, but are occurring
23 because, as Mr. Rivers testifies, workers are airing on the
24 side of safety, they're making more strict decisions in
25 terms of intervening in families, and as the academics

1 report it puts a system -- it puts the system out of
2 balance.

3 Yes, there are positives associated with it, but
4 there are also negatives. When workers are not reacting in
5 the normal way based on the evidence they see before them,
6 rather they're reacting out of fear. Rather than acting on
7 the strict evidence they have before them in terms of
8 what's going on with this family, what the referral is, how
9 solid it is. They're acting out of fear. They want to
10 cover their, their behind, as they say in the vernacular.
11 That's what's happening, and I tell you if it happens in
12 one instance where it shouldn't have happened, an
13 apprehension, and a child is ripped apart from their
14 parents, that's harm, and that's harm that you can at least
15 take some strong measure to avoid, strong measure, just by
16 saying we're not going to name the social workers unless,
17 and, and this is the point that I was maybe perhaps
18 clumsily trying to make yesterday, unless you receive
19 evidence, you receive some sort of evidence that, that
20 comes close to what the media is presuming here about
21 misconduct, and there's an individual that did something
22 that, that cries out that they be accountable, and that
23 their name be published, when you hear that evidence then
24 you can change -- you can allow the publication of that
25 witness' name, but, but we've got -- remember we heard 24

1 witnesses, social worker witnesses attached to this file,
2 24, 24 witnesses and now that's been added to, and I
3 submitted my list last night, so it's around 30, 30 social
4 workers. There are not 30 social workers in that category,
5 and I'm submitting the majority will be very routine type
6 of evidence, so the point is that the first harm from
7 sensational stories on this subject, which is -- you know,
8 it's the subject matter itself that drives probably the,
9 the reason for the social -- for the sensational stories,
10 but the first effect is increased apprehensions. Increased
11 over what they would be but for the media coverage.

12 The next -- at tab 16 is -- I'm continuing on
13 with Mr. Rivers' testimony, and he says at tab 16 in the
14 highlighted portions, at paragraph 20, that:

15

16 "The inquests also took their toll
17 on staff members who were directly
18 involved in the inquests, but
19 observed what their colleagues
20 went through --"

21

22 Sorry.

23

24 "-- who were not directly
25 involved, but observed what their

1 colleagues went through."

2

3 That's the radiated distress.

4

5 "Staff members throughout the
6 Society were clearly impacted by
7 observing what their colleagues
8 were going through. This sent a
9 chill throughout the Society."

10

11 This is Mr. Rivers' experience, and he talks
12 again about erring -- social workers erring on the side of
13 caution, to take no risks whatsoever when it came to the
14 assessment of whether a child was in need of protection,
15 because of the harsh media treatment that their colleagues
16 were receiving.

17 And then he goes on at paragraph 21 to talk
18 about --

19 THE COMMISSIONER: Now wait a minute. What tab
20 are you at now?

21 MR. SAXBERG: Well, I was at tab 16.

22 THE COMMISSIONER: Okay. Sorry.

23 MR. SAXBERG: And that was paragraph 20, and then
24 paragraph 21.

25 THE COMMISSIONER: All right.

1 MR. SAXBERG: The number of apprehensions because
2 of the, we're not taking any risks, we're going to cover
3 ourselves, leads to huge court backlogs, and a court
4 backlog harms children, and it harms children because
5 there's no resolution in their -- in the family plan.

6 When children are in limbo, and you, you may know
7 this from your days in, in Queen's Bench, but I'll tell you
8 one thing, the judges here in Manitoba do not want to see
9 children in limbo where they don't know what the future is,
10 whether it's going to be in foster care, whether it's going
11 to be with the parents, whether it's going to be with this
12 foster care placement, or that one, limbo is no good for
13 children. Children need certainty, and they need planning.
14 When there are court back-ups that doesn't happen, and
15 that's another direct effect in the uncontested evidence of
16 Mr. Rivers about sensational media coverage.

17 And, you know, I, I can take you through the rest
18 of these tabs, but you've only -- I've only got 10 more
19 minutes and I don't want to -- I want to use my time
20 wisely, so I've left this binder with you. You have to
21 read the affidavit of Mr. Rivers because --

22 THE COMMISSIONER: And it runs from tabs what
23 to what?

24 MR. SAXBERG: Well, I, I would ask that you read
25 the entire affidavit in our material. I just -- I've given

1 you some selections here that you can read as well, but in
2 the material his affidavit is before you.

3 THE COMMISSIONER: I, I have read it all, but --

4 MR. SAXBERG: Okay.

5 THE COMMISSIONER: -- I, I would like to know the
6 tab, the tab where you highlighted what -- the parts of it
7 you consider to be the most important.

8 MR. SAXBERG: Yes. Tab 14 to --

9 THE COMMISSIONER: Yes.

10 MR. SAXBERG: -- and including tab 17.

11 THE COMMISSIONER: Thank you.

12 MR. SAXBERG: The point is this, and it's a
13 simple one. It's, it's maybe a cliché, but it's applicable
14 here.

15

16 "It's those who fail to learn from
17 history are doomed to repeat it."

18

19 That's what all the evidence the authorities have
20 placed behind you is for. We have to learn from the
21 experiences in these other jurisdictions. We have a duty
22 to children to ensure that the very process that's being
23 put in place to improve the lot of, of childrens (sic) and
24 the protection of childrens doesn't along the way create
25 collateral damage that harms them, and this very simple

1 measure of not disclosing the identities, as is the case in
2 every child protection hearing, until you receive evidence
3 that cries out in the name of justice for the release of
4 that name I think is an extremely modest request. On the
5 one hand an extremely modest restriction, on the one hand,
6 but has the positive benefit to avoid all of this harm
7 we've seen on the other, and is absolutely necessary in
8 order to avert what other jurisdictions have experienced
9 when they've gone through a similar hearing.

10 So let's then turn to that question then of how
11 minimal is this restriction, and I'll just refer you to our
12 reply brief, which I've included, at tab 12, and I'm going
13 to refer you first to page 10, and I, I strongly recommend
14 that, that you consider this reply brief. It has a lot of
15 important information on it summarizing a lot of what I've
16 been saying over the last while.

17 But at page 10, beginning at tab 10, the title is
18 Restriction Sought is Minimal, and we're not restricting
19 the hearing itself. The hearing there is going to be zero
20 restriction on it. Anyone can walk in, sit down, watch the
21 proceeding without any restriction. They will see the
22 social worker, they will hear the social worker's name, and
23 they will do what they will do with that information.

24 What we're seeking is the mass publication of it
25 through a sensational story, and the reason -- you know,

1 the reason why we're afraid of the sensational story is as
2 I've said over and over again, is because that's what
3 happens in these cases, that's what the academics have
4 documented, and that's what we've already seen, so we're
5 just precluding the mass production, which can then lead to
6 the radiated distress, and those impacts on the child
7 welfare system, so no restriction whatsoever on the hearing
8 itself.

9 The media will be here, will be able to see the
10 face, will hear the name, will be able to identify if there
11 is some sort of connection between the identity of that
12 name and, and the reason for it being important to, to
13 identify that, that person, and they'll be able to come
14 forward, or they'll be able to do their independent
15 research, they'll be able to come forward and say, this
16 individual here we need to publish the name of that person,
17 and here's why, here's why justice commands it. That would
18 be open to them, they will hear it, so that's the process,
19 and what -- you know, Mr. Kroft is going to get up here,
20 and he's going to say -- and only because I've heard him
21 say it before, this is going to be the most private public
22 inquiry ever if this ban is granted.

23 Well, that's wrong, and as I told you the other
24 day we are dealing with child protection in this inquiry,
25 and the only other inquiry that I know of that's dealt with

1 that is the Gove inquiry where that's the subject, and
2 because we're dealing with that all bets are off, things
3 are different here, and as it stands this inquiry is
4 already the most public child welfare proceeding in the
5 history of this province by a long shot.

6 We've got a camera, we're having an open public
7 hearing, child, child welfare documents that are never
8 disseminated, never allowed to go out into the public, will
9 be put forward, albeit in redacted form, in this
10 proceeding. That is an incredible amount of lifting of
11 confidentiality already, so what we're requesting is very
12 small.

13 And then what I wanted to point out was the media
14 itself how important is the identity of the story -- of the
15 individual in the story? That's what you have to ask
16 yourself. Well, there are all kinds of occasions where the
17 media does not publish the identity of a key witness, or a
18 key person in the story, and that's at paragraph --

19 THE COMMISSIONER: What about at inquests, are
20 the names of the social workers published there?

21 MR. SAXBERG: Yes, and I'm going, I'm going to
22 definitely talk about that.

23 So far there, there have been in Manitoba several
24 inquests that have dealt with child deaths. Mr. Smorang
25 and I have talked mostly about the Tracia Owen inquest.

1 Before that inquest there had been no formal prohibition on
2 the access to the documents filed in an inquest by the
3 media, there hadn't been, and, and do you want to know why?
4 Because it hadn't been asked for. The application had not
5 been made, and in the Tracia Owen case it was made where
6 the authorities and the agencies said, no, you're going to
7 harm the efficacy of the child welfare system if you allow
8 these confidential documents to be disclosed to the media,
9 and Judge Guy agreed, and the court of appeal agreed. The
10 court of appeal said freedom of the press and, and the
11 efficacy of the child welfare system are competing.

12 THE COMMISSIONER: But they deal with the
13 identity of social workers?

14 MR. SAXBERG: Yes, yes. All of those exhibits
15 would have dealt with the identity of social workers, it
16 would have been the section 4 report, the section 10
17 report, the same reports that we're dealing with here.

18 Now, have witnesses' names been identified in
19 those inquests, and my understanding is that they have, but
20 I say it's only -- they ought not to be, and it's only
21 because there hasn't been a motion brought at the inquest,
22 and the reason why there hasn't been a motion brought
23 because we have in those inquests --

24 THE COMMISSIONER: Would the motion in the Owen
25 case deal specifically with identifying social workers?

1 MR. SAXBERG: No, it dealt just with the release
2 of all the exhibits.

3 THE COMMISSIONER: Documents.

4 MR. SAXBERG: All the documents which of course
5 had the names of social workers in them.

6 THE COMMISSIONER: But the social workers'
7 names --

8 MR. SAXBERG: Were in them.

9 THE COMMISSIONER: -- were, were there?

10 MR. SAXBERG: Yes, absolutely.

11 THE COMMISSIONER: But was mention made of the
12 publication of the names?

13 MR. SAXBERG: We were dealing with -- well, you
14 can see the documents et al, and the documents have the
15 social workers' names in it.

16 Now, it was a public inquest, people could
17 attend, they weren't restricted from attending, the media
18 wasn't restricted from attending. The names of the social
19 workers were not -- there was no request that the names of
20 the social workers not be published, so it was never
21 adjudicated in that inquest, and it was never adjudicated
22 -- it hasn't been adjudicated in other inquests. That's
23 because it hasn't been asked for, and the reason it hasn't
24 been asked for is because we have never -- this is my
25 submission, there hasn't been a situation where the media

1 attention is so enormous on the matter that it would create
2 the kind of situation that all of this evidence we've put
3 forward vis-a-vis other jurisdictions shows that the media
4 attention itself is going to result in these negative
5 impacts on social workers that then harm children, because
6 those matters didn't attract the media attention that this
7 matter does.

8 THE COMMISSIONER: But the practice in this
9 province is that social workers are identified in public
10 inquest reports; is that correct?

11 MR. SAXBERG: That has happened. Yes, that has
12 happened. I, I -- that has happened because --

13 THE COMMISSIONER: Well, it doesn't happen all
14 the time.

15 MR. SAXBERG: Well, it has happened because no
16 one has asked for it not to happen. That's the only
17 reason, and what I said is just like the exhibits were open
18 until someone asked for it not to happen.

19 No inquest judge has received the evidence that
20 you've just received. No inquest judge has received the
21 submissions. No inquest judge has been told about the harm
22 that could be caused if there is large media attention on
23 the matter. They -- no inquest -- it cannot be used as a
24 precedent, Mr. Commissioner. It cannot be used as a
25 precedent that because names have been published in

1 inquests that that's the rule we have to follow, it can't.
2 None of those inquest judges have considered this matter,
3 and I can tell you that they, they soon will. But there is
4 a difference between those inquests and this, and it's
5 scope. It's the amount of media attention. It's the
6 amount of public attention, and you know that this inquiry
7 is attracting a lot of attention. All you have to do is
8 look to the media articles, and then all the comments that
9 follow them, that we went through the other day, and I've
10 included it at my tab 23, and you can -- you see -- if you
11 turn to tab 23 you see the story, and then you see all the
12 comments made.

13 There were stories, there were stories yesterday
14 that received hundreds of comments as well. People are
15 moved by what happened to Phoenix, as they ought to be.
16 People are emotional about what happened to Phoenix, as
17 they ought to be. It's gut wrenching, and it creates the
18 type of story that can lead to the naming and shaming, and
19 blaming of social workers that ought not to be treated that
20 way, and that when their colleagues see it, and they know
21 it's unfair, affects how they work and that harms children.
22 That's our whole point.

23 The media itself doesn't publish the names of
24 people in stories -- in numerous situations and I've listed
25 that at tab -- at page 10 --

1 THE COMMISSIONER: Tab what?

2 MR. SAXBERG: That's at tab 12, and you can just
3 make note of this then.

4 THE COMMISSIONER: Just a minute. What, what ...

5 MR. SAXBERG: That what we're talking about from
6 -- sorry, from page 11 -- tab 12, page 11 --

7 THE COMMISSIONER: Yes, yes.

8 MR. SAXBERG: -- through to page 13.

9 THE COMMISSIONER: Yes.

10 MR. SAXBERG: Is a discussion that, for instance,
11 legislative bans do not allow the media to report the names
12 of, of young offenders, as you know. The identities of, of
13 sex crimes are not identified.

14 THE COMMISSIONER: Yes.

15 MR. SAXBERG: And anyone that would lead to the
16 disclosure --

17 THE COMMISSIONER: Yes.

18 MR. SAXBERG: Most children and families, subject
19 to child protection hearings, as you know, but also -- how
20 about this; confidential sources.

21 As you know there are stories virtually daily in
22 the media where the media relies on a confidential source.
23 They, they allow the person who's usually driving the story
24 to go unnamed --

25 THE COMMISSIONER: I understand that.

1 MR. SAXBERG: -- and it's -- and the CBC has a
2 policy, I've cross-examined on it with Mr. Cecil Rosner,
3 and you can see that in the cross-examination, their policy
4 is if the confidential source fears reprisal then they
5 won't publish the name, so I said, well, you know, what
6 amounts -- how do you test that fear of reprisal, and so
7 you can see that discussion in the cross-examination, but
8 of course it's here. You've seen the comments where people
9 are saying that social workers should be shot, they should
10 be fired, they -- you know, all of these comments, and --

11 THE COMMISSIONER: I'm not sure that it's up to a
12 Commissioner at a public inquiry to control that kind of
13 thing. If it's wrong don't we have elected representatives
14 to our Parliament and legislatures that should be dealing
15 with that?

16 MR. SAXBERG: Your responsibility is with respect
17 to your proceeding, and how you -- and controlling your
18 proceeding, and controlling what restrictions are placed on
19 the media coverage of it in order to avoid harm to
20 children, which is --

21 THE COMMISSIONER: But how am I going to control
22 the, the comments that are made on the network following
23 the placement of the, of the --

24 MR. SAXBERG: Well --

25 THE COMMISSIONER: -- newspaper stories thereon?

1 MR. SAXBERG: By granting this request which is
2 our request to not lift the confidentiality of the names.
3 Granting that now you're not -- because if you look at
4 these lists where it says --

5 THE COMMISSIONER: But that's, that's not going
6 to control someone saying a social worker should be shot.

7 MR. SAXBERG: Yeah, but it's not going to name
8 the social worker, and say that person's name available on
9 the internet to say that -- connect that person to it --

10 THE COMMISSIONER: But --

11 MR. SAXBERG: -- this person should be shot.

12 THE COMMISSIONER: But that comment appeared
13 there without any name being attached to it, and, and you
14 take objection to the, to the, the violence of the
15 statement, if I can put it that way, and I agreed with you.

16 MR. SAXBERG: Yes.

17 THE COMMISSIONER: But it's, it's there without
18 any name being attached to it.

19 MR. SAXBERG: Right, and can you imagine how bad
20 it would be if the name was attached to it, how far worse
21 it would be, and that's my point. Once we get the names --
22 if the names are available then there's going to be serious
23 harm that's going to flow directly through to children.
24 It's going to be that much worse, and if you say so and so
25 should be shot I mean that's a lot worse than social

1 workers. I'm not asking you to control those comments, I'm
2 not telling to -- we're not in any way restricting what can
3 be reported in terms of the content, or -- you know, we
4 don't want to restrict freedom of expression, people can
5 say what they're going to say and sometimes they say things
6 that are vile, and that's what we've seen here, but we --
7 this is a free, democratic society. They ought to be able
8 to say what they want to say.

9 What we're talking about here is just restricting
10 the name of that social worker because the history shows us
11 unfair, sensational journalism gets attached, they get
12 named, they get shamed, and it hurts children, and none of
13 that evidence is contested here so -- and just in terms of
14 no one else is going to be held accountable what, what
15 would happen, you know, if someone truly did something
16 wrong of a level that, that requires justice to publish
17 their name then you can make that decision once you've
18 heard that evidence, but there's no evidence before you
19 today that that happened, and, and I'm telling you that the
20 perception in the media about what happened here is
21 fundamentally wrong and it's not even an issue. I know you
22 chastised me yesterday for trying to give evidence, but I'm
23 talking about matters where there's no issue, no party in
24 this proceeding would ever say there's an issue as to
25 whether or whether or not that's the case, and I mean in

1 today's Free Press it said that Phoenix was under the
2 supervision of Child and Family Services while she was shot
3 with a BB gun, and forced to eat her own vomit. That's
4 just fundamentally wrong, and no one ever is going to say
5 otherwise. It's not an issue in this hearing.

6 She wasn't under the supervision of CFS, and it's
7 what's driving this anger, so you got to wait until you
8 hear that evidence to say, this person's name should be
9 mentioned, they should be exposed.

10 Those are my -- the areas I wanted to cover, but
11 you had asked some questions. One of them was germane to
12 my client, who's ANCR. As you know ANCR is the agency
13 that's responsible as the first point of contact in
14 Winnipeg for all calls from people who have concerns that a
15 child may be in need of protection. The number that you
16 phone goes to ANCR. It's divided into certain units, and
17 the first unit that talks to people phoning in with those
18 complaints is the Crisis Response Program. There are going
19 to be seven witnesses, seven witnesses --

20 THE COMMISSIONER: What, what question are you
21 answering now?

22 MR. SAXBERG: A good, good point, sir. The
23 question of what other measures are there that worker --

24 THE COMMISSIONER: Oh, yes.

25 MR. SAXBERG: -- that the employer could impose

1 here to --

2 THE COMMISSIONER: Um-hum, um-hum.

3 MR. SAXBERG: -- mitigate the harms that I've
4 been discussing, so what are the measures, and I, I believe
5 that you had indicated, well, you know, could you arrange
6 for some leave for these workers --

7 THE COMMISSIONER: Yes.

8 MR. SAXBERG: -- something to assist them along
9 those lines, and what I was describing was one of the major
10 -- the first point of contact with the child welfare system
11 is the Crisis Response Program. There are two teams of, of
12 workers, 14 workers, two teams. Seven workers are
13 testifying in this proceeding from that. The workers that
14 are still -- that had involvement in this file, and are
15 still working, and still doing the same work. They now
16 work for ANCR the seven of the fourteen. If you were to
17 take those seven workers off the job that would be a direct
18 impact on children and families. It would be a major
19 safety concern. You can't just take anyone else to plug
20 into that job, which is a specific assessment job, a
21 screening job with respect to calls coming into CFS. It
22 just -- it's the function which determines, do we go out
23 and investigate, how much of an investigation do we do,
24 it's that function, and as I say there are seven workers
25 there that are testifying, so --

1 THE COMMISSIONER: I have your point, I have your
2 point.

3 MR. SAXBERG: -- it's not possible, not possible
4 to do that.

5 So that was the most important of the questions.
6 I, I -- you asked, Has a publication ban been imposed in a
7 similar situation, and I just want to point out that in
8 other inquiries -- there are no other inquiries that have
9 dealt with child protection, as you know, but --

10 THE COMMISSIONER: But in, in -- you've talked
11 about Rivers' affidavit and the inquests and the inquiries
12 he talks about --

13 MR. SAXBERG: Yeah.

14 THE COMMISSIONER: -- were social workers
15 identified in those instances, or do you know?

16 MR. SAXBERG: Yes, they were, and that's why he's
17 saying that that harm arose.

18 Now, the Gove inquiry, which you no doubt are far
19 more familiar with than I am, we went back to the office
20 yesterday and tried to research -- tried to get a hold of a
21 copy of the Gove report, and it's not on line. All we were
22 able to see was the summary. The summary in the Gove
23 inquiry does not mention the social workers' names. I
24 don't know if that has been changed because of what
25 happened, or whether it was always the case, I don't know,

1 that's information that you have, but I'm saying to you
2 that's the only other example that we know of where you
3 have a public inquiry dealing with private child protection
4 matters.

5 THE COMMISSIONER: Okay. Just a couple of
6 questions to close then.

7 Is, is it your submission that the publication
8 ban would apply to the content of my report?

9 MR. SAXBERG: Yes. In other words that you, you
10 wouldn't refer to workers by name?

11 THE COMMISSIONER: Yes.

12 MR. SAXBERG: Yes.

13 THE COMMISSIONER: Thank you. Now, just finally,
14 and you've covered this, but I'd like you to sort of
15 succinctly tell me how is the risk to child -- the child
16 welfare system, and to children in the system, reduced by a
17 publication ban?

18 MR. SAXBERG: Okay. And, and that's -- how is --
19 and we'll get more specific. By requiring that the
20 witnesses testify -- the social workers have anonymity how
21 is that going to reduce the harm to children, and, and
22 that's the evidence that I went through already. The, the
23 direct way is you're not going to get that radiated
24 distress throughout every worker who works in Child and
25 Family Services when they see the name of their colleagues

1 that sits beside them being, as Mr. Smorang described,
2 pilloried in the media.

3 You take these sensational stories that you've
4 already seen, and the comments to them, and you attach a
5 name, and it becomes self-apparent, it becomes obvious that
6 those individuals that work in social work would see that
7 and be affected by it, and all of the studies say it
8 changes the way they deal with children, it changes the way
9 that they work, and that has harmful effects.

10 One of the biggest that I didn't talk about was a
11 lot of them leave the business. If, if doing your job,
12 just doing your job as best you can, if someone wants you
13 to -- if, if the media's expecting you to accomplish the
14 impossible, to foresee the unforeseen, to have a crystal
15 ball and to know when a parent is going to so severely
16 abuse a child, that's what's being asked of you, and if you
17 don't foresee those things then your face, your name is in
18 the paper for everybody to see in your life, your life is
19 affected, well I'm telling you you're going to be afraid,
20 you're going to want to avoid that at all costs, and it
21 changes the way you work.

22 What it does is it impacts how the State can
23 deliver child protection services, it produces a chill and
24 all of this -- this isn't me saying this, this is the
25 academic literature from similar experiences in other

1 jurisdictions which I believe the Commission cannot ignore.

2 I thank you for allowing me to go into overtime.

3 THE COMMISSIONER: Well, I perhaps occupied five
4 minutes of that myself, so we're -- I think we're even.

5 MR. SAXBERG: Thank you.

6 THE COMMISSIONER: Thank you. All right. Now I
7 think counsel for Intertribal is next, is that correct, Mr.
8 Khan.

9 MR. KHAN: Yes. Good morning, Mr. Commissioner.
10 It'll just take me a couple of minutes to set up.

11 THE COMMISSIONER: Yeah, sure.

12 MR. KHAN: Thank you, Mr. Commissioner, and for
13 the monitor it's Hafeez Khan. I'm counsel for Intertribal
14 Child and Family Services.

15 THE COMMISSIONER: We'll probably take half an
16 hour from you, and then we'll take our mid-morning break.

17 MR. KHAN: Okay. Mr. Commissioner, I filed three
18 documents. One is the notice of motion --

19 THE COMMISSIONER: Now, I should have been
20 getting that --

21 MR. KHAN: It's a separate small document.

22 THE COMMISSIONER: Let me just get your notice of
23 motion out here. Yes, I have that.

24 MR. KHAN: And our motion brief. It's about ...

25 THE COMMISSIONER: Just a moment. I've got --

1 your, your third document will be your reply, I assume?

2 MR. KHAN: Yes.

3 THE COMMISSIONER: I have that, too.

4 MR. KHAN: And both our motion brief and our
5 reply brief contains are, are case law with tabs as well,
6 so they're --

7 THE COMMISSIONER: Just let me get that. That's
8 there, and I just want to get your actual motion.

9 Yes, I have all three of those in front of me
10 now.

11 MR. KHAN: Okay, fantastic. At some point I will
12 also be referring to the affidavits of Ms. Regehr and --

13 THE COMMISSIONER: Yes.

14 MR. KHAN: -- the affidavits of Mr. Rivers.

15 THE COMMISSIONER: Yes.

16 MR. KHAN: Now, I don't expect to take much time.
17 A lot of what I -- some of what I, I wanted to cover has
18 been, has been covered already, and I don't think there's a
19 need to go through it again.

20 THE COMMISSIONER: I'm, I'm appreciative of that,
21 but I also realize you haven't had any time yet so go
22 ahead, and we'll see where this goes later in the morning.

23 MR. KHAN: Great, thank you very much.

24 Okay. Well, for today if we could first address
25 -- go to the notice of motion, and you'll see we're seeking

1 three -- the order seeks -- it's, it's in three parts, and
2 the first of course is the main application, which is the
3 -- you know, the, the restriction on the publication of
4 the, of the workers.

5 THE COMMISSIONER: And that is in accord with
6 what Mr. Smorang and Mr. Saxberg are asking for?

7 MR. KHAN: Yes. Yeah. Simply that the names of,
8 of our workers not be published, and their identities not
9 be given by, by the media.

10 We're also seeking, and it's been dealt with
11 already, but we've, we've also -- we're also seeking a
12 prohibition on the live broadcasting of the inquiry, and
13 lastly, the redaction of, of the documents that will be
14 tendered during the inquiry.

15 I'll just deal with the, the second two first.
16 They do relate a bit to the main application, and I think
17 it would be easier if we just summarily dealt with those
18 issues.

19 The redaction -- so our application for the
20 redaction I, I discuss it in our brief, I'm not going to,
21 I'm not going to review the brief, but it's essentially the
22 -- and clearly the, the documents are generally
23 confidential under The Child and Family Services Act. You
24 now have the documents, you have, you have the --

25 THE COMMISSIONER: Well, are you asking for

1 something that goes beyond the, the terms of redaction that
2 were in my redacting decision of some months ago?

3 MR. KHAN: No, but I, I just wanted -- my
4 understanding was that, that I needed to file a separate
5 motion to, to maintain the term.

6 THE COMMISSIONER: Okay.

7 MR. KHAN: And, and I just want to clarify my
8 understanding of, of how that ruling follows.

9 Basically we're seeking that evidence that's not
10 relevant, and otherwise confidential, be redacted, and I
11 think the logic is, is pretty obvious. It's, it's -- for
12 example, family names, you know other people who are
13 involved in, in child protection whose names or identities
14 would appear in documents that are also relevant to the
15 inquiry they should be redacted. They're not relevant to
16 the inquiry, they would otherwise need protecting under the
17 Act.

