



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

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

Transcript of Proceedings
Publication Ban and Redaction Hearing,
held at the Winnipeg Convention Centre,
375 York Avenue, Winnipeg, Manitoba

FRIDAY, JULY 6, 2012

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3

4 THE CLERK: You may be seated.

5 THE COMMISSIONER: Now, oh, Mr. Smorang?

6 MR. SMORANG: I wish I could say that Mr. Kroft
7 has asked me to make the rest of his argument, but he
8 hasn't.

9 MR. KROFT: Mr. Smorang has become a junior at
10 Aikins MacAulay, we can put that in the record now and he's
11 going to wash my car as soon as he's done.

12 MR. SMORANG: Mr. Commissioner, I interrupt Mr.
13 Kroft's submission to bring to your attention something
14 that came to my attention earlier this morning. I'm not
15 sure if it has yet come to your attention.

16 THE COMMISSIONER: No, nothing has this morning.

17 MR. SMORANG: All right. I was sent a link this
18 morning to a, a video that is on the Winnipeg Sun website.
19 It is a video purporting to a report by a Winnipeg Sun
20 reporter, Mr. Brodbeck. And in that report and in that
21 video, Mr. Brodbeck shows a variety of video recorded
22 segments of this room. And it is clear, from reviewing
23 that video, that he was using his own, or a video recorder,
24 not that one. The shots are taken from the back of the
25 room. In fact, there's one shot where you can actually see

1 the camera. So Mr. Brodbeck was apparently here. He was
2 apparently video recording and he has broadcast those on
3 the internet, making them public.

4 When I became aware of that, I sent an e-mail to
5 all counsel and to Mr. Brodbeck, because as you may recall,
6 the Sun is not represented any longer by Mr. Kroft. I
7 indicated I wanted to raise the matter, because it appears
8 to me to be a clear breach of your protocol. I have
9 subsequently received an e-mail from Ms. Walsh and I'm told
10 that Mr. Brodbeck has also sent an e-mail, at least
11 impliedly threatening to sue me, but in any event, I can
12 deal with that. Ms. Walsh may wish to speak on the matter.
13 This is the first time it's come to my attention that
14 anyone was in this room with a camera, and certainly now,
15 this morning, that that video has been broadcast
16 permanently on the internet.

17 THE COMMISSIONER: If it offends our rules, when
18 you say permanently, can it not be taken down?

19 MR. SMORANG: It can be taken down by the
20 Winnipeg Sun, but again, I'm not a techie, but as I
21 understand it, any individual who views that video can
22 download it onto their own computer and then the Winnipeg
23 Sun can take it down and that individual can then put it up
24 on another site, YouTube or anything else and then it's up
25 again. It's a little bit like the sad saga of -- well, I

1 won't even get into that, but other pictures of individuals
2 that have, that have been taken down, and put up, and taken
3 down and put up. In other words, it becomes, essentially,
4 free for anybody to grab, keep, put on their own computer,
5 or then re-upload onto the internet. So it's there.

6 THE COMMISSIONER: All right. Yeah, ordinarily
7 I'm in the office first thing in the morning, but because
8 we started early this morning, I did not go in the office.
9 So I've not talked to Ms. Walsh, so I'll want to hear what
10 she has to say.

11 MS. WALSH: Thank you, Mr. Commissioner. I don't
12 have copies of all the e-mail correspondence. I did
13 receive Mr. Smorang's e-mail. It was copied to me this
14 morning and as soon as I got it, I sent an e-mail to all
15 counsel and to Mr. Brodbeck, confirming that the matter had
16 been brought to my attention on Monday. At the break, I
17 spoke with Mr. Brodbeck. I confirmed with him and
18 clarified the provisions of our media protocol, that
19 filming and video and photo shots were not allowed and
20 that, subject to your ruling, there could be some filming
21 or video shots at the beginning, but that would only be
22 with permission from you. Once I clarified that to him, he
23 said he understood. I did not see him videotape after that
24 point.

25 I see that Mr. Brodbeck has sent back an e-mail

1 confirming that my characterization is correct and that --
2 well, I won't paraphrase. He says:

3

4 I confirm the facts as laid out
5 below by Commission counsel. At
6 no time did I videotape the
7 inquiry room prior to the
8 proceedings or during a break,
9 following my discussion with
10 Commission counsel. Also, I
11 understand fully that I, or any
12 other member of the news media
13 would require permission from the
14 Commissioner to videotape prior to
15 the proceedings, or at a break in
16 the future.

17

18 THE COMMISSIONER: So it, it's your view that,
19 that what has occurred is a breach of our rules?

20 MS. WALSH: His filming was a breach of our rules
21 and he --

22 THE COMMISSIONER: All right. You --

23 MS. WALSH: -- indicated that --

24 THE COMMISSIONER: -- you --

25 MS. WALSH: -- he understood that he was not to

1 do that.

2 THE COMMISSIONER: Is, is the gentleman in the
3 room this morning?

4 MR. SMORANG: As I indicated, sir, I did copy him
5 on my e-mail to all counsel, which went out at 7:53. And I
6 advised everyone, including Mr. Brodbeck, that the matter
7 began this morning at nine o'clock.

8 THE COMMISSIONER: Right. Well, Ms. Walsh, I
9 think it's imperative that you, you make contact with him
10 and I -- you now have a commitment from him, he understands
11 he breached the rules and there will be no further breach
12 on his part; is that correct?

13 MS. WALSH: So it would appear, what, what I read
14 out to you.

15 THE COMMISSIONER: Yeah, well then, has he made
16 any commitment to remove the offensive video from the, from
17 the -- from where he had posted it?

18 MS. WALSH: Don't see that. I had turned my
19 BlackBerry off before coming in. He goes on to say:

20

21 Counsel for the Union has made a
22 false public allegation against
23 me, stating that I was filming the
24 proceedings and violated the media
25 protocol as a result. Mr.

1 Smorang's accusations are
2 completely inaccurate. Not once
3 did I film the proceedings of the
4 inquiry.

5
6 He doesn't mention --

7 THE COMMISSIONER: Well --

8 MS. WALSH: -- taking anything off his website.

9 THE COMMISSIONER: -- I, I appreciate, Mr.
10 Smorang, that there's not a great deal, as I see it, that,
11 that I can do about subsequent postings, but I'm certainly
12 prepared to, to direct Commission counsel now to make
13 contact with the gentleman and tell him to get it down from
14 his own website.

15 MR. SMORANG: Well, and that's, that's
16 appropriate indeed, Mr. Commissioner, but I still have two
17 questions. Number one, why didn't the Winnipeg Sun know
18 the, the media protocol? In other words, where is Mr.
19 Brodbeck to tell us that he didn't understand or didn't
20 care to even look at the protocol before he wandered in.
21 And number two, and I think more importantly, when Ms.
22 Walsh advised him that he was breaching a protocol, he
23 stopped. Fair enough. And he says so in his e-mail. But
24 then he went back to the office and put the video on the
25 internet --

1 THE COMMISSIONER: After that?

2 MR. SMORANG: -- it's, it's there. After saying
3 I won't do it anymore, he took what he had already done and
4 that's what he's put on the internet. So he's --

5 THE COMMISSIONER: Well --

6 MR. SMORANG: -- it's been brought to his
7 attention that he's violated the, the media protocol, so
8 okay, I don't do anymore, but what I've already got, I'm
9 using and used.

10 THE COMMISSIONER: But, but, but it, it -- did he
11 put something on the second time that he hadn't put on the
12 first time?

13 MR. SMORANG: Let, let's get the order correctly.
14 The man was in the room with a video camera.

15 THE COMMISSIONER: Yes.

16 MR. SMORANG: He was recording.

17 THE COMMISSIONER: Yes.

18 MR. SMORANG: Ms. Walsh approached him, this is
19 what I found out this morning.

20 THE COMMISSIONER: Oh, I did not know that.

21 MR. SMORANG: Nor did any of us.

22 THE COMMISSIONER: Okay.

23 MR. SMORANG: Ms. Walsh approached him, told him
24 to stop, he said he would stop. Then he went back to this
25 office and he took that video that he now knows he took

1 illegally and he made it part of his news story and put it
2 on the internet. That's my concern, that's my concern
3 right now.

4 THE COMMISSIONER: Is that --

5 MS. WALSH: Just to clarify, I didn't see him
6 taking the video. I was advised that he was taking the
7 video, or, or had taken the video and so I went over to
8 speak with him, just --

9 THE COMMISSIONER: And did you --

10 MR. SMORANG: If you watch the, the, the internet
11 story, if you watch the TV story, you can tell he's taking
12 video.

13 THE COMMISSIONER: But, but did you tell him that
14 if he was taking video, he was offending our rules?

15 MS. WALSH: I did.

16 THE COMMISSIONER: And then, do you, do you agree
17 with Mr. Smorang that it was subsequent to that he did the
18 posting?

19 MS. WALSH: I honestly don't know. I haven't
20 looked at the posting and, and I don't know that I'd be
21 able to identify what time the posting was, was put up --

22 THE COMMISSIONER: But you're, you're --

23 MS. WALSH: -- that, that's not something I can
24 comment on.

25 MR. SMORANG: Well, what we can agree upon, I

1 think, is that you spoke to him before he left the room?

2 MS. WALSH: Yes.

3 THE COMMISSIONER: And at that time --

4 MR. SMORANG: And it's hard to believe he could
5 have posted it on the internet before he left the room.

6 MS. WALSH: Well, I don't know if he left the
7 room once between filming and when I spoke to him.

8 THE COMMISSIONER: But are you satisfied he did
9 the posting after Commission counsel spoke to him?

10 MR. SMORANG: I have no knowledge of that, but I
11 can't imagine how it could have happened before.
12 Commission counsel spoke to him before he left. Again, I'm
13 not a tech person, but I can't imagine how he could have
14 taken the video from his camera, because it's part of a
15 story. It's like the news story you see on TV with a
16 reporter and a microphone and then they cut to the, to the
17 room and then they cut back to him. It's been edited, it's
18 been created in a, in a, in a professional way and it's now
19 been posted. It has to have been done after he left this
20 room. Has to have.

21 THE COMMISSIONER: All right. Well then I think
22 if that's, if, based upon what you tell me, I think you
23 should -- I'll ask Commission counsel, at the morning
24 break, to make contact with the gentleman and ask him to
25 come here at 1:30 this afternoon.

1 MS. WALSH: Yes, Mr. Commissioner.

2 THE COMMISSIONER: All right.

3 MR. SMORANG: Thank you.

4 THE COMMISSIONER: Mr. Kroft?

5 MR. KROFT: Good morning. I will be done by
6 1:30, and so I will be a spectator --

7 THE COMMISSIONER: Well, but you --

8 MR. KROFT: -- but I'm not --

9 THE COMMISSIONER: -- but you --

10 MR. KROFT: -- done yet.

11 THE COMMISSIONER: -- you, you, you're not
12 planning to take all morning, are you?

13 MR. KROFT: I am not, no.

14 THE COMMISSIONER: No, oh, all right. Because
15 there are two other counsel I want to hear from, plus the
16 replies, so --

17 MR. KROFT: And, I, I quite understand --

18 THE COMMISSIONER: -- yeah, yeah.

19 MR. KROFT: -- so I know we're --

20 THE COMMISSIONER: You'll, you'll, you'll --

21 MR. KROFT: -- already 15 --

22 THE COMMISSIONER: -- you'll probably be here at
23 1:30, but --

24 MR. KROFT: May, may, well, I may well be, we'll
25 see how interesting my, my colleagues are, I guess.

1 THE COMMISSIONER: Now you --

2 MR. KROFT: But --

3 THE COMMISSIONER: -- fine, you carry on --

4 MR. KROFT: Yeah.

5 THE COMMISSIONER: -- and we're down to number
6 what?

7 MR. KROFT: Well, we are in -- we, we were doing
8 number 5 --

9 THE COMMISSIONER: Yes, in the first segment.

10 MR. KROFT: -- yes and I had said that I had
11 interpreted the submissions to be advancing three
12 arguments.

13 THE COMMISSIONER: Yes?

14 MR. KROFT: The first argument had to do with
15 stress and I addressed that and completed that part
16 yesterday afternoon.

17 THE COMMISSIONER: Yes.

18 MR. KROFT: The next argument that I understood
19 that has been made and then I wanted to comment on was what
20 I had termed the negative association argument.

21 THE COMMISSIONER: Yes.

22 MR. KROFT: And that, that argument was that any
23 witness who was publicly identified, any professional
24 witness we're talking about, any government employee,
25 identified as being associated with this inquiry will

1 thereafter be unable to gain the trust of the people or the
2 collateral agencies in the future and so we shouldn't tell
3 the public who's associated with this case and I'm calling
4 that the negative association argument.

5 Interestingly, this, this, this is the -- all of
6 these orders are advanced to cover all social workers. So
7 if somebody were to come and testify, as I understand it,
8 and we'll talk about this in the remedy, about, about
9 matters having to do with the child welfare system
10 generally, the same would apply. So that's, that, the, the
11 argument is if people know the truth, they'll never, that,
12 that somehow they won't deal with it rationally.

13 Now, I, I discussed this -- if you'll just give
14 me a moment. I, I guess the first point I want to make is
15 that there, there's no expert evidence on this. So you
16 don't have to look, when you're considering this part, any
17 of the experts. They don't speak to it at all. There's no
18 expert that suggests that this, in fact, is a realistic
19 concern.

20 Ms. Kehler was the one who first raised the
21 issue. She raised it in her affidavit and it's on -- if
22 you have that, it's in her first affidavit at paragraph 36.

23 THE COMMISSIONER: Now, just a minute.

24 MR. KROFT: And I, I, I just want to show you
25 sort of the type of evidence that's been advanced.

1 THE COMMISSIONER: Yes, I think I have her -- no,
2 I don't have the affidavit here. It'd be behind
3 me.

4 MR. KROFT: Oh, I'm sorry. Do you want me to
5 just read it out to you and --

6 THE COMMISSIONER: I'll, I'll get it here, just a
7 minute. Yes?

8 MR. KROFT: So to refresh your memory, Ms. Kehler
9 is, is on staff at the Manitoba Government Employees Union.
10 She hasn't been in social work for about six years, but she
11 does have a background prior to that time of a social work
12 training and she did work in the field some time ago.
13 She's not advanced as an expert and we look at paragraph 36
14 on the issue we're talking about, this is her evidence.
15 And we've sought to strike out this paragraph 36, but I
16 want to give you a sense of even, even if it's not struck
17 out, this is the evidence:

18

19 "In addition ..."

20

21 She, she says.

22

23 "... social workers have advised
24 me ..."

25

1 Doesn't name the social workers.

2

3 "... that they are fearful ..."

4

5 She doesn't say that it's going to happen.

6

7 "... they are fearful that they
8 may face greater aggression or
9 negative attitude from families if
10 they are identified as a worker
11 involved with the Phoenix Sinclair
12 Inquiry due to the misperception
13 that they were somehow responsible
14 for Phoenix Sinclair's death."

15

16 So the argument is you should ban publication and
17 grant anonymity because somebody told Ms. Kehler, a number
18 of people maybe told Ms. Kehler about what they were
19 fearful of that could happen.

20 Well, I discussed this concept with Ms. Cochrane,
21 who is currently involved in the system and who had raised
22 a similar concern in her affidavit. And her answer, I'm
23 suggesting to you, and this is, Ms. Cochrane, of course, is
24 also the, one of the affiants relied upon by the
25 applicants. And I, I'm going to ask you to take out her

1 cross-examination because she answers this, I think, pretty
2 succinctly.

3 THE COMMISSIONER: All right. I, yes, I have her
4 cross here.

5 MR. KROFT: Are we on her cross?

6 THE COMMISSIONER: Not yet.

7 MR. KROFT: Not yet? Okay. You tell me.

8 THE COMMISSIONER: I, I have it now.

9 MR. KROFT: Okay. So paragraph 13 -- sorry,
10 sorry, not paragraph 13, I'm sorry, page 13.

11 THE COMMISSIONER: Yes?

12 MR. KROFT: Page 13, and I'm going to start at
13 paragraph 55, question 55.

14 THE COMMISSIONER: Page 13 --

15 MR. KROFT: Yes, question 55, I asked Ms.
16 Cochrane:

17

18 "55 Q Can I suggest to
19 you then that what is bothering
20 you, at least what comes through
21 to me from your affidavit, is that
22 you believe people are under a
23 misconception about the true
24 involvement of ICFS and the death
25 of Phoenix Sinclair; isn't that

1 right?"

2

3 And she says:

4

5 "Yes."

6

7 And I ask her:

8

9 "I take it you don't take the
10 position that your community is
11 not capable of understanding the
12 accurate facts if they are allowed
13 to have them, that's not your
14 position, is it?"

15

16 She says:

17

18 "No, it isn't [my -- no, it
19 isn't]."

20

21 And then I say:

22

23 "58 Q Would it be fair to
24 say that you are confident in your
25 community, that if it has the

1 truth it will come to a fair and
2 rational conclusion?"

3

4 She agrees with me:

5

6 "Yes."

7

8 THE COMMISSIONER: Just a minute. What's that --
9 does ICFS object to the -- is that -- you're reading 57?

10 MR. KROFT: Yes.

11 THE COMMISSIONER: Okay. I have that.

12 MR. KROFT: Okay. And then while we have that
13 open, if we go to paragraph, page 19 --

14 THE COMMISSIONER: Yes.

15 MR. KROFT: -- we're addressing the same concept
16 again and I ask Ms. Cochrane, because she's telling me,
17 similarly to what we've read in Ms. Kehler's affidavit,
18 that she heard things from staff about what they're afraid
19 of and I ask her:

20

21 "88 Q Yes, is your staff
22 concerned that if the true facts
23 are known, they will appear to
24 your community to be incompetent?"