18 THE COMMISSIONER: Well, just let me ask
19 Commission counsel.

20 Is, is counsel dealing with something beyond what
21 was in my redaction order?

22 MS. WALSH: Well, I'm not aware of that. Are you
23 not simply asking that the order that the Commissioner made
24 in December --

25 MR. KHAN: Yes.

1 MS. WALSH: -- extend to documents that are
2 entered into the public realm?

3 MR. KHAN: Yes, that's correct.

4 MS. WALSH: So all of the matters that were
5 covered by the Commissioner's ruling would apply?

6 MR. KHAN: Yes.

7 THE COMMISSIONER: Well, is there not agreement
8 on that?

9 MS. WALSH: There hasn't been specific agreement,
10 that's the subject of the department's application which is
11 number three on our agenda, or maybe number two on our
12 agenda actually, but I don't think there's any disagreement
13 among counsel. It simply needs to be made a matter of
14 public record from -- a ruling from you, Mr. Commissioner.

15 THE COMMISSIONER: So would, would this point
16 that counsel is making be -- Mr. Khan is making be best
17 left until we hear the department's application on that
18 issue, and deal with all redaction at that time?

19 MS. WALSH: I think it could. I don't think
20 you're asking for anything different than what the
21 department is asking for.

22 MR. KHAN: No, no, it's a lead-in to -- for me
23 it's a lead-in into the main application because it does
24 somewhat address the context of where, where we're heading.

25 THE COMMISSIONER: All right.

1 MR. KHAN: And it's the only reason I brought it
2 up, and that's all I have to say about that, that motion.

3 Next is the live broadcasting, and essentially
4 the current protocol is that there's a five minute delay.
5 The rationale behind the prohibition of the live, the live
6 broadcasting is essentially to, to be consistent with the
7 redaction order, so like the redaction order or the
8 redaction ruling irrelevant confidential information should
9 not be provided. Equally during oral testimony it's
10 possible that that information could be disclosed perhaps
11 through questioning or through answers, and we're asking
12 that to preserve the integrity of the redaction ruling live
13 broadcasting should not be allowed, so that we can somehow
14 restrict mass broadcasting of that information.

15 THE COMMISSIONER: Well, you're asking for the
16 removal of the camera; are you?

17 MR. KHAN: Oh, no, no. Not, not with respect to
18 -- that applies it -- I understand that applies to the main
19 application as an alternative, but despite that if, if you
20 were not to give any relief with respect to the main
21 application I would ask that the -- that there's still a
22 five minute delay in the broadcasting of, of the inquiry
23 hearings.

24 MS. WALSH: That is in our protocol.

25 MR. KHAN: That's right.

1 MS. WALSH: That is the context --

2 MR. KHAN: Yeah.

3 MS. WALSH: -- in which you're making your
4 arguments?

5 MR. KHAN: That's right, and I'm only bringing it
6 up -- I've raised it in my motion, and I just want to deal
7 with it --

8 THE COMMISSIONER: But, but are you asking for
9 something beyond what's in our protocol?

10 MR. KHAN: No.

11 THE COMMISSIONER: All right.

12 MR. KHAN: But I, I just wanted to address it
13 because I have it in the motion.

14 I have spoken with Mr. Kroft about it, and my
15 understanding that the only issue that, that might arise
16 out of it is logistical issues in terms of how we would
17 edit the feed if, if that were to occur where confidential
18 information, that's not relevant, is revealed, but I'll
19 leave that for another time.

20 So now I'll deal with the main application. Mr.
21 Commissioner, as we've expressed in our original
22 application for standing the, the tragedy surrounding the
23 death of Phoenix Sinclair has deeply affected both the
24 agency and the community. We've indicated that we're very
25 concerned about maintaining our relationship with the

1 community and the trust that, that we need to maintain with
2 the community in, in conducting our services to them.

3 We've also indicated that we feel in terms of
4 participating in this inquiry that we do have a unique
5 perspective and this will come out through our submissions
6 and through our questions throughout the inquiry. We're
7 hopeful that that will be of assistance to you, Mr.
8 Commissioner, throughout the inquiry.

9 Of particular note I would just like to point out
10 that with you -- the inquiry is very similar to the typical
11 child protection hearing where the process is not
12 adversarial. In, in child protection matters the process
13 is not adversarial, and, and it's not meant to be because
14 of the importance of maintaining relationships.

15 The agency is mandated to consider the best
16 interests of the children in, in everything it does. From
17 that principle the agency has filed this motion. It feels
18 that there is a serious risk that the agency may not be
19 able to provide sufficient services, or adequate services,
20 and therefore that would cause risk to the families, and
21 most importantly to the children that we're mandated to
22 protect.

23 THE COMMISSIONER: Just repeat that again.

24 MR. KHAN: Yeah. That the agency is concerned
25 that we may not be able to provide the services that are

1 required to protect the children, and serve the families in
2 our community.

3 THE COMMISSIONER: If, if the names are
4 published?

5 MR. KHAN: Yes, we think there's a serious risk
6 to that, and that's, and that's our motion.

7 So, Mr. Commissioner, today I, I intend just on
8 discussing what I view as the principles at issue, applying
9 those principles to the test, which is the Dagenais/Mentuck
10 test, and most importantly to review the evidence that's
11 before you.

12 In short, and, and I think it will become
13 apparent after reviewing the test in, in the applicable
14 cases it really comes down to whether the evidence
15 demonstrates that there is a serious risk, or significant
16 risk, to the child welfare system, in our case our agency's
17 operations, and its workers, to provide the services that
18 it's mandated to do.

19 Now, are two themes that we're dealing with with
20 respect to this motion. One is the best interests of the
21 children, the best interests of the child, and the second
22 is the open court principle, and here we have a situation
23 where they're colliding.

24 Now, I don't think I need to describe and explain
25 the open court principle, and I'm certain Mr. Kroft is much

1 better at that than I am, so I'll leave that to him, but I
2 think it's obvious. We're not denying that the open court
3 principle is, is extremely important, it's a right, and so
4 on, but the case law doesn't particularly define what's the
5 best interests of, of the child. It deals with situations
6 where it occurs, and, and there's examples of what is
7 considered the best interests of the child, and I, I don't
8 think that, that concept has been clearly explained as it
9 applies to this application, or should I say I, I would
10 like to define it so that you're aware exactly what, what
11 the agency is talking about when we're referring to the
12 best interest of the child.

13 THE COMMISSIONER: I would -- it would be very
14 appreciated if you would define that for me.

15 MR. KHAN: Thank you. Well, first of all most
16 people consider the -- when they're referring to the best
17 interest of the child, especially in the context of child
18 protection, that what most people consider or they think
19 about is simply the physical harm to the children. Now,
20 now, that's obvious. It's in the child's best interest not
21 to be physically harmed.

22 But also of, of great concern, and, and sometimes
23 of equal concern, we're dealing with psychological and
24 emotional harm, and what is sometimes forgotten it's their,
25 it's their right to be -- it's the right to be with their

1 parents, family unity, that is also -- that's also
2 encompassed in the best interest of the child.

3 Stability, and when I refer to stability I'm
4 referring to stability within the family unit, as well as
5 in the CFS system. The proper functioning of the CFS
6 system is also in the best interests of the child. It's
7 obvious that the very agencies mandated to protect children
8 must function properly and efficiently.

9 In our view the best way to ensure the best
10 interests of the child is, is to promote, encourage and,
11 and assist families in, in maintaining a positive and
12 nurturing environment for those children.

13 THE COMMISSIONER: You just said the best method
14 of preserving the best interests of the child, is that what
15 you just said?

16 MR. KHAN: That's right.

17 THE COMMISSIONER: Is what?

18 MR. KHAN: Is to promote, encourage and support
19 families in maintaining a positive and nurturing
20 environment for that child.

21 THE COMMISSIONER: Maintaining a positive what?

22 MR. KHAN: And nurturing.

23 THE COMMISSIONER: And nurturing.

24 MR. KHAN: Mr. Commissioner, these aren't
25 concepts or ideas that I've just come up with. They're

1 found in, in legislation, in the case law, and they're also
2 reflected in the convention on the rights of the child,
3 what I -- which I included in our, in our motions brief.
4 All those principles emanate from, from the convention,
5 from The Child and Family Services Act, and they're also
6 repeated through the case law.

7 If I can also add confidentiality is also in the
8 best interests of the children.

9 So essentially that's what we're dealing with.
10 When, when I'm referring to the best interests of the child
11 in, in this situation first is the open court principle,
12 those are the two ideas that are now colliding, and what
13 the agency feels is now before you is a potential risk to
14 the best interests of the children.

15 And for much the same reasons as the authorities
16 have, have advised in, in their original motion brief given
17 that we're mandated to protect children, and we see that --
18 we feel that there is this potential and real risk, we're
19 required to bring this motion, and so we're before you
20 today.

21 Now, Mr. Commissioner, there's been a number of
22 cases where the best interests of the child have been
23 considered, quite a few cases in fact. I referred to some
24 of them in, in our brief. Mr. -- the authorities in the --
25 their reply -- we've also referred to some of them. I'm

1 going to bring your attention mainly to one case. I'll
2 also review some of the others, but there's one case in
3 particular that I think really encompasses most of the
4 ideas and concepts that I think apply to this situation.

5 But what you'll find is in the case law dealing
6 with the best interests of the child the best interest has
7 and, and in most cases where the evidence is sufficient
8 does displace important principles including Charter
9 rights. That's established.

10 THE COMMISSIONER: What, what case would you
11 point to to establish that point?

12 MR. KHAN: A number of cases. The one case that
13 I think -- one is K.L.W., and it's my -- it's at tab --

14 THE COMMISSIONER: Is it -- where, where will I
15 find that in your, your material?

16 MR. KHAN: You'll find it -- it's at tab 3 of the
17 reply brief.

18 THE COMMISSIONER: Just a minute now. Okay, I've
19 got your reply brief, but I haven't got the tabs here.
20 That'll -- I find that behind me, will I, or ... Thank
21 you. All right.

22 MR. KHAN: Okay. So this is Winnipeg Child and
23 Family Services in K.L.W., it's a 2000 Supreme Court
24 decision. In Manitoba this is an often referred to
25 decision in many contexts.

1 In this situation there was, there was an
2 apprehension of course, as always is in child protection
3 matters. There's an apprehension. What was brought -- the
4 issues brought to the court, the Supreme Court, was whether
5 the apprehension of a child violates section 7 of the
6 Charter, particularly in the context of what would be
7 considered emergency and non-emergency situations.

8 THE COMMISSIONER: Violate what section?

9 MR. KHAN: Section 7 of the Charter. And what's
10 interesting about that case is while we're dealing with
11 section 7 of the Charter there's actually an inner
12 competition within, within the, the best interests of the
13 child context. We've got a -- we have a situation there
14 where there are two sub-competing interests. The, the
15 interest in, in preventing harm to the child versus
16 basically a child's right to family, family unity.

17 Now, it's been, it's been brought up in earlier
18 arguments that an apprehension, especially in particularly
19 unnecessary apprehensions, is harmful to children. This
20 court addresses that, and, and I think it helps to explain
21 the significance of that.

22 Essentially whenever, and this is occurring
23 certainly on a weekly basis in Manitoba, whenever an agency
24 apprehends a child it is, it is in fact violating section 7
25 of the Charter. This is happening all the time, and what

1 the court says, and what society is saying is that where
2 there is a risk that a child might be harmed then that
3 violation is, is justified.

4 If I can bring your attention to paragraph 72 of
5 that case.

6 THE COMMISSIONER: Seventeen?

7 MR. KHAN: Seventy-two, 7-2. And these are just
8 some quotations to help explain the importance of the, of
9 the family relationship.

10 At the beginning of 72:

11

12 "The mutual bond of love and
13 support between parents and their
14 children is a crucial one and
15 deserves great respect.

16 Unnecessary disruptions of this
17 bond by the state have the
18 potential to cause significant
19 trauma to both the parent and the
20 child."

21

22 At paragraph 94 ...

23 THE COMMISSIONER: Yes.

24 MR. KHAN: The court writes:

25

1 "The interests at stake in cases
2 of apprehension are of the highest
3 order, given the impact that state
4 action involving the separation of
5 parents and children may have on
6 all of their lives, and
7 particularly on their
8 psychological and emotional well-
9 being."

10

11 And, again -- and I'm pointing these out just to
12 explain the importance that the court has given to the
13 family unit, as well as non-physical harm.

14 The case quotes those -- the case refers to that
15 in a number of occasions, including the ones I've
16 mentioned.

17 Now, the purpose is -- it's been brought to your
18 attention earlier by counsel, and, and you've been referred
19 to the expert evidence that suggests, or that states that
20 during inquiries due to the heightened stress placed on
21 workers there's an increase in apprehensions, and what
22 we're saying is we're dealing with two risks here.

23 We're dealing with an inability of workers to, to
24 properly make decisions, and either way they go, in terms
25 of the wrong decision ...

1 THE COMMISSIONER: Did you say the inability of
2 workers to make decisions?

3 MR. KHAN: To make proper decisions.

4 THE COMMISSIONER: Yes.

5 MR. KHAN: And if they make --

6 THE COMMISSIONER: You said there's two risks --

7 MR. KHAN: That's right.

8 MR. COMMISSIONER: -- that's, that's the first
9 one.

10 MR. KHAN: No, no. The risk is they'll, they'll
11 not apprehend when they're supposed to --

12 THE COMMISSIONER: Yes.

13 MR. KHAN: -- but there's the equal risk of
14 apprehending when they should not because they're going to
15 cause harm to that, to that child either way.

16 Now, the evidence is clear, and I don't think
17 it's contested that the work that a front line worker does,
18 particularly with respect with apprehension, is, is clearly
19 extremely important and it's not easy, there's no science
20 to apprehension. The worker must make a decision based on
21 in many cases insufficient evidence.

22 THE COMMISSIONER: Now, whenever you think it's
23 an appropriate time for a mid-morning break we'll take it,
24 but I'll let you decide that.

25 MR. KHAN: Sure, why don't we take it now if

1 that's all right --

2 THE COMMISSIONER: All right. All right, and,
3 and I have to tell you I am going to try to limit it to 15
4 minutes, so we can move forward, so we will, we will
5 adjourn now for 15 minutes hopefully only.

6 MR. KHAN: Thank you.

7 THE COMMISSIONER: All right.

8

9 (BRIEF RECESS)

10

11 THE COMMISSIONER: Mr. Khan.

12 MR. KHAN: Mr. Commissioner, I was -- just before
13 the break I was reviewing the K.L.W. case.

14 If I could bring your attention to paragraph 100
15 of that case.

16 UNIDENTIFIED PERSON: Which case?

17 MR. KHAN: The same case.

18 THE COMMISSIONER: Yeah, you got it back.

19 UNIDENTIFIED PERSON: Oh, did you give it back to
20 me? I -- you gave it back to me, oh.

21 THE COMMISSIONER: Paragraph?

22 MR. KHAN: One hundred.

23 THE COMMISSIONER: Yes.

24 MR. KHAN: It's, it's a very lengthy passage.
25 I'm going to read it out. I think it's -- it helps to

1 explain, first of all, the dilemma that workers are in, and
2 also basically the, the amount of evidence that's,
3 typically needed to, to apprehend children and displays
4 the, the Charter right, section 7.

5 So paragraph 100:

6
7 "The evidentiary difficulties
8 particular to the child protection
9 context arise out of the fact that
10 child protection authorities are
11 almost always concerned with
12 situations taking place within the
13 intimacy of private homes. The
14 following passage from Southin
15 (...) --"

16

17 This is Southin:

18

19 " -- describes the problems this
20 causes for child protection
21 authorities carrying out their
22 mandate:

23 Social workers must make difficult
24 choices when determining what to
25 do about a child allegedly in

1 danger. From time to time, we
2 read of a child who dies because
3 he was physically maltreated. The
4 ministry is sometimes blamed for
5 not having done enough. A child
6 may have physical injuries. The
7 ministry investigates. The parent
8 says the child fell. The
9 physicians say that perhaps the
10 injuries came from a fall and
11 perhaps they came from a beating.
12 The evidence is inconclusive and
13 the child is not apprehended. It
14 was a beating. The child who is
15 neglected may or may not tell the
16 truth. He stays in the home and
17 is abused further. The ministry
18 can do little as it has
19 insufficient evidence.
20 As this passage reveals, child
21 protection workers are inevitably
22 called upon to make highly time-
23 sensitive decisions in situations
24 in which it is often difficult, if
25 not impossible, to determine

1 whether a child is at risk of
2 imminent harm, or at risk of non-
3 imminent but serious harm, while
4 the child remains in the parents'
5 care. The challenging task facing
6 child protection workers was also
7 recognized by Lord Nicholls in
8 his speech for the majority in In
9 re H. (...) --"
10 I am very conscious of the
11 difficulties confronting social
12 workers and others in obtaining
13 hard evidence, which will stand up
14 when challenged in court, of the
15 maltreatment meted out to children
16 behind closed doors. Cruelty and
17 physical abuse are notoriously
18 difficult to prove. The task of
19 social workers is usually anxious
20 and often thankless. They are
21 criticized for not having taken
22 action in response to warning
23 signs which are obvious enough
24 when seen in the clear light of
25 hindsight. Or they are criticized

1 for making applications based on
2 serious allegations which, in the
3 event, are not established in
4 court. Sometimes, whatever they
5 do, they cannot do right."

6
7 Now, what I'd like to point out is, as I
8 mentioned earlier, apprehensions occur, and often occur
9 with somewhat limited information, so agencies on a regular
10 basis are displacing a Charter right on, on the risk of
11 harm to that child. Sometimes the evidence -- and
12 sometimes they're wrong, sometimes the evidence isn't
13 sufficient, they return the child, but the point is is the
14 law in the courts have shown the -- have expressed the
15 importance of not taking that risk, and while in this case
16 we're not dealing with section 7, we're dealing with
17 section 2 I would say by analogy the same principle
18 applies.

19 I would also like to bring your attention to
20 paragraph 76 of that case.

21 THE COMMISSIONER: Yes, I have it.

22 MR. KHAN: Okay. And I think it's important
23 because in terms of child protection, and the best
24 interests of the child, I think the paragraph reflects
25 where we've come from and where we're going in the legal

1 significance and importance of the best interests of the
2 child.

3 I'll read out paragraph 76.

4
5 "Canadian child protection law has
6 undergone a significant evolution
7 over the past decades. This
8 evolution reflects a variety of
9 policy shifts and orientations, as
10 society has sought the most
11 appropriate means of protecting
12 children from harm. Over the last
13 40 years or so, society has become
14 much more aware of problems such
15 as battered child syndrome and
16 child sexual abuse, leading to
17 calls for greater preventive
18 intervention and protection. At
19 the same time, Canadian law has
20 increasingly emphasized individual
21 rights to protection against state
22 intervention. This has led,
23 somewhat paradoxically, both to
24 greater scope for state
25 intervention in the lives of

1 families for the purpose of
2 protecting children, and to
3 greater emphasis on court-enforced
4 procedural protections from such
5 intervention."

6

7 So I think what we can take from that case is
8 first of all the best interests of the child are certainly
9 -- it's certainly a principle that, that does displace a
10 Charter right.

11 THE COMMISSIONER: Best interests of the child
12 can --

13 MR. KHAN: Of the child can displace --

14 THE COMMISSIONER: -- displace a Charter right?

15 MR. KHAN: -- a Charter right, yeah. I don't
16 think there's any dispute of that as law. And what's also
17 very important in this context is that insufficient
18 evidence, as long as it's -- as long as it demonstrates a
19 risk suffices for this displacement of the Charter right,
20 and it's also recognized that there's a, there's a harm to
21 children in every apprehension, whether it's justified or
22 not there is always a harm to children.

23 THE COMMISSIONER: In every apprehension?

24 MR. KHAN: Yeah. Well I would say most
25 apprehensions, and that's, and that's to the disruption of

1 family unity.

2 Now, this isn't just theoretical concepts. I
3 think if we, if we personalize that thought, considered our
4 own families, you know, clearly we can all imagine that,
5 that the, the forced removal by strangers of our children,
6 from, from our homes, would, would traumatize our children,
7 so workers, workers constantly have that on their minds
8 when they're apprehending children. I just want to put
9 that into context.

10 Now, the principles outlined in K.L.W. are
11 followed in a number of cases. What I'd like to bring to
12 your attention is at tab 6, the case of Radke (phonetic),
13 it's at tab 6 of my reply brief.

14 THE COMMISSIONER: What's the first one? You
15 said that it followed a number of cases --

16 MR. KHAN: Right, and I'm going to bring you to
17 Radke.

18 THE COMMISSIONER: Radke.

19 MR. KHAN: Tab 6, yes.

20 THE COMMISSIONER: Yes. Yeah.

21 MR. KHAN: It's a Saskatchewan Court of Queen's
22 Bench decision, it's not a Supreme Court decision but it's
23 -- I think it helps to show the trend and where we're
24 going.

25 That decision was, was essentially a custody

1 dispute and there was an application for an order to stop
2 publicizing confidential information in this situation by
3 the paternal grandmother.

4 Dagenais/Mentuck was considered in it's
5 considered at -- if you look at paragraphs 9 and 15 of the
6 decision.

7 THE COMMISSIONER: Nine and 215?

8 MR. KHAN: Nine and 15, yes. So this is a case
9 where the, the best interests of the child was considered
10 -- or, sorry, the Dagenais/Mentuck test is considered in
11 the context of the best interests of the child.

12 At issue here were the privacy, were the privacy
13 interests of the children. In the end a limited, a limited
14 ban on the freedom of expression was granted to protect the
15 confidentiality interests of the children.

16 Of particular note is paragraph 37 of that
17 decision, so paragraph 37, and what's interesting is the
18 court says that -- and this is halfway through that
19 paragraph.

20

21 I am entitled to rely on logic and
22 common sense to determine whether
23 there is a reasoned apprehension
24 of that harm.

25

1 And of course they're referring to the harm of
2 the child.

3 The case refers to the Harper decision, and then
4 -- now just to provide greater context to that, to that
5 paragraph the Harper decision is -- it's not a child
6 protection matter, but what's interesting in, in there, in
7 the Harper decision, is it looks at -- in which situations
8 in which harm could be adduced, so we've got, we've got a,
9 a case involving the best interests of the child now, now
10 incorporating principles from matters that don't involve
11 children at all, for the purposes of, of addressing and
12 making appropriate decisions when we're dealing with the
13 bests interests of the child.

14 So it's following a trend and the trend that
15 we're seeing is greater protection for children, less
16 chance of risk.

17 THE COMMISSIONER: Well, how, how is the risk to
18 the child welfare system or to children within the system
19 reduced by a publication ban?

20 MR. KHAN: Well, I can answer it shortly now but
21 I'm also going to be addressing it when I --

22 THE COMMISSIONER: All right, you can wait.

23 MR. KHAN: -- when we talk about the issues.

24 THE COMMISSIONER: You can --

25 MR. KHAN: But I would like to --

1 THE COMMISSIONER: And want you to hear --

2 MR. KHAN: -- provide a short answer --

3 THE COMMISSIONER: In that you've raised the risk
4 issue now, I wanted to ask that, but you can certainly
5 leave it till later when you can fit it where you want to.

6 MR. KHAN: Okay. Now both in our reply brief as
7 well as the reply brief of the authorities, there's a list
8 of cases that, that all involve the best interests of the
9 child that talk, that in those cases the open court
10 principle or Charter rights are displaced where the best
11 interests of the child are involved and I don't think
12 there's a need for me to go through each one in any
13 detail --

14 THE COMMISSIONER: But those --

15 MR. KHAN: -- but they're there.

16 THE COMMISSIONER: Those are, are those the cases
17 in your, in your part 1 or the ones you identified as you
18 go through the page by page?

19 MR. KHAN: Sorry, in my part 1?

20 THE COMMISSIONER: You're referring to your reply
21 brief.

22 MR. KHAN: Yes. Oh, as I go through in page by
23 page in the arguments themselves.

24 THE COMMISSIONER: Yeah, I see, yeah, okay.

25 MR. KHAN: And the, the authorities reply brief

1 has a similar format, it's just they're referring to
2 different cases. But the point is is that there is plenty,
3 and these are just a selection of the cases that are out
4 there. There's plenty of cases that stand for those
5 principles.

6 Also the case that I would like to bring to your
7 attention are cases where it says that, where the courts
8 have said that we do not need to prove harm and that's
9 obvious, that's reflected, that would be reflective of the
10 K.L.W. case. So we don't need to establish that there is
11 harm.

12 I don't think I need to discuss the
13 Dagenais/Mentuck test specifically. I think it's been
14 addressed by counsel before. We think it applies. But
15 essentially when we're dealing with the best interests of
16 the child, the end result becomes whether, whether the
17 evidence that's before you shows that there's a serious
18 risk to the children.

19 THE COMMISSIONER: Whether what?

20 MR. KHAN: The evidence that's before you, in
21 this case it's all the affidavit evidence ...

22 THE COMMISSIONER: Yes?

23 MR. KHAN: Shows a risk to children. The
24 evidence doesn't need to show that harm has occurred, it
25 just needs to show that there's a risk.

1 THE COMMISSIONER: The risk arising out of an
2 apprehension?

3 MR. KHAN: Well, we just need to show that there
4 is a risk to the best interests of the child.

5 THE COMMISSIONER: Okay.

6 MR. KHAN: So and any of those --

7 THE COMMISSIONER: However it occurs.

8 MR. KHAN: Yeah, however it occurs. Now if I
9 take -- you may -- if I can just take a step back. When I
10 was defining the best interests of the child I had
11 mentioned that it's encompassed in the legislation in the
12 Convention on the Rights of the Child and I would just like
13 to bring -- I thought I would just simply cite them so that
14 you're aware of it when you're making your decision. Now I
15 refer to the Convention on the Rights of the Child. It's
16 at tab 11 of my motions brief. Sorry, you don't need to --
17 I just wanted to bring -- it's just so that you have
18 easy reference when you need -- and I'm looking at
19 article 7, 8 --

20 THE COMMISSIONER: Wait a minute.

21 MS. WALSH: Mr. Commissioner, I think you have
22 the reply brief. I'll give you the binder with the motions
23 brief.

24 THE COMMISSIONER: Oh, give me the motions brief
25 now, yes. I have the motions but I don't have the

1 attachments. They're all behind me, I guess. Do you want
2 to take this back, this one?

3 MS. WALSH: Sure.

4 THE COMMISSIONER: All right. Tab 11, this is of
5 your motions brief?

6 MR. KHAN: Yes.

7 THE COMMISSIONER: Yes. Which section --

8 MR. KHAN: We're looking at articles 7, 8 and 19.

9 THE COMMISSIONER: Articles 7, 8 and 9.

10 MR. KHAN: In terms of the Child and Family
11 Services Act, subsection 2(1), so section 2(1) and section
12 17(2).

13 THE COMMISSIONER: Seven, eight and nine, then
14 what?

15 MR. KHAN: Seven, eight and nineteen for the
16 convention.

17 THE COMMISSIONER: Seven, eight and nineteen?

18 MR. KHAN: Nineteen.

19 THE COMMISSIONER: Yes. And then?

20 MR. KHAN: And from the Child and Family Services
21 Act, section 2(1).

22 THE COMMISSIONER: Yes.

23 MR. KHAN: And 17(2).

24 THE COMMISSIONER: Right.

25 MR. KHAN: So basically those provisions assist

1 in defining what are the best interests of the child.