25

1 They being the staff. And she says:

2

3 "No."

4

5 THE COMMISSIONER: What question is that?

6 MR. KROFT: Eighty-eight, page 19.

7 THE COMMISSIONER: Yes, I have it.

8 MR. KROFT: And in fairness, I maybe should have
9 read 87, because I was referring her to a point in her
10 affidavit and asked her:

11

12 "Does your staff believe that if
13 accurate facts are known, your
14 staff will appear incompetent in
15 the eyes of the community?"

16

17 She asked me to rephrase it, which I did, and I
18 read you the re-phrase. And the bottom line is, she's
19 comfortable that if her community knows the truth, they
20 will not feel that, that staff is incompetent or
21 untrustworthy.

22 So the evidence that you have is that this
23 argument is not valid.

24 Now, I told you yesterday that the
25 Dagenais/Mentuck test says that it is not appropriate for a

1 ban to be issued based on remote and speculative
2 information and I didn't have the citation for you.

3 THE COMMISSIONER: Oh yes, okay.

4 MR. KROFT: I have it now and it's very
5 applicable to this point. It, it actually comes from the
6 Dagenais case --

7 THE COMMISSIONER: Yes.

8 MR. KROFT: -- page 54, which is at tab 20 of our
9 productions. It's the last line of the paragraph.

10 THE COMMISSIONER: All right. Just let me --
11 and, and --

12 MR. KROFT: Do you want --

13 THE COMMISSIONER: -- you're citing this for what
14 proposition?

15 MR. KROFT: Let me read it to you.

16 THE COMMISSIONER: Well, let me get it.

17 MR. KROFT: Okay. So it would be tab 20 of our
18 authorities, which are in those blue coil binders.

19 THE COMMISSIONER: Yes?

20 MR. KROFT: If you look --

21 THE COMMISSIONER: Page?

22 MR. KROFT: -- go to page 54.

23 THE COMMISSIONER: I have it.

24 MR. KROFT: Okay. The first full paragraph, go
25 to the very last sentence. It's just above paragraph 77.

1 THE COMMISSIONER: Yes?

2 MR. KROFT: And it says:

3

4 "As the rule itself states, the
5 objective of a publication ban
6 authorized under the rule is to
7 prevent real and substantial
8 risks ..."

9

10 This case, they were talking about trial
11 unfairness. We're talking about harm to children. And
12 then Supreme Court says:

13

14 "... publication bans are not
15 available as protection against
16 remote and speculative dangers."

17

18 And the fact that a social worker, who is
19 unnamed, or a few social workers who are unnamed, tells
20 another person who is named that they're afraid that
21 something like this might happen is exactly what the
22 Supreme Court is talking about and even Ms. Cochrane, who's
23 the only social worker who is currently practicing and who
24 speaks to this point on cross-examination, distances
25 herself from this remote and speculative argument.

1 And I, I want to end my submission on this
2 argument, by pointing out that when you think about it,
3 this argument is, is a bit disturbing, which is probably
4 why Ms. Cochrane distanced herself from it. It either
5 suggests, if you think about it, it either suggests that
6 the public is not capable of understanding the evidence and
7 the recommendations of this committee, or it suggests that
8 the public is not to be trusted to make rational decisions,
9 based on the evidence or recommendations that you issue.
10 Or it's suggesting that it's somehow appropriate for you,
11 on behalf of the government, to prevent the spread of
12 truthful information, so that members of the public will
13 place their trust in people whom they would not trust if
14 they were fully informed. And I submit to you that none of
15 those propositions, which are necessarily embedded in this
16 argument, are consistent with the democratic principles
17 that underlie this whole proceeding and our whole judicial
18 system and government. That is not somewhere that a
19 government official wants to go.

20 And I asked Ms. Cochrane about that, because I,
21 I, I was disturbed by that argument. And if you look at
22 her cross-examination, if you still have that out, at page
23 24 -- I'm sorry, yeah, page 24 --

24 THE COMMISSIONER: That's in -- I --

25 MR. KROFT: Oh no, did you put it away? I'm

1 sorry.

2 THE COMMISSIONER: No, it's all right.

3 MR. KROFT: Should have told you.

4 THE COMMISSIONER: That, that's -- it -- that was
5 filed by Intertribal wasn't it?

6 MR. KROFT: Yes, it was.

7 THE COMMISSIONER: No (inaudible).

8 UNIDENTIFIED PERSON: (Inaudible).

9 MR. KROFT: That's Shirley Cochran (phonetic),
10 filed by Intertribal.

11 THE COMMISSIONER: All right. Maybe I do have it
12 out.

13 MR. KROFT: It, it was one you just had out
14 before you a minute ago.

15 THE COMMISSIONER: Yes, yeah, maybe I still have
16 it here.

17 MR. KROFT: I, I, I didn't see you put it away,
18 so -- it was stapled.

19 THE COMMISSIONER: Is, is it not in the black
20 binder?

21 MS. WALSH: (Inaudible), Mr. Commissioner.

22 (Inaudible) copy (inaudible)?

23 MR. KROFT: Yes, and if you could open it to page
24 24 --

25 MS. WALSH: Mr. Commissioner, I've got it here

1 (inaudible).

2 THE COMMISSIONER: (Inaudible) I should have it.

3 MS. WALSH: (Inaudible) CFS.

4 THE COMMISSIONER: Publication ban (inaudible).

5 Yes, I have it, okay.

6 MS. WALSH: Volume 1.

7 THE COMMISSIONER: Yeah.

8 MS. WALSH: Okay.

9 THE COMMISSIONER: No, this is volume 2.

10 MS. WALSH: Do you have volume 1? Otherwise,
11 I've got it right here.

12 THE COMMISSIONER: I know, but -- yes, I
13 (inaudible). Yes, what page?

14 MS. WALSH: Twenty-four.

15 MR. KROFT: Page 24, question 110, actually 111,
16 it's, it's ...

17 THE COMMISSIONER: This is Cochrane's affidavit?

18 MR. KROFT: No, Cochrane's cross-examination.

19 THE COMMISSIONER: Oh, oh, oh, oh, okay. I have
20 that somewhere.

21 MR. KROFT: Well, why don't I just read it?

22 THE COMMISSIONER: No, no, I have it here. I --

23 MR. KROFT: Page 24. I'm discussing here with
24 Ms. Cochrane, her comments in the affidavit that it's
25 important to have trust with collateral agencies and

1 clients.

2 THE COMMISSIONER: Yeah.

3 MR. KROFT: And at question 111 on page 24 --

4 THE COMMISSIONER: Yeah.

5 MR. KROFT: -- I ask her:

6

7 Now, is it your position, and the
8 position of your agency that
9 withholding information from the
10 community is a good way to foster
11 trust?"

12

13 She says:

14

15 "No."

16

17 And then, at 113 I say:

18

19 "I take it you are not suggesting
20 that accurate facts should be
21 withheld from the families, so
22 that they will have confidence in
23 you?"

24

25 Her answer:

1

2

"No. No, I am not."

3

4

And I ask her:

5

6

"And confidence is, requires

7

openness, and sharing of the true

8

facts?"

9

10

She says:

11

12

"Yes."

13

14

And at question 115:

15

16

"And if the families in your

17

community had the true facts, you

18

are not concerned they would not

19

have confidence in you, are you?

20

A I am not.

21

116 Q I'm sorry, I didn't

22

hear you?

23

A No, I am not."

24

25

This argument, Mr. Commissioner, far from

1 fostering trust, undermines the trust and damages the
2 result that the applicants are arguing is in the best
3 interests of children and that's what I have to say about
4 the negative association argument.

5 THE COMMISSIONER: Okay. And then you go to your
6 third one?

7 MR. KROFT: My third argument I called the
8 managing public debate argument. This is an argument being
9 made to you that says that the media and the public are
10 going to get things wrong, or sensationalize things, or
11 maybe write comments, or blogs that some people don't like.
12 And that the way to deal with that, the appropriate way for
13 you to deal with that, Mr. Commissioner, is you should
14 restrict the flow of truthful information in order to
15 manipulate the content of that discussion and the tone of
16 the discussion. In other words, to restrict the
17 information that goes to the public because you're
18 concerned about what the public might say if they had that
19 information.

20 THE COMMISSIONER: Well, manipulate's a little
21 strong, isn't it?

22 MR. KROFT: There -- no, I don't think so.

23 THE COMMISSIONER: All right.

24 MR. KROFT: Let, let's talk about it.

25 THE COMMISSIONER: Yeah, let's talk about it.

1 MR. KROFT: What -- you heard arguments over the
2 past few days that say look at some of these things that
3 people said on, individuals said, and in some cases,
4 headlines that we don't like, we think they're sensational
5 and you're being asked to ban, to make it illegal for
6 people to talk about certain things because you want the
7 tone of the public discussion to be different and better.
8 You want the content to be what the MGEU feels is more
9 appropriate, in its judgment.

10 They're arguing that if you prohibit the
11 publication of names and of social workers and identities,
12 that it's going to reduce what they find to be offensive
13 public discussion about these important public issues. And
14 some of them may be offensive. It's -- free speech can be
15 a little messy. It -- there's no question about that, I'm
16 not going to argue otherwise. Sometimes people say things
17 that the government finds offensive. Some --

18 THE COMMISSIONER: You said they argue that to
19 prohibit the names of the social workers and then where did
20 you go?

21 MR. KROFT: I'm saying that this particular
22 argument is saying to you, you should prohibit the
23 publication of the names of social workers in order to
24 manipulate -- and I, I do pick that word -- the tone and
25 the content of public debate so we don't find it as

1 offensive as we found some of the examples that were read
2 to you on Wednesday.

3 THE COMMISSIONER: So the, the subsequent public
4 debate?

5 MR. KROFT: Yes, what they're saying is, well, if
6 you don't like what you think they're going to say about
7 it, don't tell them. That's the argument. And I am not
8 disagreeing that sometimes people say critical things about
9 the government and government employees and sometimes, you
10 know what, sometimes it's not fair. And in a dictatorship,
11 dictators, the first thing they do, you always hear, is
12 they control, control the media, they forbid discussion.
13 That's how they manage public debate. But that's not how
14 we do it here and I say, with respect, that in a free and
15 democratic society, it's the people and not the government
16 officials who determine what the tone and the content of
17 the public debate is, subject, as you pointed out, to hate
18 literature laws and the law of defamation and things, which
19 are all available if people step out of line. But in a
20 free and democratic society, it's not up to the government
21 to say we're not going to tell you what we're doing. We're
22 not going to be transparent, because we're afraid you won't
23 like it if we tell you, or we're afraid you're going to
24 criticize us if we tell you.

25 And I submit to you, Mr. Commissioner, that if

1 you adopt this kind of an argument, if you abandon that
2 principle that it's the people who decide what they should
3 be talking about, in terms of public policy issues, none of
4 us, including the children, are safe. We are all in need
5 of protection and I'm suggesting to you that that is
6 somewhere where a commission of this nature, or any
7 governmental institution wants to go. And it's not
8 necessary.

9 And I want to say something briefly about your
10 role.

11 THE COMMISSIONER: Yeah, I, I'm just a little
12 concerned about your --

13 MR. KROFT: Yeah.

14 THE COMMISSIONER: -- use of the word manipulate.
15 It, it -- to me, that implies something, something less
16 than below the line, by way of conduct. Isn't it you want
17 to prohibit the names in order to, to lessen the tone of
18 the public debate?

19 MR. KROFT: You could -- well, not lessen the
20 tone, if we're looking for words. To, to --

21 THE COMMISSIONER: Reduce?

22 MR. KROFT: -- well, no, a tone isn't reduced or
23 not reduced. They don't like the tone of some articles.

24 THE COMMISSIONER: Yes, yes.

25 MR. KROFT: Now, one way of dealing with that is

1 to answer back, to write a letter to the editor, to write
2 an editorial and say your tone is wrong and your facts
3 maybe were wrong. I -- that's how things are done in
4 democratic society. Another way of doing it though, and it
5 does work, you can say well, we don't like the kind of
6 reaction we're getting to this information, so we're going
7 to, we're not going to release the information, because
8 maybe if we don't tell them all of the information, then
9 the tone will be different. Now whether we call that
10 manipulation, whether we call it structuring, whether we
11 call it managing, it is government using restrictions on
12 the flow of information so that people don't say things
13 that the government officials find offensive.

14 THE COMMISSIONER: Yeah, that's, that's fine. I
15 like your alternatives --

16 MR. KROFT: Okay.

17 THE COMMISSIONER: -- better.

18 MR. KROFT: And that, that does bring me to, to
19 your role, because of course, underlying all of this is
20 that balancing that my friends talked about and this has to
21 be -- before you go to this kind of a, a interference with
22 a Charter right, you need to make sure not only that it's
23 warranted, but also there's no other way of achieving the
24 goal. And I want to talk about your role in that context,
25 because you're leading this process. And I want to suggest

1 to you, Mr. Commissioner, that you, with your counsel, you
2 have all of the necessary tools to ensure that witnesses
3 are treated fairly and I think this came up earlier in our
4 discussions, not, not mine, but with my friends. You, you
5 have the platform and the authority to make interim and
6 final reports. You have the last word. And it's obvious,
7 by your appointment and, and then the appointment of your
8 counsel, that the people of Manitoba, through its
9 government, have confidence that your report is going to be
10 complete, fair and balanced and that you are going to run
11 these proceedings in a way that is fair and that treats
12 people with respect. And I've see that.

13 A very similar argument about -- was made to the
14 Cornwall Commission, the Cornwall inquiry, which is at tab
15 18 of our book of authorities and I want to take you to
16 that. Tab 18, page 13.

17 THE COMMISSIONER: Page 13?

18 MR. KROFT: Yeah, so tab 18 --

19 THE COMMISSIONER: Yes?

20 MR. KROFT: -- page 13. This is the --

21 THE COMMISSIONER: I know the case.

22 MR. KROFT: Yeah. Now, you'll, you'll recall
23 that this was a case where the argument, the unsuccessful
24 argument, for a publication ban had to do with protecting
25 somebody who, who they said qualified as an innocent, who

1 shouldn't be embarrassed. And I -- page 13, after
2 rejecting that argument, the top of the page, the Court of
3 Appeal points out as follows:

4

5 "The employee's counsel ..."

6

7 THE COMMISSIONER: What paragraph?

8 MR. KROFT: It's at the very top, it's the --
9 it's a continuation, actually, from the paragraph --

10 THE COMMISSIONER: Wait a minute. Have I got the
11 right case here?

12 MR. KROFT: Page 18 --

13 THE COMMISSIONER: Tab 13 --

14 MR. KROFT: No, I'm sorry, tab 18.

15 THE COMMISSIONER: Yes, okay.

16 MR. KROFT: Page --

17 THE COMMISSIONER: Just a minute.

18 MR. KROFT: -- 13.

19 THE COMMISSIONER: Just a minute.

20 MR. KROFT: Just give me a minute, I may have --

21 THE COMMISSIONER: No, I --

22 MR. KROFT: -- the wrong --

23 THE COMMISSIONER: -- just -- tab 18 --

24 MR. KROFT: -- you know, just give me, just give
25 me a minute before I send you on a --

1 THE COMMISSIONER: That's Cornwall all right, but
2 there's no page -- oh yes, I have page 13, yes, okay. I've
3 got it.

4 MR. KROFT: Yeah, now I don't. I will give you
5 the cite in a moment. I, I seem to have lost it. But it,
6 it, it really goes back to the point that I just made, that
7 you have the tools and the other counsel who are sitting
8 here, and are sitting in the Commission, counsel for the
9 various parties who have concerns are here and their job is
10 to make sure that this hearing is conducted appropriately
11 and fairly and that you have the information you need, so
12 that you can present a fair report with fair conclusions
13 that, in a democracy, we trust, that the public will
14 understand. If we don't trust that, we're in trouble.

15 And, and I'm, I'm sorry, it is on page 13, at the
16 top and, and their point here is, and I'll just read it,
17 it's at the top of, in that first paragraph:

18

19 "... 'one cannot presume that the
20 public, equipped with the
21 reminders of the Moving Party's
22 acquittal, will jump to any [fair]
23 or unfounded allegations about the
24 Moving Party.' The Commissioner
25 also indicated that the employee

1 could object to evidence of the
2 specifics of the allegations and
3 indeed later made rulings and
4 redacted certain documents to that
5 end."

6
7 So in other words, the Commissioner has the tools
8 to make sure that the perceived harm doesn't happen and to
9 say that somehow children are going to be harmed is to
10 presume that a whole lot of people aren't going to be doing
11 their jobs. And, and I know, from hearing the quality of
12 counsel in this courtroom and, and hearing the inquiry so
13 far, that's not a worry. So that's what I have to say
14 about the last of the arguments, the managing public debate
15 argument.

16 Which takes me to number six, which is the issue
17 of filming. And I know I'm short of time, so I'm going to
18 be quick on this, perhaps at the risk of making you do some
19 more reading than you, you might have hoped to be able to
20 do. But you correctly pointed out, on the first day of
21 this application, that the Supreme Court of Canada case,
22 CBC v. Canada, that we circulated just before Wednesday,
23 made it clear that, in fact, the filming, that type of
24 expressive activity, is covered by Section 2(b) of the
25 Charter.