2 Okay, now quite a bit of evidence has been placed
3 before you and I understand that you've had the, you've had
4 the opportunity to review all of the evidence. But I, what
5 we would submit is the evidence before you clearly shows
6 that there is a risk to children through the publication of
7 the workers' names. And in our, and in our situation, at
8 Intertribal's situation, that's even more true.

9 Now basically all of the affiants, including the
10 media's affiants, have agreed that social workers are
11 clearly important to the Child and Family Services and to
12 the protection of children. That's not contested.

13 THE COMMISSIONER: No.

14 MR. KHAN: Neither is the fact that a worker's
15 inability to perform her functions would put children at
16 risk or could put children at risk. I don't think that's
17 contested either and it hasn't been contested by the, by
18 any of the affiants.

19 The media suggests in their brief that the expert
20 evidence really shows that we shouldn't have an inquiry and
21 it doesn't really lend to the specific issue of harm and
22 risk to the children. I would disagree. Clearly the
23 expert evidence shows that the inquiry adds a great amount
24 of pressure and distress on the system itself. Now we're
25 not suggesting at all that that means we shouldn't have an

1 inquiry, I don't think that's the position of any of the
2 parties. But what -- and I'll go through it -- but what we
3 see from the evidence is that this is a system, an
4 extremely important system, fundamental to our society, I
5 would submit, because we're dealing with children, that's
6 already under a fair amount of strain. But what we have in
7 Shirley Cochrane's affidavit, the affidavit, the affidavit
8 of Ms. Kehler, the expert affidavits, the affidavit of
9 Mr. Rivers, is a situation where there is a, it seems that
10 there's a, there is a constant shortage of qualified
11 workers.

12 There is a high turnover rate which seems to be
13 across all the countries that have been reviewed in the
14 articles provided by the experts. So there's this high
15 turnover rate. There's, there's a certain degree of stress
16 that's always present in social work, particularly in the
17 child protection field. That's just -- it's a constant.
18 So we're dealing with a high strain on the system that
19 exists already, and it's always there. The experts talk
20 about the, of course the death of a child in itself is one
21 of the most distressing events for a worker, that's
22 understandable. It certainly applied in Intertribal's
23 situation when the death was discovered and that's, I think
24 that's pretty clear in our affidavit material, in our
25 submissions when we applied for standing.

1 Ms. Regehr also says that, that the apprehension
2 of children is close to as distressing as the death of a
3 child.

4 THE COMMISSIONER: What's that again?

5 MR. KHAN: That the apprehension of children --

6 THE COMMISSIONER: Yes.

7 MR. KHAN: -- is also very close to the, or as --
8 close to the same distress as when a child dies in care, or
9 in this circumstance it would be out of care, but shortly
10 afterwards. So apprehensions are a weekly event, not
11 daily, and if you can think about the entire agency, the
12 entire CFS system. So we're dealing with constant
13 stressful events on our front line workers.

14 The workloads tend to be very high. You know in
15 most cases, you know in the eyes of people we're dealing
16 with the workers can't do anything right. We're, we're
17 constantly, you know, dealing with families who, in many
18 cases, don't see anything wrong with, with how they're
19 raising the children. When we apprehend children we're
20 basically saying there's something wrong with how children
21 are being raised. We're constantly being with families who
22 certainly are hostile to that. It's instinctive that
23 families are hostile during the apprehensions. So we've
24 got, we've got these stresses on the workers.

25 In Intertribal's particular situation, we have,

1 we're now faced with, and it's provided in Ms. Cochrane's
2 affidavit, we're faced with blame. We've been alleged and
3 accused of being responsible for this child and I'm not
4 putting any new evidence before you. I understand that you
5 haven't reviewed the materials that have been, that we'll
6 be going through during the inquiry, but I do, I do bring
7 it up in, it is mentioned in the affidavit of Ms. Cochrane.
8 Our involvement in this file is, is negligible. We
9 received a phone call --

10 THE COMMISSIONER: So it wouldn't it work to the
11 advantage of your client to get it all out on the table?

12 MR. KHAN: It does, it does. We've very thankful
13 that we're a party here. We're very thankful that we can
14 ask questions because we want to know, we also want to know
15 what happened. We want to be able to, you know, set the
16 record straight, so to speak. It's very important in our
17 community because these are the people we deal with, the
18 people depend on us. It's a very --

19 THE COMMISSIONER: But if your worker, if your
20 workers have nothing to do with this, why would they want
21 anonymity at this hearing?

22 MR. KHAN: That's right. And the reason is it's
23 not the workers that have been blamed specifically, it's
24 the agency. So, and it's, the agency has been accused of
25 being responsible for Phoenix Sinclair. There was never an

1 open file and this isn't a play on words. Not only was --
2 we never had Phoenix in our care. Unfortunately --

3 THE COMMISSIONER: But you, you don't want the
4 names of the social workers in the employ of your client
5 revealed in this hearing.

6 MR. KHAN: That's right.

7 THE COMMISSIONER: Why?

8 MR. KHAN: Because in the community the, the
9 agency as an entity, has been, has been blamed or held
10 responsible for this tragic event. Even when we set the
11 record straight, there, in our respectful view, there is no
12 way of completely eradicating that perception. Now
13 Ms. Cochrane, in cross-examination, has stated that she is
14 confident that the community, the community as a whole,
15 were understanding the facts as they come out.

16 THE COMMISSIONER: Well, wouldn't it help to
17 eradicate that misconception if it were shown that the
18 social workers in the employ of your client were not
19 involved here and who they were?

20 MR. KHAN: Well, we want to show that the
21 employer was not involved. And of course the employer, the
22 agency consists of workers --

23 THE COMMISSIONER: But you're, but your motion
24 relates to individuals, does it not?

25 MR. KHAN: That's right.

1 THE COMMISSIONER: Not the agency.

2 MR. KHAN: That's correct. We don't want that
3 blame that exists and like I mentioned earlier, regardless
4 of when, regardless of how well we can set the record
5 straight, we have no control over the publication of
6 information. The media, and it's quite -- and it looks
7 like it's either on an assumption or they were misinformed.
8 I don't see this as a -- I don't believe it was intended,
9 but the media has misreported, has reported something
10 that's simply not true with respect to Intertribal.

11 THE COMMISSIONER: But then isn't this, this
12 hearing, this public inquiry is the opportunity to put the
13 record straight.

14 MR. KHAN: Yes, and we're very thankful for that.
15 We want to come forward, we want the public to know that
16 Intertribal was not involved.

17 THE COMMISSIONER: Well, why do you want your,
18 your social workers not identified by name then?

19 MR. KHAN: Because there's a lack of confidence
20 in how -- if, if -- of whether that would even be reported.

21 THE COMMISSIONER: Pardon?

22 MR. KHAN: There's a lack of confidence as to
23 whether that would be reported. Mr. Commissioner, you can,
24 you can answer that in your final report.

25 THE COMMISSIONER: If that's what the evidence --

1 MR. KHAN: If that's what the evidence is, of
2 course. I'm making the assumption --

3 THE COMMISSIONER: If that's what the evidence
4 shows you can be assured I will.

5 MR. KHAN: Thank you. However, and I think as
6 we've seen already and I'm not, and I'm not intending on
7 casting the media in a negative light, with respect to us,
8 I can understand why that may have been assumed in the
9 past. It's unfortunate that it was reported. However,
10 your -- and this relates to the influence and the, and the
11 power of the media. When the media reports things, people
12 have a tendency to believing it's true. When someone is
13 accused of a crime, in my view it is the simple publication
14 of being accused. People will -- even if the person is
15 held not to be responsible for that crime, there will
16 always -- there always is a harm done and it can't be
17 completely retracted, it can't be completely dealt with.

18 THE COMMISSIONER: But as I hear you, you're
19 telling me your client has nothing to hide here.

20 MR. KHAN: Nothing.

21 THE COMMISSIONER: All right. But yet they don't
22 want the names of their workers revealed.

23 MR. KHAN: That's correct. And the reason is we
24 don't want, we don't want a name and a face to be
25 associated with the misconception that we were responsible.

1 It's already affected the agency to the point where we've
2 needed to seek assistance from the authority and then as
3 Ms. Cochrane's affidavit shows, that occurred shortly after
4 the tragedy was discovered. It was devastating. It was
5 devastating on the community and on the agency. But what
6 they're, but what they've observed, and Ms. Cochrane has
7 observed since, is amongst, not everybody, but amongst a
8 significant number, a significant number of members of this
9 public there was this belief that we were somehow
10 responsible.

11 Now, we are confident that the community as a
12 whole will, will understand the facts as they come out and
13 will be able to process them and realize no, we weren't
14 involved. But what we're -- I wouldn't say that we're more
15 concerned about, but what we certainly have to be concerned
16 about are the people that we deal with in the work we do.

17 Now unfortunately a number of families, and this
18 is the same throughout CFS, throughout the world, a number
19 of families, the reason they fall into CFS is because
20 sometimes there are addiction issues. Sometimes there are
21 mental health issues, right. There's -- unfortunately
22 there's a cycle abuse, you know, children who have been
23 abused often end up abusing their children and so on.
24 We're dealing with people who may not be able to fully
25 grasp the information that's coming out. And when we go to

1 those homes, when we're apprehending those children, we
2 apprehend but at the same time we're trying to build a
3 relationship with that person because if there's no
4 relationship, these cases end up in trial and once they end
5 up in trial, because of our mandate, we're forced to, to
6 introduce evidence that sheds those, that sheds a very
7 negative light on those parents. Those parents don't want
8 to work with an agency after something like that happens.

9 THE COMMISSIONER: But wouldn't your social
10 workers be better off when they go to that house, under
11 those circumstances, for it to be known that they had
12 nothing to do with this tragedy?

13 MR. KHAN: We don't think that -- my answer to
14 that is in two parts. I doubt that the media would, and
15 not that I would expect them to, they're not going to have
16 a full page retraction that Intertribal was not involved,
17 you know, in this tragedy. It's not -- I just -- it's not
18 going to happen. I've seen full page pictures on something
19 very different which it was essentially, quite frankly
20 scares my client. That's not going to happen. We don't
21 have, and with all due respect, Mr. Commissioner, you don't
22 have the control on what's going to be reported by the
23 media or on how it's going to be reported. I'm not
24 suggesting that the media, and I don't see what the purpose
25 would be, but I don't, I'm not suggesting that the media

1 would, would publish negative things about Intertribal as
2 the evidence comes out. I don't see it. Quite frankly, I
3 don't know if the media would want to publish anything
4 about Intertribal. Our involvement, and this is based on
5 the affidavit of Shirley Cochrane, is very benign, there's
6 no involvement.

7 So if they were not to publish anything we're
8 still in the same boat, we're still in the same boat of
9 people, particularly people who we are going to be dealing
10 with think that we were involved. And so the issue of the
11 non-publication is we don't want those parents, right,
12 those family members now associating a name and a face to
13 what they misconceive, something that's not true. We
14 simply think that they're going to start associating a
15 particular worker to the tragedy and we want to limit that
16 risk. And we've gone through a great amount of trouble in
17 preparing our materials and so on. We feel that there is a
18 significant risk in that. And I think that, I don't know
19 how we can otherwise deal with the situation. Like I said
20 we don't know what will be published and we don't know how
21 it will be published. Also is this, the evidence is going
22 to come out in pieces and it is, it's not going to come out
23 all in one day and how the media reports as the evidence
24 comes out is going to affect us, it's going to affect, it's
25 going to affect all social workers, right. We're going to

1 hear one side of the story and that side of the story might
2 last for a long time and then the other side of the story
3 that corrects everything might come out later on. But
4 again, back to what I view as damage already being done,
5 once something is misreported, even correcting that, it
6 doesn't, you can't eliminate the harm that's already there.

7 And again, when workers are, workers are dealing
8 with families where there's also, like concerns of
9 violence, gang affiliations and so on, it's instinctive for
10 parents to be, to be resistant to a stranger removing their
11 children, that's instinctive. We wouldn't expect anything
12 much different than that so we try to lessen that
13 situation, lessen the stress. But now someone with a
14 violent history believes that that particular worker is
15 somehow responsible for the death of a young child. There
16 is a -- in my view, in our view, we now have elevated a
17 general risk that exists always in apprehensions to a much
18 higher level. And from reading and from reading, reviewing
19 the reader's comments that have been, that Mr. Smorang has
20 talked about that in length yesterday morning, some of
21 these people are saying very hostile things, very dangerous
22 things about these workers. We don't know if in the next
23 home we want into someone will have that view, right. We
24 don't know in what state of mind they will be at that
25 particular moment when we walk into the home. We simply

1 want to reduce the risk. The risk is always there. Even
2 if this inquiry never happened, that risk is always there.

3 I hope that helps to --

4 THE COMMISSIONER: Yes.

5 MR. KHAN: -- answer the question.

6 THE COMMISSIONER: About how much longer would
7 you expect to be, Mr. Khan?

8 MR. KHAN: You know I might be perhaps 10
9 minutes.

10 THE COMMISSIONER: Fine.

11 MR. KHAN: Perhaps longer.

12 THE COMMISSIONER: Well --

13 MR. KHAN: I think it will be 10 minutes.

14 THE COMMISSIONER: -- how about 15 and then we
15 can get a half hour in of the next counsel before we break
16 for lunch.

17 MR. KHAN: Okay. Now, Mr. Commissioner, I had
18 planned on going through what I view is the relevant
19 evidence specifically but now you've read, you've read
20 Ms. Regehr's affidavit, Mr. Rivers' affidavit. Do you --
21 would you like me to point out certain paragraphs?

22 THE COMMISSIONER: Well I've read them but I
23 don't have specifics to the front of my mind in all of
24 them, I can assure you, because there's such a volume of
25 them.

1 MR. KHAN: Okay. Well, firstly, and I'm not
2 going to refer to it specifically but I just wanted to
3 discuss Ms. Cochrane's affidavit first.

4 THE COMMISSIONER: Yes.

5 MR. KHAN: Now, I would -- first of all, we're
6 hopeful that that was of assistance in sort of explaining
7 how our agency operates.

8 THE COMMISSIONER: Just let me get her -- I think
9 you can take this back. I think this is yours, isn't it?

10 MS. WALSH: I think you need that one.

11 THE COMMISSIONER: Oh, okay. All right. I want
12 to get the ...

13 MR. KHAN: That would be at tab, sorry, at tab 1
14 of our motion brief.

15 THE COMMISSIONER: Just a moment. Yes, I --

16 MS. WALSH: (Inaudible) this one if you prefer to
17 use yours.

18 THE COMMISSIONER: All right. I have
19 Ms. Cochrane's affidavit.

20 MR. KHAN: Thank you. Our purpose was twofold,
21 one was just to describe how our agency operates. I think,
22 I'm hopeful this is of assistance just in terms of how CFS
23 operates in general. In particular, our agency, we're a
24 small agency. We've got four front line workers, two of
25 which are scheduled, currently scheduled to testify. I

1 don't think it needs to be said but if either, if one or
2 both of those workers were unable to, you know, needed time
3 off, were unable to perform their functions, it really puts
4 the agency at a disadvantage, a serious disadvantage in
5 terms of its ability to service the families and children.
6 We are a rural community. It's not necessarily easy to
7 have someone come up north. We're two hours north of the
8 city. And also is, because it's a rural community and
9 these are all, all -- most, if not all, of our staff are
10 from the community, there's always family connections. So
11 we're constantly keeping an eye on whether there's a
12 potential family conflict of interest and so on. So that
13 could also, that would put a fair amount of pressure on the
14 agency if they were short staffed.

15 What I thought was interesting was the concerns
16 and the observations of Ms. Cochrane throughout her
17 affidavit were actually echoed by the experts and I think
18 it speaks of two specific things and on the first point
19 I'll discuss it much more if I reply, if I replied to
20 Mr. Kroft later, later this week or this afternoon, but I
21 think it speaks to the reliability of the evidence that
22 Ms. Cochrane is providing. Also, just to keep in mind, the
23 agency, like all agencies, are mandated to protect
24 children. We approach things in as an objective way as we
25 can. I mean certainly we have an interest in your

1 decision, but our interest is motivated because of the work
2 we do. So I hope you understand that.

3 But what's also of interest is -- so the evidence
4 we're providing, the concerns being showed and what we've
5 experienced is echoed in the expert reports of what they've
6 studied and what they've noticed. And so I think that
7 leads -- I think you can extrapolate from that where we're
8 heading and again the experts show that we're heading into
9 very rough waters and this goes back to my comments on the
10 currency of affairs. The system is currently under strain,
11 there's a lot of stress, and putting the system under
12 further stress and an individual under further stress,
13 you're really creating a risk to the -- you're putting the
14 best interests of children at risk. And it's equally from
15 apprehending when you should not be apprehending, or not
16 apprehending. And the case law says we should not take
17 that risk.

18 Now I'll review quickly Ms. Regehr's affidavit,
19 if you don't mind.

20 THE COMMISSIONER: No, that's fine.

21 MR. KHAN: And I don't want to go over my time so
22 I'll go through the paragraphs fairly quickly but I'll make
23 sure that I mention the paragraphs so that you're aware of
24 them.

25 THE COMMISSIONER: Yes. Okay, go ahead.

1 MR. KHAN: Okay. And so at paragraph 11, the
2 death of a child is a most distressing event encountered by
3 CFS workers, as I mentioned before, but that's the
4 paragraph.

5 THE COMMISSIONER: Yes.

6 MR. KHAN: And if you note that's consistent with
7 what Ms. Cochrane has experienced or her agency has
8 experienced. At the same paragraph, apprehending a child,
9 the apprehension of a child is distressing the workers, is
10 almost equally as distressing to workers. And again,
11 that's also consistent with, with what both Intertribal and
12 the union has been saying in terms of their evidence.

13 Paragraph 12: The inquiry process was identified
14 as highly stressful, resulting in repeated exposure to
15 highly distressing memories. And when you review
16 Ms. Cochrane's affidavit, you'll read how the workers are
17 concerned about, again, reliving those memories and those
18 emotions they felt when the tragedy was first discovered.
19 So it's consistent again.

20 Paragraph 13: Media attention intensified the
21 distress of workers subject to the review and Intertribal
22 feels this is particular acute in our situation. Again, at
23 paragraph 13, the sense that the media weakens support for
24 the CFS system. And I've mentioned on a few occasions,
25 written and orally, that trust in the system is essential,

1 trust in the agencies is central for anything to get done.

2 Paragraph 14: The degree of media coverage
3 significantly associated with the level of post-traumatic
4 stress symptoms. Now, Mr. Commissioner, the agent's,
5 Intertribal's, most witnesses aren't scheduled to testify
6 until later on during the inquiry while other witnesses are
7 testifying. Just to follow up some of the concerns raised
8 by Mr. Smorang and Mr. Saxberg about how the media will be,
9 I guess reporting and publishing information provided by
10 their workers. My workers, you know, they clearly, you
11 can't stop them. They've been paying attention to how the
12 media has been reporting this inquiry in advance. It's
13 going to be extremely distressful for them if the media
14 were to report harshly on specific workers and publish
15 their photos. They're going to -- knowing that they will
16 one day be also testifying at the inquiry. Once again, I
17 don't see a reason why the media would be interested in
18 Intertribal. Regardless, in a worker who is going to be
19 testifying two months down the road and, and you're
20 watching one worker after another, perhaps their faces is
21 on the front page beside a picture of Phoenix Sinclair,
22 it's going to raise significantly the level of stress, both
23 for that worker and the agency. And why does that matter?
24 Well it matters because the work, it's going to affect or
25 could affect the work they do.

1 Keep in mind, Mr. Commissioner, that, I mean
2 there's no -- workers aren't, they may not be made -- I
3 don't mean to be sarcastic. They're not made out of a
4 cookie cutter. They all have individual levels of stress
5 tolerance. Some individuals can take, withstand a great
6 amount of stress. Others crack under relatively little
7 pressure. What we've already experienced at Intertribal
8 and what we've shown in our affidavit is that events around
9 the subject matter of this inquiry has already caused
10 significant and tangible distress to the agency and to its
11 staff, to its workers. We've seen that already. And while
12 we, we've taken, we've done our best to put preventative
13 measures to assist and support our workers, it's impossible
14 to know who in society will withstand or not withstand a
15 certain level of stress and it would be, in the agency's
16 view, it's taking a big risk to take that chance to see
17 well let's see who, let's see if they're going to be able
18 to do their jobs, you know, under these more stressful
19 situations. We should be doing our best as we've done and
20 I'm sure the union will be, as they've mentioned they'll be
21 talking to the department as they will be doing to try to
22 mitigate the situation. But even our attempts, I don't
23 think, are suffice to disregard the law that says we have
24 to avoid those risks whenever we can and that's what we're
25 asking, we're asking to avoid these serious risks.

1 Paragraph 12 of Ms. Regehr's affidavit: The
2 impact of media attention affected professional witnesses'
3 family members and children. And this is particularly of
4 concern of Intertribal given that it was, it's in a rural
5 setting.

6 At Exhibit 2 of Ms. Regehr's affidavit is an
7 article, titled "Inquiries into the Deaths of Children in
8 Care: The Impact on Child Welfare Workers and their
9 Organization." This discusses the high turnover rate. It
10 discusses the -- it particularly makes mention of the Gove
11 inquiry where it says 250 of the 300 workers hired in B.C.
12 after the Gove Inquiry quit because of case overload and
13 there's a difficulty in retaining sufficient workers.
14 Clearly turnover is not in the best interests of the child.
15 Turnover results in instability for children who are in
16 care. We already experience a high turnover rate
17 throughout the CFS system, that hurts children.

18 Mr. Bruce Rivers' affidavit and this is
19 particularly concerning to the agency. At paragraph 5,
20 Mr. Rivers describes how one worker went AWOL due to the
21 pressures of being publically ostracized and the worker
22 could not be tracked down by police and he has since left
23 the agency. Again, like you know, again this -- we're
24 dealing with individuals who have different stress
25 tolerances.

1 Paragraph 19 of his affidavit: It became more
2 and more difficult to retain child welfare staff.
3 Intertribal's also exhibiting those same problems at the
4 present time.

5 Paragraph 20 of his affidavit: A spike in the
6 number of children coming into care. As I've mentioned on
7 numerous occasions, unnecessary apprehensions is just as
8 harmful to children.

9 At paragraph 23 of Mr. Rivers' affidavit, he
10 talks about increasing difficulty in engaging the number of
11 volunteers that they need. To equate that to CFS, we deal
12 with collaterals. Sources of referrals are, it's not a
13 collateral but collaterals and sources of referrals. There
14 is a lot of cooperation between different organizations
15 that provide different services that we need to engage to
16 meet the needs of families and children and there is a
17 concern that if there's a breakdown in the trust and
18 there's a misconception that you know that particular
19 workers or agencies are not competent that it will affect
20 the assistance that it needs from, well certainly from
21 sources of referrals which are essential in this system but
22 also from collaterals.

23 A lot of what has been said by Ms. Regehr and
24 Mr. Rivers is also echoed by Ms. Gosek. Now I'm not going
25 to refer to any specific paragraphs but the evidence is

1 consistent. Now there's no evidence that says that those
2 things aren't -- that contest what the experts, what
3 Ms. Cochrane, Ms. Kehler has said. Ms. Hastings, in cross-
4 examination, has stated that, you know, she feels that in
5 her view her name could be published in terms of, you know,
6 when there's a death of a child or even in a regular course
7 of her work. I believe she says that at, it's at the end
8 of her cross-examination. That's inconsistent with how the
9 law currently stands. Mr. Smorang made reference to a
10 decision of the Court of Queen's Bench by Justice Rivoalen.

11 THE COMMISSIONER: Mr. Khan, I'm going to ask you
12 to wrap up in the next five minutes.

13 MR. KHAN: Okay.

14 THE COMMISSIONER: I think we just have to if
15 we're going to get this job done.

16 MR. KHAN: Okay. In any event, with respect to
17 that, section 75. It's been the practice of the court and
18 in fact it's been the practice of the media in child
19 protection matters not to, not to report names of any
20 professional witness. As Mr. Saxberg pointed out, those,
21 the trilogy of cases are at tabs 14 -- sorry, 12 to 14 of
22 my reply brief. There's no need to go to it now, but
23 essentially Justice Rivoalen confirmed that section 75(2)
24 means that no witnesses --

25 THE COMMISSIONER: Means what?

1 MR. KHAN: Means that no witnesses, including
2 social workers, professional witnesses can be reported by
3 the media. In that particular case, the breaching reporter
4 was banned from the courtroom for the remaining of the
5 trial.

6 THE COMMISSIONER: What case was that?

7 MR. KHAN: That's The Director of Child and
8 Family Services v. D.M.P.

9 THE COMMISSIONER: All right.

10 MR. KHAN: It's a Manitoba case. While it's been
11 suggested in the media's affidavits that the names of
12 workers are published, regularly published, there's no
13 evidence before you, Mr. Commissioner, that the media has
14 ever published the name of a social worker. There is
15 evidence, there is evidence that workers' names are
16 published in the context of an inquest report. That's
17 occurred. I would --

18 THE COMMISSIONER: And those are available to the
19 media to report on, am I correct?

20 MR. KHAN: I would say yes if it's, if it's --
21 yeah, I would say yes. But in those cases, publication
22 bans are not requested. And if I can use by analogy, and
23 this is at my -- just for reference it's at tab 14 of my
24 reply brief and again it's The Director of Child and Family
25 Services and D.M.P., paragraph 34. In the paragraphs

1 surrounding that, this case discusses section 75(2) and it
2 refers to two cases where a publication ban was granted,
3 however the court notes that in those two particular cases
4 where a publication ban has been granted, it was never
5 contested. At the bottom of paragraph 32 (sic), the court
6 writes:

7

8 "Cases featuring uncontested
9 outcomes are of little value as a
10 precedent, and that case is of
11 little assistance in finding the
12 answer to this application."

13

14 I would submit the same principle applies with
15 the previous inquest reports in which names have been
16 published.

17 It's never been, as far as I'm aware, it's never
18 been contested. A restriction on the publication of
19 workers' names have never been asked. And even for those
20 inquests there is no, there is no evidence before you that
21 the media has ever published names of workers, it's just
22 not there. Perhaps there is. It was put to Mr. Rosner on
23 cross-examination but it wasn't provided. I should say it
24 was never provided in -- we don't have that. So that's
25 been the practice up till today.

1 THE COMMISSIONER: I'm going to ask you to wrap
2 up. I hate to do that but you've had a couple of hours and
3 we've been on the applicant's cases from when we started
4 yesterday morning and we've just got to get through this
5 this week.

6 MR. KHAN: No, I understand and I apologize for
7 taking too much time.

8 THE COMMISSIONER: No, you don't need to
9 apologize, you're being very fair, but I'm trying to be not
10 under unfair to you.

11 MR. KHAN: Well in short, I think the context in
12 applying the Dagenais/Mentuck test is extremely important.
13 The test is flexible and contextual. In this situation
14 we're dealing with the best interests of the child. In all
15 the cases that have been brought to your attention where
16 the best interests of child is engaged, the best interest
17 has overridden a Charter right or the open court principle.