1 In that particular case, and you clearly read, if
2 you recall that the media challenged some regulations that
3 were issued by the court and then by the government, which
4 restricted filming and interviews in courthouse halls, to
5 particular areas. And prohibited the broadcast of the
6 official audio tapes that the court recorders make. And
7 the court held that those activities were covered by
8 Section 2(b) of the Charter, they're protected expression.
9 The court then applied the Oakes test, to say that those
10 particular rules issued by the government of Québec,
11 although they breach Section 2(b) of the Charter, were
12 reasonable limits in a free and democratic society.

13 So I'm suggesting to you that that case is
14 authoritative and recent and says that the filming is a
15 constitutionally protected right.

16 It's interesting, in coming to that conclusion,
17 that the court, the Supreme Court, considered the issue of
18 the, the, the traditional role of filming and of recording
19 and coming to its conclusion, that these activities are
20 covered by Section 2(b). You can -- and I, I'm not going
21 to take you to it, but if you want to make a note, it's at
22 paragraphs 44 and 45 of the decision.

23 I'm referring to them because they point out that
24 the history of the institution is important. And when you
25 look at the affidavit of Cecil Rosner, what you will see,

1 and what you've already heard, is that it, the history of
2 public inquiries in this country are that they have a fixed
3 camera just as the protocol that has been proposed,
4 prescribes. This has happened in the, all of the inquiries
5 in the last couple of decades in Manitoba and there's a
6 list of other inquiries from the Westray Mine, to the
7 inquiry that's going on in B.C. about the missing women,
8 the child death, a forensic inquiry in Ontario where
9 children and child welfare issues did come up. The
10 Sinclair Inquiry here, which gave rise to our child welfare
11 system that we're now talking about, they were all filmed.
12 So the history of this institution, the normal role of this
13 institution is exactly what the protocol is that you have
14 put forward as, as suggestion.

15 And the question before you is whether you should
16 make an exception to this traditional means of
17 communicating the proceedings of a public inquiry to the
18 public. That's what you need to decide and that's what
19 you're being asked to do.

20 Now, in the CBC case that we looked at, because
21 it was a regulation, they applied the Oakes test. This, of
22 course, is a request for a discretionary order, so the,
23 the, the compliment to that, when we're dealing with
24 discretion, as opposed to a statute, is the
25 Mentuck/Dagenais test. And so, I submit to you that just

1 like when you're deciding whether to ban publication of the
2 names, if you're being asked to ban communication through
3 the traditional method of filming in a public inquiry, you
4 apply the Mentuck/Dagenais case and all of the arguments
5 that I made over the past day and however much we've used
6 today, those all apply and I'm not going to repeat them,
7 because the same result comes.

8 I, I do though, want to say a few things about
9 what the courts have said about the particular medium of
10 film. And I want to say this, first of all, in that CBC
11 case, if you look at -- and, and, and, and we won't read
12 through this, because I'm cognizant of time, but paragraph
13 52 and 53, when you are thinking about this, the Supreme
14 Court responded to an argument that was made that this
15 shouldn't be covered because a written description is good
16 enough. A newspaper article is good enough. And, and the
17 Supreme Court said no, it is different, a film, an audio,
18 that's not the same. It doesn't convey the same meaning,
19 it doesn't convey the same information and they referred to
20 it, the fact that the courts of appeal, in this case, have
21 made a particular point of saying that the reason why we
22 don't interfere with trial judge decisions on matters of
23 evidence and credibility is because they're in a privileged
24 position. This is what the Supreme Court said. And we
25 can't now suggest that a transcript provides the same

1 evidence as, as a film or an audio. That would be going
2 against everything we say about trial judges and the
3 importance of not interfering with them. You'll find that
4 at paragraph 53. I've told you about that.

5 And I'm going to give you another cite to the
6 evidence, but I'm not going to ask you to go there. But
7 it's the cite of Ms. Gosek. You'll recall she was put
8 forward by the faculty as an expert witness.

9 THE COMMISSIONER: Yes.

10 MR. KROFT: And make a note of page 15, question
11 57 to 62. Because there, she explains why she teaches her
12 students that reading a report is not enough, that they
13 have to observe the non-verbal clues, that that's critical
14 to understanding the truth of the situation in the social
15 work context.

16 So my friend's evidence agrees with what the
17 Supreme Court says, which is that the information that is
18 conveyed through film is different. It has more contact,
19 more information and it is important.

20 The other case that I circulated to you was the
21 Aboriginal Peoples Television Network case, APTN.

22 THE COMMISSIONER: Yes.

23 MR. KROFT: Now this was a case where the APTN
24 station made an application to film proceedings at a Human
25 Rights tribunal.

1 THE COMMISSIONER: Yes.

2 MR. KROFT: And the Human Rights tribunal said
3 no, you can't film the proceedings and there was an
4 application to quash that decision, which was successful.
5 The Federal court said that the decision the tribunal made
6 not to allow cameras was unreasonable. So they didn't go
7 so far as to say whether cameras should be allowed, they
8 simply said it should go back because what you did was
9 unreasonable when you dismissed the application. Try
10 again.

11 And it is interesting to look at some of the
12 reasoning of the Federal court, because it really applies
13 very, very closely today. And I, I'm going to take you to
14 page 5 of that case, if you have it in front of you --

15 THE COMMISSIONER: I have.

16 MR. KROFT: -- paragraph 14. And about --

17 THE COMMISSIONER: Yes.

18 MR. KROFT: -- halfway through that paragraph
19 you'll see the words there "primary concern".

20 THE COMMISSIONER: Yes.

21 MR. KROFT: Okay. Mark that. This is the court
22 talking about why it is that the people opposing filming
23 didn't want filming. And they, they were arguing,
24 according to the Federal court:

25

1 "Their primary concern was that if
2 their testimony was taken out of
3 context, it would portray them in
4 a negative light and damage their
5 working relationships with First
6 Nations [and] persons and
7 agencies."

8

9 Well, that, that's kind of familiar.

10

11 "None of the proposed witnesses
12 expressed concern that their
13 testimony would be affected by the
14 presence of a camera ..."

15

16 Which is the case here as well.

17

18 "... or otherwise expressed any
19 concerns relating to the fairness
20 of the hearing. None of the
21 potential witnesses were
22 named ..."

23

24 Exactly like here, the people who are going to be
25 testifying under what is requested as a ban are not named.

1

2

"... and no evidence was provided
directly from them regarding their
concerns."

4

5

6

Well, that's what we're dealing with here. And
then it -- if you go over to paragraph 18, which is at the
bottom of page 6, you'll see the words:

7

8

9

10

"The government witnesses ..."

11

12

THE COMMISSIONER: Yes.

13

MR. KROFT: Federal court says:

14

15

"The government witnesses would be
testifying about policies and
decisions made regarding the
provision of child welfare
services. Information about these
policies and decisions is already
publicly available through several
reports ..."

16

17

18

19

20

21

22

23

24

25

Which it would be, by the way, if you, your,
yourself permit publication of the evidence, which you

1 will. And then they go through how it's available.

2 And then if we go to 19:

3

4 "The interests of people living on
5 reserve in observing the
6 proceedings at issue are more
7 direct than those of the general
8 public in observing a criminal
9 trial."

10

11 So they're distinguishing a court case.

12

13 "The proceedings will decide
14 whether large numbers of
15 geographically dispersed people
16 have experienced discrimination
17 [in that case]."

18

19 But it's the same here with the constituency
20 that's interested in this case, in large part, and there's
21 evidence to that effect.

22

23 "The proceedings directly
24 implicate the human rights of
25 APTN's intended audience."

1 All of that is applicable to the decision you
2 need to make today. And so we say this is a Charter issue,
3 the Dagenais/Mentuck test applies and no convincing case
4 has been brought before you to suggest that you should
5 deviate from the long established tradition for public
6 inquiries in this country. And that's what I have to say
7 about filming.

8 THE COMMISSIONER: Thank you.

9 MR. KROFT: I'm now moving to the relief sought,
10 number 7.

11 Now, I'm a little unclear, having heard my
12 friends, about exactly whether everybody is on the same
13 page as to what the proposed publication ban is. We have
14 what I think is an agreed, amongst the applicants, an
15 agreed formulation, or partial formulation in, in the, tab
16 13 of the ANCR motion, reply motion brief, or their, or, or
17 their tabs to it. I have a copy for you; why don't I just
18 give it to you? I have an extra copy.

19 THE COMMISSIONER: All right. I, I have that,
20 but I, that's handy. And this is --

21 MR. KROFT: So this is, this is what the
22 applicants have submitted to you --

23 THE COMMISSIONER: It's found in, in --

24 MR. KROFT: The ANCR --

25 THE COMMISSIONER: -- ANCR brief --

1 MR. KROFT: -- reply.

2 THE COMMISSIONER: -- ANCR reply brief.

3 MR. KROFT: Yes, it is, tab 13. And what they
4 did was they marked up the media protocol that was
5 circulated to counsel, to show what, the changes that they
6 are proposing you make. And the relevant provision for our
7 discussion this morning is number 7. And what we have
8 here --

9 THE COMMISSIONER: What, what -- you're, you're
10 talking about relief claimed?

11 MR. KROFT: Yeah, relief, what they want you to
12 order.

13 THE COMMISSIONER: In, in the, relief claimed in
14 the initial motions brought by them?

15 MR. KROFT: Well, no, they, they each claim
16 different relief, overlapping in some respects, not in --

17 THE COMMISSIONER: In their motions?

18 MR. KROFT: -- others, in their motions and Ms.
19 Walsh asked them if, if it would be possible for them to
20 get together --

21 THE COMMISSIONER: Yes.

22 MR. KROFT: -- to have one form of order that you
23 might grant if you were persuaded --

24 THE COMMISSIONER: Yes.

25 MR. KROFT: -- to grant it.

1 THE COMMISSIONER: Yes.

2 MR. KROFT: They did that and they produced this
3 document and the form that they produced it in was a markup
4 of the protocol that this Commission had circulated. And,
5 and Mr. Saxberg explained that, and I think Mr. --

6 THE COMMISSIONER: I just, I just didn't see
7 point number 7 addressing the relief claimed.

8 MR. KROFT: Well, that's the issue that I'm
9 exactly going to raise. It partially addresses it and this
10 is why I'm not clear either, because it, it, it, it, when
11 it says about publication bans, it says if there's a
12 publication ban:

13

14 There will be a ban on the media
15 publishing, broadcasting,
16 streaming, or otherwise
17 communicating by television,
18 internet and radio, in print, or
19 by any other means, the name, face
20 or identity of any such witness.

21

22 Now, I think I heard that at least as far as this
23 goes, that's what the publication ban would look like if it
24 applies to a witness. But what it doesn't address and I
25 think you're going to want to hear more on it from my

1 friends, is to who that applies. What witnesses does that
2 apply to? And, and there is something remarkable about
3 this particular application that, that is relevant and that
4 I want to bring to your attention and that is that the
5 applicants have elected not to tender any evidence about
6 their individual circumstances in this case. They've
7 relied solely on general evidence about the role of
8 professional child welfare staff in the child welfare
9 system and they've put all of the professional witnesses
10 essentially in the same basket. So this ban, if you were
11 to grant it, would apply regardless of whether the witness
12 was a frontline social worker or a supervisor.

13 THE COMMISSIONER: Well, are, are you -- you're
14 lumping all applicant counsel into concurrence with that
15 point?

16 MR. KROFT: What I'm telling you is I don't know.
17 I'm really raising the question. I'm disturbed if this is
18 the case. But they've really given you no evidence, or,
19 or, or direction as to whom this should apply to. They
20 have said, in their evidence though, for example, Ms.
21 Kehler explained, and this is certainly the MGEU's
22 position, as articulated in the affidavits and in the
23 cross-examinations, it is the MGEU position that the ban is
24 going to apply to all social workers, whether they see
25 clients or not. Whether they are testifying about this --

1 THE COMMISSIONER: Well, I, I thought Mr. Smorang
2 was making the application on behalf of the 24 that he
3 represents.

4 MR. KROFT: He is.

5 THE COMMISSIONER: All right.

6 MR. KROFT: That's, that, that is true. But
7 we -- I -- the, the, the, the difficulty that --

8 THE COMMISSIONER: And then Mr. Saxberg has three
9 or four others that he has communicated --

10 MR. KROFT: Correct.

11 THE COMMISSIONER: -- to Commission counsel.

12 MR. KROFT: Yes.

13 THE COMMISSIONER: And then --

14 MR. KROFT: And, and I'm assuming Mr. Kahn has
15 also done the same thing.

16 MS. WALSH: Yes, I've -- 24 from Mr. Smorang, six
17 from Mr. Saxberg and two from Mr. Khan.

18 THE COMMISSIONER: From Mr. Cochrane, yes.

19 MS. WALSH: For a total of 32 witnesses.

20 THE COMMISSIONER: All right.

21 MR. KROFT: All right. So, for example, Mr. --
22 let's use Mr. Smorang, he represents the biggest bundle.

23 THE COMMISSIONER: Yes.

24 MR. KROFT: Mr. Smorang has not identified the
25 particulars of the people, except to Ms. Walsh,

1 confidentially. But Ms. Kehler in her --

2 THE COMMISSIONER: But they're social workers.

3 MR. KROFT: Well, they're, they're -- no,
4 actually not. They were social workers at one time. For
5 example, Ms. Kehler indicates that some of the, one or two
6 of them, in any event, have left the field.

7 THE COMMISSIONER: But their contact with the,
8 with the Sinclair case was in the role as social workers.

9 MR. KROFT: Or supervisors, correct.

10 THE COMMISSIONER: Of social workers.

11 MR. KROFT: Correct.

12 THE COMMISSIONER: And they wouldn't be
13 supervisors if they weren't social workers.

14 MR. KROFT: Correct. But the arguments about the
15 future -- I mean, they may well be saying that even after
16 retirement, even after five years, even if they're now
17 running an oil company, they still need this protection in
18 order to avoid harm to children. I think that is what
19 they're saying. It's an argument that is important. It's
20 an argument that was specifically dealt with in the Mentuck
21 case, because that's what the police officers in that case
22 were asking for. And you'll remember I read to you that
23 portion and I've referred it to you, you have it in your
24 notes, where the Supreme Court said we're not going to do
25 that. We're not in the business of permanently banning

1 publication.

2 THE COMMISSIONER: Well, I think Mr. Smorang has
3 identified how many of his 24 are still on the front line
4 and, and how many are --

5 MR. KROFT: He had, he, he has -- what he hasn't
6 done is told us what they're doing. For example, you, you
7 have the obligation, under the Mentuck test, to use the
8 least restrictive means. So even if you were persuaded
9 that some order were required, you would then have to say
10 what's the minimal order I could make? Do I really, for
11 example, need to make this order in respect of supervisors
12 who actually don't go out and speak to, to people? Do I
13 really need to make this for people who just work in a
14 government office? What about somebody who only meets with
15 a client once or twice a year? Is that necessary? You'd
16 need to ask yourself all those questions to comply with the
17 Dagenais/Mentuck test, but you don't have that information.

18 THE COMMISSIONER: Well, are you, are, are you
19 telling me that what you've identified in paragraph 7 of
20 that document is the sole reference in that document to the
21 nature of the ban?

22 MR. KROFT: My understanding, and again, you're,
23 you're asking me about relief I'm opposing, not the relief
24 I am seeking --

25 THE COMMISSIONER: Well, you, you, you've, you,

1 you put that in front of me.

2 MR. KROFT: I have put that in front of you and
3 my understanding is that what number 7 says is whoever is
4 going to be subject to any ruling that you make on a ban,
5 Section 7 is going to apply to. What that doesn't speak
6 to, in Section 7, is who, who is subject to the ban.

7 They are asking you to make subject to the ban
8 the people that they have identified to Ms. Walsh.

9 THE COMMISSIONER: Yes.

10 MR. KROFT: You have no information -- no
11 information is an exaggeration, I'm sorry, you have very
12 little, almost no information about the, any of these
13 people individually. You have no -- there, there's no
14 personal information, no issue of stress, no psychological
15 reports, but also no work information. You don't know
16 which of those people, none of us know, whether -- sits
17 behind a desk most of the day, as opposed to somebody who's
18 every day out in the field.

19 Now, the law says that you have to --

20 THE COMMISSIONER: Well, well, am I not correct
21 that, that those 32 all, at some time, had some contact
22 with the Phoenix Sinclair file while the child was in, in
23 government care?

24 MR. KROFT: I, I think that's correct. I mean,
25 I'm assuming that's correct. I can't, I can't answer that.

1 I don't know --

2 THE COMMISSIONER: All right.

3 MR. KROFT: -- anything about them.

4 THE COMMISSIONER: Then, then if that is
5 correct --

6 MR. KROFT: Yeah.

7 THE COMMISSIONER: -- then isn't, aren't, then
8 don't we then have two categories? Those that continue as
9 social workers and those that have left the field?

10 MR. KROFT: Well, that's not what the evidence
11 says, because there's, there's actually all kinds of
12 different levels of social work that Ms. Kehler describes
13 in her affidavit in some detail. And one of the questions
14 is, is it -- even if it were necessary to ban some
15 identities for some period of time, is it necessary to ban
16 all of them? Do the supervisors have to be included? But
17 we, we don't know who they are. I've had no opportunity to
18 cross-examine --

19 THE COMMISSIONER: Well, I --

20 MR. KROFT: -- on that.

21 THE COMMISSIONER: -- just for, for the sake of,
22 of getting some consensus on this --

23 MR. KROFT: Yes.

24 THE COMMISSIONER: -- if we were to adjourn for
25 15 minutes, Mr. Smorang, Mr. Saxberg, Mr. Cochrane, can

1 you, in, in conference with Mr. Kroft and Commission
2 counsel and whoever else wants to join, reach some
3 consensus on who you're asking this ban for, as
4 individuals?

5 MR. KROFT: Well, well, I think we've done --

6 THE COMMISSIONER: Not, not, not identification
7 of them, but, but if, through categories. Can, can you,
8 can -- is, is this something you can reach agreement on?

9 Mr. Smorang?

10 MR. SMORANG: Happy to try.

11 THE COMMISSIONER: Mr. Saxberg?

12 MR. SAXBERG: I believe so.

13 THE COMMISSIONER: Mr. Cochrane?

14 MR. KHAN: Mr. Khan, actually.

15 THE COMMISSIONER: Yes, Mr. Khan.

16 MR. KHAN: It certainly wouldn't be a problem
17 (inaudible).

18 THE COMMISSIONER: Sorry. Well, well we, well,
19 we'll see if we can't get that -- yes, sir?

20 MR. FUNKE: Mr. Commissioner, Funke for the
21 monitor. I share Mr. --

22 THE COMMISSIONER: Come up to the mic please.

23 MR. FUNKE: I apologize, it's somewhat premature,
24 but I was going to be making very similar submissions when
25 I had an opportunity to speak as well and I have some

1 specific concerns with respect to the relief sought by
2 counsel on behalf of ANCR and the authorities.

3 THE COMMISSIONER: Well, you'd certainly be in
4 the conference.

5 MR. KROFT: What I would propose, Mr.
6 Commissioner, you, you've raised a, a suggestion, let me
7 move on and continue, so we can get this done. We can deal
8 with this at a break and hopefully make some progress along
9 the lines you've asked for.

10 THE COMMISSIONER: All right.

11 MR. KROFT: So, so --

12 THE COMMISSIONER: So I, I will expect that to
13 occur, we'll be adjourned and if we need --

14 MR. KROFT: Yeah.

15 THE COMMISSIONER: -- a little extra time, we'll
16 take it. But I'm conscious to give the others the
17 opportunity to, the podium.

18 MR. KROFT: Exactly. The, the next question,
19 dealing with the relief as set out here, is who is the
20 media? You, you touched upon this. Does it include just
21 the commercial media? Does it include political or
22 charitable organizations? What about people who have their
23 own web pages or comment pages, or blog pages? Does it
24 include people who, who blog and tweet, or have discussion
25 boards? The point in raising these questions is that

1 they're something that you need to, to consider. We had a
2 little incident this morning with Mr. Brodbeck. It doesn't
3 help anybody, not my clients and none of the applicants, if
4 people don't know what they can do and what they can't do.
5 And if it's not clear who can do what, it tends to chill
6 public discussion that, that, that, that is intended to be
7 generated by this whole process. And it is a -- when they
8 say the media can't do it, I, I raise the question who is
9 the media and what's the definition going to be? They have
10 not proposed anything. I'm not going to define it for
11 them. I'm leaving it to you as a question, but I'm
12 suggesting you may want to ask them about that. Can I go
13 home and e-mail my wife? Can I e-mail 10 of my best
14 friends? Can I e-mail a hundred of my best friends?
15 Because there's the very act that Mr. Smorang pointed out
16 to you, community on all kinds of different sites, some run
17 by the media, some run by the aboriginal organizations,
18 some run by the welfare, child welfare organizations, where
19 people can interact and you're going to have to be quite
20 clear, if you wish to make an order, who it covers and who
21 it doesn't.

22 THE COMMISSIONER: Well, well, in, in, in Mr.
23 Smorang's motion, he, he's asking for and order that:

24

25 The Commissioner prohibit any form

1 of publishing, broadcasting, or
2 otherwise communicating, by
3 television, internet, radio, in
4 print or in any other means, the
5 name, face, identity of any
6 witness at the inquiry who is or
7 was a social worker, as well as
8 the name of any social worker
9 identified in documents produced
10 at the inquiry.

11

12 MR. KROFT: Yes.

13 THE COMMISSIONER: Well, how, how much further do
14 you think we have to go than that?

15 MR. KROFT: So, if you make that order, and Ms.
16 Walsh sends you an e-mail over the internet, referring to
17 one of the witnesses who's going to come the next day,
18 she's breached your protocol. Is that what's intended?

19 I asked Ms. Cochrane about that. That's now what
20 she intended. Let's look at what, what, what she intended.
21 If you -- do you have Ms. Cochrane, page --

22 THE COMMISSIONER: Well, but she's not, I mean,
23 she's just a witness.

24 MR. KROFT: Well, but, but --

25 THE COMMISSIONER: She, she's not -- or she's got

1 -- she's, she is represented by counsel here, or, or her,
2 her, there's someone who's filed that affidavit on her
3 behalf from Intertribal, I think. I'm, I'm right, are I
4 not, Mr. Khan? Yeah, yeah.

5 MR. KROFT: It is, but, but, but I'm just going
6 to read this to you, because I think it's relevant. I
7 think, when you hear it, you'll understand why I'm telling
8 you it's relevant. I asked Ms. Cochrane:

9

10 "I take it you understand that
11 members of your community,
12 regardless of what happens with
13 this application, will be free to
14 attend?"

15

16 And she says:

17

18 " A Yes.

19 Q And from your affidavit,
20 I take it that members of your
21 community have a particular
22 interest in attending?

23 A Yes.

24 Q And so you would assume
25 that a number of them will attend?

1 A Yes.

2 Q You are not seeking to
3 somehow prevent them from talking
4 to their friends, or neighbours,
5 are you?

6 A No, I am not.

7 Q Or their families?

8 A No. I am not.

9 Q You understand that
10 regardless of what the media
11 publishes, once the inquiry starts
12 and your community members attend,
13 they will be free to talk about
14 all of the things that go on in
15 the hearing room?

16 A Yes.

17 Q And your ..."

18

19 THE COMMISSIONER: And I think Mr. Smorang told
20 me and, and he, he accepts that there's no way of
21 controlling that.

22 MR. KROFT: Well, you, the, the order that you --
23 the, the wording of an order that you just read to me makes
24 it illegal to do what Ms. Cochrane understands will be
25 legal.

1 THE COMMISSIONER: Well, let me ... Just repeat
2 that again?

3 MR. KROFT: The wording that you read to me from
4 Mr. Smorang's motion --

5 THE COMMISSIONER: Yes.

6 MR. KROFT: -- would make illegal what Ms.
7 Cochrane, what, I assume Ms. Walsh, when she writes to you
8 about witnesses, believes is legal. It means you can't
9 name a witness in an e-mail. That's what that says.

10 THE COMMISSIONER: Well, that's another matter
11 that's going to have to be resolved then.

12 MR. KROFT: Yeah, it, it's going to have to be
13 resolved. It's very difficult. This comes up all of the
14 time.

15 I'll tell you another matter that's going to have
16 to be resolved, what constitutes communication of identity.
17 You, you, you read that there. Easy enough to say well,
18 don't say Commissioner Hughes, can't say the word Hughes
19 on, when you write an e-mail. Okay. But if you say the
20 fellow who's chairing the Commission? We're dealing with
21 some, in this case, child welfare workers who, one, one or
22 two, or, or three in a, in a particular community; can you
23 say where they came from? Where they went to school?
24 Where they're now working? Whether they're retired? Is
25 that, is that communication of identity? What does it

1 mean?

2 THE COMMISSIONER: Well, now, look, these matters
3 are going to have to be resolved, but the, the issue that
4 other counsel hadn't had the chance to speak to yet is, is
5 whether there should or should not be a publication ban.

6 MR. KROFT: Well, let me tie that then to that
7 question, fine.

8 THE COMMISSIONER: And, and I, I -- if these
9 problems have to be resolved and you may be right that they
10 do, I'm, don't want to spend the day resolving them. I
11 want to hear from those who have come here for the
12 opportunity of, of opposing the motion and I want to hear
13 the replies from counsel who spoke yesterday.

14 MR. KROFT: Fair enough.

15 THE COMMISSIONER: And then, I think then you'll
16 have to find a, a time or a mechanism of determining these
17 points you're raising with respect to the extent of the
18 ban.

19 MR. KROFT: And, and I, I hear what you're
20 saying, I completely understand what you're trying to
21 achieve and I will just bring it right back to the question
22 that you've addressed as being the central one. I agree
23 with it, should there be a ban.

24 THE COMMISSIONER: Yes, and --

25 MR. KROFT: And the problem, the --

1 THE COMMISSIONER: -- and, and, and I'll ask
2 Commission counsel to take the lead responsibility in
3 trying to coordinate the, those other questions that have
4 to be answered that would have to have application if
5 there's going to be a ban.

6 MR. KROFT: Now, let me tell you though why what
7 you've just logically said creates an issue in respect of
8 whether to grant a ban or not, whether there should be a
9 ban, because it ties back. This isn't a matter of detail
10 and drafting.

11 In the Dagenais case and I'm, I'm not going to
12 make you go to it, because I know you want me off of here
13 and I'm happy to leave, but if you look at paragraph 90 of
14 the Dagenais case, if you make a note of that --

15 THE COMMISSIONER: Yes?

16 MR. KROFT: -- the court says before a judge
17 makes a publication ban, the judge has to consider whether
18 it's going to work, whether it's going to really achieve,
19 in the real world, the purpose. They refer to it as the
20 efficacy and they say that even if, in theory, a ban would
21 be nice, it would be justified by the Mentuck and the
22 Dagenais test, if, in the real world -- and they talk about
23 all the things I've just talked to you about -- in the real
24 world, it isn't going to work, you shouldn't make the ban.
25 They say this:

1 "These concerns about the efficacy
2 of some publication bans fit into
3 the analytical approach under the
4 common law rule outlined
5 previously at several stages,
6 since it is necessary to consider
7 how efficacious a publication ban
8 will be before deciding whether a
9 ban is necessary, whether
10 alternative measures would be
11 equally successful at controlling
12 the risk of trial unfairness, and
13 whether the salutary effects of
14 the ban are outweighed by its
15 negative impact on freedom of
16 expression."

17
18 And what I'm saying to you is that if what Ms.
19 Cochrane says is correct, and if it's going to be okay for
20 people to e-mail and do all of that stuff, if the
21 information is going to be out there anyway, that goes
22 right to the question of whether it's appropriate to even
23 issue the ban in the first place. And I'm making the
24 submission to you that regardless of what the ban, whether
25 the ban is implemented or not, it is going to be extremely

1 difficult for you to form an order without closing this
2 place completely down, which will, which will have the
3 effect that you intend, even if you think that the effect
4 is justified otherwise. And that is something you need to
5 consider under the Dagenais/Mentuck test, when you're
6 deciding whether to grant a ban.

7 THE COMMISSIONER: Well, I can't prevent people
8 talking when they leave this room, having sat here and
9 heard the evidence.

10 MR. KROFT: Well, can you prevent people from
11 e-mailing their families? Ms. Cochrane thinks they should
12 be able to -- when you say talk, we're talking about
13 communication. The problem is that what Mr. Smorang
14 drafted for you talks about a, a, a common form of
15 communication, whether you talk or you send a text, you've
16 done the same thing.

17 THE COMMISSIONER: Well, I, I won't be making an
18 order that stop people talking what they heard in the
19 courtroom when, when it's an open courtroom for them to, to
20 hear and attend.

21 MR. KROFT: I wouldn't think so. But on the
22 wording there, I think you might be doing a lot more than
23 you think you're doing and I'm suggesting that once you
24 start thinking about how actually to implement this ban,
25 which we argue is not even necessary.

1 THE COMMISSIONER: So you're saying that an
2 e-mail is print?

3 MR. KROFT: And it's, and it's sent over the
4 internet. With the same effort -- Mr., Mr. Smorang talked
5 to you about these blogs and tweets --

6 THE COMMISSIONER: Well, look, I think we should
7 deal with, with the, hear the other counsel on their
8 position with respect to the application for the ban and,
9 and let counsel reply to, to that issue and then the scope
10 of the ban, we'll have to deal with before the end of the
11 day as a separate issue.

12 MR. KROFT: Okay. And, and, and then, in
13 fairness to them, I'm going to raise one more question, I'm
14 not going to make an argument on it. But it has to do with
15 this question and I'm going to leave it with you: If a
16 media outlet knows the identity of somebody who was
17 involved in the Phoenix Sinclair case, as a result of their
18 own research, they didn't learn it here, is your ban going
19 to be intended and you, you need to say this, because it's
20 a real question, does it mean that information that they
21 have from another source, that they could publish today,
22 they can't publish after they take the stand? Those are
23 the real questions that newsrooms are going to be dealing
24 with.

25 THE COMMISSIONER: Well, I'll be taking some

1 guidance from Commission counsel to, for assistance on
2 this. And, and I'm sure they've noted that and when we get
3 to the extent of the ban later in the day, those questions
4 will have to be addressed.

5 MR. KROFT: Yes. All right. I'm going to move
6 on. I have one --

7 THE COMMISSIONER: You mean you're, you're not
8 through?

9 MR. KROFT: Well, if you tell me that you're not
10 going to order my clients to pay the costs of Ms.
11 Wotherspoon --

12 THE COMMISSIONER: Oh, okay. No, I'm not going
13 to tell you that.

14 MR. KROFT: Well, then I'm going to have to say
15 something about that.

16 THE COMMISSIONER: All right. All right. It's
17 on your agenda, I guess.

18 MR. KROFT: That's the, that's the only
19 miscellaneous item I have and then I have a brief
20 conclusion and I should be finished in, in less than five
21 minutes.

22 On the costs of Ms. Wotherspoon: The MGEU has
23 claimed reimbursement from the media for the costs of
24 flying her in. I simply say that the Mentuck case makes it
25 clear that it's the tribunal that bears the burden,

1 ultimately, of scrutinizing a publication ban and the fact
2 that the, my media group stepped up to the plate and I've,
3 I've, I've said this before, takes some pressure off of
4 this Commission and off of the tribunal, one which the
5 Mentuck case clearly says would have had to have been dealt
6 with by you and, and your counsel, but for our
7 participation. They've stepped forward on a voluntary
8 basis, without funding, to do something that I'm
9 respectfully suggesting is something that otherwise, that,
10 that you would have to do. And the, the MGEU is getting
11 any reimbursement that ought to come, (inaudible) the
12 public interest intervenors, which is what my clients are,
13 from the Commission.

14 I also make one other point on this issue --

15 THE COMMISSIONER: You're saying the Commission
16 should bear that cost?

17 MR. KROFT: I'm saying if, if, if there is, if,
18 if it is a reimbursement that's justified, it shouldn't
19 come from public interest intervenors who aren't getting
20 funding and who are doing work that otherwise the
21 Commission and its counsel would have to do. That's
22 question one, or point one on the cost issue.

23 On -- two, on the cost issue, you've heard me on
24 the issue of Ms. Wotherspoon's qualifications and I'm
25 submitting that Ms. Wotherspoon, in fact, was not qualified

1 to give the report she brought. That had that been
2 addressed, there would have been no necessity for a cross-
3 examination and that therefore, the MGEU claim for
4 reimbursement, whether it's from my clients, or from the
5 Commission, is weak.

6 Those are my two points on that and I'm going to
7 conclude now.

8 My conclusion is this, that after commissioning a
9 number of private reports, that the government has decided
10 it's necessary to have a public inquiry. I've said to you,
11 the taxpayers are investing millions of dollars into the
12 inquiry and it's our submission to you that it will not be
13 a public inquiry if the most important witnesses, the
14 public officials, are allowed to testify behind the curtain
15 of a publication ban. My friends argued for their period
16 of time that the best interests of children are paramount
17 and I'm saying to you, Mr. Commissioner, you don't have to
18 choose between the best interests of children and
19 democratic principles. That's a false choice. There's no
20 conflict between those values. The choice, the only choice
21 that you have today is whether this is going to be a public
22 hearing or something less and the media group is submitting
23 that this hearing should be public.

24 And unless you have any questions, you will be
25 pleased to know that I've just finished number 9.

1 THE COMMISSIONER: Thank you, Mr. Kroft, for your
2 presentation.

3 Yes?

4 MS. WALSH: Mr. Commissioner, two matters then.
5 Did you want the applicants to meet with me to determine
6 more specifically the categories of witnesses to whom
7 they're asking the publication ban to apply? Or would you
8 want to hear from them first?

9 THE COMMISSIONER: I think I'll hear from them
10 first and, and leave that until later in the day --

11 MS. WALSH: Okay.

12 THE COMMISSIONER: -- in light of the other
13 developments. I thought when there was only the one issue,
14 but there are more than one. So I think it, it would be
15 best we hear counsel in their submissions and, and then
16 deal with that.

17 MS. WALSH: The other thing is, I did send Mr.
18 Brodbeck an e-mail asking if he could be here for 1:30. He
19 has replied, indicating that he has a commitment this
20 afternoon, but he's here this morning and we'd be prepared
21 to come speak with you. So would you like to do it now, or
22 after the break?

23 THE COMMISSIONER: After the break.

24 MS. WALSH: Okay.

25 THE COMMISSIONER: So we'll adjourn now for 15

1 minutes.