18 Also, for the open court principle or to be
19 displaced we do not need to prove harm, but that there's an
20 increased risk in harm. And a perfect example of that is
21 the K.L.W. case which we discussed, but also the other
22 cases mentioned in our reply brief and there's different
23 types of risks, a risk of kidnapping was sufficient in one
24 situation, different kinds of risk. I think -- so my --
25 what I propose to you, Mr. Commissioner, is that this all

1 comes down to the evidence that's before you and if the
2 evidence is that there's an increased harm to the best
3 interests of the children, the law as it stands today --

4 THE COMMISSIONER: Who then what?

5 MR. KHAN: The law as it stands today --

6 THE COMMISSIONER: Yeah.

7 MR. KHAN: -- and the trend we're following, in
8 the law of course, is that we must take whatever measures,
9 minimal of course when and where possible, to prevent the
10 increase in risk. We're dealing with a system that's
11 always undergoing a fairly high level of stress and our
12 position is that the evidence before you suggests that
13 we're, we're significantly increasing that level of stress
14 on the system and on individual workers.

15 THE COMMISSIONER: What are we -- that level of
16 stress ...

17 MR. KHAN: On the system --

18 THE COMMISSIONER: On the workers, on the
19 system --

20 MR. KHAN: And on the workers.

21 THE COMMISSIONER: -- would be increased by the,
22 by the --

23 MR. KHAN: Publication of the name.

24 THE COMMISSIONER: -- of the identity. Okay.

25 MR. KHAN: Okay. And just one last line and then

1 I'll go.

2 THE COMMISSIONER: All right, I'll let you one
3 last line.

4 MR. KHAN: Thank you. And this is in reference
5 to the blue, the blue paged brief provided by Mr. Saxberg.

6 THE COMMISSIONER: Yes.

7 MR. KHAN: And it's at paragraph, sorry, tab 24.
8 I don't think you need it before you. I'll just read it
9 out.

10 THE COMMISSIONER: Where is it?

11 MR. KHAN: It's tab 24 --

12 THE COMMISSIONER: Yeah.

13 MR. KHAN: -- of the additional compiled book of
14 authorities --

15 THE COMMISSIONER: Yes.

16 MR. KHAN: -- or documents.

17 THE COMMISSIONER: Yeah.

18 MR. KHAN: And it's an article by Ms. Reynolds of
19 the Winnipeg Free Press, where one of the concerns that
20 we've raised is at least understood in this article and
21 that is:

22

23 The anonymity argument is a solid
24 one. Having your face in the
25 newspaper or on television in

1 connection with this hideous case,
2 no matter how insignificant a role
3 you played, could make it even
4 harder to walk through the next
5 stranger's door to remove their
6 children.

7
8 And that's one of the situations that
9 Intertribal's workers as well as all the other workers are
10 going to be faced with.

11 THE COMMISSIONER: Thank you.

12 MR. KHAN: Thank you, Mr. Commissioner.

13 THE COMMISSIONER: Thank you, Mr. Khan.

14 MS. WALSH: Mr. Commissioner?

15 THE COMMISSIONER: Yes.

16 MS. WALSH: The University of Manitoba has a --

17 THE COMMISSIONER: Pardon?

18 MS. WALSH: The University of Manitoba has a
19 brief submission as well.

20 THE COMMISSIONER: All right, and that will be
21 next. Now just let me find -- I'll give you this book
22 back, counsel. Let me just find -- it will be Ms. Gosek's
23 affidavit, I assume.

24 Yes, sir.

25 MR. JULIANO: Mr. Commissioner, my name is

26

1 Greg Juliano. I'm general counsel for the University of
2 Manitoba and as you know, we are intervenor with status
3 here but we consider our role quite peripheral and we will
4 be very brief and hopefully not interrupt anyone's lunch.

5 THE COMMISSIONER: I think I made myself clear
6 earlier on, I'm pleased to have you here because I think
7 it's something the university should be doing is
8 interacting in publications of this kind.

9 MR. JULIANO: For sure and that's exactly why
10 we're here. And you know, we are an intervenor, we don't
11 have our motion before you today, but we do wish to express
12 our support for the motion that has been filed by MGEU and
13 the others as well.

14 It is unusual for us so far in these proceedings.
15 We haven't really taken a position with regard to anything
16 in the pre-inquiry process but this is a point that our
17 institution feels quite strongly about across the
18 university and in particular in our Faculty of Social Work.

19 The university -- I just want to point out, the
20 university really has nothing to gain or to lose in taking
21 this position. We don't have anyone on our faculty or
22 staff who would be amongst the people that have at stake
23 their names being published. But we simply are here just
24 to provide our own unique set of knowledge and our unique
25 perspective for the commission's consideration.

1 As you know, we are the only accredited social
2 work program in the province of Manitoba and as such, we
3 feel a societal responsibility to help build a strong child
4 protection system in the province and there's a strong
5 feeling amongst our faculty that the publication of names
6 is counterproductive to that goal.

7 You've already heard reference to the evidence
8 that has been introduced through the university, that being
9 entirely contained in the affidavit of Ms. Gwen Gosek. So
10 I'll try not to repeat anything, if I can.

11 Ms. Gosek, although one individual, was selected
12 by her dean and her colleagues, based upon her expertise
13 and experience, to be our representative in terms of giving
14 evidence to today, but is fully supported by the faculty.
15 Ms. Gosek, you'll see from her, her C.V. which is attached
16 to her affidavit, has been a faculty member with the
17 university for almost 14 years. Prior to that she spent
18 about almost eight years in the community as a support
19 worker, including as a director or manager of other support
20 workers. I think it's particularly interesting that she's
21 an aboriginal woman and this came out in her cross-
22 examination and that she made the personal choice to be a
23 support worker rather than a front line, what we
24 traditionally call a front line social worker because of
25 her personal belief and the difficulties she would have

1 being placed in a position where she might have to
2 encourage the apprehension of a, of a child and remove them
3 from their parents. But she has an immense experience
4 advising and preparing students, both at the undergraduate
5 and the master's degree level in the Faculty of Social Work
6 and is very familiar with the challenges. The students are
7 quite often people who are already working in the system
8 and as well as new students who are just entering the
9 system and she has a bit of a emphasis on serving the
10 indigenous community. She as well, you will see, has
11 researched, in particular why we presented her evidence.
12 She's done a lot of research in the area of the stresses
13 that social workers encounter on the job and the effects
14 that that has had on the system.

15 So I adopt many of the comments that my learned
16 friends who have gone before me have, have said, and I
17 don't want to repeat those things. I did just want to
18 bring your attention to, I suppose, one train of thought
19 through Ms. Gosek's affidavit and I'm just going to comment
20 on that one, that one train of thought. I won't, I won't
21 stop to refer you to paragraphs unless you want me to.

22 THE COMMISSIONER: I have your brief here.

23 MR. JULIANO: Yeah.

24 THE COMMISSIONER: Are you going to make
25 reference to that?

1 MR. JULIANO: I wasn't really going to stop --

2 THE COMMISSIONER: That's fine.

3 MR. JULIANO: But if you want me --

4 THE COMMISSIONER: No, no.

5 MR. JULIANO: -- I'll cite some propositions that
6 are in the affidavit and if you want me to tell you where
7 they are, I will.

8 THE COMMISSIONER: I have read it and so you go
9 right ahead.

10 MR. JULIANO: So I think what's really
11 interesting about Ms. Gosek's affidavit and it's only
12 something that's been touched on previously but I think is
13 a bit more unique to her situations, is it kind of follows
14 the career path of an alumni of the university that someone
15 coming out of social work and entering into the profession
16 and, and sort of how, what they would experience and then
17 how that impacts the system. So she, early on in her
18 affidavit, states that people who enter into child, sorry,
19 child protection work, do so out of a desire to help. They
20 do so out of a desire to help. It's a highly altruistic
21 motive and these are good people. The unfortunate thing
22 that is quite clear from her affidavit is that they quickly
23 become disenchanted and essentially by the stress of the
24 work. That stress is derived, you'll see in her affidavit,
25 from a number of factors and she describes --

1 THE COMMISSIONER: Excuse me, would one of you
2 counsel give me that, her affidavit, please. I know it's
3 behind here somewhere but we're just not organized as such
4 that I can get onto it.

5 MR. JULIANO: So what I was saying that it's
6 unfortunate but it seems that social workers are quickly
7 disenchanted, largely by the stress of the work. She
8 describes a wide variety of stresses that contribute to
9 this, some of which are not really relevant here, funding
10 issues, low salaries, that sort of thing. But she does
11 describe a number of stresses which are highly relevant to
12 what we're talking about today, high case loads, high
13 turnover amongst colleagues, their experiencing of
14 traumatic events such as a death of a child in care, and
15 also the risk of personal violence against them.

16 It's also pointed out that inquiries and inquests
17 are a source of stress and has been discussed previously,
18 those, that stress flows down, not to just those who are
19 participating in the inquiry but also to the whole
20 profession.

21 Of course it's also been described the tension
22 of, the desire to support families and also the need to
23 protect children, that social workers are sometimes asked
24 to apprehend children, a social worker is being criticized
25 for either doing too much or too little. And you'll see in

1 Ms. Gosek's affidavit her citing studies that demonstrate
2 annual turnover rates in the profession at between 23 and
3 60 percent per year.

4 So in other words, what we have there is a
5 quarter to half of the staff being new every year and what
6 that, the effect is is that it leaves families without
7 consistent help and the ability to build critical
8 relationships. It's those relationships that are really
9 important in terms of the primary goal of the system which
10 is to help keep families together and working well, but
11 also in terms of identifying problems and issues and
12 potential dangers that are critical to protecting children.

13 This trickles down even further. The ones
14 remaining, even after all these people have left the
15 profession, struggled to get familiar with new files and
16 they experience a huge amount of case overload. One study
17 that is cited by Ms. Gosek indicated that after the Gove
18 Inquiry in B.C., that 250 out of 300 new social workers
19 hired after that inquiry quit, citing case overload, and
20 that must, that clearly would be devastating to the system.
21 She cites the high cost of training new recruits and she
22 also cites articles indicating that it takes approximately
23 two years to train, to properly train a new social worker.
24 So we have turnover rates which indicate people are only
25 staying in the role for two years yet it takes two years to

1 properly train someone. And those people, in the infancy
2 of their career, are being asked to make life and death
3 decisions. The stress must be unbelievable.

4 So the university would submit that the stress of
5 child protection work is an extremely serious issue and it
6 is, as we speak, already impacting the support that
7 families receive and the system's ability to protect
8 children. The university is, the university's position is
9 that this inquiry can accomplish its mandate, which of
10 course does not include making recommendations about civil
11 or criminal responsibility. It can accomplish its mandate
12 without adding to the stress that social workers are
13 already under. Unduly emphasizing personal blame only
14 encourages that chilling effect. It's counterproductive to
15 this inquiry, getting to the bottom of what happened and
16 hopefully in the end, improving the system that is
17 currently under so much stress.

18 So that's really all I have to say other than
19 that we encourage the commission to give very serious
20 consideration to the motions that are before you.

21 THE COMMISSIONER: Well, I just want to ask you
22 this one question. I fully understand the stress that
23 you've outlined, but how would that be reduced by the
24 imposition of a publication ban in this instance?

25 MR. JULIANO: I think, I would adopt the comments

1 of the other counsel. The stress would be reduced in the
2 sense that I think the feeling amongst the social work
3 community would be that the system is under review, not so
4 much individual actions and that would have a comforting
5 effect. It's not that there aren't other ways to ensure
6 personal accountability but that's really not the point of,
7 or it's certainly not the university's hope, which is
8 really what we're hoping that this commission accomplishes
9 is getting down to the bottom of really what's troubling
10 our system and --

11 THE COMMISSIONER: That's what we hope we deal
12 with.

13 MR. JULIANO: Exactly.

14 THE COMMISSIONER: Okay. Thank you very much.

15 MR. JULIANO: Thank you.

16 THE COMMISSIONER: Well, I guess we'll adjourn
17 for lunch. Mr. Kroft, you're up next I guess; is that
18 correct?

19 MR. KROFT: Yes, sir.

20 THE COMMISSIONER: Do you have any idea about
21 your time required?

22 MR. KROFT: I'll ask you to ask me that about an
23 hour into it and then I'll be able to tell you more.

24 THE COMMISSIONER: All right. Well, I think
25 being the time now at 20 minutes past 12:00, it's best we

1 probably adjourn until 1:30.

2 MR. KROFT: And I'm happy to have a shorter lunch
3 break if it's possible and if we, if you sent us home early
4 on Friday but we ate quickly today, I think that would be a
5 good -- if we're talking about balancing acts and
6 tradeoffs, that would be good for, a good balance.

7 THE COMMISSIONER: A short lunch break today and
8 what?

9 MR. KROFT: I think I'm speaking for my
10 colleagues --

11 THE COMMISSIONER: What's the, what's the
12 tradeoff?

13 MR. KROFT: The tradeoff would be that if we
14 happen to finish earlier on Friday but we ate quickly
15 today, that's probably not a bad tradeoff. I see some of
16 my colleagues are nodding.

17 THE COMMISSIONER: Well, that's, that's all right
18 with me. I'm rather encouraged to hear you say that we
19 might even get through early tomorrow. So what, what do
20 you suggest for a lunch hour today then?

21 MR. KROFT: I'm happy to come back in 40 minutes,
22 but I'm not going to speak for my colleagues on that and I
23 don't think there's any evidence before you, sir.

24 THE COMMISSIONER: Well, shall we say 1:15 then?
25 All right, we'll adjourn till 1:15. Enjoy your soup.

1 (LUNCHEON RECESS)

2

3 MR. MCKINNON: Mr. Commissioner, for the record
4 I'm Gordon McKinnon --

5 THE COMMISSIONER: Yes.

6 MR. MCKINNON: -- and I represent the department
7 and Winnipeg CFS, which is a branch of the department. I'm
8 just going to take a moment to answer the question that you
9 asked of Mr. Smorang about the ability of the employer to
10 accommodate workers who may be adversely affected by
11 publication of their identifying information.

12 THE COMMISSIONER: Yes.

13 MR. MCKINNON: So I have made some inquiries of
14 my client. I can advise you that Winnipeg CFS employs six
15 workers who are testifying or, or we anticipate will
16 testify at the inquiry. All six of those workers do have
17 regular contact with children and families. And just as a
18 reminder, Mr. Commissioner, Winnipeg CFS no longer has an
19 intake function. In Winnipeg, all intakes are done by ANCR
20 for Winnipeg CFS and all the other Aboriginal agencies that
21 have a presence in Winnipeg.

22 THE COMMISSIONER: ANCR, and who else?

23 MR. MCKINNON: ANCR does all the intakes --

24 THE COMMISSIONER: Yes.

25 MR. MCKINNON: -- for Winnipeg --

1 THE COMMISSIONER: Yes.

2 MR. MCKINNON: -- for Jewish Child and Family,
3 and for all the Aboriginal agencies that have a presence in
4 Winnipeg.

5 THE COMMISSIONER: Yeah.

6 MR. MCKINNON: And I make that point because only
7 six of the workers expected to testify are now with
8 Winnipeg CFS. I think about a dozen are with ANCR. So it
9 may be that Mr. Saxberg and his client should be commenting
10 on this as well.

11 And I also point out that with respect to the two
12 workers who are testifying from Intertribal, that's a much
13 smaller agency so you may wish to ask Intertribal this
14 question. So really what I'm saying is I can only speak
15 for the six workers who now are employed at Winnipeg.

16 THE COMMISSIONER: Yes.

17 MR. MCKINNON: One of those six workers, Mr.
18 Commissioner, is what we refer to -- or what is referred to
19 as a float worker. And I think the best way to describe a
20 float worker is to make an analogy to a substitute teacher.
21 The float fills in during someone else being vacant or --
22 some position being vacant or employee being absent or on
23 maternity leave. So float social workers are intended to
24 provide short-term relief when other social workers can't
25 be at work. The float social work program at Winnipeg CF

1 has five or six staff. The staff are fully utilized
2 already and --

3 THE COMMISSIONER: Just a minute. There are six
4 social workers or staff?

5 MR. MCKINNON: Six social workers.

6 THE COMMISSIONER: One of whom is a float.

7 MR. MCKINNON: No, there are six that are
8 testifying --

9 THE COMMISSIONER: Yes.

10 MR. MCKINNON: -- and coincidentally there are
11 six who are float social workers. Only one of the floats
12 is testifying.

13 THE COMMISSIONER: Okay.

14 MR. MCKINNON: But the point I'm attempting to
15 make is there's a very small unit of five or six
16 individuals who are intended to cover if there are short-
17 term vacancies in the system.

18 THE COMMISSIONER: Well, while there are six
19 going to testify, how many social workers are there in the
20 employ altogether?

21 MR. MCKINNON: Oh, in the total agency, I think
22 it's about 150 --

23 THE COMMISSIONER: All right.

24 MR. MCKINNON: -- in the agency.

25 THE COMMISSIONER: All right. Doing --

1 MR. MCKINNON: And --

2 THE COMMISSIONER: Doing the same kind of work?

3 MR. MCKINNON: The functions of Winnipeg CFS now
4 includes things like long-term relationships with families.
5 So, so when there's long-term service required, Winnipeg
6 would do that. They do things like adoption services.
7 They do things like family reunification. They do the, the
8 social work required after a case goes from intake. So
9 they could be children in care --

10 THE COMMISSIONER: Um-hum.

11 MR. MCKINNON: -- or they could be investigations
12 on child protection cases where further, further
13 investigation is required than can be done at an intake
14 level. So the two categories of work, broadly speaking,
15 are ongoing investigation on protection files and providing
16 care for children who have been apprehended and are wards,
17 so to speak.

18 THE COMMISSIONER: And in total, you said that is
19 how many social workers in the employ of --

20 MR. MCKINNON: About 155 is my recollection.

21 THE COMMISSIONER: And, and the six are part of
22 155.

23 MR. MCKINNON: Those -- six of those 155 are
24 scheduled to testify.

25 THE COURT: Yes, okay.

1 MR. MCKINNON: And if they had to be removed from
2 their position, for whatever reason, to protect their
3 identity, the impact would be someone would have to fill
4 their position. The way that is typically handled is by
5 assigning a float social worker. And as I mentioned, there
6 are five or six float social workers who would have to fill
7 in if one or more of the witnesses who testified, for
8 whatever reason, couldn't continue in their duties.

9 Those float social workers are currently all
10 assigned. In other words, there are no individuals
11 available in Winnipeg CFS to fill in if a current employee
12 were unable to fulfil their duties for whatever reason.

13 THE COMMISSIONER: That's taking into account the
14 155 complement.

15 MR. MCKINNON: That's taking into account the 155
16 complement, yes.

17 THE COURT: Okay.

18 MR. MCKINNON: I guess what I'm saying to you,
19 Mr. Commissioner, is that it would create a hardship on
20 Winnipeg CFS if five or six of their social workers had to
21 be replaced for any period of time. There are not five or
22 six available replacements.

23 You also asked about counselling and support.

24 THE COURT: Before you leave that --

25 MR. MCKINNON: Yes.

1 THE COURT: -- what, what's the recruitment
2 program with respect to people coming into CFS to work, or
3 into the Winnipeg Child and Family Services?

4 MR. MCKINNON: I wouldn't be comfortable
5 answering that; I don't think I have enough information to
6 answer that. I know that there are chronic vacancies. I
7 know there are difficulties in finding qualified people,
8 but I, I don't want to go much further than that, Mr.
9 Commissioner. I would be uncomfortable --

10 THE COMMISSIONER: Okay.

11 MR. MCKINNON: -- as to how reliable I would be.

12 THE COMMISSIONER: Thank you.

13 MR. MCKINNON: In terms of counselling and
14 support, which was your other question to Mr. Smorang,
15 Winnipeg CFS does have a peer support group. It also has
16 an employee assistance program. It also has a practice of
17 providing additional counselling to its employees who may
18 require it.

19 So that's the response of the employer to your
20 question, Mr. Commissioner, unless you have any questions.

21 THE COMMISSIONER: No, no, that's fine. Thank
22 you.

23 Now, just a minute, Mr. Smorang. Before I hear
24 from you, on the agenda ...

25 UNIDENTIFIED PERSON: Mr. Commissioner, is your

1 microphone on?

2 THE COMMISSIONER: Oh, no, it's not. Sorry. You
3 did well to hear me.

4 You, you will -- you get a reply, Mr. Smorang,
5 under this timetable, do you not, to -- once the three
6 parties have spoken against the ban?

7 MR. SMORANG: I get a reply? Yes.

8 THE COMMISSIONER: Yeah. Well, we, we -- can you
9 deal with what Mr. McKinnon's just dealt with now at that
10 time, along with Mr. Saxberg and Mr. Khan?

11 MR. SMORANG: I can. In fairness to Mr. Kroft,
12 we felt it would be important to answer your question in
13 full before he spoke, to give him an opportunity if he
14 needs to --

15 THE COMMISSIONER: Oh, all right.

16 MR. SMORANG: -- to address it. It was more of a
17 fairness question in terms of the order that we felt --

18 THE COMMISSIONER: All right. I was just
19 thinking of time, but --

20 MR. SMORANG: Yes, I'll be, I'll be --

21 THE COMMISSIONER: -- that, that --

22 MR. SMORANG: -- two minutes.

23 THE COMMISSIONER: I understand. You've
24 explained. Go ahead.

25 MR. SMORANG: Thank you, sir.

1 THE COMMISSIONER: Thank you, Mr. McKinnon.

2 MR. MCKINNON: Thank you.

3 MR. SMORANG: Just because you asked me the
4 question -- and the question was, are there reasonable
5 alternative measures --

6 THE COMMISSIONER: Yeah.

7 MR. SMORANG: -- that an employer could take to
8 otherwise ameliorate the damage of media exposure, and the
9 two examples you, you pointed out were counselling or
10 temporary removal from duties. Obviously, the question
11 you've asked relates to your -- to part one of the
12 Dagenais/Mentuck analysis, which is, are there reasonable
13 measures that will prevent the risk. I indicated to you I
14 don't act for an employer, I act for the employees. You've
15 now heard from three employers, and you may wish to delve
16 further later on, but I think I heard Mr. Khan speak to
17 that question on behalf of Intertribal, Mr. Saxberg on
18 behalf of ANCR, and now Mr. McKinnon on behalf of the
19 department.

20 I guess just to fully answer your question --
21 because I think your question has two parts to it. One is,
22 can specific workers be accommodated by either counselling
23 or removal from the workplace, and, and the employers have
24 answered that question.

25 But the second part is, would that prevent the

1 risk? And I would simply point out on behalf of my client
2 that you have also heard of other wider effects, not just
3 that would apply to the actual witnesses, that is, the
4 system-wide effects such as changes to file and case loads.
5 If people left, you'd have families that have been dealing
6 with a worker who now have to deal with a brand new worker,
7 so there's that whole trust relationship issue. You heard
8 from Mr. Saxberg about -- through, through Dr. Regehr,
9 about radiated distress on other workers and on the concept
10 of the vicious circle. And then just this morning you
11 heard from Mr. Juliano, who I think summed it up nicely in
12 terms of the chilling effect on the entire system and the
13 profession.

14 So I would simply point out to you, sir, that
15 while taking care, if you will, of the individual witnesses
16 might theoretically be possible -- and I think from the
17 answers you heard from the employers, it's not -- but even
18 if it were, that only deals with those workers. It doesn't
19 deal with the effect of the other individuals or the
20 effects on the families who are already in the system and
21 who rely upon their ongoing relationship with those
22 workers. So that's just, I think, what I needed to say in
23 order to fully answer your question and, as I say, to give
24 Mr. Kroft the benefit of hearing our answer to your
25 question.

1 THE COMMISSIONER: Thank you, Mr. Smorang.

2 Mr. Kroft?

3 MR. KROFT: Thank you, Mr. Commissioner. I left
4 on your desk -- or Ms. Wowchuk, she left on your desk -- I,
5 I prepared for you and for my colleagues a summary of nine
6 benchmark points that I'm going to cover. I did that kind
7 of like, you know, you see those fundraising campaigns with
8 a thermometer; at least you know how close you are to the
9 top.

10 THE COMMISSIONER: Yes.

11 MR. KROFT: What you don't really know is how
12 long it's going to take to get the extra --

13 THE COMMISSIONER: Well, we're, we're going down
14 to the bottom, that's --

15 MR. KROFT: We're going down to the bottom.

16 THE COMMISSIONER: Yeah.

17 MR. KROFT: So I have some other copies here if
18 anyone needs one. I'll just put it here.

19 What I'll try to do is stop at each point when
20 I'm done. I know that you've been very courteous in terms
21 of leaving questions to the end. When you get to be my
22 age, you'll, you'll realize that sometimes it takes a
23 little effort to remember if you let it go too long and so
24 I'm happy to be interrupted or -- and I'll try to pause at
25 each juncture.

1 THE COMMISSIONER: Thank you.

2 MR. KROFT: So I will tell you I am not going to
3 follow my brief. I believe you've read -- you mentioned
4 you read that.

5 THE COMMISSIONER: Yes.

6 MR. KROFT: And so I'm going to leave that with
7 you, and you can either remember it or read it again. That
8 was the logical presentation done in accordance with what
9 they teach you at university is a proper legal analysis.
10 Now I'm going to drift around and just hit topics that I
11 think are probably the most important or the ones that
12 require response, if that's to your satisfaction, sir.

13 So let me begin with the beginning with a brief
14 introduction about how we see this case. And when I say
15 "this case," of course, I mean the application that I'm
16 speaking to now, which is the publication ban application.

17 The applicants are, I believe, all, or for the
18 most part, government officials. They work for the
19 government, they're paid by the taxpayers of Manitoba, and
20 the people of this province have entrusted those people
21 with the power to remove children from their parents.

22 You heard Mr. Khan this morning talk about the
23 K.L.W. case, I believe it was, where the Supreme Court
24 found that that, in fact, was a violation of a section 7
25 Charter right and upheld the power of these people to

1 apprehend children, to, to interfere with family life, even
2 without a judicial warrant. That's what that case was
3 about.

4 In other words, you're dealing with government
5 officials paid by the taxpayers who have a fairly awesome
6 and, at least on an emergency basis, unsupervised public
7 power, a power that the state must exercise but one that is
8 of significant intrusiveness and potential damage if not
9 done carefully, to all of the citizens of this province who
10 have families.

11 Those are who the applicants are, and there have
12 been, as I understand it -- although I'm not privy to them
13 -- a number of private reports referenced in your
14 order-in-council relating to the Phoenix Sinclair anyway.
15 But the government has determined, in its wisdom, that
16 those private reports aren't enough, that a public review
17 is necessary, and that's what the order-in-council says as
18 I read it.

19 And I know from the newspapers and from my own
20 common sense that the government has committed and will be
21 committing a large sum of taxpayers' money in order to
22 finance this public inquiry which they feel is in the best
23 interests of Manitoba.

24 So I also know that the Manitoba Government
25 Employees Union, at least, doesn't agree that a public

1 inquiry into the death of Phoenix Sinclair is appropriate
2 or necessary. They sought a court order that the
3 government didn't have the authority to call a public
4 inquiry and they went, I gather, to the Court of Appeal,
5 who told them that they were not correct and that the
6 government of this province had every right to call this
7 inquiry if it thought it was in the best interests of the
8 province, and so that is why we are here today.

9 Following that court ruling, the MGEU, Ms. Kehler
10 and two other people, wrote a letter to all of their
11 members and I'm just going to read you a portion of the
12 cross-examination where Ms. Kehler summarizes the letter.
13 This is the cross-examination of Ms. Kehler. You don't
14 need to pull it out now because it's a short part.

15 It's page 8, question 35. And the question and
16 answer were:

17

18 "Okay. You have committed to
19 the members of the MGEU and the
20 public, because it was a public
21 letter, you have committed to
22 oppose the public review of the
23 facts of the Phoenix Sinclair
24 case.

25 "A That's correct."

1 This was her letter following the court ruling.

2 The applicant who -- and, of course, I don't know
3 exactly who they are, but based on the numbers, the
4 applicants are going to be, it seems, the most important
5 witnesses in this proceeding. Or certainly arguably so.
6 They're the people who, to put it colloquially, run the
7 child welfare system in this province, the system that is
8 the subject of the entire inquiry.

9 And I have no doubt that they will be important,
10 probably the most critical sources to you of information
11 that you will require when you're making recommendations
12 that, if accepted, could profoundly affect children and
13 families in the province.

14 So those are the applicants, these public
15 servants, and they are asking you, they're asking you to
16 make it illegal for the media to tell the citizens of this
17 province who they are. I don't mean to put too fine a
18 point on it, but that is what the publication ban is
19 requesting.

20 THE COMMISSIONER: Just repeat that.

21 MR. KROFT: They are asking you to make it
22 illegal for the media to tell the citizens of this province
23 who they are, to reveal who is providing you with the
24 information that you are going to be relying on to make the
25 recommendations to what everybody in this room agrees is a

1 central government service in the province.

2 So to put it another way, they are asking you to
3 withhold truthful information from the people of Manitoba,
4 and the most talked about reason for doing that -- and I'll
5 discuss all of them, but the most talked about reason over
6 the past day and a half is because they want to control the
7 content and the tone of the public discussion about this
8 public inquiry.

9 You heard Mr. Smorang and also Mr. Saxberg talk
10 about how they didn't like some of the headlines that
11 they've seen so far in relation to the death of Phoenix
12 Sinclair and, and this inquiry, and you heard at some
13 length from Mr. Smorang about his displeasure -- and I, I
14 don't disagree with him -- about some of the comments that
15 ordinary Manitobans made on different websites. Mr.
16 Smorang went through some of the more colourful blogs and
17 comments, I would say some of them even vulgar.

18 And in some countries, Mr. Commissioner, in some
19 countries the government executes people or puts them in
20 jail for using those kinds of tones when they're talking
21 about what the government does. But our constitution and
22 our Supreme Court says that it's different here in Canada.
23 Our Supreme Court says that in this country you can't stop
24 people about talking, about public issues. Even if you
25 don't like what they're saying or even if you don't like

1 the language they're using, you can't stop them unless the
2 applicants demonstrate to a judicial officer such as
3 yourself on clear and on convincing evidence that that
4 censorship is the only reasonable way to prevent very
5 serious harm to a social value of superordinate importance.

6 So in a nutshell, today or tomorrow, depending
7 how quickly you move me along, but at the end of my
8 presentation I am going to be submitting to you that the
9 true danger to children, and in fact to all Canadians,
10 would be to permit an unaccountable group of anonymous
11 civil servants to make decisions which violate section 7
12 Charter rights, the right to liberty, without at some point
13 being accountable personally to the public that they serve.

14 Mr. Commissioner, I'm going to suggest to you at
15 the end of my presentation that if you grant the order
16 requested, this will not be a public inquiry as that term
17 is used and understood by the public in this province, in
18 this country, and that you will have facilitated the
19 promise of the MGEU to its members and to the public that
20 there not be a public inquiry.

21 You can call it something else, but if the most
22 important witnesses who are government employees exercising
23 discretion over the people of Manitoba's fundamental
24 rights, and they are not identified, this is something
25 other than a public inquiry. That is my introduction.

1 THE COMMISSIONER: Just let me go back to that
2 statement you made about the Constitution and the Supreme
3 Court of our country, saying you, you can't stop people
4 talking about public issues unless it is demonstrated to a
5 judicial officer on clear and convincing evidence that --
6 and I just want to take the rest of that down, what you
7 said.

8 MR. KROFT: And, and I'm, I'm going to come back
9 to it later, but it's just the Mentuck test.

10 THE COMMISSIONER: All right.

11 MR. KROFT: What I said was, on clear and
12 convincing evidence --

13 THE COMMISSIONER: Yes.

14 MR. KROFT: -- that the censorship --

15 THE COMMISSIONER: Yes.

16 MR. KROFT: My word.

17 THE COMMISSIONER: Yeah.

18 MR. KROFT: -- is the only reasonable way to
19 prevent very serious harm to a social value of
20 superordinate importance. And I wish I could claim credit
21 for that eloquence, but I cribbed it from one of the
22 Supreme Court cases.

23 THE COMMISSIONER: Yeah. Of superordinate what?

24 MR. KROFT: Importance.

25 THE COMMISSIONER: Importance.

1 MR. KROFT: When I get to the cases I'll try to
2 remember which case it was it came from and --

3 THE COMMISSIONER: Yeah, yeah, I, I --

4 MR. KROFT: -- point you to it.

5 THE COMMISSIONER: I know it's there but I just
6 want -- that's fine. Thank you. Carry on.

7 MR. KROFT: Well, I finished my introduction and
8 I want to now touch upon some important themes that have
9 come up in the submissions to you.

10 The first theme that I want to touch upon is
11 freedom of the press and other media in a democratic
12 society, and I have to tell you that I wasn't expecting to
13 have to spend any time on explaining why freedom of the
14 press is vital to the preservation of freedom of Canadians,
15 both children and otherwise. I thought that it had been
16 cleared up by John Stuart Mill and Jeremy Bentham in the
17 17th century.

18 But I listened carefully to Mr. Smorang's
19 presentation and his passion about the evils of a free
20 press in the internet age, and I thought that the best
21 thing I could do is just to point you to one of the Supreme
22 Court of Canada cases lest you have any doubt about the
23 connection between a free press and a free and democratic
24 society.

25 And I won't take you to it because I'm conscious

1 of the time, but you might look at the Edmonton Journal
2 case, which is at tab 2 of our authorities --

3 THE COURT: Yes.

4 MR. KROFT: -- at page 13 and following, where
5 Mr. Justice Cory deviates somewhat from Mr. Smorang and the
6 MGEU's view of the press and its role in our freedom. I'm
7 not going to say any more about freedom of the press
8 generally, but I do want to move on to speak a minute about
9 freedom of the press in the context of the administration
10 of justice and the judicial system.

11 In the MGEU brief you will see, at paragraph 82,
12 the view that that party takes of freedom of expression and
13 its relationship to the administration of justice. It
14 said:

15
16 "What is portrayed as charter
17 values and the open court
18 principle is nothing more, it is
19 submitted, than an attempt by the
20 Media to maximize profits and sell
21 newspapers and increase viewership
22 and readership."

23
24 That is their view.

25 The Supreme Court of Canada does not agree with

1 that view. And you might make a note to look at the
2 Edmonton Journal case, again at tab 2 of our brief, at page
3 17 this time. And there Justice Cory says this:

4

5 "Discussion of court cases and
6 constructive criticism of court
7 proceedings is dependent upon the
8 receipt by the public of
9 information as to what transpired
10 in court. Practically speaking,
11 this information can only be
12 obtained from the newspapers or
13 other media."

14

15 You mentioned yesterday -- and I'm going to come
16 back with the case I circulated just before the hearing,
17 from the Supreme Court that just came out on filming. In
18 that case Madam Justice Dechamps said ... She said, and
19 she was quoting:

20

21 "'[o]penness would be a myth if
22 the media were not given
23 legitimate access to the courts in
24 order to witness all stages of
25 proceedings, and the freedom to

1 make accurate and honest reports
2 of those proceedings.'" "

3

4 We're not talking about trivial rights and
5 trivial matters. We're talking about rights that go to the
6 very heart of our democratic tradition, a tradition that
7 children have a stake in as well as adults. And I point
8 out, sir, that the media can't perform this role if it
9 doesn't have the facts.

10 You heard Mr. Saxberg this morning and Mr.
11 Smorang yesterday complain quite bitterly about what they
12 say were errors in the media's coverage of this particular
13 set of incidences. And there, there is some irony there; I
14 don't know if you noticed it. But when the government,
15 government officials in this case refuse to disclose facts
16 about important public issues, does it really lie in their
17 mouths to then complain that the media or the public get it
18 wrong? Of course, they got it wrong. That's why we're
19 having a public inquiry, so that they can get it right.

20 The remedy, if there has been some wrong
21 reporting, is transparency, not censorship. And so on this
22 point, the role of the media, I simply say that the
23 applicants apparently disagree with our Supreme Court and
24 our Charter of Rights and Freedoms when it comes to the
25 importance of the media to the proper functioning of

1 judicial proceedings in a free and democratic society.

2 But I want to assure you, Mr. Commissioner, that
3 on behalf of my clients I'm not asking for a publication
4 ban to suppress these extreme views. In fact, my client
5 defends the right of the applicants to make the comments
6 that they made, although they seem to be somewhat out of
7 step with democratic principles because they believe that
8 good public policy and accountable government comes from
9 informed discussion, not from suppression of information.

10 THE COMMISSIONER: But you wouldn't go that far
11 with respect to comments that incite violence, for
12 instance, would you?

13 MR. KROFT: No, I'm not here to defend hate
14 literature, and there's a whole -- if, if you look at the
15 very end of my motions brief you will see a quote from Mr.
16 Justice Brandeis of the United States Supreme Court, made
17 many years ago at the turn of the century, where he talked
18 about where there's no time between a negative consequence
19 -- no time for discussion, there is an exception to the
20 otherwise important democratic rule that the remedy for bad
21 speech is more speech, not suppression.

22 So I've dealt with the issue of freedom of the
23 press generally; I've touched on the issue of why a free
24 press is important to a free and democratic society in
25 judicial proceedings such as these in particular. I want

1 to move on now to a third general point, a general theme,
2 the theme of why it is important for witnesses to testify
3 in public and not anonymously. Obviously, a topic that's
4 been dealt with quite a bit.

5 My friends for the applicants argue that an order
6 prohibiting public discussion of the identity of the
7 professional witnesses is of no real consequence. It's a
8 minimal impairment. In his brief, Mr. Smorang says it's
9 barely a restriction at all. Mr. Saxberg in his brief, at
10 paragraph 28, went further. He said there's no purpose
11 whatsoever that is advanced by revealing the identities of
12 the applicants.

13 Well, these positions articulated by my friends
14 are not supported by the law, they're not supported by the
15 evidence which they filed, and it's not supported by common
16 sense, either, and I want to speak to that for a few
17 moments now.

18 I'm going to begin with the law. One of the
19 principle reasons for the open court rule is the testimony
20 is more honest and more accurate and more reliable when it
21 is given in full public view. And as authority for that, I
22 am going to direct you again to the Edmonton Journal case
23 at tab 2 of our brief. You can make a note that it's at
24 pages 36 and 37 and it's part of actually Madam Justice
25 Wilson's explanation because she, even more than Mr.

1 Justice Cory, goes into a discussion of why freedom of the
2 press is so important to judicial proceedings. And she
3 says:

4

5 "The one most frequently advanced,
6 and certainly the one with the
7 deepest roots in the history of
8 our law" --

9

10 And she's talking about why is it important to have free
11 reporting on judicial proceedings.

12

13 "... the one with the deepest
14 roots in the history of our law,
15 stresses the importance of an open
16 trial for the evidentiary
17 process."

18

19 She refers to Mr. Cory referring to:

20

21 "... Blackstone [who] stressed
22 that the open examination of
23 witnesses 'in the presence of all
24 mankind' was more conducive to
25 ascertaining the truth than secret

1 examinations."

2

3 And she goes on then to discuss some of the
4 things that Dean Wigmore said in his treatises. This is the
5 same cite, and let me just tell you what he said because it
6 explains why it is important that witnesses be identified.

7 Dean Wigmore said the ...

8

9 "Its operation in tending to
10 improve the quality of testimony
11 is two-fold."

12

13 We're now talking about public giving of evidence.

14

15 "Subjectively, it produces in the
16 witness' mind a disinclination to
17 falsify; first, by stimulating the
18 instinctive responsibility to
19 public opinion, symbolized in the
20 audience, and ready to scorn a
21 demonstrated liar; and next, by
22 inducing the fear of exposure of
23 subsequent falsities through
24 disclosure by informed persons who
25 may chance to be present or to

1 hear of the testimony from others
2 present."

3

4 Like the media. That wasn't Dean Wigmore, that was me, the
5 last word.

6

7 "Objectively" --

8

9 Dean Wigmore says,

10

11 "... it secures the presence of
12 those who by possibility may be
13 able to furnish testimony in chief
14 or to contradict falsifiers and
15 yet may not have been known
16 beforehand to the parties to
17 possess any information."

18

19 So people come forward when they have access.

20 And he says:

21

22 "The operation of this latter
23 reason was not uncommonly
24 exemplified in earlier days in
25 England, when attendance at court

1 was a common mode of passing the
2 time for all classes of
3 persons ..."

4

5 And then he says:

6

7 "The same advantage is gained, and
8 much relied on, in more modern
9 times, when the publicity given by
10 newspaper reports of trials is
11 often the means of securing useful
12 testimony."

13

14 That's why more than a century of jurisprudence
15 says it's important that witnesses don't testify
16 anonymously.

17 And that's not to say, though -- Mr.
18 Commissioner, it's not to say that public testimony is
19 always what the witnesses prefer. In fact, we know that's
20 not the case. The arguments that you have heard today have
21 been heard many times by the court.

22 And if you do have time, you might refer to tab
23 19 of my brief, which I will need to do to make sure I get
24 it right. You're not going to like the heft of it. It's
25 in our authorities -- I'm sorry, not the brief, the, the

1 brief of authorities.

2 UNIDENTIFIED PERSON: Nineteen?

3 MR. KROFT: Tab 19, yes. You know what, I'll
4 just read it to you, but you should have my brief of
5 authorities anyways.

6 THE COMMISSIONER: Here's, here's one.

7 MR. KROFT: Is, is that the one? I thought we
8 filed it in a, in a binder. No?

9 THE COMMISSIONER: You, you filed two volumes?

10 MR. KROFT: Yeah.

11 THE COURT: Yes.

12 MR. KROFT: Yeah.

13 THE COMMISSIONER: I have it.

14 MR. KROFT: I'm referring to tab 19 now.

15 THE COMMISSIONER: Give that back (inaudible) --

16 MR. KROFT: You know what, let me just read it to
17 you rather than make you ...

18 THE COMMISSIONER: Well, I want to see it.

19 MR. KROFT: Okay, good. Good.

20 THE COURT: You, you've whetted my appetite.

21 MR. KROFT: All right. It's on tab 19.

22 THE COMMISSIONER: Yes.

23 MR. KROFT: So this is our Manitoba Court of
24 Appeal in rejecting an application for an order that was
25 intended to keep witnesses anonymous. And if you look at

1 page 4, paragraph 15, the court actually cribs from Scott
2 v. Scott from the early part of the last century, and
3 you'll see this quoted all through the cases. You may want
4 to highlight it. It's the bottom of the page, paragraph
5 15. There's a quote at the bottom -- are you -- are we
6 together?

7 THE COMMISSIONER: Yes, yes. Um-hum.

8 MR. KROFT:

9

10 "The hearing of a case in public
11 may be, and often is, no doubt,
12 painful, humiliating, or deterrent
13 both to parties and witnesses, and
14 in many cases, especially those of
15 a criminal nature, the details may
16 be so indecent as to tend to
17 injure public morals, but all this
18 is tolerated and endured, because
19 it is felt that in public trial is
20 to" ...

21

22 I think it should be:

23

24 "... be found, on the whole, the
25 best security for the pure,

1 impartial, and efficient
2 administration of justice, the
3 best means for winning for it
4 public confidence and respect.'"
5

6 And I stop on "public confidence and respect"
7 because that has special application when we're dealing
8 with a public inquiry, of course, which is called in order
9 to, to some degree, restore public confidence and respect
10 in governmental matters where the government feels that
11 that may be in jeopardy.

12 And so let me spend a minute when I'm talking
13 about the importance of giving testimony in public, to talk
14 about it in the context of public inquiries. And I refer
15 you to the Phillips case, the Westray mine disaster case,
16 which I provided to you at tab 4.

17 THE COMMISSIONER: Yeah. That's Cory, too, isn't
18 it?

19 MR. KROFT: Yes, indeed, it is. And at paragraph
20 117 --

21 THE COMMISSIONER: What tab is that at?

22 MR. KROFT: That's at tab 4 of our book of
23 authorities.

24 THE COMMISSIONER: Yeah. Yeah.

25 MR. KROFT: And he --

1 THE COMMISSIONER: Paragraph --

2 MR. KROFT: He wrote --

3 THE COMMISSIONER: Paragraph 15, did you say?

4 MR. KROFT: No paragraph 117 is where I'm going
5 to start.

6 THE COMMISSIONER: Okay.

7 MR. KROFT: You'll find that on page 78.

8 THE COMMISSIONER: I'm there.

9 MR. KROFT: Okay. There's a fairly large quote
10 there from --

11 THE COMMISSIONER: Paragraph 178?

12 MR. KROFT: Sorry, no, page 78, paragraph
13 one-one-seven, 117.

14 THE COMMISSIONER: Oh, oh, page 78.

15 MR. KROFT: Yes, I'm sorry.

16 THE COMMISSIONER: Go ahead.

17 MR. KROFT: So Mr. Justice Cory here is, is
18 adopting with favour some comments by Professor Jamie
19 Cameron in the quote in the middle of the page. And I'll
20 just take you to the bottom of that quote.

21 THE COMMISSIONER: Um-hum.

22 MR. KROFT: It's all good, but I don't want to
23 take a lot of time.

24 THE COMMISSIONER: Yeah.

25 MR. KROFT: But what she says at the end of her

1 piece is:

2

3 "Where different phases of the
4 proceedings" --

5

6 And she's talking about public inquiries here.

7

8 "... are closed ..."

9

10 "Where different phases of the
11 proceedings are closed or where
12 information about them is
13 censored, the public's ability to
14 judge the functioning of the
15 system, rate the government's
16 performance and call for change is
17 effectively removed."

18

19 That's from the Supreme Court.

20 And another interesting comment that Mr. Justice
21 Cory picks up is one from Justice Grange, who was talking
22 about the inquiry that he held. And if you turn back to
23 page 52, paragraph 63.

24

THE COMMISSIONER: Um-hum.

25

MR. KROFT: This is a -- I think a speech that

1 Justice Grange gave and it is adopted by Justice Cory. And
2 I'm focusing on the -- starting in the second line of the
3 quote, where Justice Grange said:

4

5 "They are not just inquiries; they
6 are public inquiries."

7

8 And then a little later, he says:

9

10 "I realized that there was another
11 purpose to the inquiry just as
12 important as one man's solution to
13 the mystery and that was to inform
14 the public. Merely presenting the
15 evidence in public, evidence which
16 had hitherto been given only in
17 private, served that purpose. The
18 public has a special interest, a
19 right to know and a right to form
20 its opinion as it goes along."

21

22 That's what the Supreme Court and Justice Grange
23 said, and of particular significance in that comment -- and
24 remembering back to some of the comments you've heard --
25 it's not enough to say: Well, don't worry because you'll

1 know. Don't worry, Mr. Commissioner, you'll hear it, no
2 one else has to.

3 That's not what a public inquiry is about, and if
4 that's what it's turned into, it isn't a public inquiry and
5 it doesn't achieve the purpose. And that's what the
6 Supreme Court is saying here and why I bring it to your
7 attention.

8 And on this point as well, there, there is
9 actually -- I'm sorry, did you have a question or ...

10 If you, if you look at tab 18 of our brief, the
11 Ontario Court of Appeal had a crack at a public inquiry
12 case. It was the one from Cornwall involving the alleged
13 child abuse ring. And there was an application in that
14 case for a publication ban of the name of a witness, of a
15 particular witness -- not a whole group like here, but
16 particular witness -- and it went to the Court of Appeal.

17 And if you look at paragraph 47 on page 13 ...

18 THE COMMISSIONER: Yes.

19 MR. KROFT: The Court of Appeal, I think it was
20 Mr. Justice Sharpe, said:

21

22 "Even if it were possible for the
23 Commission to conduct certain
24 fact-finding investigations by
25 using a moniker to identify the

1 employee, one must have regard to
2 the fact that this is a public
3 inquiry called to clear the air in
4 a community long troubled by
5 rumours, innuendoes, and
6 allegations of secrecy and cover-
7 up."

8

9 And then he says:

10

11 "His identity cannot be viewed as
12 a mere detail that is not germane
13 to the inquiry. A central purpose
14 of this Commission is to
15 facilitate the public's
16 understanding of the institutional
17 response to the allegations
18 made" --

19

20 In this particular case, it's not applicable here.

21

22 "... against well-known
23 individuals, including the
24 employee, prominent in the
25 community and whose names have

1 already been in the public eye in
2 relation to this very
3 controversy."

4

5 And, and what I'm focusing on here and ask you to
6 focus on is the importance of identity as not a mere
7 detail.

8 And while I'm talking about the importance of the
9 identities of witnesses, I also want to point out that it
10 is particularly important not only in public inquiries but
11 also when we're dealing with public servants who are
12 exercising state power, such as the witnesses, the
13 applicants here. And for that I'd like to take you to the
14 Mentuck case, which is at tab 5.

15 THE COURT: And what is that proposition you just
16 mentioned?

17 MR. KROFT: The identifying witnesses -- that
18 identity -- not identifying witnesses, but identity is
19 particularly important when the inquiry relates to
20 government officials who are exercising state powers, such
21 as social workers do when they apprehend children.

22 THE COMMISSIONER: All right. And tab what?

23 MR. KROFT: Taking you to tab 5.

24 THE COMMISSIONER: Yes.

25 MR. KROFT: Okay. And taking you to paragraph

1 58. Just to remind, this was a case where undercover
2 police officers were seeking anonymity. They didn't want
3 to be identified because they said that they might be in
4 danger. And they wanted a publication ban on naming them
5 because they were giving evidence, and they wanted that
6 permanently.

7 And at paragraph 58, the court said as follows:

8

9 "As a general matter, it is not
10 desirable for this, or any, Court
11 to enter the business of
12 permanently concealing information
13 in the absence of a compelling
14 reason to do so."

15

16 So they don't like permanent bans at all.

17 And then they say:

18

19 "The appellant suggests that the
20 officers would be in physical
21 danger if their identities were
22 ever revealed. This is not a
23 substantial enough risk to justify
24 permanent concealment. All police
25 officers are subject to the

1 possibility of retributive
2 violence from criminals they have
3 apprehended and other persons who
4 bear them grudges or ill-will. In
5 rare cases this may result in
6 tragic events, and while all
7 efforts must be deployed to
8 prevent such consequences" --

9

10 And here is where I really want to focus:

11

12 "... a free and democratic society
13 does not react by creating a force
14 of anonymous and unaccountable
15 police."

16

17 I would say that those, those words are
18 particularly apt in this case.

19

20 So I'm talking at this stage about why it's
21 important to identify witnesses, and I've just finished
22 telling you what the law says about that. I want to now
23 tell you what the applicant's evidence from Ms. Gosek, one
24 of the experts tendered on behalf of the faculty, as Mr.
25 Juliano pointed out.

25

 She dealt with this issue and Ms. Gosek

1 volunteered to me when we were cross-examining at the very
2 beginning of her testimony, early on, her particular bias
3 and perspectives on social work and child protection and,
4 and -- I think Mr. Juliano referred to it in terms of why
5 she didn't take a position as a social worker in the end.
6 She volunteered that information and it would be useful --

7 THE COMMISSIONER: She volunteered what
8 information?

9 MR. KROFT: She, she volunteered information to
10 me right off the top --

11 THE COMMISSIONER: On the record.

12 MR. KROFT: On the record. But let's look; maybe
13 take out her -- the transcript of her cross-examination.

14 THE COMMISSIONER: Okay.

15 MR. KROFT: This is Ms. Gosek.

16 THE COMMISSIONER: Yeah, just a minute. I've got
17 to find Gosek. We got your other two, but ... It's here.

18 MR. KROFT: Keep those other two handy, because I
19 intend to spend some time in the cross-examinations. But I
20 was thinking of Ms. Gosek here. Maybe I can just read it
21 to you. Would that be better?

22 THE COMMISSIONER: Well, just, just a minute.
23 I've got, I've got it. Just one second.

24 That's Rosser. Should have put tabs on ... I've
25 got them all marked so I, I ... There's Hastings.

1 Well, go ahead.

2 MR. KROFT: Okay. I'll, I'll read it to you and,
3 and, and -- let me just give you the cite and you can --

4 THE COMMISSIONER: At what page of her -- of the
5 transcript?

6 MR. KROFT: So it's page 7, question 25 to 27.

7 THE COMMISSIONER: Yeah.

8 MR. KROFT: And then page 13, question 51 to 53.

9 THE COMMISSIONER: Go ahead.

10 MR. KROFT: So, so as I was saying and as, as Mr.
11 Juliano described to you earlier, at the beginning of the
12 cross-examination when I actually asked Ms. Gosek why it
13 was she never became a social worker in the field, she, she
14 gave me a fairly long explanation about her own
15 perspectives and her own identity and, and feelings about
16 social work and background.

17 And I said to her:

18

19 "I guess when we hear your
20 opinions, and read your
21 information, it is important we
22 understand that you have a
23 particular perspective that you
24 have just articulated?"

25

1 And she said, "Right."

2 And I asked her:

3

4 "[Would you] agree with
5 me, that when you are, I guess,
6 speaking to anybody, certainly any
7 social workers, there can be
8 different perspectives?"

9 "A Yes.

10 "And that, in part,
11 influences how people make
12 decisions about their career, and
13 their work?"

14

15 And she answers, "Right."

16 That's why she told me about who she was, because
17 her identity and her background was important.

18 And then at page 13, I put to her:

19

20 "And it is important to know if
21 people have a particular axe to
22 grind, if, for example, there is
23 evidence of conflict of interest,
24 that would be something you would
25 want to know in evaluating on

1 whether or not to rely on some
2 information; is that right?

3

4 Her answer was:

5

6 "Absolutely. That is why I stated
7 up front where my personal biases
8 come from. Because I believe that
9 we all bring biases to the table."

10

11 The question was:

12

13 "Q So that is sort of a, I
14 guess a universal statement about
15 everybody, one way or another?"

16

17 And she said:

18

19 "I would say so. We
20 bring our personal experiences."

21

22 And I asked:

23

24 "And the way we have to
25 deal with that in our search for

1 the truth, is to just make sure we
2 understand that, and understand
3 the biases; is that right?"

4

5 And her answer was, "[Yes,] to the best of our
6 ability."

7 The point she was making and the point I'm making
8 to you is that knowing somebody's background, their
9 relationships to other people, all the things that we call
10 identity, is not a mere detail. It has everything to do
11 with what we understand about what the person is telling
12 us, at least according to Ms. Gosek, as well as the
13 jurisprudence that I cited to you.

14 And that's not our evidence; that's the evidence
15 from the applicants.

16 And I also want to make the point, Mr.
17 Commissioner, that the publication of identity is important
18 to the public understanding that the child welfare system
19 is a human process. You, you read in the affidavits and
20 you heard during the submissions that there's a sentiment
21 that the media doesn't and the public doesn't understand
22 the stresses that affect child welfare workers.

23 That came through loud and clear both from the
24 affidavits and from some of the submissions this morning.
25 Mr. Khan spoke of this when he made the point to you that

1 the social workers aren't cookie cutters; they're people.
2 Individuals.