2 MS. WALSH: And then we'll start with, with Mr.
3 Brodbeck --

4 THE COMMISSIONER: We'll, we'll, we'll deal --

5 MS. WALSH: -- appearing in front of you?

6 THE COMMISSIONER: -- we'll deal with that and
7 then we'll go to, I guess, Mr. Gindin's next?

8 MS. WALSH: Yes.

9 THE COMMISSIONER: All right.

10 MS. WALSH: Thank you.

11

12 (BRIEF RECESS)

13

14 THE CLERK: Please be seated.

15 THE COMMISSIONER: Commission counsel.

16 MS. WALSH: Mr. Commissioner, standing at the
17 lectern is Mr. Brodbeck, about whom we were speaking this
18 morning. He has come at your request to deal with the
19 issue that Mr. Smorang raised at the outset of this
20 morning's proceedings, and that is the perceived violation
21 of our media protocol. The aspect of the protocol which
22 we're dealing with is item number 8.

23 THE COMMISSIONER: You can be seated, sir, till
24 we're ready to chat with you.

25 MR. BRODBECK: Here or --

1 MS. WALSH: Right there.

2 THE COMMISSIONER: Right there, sure.

3 MR. BRODBECK: Okay.

4 MS. WALSH: Item number 8, which reads:

5

6 Still photography and video cut-

7 away shots will not be allowed.

8 Subject to the rulings of the

9 Commissioner, they may be

10 permitted at the start of the

11 public session.

12

13 This protocol, I'm advised by my staff, our
14 staff, was sent out to media outlets on July the 3rd, who
15 had registered with our office, and I've been given a list
16 of those outlets and that does include the Winnipeg Sun,
17 the assistant managing editor, an individual named Kevin
18 Engstrom.

19 The issue of Mr. Brodbeck's filming on Monday, as
20 I indicated, was brought to my attention by, I believe, one
21 of the counsel. I did go speak with Mr. Brodbeck at the
22 break. He indicated that he did not fully understand the
23 significance of the protocol. I clarified for him that
24 taking video photographs was not allowed, that the only
25 video that was allowed was through the feed, the common

1 feed, and the fixed camera, and that's the last of my
2 involvement with the matter.

3 And as you requested, Mr. Commissioner, Mr.
4 Brodbeck is, is here to answer your questions.

5 THE COMMISSIONER: Thank you. Mr. Brodbeck, you
6 heard Commission counsel give that background review. I
7 would like to say to you this, that, that I would not
8 proceed if it would be your wish to consult counsel of have
9 counsel come on your behalf. On the other hand, if you
10 wish to speak to it this morning, I certainly would be
11 pleased to hear from you.

12 The suggestion is that in violation of that rule,
13 you did publish a video of some of the proceedings here on
14 the, on the public site, which has been broadcast beyond
15 the room. The further suggestion is that that could have,
16 could have occurred after, that is, the posting could have
17 occurred after Commission counsel brought the particular
18 section of the policy to your attention.

19 Now, that is the background that has brought you
20 here at my request. And as I say, if it would be your wish
21 to not have this dealt with until you have the opportunity
22 to consult with counsel or with your managers at, of the
23 newspaper, I would certainly grant that to you.

24 MR. BRODBECK: I'll speak to it now, Mr.
25 Commissioner.

1 THE COMMISSIONER: Right. If you would, then,
2 please.

3 MR. BRODBECK: I wish to clarify that at no time
4 did I film or videotape the proceedings of this inquiry and
5 I've been falsely accused by Mr. Smorang in an e-mail that
6 was distributed this morning of videotaping the
7 proceedings. I, at no time, did so and I understand that
8 that would be a violation of the media protocol. What I
9 did do was videotape the room prior to the, prior to the
10 commencement of the proceedings and during break. I was
11 advised by Commission counsel after that, that in order to
12 do so, media would have to make an application to you, Mr.
13 Commissioner, to get your authorization and that, that
14 closed the matter. And I, I did not videotape anymore
15 after that. But I just want to clarify that I did not
16 tape, videotape or take stills of the proceedings. I just,
17 I want to make that clear.

18 THE COMMISSIONER: Well, what did you do?

19 MR. BRODBECK: I, I videotaped the room prior to
20 the commencement of the proceedings. So you were not in
21 the room, Mr. Commissioner.

22 THE COMMISSIONER: All right. Did, did you post
23 that publicly after Ms. Walsh had brought this to your
24 attention?

25 MR. BRODBECK: Yes, I did.

1 THE COMMISSIONER: I think that's the, that's the
2 problem, that you would have done that when you knew what
3 the protocol was.

4 MR. BRODBECK: My understanding was that on a go-
5 forward basis that we would have to seek the authorization
6 of you, Mr. Commissioner. That's how I proceeded.

7 THE COMMISSIONER: Well, then when you had that
8 knowledge, why did you proceed to make the posting?

9 MR. BRODBECK: My understanding was that on a go-
10 forward basis, if I wanted to continue to videotape prior
11 to the commencement of the proceedings, that we would have
12 to get your permission. That's how I understood it. And
13 I, I should say that it is in keeping with past inquiries
14 that I've covered where cameras are allowed to come in and
15 shoot the room, to videotape what we call "B-roll" in our
16 industry, and then once the, once the proceedings commence,
17 all cameras are removed from the room or shut off.

18 THE COMMISSIONER: Is there anything else you
19 want to say?

20 MR. BRODBECK: That's it.

21 THE COMMISSIONER: You can take your seat. You
22 can take that seat.

23 MR. BRODBECK: Okay.

24 THE COMMISSIONER: Mr. Smorang, having raised
25 this matter, would you wish to speak to it?

1 MR. SMORANG: Only, Mr. Commissioner, to provide
2 you with a little bit more information, which is that on
3 the posting we can see that it was posted at 8:07 p.m. that
4 evening. Ms. Walsh mentioned it was Monday morning. It
5 was actually Wednesday morning; it was the first day of
6 these hearings that Mr. Brodbeck was here and it was on
7 Wednesday evening at 8:07 p.m. that he made that posting.

8 Just in terms of, of your intention, Sir, you
9 are, of course, free to do as you wish. I didn't hear
10 anything resembling an apology from the gentleman. You
11 have a number of options available to you. You have case
12 law before you where, in similar circumstances, the
13 reporter was banned from attending the proceeding for the
14 balance of it. I'm not suggesting that, I'm just pointing
15 it out to you. You also have the power to demand and
16 require the Winnipeg Sun to publish an apology and I'm sure
17 you have other things available to you that you've thought
18 of, and I will leave it to you to deal with this matter in
19 whatever way you feel appropriate.

20 THE COMMISSIONER: Ms. Walsh, anything else you'd
21 like to say?

22 MS. WALSH: No, Mr. Commissioner, other than we
23 didn't discuss, and in part perhaps because I don't have
24 the technical foresight or, or information, but we didn't
25 discuss whether or not the information could be posted, so

1 that wasn't, that aspect wasn't a matter of discussion one
2 way or the other. But I trust that the matter has been
3 clarified now.

4 THE COMMISSIONER: Mr. Brodbeck, I do -- if you'd
5 like to stand. I do find it disappointing that you
6 proceeded to make that posting after that discussion. I
7 think you now understand the rules. They're going to be --
8 I expect them to be fully respected and obeyed. I'm
9 looking at this as a one-off situation where you, I think,
10 improperly made that posting after that discussion with
11 counsel. I think you understand now that there'll be no
12 more of that and what the rules are that are going to be
13 provided for, and with that I will not take carry the
14 matter forward beyond that.

15 MR. BRODBECK: Thank you, Mr. Commissioner, and
16 I, and I apologize for my actions and I will refrain from
17 taking any videotape in this room. Thank you.

18 THE COMMISSIONER: You may take your leave.

19 MR. BRODBECK: Thank you.

20 THE COMMISSIONER: As opposed to the media table.

21 Mr. Gindin, after a long wait, your, your turn.

22 MR. GINDIN: Thank you, Sir.

23 For the record, Mr. Commissioner, I represent Kim
24 Edwards and Steve Sinclair. Steve Sinclair is the
25 biological father of Phoenix Sinclair and Kim Edwards, some

1 would say, the de facto mother in terms of raising the
2 child.

3 Our position is that we want this public inquiry
4 to be exactly what the government ordered it to be, a
5 public inquiry in every sense of the word. It's my
6 submission that the people of Manitoba deserve a public
7 inquiry, again, in every sense of the word.

8 Mr. Smorang and Mr. Saxberg, in discussing their
9 arguments, didn't mention, if at all, the issue of public
10 perception and I submit that that is very important in your
11 decision. What would the public perception be if the
12 people who know about the system and who took part in it
13 would be able to hide behind a curtain of anonymity? I
14 submit that it wouldn't be positive. It would lead to more
15 suspicion and more detrimental effects than a publication
16 ban would.

17 Now, you've been listening to lawyers make
18 submissions for two and a half days. They've quoted all
19 sorts of cases to you and referred you to countless tabs.
20 I'm not going to do that. I don't see any reason to go
21 over the case law, it's pretty clear. I think it's time
22 for a little common sense and I hope to simply talk about
23 that for a while.

24 Now, the paragraph you referred to earlier, in
25 terms of what the applicants are asking for from Mr.

1 Smorang's brief, and I know that Mr. Kroft tried to deal
2 with this and there was some confusion as to what they're
3 really asking and how far it would go, but I feel that I
4 have to get into that a little bit because that's one of
5 the main reasons why I'm against a publication ban and that
6 is that it can't work and makes no sense.

7 Now, just looking at that paragraph, which you
8 just finished reading earlier, it says as follows, again:

9

10 That the Commissioner prohibit any
11 form ...

12

13 And I emphasize:

14

15 ... any form of publishing,
16 broadcasting or otherwise
17 communicating by television,
18 internet, radio, in print or by
19 any other means, the name, face or
20 identity of any witness who is or
21 was a social worker.

22

23 That's a pretty broad request. And it does use the word
24 "internet" and I say that people in the audience who are
25 hearing the names of witnesses wouldn't be able to send an

1 e-mail. That's communicating by way of internet. Just an
2 example of how wide that is.

3 Now, while I was listening to the arguments of
4 the applicants, I started to wonder how would it affect
5 your decision if you made a publication ban. And with a
6 little poetic licence, if I may, here's what it might have
7 to sound like, and I think it points out how difficult a
8 request is to follow. Now, they -- I think Mr. Smorang,
9 when he talked about what would be the effects of a
10 publication ban, he began by saying, well, first of all, on
11 you it would be zero, and I take issue with that.

12 Now, if there was a publication ban, your
13 decision, in the end, I submit may have to sound something
14 like this: You might say, the evidence of number 21 is
15 contradicted in some ways by the evidence of 22, but in
16 some ways it's corroborated by 23 and 24 to a lesser degree
17 perhaps than 25. Now, let's have a look at number 19. You
18 might say, I accept the evidence of number 19 but
19 unfortunately I can't tell you why. I'd like to tell you
20 it's because they have certain number of years of
21 experience, but if I do, it might identify them. I'd like
22 to tell you whether they're from Fisher River or Winnipeg,
23 but I can't say that either. I'd like to tell you that
24 they were in a certain capacity and therefore would know
25 certain things better than others, but that could be a

1 problem as well.

2 THE COMMISSIONER: And you're talking about, of
3 course, my final report?

4 MR. GINDIN: Yes. I'm talking about how your
5 final report may have to sound if you order this
6 publication ban. Now, that sounds pretty confusing to
7 people who aren't here to hear the evidence. And the odd
8 thing is that it sounds probably -- or may sound even more
9 confusing to the people who were here, because what's their
10 reaction going to be when they read your report? Well,
11 he's talking about number 22. Is that the one who was
12 pausing a lot before they answered? And is 24 the tall
13 woman or the short man? I can't quite recall. And is 21
14 the one who looked over at counsel on occasion to
15 apparently seek their help before answering? All of these
16 things are part of the demeanour that trial judges have
17 come to look at over the years, something that may be hard
18 for others to understand but that's definitely part of not
19 only being a judge, being a person in society when you talk
20 about what goes on. Body language, tone of voice, pausing,
21 eye movement; all of these things are very, very important
22 and yet we're expecting the public to sit back and say,
23 well, we'll somehow try to understand this process with a
24 bunch of numbers instead of names and not much information
25 about the people. Sort of like saying, read this book but

1 don't pay attention to the characters at all.

2 Doesn't seem to make sense, and that's why I
3 think it's a very, very difficult order to grant. And the
4 people here who have watched what goes on, do they -- take
5 my clients, for example: They've waited a long time for
6 this to happen, an awful long time, and here it is
7 happening. Can they not e-mail their family to talk about
8 who said what in the courtroom? Are they not entitled to
9 express opinions to whoever they wish? And if they wish to
10 do it by way of e-mail, which is what most of us do these
11 days, or by text instead of some huddled private
12 conversation, shouldn't they be able to? How do we control
13 those things? Every, very difficult. I think that, it's
14 my submission that this publication ban, if granted, would
15 make a mockery of the inquiry and the decision that we're
16 all expected and want to understand later. People being
17 afraid to discuss it because a name may slip out.

18 So I wanted to start with that example to
19 demonstrate the difficulty that you would have, and I know
20 that we decided perhaps we'll talk about it later, in terms
21 of specifics, but I'm not sure there is a way, quite
22 frankly.

23 Now, with respect to some of the submissions that
24 were made earlier, it's my submission that there have been
25 a number of errors in law, and I, and I'll try to be

1 general. Mr. Kroft has dealt with them specifically by
2 referring to cases.

3 One of the errors I submit, and again, it's been
4 dealt with, I won't dwell on it, but this idea that the
5 onus is not on the applicants. If the onus wasn't on the
6 applicants they wouldn't have to file a motion, would they?
7 We'd just sit back and have the respondents tell you why
8 there should be publication. It doesn't conform to the law
9 and it doesn't conform to the Charter of Rights law, which
10 is clear that if you're asking a court to infringe on a
11 right such as freedom of expression, then you have to
12 demonstrate why. That's obvious. That's trite law. We
13 don't need any quotes for that.

14 Also, this inquiry is not a child protection
15 hearing. We've heard counsel try to characterize it that
16 way, as if this is a child protection hearing. It's not.
17 If you were to have an inquiry about a murder trial and
18 what went wrong, would that turn the inquiry into a murder
19 trial? Would that mean that therefore, at an inquiry about
20 a murder trial suddenly the balance of proof is beyond a
21 reasonable doubt and all the strict rules of evidence
22 apply? No. It just happens to be an inquiry about a
23 certain subject.

24 This inquiry is about the child protection system
25 to some degree but more specifically, the order in counsel

1 says it's about Phoenix Sinclair and what happened to her,
2 and what social workers and other people may have done or
3 not done in that regard, and what can we do to prevent
4 things like this in the future. It may touch on the
5 system, of course, but it's really about Phoenix Sinclair.
6 And so that doesn't make this a child protection hearing.
7 It's an inquiry that may touch on those proceedings but it
8 doesn't turn it into one. And that's why the applicants
9 had to make a motion and that's why the onus is on them,
10 because this isn't anything other than an inquiry.

11 And I point out that, and I'm sure you're
12 familiar with, the decision of the Court of Appeal in the
13 matter of February the 16th, 2012 in response to the motion
14 made by MGEU about whether we should even be proceeding.
15 And Mr. Justice Freedman, without quoting all sorts of
16 portions, took great pains to explain just that, that an
17 inquiry is not an inquest, an inquiry is something unto
18 itself; it's governed by the Manitoba Evidence Act. There
19 may be some similar goals but it's different. Your mandate
20 is different, procedures are different, and he goes to
21 great length, and I say that from page 25 on he basically,
22 he discusses the differences. And I won't go into it but
23 it's there very, very clearly. He's made that decision and
24 so we don't want to confuse what we're doing with what,
25 perhaps, Mr. Saxberg or Mr. Smorang would like it to be, a

1 child protection hearing that has its own rules. But
2 that's not what it is. It's a public inquiry.

3 We've touched on the admissibility of certain
4 portions of affidavits. Mr. Kroft has very eloquently
5 dealt with that. I would simply say that I adopt
6 everything he said about all of those affidavits for the
7 same reasons as he's expounded upon, but I say further, and
8 I think he made this point as well, that regardless of
9 whether these certain portions of the affidavits are
10 legally admissible or not, they have very little weight, in
11 any event, for all of the reasons that he suggested. In
12 many ways they were relevant. It doesn't matter that some
13 people don't want to have an inquiry or that an inquiry is
14 difficult on some people. That's interesting and it's to
15 be expected. Nobody wants to testify anywhere. From my
16 experience of 40 years, I've never met somebody who wants
17 to come to court and testify. Nobody wants to, but they
18 have to. Nobody wants their name in the paper because they
19 don't know how they'll be portrayed. They might not agree
20 with it. Lawyers probably feel that way as well, but
21 that's not the way life works.

22 Can we ever control what people will write and
23 the opinions they'll give or the way they'll discuss
24 things? No. And, we don't want to. And Mr. Kroft has
25 dealt with that very effectively. And in essence, my

1 submission is that much of what you've read in these
2 affidavits filed by the applicants are speculative, vague
3 anecdotal and even self-serving. And one of the main
4 arguments, of course, is that there will be harm done to
5 the interests of children if you name anyone. And my
6 submission is that there'll be more harm done if you don't.
7 If you don't name anyone, then all social workers are
8 tainted, totally. If it's true what Mr. Saxberg has to
9 say, that no one did anything wrong, let's hear about it.
10 What's to worry about? If we're talking about trust and
11 people wanting to trust social workers, where will, where
12 will you see less trust than if we don't know who we're
13 talking about. So, let's just assume they're all bad?
14 They're social workers, we don't know one from the other,
15 we don't trust them to begin with, let's not trust them
16 anymore. But if you name these people and if most of them
17 did nothing wrong, as everyone suggests, that's terrific.
18 You'd think they'd want that to be known. There's a
19 difference between press before a hearing and press after a
20 hearing.

21 And I've been involved in criminal cases for a
22 long time and I see the accused being arrested and
23 apparently tried in the media, and it's frustrating,
24 certainly. And at the beginning, when no one knows what
25 happened, we're all speculating, there's emotion and people

1 say, I wonder what happened, could it be this, could it be
2 that. But once the hearing begins and you've got evidence
3 to rely on, it changes. Now people seem to concentrate,
4 well, this is what was said in court, I think it's
5 different. There's been a lot of wait for this thing to
6 begin and certainly a lot of speculation, and that, I think
7 common sense tells us, will change once we have a hearing
8 where evidence is being called.

9 It's my submission that keeping the names and
10 identities hidden will cause more suspicion and be more
11 detrimental to the child welfare system by tainting all of
12 them. It will lead to more distrust. We've heard in
13 affidavits that people are talking about how difficult
14 their job is and about a lot of things that people don't
15 seem to understand about their jobs. It's very difficult.
16 No one is going to dispute that. There's stress, there's
17 lots of judgment calls that have to be made. They're
18 dealing with something very, very important. Isn't it time
19 we all heard about that? Let them get up there and tell us
20 what's difficult about their job. If they're under-
21 staffed, under-funded, we will hear about it. If anything,
22 it will explain some of the pressures that they're on
23 without the suspicion of thinking we're talking about
24 everyone whenever something may have gone wrong.

25 We've seen affidavits where various affiants have

1 said that people will be afraid to go into this kind of
2 work. I think if you go into this kind of work you have to
3 be able to handle the pressure of public scrutiny. And if
4 you can't handle the pressure of public scrutiny, maybe you
5 should go into another line of work.

6 It's my submission that the safety of children in
7 future cases and our efforts to try and prevent problems
8 demands a full and public inquiry and that that is more
9 important than the discomforts of transparency.

10 To some extent the same logic applies to police
11 officers and lawyers and judges. They have to expect,
12 because they're dealing with such important things, that
13 there may be something in the paper they're not happy
14 about, but that's part of freedom of expression.

15 Mr. Smorang's brief begins -- and again in his
16 submission as well, reminding this hearing that it will be
17 open to the public. That's one of the things that was
18 said. And I say that is very small consolation to the
19 people who can't be here, which is pretty close to a
20 hundred percent. You could have this hearing at the
21 Winnipeg stadium where 30,000 people would come, there
22 would be hundreds and hundreds of thousands who wouldn't be
23 there. In fact, a very small group of people will be able
24 to attend, not people from remote communities, so we're
25 talking about a small group of people who are here and will

1 be listening and may have some restrictions about who they
2 can talk to about it and in what manner. And then, when
3 they hear the decision, as I pointed out earlier, they'll
4 be confused, if they weren't in the first place, about who
5 you're talking about.

6 Mr. Smorang, in his brief, his reply brief, and
7 I'm just going to refer to one paragraph near the end of
8 the brief, paragraph 89. I'm not sure it's necessary to
9 find it, I'll just read it to you in its entirety --

10 THE COMMISSIONER: All right.

11 MR. GINDIN: -- if that's fine.

12 THE COMMISSIONER: Yes.

13 MR. GINDIN: It says, at paragraph 89, page 29 --

14 THE COMMISSIONER: Paragraph 89, page 29?

15 MR. GINDIN: Page 29 --

16 THE COMMISSIONER: Yes.

17 MR. GINDIN: -- paragraph 89. It's a fairly
18 short paragraph. It says:

19

20 Further, counsel for Steven

21 Sinclair ...

22

23 which is myself:

24

25 ... have sought to prevent the

1 majority of Mr. Sinclair's child-
2 in-care file from being entered
3 into evidence at the inquiry
4 despite the file already having
5 been disclosed to the parties and
6 despite the fact that portions of
7 the file will likely be entered as
8 evidence in the form of admitted
9 facts. The parties have agreed to
10 extend to Mr. Sinclair this
11 requested right of privacy
12 notwithstanding that he is a party
13 to the inquiry yet Steven Sinclair
14 opposes the motion brought by
15 MGEU.

16

17 So I want to comment on that --

18 THE COMMISSIONER: Yes, I've read --

19 MR. GINDIN: -- statement.

20 THE COMMISSIONER: -- that paragraph.

21 MR. GINDIN: Yes. First of all, all counsel
22 agreed to doing it that way. We've also all agreed that if
23 something comes up during his testimony that requires
24 someone to look at the file and bring it forward, they're
25 certainly free to do that. They might have to ask

1 permission, but we would discuss it. Everyone agreed to
2 that.

3 The matters that are in that file that may not
4 come out are simply private irrelevant matters, clearly. I
5 don't think anyone would agree to set aside relevant
6 matters. And so if I was to raise with one of Mr.
7 Smorang's clients something personal and private and
8 irrelevant, I expect he'd object as well and deal with it
9 then. So I don't think there's any magic in the fact that
10 we've come to this agreement. And it's also significant
11 that Mr. Sinclair's name will be published and has never
12 asked that it not be. So I'm not so sure that that
13 paragraph really has any bearing on what's going on here.

14 Another disturbing feature, I submit, of some of
15 the -- or at least one of the affidavits, I think it was
16 submitted by Ms. Kehler, is a discussion of the
17 disincentive that some may have with regard to the truth if
18 their names were in the paper and with regard to coming
19 forward with helpful information if their names were
20 published. That doesn't sound a lot to me like being
21 concerned with the interest of children first. Sounds
22 pretty close to maybe being concerned with your own
23 discomfort first. And during the cross-examination of Ms.
24 Kehler, without really going into the details, to be fair,
25 she did say that I don't think it would affect the truth of

1 their evidence when I put that to her, but it might have
2 some effect on them, their willingness to come forward. I
3 find that somewhat disturbing, that that would be paramount
4 in anyone's mind if they had information that could help us
5 in our task, that they would think twice about coming
6 forward if the main concern is the interest of children in
7 the future.

8 It's my submission that there would be more harm
9 to children and families if everyone was left to speculate
10 and thereby become suspicious again of all social workers.

11 Mr. Saxberg, in his submission and in his reply
12 brief, paragraphs 35 to 38, seems to have decided the
13 inquiry --

14 THE COMMISSIONER: Just a minute now. In, in his
15 -- was it his brief or his ...

16 MR. GINDIN: In his reply brief.

17 THE COMMISSIONER: The reply brief. Yes.

18 MR. GINDIN: Paragraphs 35 to 38.

19 THE COMMISSIONER: Yeah.

20 MR. GINDIN: There's a heading, and I don't have
21 it right in front of me, but I think it's something like,
22 no misconduct by any social worker, was the heading; and he
23 tried to deal with his view that there won't be any
24 evidence of that. You may recall that, he was talking
25 about that.

1 And in fairness to him, he begins, at paragraph
2 35, by talking about this assumption that's already been
3 made by the public and perpetuated by the media, he says,
4 that social workers are to blame for the death, as though
5 there's some suggestion that they directly caused her
6 death. I don't think anyone's suggesting. We know who
7 killed poor Phoenix Sinclair. That's pretty clear. So the
8 issue is not whether social workers had a direct connection
9 to causing her death but more whether there's an indirect
10 connection. Clearly, I think that's common sense would
11 tell you that.

12 THE COMMISSIONER: Just let me look at that. I
13 have that here. I just wanted to look at what you're ...

14 MR. GINDIN: It's at page 13.

15 THE COMMISSIONER: Yeah. Yes, I have it. Now,
16 just repeat what you said.

17 MR. GINDIN: At paragraph 35 and the --

18 THE COMMISSIONER: Yes.

19 MR. GINDIN: -- following paragraphs --

20 THE COMMISSIONER: Yes.

21 MR. GINDIN: -- they seem to be suggesting and
22 wanting to make it clear that there won't be any evidence
23 here that any social worker had a direct, directly caused
24 the death of Phoenix Sinclair. I'm not sure that that
25 needs to be stated in any affidavit because no one is

1 suggesting such a thing. We all know that Phoenix Sinclair
2 was murdered by two people who are now serving a life
3 sentence. The question in this inquiry will likely be, as
4 you can see from the order in counsel, what role did the
5 social workers play prior to that. And if you change any
6 fact in a story, it affects the entire story to some
7 extent. If one or two things may have been done
8 differently along the way, who knows how things would have
9 ended, and so there may be some indirect result, and
10 that's, I think, one of the things we're going to be
11 examining. But the odd thing about the argument is that he
12 takes the position that we won't hear about any misconduct
13 and therefore we shouldn't put the names in the paper. We
14 should only put the names in the paper if there's serious,
15 serious misconduct that comes out. That's an odd sort of
16 circular argument. You would think that if we're not going
17 to hear about any misconduct, what are we worried about?
18 That's what the logic would dictate and common sense.

19 THE COMMISSIONER: But he's not saying, if there
20 is misconduct, that it's okay to go ahead and put the names
21 in the paper.

22 MR. GINDIN: Well, he came pretty close to saying
23 that if the, the evidence is pretty gross and if there's
24 serious misconduct, then maybe there's an argument for
25 putting it in the paper, but don't worry about that because

1 it's not going to happen. And I think that's what he said,
2 and he can clarify that if, if I'm wrong. There's
3 something about that that lacks common sense and logic. I
4 don't think it should depend on what you expect to hear.
5 That's not really the issue. You don't know what you're
6 going to hear.

7 And it's interesting that Mr. Khan takes the
8 opposite view, that his witnesses did absolutely nothing
9 wrong with nothing to hide, and therefore that shouldn't be
10 in the paper. So I don't know how you reconcile those
11 things. I don't think the issue is, let's look at the
12 evidence first and figure out whether it should be in the
13 paper. But you would think if Mr. Saxberg is correct, that
14 no social worker did anything wrong, what are we worried
15 about? You'd think the first thing he'd want is to let's
16 straighten this all out and let's hear about it, clearly.

17 Ms. Wotherspoon's affidavit, which has been
18 touched on already, gives the opinion that if the names are
19 in the paper, she points to some consequences that might
20 result: it may lead to more apprehensions. That's one of
21 the things that is argued. That's not always a bad thing.
22 Sometimes that's required; depends on the circumstances.
23 Should that have happened here? Might have changed
24 everything. We don't know. But that's not necessarily a
25 negative effect. Perhaps there needs to be, in some

1 circumstances, that. She says it will cause people to
2 focus on avoiding mistakes. Good. What's wrong with that?
3 People should focus on avoiding mistakes. It will make
4 them make better notes. That's good. It may well be an
5 issue in this inquiry that certain people should have had
6 more notes. Maybe they'd be able to remember some things
7 better. That's -- I don't see how that's a negative
8 consequence, to be more cautious. How can it be bad to be
9 more cautious?

10 I want to move on to some specific arguments made
11 by the various counsel. I'll deal with Mr. Smorang first.

12 He used, as an example, you may recall, the
13 Graham James case, and he quoted the decision of Judge
14 Carlson not allowing the press in that courtroom, and he
15 quoted a comment that talked about victims and not coming
16 forward perhaps. We're talking about victims of sexual
17 assault in the Graham James case. That's what he's talking
18 about as victims. I think there's a difference between
19 victims of sexual assault and witnesses at an inquiry who
20 will tell you about how they did their job. He talked
21 about the negatives of the order, if you made one. And
22 I've already dealt with the fact that his position was that
23 it would have no effect on you, and I have hoped to
24 demonstrate that it would affect your ability to make a
25 proper decision that's easily understood by all.

1 You may recall he listed three things that you
2 should consider when you're assessing the negatives of
3 making the order, and the first one was, what effect would
4 it have on you. And I think I've dealt with how it might
5 affect your decision and how cumbersome that would be.

6 He then argued that it would have no effect on
7 the hearing itself, and he said everyone in this room will
8 see and hear. Well, I've talked about the fact that
9 everyone in this room is a very, very small percentage of
10 the public. He talked about the effect on the media. One
11 thing that wasn't mentioned, and I've touched on this, is
12 what about public perception? Didn't really get into that.
13 That's very, very important, what's in the public interest
14 and what would the public perception be. That wasn't
15 mentioned.

16 He did say he wants members to feel safe in
17 saying what they really think. Is the opposite of that
18 that they might not say what they think if their name's in
19 the paper? I hope not. Maybe I'm -- have more confidence
20 in them, but I think we can hope that they'll come here and
21 tell us what needs to be told either way. I'd like to
22 think that they have the moral courage to do that.

23 A question was asked -- I'll move on to Mr.
24 Saxberg's submission, and I'm trying to be brief rather
25 than repeating their submissions, but --

1 THE COMMISSIONER: I appreciate that. By the
2 same token, I, I won't --

3 MR. GINDIN: Thank you.

4 THE COMMISSIONER: -- you know, if there are
5 things you want to say, then I want to hear them. But I
6 appreciate you not covering --

7 MR. GINDIN: Thank you.

8 THE COMMISSIONER: -- the same ground.

9 MR. GINDIN: Thank you, Mr. Commissioner.

10 Mr. Saxberg, in his submission, and I hope my
11 notes are accurate, said that the status quo is
12 confidentiality. It is in a child protection matter. The
13 status quo, however, in a public inquiry, is that it's
14 public. He asks the question: Is this inquiry an
15 extension of child protection hearings, and tries to
16 suggest that it is. And again, I have referred you already
17 to Freedman's decision and it clearly is not.

18 Actually, he goes on to say that the subject of
19 this inquiry is to examine the entire child protection
20 system, and the order in council doesn't say that. We may
21 get into a little bit of things in that direction, but the
22 order in council makes it very clear, we're here to talk
23 about Phoenix Sinclair and what happened. And this is a
24 known child, not some unknown child in some other type of
25 proceeding. This is a known child.

1 And if you take Mr. Saxberg's logic to its
2 conclusion, then any time we talk about the subject, an
3 inquiry should be private essentially is what he's saying.
4 It should no longer be a public inquiry.

5 He goes on to say, how will we deviate from the
6 inquiry world and how will we deviate from the child
7 protection world, acknowledging, of course, that they're
8 two different worlds. And that's my point, they are two
9 different worlds.

10 And he actually goes on to say that just because
11 this is a public inquiry, that's not the be-all and end-
12 all. That's an exact quote. And I say it is. It is.
13 That's what this is and that's what it should be. That is
14 the defining feature of this matter, that it's a public
15 inquiry.

16 THE COMMISSIONER: That's what you're saying?

17 MR. GINDIN: I'm saying. He said it's not the
18 be-all and end-all and we should go beyond that. It is the
19 be-all and end-all. This is a public inquiry.

20 And of course, the fundamental difference between
21 this and other matters is that this is a public inquiry
22 called by the government. It's not a child protection
23 hearing, it's not an inquest. It's called by the
24 government so that the people of Manitoba can hear about
25 what happened finally.

1 There was some comment made about the article
2 that said cowards. Recall that? That was referred to?

3 THE COMMISSIONER: Yes.

4 MR. GINDIN: We haven't heard about how that
5 affected anybody in particular. It's just an article that
6 was in the paper. I might not have phrased it that way,
7 might not be the best choice of words, but we haven't heard
8 of anybody being particularly affected by that since it
9 happened. There may be. I don't think that's the issue.
10 One of the other articles that was referred to was an
11 article by the Winnipeg Sun and it was tab 22. And I won't
12 have to quote it all but the one line that was quoted was,
13 someone in the Winnipeg Sun, I can't recall the journalist:

14

15 If they screwed up they should
16 have to face the music.

17

18 And that seemed to be objectionable, the comment that if
19 someone screwed up they should have to face the music.
20 Sounds right to me. Sounds like that makes a little bit of
21 sense to me. Now, of course, if they didn't screw up,
22 let's hear about that, too. Why taint them all with the
23 same brush whether they did or not? And doesn't even have
24 to rise to the level of screwing up. Maybe it's just a
25 simple ordinary error in judgment that many people might

1 have made. Well, let's hear about it clearly.

2 Mr. Saxberg goes on to compare this inquiry to
3 inquiries like the Taman Inquiry, recall that, and the
4 Sophonow Inquiry. And he said that there's a difference
5 there because in those inquiries there was a direct
6 relationship between the witness called and the issue like
7 the plea bargain, in Taman, or the witnesses called and the
8 wrongful conviction in Sophonow. Here, there's a direct
9 link between the witnesses being called who are social
10 workers and what they did. That's why we're here. So
11 there is a direct link between what they did or didn't do
12 or should have done or might have done and what occurred.
13 So I don't really get that sort of distinction or
14 comparison that was made there.

15 In the end, it's my submission, and Mr. Kroft's
16 as well, that there really is no rational connection
17 between naming people and harm to children. That has not
18 been established, and it has to be established. Counsel
19 for the applicants --

20 THE COMMISSIONER: Just a minute. You say no
21 rational connection between ...

22 MR. GINDIN: Naming witnesses and future harm to
23 children as a result, and that's what they would like to
24 argue but it's been demonstrated by Mr. Kroft quite amply
25 that there really is no rational connection. In other

1 words, the evidence just simply isn't --

2 THE COMMISSIONER: Between naming witnesses and
3 future harm to children?

4 MR. GINDIN: Yes. Yes. The counsel for the
5 applicants have argued that some of the media's previous
6 stories are fanciful and speculative, and I say that would
7 also characterize the evidence presented in various
8 affidavits.