3 Well, if the people of Manitoba are going to get
4 the benefit of their investment in this public inquiry, if
5 they're going to be empowered to understand what Mr. Khan
6 believes they ought to be understanding, they need to
7 understand that these people, these professional witnesses,
8 are real human beings with real identities, real
9 backgrounds, making professional judgment calls in the real
10 world, just like Mr. Khan said. That these are people.
11 This isn't Mr. X or Madam Y; these are real people. That
12 is how the public will understand and address the concerns
13 that Mr. Khan and others have raised that there is
14 insufficient understanding of the stresses on social
15 workers.

16 And the order that they're seeking goes directly
17 contrary to achieving that purpose. You pointed out
18 earlier, I think -- but I'll point it out if, if you
19 didn't; I think this is what you meant -- that, in fact,
20 the order that they're seeking can operate actually quite
21 unfairly to the professional witnesses. I don't know how
22 many there are now, but there are dozens of social workers
23 and, and I have no idea -- I'm assuming that nobody did
24 anything wrong. But you may in the course find that one or
25 two didn't do something well, or maybe you, you'll even be

1 harsh with them; that will be up to you.

2 Hardly seems fair that if there's 40 social
3 workers and one person who deserves some condemnation that
4 you say, Well, there's one of the 40 who's really bad, the
5 rest were great, and there's no, there's no identification.
6 I'm not sure how I would feel if I was one of the other 39.
7 So there's some unfairness, even, in not naming the social
8 workers.

9 Let me conclude, then, on this point, that naming
10 -- that the identity is important, it's not trivial, it's
11 not a minimal impairment, by saying that it is, to
12 summarize, going to impair the evidence -- the quality of
13 the evidence that you receive. It will impair the input to
14 your decisions; that's what the law says since Blackstone.

15 And if you grant the order, the confidence of the
16 public is not going to be restored in the same way. It's
17 not going to be enhanced by the inquiry where it's illegal
18 to publicly mention the names of the government employees
19 who are, after all, testifying about their professional
20 service. What is called for to clear the air, what is
21 called for to promote understanding, is a public inquiry,
22 as we all understand it. And that is why we say it is not
23 a detail, identity. It is fundamental.

24 I have one more item that I'd like to deal with
25 under item 2 of my list. I don't know when you want to

1 take a break, but you'll give me the --

2 THE COMMISSIONER: Well, let's -- not yet.

3 MR. KROFT: Okay. Well, the, the next --

4 THE COMMISSIONER: In, in the -- we're going to
5 be here until five o'clock, I assume.

6 MR. KROFT: I'm here as long as you need me here.

7 THE COMMISSIONER: Well, we, we won't break --

8 MR. KROFT: And longer, probably.

9 THE COMMISSIONER: We won't break for half an
10 hour yet.

11 MR. KROFT: Okay.

12 THE COMMISSIONER: Unless someone needs to, and
13 so indicates.

14 MR. KROFT: So the last point under my important
15 theme section has to do with an argument that you heard
16 this morning and that you saw in the briefs. I think it
17 was made mostly by the ANCR brief and by Mr. Saxberg, and
18 then repeated somewhat by Mr. Khan, which is an argument to
19 the effect that the best interests of the children or the
20 children's rights are paramount. If you wanted to see how
21 they articulated it, it's in parts IV and V of the ANCR
22 brief.

23 THE COMMISSIONER: What, what did you just
24 identify, section?

25 MR. KROFT: It's sections IV and V of their reply

1 brief.

2 THE COMMISSIONER: Yes. Yeah.

3 MR. KROFT: And the argument they're making is
4 that the best interests of children are paramount to
5 section 2(b) rights like freedom of expression.

6 THE COMMISSIONER: Yes.

7 MR. KROFT: And what I want to say about that is
8 that the Supreme Court --

9 THE COMMISSIONER: I, I want to hear you on that,
10 I --

11 MR. KROFT: Yeah.

12 THE COMMISSIONER: -- must tell you.

13 MR. KROFT: Yeah. Well, let -- I don't intend to
14 be long, because it's so clear.

15 THE COMMISSIONER: Well, I still want to hear
16 you.

17 MR. KROFT: Here it goes.

18 THE COMMISSIONER: Because I, I guess I haven't
19 got it quite clear yet.

20 MR. KROFT: Well, let's, let's see if I can fix
21 that real quick.

22 The Supreme Court has definitively rejected an
23 approach to Charter analysis based on a hierarchy of
24 rights. In fact, the Dagenais case, if you wanted to say,
25 what was the nugget, what was the turning point in Canadian

1 constitutional jurisprudence? It's that. And if you look
2 at the Dagenais case, which we provided at tab 20 ...

3 THE COMMISSIONER: Yes.

4 MR. KROFT: And if you look at page 51 of tab
5 20...

6 THE COMMISSIONER: Yes.

7 MR. KROFT: And you look at paragraph 72 on that
8 page.

9 THE COMMISSIONER: Yeah.

10 MR. KROFT: Halfway down begins, "A hierarchical
11 approach"?

12 THE COMMISSIONER: Yes.

13 MR. SMORANG: This is the answer to the question:
14

15 "A hierarchical approach to
16 rights, which places some over
17 others, must be avoided, both when
18 interpreting the Charter and when
19 developing the common law. When
20 the protected rights of two
21 individuals come into conflict, as
22 can occur in the case of
23 publication bans, Charter
24 principles require a balance to be
25 achieved that fully respects the

1 importance of both sets of
2 rights."

3

4 If you want any more focus -- I'm, I'm not going
5 to take you to this, but if you look back at that Cornwall
6 inquiry case ... If you look at the Cornwall inquiry case
7 which was at tab 18, and you look at paragraph 42 in that
8 case -- you can just make a note because it's relevant
9 because it was a publication ban case as well.

10 THE COMMISSIONER: Paragraph 42?

11 MR. KROFT: Forty-two of the Cornwall case.

12 THE COMMISSIONER: Yeah.

13 MR. KROFT: That's the --

14 THE COURT: Yeah.

15 MR. KROFT: -- Court of Appeal case. It says --

16 THE COMMISSIONER: Yeah.

17 MR. KROFT: It says the same thing, though:
18 There is no hierarchical approach to rights.

19 And that just makes sense, Mr. Commissioner. It
20 just makes no sense to ask a judge or anybody else whether
21 child safety is more important than freedom of expression.
22 The question, I say with respect, entirely misses the
23 constitutional point.

24 THE COMMISSIONER: Well, is it the constitutional
25 point alone, or what about when it comes time to, to

1 balance the test?

2 MR. KROFT: Yes.

3 THE COMMISSIONER: The Dagenais/Mentuck test.

4 MR. KROFT: Correct. So -- and I agree with my
5 friends on this. It is a contextual and balanced approach
6 that requires respect and reconciliation of both rights to
7 the extent possible, and there is no this right trumps that
8 right.

9 In that paragraph on Dagenais, that was talking
10 about an old saw that, that those of us who have lived that
11 long used to encounter when we acted for the media on these
12 kinds of cases, where the Crown would always stand up and
13 ask for a publication ban and say, Fair trial trumps
14 freedom of expression, and that was the end of the case.
15 They were very short.

16 And that's what Dagenais/Mentuck was about. That
17 was the case and what it was about, and that's what
18 happened in the lower courts. And the, the court --
19 Supreme Court said:

20

21 "The pre-Charter common law rule
22 governing publication bans
23 emphasized the right to a fair
24 trial over the free expression
25 interests of those affected by the

1 ban. In my view, the balance this
2 rule strikes is inconsistent with
3 the principles of the Charter, and
4 in particular, the equal status
5 given by the Charter to ss. 2(b)
6 and 11(d)."

7

8 That's the fair trial right.

9 It would be inappropriate for the court to
10 continue to apply a common law rule that automatically
11 favoured the rights protected by section 11(d) over those
12 protected by section 2(b). So the question is wrong, if
13 you ask the question.

14 THE COURT: What, what were you just reading
15 from?

16 MR. KROFT: The first part of paragraph 72 on
17 page 58 of Dagenais.

18 THE COMMISSIONER: Oh.

19 MR. KROFT: Sorry.

20 THE COMMISSIONER: Okay.

21 MR. KROFT: Fifty-one of Dagenais.

22 THE COMMISSIONER: I'd gone back to Cornwall.

23 MR. KROFT: Yeah, no.

24 THE COMMISSIONER: All right.

25 MR. KROFT: It's the Dagenais case.

1 THE COMMISSIONER: You're, you're gone to page --
2 yes, okay.

3 All right. Carry on.

4 MR. KROFT: So the answer to your question is,
5 Don't ask me who do you like better, your mother or your
6 father. That's not a question.

7 In a particular case, in particular context, you
8 balance the values between two rights and sometimes one
9 right will have to be preferred; in another case, other
10 rights will have to be preferred. What is constitutionally
11 wrong is to make the kind of statements that you heard in
12 some of the motions briefs, one right is paramount to the
13 other. It's just not legally so.

14 I am not arguing to you and you will not hear me
15 argue that in a particular case protecting a child is not a
16 social value of importance that needs to be weighed in the
17 balance. Of course, it is. But does it always prevail?
18 Of course not.

19 In fact, if you think about, what could be more
20 in the interests of the rights of children than living in a
21 free and democratic society? There's a whole line-up of
22 people escaping from places like Syria and all else over
23 the world because they think that their children are going
24 to be better off here.

25 To, to juxtapose the best interests of the

1 children on the one hand and democratic freedom on the
2 other makes no sense. And if you get back into that
3 corner, you're making a mistake according to the Supreme
4 Court in the Dagenais case.

5 I'm finished number two.

6 THE COMMISSIONER: All right.

7 MR. KROFT: Are there any other questions arising
8 from number two or should I just -- I'll, I'll push on,
9 then. And I want to talk about the Mentuck test now and
10 the evidentiary, the evidentiary requirements. I'm, I'm
11 not going to speak a lot about the Mentuck case and I don't
12 think it's in controversy. That's the test that applies.

13 THE COMMISSIONER: I think everybody agrees with
14 that.

15 MR. KROFT: I do, too. Yeah.

16 THE COMMISSIONER: There anyone that doesn't, I'd
17 want to hear them.

18 MR. KROFT: So, so, in essence, what we're
19 talking about today is whether the applicants have
20 demonstrated that the publication of their identities will
21 cause serious and unavoidable harm to the administration of
22 justice that outweighs the damage caused by the requested
23 infringement of constitutional rights.

24 THE COMMISSIONER: Okay, now, now that you're
25 onto that test, let me just get it in front of me.

1 MR. KROFT: Sure. You may want to just look at
2 Mentuck. It's at tab 5.

3 THE COMMISSIONER: All right. That ... The two,
4 two prongs are set out there, are they?

5 MR. KROFT: They, they, they are, and, and, and,
6 and --

7 THE COMMISSIONER: Page 5.

8 MR. KROFT: I don't think there's any
9 controversy. Everybody's repeated them in their briefs, I
10 think.

11 THE COMMISSIONER: Yes. Oh, many times, but I --

12 MR. KROFT: Yes.

13 THE COMMISSIONER: I just -- as you're going to
14 discuss it, I want to have it in front of me.

15 MR. KROFT: Well, I'm actually not going to
16 discuss it any further because I want to -- I, I, I don't
17 think we need to.

18 THE COMMISSIONER: Well, it's not there on page
19 5. Tab 5?

20 MR. KROFT: The Mentuck case is at tab 5.

21 THE COURT: Page what? Where --

22 MR. KROFT: That's a good question, and I'll find
23 it for you.

24 THE COMMISSIONER: And is the two-step test set
25 out in the, in the case.

1 MR. KROFT: It is, indeed, yeah. Paragraph 32.

2 THE COMMISSIONER: Okay. You say everybody's
3 quoted it, but it still -- I want it in front of me.

4 MR. KROFT: Okay.

5 THE COMMISSIONER: All right, there it is.

6 MR. KROFT: Do you have a yellow sticky or
7 something? Because I'm going to take you to some --

8 THE COMMISSIONER: No, I've got everything else,
9 but I, I'm -- I've got red pen, that's okay.

10 MR. KROFT: You can have half of mine.

11 THE COMMISSIONER: Thank you.

12 MR. KROFT: I'm not going to talk about that
13 because it's not controversial, but I think the part that
14 is more controversial is the evidentiary standards that are
15 required by that test. That's really the point of
16 controversy before you.

17 Now, Mr. Saxberg made some arguments to suggest
18 that there should be some kind of different onus than all
19 of the tests, all of the cases I talk about. I hadn't
20 expected until I heard Mr. Saxberg on the point, that there
21 would be any controversy about that and I simply say to you
22 that the Supreme Court could not have been clearer, both in
23 Mentuck and its progeny, that the applicant bears the onus
24 to prove a case for a discretionary publication ban.

25 THE COMMISSIONER: In Mentuck?

1 MR. KROFT: In Mentuck, if you look at paragraph
2 34 ...

3 THE COMMISSIONER: Is this where onus is
4 addressed?

5 MR. KROFT: Let me just make sure. I'm sorry. I
6 may have, I may have given you the wrong paragraph.

7 I, I will give you that cite; Ms. Chisick is
8 going to find it for me.

9 THE COMMISSIONER: Well, what, what -- you cited
10 the proposition --

11 MR. KROFT: Yeah.

12 THE COMMISSIONER: -- that, that the applicant
13 bears the onus.

14 MR. KROFT: Yes. And I'm going to give you the
15 cite for that it because it's --

16 THE COMMISSIONER: Yeah. I --

17 MR. KROFT: -- clear as, as a bell.

18 THE COMMISSIONER: I will want that cite, yes.

19 MR. KROFT: Yes.

20 UNIDENTIFIED PERSON: (Inaudible).

21 MR. KROFT: Thirty-two? Okay. I must have
22 missed it.

23 THE COMMISSIONER: Oh, right in the ...

24 MR. KROFT: Where, where, where is that?

25 UNIDENTIFIED PERSON: (Inaudible).

1 THE COMMISSIONER: I don't think it's in 32.

2 MR. KROFT: I don't, either.

3 THE COMMISSIONER: We, we --

4 MR. KROFT: I'm going to give it to you after the
5 break.

6 THE COMMISSIONER: You'll get it for me.

7 MR. KROFT: I'll get it for you after the break,
8 yes, I will. So for now, I'm going to ask you to trust me
9 that it's there and that it's clear as a bell. The case is
10 just too long.

11 The case also says, while, while we are on 30 --
12 paragraph 34 -- and, and this is really the point I, I want
13 to mention. In paragraph 34, you'll see the admonition
14 that the reality of the risk, the risk that could justify a
15 publication ban, must be well-grounded in the evidence.

16 Have you found that piece?

17 THE COMMISSIONER: Yes, yeah.

18 MR. KROFT: And then if you flip over to
19 paragraph 39 ...

20 THE COMMISSIONER: Yes.

21 MR. KROFT: If you look at paragraph 39, the
22 first words:

23

24 "It is precisely because the
25 presumption that courts should be

1 open and reporting of their
2 proceedings should be uncensored
3 is so strong and so highly valued
4 in our society that the judge must
5 have a convincing" --

6

7 A convincing.

8

9 "... evidentiary basis for issuing
10 a ban."

11

12 Then, if you go to tab 16, which is one of the
13 cases following Mentuck from the Supreme Court of Canada
14 ... Sorry.

15 THE COURT: Would you like to take a break now?

16 MR. KROFT: You know, maybe I should, and try to
17 get those cites for you.

18 THE COURT: All right. And, you know, depending
19 upon what kind of pace we're making, we might even be here
20 long enough we need two breaks.

21 MR. KROFT: Okay, well --

22 THE COMMISSIONER: But we'll take one now for 15
23 minutes only.

24 MR. KROFT: Thank you.

25

1 (BRIEF RECESS)

2

3 MR. KROFT: I've recovered.

4 THE COMMISSIONER: Okay.

5 MR. KROFT: Let me try it again with those cites
6 but before I do, Mr. Khan corrected me during the break and
7 I just want to correct it. I had apparently said that he
8 had expressed the view that the rights -- the best
9 interests of the child trumps Charter rights. He, he --
10 that's not his position, his -- he doesn't disagree with
11 the submission I made and there was another applicant who
12 made that submission so I apologize for putting words in
13 his mouth.

14 THE COMMISSIONER: Right. It's good to clear the
15 record.

16 MR. KROFT: Yeah. I was fumbling around with
17 some cites, I'm not able to give them to you. We were
18 talking -- I had moved onto --

19 THE COMMISSIONER: Did you get the onus section?

20 MR. KROFT: Yeah, yeah. So the first question
21 we've got to deal with is, is the onus section, and if you
22 go to tab five of my brief of authorities --

23 THE COMMISSIONER: Yes.

24 MR. KROFT: -- and go to paragraph 26. Sorry,
25 page 26, page 26.

1 THE COMMISSIONER: Yes.

2 MR. KROFT: And starting at the second line
3 there's a quote.

4 THE COMMISSIONER: Yes.

5 MR. KROFT:
6

7 The burden of displacing the
8 general rule of openness lies on
9 the party making the application.

10

11 And then he quotes from Dagenais and another
12 Supreme Court case.

13

14 There must be a sufficient
15 evidentiary basis --

16

17 THE COMMISSIONER: Yes.

18 MR. KROFT:
19

19

20 -- from which the trial judge may
21 assess the application and upon
22 which he or she may exercise his
23 or her discretion judicially.

24

25 THE COMMISSIONER: Yes.

1 MR. KROFT: And talks about the importance of an
2 evidentiary basis as well for the appeal.

3 So I, I had -- my first point had been to you on,
4 on, on the Mentuck issues about onus in evidence was on the
5 onus, so we've covered that. This also goes to the
6 question of the importance of having evidence --

7 THE COMMISSIONER: Yes.

8 MR. KROFT: -- and I think I had already taken
9 you to the top of paragraph 39 which talks again about the
10 importance of having a convincing evidentiary basis, I
11 think you, you may have marked that already.

12 THE COMMISSIONER: Yes, yes.

13 MR. KROFT: Okay. And then the last thing that I
14 was going to do is, is take you to tab 16 to yet another
15 Supreme Court case.

16 THE COMMISSIONER: The Toronto Star?

17 MR. KROFT: Yeah. This is the one that had to do
18 with that "M" or meat packing plant, poison food issue and
19 had to do with search warrants. But they talk about the
20 Dagenais/Mentuck test again at --

21 THE COMMISSIONER: Yes?

22 MR. KROFT: And if you go to page eight,
23 paragraph 10. And here the court, the Court of Appeal and
24 the Supreme Court, were -- refused the, the ban -- I'm
25 sorry, the, the -- refused to seal the, the order, applying

1 the Mentuck test, said that a generalized desertion of
2 possible disadvantage was not enough.

3 THE COMMISSIONER: Just a minute. All right,
4 where are you reading from?

5 MR. KROFT: Paragraph 10.

6 THE COMMISSIONER: Yes.

7 MR. KROFT: Second line.

8 THE COMMISSIONER: Oh, yes.

9 MR. KROFT: You see generalized assertion?

10 THE COMMISSIONER: Yes.

11 MR. KROFT: And this comes back to well grounded
12 in the evidence and in this case it's a policeman saying,
13 well, it will interfere with our investigation and you know
14 I, I think, people might see something they shouldn't,
15 that's not enough, it has to be firmly rooted in the
16 evidence and that's, that's the point that I make with
17 that.

18 So that gives you the flavor of what the Mentuck
19 test requires in terms of an evidentiary basis and that
20 it's clearly that the applicant has the onus to bring that
21 evidence and you'll see, if you read the Mentuck case that
22 the court -- and I won't give you a cite for this, the
23 court even points out that even -- that the absence of
24 evidence brought from the party who is opposing the ban is
25 not to be taken by the court as an indication in favour of

1 the ban. It's not the job of the party, in my position
2 today, to bring evidence, it's the party, the other party.
3 I can give you that cite if you would like but it's along
4 the same lines. And, and the reason why I'm dwelling on
5 this point is really to get to the point about the rules of
6 evidence and why they're applicable here and, and really to
7 respond to Mr. Smorang's comments, which I provoked of
8 course in my motions brief, so I'm not saying that with any
9 disrespect but that his argument is you should just use
10 relaxed rules of evidence, after all this is a public
11 inquiry.

12 And I should tell you first that my point is this
13 particular application is not about developing
14 recommendations. That's going to come in September and you
15 may well find that the evidence rule should be relaxed for
16 that purpose. I'm not disagreeing that a public inquiry,
17 when it's developing its recommendations and, and doing its
18 substance, that that doesn't have to apply, the strict
19 rules of evidence.

20 But that's not what we're doing today. This
21 application, today, is going to determine whether you, a
22 holder of government authority, under The Evidence Act of
23 Manitoba, whether you should order an infringement of a
24 Charter right, protected under Section 2(b).

25 If you grant the order today and someone says the

1 wrong thing, they will be subject to prosecution by the
2 state. So unlike when you're developing recommendations,
3 at stake today is the liberty of subjects, the liberty of
4 citizens who could face punishment at the hands of the
5 state, as a result of what you determine today, citizens
6 whose rights, the right to say something to somebody else,
7 their democratic right of free speech will be infringed.
8 So when fundamental rights are --

9 THE COMMISSIONER: You mean if I --

10 MR. KROFT: If you were to grant an order --

11 THE COMMISSIONER: And, and someone breaches it.

12 MR. KROFT: Yes. You, you, you will be saying to
13 somebody you know that name that I'm saying here in this
14 room, well, when you go out of this room, you can't mention
15 that, that name, you can't say that, and if you say that
16 you're in trouble. I'm taking away a right that you would
17 otherwise have on pain of punishment.

18 And I say those are fundamental rights, the right
19 to, to speak, the right to say what it is that you saw in
20 court today. That's a right that you will be infringing
21 upon if you make the order.

22 And, and let me give you an analogy, dealing with
23 the rules of evidence. In Section 91 of The Evidence Act,
24 a Commissioner has the authority to send someone to jail if
25 they refuse to testify or don't come when they're

1 subpoenaed. So you have the right to some -- send someone
2 to jail. Now, on my friend's argument, that you have to
3 use the same rules of evidence, that there should only be
4 one relaxed standard for anything that happens before you,
5 you would be taking away somebody's liberty under that
6 section without regard to the rules of evidence. Would you
7 really do that, I would submit very strongly if I was
8 acting for that person that that would be a breach of legal
9 principle.

10 So when you're dealing with recommendations, yes,
11 relaxed rules of evidence, when you're dealing with
12 people's rights, their liberties, no. You're taking away
13 something that belongs to Canadian citizens and a higher
14 standard of evidentiary caution is warranted.

15 I don't propose, you'll be happy to hear, to go
16 through each paragraph that our motions cite as being
17 contrary to the rules of evidence and that you shouldn't
18 consider. I am going to do two or three examples and then
19 I'm going to move on.

20 And the examples I'm going to refer to are
21 examples of assertions of opinion from people who aren't
22 qualified to give it, second hand evidence --

23 THE COMMISSIONER: Now, you're still under number
24 three?

25 MR. KROFT: Yes.

1 THE COMMISSIONER: On, on your nine points?

2 MR. KROFT: Yes.

3 THE COMMISSIONER: Sorry.

4 MR. KROFT: Yes. So what, what I, what I've done
5 under number three, we've talked about Mentuck, I've talked
6 about the importance of evidence under Mentuck, and why the
7 rules of evidence do apply and now without getting into
8 detail I'm, I'm going to show you some examples of what we
9 find to be offensive and, and things that you ought not to
10 be considering when you're determining this motion as
11 opposed to developing recommendations. That's where I am.

12 So let me, let me begin by giving you an example
13 of the kind of opinion evidence from people who aren't
14 qualified to give it, that we respectfully submit you
15 should not be relying upon and for that I'll take you to
16 the affidavit, first, of Ms. Kehler.

17 And I'll be looking at that and then I'll be
18 looking at her cross-examination so you may want to get
19 those two documents out.

20 THE COMMISSIONER: Yes. I've got her
21 cross-examination here. Where will I find her affidavit?

22 MS. WALSH: Everything is behind you. The MGEU
23 binder. Do you have the MGEU binder? (Inaudible)
24 affidavit. Kehler.

25 Are there two Kehlers?

1 THE COMMISSIONER: This is Kehler, yes.

2 MS. WALSH: Do you have two Kehlers?

3 THE COMMISSIONER: Yes.

4 MS. WALSH: Okay.

5 THE COMMISSIONER: Okay.

6 MR. KROFT: Okay. So do you have the affidavit
7 and the cross?

8 THE COMMISSIONER: Yes.

9 MR. KROFT: Okay. So let's start on the
10 affidavit, at page nine.

11 THE COMMISSIONER: This is her first affidavit.

12 MR. KROFT: Her first affidavit, I'm sorry, yes.
13 Page nine.

14 THE COMMISSIONER: Yes.

15 MR. KROFT: Okay, so this is, this is evidence
16 that Ms. Kehler gave, in chief, as it were. She says:
17 First -- and she's talking about meeting social workers.

18 THE COMMISSIONER: Paragraph?

19 MR. KROFT: Twenty-six at the bottom of the page.
20 She's talking about naming social workers, of course, and
21 she, she makes the argument that:

22

23 "... this will have personal
24 privacy implications for them
25 outside of the work ... where --"

1 She says:

2

3 "-- like other citizens, they have
4 the right (the right) to expect
5 that they will not be recognized
6 and approached by strangers in the
7 day to day events of their
8 privates lives."

9

10 And she says that:

11

12 "Social workers make every attempt
13 to keep the nature of their work
14 as private as possible."

15

16 That's her evidence.

17 Well, if we look at her cross-examination and we
18 take you to that, because we ask her about, about, about
19 that. If you go to page 2 of her cross-examination,
20 question five.

21 THE COMMISSIONER: Yes.

22 MR. KROFT: Or first of all, at that point we, we
23 were dealing with her expertise and Mr. Smorang advised she
24 is not being provided as an expert, put forward as an
25 expert.

1 And then if you go to page 43, I ask her about
2 what she said about, about both the rights of privacy and
3 also about instructions and expectations of social workers
4 keeping their, their profession secret. And at question
5 193, I asked her to look at that paragraph you and I just
6 looked at, Mr. Commissioner and, and showed to her the
7 statement:

8

9 "Social workers have the right to
10 expect that they will not be
11 recognized and approached by
12 strangers in the day to day events
13 of their private lives."

14

15 And I asked her: "Are you intending that to be a
16 legal statement?" She says: "I don't know what that would
17 mean."

18 I said:

19

20 "You're claiming that people have
21 a right. On what basis do you say
22 that people have a right not to be
23 approached by strangers?

24 A I guess I'm using my own --

25 Q Just your personal opinion?

1 A Right.

2 Q And that is true of a number
3 of the statements that you make in
4 this affidavit, isn't it?

5 A Yes."

6

7 And I ask:

8

9 " Now you, in the same
10 paragraph, talk about social work
11 is keeping the nature of their
12 work private.

13 A Yes.

14 Q I take it from what we have
15 already discussed there is no
16 written policy that you can point
17 to that talks about that?

18 No.

19 You are aware that the -- I
20 want to get this right, The
21 Manitoba Institute of --

22

23 And then I got it wrong but --

24

25 " The Manitoba Institute of

1 Registered Social Workers,
2 publishes a list of all of the
3 names of registered social workers
4 on their website."

5

6 But she didn't know that.

7

8 " You did not know that at the
9 time you swore this affidavit?

10 No, (I didn't) I did not.

11 Are you aware that there are
12 a number of social service agency,
13 child welfare agencies, in this
14 province that on their website
15 post the names and positions of
16 their child welfare worker staff?