9 Now, Mr. Saxberg, as well, talking about the
10 media, told you that there are some examples where names
11 aren't published in law. One is young offenders - and
12 they're children, of course, so that is no surprise;
13 victims of sexual crimes - not a surprise, makes perfect
14 sense, it's in the Criminal Code. SORs, legitimate SORs.
15 There's policy behind that. So those are the examples that
16 were given. None of them really apply to what we're here
17 to, to talk about.

18 And I think Mr. Saxberg pointed out an article in
19 the paper that said that Phoenix was under the supervision
20 of Phoenix for most of her life and he debates whether
21 that's accurate. It may not have been most, may have been
22 some. The issue may be, here, should it have been more.
23 That's still to be decided. That's not what you call some
24 sort of flagrant improper remark that's going to affect
25 anyone, but that's one of the issues that we have to deal

1 with.

2 Now, I'll move on briefly to Mr. Khan's
3 submission. He began by saying that apprehension is
4 harmful to children. It can be, of course. Not always.
5 Sometimes it might save a life. Maybe I got this wrong in
6 my notes because I'm having trouble understanding it, but
7 my notes say that his submission was that insufficient
8 evidence may still demonstrate a risk, which is like saying
9 insufficient evidence can be sufficient evidence. And
10 maybe I've got it wrong, but if that's what he said, it, it
11 can't be accepted as any legal principle for sure.

12 He did indicate that apprehension is, as far as
13 distress goes, about the same as a death. I don't think
14 anything comes close to losing a child. The only thing
15 close to the same distress as a death, to a social worker,
16 would be the way feels to a parent.

17 He gave the example of the accused in a criminal
18 case and how harm is done just by mentioning the name in
19 the paper, but the name still goes in. Certainly, there's
20 harm, specially if the person is acquitted or charges are
21 dropped, but the name goes in because people have the right
22 to know. So you can't say that it's only okay to put names
23 in the paper if there's lots of misconduct yet if there's
24 hardly any, it's also a good reason.

25 We've talked about suggestions that names in the

1 paper may lead to a high turnover rate. Well, we've also
2 heard that there's already a high turnover rate. That's
3 the way it is. Probably always will that be -- be that
4 way. It's a tough job.

5 The University of Manitoba, in a brief
6 submission, I'll just touch on this very briefly --

7 THE COMMISSIONER: Um-hum.

8 MR. GINDIN: -- argued that the system is under
9 review more than individual actions. If that's correct, we
10 shouldn't be worried about individuals' names coming out.
11 I say why not publish the names of individuals.

12 I'll just briefly comment on a couple of things
13 that Mr. Kroft has said. Obviously, I agree with all of
14 them.

15 At one point he gave you some law about why it is
16 that trials are public, that there's a tendency to promote
17 the truth when you have to testify in that public way.
18 Another way of putting it is, it's easier to lie in secret.
19 That's another way of saying the same thing in a more
20 direct way perhaps, but that's a concept we all understand.
21 I think it's just plain common sense.

22 He talked about what identity actually means, and
23 that it's not a mere detail. I emphasize that even more,
24 and I hope I've demonstrated that in my imagined decision
25 you might have to make without being able to identify

1 anyone or say anything that might identify them clearly and
2 how we are supposed to understand what it is that you're
3 saying.

4 We all hope that the public will understand the
5 job of social work better if you can relate it to real
6 people or human beings and have their experiences. We know
7 who they are. And if they have an explanation or something
8 to say about anything, we'll all listen to it and I'm sure
9 you'll give them all the respect they should have.

10 It's my submission that the only way that you
11 could rule in favour of the applicants would be to rely on
12 conjecture, speculation and hearsay and to somehow conclude
13 that it's in the public interest not to have names
14 published, that it's more beneficial than detrimental. And
15 again I reiterate that it seems logical to say that if you
16 don't name anyone, they are all tainted with the brush of
17 suspicion while they hide behind a curtain of anonymity and
18 we are left to speculate who's talking about what.

19 I've already dealt with the difficulties of and
20 the cumbersome nature of any sort of order that could be
21 made that would make any sense, and that's -- I know you
22 wanted to hear about that some other time, but that's
23 fundamental to whether it should be done. If it's
24 difficult to do and doesn't make a lot of sense, you have
25 to think about that in the first place, and I would urge

1 you to do that.

2 So in conclusion, I'll just reiterate that our
3 position is that what we want is a public inquiry, in every
4 sense of the word, and no reason has been demonstrated to
5 deviate from that position and we ask that you dismiss the
6 applications. Thank you.

7 THE COMMISSIONER: All right. Now, I guess, Mr.
8 Funke, you're next. Do you want to start now or an hour
9 from now?

10 MR. FUNKE: I leave that to you, Mr.
11 Commissioner. I can perhaps assist you in that regard by
12 advising that I anticipate that my comments may run closer
13 to 40 to 45 minutes so that if I were to start now it's
14 unlikely that I would finish my submissions prior to one
15 o'clock.

16 THE COMMISSIONER: Well, why don't we adjourn
17 till 1:15 and then bring you on.

18 MR. FUNKE: Certainly.

19 THE COMMISSIONER: Does that sound reasonable,
20 Commission counsel?

21 MS. WALSH: Certainly.

22 THE COMMISSIONER: All right. We'll, we'll stand
23 adjourned now till 1:15 and then you'll be on.

24 MR. FUNKE: Very good.

25 THE COMMISSIONER: Then we'll take the replies

1 and there's the SOR matter.

2

3 (LUNCHEON RECESS)

4

5 THE CLERK: Please be seated.

6 THE COMMISSIONER: All right, Mr. Funke, you've
7 waited patiently a long time, so the floor is yours.

8 MR. FUNKE: Thank you, Mr. Commissioner.

9 My name is Jay Funke. I'm here on behalf of the
10 Assembly of Manitoba Chiefs and the Southern Chiefs
11 Organization. With me this afternoon is Ms. Jessica
12 Saunders of our office, and as you may be aware the AMC and
13 the SCO have filed an application for expanded standing
14 during phases two and three of this inquiry, and I am
15 advised that that application is likely to be heard on the
16 24th of July.

17 Nevertheless the SCO and AMC continue at this
18 point in the proceedings to enjoy separate grants of
19 standing as interveners. Nevertheless a joint brief was
20 filed on behalf of the AMC

21 THE COMMISSIONER: Just move that mike a bit to
22 you, please.

23 MR. FUNKE: Sorry. Yeah. I was just saying that
24 despite the fact that the SCO and the AMC currently enjoy
25 separate grants of standing, as interveners in these

1 proceedings, a joint brief was filed on behalf of both of
2 the organizations as they are add-in with respect to this
3 application.

4 Just by way of introductions I earlier indicated
5 my name Jay Funke, but I'm also accompanied this afternoon
6 by Ms. Jessica Saunders, who's an associate with our firm.

7 So you no doubt had an opportunity to review our
8 brief, and appreciate the nature of our opposition to the
9 relief being sought by the MGEU, ANCR and the authorities,
10 and Intertribal CFS.

11 I can advise that I've had the benefit of
12 reviewing the briefs filed on behalf of both the media
13 group and by counsel on behalf of Kim Edwards and Steven
14 Sinclair, and upon hearing their oral submissions made
15 before you by counsel for both parties the AMC and SCO
16 endorse and adopt the positions as advanced on each of
17 their behalf. As a result I intend to confine my comments
18 this afternoon to two principle issues, and in doing so I
19 hope that I will be as brief as possible, and also avoid
20 treading on the toes of the arguments made by Mr. Kroft and
21 Mr. Gindin.

22 However, before I proceed to those comments I
23 wish to raise a concern regarding the relief sought by
24 counsel for ANCR and the Authorities insofar as it differs
25 from the relief sought by MGEU and Intertribal CFS on this

1 application.

2 Although I adopt --

3 THE COMMISSIONER: Just, just a minute. Let me
4 get that out. All right. That's not the motion, that's
5 the brief.

6 MR. FUNKE: What I'm going to be referring you
7 to, Mr. Commissioner, is the, the notices of motion filed
8 on behalf of the three applicants.

9 THE COMMISSIONER: Yes. It's, it's the
10 Authorities' and ANCR's motion?

11 MR. FUNKE: Well, actually I'm referring to all
12 three.

13 THE COMMISSIONER: All right. Well, that's --

14 MS. WALSH: MGEU --

15 MR. FUNKE: Intertribals, the Authorities -- and
16 ANCR and the Authorities.

17 THE COMMISSIONER: Wait a minute.

18 MR. FUNKE: Certainly.

19 THE COMMISSIONER: I think -- I've got them all
20 right here.

21 MS. WALSH: Thank you.

22 THE COMMISSIONER: And you take that back, yeah.

23 MS. WALSH: You don't need this?

24 THE COMMISSIONER: No. Sorry, Mr. Funke.

25 MR. FUNKE: No, that's quite all right.

1 THE COMMISSIONER: And you're, you're making
2 reference first to ...

3 MR. FUNKE: Just before I refer to those I just
4 wanted to finish my introductory comments, and that is
5 although I certainly adopt Mr. Kroft's comments this
6 morning with respect to the concerns he raised about the
7 relief being sought, the issue that I'm raising is somewhat
8 different insofar as it relates to the scope of the remedy
9 being sought by ANCR --

10 THE COMMISSIONER: Yes.

11 MR. FUNKE: -- and the authorities. Perhaps we
12 can start first by looking at the relief sought by MGEU.

13 THE COMMISSIONER: Yes, I can do that. I have
14 that.

15 MR. FUNKE: And we look at -- or this motion is
16 for an order. The wording that they used reads as follows:

17

18 That the Commissioner prohibit any
19 form of publishing, broadcasting
20 or otherwise communicating by
21 television, internet, radio and
22 print, or by any other means the
23 name, face or identity of any
24 witness at the inquiry who is or
25 was a social worker, as well as

1 the name of any social worker
2 identified in documents produced
3 at the inquiry.
4

5 If we look at the notice of motion filed on
6 behalf of ANCR the first order that they are seeking
7 replicates the language used in the MGEU motion, almost
8 identically with some minor grammatical changes, but
9 there's no distinction between the remedy that Intertribal
10 is seeking and MGEU is seeking.

11 It's not the case with respect to the remedy
12 sought by ANCR and the authorities.

13 THE COMMISSIONER: Except, except with respect to
14 a witness who consents. Isn't there a difference there?

15 MR. FUNKE: That is true. I'm not so concerned
16 about that.

17 THE COMMISSIONER: All right.

18 MR. FUNKE: I'm not so concerned about that. The
19 focus of my concerns --

20 THE COMMISSIONER: Well, I am concerned about
21 that, but --

22 MR. FUNKE: I appreciate that, but --

23 THE COMMISSIONER: Yes.

24 MR. FUNKE: -- but I'm prepared to rely upon Mr.
25 Kroft's and Mr. Gindin's --

1 THE COMMISSIONER: Yeah.

2 MR. FUNKE: -- submissions in that regard.

3 THE COMMISSIONER: Fair enough, fair enough.

4 MR. FUNKE: That wasn't the intent of my
5 comments.

6 THE COMMISSIONER: Right.

7 MR. FUNKE: My concern is with respect to how
8 counsel for ANCR and the Authorities have crafted the
9 remedy that they are seeking, and under the subheading
10 regarding witnesses of ANCR and the Authorities' brief it
11 starts off under sub-heading A, and it uses very similar
12 language with respect to the nature of the publication ban.
13 The concern that I have is with respect to the scope of
14 individuals intended to be caught by that publication ban,
15 and if you look at the phrasing that you've used in A(i)
16 they refer to a Child and Family Services employee who had
17 direct involvement in the delivery of services to Phoenix
18 Sinclair.

19 Now, that's a very different phraseology, it's
20 not specific in the sense that the MGEU and Intertribal
21 have crafted their relief sought in terms of the
22 individuals that they intend to be caught by the
23 publication ban, and the difficulty in our submission is
24 in, is in discerning precisely who ANCR and the Authorities
25 intend to identify by the use of those terms.

1 Now, although counsel for ANCR and the
2 Authorities have provided a list of the names of the
3 (inaudible) witnesses to Commission counsel they have done
4 so in confidence, and neither the parties, the interveners,
5 or you for that matter have any means of ascertaining
6 whether the individuals so proposed qualify for the
7 protection being sought on their behalf.

8 During oral submissions on Wednesday afternoon
9 Mr. Saxberg in fact further elaborated on the position of
10 ANCR and the Authorities by indicating that they were not
11 merely seeking a prohibition against the publication of the
12 identities of employees who provided services to Phoenix
13 and her family, who may testify before you, but also the
14 identities of those employed in management positions who
15 had involvement in the matter, but who would not be
16 properly identified as social workers. That was his
17 position in his oral submissions to you.

18 It is our submission that this raises a number of
19 distinctions which we submit must be clarified. The first
20 one is that the relief planned by ANCR and the Authorities
21 is not limited to the publication of the identities of
22 employees of CFS agencies, or rather refer simply to CFS
23 employees.

24 In that, in that case in our view the question
25 becomes is it the position of ANCR and the Authorities that

1 the ban would include the publication of the identities of
2 employees of CFS Authorities, as well as employees of CFS
3 agencies. Put that another way are they suggesting that an
4 employee of the CFS Authority ought to be considered a CFS
5 employee?

6 THE COMMISSIONER: You're talking about people
7 within the six, whose names were given to Commission
8 counsel?

9 MR. FUNKE: I don't know who they are because --

10 THE COMMISSIONER: No, no, I know, but you're
11 talking about those six people, or, or one or more of them?

12 MR. FUNKE: That is certainly possible, yes.

13 THE COMMISSIONER: No, but are you talking about
14 people beyond the six?

15 MR. FUNKE: Well, it's, it's difficult for me to
16 forecast what counsel for ANCR and the Authorities may
17 argue in the future. I, I don't know what their future
18 intentions are. My concern is that if, if in the future
19 they try to argue that this protection -- sorry,
20 publication ban should be expanded to include individuals
21 who are caught within that definition, but who are not
22 identified now, we would object to that of course, but I
23 have an additional concern, which is that of the six names
24 that have been provided to the Commission counsel there is
25 no way for the interveners, the other parties, or for you

1 for that matter, to be able to ascertain whether or not
2 those individuals are employees of CFS agencies, or may
3 they include employees also of CFS Authorities.

4 THE COMMISSIONER: But we are agreeing that we're
5 talking about those six as you address this point?

6 MR. FUNKE: For, for the time being, yes. Those
7 are the six --

8 THE COMMISSIONER: Yes.

9 MR. FUNKE: -- impugned names, that's correct.

10 THE COMMISSIONER: Yes, yes.

11 MR. FUNKE: So that's the first issue. Do we
12 know what they mean by CFS employees? That's a fairly
13 nebulous term.

14 The second aspect of that that causes concern in
15 our view is how do ANCR and the Authorities propose the
16 Commission deal with what constitutes in their terminology
17 involvement in the delivery of services, and in that regard
18 I direct you to ANCR's brief that they filed on April the
19 11th, this is not their reply brief but rather their
20 original brief.

21 THE COMMISSIONER: All right, I'll get that.
22 This is it. Okay.

23 MR. FUNKE: And I'm drawing your attention to
24 page 2, paragraph 5.

25 THE COMMISSIONER: The brief or the, the motion?

1 MR. FUNKE: The brief.

2 THE COMMISSIONER: Okay.

3 MR. FUNKE: Their original brief filed on April
4 the 11th.

5 THE COMMISSIONER: Tab 7, at tab 7. Just a
6 minute. Yeah. And, and where?

7 MR. FUNKE: Page 2, paragraph 5, under the
8 heading "Duties of the Authorities and ANCR".

9 THE COMMISSIONER: Page 2. Yes, I have it.

10 MR. FUNKE: Yeah. And remember the way they
11 phrased the relief that they're seeking is CFS employees
12 who had involvement in the delivery of services, so the
13 delivery -- involvement in the delivery of services is the
14 part that I'm focusing on at this point, and asking you to
15 turn your attention to, and if we look at what they've
16 included in their brief they have included the powers and
17 duty section under the CFS Authorities Act that sets out
18 which powers and, and duties an Authority has.

19 I'll just read from their brief at paragraph 5:

20

21 "The Authorities are the bodies
22 that are ultimately responsible
23 for administering and providing
24 for the delivery of child and
25 family services in Manitoba. They

1 have a number of specific duties
2 which are set out in the
3 legislation. These duties are
4 specifically set out in section 19
5 of The Child and Family Services
6 Authorities Act."

7

8 Section 19 says:

9

10 "Subject to the regulations, an
11 authority must, in respect of the
12 persons for whom it is responsible
13 to provide services under section
14 17 --"

15

16 And then it lists a number of duties and
17 responsibilities that they have, and I'll draw your
18 attention to the specific provisions that I'm focused on.

19 Sub. (e) says that the Authority is responsible
20 to:

21

22 "(e) ensure that the agencies it
23 has mandated under Part I of The
24 Child and Family Services Act
25 provide services and follow the

1 practices and procedures in
2 accordance with the standards
3 referred to in clause (c)."