17 A No. I was not aware of that.

18 Q You are aware that there has
19 been inquests into the deaths of
20 children in care in Manitoba other
21 ... than Phoenix Sinclair?

22 Yes.

23 And I assume (that) you have
24 probably followed those fairly
25 closely in your position?

1 A Some. Yes.

2 Q And you would know that the
3 names of the social workers who
4 testify in those inquests are not
5 subject to any publication bans?"

6
7 Well, she wasn't aware of that but she has no
8 reason to challenge that. I can't say it conclusively.
9 And then I took her to some reports and showed her, for
10 example, the Redhead report, which she remembered. And I
11 showed her a copy of the report. "You can see that the
12 social workers are named there." And she looked at it, she
13 wanted to read it, and that was fine.

14 And I put to her:

15
16 " The people who are involved
17 in the care of Mr. Redhead gave
18 evidence and their names were used
19 in the public report.

20 A Okay.

21 Are you ... disagreeing with
22 that?

23 A No."

24

25 I asked her:

1 "... Were you aware that that is
2 the practice in Manitoba at the
3 time that you swore your
4 affidavit?

5 No."

6
7 So Ms. Regehr (sic), who, who was not an expert
8 made a statement in her affidavit of opinion, opinion about
9 people's -- some right of privacy, not to be approached by
10 strangers, which I had never heard of, an opinion, an
11 important opinion in the context of this case, which turned
12 out to be wrong and completely unsupported. That's what
13 happens when you rely on people or allow people to give
14 evidence when they don't have the expertise to give it.

15 Another example I'll take you to is the affidavit
16 of Ms. Wotherspoon.

17 THE COMMISSIONER: Yes.

18 MR. KROFT: Now, her -- the meat of her report
19 is, is, is attached to the letter in Exhibit, Exhibit
20 "B" --

21 THE COMMISSIONER: Yes.

22 MR. KROFT: -- to that affidavit and the report
23 that she writes is about the potential hazards to
24 publishing the identities of adult social workers. That's
25 what she's talking about in the first paragraph of her

1 letter so she's opining on what adult social workers will
2 do under stress.

3 And she's writing about the effect that publicity
4 will have on adult social workers in their decision making.
5 And that's the subject of her report.

6 She is put forward as an expert. So I want to
7 take you to her cross-examination.

8 THE COMMISSIONER: Yes.

9 MR. KROFT: Okay. So starting on, on page three,
10 I ask her about whether she has expertise in adult
11 psychology because that's what she was talking about in her
12 report.

13

14 "Q And just to deal with what we
15 spoke about a moment ago, you
16 don't hold any degrees in adult
17 psychology?

18 A I do not. My degree is in a
19 Master of Social Work.

20 Q (Are you) an expert in
21 neuropsychology?

22 A I have a lot of training in
23 psychology by virtue of the work I
24 do with the Norlien Foundation in
25 Alberta. ... I attend every year

1 a symposium in early brain and
2 biological development, which is,
3 a lot of that is neuropsychology.

4 Q For children?

5 A But it is not my area of
6 expertise.

7 Q You have never written a
8 paper on that, conducted any
9 experiments, anything like that?

10 A No.

11 Q You are not published in the
12 literature?

13 A No, not in that area of
14 neurodevelopment, no.

15 Or neuropsychology for
16 adults?

17 A No.

18 You haven't conducted any of
19 your own research in decision
20 making theory?

21 A Pardon me?

22 Q You haven't conducted your
23 own original research in decision
24 making theory?

25 A No. My research would be

1 characterized as a literature
2 review.

3 Q In other -- you haven't done
4 original research you have read
5 what other people have done?

6 A Exactly.

7 And you have cited the
8 instances where you are relying on
9 other people in your affidavit,
10 correct?"

11

12 So we, we establish that. And if you go down to
13 question 15, which is at the bottom of page four and we
14 talk about these people that she relied on.

15

16 "So, one of the authors that you
17 have relied upon in coming to your
18 conclusions is a fellow named
19 Joseph Hallinan?

20 Correct. That is one of the
21 books that I did look at. Yes.

22 Q And, in fact, relied on, when
23 you gave your report, and came to
24 your conclusions, correct?

25 A Correct. (Yes or) Mh-hmm.

1 Q And in particular, you cited
2 him in respect of adult decision
3 making theory?

4 A Correct.

5 Q Can you tell me what is
6 Joseph Hallinan's qualification?

7 A Joseph Hallinan, I am not
8 sure what his background, or
9 biography is, I mostly, my
10 interest in him was in the book
11 that he wrote. And so that is my
12 familiarity with him, is
13 specifically ... that book. But
14 his book, ... is fairly consistent
15 with a lot of decision theory.

16 Q Just I want --

17 A I don't know his specific
18 biography.

19 Q Right. You cited Hallinan?

20 A Correct.

21 Q ... And you don't know what
22 his background is?

23 No. I couldn't tell his
24 specific biography.

25 Q If I suggested to you that he

1 was a journalist and had no
2 training in psychology would you
3 know that one way or the other?

4 A No, but it wouldn't surprise
5 me. People looking at decision
6 theory come from a lot of
7 different fields.

8 Q As far as you know, has he
9 any training in that area?

10 A Pardon me?

11 Q You don't know if he as any
12 training in that area at all?

13 A No.

14 Q And his book is a popular
15 psychology book, isn't it?

16 A ... Yes."

17

18 And we move on to the next person she cites.

19

20 " And you also cite a book by
21 Kathryn Schulz, correct?

22 Yes.

23 What is her background?

24 I can't remember, I would
25 have to look (at it). I know I

1 read about her because her book is
2 partly autobiographical. I can't
3 recall at the moment.

4 Q Did you know what her
5 background was when you chose to
6 cite her as one of the authorities
7 you were relying on?

8 A Possibly. My memory isn't
9 that good as I get older.

10 Q If I told you she was a
11 journalist as well, you wouldn't
12 disagree with that?

13 A I wouldn't disagree.

14 Q Her background and training
15 is as an editor and (a) reporter,
16 correct?

17 A Now that you mention it, that
18 is probably true."

19

20 That is one of the reports that I object to and
21 object to you relying on. And I, I don't object, for
22 example, to Ms. Gosek's report, and let's just contrast the
23 reports that I am suggesting should not be relied upon with
24 the ones that I have not sought to strike out. Perhaps --

25 THE COMMISSIONER: You say you're -- you, you

1 don't object to Ms. Gosek's report?

2 MR. KROFT: No. There's one or two paragraphs,
3 in particular, where she talks about law that I object to
4 but generally I have not objected to that report, no. And
5 in fact I'm going to use her as an example of the sort of
6 thing you should be looking for when you decide if you're
7 going to accept the person presented as an expert is a true
8 expert in the field.

9 So if you can take out Ms. Gosek's affidavit.
10 Sorry, not her affidavit, her cross-examination.

11 THE COMMISSIONER: Conducted by you?

12 MR. KROFT: Yes.

13 THE COMMISSIONER: Yes. Just a minute now.

14 MR. KROFT: And if you look at page 10.

15 THE COMMISSIONER: Just a minute, I have to find
16 that.

17 I just don't know where that is at the moment,
18 just a minute. Have you got a copy of that I can have?

19 MS. WALSH: Everything is up there.

20 MR. KROFT: I can just read it to you, because
21 there's not that much.

22 MS. WALSH: Do you not have the University of
23 Manitoba? I'll look behind you.

24 THE COMMISSIONER: (Inaudible.)

25 MS. WALSH: So is the cross-examination in there?

1 THE COMMISSIONER: Yes, it's here.

2 MS. WALSH: Good.

3 THE COMMISSIONER: Thank you.

4 MR. KROFT: So I'm contrasting Ms. Kehler's
5 approach to information which -- sorry, Ms. Wotherspoon's
6 approach in information which she obtained from sources
7 that she --

8 THE COMMISSIONER: Wait a minute I guess I must
9 have --

10 MR. KROFT: Which one do you have, do you have --
11 I'm, I'm --

12 THE COMMISSIONER: Here it is.

13 MR. KROFT: Do you have Gosek?

14 THE COMMISSIONER: Yeah.

15 MR. KROFT: Yeah.

16 THE COMMISSIONER: All right, page what?

17 MR. KROFT: Sorry, if you go to page 10 of Ms.
18 Gosek, I'm, I'm, I'm just going to show you her testimony
19 by way of contrast, in support of my argument that you
20 should not be considering Ms. Wotherspoon's affidavit at
21 all or, or her report, I should say.

22 THE COMMISSIONER: Are you going to --

23 MR. KROFT: If you look at Ms. Gosek --

24 THE COMMISSIONER: Are you going to Gosek's --

25 MR. KROFT: Yes.

1 THE COMMISSIONER: -- cross-examination or her
2 affidavit?

3 MR. KROFT: Her cross-examination, sorry.

4 THE COMMISSIONER: Yes.

5 MR. KROFT: And I'm going to page 10.

6 THE COMMISSIONER: Yes.

7 MR. KROFT: Now, she also relied heavily on
8 literature and so I asked her about her practice and I --
9 starting at paragraph (sic) 39, I said:

10

11 " And when you chose which
12 articles to rely on in order to
13 come to your conclusions, you
14 would agree with me that it was
15 important to you that you knew the
16 source of the article, who wrote
17 it?

18 A Yes. I for sure, I expected
19 that they would be peer reviewed
20 articles, that they would be
21 people who have worked in the
22 field, and have, in terms of their
23 research and so forth, yes.

24 People who, whose experience,
25 you know, and accept?

1 Right.

2 And, obviously, their
3 education would be important to
4 you?

5 Yes."

6

7 So by contrast, the reason why I am objecting to
8 Ms. Wotherspoon's affidavit because she, herself, has no
9 expertise and because the people she relied on had no
10 expertise and, in fact, she didn't even know the expertise
11 of the people she relied upon when I asked her about it.
12 And yet you're being asked to rely on that kind of evidence
13 to infringe Charter rights and I say to you, with respect,
14 that that is not in accordance with those portions of the
15 Mentuck case and its progeny which I, in a fumbling manner,
16 cited to you. Those should not be admitted, you should not
17 rely on them.

18 And I'm going to give you one more example of the
19 kind of evidence that I'm submitting you should be
20 concerned about and this is from the Cochrane affidavit and
21 this one will be short. Just showing you an example of the
22 hearsay objection that we have raised.

23 Do you have Ms. Cochrane's affidavit?

24 THE COMMISSIONER: Not yet.

25 MR. KROFT: Okay. If you look at paragraph 21.

1 THE COMMISSIONER: That will be found in
2 Intertribal's --

3 MR. KROFT: Yes.

4 THE COMMISSIONER: Yes, I have her affidavit and
5 her cross.

6 MR. KROFT: Okay. I don't need her cross but I
7 do need her affidavit. If you could look at paragraph 21
8 of that affidavit.

9 THE COMMISSIONER: Yes.

10 MR. KROFT: All right. Now, this is the evidence
11 that's before you to demonstrate on that strong evidentiary
12 basis that there is a risk, and the main risk they're
13 citing is children. And this is the kind of evidence that
14 I'm suggesting you not rely upon and you'll see why,
15 paragraph 21. I'll just give you an example.

16 This is Ms. Cochrane's evidence of risk.

17

18 "I have spoken with our
19 staff --"

20

21 And by the way, Ms. Cochrane is not an expert, she
22 is not put forward as an expert. And this is what she says,
23 a lay witness.

24

25 "I have spoken with our staff on

1 many occasions about the upcoming
2 Inquiry hearings. My staff have
3 advised me of their concerns,
4 which include ..."

5

6 And take, for example, number "B".

7

8 "That exiting families currently
9 receiving voluntary services may
10 refuse to work with ICFS and
11 parents --"

12

13 And sorry.

14

15 "-- and parents will become
16 resistant."

17

18 So somebody on her staff that was unnamed
19 conjectured that a family may refuse to work with ICFS,
20 that's the evidence of risk that you have from Ms.
21 Cochrane, and if you go through that affidavit you'll see
22 there's a couple of pages of all the things that somebody
23 who we don't know, and who she won't disclose, told her may
24 happen. And I say, with respect, that's not what Mentuck
25 was talking about when Mentuck said you need a strong

1 evidentiary base and it's exactly what Mentuck and Dagenais
2 were talking about when they said you shouldn't be relying
3 upon conjecture and speculation and it's exactly what The
4 Toronto Star case is referring to when it said it's not
5 appropriate to rely on conjecture and mere assertion. And
6 so you will see that we have objected to that kind of
7 evidence.

8 I'm not going to go any further into the, the
9 details, you can, can look at it, I'm going to leave you
10 with this. I'm submitting to you, I'm submitting to you,
11 Mr. Commissioner, that you should look carefully at the
12 evidence that you are being asked to rely on as you go
13 through it and that you ask yourself if you know who is
14 actually stating the fact you are being asked to accept.
15 Like Ms. Gosek says who is the source? And if you don't
16 know, you don't where it comes from, who is saying it, I'm
17 respectfully submitting you shouldn't accept it.

18 I'm asking yourself -- I'm asking you to ask
19 yourself whether you can tell, when you read something,
20 whether the source has a private interest in anonymity that
21 may not be consistent with the public interest and full
22 disclosure and I'm saying if you can't tell from the
23 evidence whether that is so or not, you should disregard
24 it. And I'm saying to you, with respect, that to the
25 extent that opinions are offered, you should ask yourself

1 if the applicants have satisfied you that they have any
2 more expertise in the area than they do. And if they
3 don't, then you should disregard that opinion. And I'm
4 asking you, when you go through the material to write your
5 decision to simply ask yourself those questions and conduct
6 yourself in what would be, I submit, a very common sense
7 kind of way and that's the basis for my objection. I
8 shan't speak further about it, and now I am done with
9 number three.

10 THE COMMISSIONER: You're going to number four?

11 MR. KROFT: I am, indeed. Unless, of course, you
12 have any questions on number three.

13 Number four I want to talk about what this is not
14 about and I think that's important because this can get
15 awfully confusing and there's a lot of material before you
16 that I am going to submit to you doesn't matter.

17 And the first thing I want to say to you is this
18 is not about whether it's a good idea to hold a public
19 inquiry. I'll say it again, this is not about whether it's
20 a good idea to hold a public inquiry.

21 Sir, you have before you --

22 THE COMMISSIONER: Well, that decision has been
23 made, hasn't it?

24 MR. KROFT: Well, yes. You went right to my
25 conclusion. But what you will see when you review -- or

1 what you probably have already seen is that you have a full
2 list of affidavits and articles that relate to whether an
3 inquest, or public inquiries or other models of
4 investigation are good ways to investigate child deaths.

5 THE COMMISSIONER: Well, the government has
6 decided that, with respect to this unfortunate death, that
7 this is something that it wants done.

8 MR. KROFT: Exactly. This is not about that.
9 And so when you hear about, for example, Mr. Rivers'
10 affidavit, I am asking you to pay special attention to what
11 Mr. Rivers is criticizing and let's look at Mr. Rivers --
12 where's Mr. Rivers?

13 THE COMMISSIONER: Well, I won't be holding that
14 this inquiry is not a good idea, the government, in its
15 wisdom, decided it wanted it done and I -- and, and, and
16 the, and the Court of Appeal has said it, indeed, should
17 carry on.

18 MR. KROFT: I understand. I'm glad to hear you
19 say that, Mr. Commissioner. The problem is that for the
20 past day and a half, you've heard people cite experts who
21 they are suggesting support their view that there should be
22 a ban on the publication of identities and when you look at
23 the material what you see is what they're really saying, is
24 that past inquiries were bad or they had a bad outcome, or
25 they weren't properly conducted or the recommendations

1 weren't appropriate, and when Mr. Smorang talked to you
2 about all of the experts that lined up, I'm saying well,
3 let's look at what those experts say and what they're
4 really talking about. Are they saying you shouldn't
5 publish names or are they saying you shouldn't have
6 inquiries because they're not a good idea, or you should do
7 them in a different way. And I am suggesting to you that
8 more than half of the material that you're sitting looking
9 at has nothing to do with the issue that's before today and
10 everything to do about the very thing you say has already
11 been decided.

12 And I'm giving you an example of Mr. Rivers, in
13 his affidavit, that we'll -- if you look at paragraph 13.

14 THE COMMISSIONER: Well, wait a minute, we've got
15 to find that.

16 MR. KROFT: Okay. You know what, you don't need
17 to find it, you don't need to find it. I think you have my
18 point on this. Let me just tell you, I just want to read
19 you two sentences from the report, in paragraph 13, you can
20 read the note --

21 THE COMMISSIONER: Well, just a minute. If
22 you're going to deal with it, I want to find it.

23 MR. KROFT: Okay.

24 MS. WALSH: Mr. Commissioner, I think it's in the
25 binder from ANCR, in the authorities.

1 THE COMMISSIONER: Oh, okay.

2 MS. WALSH: Which was a big one.

3 THE COMMISSIONER: It was filed by them.

4 MS. WALSH: I don't know.

5 That could be it.

6 THE COMMISSIONER: It is here.

7 MR. KROFT: So what is Mr. Rivers addressing?
8 Mr. Smorang and others pointed out that I didn't
9 cross-examine, there's a reason why I didn't cross-examine.
10 One was I would have had to bring him and Mr. Smorang or
11 ANCR would have wanted me to pay for it, but there was
12 another reason and that reason was, he doesn't speak to the
13 issue that you're dealing with. Look at paragraph 13.
14 This is, this is sort of a taste of what he's talking
15 about.

16

17 "My observations --"

18

19 And he's talking about inquests that occurred in
20 Ontario, followed by reports, followed by legislative
21 changes. He says:

22

23 "My observations were that (the)
24 child welfare policy changes at
25 that time were being driven by the

1 deaths of a relatively small
2 number of children in care. The
3 policy changes were not research
4 or evidence based but rather
5 grounded in the recommendations
6 that came out of the individual
7 examinations of the circumstances
8 surrounding these deaths."

9

10 Mr. Chairman -- Mr. Commissioner, I'm sorry, this
11 has nothing to do with what we're talking about today, he
12 doesn't speak to the issue of the publication ban, he
13 doesn't speak to the issue of identifying medias. The
14 information is an interesting comment on how Ontario dealt
15 with a problem in the 1990s but it's not relevant to us
16 today and that is why I agree with you that this not at
17 about whether to hold a public inquiry and you need not
18 spend any time, at all, on all the material that goes to
19 that point.

20 My next point about what this is not about. This
21 is not about revealing the identity of children or clients
22 or sources of referral, this is about the identity of
23 public servants paid to exercise state power, as I told
24 you. We are not talking about children's identity, we are
25 not talking about the identity of informants.

1 A number of my friends, Mr. Smorang and Mr.
2 Saxberg, spent a great deal of time talking to you about
3 the Tracia Owens case and you asked a very good question.
4 That was the case, just to remind you, where media applied
5 for access to some child welfare records that had been
6 submitted as evidence in an inquest. The issue was do they
7 have access to that exhibit.

8 That was a case that related to private
9 information about child welfare clients. In that case the
10 social workers were named, they're in the report. The case
11 supports the proposition that we're making today, that this
12 ban is not appropriate. This case, that we're talking
13 about today, has nothing to do with private information of
14 children or parents, or anyone else, it has to do with the
15 identity of civil servants. And just like in the Tracia
16 Owens case, that my friend cited to you, we say that they
17 should testify in public. So client confidentiality, it's
18 a red herring.

19 This is not about keeping social worker's
20 professions a secret. We talked a little bit about that
21 when I showed you Ms. Kehler's affidavit, she mistakenly
22 suggested that somehow social workers keep their identities
23 as social workers quiet. That's just a mistake, it's not
24 about that.

25 The evidence shows you they come to the door with

1 photo ID, they hand out business cards. The evidence is
2 uncontradicted, you have copies of websites where the
3 agencies post the names of the social workers and in at
4 least one case, they have their pictures on their website.

5 The Manitoba Association of Registered Social
6 Workers publishes the name on the public website of every
7 single social worker who is registered to practice in this
8 province. There are no policies or procedures requiring
9 social workers to keep their identities or professional
10 identities a secret and the evidence from, from anybody who
11 spoke to it, was that especially in their communities
12 everybody knows already who the social workers are and what
13 they do for a living. This case is not about identifying
14 social workers as child welfare workers, that's known.

15 This case is also not about the physical -- of a
16 physical danger to social workers, about, about that kind
17 of danger. Social workers do, in fact, have to deal with
18 people in terribly stressful situations and, in fact, the
19 evidence shows that they very often attend with police.
20 I'm not saying for one minute that safety isn't a valid
21 concern and something that they manage very, very
22 carefully, but it has nothing to do with this application
23 for a publication ban on identity. They have well thought
24 out and effective procedures to protect their safety, you
25 can read the affidavit of Shavonne Hastings, and her

1 cross-examination, that talks about all of that.

2 But there is no evidence before this tribunal
3 that the safety of any social worker, in any jurisdiction,
4 anywhere in the world, has ever been compromised because
5 their identity was revealed. There is not one example
6 before you of a physical encounter anywhere in the world
7 that had anything to do with the identification of a social
8 worker.

9 There is not even before you a credible scenario
10 where a publication ban not being made would realistically
11 increase the risk of violence. Shavonne Hastings, in her
12 affidavit, deals with the point specifically. I think she
13 is the only one --

14 THE COMMISSIONER: You're saying there's no, no,
15 no case, no evidence before me that, that revealing
16 identity resulted in some violent act to, to that social
17 worker?

18 MR. KROFT: Correct. No evidence and not even a
19 realistic scenario where it might.

20 I'm dreading asking you this but do you have
21 Shavonne Hastings' affidavit in front of you?

22 THE COMMISSIONER: I can have it --

23 MR. KROFT: I know this is find the page day.

24 THE COMMISSIONER: Yes, I, I think it's one that
25 I do have, maybe.

1 MR. KROFT: Awesome.

2 THE COMMISSIONER: Well, wait a minute.

3 Oh, yes, yes, it's here.

4 MS. WALSH: Got it?

5 THE COMMISSIONER: Yes, yeah, yeah, yeah. I know
6 where my copy of it is, too, but I'll go to this one.

7 MR. KROFT: Okay. On page three, paragraph nine.

8 THE COMMISSIONER: Oh, that's her affidavit. Is
9 it the affidavit or the cross?

10 MR. KROFT: The affidavit.

11 THE COMMISSIONER: All right.

12 MR. KROFT: This is what she says. She says:

13

14 "I have not been involved in any
15 circumstance and I am not aware of
16 any circumstance where the fact
17 that the identity of the social
18 worker was known in advance made
19 any material difference to a
20 volatile situation. In fact, it
21 is difficult to imagine realistic
22 circumstances where prior
23 publication of an identity would
24 make a material difference to the
25 safety of a social worker in an

1 intervention, given the nature and
2 scope of our work."

3

4 It is conjecture, with zero evidence to support
5 it. This case is not about the safety of social workers.
6 This is exactly the sort of remote and speculative risk
7 that the Supreme Court of Canada says is not sufficient to
8 meet the Mentuck test.

9 THE COMMISSIONER: What was that you said?

10 MR. KROFT: In the Mentuck case --

11 THE COMMISSIONER: Yes.

12 MR. KROFT: -- the Supreme Court of Canada said
13 that it is not sufficient to have remote and speculative
14 risks justify a publication ban. I'm saying to you this is
15 a perfect example of what the Supreme Court means when it
16 says remote and speculative risks.

17 And that's all to make my point that the physical
18 safety issue that's raised in some of the affidavits is a
19 red herring, it's a straw man. Not to say that social work
20 and social workers don't need to deal with people who are
21 in volatile situations but they come to the door with their
22 photo ID, their identification is known, and the only
23 examples of any violence that are before you have to do
24 with -- they come from Ms. Hastings, in her
25 cross-examination, and they're cases -- the only two

1 examples anywhere are cases where the social worker was
2 well known to the client. Identity and identification is
3 not relevant.

4 THE COMMISSIONER: And, and what statement in
5 Mentuck did you just refer to or, or were you referring to
6 the test itself? You just made some reference to --

7 MR. KROFT: I did.

8 THE COMMISSIONER: -- one or both those cases or
9 to the test, which was it?

10 MR. KROFT: I, I made a reference to the Mentuck
11 test -- case, I'm sorry.

12 THE COMMISSIONER: Yes. And at --

13 MR. KROFT: At tab five.

14 THE COMMISSIONER: Yes. I have it.

15 MR. KROFT: Now I'm going to find it again for
16 you.

17 THE COMMISSIONER: I want that.

18 MR. KROFT: Yes. They use the -- (inaudible) and
19 speculative is not enough. Okay, I'm not -- I'm going to
20 give you that cite first thing in the morning, after our
21 evening break.

22 THE COMMISSIONER: All right. I want that.

23 MR. KROFT: Yeah, you'll get it.

24 THE COMMISSIONER: Okay.

25 MR. KROFT: I have one last point to make under

1 my item four which is telling you what I am suggesting this
2 case is not about and that last point is that this case is
3 not about Section 75(2) of The Child Welfare Act -- or I'm
4 sorry, the Child and Family Services Act. That's the
5 section you'll remember that says in child protection
6 proceedings the press can come in and there is a dispute as
7 to whether the section means -- there, there is a
8 restriction on publication and it definitely applies to the
9 children and the families involved and there is a dispute
10 about whether it can properly be interpreted as covering
11 professional witnesses, social workers and state actors.
12 There is a dispute about that section but it doesn't
13 matter, there is a dispute but there is no dispute, that
14 the section doesn't apply to these proceedings, has no
15 application to these proceedings.

16 What is important is that it is the practice in
17 this country to identify professional witnesses in child
18 death inquests and inquiries. And you have the affidavit
19 of Cecil Rosner, and it's got eight or nine examples, and
20 not one example has been cited to you. In any inquest or
21 inquiry has prohibited the publication of the
22 identification of the state actors, the professionals, who
23 are testifying. So whatever Section 75(2) of the Child and
24 Family Services Act means here, it doesn't apply and even
25 if it meant what my friends say it meant, it is different

1 than the universal practice in this country dealing with
2 this kind of a proceeding and inquest so the case isn't
3 about that.

4 And so I'm done with number four.

5 THE COMMISSIONER: Four.

6 MR. KROFT: Shall I soldier on or do people need
7 a break?

8 THE COMMISSIONER: Well, if we took a 10 minute
9 break will you be able to get through five to nine today by
10 5:30, say?

11 MR. KROFT: Would be tight.

12 THE COMMISSIONER: Well, why don't we say five to
13 eight and then you can have a few minutes in the morning
14 for your conclusion. And anything that came to mind
15 overnight.

16 MR. KROFT: I would rather do five to seven and I
17 promise not to think tonight.

18 THE COMMISSIONER: All right. Well, if we --

19 MR. KROFT: My conclusion -- if I got to my
20 conclusion I would finish it because my conclusion --

21 THE COMMISSIONER: All right.

22 MR. KROFT: -- will take a few sentences.

23 THE COMMISSIONER: We'll do five to seven. Do
24 you need -- do you want a break?

25 MR. KROFT: I'm happy to have a short break,

1 yeah.

2 THE COMMISSIONER: All right. Well, now, I want
3 to address Commission counsel. Commission counsel --

4 MS. WALSH: I'm sorry, Mr. Commissioner.

5 THE COMMISSIONER: While, while there's a break,
6 I would like you to talk to other counsel who have yet to
7 speak to follow Mr. Kroft, in opposing the motion, and
8 there are two of them. And then there are the series of
9 replies from the three counsel and I would like you to see
10 what you can get out -- get by way of a timeframe to
11 involve those presentations.

12 If, if we're not going to be able to get to the
13 remainder of the agenda, that is dealing with the SORs and
14 perhaps Mr. McKinnon's motion, we might have to put those
15 over but I -- if, if the other two counsel are going to
16 follow Mr. Kroft and the counsel who are going to reply
17 would, would -- if it appears they're going to consume all
18 day tomorrow, then we're going to have to make some other
19 arrangement and we will deal with that but I would like you
20 to canvass that while we have this 10 minute break.

21 MS. WALSH: I will, Mr. Commissioner. I did
22 canvass counsel for the SORs, the two separate counsel, as
23 to how long they would take, and Mr. McKinnon, as to how
24 long he thought he would take and between them, amongst
25 them, they thought, in total, less than an hour for all

1 three of those. So Mr. McKinnon and the two SORs, the two
2 SORs, that would be 15 minutes all in, including
3 responses --

4 THE COMMISSIONER: Well --

5 MS. WALSH: -- and Mr. McKinnon thought five
6 minutes.

7 THE COMMISSIONER: Well --

8 MS. WALSH: So those can be fit in quite
9 easily --

10 THE COMMISSIONER: Well --

11 MS. WALSH: -- but I will talk to the other --

12 THE COMMISSIONER: -- if there is time.

13 MS. WALSH: -- counsel.

14 THE COMMISSIONER: So canvass those other five,
15 if you will, please.

16 MS. WALSH: I will.

17 THE COMMISSIONER: We'll rise for 10 minutes.

18

19 (BRIEF RECESS)

20

21 MS. WALSH: Mr. Commissioner, thank you for your
22 indulgence. We have been doing some calculating,
23 negotiating, discussions to -- discussing to see what can
24 be achieved, so that we finish within the three days that's
25 been allotted and I think we made good progress.

1 THE COMMISSIONER: Good.

2 MS. WALSH: And I thank everyone for their
3 participation in that. Based on, on our mathematical
4 calculations, we figure that no more than five hours is
5 necessary to finish everything.

6 THE COMMISSIONER: Oh, good.

7 MS. WALSH: Yes. And I think, as well, if you
8 wanted to start at 9:00 then -- will people be prepared to
9 start at 9:00? I didn't canvass that.

10 MR. KROFT: Yes.

11 THE COMMISSIONER: You mean rather than
12 continuing now?

13 MS. WALSH: That I don't know.

14 MR. KROFT: That would be fine, too.

15 MS. WALSH: Would you rather do it that way?

16 MR. KROFT: I'm happy to come at 9:00.

17 THE COMMISSIONER: I don't mind but if, if it --
18 if we can complete it in five hours and then starting at
19 9:00 tomorrow morning, we'll complete it before -- at the
20 end of the day tomorrow.

21 MS. WALSH: I've also heard people be prepared to
22 sacrifice much of their lunch hour and, and go to even a
23 half hour break so --

24 THE COMMISSIONER: All right, well --

25 MS. WALSH: -- we'll see how the morning goes.

1 THE COMMISSIONER: -- so then the only issue is
2 do you want to carry on till 5:30 today or, or, or start at
3 9:00 in the morning?

4 MR. KROFT: I can -- I'm, I'm ...

5 THE COMMISSIONER: I let Mr. Kroft say, say on
6 that.

7 MR. KROFT: Yeah, I mean I -- however well -- I
8 got the easy job, how are you doing?

9 THE COMMISSIONER: Oh, I'm fine.

10 MR. KROFT: I mean, shall we go for another half
11 hour, just --

12 THE COMMISSIONER: Sure.

13 MR. KROFT: Yeah, I'm happy to go for another
14 half hour and then I'll finish --

15 THE COMMISSIONER: Yeah, that's fine, and then
16 the other counsel will follow you. We'll get on in the
17 morning.

18 MR. KROFT: Well, yeah, I won't finish in half an
19 hour.

20 THE COMMISSIONER: No, no, I know that but --

21 MR. KROFT: Yeah.

22 THE COMMISSIONER: -- but they will get on in the
23 morning --

24 MR. KROFT: Yeah.

25 THE COMMISSIONER: -- and, and in the

1 afternoon --

2 MR. KROFT: Oh, yeah.

3 THE COMMISSIONER: -- we'll get to the replies.

4 MR. KROFT: Yeah. I, I told Mr. Walsh I figure I
5 would need about an hour and a quarter, depending on ...

6 THE COMMISSIONER: That's fine but go ahead and
7 take half an hour right now and then --

8 MR. KROFT: Yeah.

9 THE COMMISSIONER: -- and then we'll start at
10 9:00 in the morning.

11 MR. KROFT: Okay.

12 THE COMMISSIONER: You're down to number five.

13 MR. KROFT: You're not going to let me go
14 backwards, are you?

15 THE COMMISSIONER: No.

16 MR. KROFT: Fair enough.

17 THE COMMISSIONER: However, if you have a reason
18 to I would not rule you out.

19 MR. KROFT: No, no, I -- any good athlete has a
20 trainer.

21 All right. What I don't want to do is go longer
22 than you can pay attention because that --

23 THE COMMISSIONER: Yeah, that's --

24 MR. KROFT: -- that's not going to help --

25 THE COMMISSIONER: -- that's --

1 MR. KROFT: -- my cause.

2 THE COMMISSIONER: -- that's quite reasonable.

3 MR. KROFT: So I've spent some time talking about
4 what this isn't about, I'm done with that I'm not going
5 back and now I want to talk about what I understand to be
6 the three main arguments that, that I heard over the past
7 day and a half, and I'm going to try to deal with, with the
8 most substantive one now, and then we can go on in the
9 morning with the other ones.

10 THE COMMISSIONER: All right.

11 MR. KROFT: And then in the morning I'm going to
12 deal with filming, with some questions about the relief and
13 the miscellaneous stuff which shouldn't take very much
14 time.

15 THE COMMISSIONER: Right.

16 MR. KROFT: So, so and you'll tell me if you
17 agree with me but the way I hear it there are really three
18 arguments when you clear away all the straw men. The first
19 argument that the applicants are, are making is they're
20 saying identification of the professional witnesses will
21 increase stress on them and if they are stressed they won't
22 do their jobs well, or they'll leave their jobs and
23 children will then be at risk.

24 THE COMMISSIONER: All right. Well, I --

25 MR. KROFT: So I'm, I'm going to call that the

1 stress argument --

2 THE COMMISSIONER: Well --

3 MR. KROFT: -- just for shorthand.

4 THE COMMISSIONER: All right.

5 MR. KROFT: The second argument that I think
6 they're making --

7 THE COMMISSIONER: And if they don't agree with
8 you they'll have the opportunity, in reply, to say so.

9 MR. KROFT: To, to say so, yeah. The second
10 argument I hear them making is they're saying any
11 professional witnesses whose -- who is publically
12 identified as being associated with this case will be
13 unable to gain the trust of clients and collateral agencies
14 in the future.

15 THE COMMISSIONER: All right.

16 MR. KROFT: And I'm going to call that the
17 negative association argument.

18 And the third argument that I hear being made is
19 the applicants are saying that you need to withhold
20 identifying information from the public in order to manage
21 the content and the tone of the public discussion about
22 this inquiry and the case.

23 THE COMMISSIONER: In order to manage the tone?

24 MR. KROFT: The tone and content of public
25 debate. I'm going to call that the managing public debate

1 argument. And if you -- if I have time I want to respond
2 to all three of them but let me start with the stress
3 argument which I think is the, the -- is the most evidence
4 on that point.

5 THE COMMISSIONER: Yes.

6 MR. KROFT: So if you, if you putting a heading
7 the stress argument, this is how I think it, it goes, I'm
8 being the -- my own devil's advocate. I think what the
9 applicants need to prove in order to make this one out,
10 they have to prove, first of all, that banning publication
11 of identities is going to materially decrease stress.

12 THE COMMISSIONER: Just a minute, just a minute,
13 banning?

14 MR. KROFT: If, if -- that if you accede to
15 their request --

16 THE COMMISSIONER: Yes.

17 MR. KROFT: -- for anonymous testimony.

18 THE COMMISSIONER: Yeah, then what?

19 MR. KROFT: That will materially decrease stress
20 on the system as compared to what it would be if you
21 conducted a fully public hearing.

22 If they can prove that they then need to prove,
23 as a second step, that the reduction in stress is likely to
24 make a material difference in their job performance. Maybe
25 I should put it in, in the performance of the system to be

1 more fair to that.

2 And finally, as a third point they will need to
3 prove that there is no reasonable method to manage the
4 stress and its material effect other than by censoring
5 discussion about identity.

6 THE COMMISSIONER: By granting the ban.

7 MR. KROFT: By granting the ban, exactly.

8 And to put this in context there is an important
9 point made in Mentuck, at paragraph 34. I was kind of
10 hoping it would still be open but I think it isn't.

11 THE COMMISSIONER: No, it's in, in --

12 MR. KROFT: In tab five.

13 THE COMMISSIONER: Yes. I have that. Not far
14 away anyway.

15 MR. KROFT: Okay.

16 THE COMMISSIONER: Page?

17 MR. KROFT: Page 24, paragraph 34.

18 THE COMMISSIONER: Oh, yes, I ...

19 MR. KROFT: The very last sentence in that
20 paragraph, the judge is talking about how serious the
21 threat must be and says:

22

23 In other words, it is a serious
24 danger sought to be avoided that
25 is required not a substantial

1 benefit or advantage sought to be
2 obtained.

3

4 And that's an important line. It's not enough
5 that it would be convenient or easier, or would have less
6 stress, for example, on floats and overtime personnel, it's
7 not an advantage to be gained in the child welfare system in
8 this context. It has to be the avoidance of, as my friend
9 has put it, harm to children.

10 So let me talk about the evidence that connects --

11 THE COMMISSIONER: An avoidance of harm to
12 children.

13 MR. KROFT: That -- my friends are saying kids are
14 going to be hurt --

15 THE COMMISSIONER: Yes.

16 MR. KROFT: -- unless you ban publication.

17 THE COMMISSIONER: Yes.

18 MR. KROFT: They need to prove that. And I want
19 to talk to you now about what the evidence is and why they
20 haven't proved it. That's the next section of my argument.

21 THE COMMISSIONER: Okay.

22 MR. KROFT: I'm going to ask you to take out the
23 first affidavit of Ms. Regehr because my friends have relied
24 on that significantly and I take issue with what, what she
25 says and I'm going to suggest that she doesn't go nearly as

1 far as they require.

2 MS. WALSH: Mr. Commissioner, you'll find that in
3 the --

4 THE COMMISSIONER: It's in the tribal.

5 MS. WALSH: -- sorry, you'll find that in the ANCR
6 binder.

7 THE COMMISSIONER: Yeah.

8 MS. WALSH: I think it's in there.

9 THE COMMISSIONER: The, the first, the first one.

10 MR. KROFT: Yeah.

11 THE COMMISSIONER: Yeah. Okay.

12 MR. KROFT: And, and, and Ms. Regehr has an
13 affidavit and you need the exhibits because some of what she
14 does is just attach other articles that she's wrote and I'm
15 actually going to refer to some of her articles.

16 THE COMMISSIONER: She's -- is this the one sworn
17 March 30th --

18 MR. KROFT: Exactly.

19 THE COMMISSIONER: -- 2012?

20 MR. KROFT: Yes.

21 THE COMMISSIONER: All right.

22 MR. KROFT: And let me take you directly to her
23 article which is at tab "B" because to a large extent she
24 summarizes in the affidavit the, the article that she wrote.

25 THE COMMISSIONER: Oh, yes. All right.

1 MR. KROFT: On her research.

2 THE COMMISSIONER: Yes.

3 MR. KROFT: Okay. And I'm referring to the second
4 sentence at the very top of the article where she just says
5 what she's doing, where she says:

6
7 "The present study is a
8 qualitative analysis of the impact
9 of these death reviews and ...
10 subsequent changes to child
11 welfare services on child welfare
12 workers."

13
14 So she's not studying media, she's studying what
15 you're doing or what -- the analogy to what you're doing
16 now, and she's studying the effects that the
17 recommendations, as implemented, had on children as a
18 children worker -- child welfare workers.

19 We've already talked about how most of that is not
20 relevant today because the government has already decided to
21 have this inquiry. I suppose it could be a cautionary tale
22 to make sure that your recommendations are better than the
23 ones that she is criticizing but I think we, in Manitoba,
24 obviously have confidence that they will be because you're
25 here.

1 Now, Ms. Regehr, when she's talking about stress,
2 because that's what she's studying, makes it very clear, and
3 you don't have to go back because it's in paragraph 11 if
4 you want to make a note of her affidavit. She says as a
5 first step the principle source of stress in these
6 situations is the death of the child, that's not surprising.
7 And -- paragraph 11 if you, if you would like to look at it,
8 in her affidavit.

9 So, so the main, the main -- the first thing is
10 the death that causes the stress. Then if you go to her
11 article, at page eight, and unfortunately they're not
12 numbered, I numbered my pages just ...

13 THE COMMISSIONER: Okay, I'm at page eight.

14 MR. KROFT: Eight, okay. So, so she says the
15 first thing -- the first -- the main source of stress is the
16 death of the child. She says the second main source --
17 second source, is the impact of the inquiry. So this
18 process, the process that you're going to be conducting come
19 September, and her research, which is basically she just
20 asked social workers who went through it, she interviewed
21 them, and here on page eight at the bottom she says:

22

23 "The first important element of
24 individual experiences with
25 inquiries is highly related to the

1 previous section on the impact of
2 the child dying. That is, workers
3 involved in inquiries are
4 re-exposed to the details of the
5 tragedy. People identify
6 difficulty with having to "relive
7 this kind of work on the stand."

8
9 So the first two things that she says causes the
10 stress that she then writes about is the child dies, and
11 then they have to re-live that when they give testimony.
12 All of that is going to happen when you hold your public
13 hearings, regardless of your decision today, it has nothing
14 to do with the media.

15 Now, in her interviews Ms. Regehr did identify
16 other sources of stress and she summarizes them in that same
17 article, on page 13.

18 THE COMMISSIONER: Yes.

19 MR. KROFT: Okay. So here's a list of the other
20 contributors of stress, as related to her by the people she
21 interviewed, who had gone through the inquiries in Ontario.
22 And there's a whole list of them and towards the bottom of
23 the list one of the sources, one of the many contributors to
24 stress that was reported to her was negative and extensive
25 media coverage.

1 So some people did tell her that media coverage
2 caused -- was one cause of stress. Interesting though, if
3 you go back to page 11 for a moment of the same article.

4 THE COMMISSIONER: Yes.

5 MR. KROFT: She reports, about in the middle of
6 the page:

7

8 "Not all press attention was
9 negative, however, some workers
10 felt supported by the press and
11 subsequently the public."

12

13 So it kind of went either way.

14 But even if you grant the publication ban there's
15 going to be coverage and one of the things that Ms. Regehr
16 talks about is that it's not just the people who are
17 covered, who gave evidence that felt the stress, my friends
18 talked about radiated stress and you asked what that was.
19 What she means is the stress of the inquiry and, and to the
20 extent that the media contributed to it, wasn't just the
21 people who were named, it was everybody. So presumably at
22 least some of that stress is going to happen anyway if
23 you're going to allow any reporting of what's happening here
24 and, of course, you are.

25 What Ms. Regehr doesn't say, doesn't comment on

1 and didn't study was the connection between naming a witness
2 and that stress.

3 THE COMMISSIONER: Between what?

4 MR. KROFT: Naming a witness and stress. She
5 found that one of the contributors, one of the many
6 contributors with media coverage she says nothing and did no
7 research about whether having extensive media coverage but
8 not naming people as compared to naming people makes a
9 material difference. Doesn't speak to that.

10 Interestingly, in her affidavit and, and you've
11 probably seen this, I won't take you to it, and then
12 attached to it, she did the similar research with first
13 responders, firefighters and policemen, she did a number of
14 studies and, and, and came to the same conclusions. So if
15 what she is telling you is enough for a Mentuck publication
16 ban there's going to be an awful lot of anonymous witnesses.
17 In effect my friends have proved too much, basically be
18 shutting down the naming of any witnesses, at least in those
19 helping professions.

20 So that -- in terms of the evidence that my
21 friends rely on Ms. Regehr, to make the first leap that they
22 need to make, that there is going to be -- that banning
23 publication is going to be -- make a material difference to
24 stress, Ms. Regehr doesn't get them there.

25 THE COMMISSIONER: When you say they rely, your

1 view is they're relying on Regehr to get there.

2 MR. KROFT: Well --

3 THE COMMISSIONER: They may well not agree with
4 you but that's what --

5 MR. KROFT: They may well not but that's --

6 THE COMMISSIONER: That's your view.

7 MR. KROFT: -- what they said this morning. And,
8 and they went through Ms. Regehr's affidavit, both, both Mr.
9 Smorang and Mr. Saxberg and, and I can't remember if Mr.
10 Khan referred to it as well. Certainly it's one of the
11 things they're relying on, I'm sure they're relying on other
12 things. In fact, they're relying on some of the evidence
13 that I'm seeking to strike so I don't mean to mislead.

14 But in terms of Mr. Smorang's urging you that the
15 expert, I don't have any experts, they have experts, Ms.
16 Regehr was at the top of that list and she doesn't get them
17 there. And, in fact, she's quite careful not to, to, to, to
18 make that comment, even in her affidavit, when you read it
19 you'll see.

20 So I submit to you, they can correct me, they're
21 not there, they don't even get to the first leap. But let's
22 say they did get to the first leap, and they, and they were
23 able to prove that publication bans would materially reduce
24 stress, that doesn't equate automatically to harm to
25 children, which is what they're mainly hanging their hat on.

1 And when you read these articles, that they've filed and
2 cited, the, the connection between stress and job
3 performance is highly complex and highly attenuated.

4 You heard Mr. Juliano when he was talking about
5 Ms. Gosek's evidence. He talked about salaries, he talked
6 about resources, he -- I can't remember all of the things he
7 talked about but he gave you a long list. He didn't
8 mention, I don't think, until the end maybe, media, but the
9 relationship between stress and not doing an effective job
10 looking after the children is complex and it's attenuated.
11 There's a multiple -- a multitude of interrelated variables,
12 some of them you can see in Ms. Regehr's own table.

13 And I am submitting to you that it would be pure
14 speculation to say that a publication ban on identities of
15 professional witnesses will have a positive effect on job
16 performance throughout the system. The affidavit, the
17 witnesses, the articles, they don't get you there. In fact,
18 it could be just as persuasively argued that it will cause
19 diminished accountability and lead to poorer job
20 performance, and some of the articles talk about people and
21 accountability but the truth is we don't know because it's a
22 attenuated, it's a complex system, the link isn't there.

23 So I'm saying they haven't demonstrated to you the
24 connection between a publication ban and a significant
25 change in stress because we know stress is going to happen

1 anyway and one would hope it would, it's a terrible
2 situation that we're talking about.

3 THE COMMISSIONER: And the connection between a
4 publication ban and what?

5 MR. KROFT: Well, here's their argument, this is
6 where they have to get to. First they have to say -- they
7 have to prove to you --

8 THE COMMISSIONER: Yes.

9 MR. KROFT: -- that if you grant a publication ban
10 there will be less stress --

11 THE COMMISSIONER: Yes.

12 MR. KROFT: -- in the system because they're
13 talking about the system. They haven't brought any evidence
14 about anyone in particular. Then they have to show that
15 whatever the difference in stress is as a result of the
16 publication ban, that's going to prevent harm from children
17 that would otherwise happen. So they have to link stress to
18 job performance and I'm arguing that they have not done
19 that.

20 But what their evidence does show is that there
21 are all kinds of other ways to manage the stress involved in
22 infant death inquiries, that do not require the interference
23 with constitutional rights. I believe it was Mr. McKinnon
24 who talked about the critical incident teams and there was
25 some other types of systems already built in to assist with

1 stress. And if you look at the affidavit of Shavonne
2 Hastings, I won't make you find it, she talks about that, as
3 well.

4 There are already systems in place to deal with
5 that and there are dozens of articles that are cited on
6 issues related to public inquiries, and inquests, and the
7 internal reviews and the discussions of media coverage and
8 they contain all kinds of suggestions for how these things
9 could be managed in order to reduce stress, presumably not
10 impact on job performance.

11 But I'll tell you what's really interesting. None
12 of them, none of them suggest that there should be a
13 restriction on publication or a hiding of information from
14 the public.

15 I asked Ms. Gosek that when I cross-examined her.
16 She cited 39 articles, she cited, and then I asked her, on
17 cross-examination, whether any of the authors that she read,
18 recommended imposing restrictions on publication? And we
19 then went through several articles, looking at them, and the
20 answer was no.

21 And if you want to check that you can look at her
22 cross-examination, page 63, question 236 to 238.

23 THE COMMISSIONER: Page 63.

24 MR. KROFT: Question 236 to question 238.

25 And, in fact, not only don't they recommend what

1 my friends are recommending to you, their, their authorities
2 do not support what they want you to do. Their authorities
3 actually say something quite different. Their authorities,
4 many of them, recommend greater openness with the media.
5 Their authorities, many of them, criticize the social work
6 establishment for being too closed.

7 You'll recall this morning Mr. Saxberg referred to
8 an article by I think it's Cheno (phonetic) or Chenot,
9 C-H-E-N-O-T, which is attached to the affidavit of Ms.
10 Regehr, it's Exhibit "G". Let's look at that for a minute
11 and see the article that Ms. Regehr is relying on and what
12 that particular authority --

13 THE COMMISSIONER: Was that "G", was it?

14 MR. KROFT: It's at "G".

15 Now, in, in, in this article -- are you there?

16 THE COMMISSIONER: Yes.

17 MR. KROFT: You won't find anything about
18 restricting information or publication bans or not telling
19 the public about the identities of social workers but on
20 page 180, Mr. Chenot or Cheno, in the second paragraph, he
21 says this. He says:

22

23 "In fact, child welfare
24 administrators and staff often
25 have unhelpful relationships with

1 the media that contribute to poor
2 public images. In an interview
3 concerning child welfare directors
4 relationships with the media, New
5 York Times reporter Richard Jones
6 pointed out, "the only times
7 directors of child welfare
8 agencies and reporters speak with
9 each other in a sustained and
10 meaningful way is in moments of
11 crisis." ... Jones went on to
12 assert that the public interprets
13 the disinclination to share
14 information by child welfare
15 administrators as an effort to
16 engage in "damage control" or
17 denial of problems in the agency
18 rather than concern about the
19 grievous incidents that often
20 prompt media coverage. Jones
21 summed up his advice for directors
22 in two words: "be transparent".

23
24 That's my friend's evidence, that's the
25 applicant's evidence.

1 One of the authorities that Ms. Wotherspoon
2 referred to was somebody named Munro who did a report out of
3 the UK. And I asked her about what Ms. Munro recommended is
4 the solution. And I won't take you to the -- because of the
5 lack of time I'm not going to take you and read it through
6 but I'm going to tell you that it's at page seven of Ms.
7 Wotherspoon's cross-examination. Ms. Wotherspoon conceded
8 that Ms. Munro, her prescription was greater openness.

9 THE COMMISSIONER: Her what?

10 MR. KROFT: Her prescription was greater openness.

11 THE COMMISSIONER: Oh, yes.

12 MR. KROFT: And while you have in front of you Ms.
13 Regehr's affidavit, I'll take you to the first page of tab
14 "I". This is one of the articles I also discussed with Ms.
15 Gosek on cross-examination and she did the summary at the
16 very beginning of the article.

17 This in -- it's in small print, I'm going to read
18 it to you. Part way down the summary:

19

20 "This paper explores the
21 contribution of the media to the
22 creation of the climate of fear,
23 blame and mistrust which seems to
24 have become endemic within the
25 field of child protection. It

1 suggests that damaging distortions
2 have been introduced into the
3 child protection system as a
4 result of the defensive responses
5 of the relevant authorities at
6 both national and local level to
7 the media onslaught. A more
8 strategic approach to
9 understanding and managing media
10 coverage of this difficult field
11 is outlined."

12

13 In that outline you will not find a word about
14 publication ban or hiding information.

15 This is not the first time in Canada that judicial
16 authorities have heard the argument that this is going to be
17 stressful, don't publish my name. The most frequently
18 quoted expression of how the courts have reacted comes from
19 a case called the Attorney General of Nova Scotia and
20 MacIntyre. And you'll find that, if you need to look at it
21 when you're writing your reasons, at tab 17 of our brief of
22 authorities, at page 185. And this is what the court -- and
23 this is repeated in, in all of the Supreme -- in many of the
24 Supreme Court decisions but I'll just read it to you so we
25 don't have to fool around with different binders.

1 This is what the Supreme Court says:

2

3 "Many times it has been urged that
4 the 'privacy' of litigants requires
5 that the public be excluded from
6 court proceedings. It is now well
7 established, however, that
8 covertness is the exception and
9 openness the rule. Public
10 confidence in the integrity of the
11 court system and understanding of
12 the administration of justice are
13 thereby fostered. As a general
14 rule the sensibilities of the
15 individuals involved are no basis
16 for exclusion of the public from
17 judicial proceedings."

18

19 And then he quotes from that R. v. Wright case, a
20 19th Century case where -- I don't remember the judge's name
21 but Justice Laurence said:

22

23 "Though the publication of such
24 proceedings may be to the
25 disadvantage of the particular

1 individual concerned, yet it is of
2 vast importance to the public that
3 the proceedings of courts of
4 justice should be universally
5 known. The general advantage to
6 the country in having these
7 proceedings made public more than
8 counterbalances the inconveniences
9 to the private persons whose
10 conduct may be the subject of such
11 proceedings."

12

13 So we've looked at the evidence, the evidence --
14 my friend's evidence doesn't suggest restrictions on
15 publications and certainly courts who have heard similar
16 arguments to the ones you've heard this morning have had the
17 same reaction, no.

18 So to conclude on the stress argument, and my
19 answer to the stress argument, I concede child deaths and
20 the inquiries that follow must create stress. I'm not
21 disagreeing with Ms. Regehr that there are many contributing
22 factors to stress and she -- we saw that table where she
23 listed some of them. And I am not arguing with her that
24 social workers told her, in her reports, that one of the
25 many contributing factors is media coverage but I am

1 pointing out to you, Mr. Commissioner, that those very same
2 articles and authorities point out the defensive reactions
3 by social work establishment is one of the causes of the
4 adverse coverage and pointing out to you that many of the
5 authorities argue that the way to address adverse coverage
6 is through greater openness, not attempts to suppress
7 information. And I am reminding you that not one of the
8 authorities supports the application that is before you
9 today to ban publication of identities and so I say to you
10 that the stress argument comes nowhere close to meeting that
11 significant evidentiary standard that the court in Mentuck
12 and Dagenais says must be met before a judicial authority
13 should entertain censoring public discussion about important
14 issues of public policy. And that's my response to the
15 stress argument.

16 Probably a good time to stop.

17 THE COMMISSIONER: I think so. And then you'll
18 pick up on the others in the morning and then we'll --

19 MR. KROFT: Yes.

20 THE COMMISSIONER: -- get to the other counsel.
21 All right, are we going to come back at 9:00 in the morning?
22 We'll adjourn now till nine o'clock tomorrow morning. Thank
23 you.

24

25 (PROCEEDINGS ADJOURNED TO JULY 6, 2012)