4

5 And I ask you to think about that, and ask
6 yourself is that involvement in the delivery of services.

7 It's certainly arguable that it is.

8 Looking at subsection (g) the Authority is
9 responsible to:

10

11 "(g) ensure that child and family
12 services prescribed by regulation
13 are provided or made available,
14 and ensure that there is
15 reasonable access to services
16 generally."

17

18 Again I ask you is that involvement in the
19 delivery of services, and again I would suggest to you that
20 it's arguable that it is.

21 Sub. (h), sub. (i) and double (i) says that the
22 Authority is responsible for:

23

24 "(h) ensure that child and family
25 services are provided

1 (i) in a manner that is responsive
2 to the needs of the children and
3 families receiving the services,
4 and
5 (ii) where practicable, in the
6 language in which those children
7 and families ordinarily
8 communicate with each other."

9

10 Again the question is is that involvement in the
11 delivery of services, and I would suggest once again it's
12 quite arguable that it is.

13 Sub. (j), to:

14

15 "(j) cooperate with other
16 authorities, the director and
17 others to ensure that the delivery
18 of child and family services in
19 the province is properly
20 coordinated."

21

22 Again that seems to be involvement in the
23 delivery of services. Sub. (l):

24

25 "(l) ensure the development of

1 appropriate placement --"

2

3 THE COMMISSIONER: Between (i) and (l) what did
4 you give me?

5 MR. FUNKE: (j).

6 THE COMMISSIONER: (j). Yeah, well of course.
7 And not (k)?

8 MR. FUNKE: No (j).

9 THE COMMISSIONER: All right.

10 MR. FUNKE: (l).

11 THE COMMISSIONER: Yeah.

12 MR. FUNKE: To:

13

14 "(l) ensure the development of
15 appropriate placement resources
16 for children."

17

18 Again that would seem to suggest involvement in
19 the delivery of services. And, finally, subsection (n),
20 to:

21

22 "(n) supervise or direct the
23 supervision of children in care,
24 and receive and disburse money
25 payable for their care."

1 And I think it's without question that that is
2 almost certainly involvement in the delivery of services.

3 Now, I'm not suggesting that by any means that
4 that's an exhausted list of the powers conferred on an
5 Authority under section 19 of the Act, but these sections
6 demonstrate the extent to which an Authority is involved in
7 the delivery of services as phrased by counsel for ANCR and
8 the Authorities, all of which I submit serves to illustrate
9 the point that the scope of the relief sought by ANCR and
10 the Authorities may be much broader than it appears at
11 first glance, insofar as they have failed to clearly
12 indicate whether in their view CFS employees are limited to
13 the employees of agencies, or to indicate what activities
14 constitutes in their view involvement in the delivery of
15 services.

16 Neither of these issues were addressed in the
17 brief filed on behalf of ANCR and the Authorities, nor were
18 they addressed during Mr. Saxberg's oral submissions before
19 you, Mr. Commissioner.

20 Furthermore, counsel on behalf of ANCR and the
21 Authorities submit in their brief, and this is their reply
22 brief that I'm referring to now, submitted to you on the
23 25th of June. I'm referring to paragraph 50, which is the
24 final page --

25 THE COMMISSIONER: Paragraph 50?

1 MR. FUNKE: Page 17, the final page of their
2 reply brief.

3 THE COMMISSIONER: Yes.

4 MR. FUNKE: Paragraph 50, the very first line
5 says:

6
7 "The MGEU, ICFS and the
8 Authorities/ANCR are all seeking
9 the same relief."

10

11 Well, with respect, that's not correct. MGEU and
12 ICFS have confined themselves specifically to social
13 workers, and during his oral submissions to you on
14 Wednesday, Mr. Commissioner, when asked directly by you, is
15 ANCR and the Authorities limiting the remedy that they're
16 seeking to the class of individuals who are employed as
17 social workers, his response to you was, was clearly, no.
18 In fact he was specific. He said, no, we are also seeking
19 to protect those in management positions that may have been
20 involved in the delivery of services in this matter, what
21 would not be properly described as social workers.

22 So that's the concern that we have is that
23 although in their filed materials they claim to be seeking
24 the same relief as the other applicants in their
25 submissions, and in their notice of motion filed in this

1 matter, they're clearly seeking a much broader protection,
2 and our concern is that they are in fact seeking a
3 potentially overbroad definition of who should be afforded
4 protection under the publication ban currently being
5 considered. Depending on how those terms are interpreted
6 they could potentially include everyone from the mail clerk
7 at an agency all the way to the executive director of an
8 Authority.

9 THE COMMISSIONER: Providing they had something
10 to do with the Phoenix Sinclair file?

11 MR. FUNKE: Well, that's the problem. He says as
12 long as they were involved in the delivery of services in
13 this matter, and, and my point in reviewing with you the
14 powers of the Authority is that one can make the argument
15 that the Authority is involved almost inextricably in the
16 deliver of all services to all children in care under any
17 of the agencies within the Authority's mandate, so the
18 argument could be made that virtually anyone of the
19 Authority or the agency would be entitled to this
20 protection.

21 The concern is is that there's no mechanism
22 before you that allows you as the gatekeeper to assess
23 whether or not the names that have been provided properly
24 qualify for the protection that's been sought.

25 THE COMMISSIONER: That is those six names?

1 MR. FUNKE: That is those six names.

2 THE COMMISSIONER: So what are you suggesting we
3 do?

4 MR. FUNKE: That's a question that you should be
5 asking Mr. Saxberg.

6 THE COMMISSIONER: All right. He's likely
7 listening.

8 MR. FUNKE: Sorry?

9 THE COMMISSIONER: He's likely listening.

10 MR. FUNKE: I imagine he is. That's not a
11 problem for me to resolve. These are concerns that I
12 raise, and I suggest that, that you, Mr. Commissioner,
13 should have these foremost in your mind when you're
14 considering the application before you, and when Mr.
15 Saxberg rises to make his reply I anticipate that you'll be
16 asking him for his response.

17 The final concern that I have in that regard is
18 that none of the evidence relied upon by the applicants
19 purport to identify any deleterious effects that the
20 failure to grant a publication ban would have on CFS
21 employees who are not engaged in social work on behalf of
22 an agency. Again Mr. Saxberg clearly indicated that the
23 remedy they're seeking includes, and he doesn't say that
24 this is a, a perspective class of people, the people that
25 he's seeking this benefit for includes, as he describes

1 them, individuals in management positions who are CFS
2 employees involved in the delivery of children -- sorry,
3 involved in the delivery of services in this matter.

4 So our position is is that there's no evidence
5 before the court with -- sorry, before the inquiry --
6 before the Commission, I apologize, with respect to what
7 deleterious effects may befall the system, and place
8 children at risk should the identity of those managers be
9 disclosed. None of the evidence presented in support of
10 the applications before you speaks to that issue, so the
11 concern is is that ANCR and the authorities may be
12 attempting to seek a remedy for a wholly separate class of
13 employees without adducing any evidence in support of that
14 relief, and without addressing the distinctions between the
15 roles and functions of that class of employee compared to
16 those of a social worker in the employ of a CFS agency, so
17 those are our concerns.

18 First of all, if they're not social workers, and
19 they're managers what is the risk, what is the deleterious
20 effect that the publication of their names would have?

21 And, secondly, are some of these not CFS agency
22 employees, but rather are they Authority employees, and
23 where's the evidence to suggest that the disclosure of the
24 identity of an authority employee would place children at
25 risk?

1 So those are some of the concerns that I have in
2 reviewing the material, and hearing submissions before you,
3 Mr. Commissioner, and I, I draw these concerns to your
4 attention, as I say, ask that you give the matter your
5 consideration when you're contemplating your decision, and
6 during Mr. Saxberg's reply.

7 So I started off my comments by suggesting that I
8 had two main topics that I wanted to constrain myself to,
9 one of which is contained in my brief, and the other arises
10 in reply to the submissions made on behalf of the MGEU,
11 ANCR, and the Authorities, and Intertribal CFS in their
12 submissions.

13 The first deals with a topic that I covered in my
14 brief, as I say, and that is the relationship between the
15 public's right to know how a child could go missing for
16 nine months and without anyone noticing, and the public's
17 responsibility to ensure the well being, safety, security
18 and best interests of children.

19 THE COMMISSIONER: Wait a minute. I want to get
20 your brief out.

21 MR. FUNKE: Certainly.

22 THE COMMISSIONER: Well, I must have it here.
23 Yes, here it is. It was out all the time. Okay, go ahead.

24 MR. FUNKE: So I'm suggesting that there is a --

25 THE COMMISSIONER: What page are you at?

1 MR. FUNKE: I'm, I'm going to refer you to tab 1
2 of my brief.

3 THE COMMISSIONER: Right.

4 MR. FUNKE: And this is the media release --

5 THE COMMISSIONER: Yes.

6 MR. FUNKE: -- that was issued at the time of the
7 announcement of the, of the Commission, and, and I suggest
8 to the Commission that there is a interrelationship between
9 the notion of the public's right to know, as referred to by
10 Minister Swan when announcing the Commission, and that's
11 why I used the exact language that is contained in the news
12 release.

13

14 The public's right to know how a
15 child could go missing for nine
16 months and without anyone
17 noticing.

18

19 And the corollary to that, which is the public's
20 responsibility to ensure the well being, safety, security,
21 and best interests of children, so that's the first topic
22 that I'm going to address. I'm going --

23 THE COMMISSIONER: Where you addressing that in
24 your, in your --

25 MR. FUNKE: I'll get to that in just a moment.

1 THE COMMISSIONER: All right.

2 MR. FUNKE: I'm just, I'm just offering that
3 comment by way of introduction.

4 THE COMMISSIONER: Well then -- just, just spell
5 out that first point for me again.

6 MR. FUNKE: I'm saying that the Minister in
7 announcing the Commission cited the public's right to know
8 how a child could go missing for nine months, and without
9 anyone noticing, and I'm suggesting to you that there is a
10 corollary to that, that it's not just that the public has a
11 right to know, but the public has a responsibility to
12 ensure the well being, safety, security and best interests
13 of children, and I'll get to the authority for that in just
14 a moment.

15 The second topic that I'm going to address is the
16 relationship, if any, that exists between child protection
17 proceedings, under the CFS Act, and these hearings, and
18 what effect, if any, that may have on the application of
19 the Dagenais/Mentuck test. I can advise you, Mr.
20 Commissioner, that I anticipate spending somewhat more time
21 on the first topic, and somewhat less time on the second
22 topic, trying to avoid any duplications in submissions made
23 either by Mr. Kroft or Mr. Gindin in that regard.

24 Our submission is, is that you heard from counsel
25 for the various applicants, the media, Kim Edwards and

1 Steven Sinclair on this application, and although much has
2 been said about the right of the media to publish
3 information about these proceedings, and the possible
4 limits that you may impose on that, and to a lesser extent
5 there's been some discussion about the public's right to
6 know what happened, but so far no one has discussed the
7 responsibilities that the public have in the process of
8 this inquiry.

9 The SCO's names we submit that the public has an
10 overarching responsibility in matters involving child
11 welfare --

12 THE COMMISSIONER: What are reading from?

13 MR. FUNKE: These are just my notes. I'll get to
14 them in just a moment.

15 And that's reflected in both the declaration of
16 principles under the CFS Act and in the preamble to The
17 Authorities Act, so if you turn to --

18 THE COMMISSIONER: You're going too fast, I'm not
19 following you, so start that again.

20 MR. FUNKE: Sure. What I'm suggesting is that
21 the public has an overarching responsibility in matters
22 involving child welfare, and the source of that
23 responsibility can be found in the declaration of
24 principles under the CFS Act and in the preamble to The
25 Authorities Act, and I've provided those to you, Mr.

1 Commissioner at tabs 2 and 3 of my brief.

2 THE COMMISSIONER: The principles in the Act, and
3 what was the other?

4 MR. FUNKE: There's the declaration of principles
5 under the CFS Act --

6 THE COMMISSIONER: Yes.

7 MR. FUNKE: -- and the preamble to The
8 Authorities Act --

9 THE COMMISSIONER: To The Authorities Act, okay.

10 MR. FUNKE: -- and that appears at tab 3 of my
11 brief.

12 THE COMMISSIONER: Yeah.

13 MR. FUNKE: But dealing first with tab 2. So tab
14 2 sets out the declaration principles for The Child and
15 Family Services Act, and I direct you specifically to the
16 principles set out at numbers 1 and 10, the declaration
17 principles reads:

18

19 "The Legislative Assembly of
20 Manitoba hereby declares that the
21 fundamental principles guiding the
22 provision of services to children
23 and families are:

24 1. The safety, security and well-
25 being of children and their best

1 interests are fundamental
2 responsibilities of society."

3

4 And at number 10:

5

6 "The communities have a
7 responsibility to promote the best
8 interests of their children and
9 families and have a right to
10 participate in services to their
11 families and children."

12

13 I'm also suggesting under tab 3, in the preamble
14 to The Child and Family Services Authorities Act, similar
15 language is used, and that reads:

16

17 "WHEREAS the safety, security and
18 well-being of children and
19 families is of paramount concern
20 to the people of Manitoba;

21

22 WHEREAS parents, families,
23 extended families and communities
24 have a right and a responsibility
25 to care for their children and a
 right to receive preventive and

1 supportive services directed to
2 preserving the family unit."

3

4 So I'm suggesting that the declaration of
5 principles of the CFS Act, and the preamble to The
6 Authorities Act reflect the notion that it's not just that
7 the public has a right to know what's happening in the
8 delivery of services in this scheme, but rather has a right
9 for -- I apologize -- has a responsibility to ensure that
10 the system is responsive to those objectives.

11 THE COMMISSIONER: Responsibility to ensure that
12 what?

13 MR. FUNKE: That the system is responsive to
14 those objectives, that the system actually achieves those
15 ends. And I'll give you a moment just to finish your
16 notes.

17 And our position is is that whether in crafting a
18 declaration of principles or the preamble to The
19 Authorities Act whether the legislature uses the language
20 of society or community, or the people of Manitoba, what
21 they're talking about is the public, and they in those
22 provisions I have just read reflect and recognize the
23 responsibility that the public has in ensuring the safety,
24 security, well being and best interests of children and
25 their families throughout the province, and as a result

1 we're suggesting that insofar as the child welfare system
2 was established by these Acts, and has been created to
3 deliver the services to children and families that are
4 necessary to achieve the ends of these Acts these
5 principles recognize that it is to the public to whom that
6 system is ultimately accountable, as it is the public who
7 bears the ultimate responsibility of ensuring that these
8 goals are realized.

9 If that's the case we submit that in order for
10 the public to ensure that the goals are met the public must
11 be able to make a thorough, fair and informed evaluation of
12 the matter in which those services are provided, otherwise
13 no accountability exists to the public.

14 Furthermore we submit that to the extent to which
15 the testimony at this inquiry will evidence the extent in
16 nature of the services provided, or not provided to Phoenix
17 Sinclair and her family the public must be afforded an
18 opportunity to independently assess that evidence in a
19 liberal, unimpeded and comprehensive fashion in order to
20 determine whether the system did all that was reasonably
21 possible to ensure her safety, security, well being and
22 interest.

23 And, with respect, and I think this is a key
24 point that has to be made, counsel for MGEU and counsel for
25 ANCR and the Authorities to varying degrees during their

1 submissions, both in their briefs and orally before you,
2 suggest that the effect of the limitations imposed by this
3 publication ban wouldn't impinge on the principle of public
4 accountability insofar as they suggest, that the public
5 would know that the information denied to them was
6 available to you, and that this would be sufficient
7 assurances of accountability.

8 Now, specifically I'm referring to ANCR and the
9 Authorities' brief, this is their original brief at page
10 29.

11 Sorry, I said page 29, I meant paragraph 29.
12 This is what they have written:

13

14 "Moreover, no evidence has yet
15 been adduced to suggest that the
16 child welfare system would be
17 improved by reporting the names
18 and images of CFS workers who
19 provided services to Phoenix
20 Sinclair and her family. Quality
21 assurance and accountability
22 processes are in place in the
23 child protection system. If there
24 is a deficiency in this regard,
25 the Inquiry --"

1 Through you, Mr. Commissioner.

2

3 "-- will identify it and
4 recommend ways to fix the
5 problem."

6

7 So they say that's the way that accountability is
8 ensured, not through reliance upon the public to make that
9 assessment, but for you.

10 MGEU for its part makes similar comments at, at
11 paragraph 15 of their brief. They write:

12 THE COMMISSIONER: Paragraph what?

13 MR. FUNKE: Fifteen. This is their original
14 motion --

15 THE COMMISSIONER: Yes.

16 MR. FUNKE: Sorry, original brief, I apologize.
17 They write:

18

19 "Further, as gatekeeper of the
20 information gathered through the
21 Inquiry, the Commissioner will be
22 privy to all the important
23 information necessary to render a
24 thorough final report and will
25 know the names and identities of

1 all witnesses who publicly testify
2 before him. Nothing will be
3 hidden or kept from the
4 Commissioner, and the public will
5 know that. As such, the public
6 for whom this Inquiry is being
7 conducted, will be aware that
8 principles of openness,
9 accountability and public
10 confidence in the integrity of the
11 legal system will be maintained."

12

13 In other words trust us. And, with respect, we
14 submit that this entirely misses the point. Our submission
15 is is that the social workers who provided services to
16 Phoenix Sinclair and her family are not being called to
17 give evidence at this inquiry because as representatives of
18 the child welfare system they are accountable to you, Mr.
19 Commissioner, nor are they merely accountable to the agency
20 for whom they work, or the authority who has oversight over
21 that agency, or even to the provincial government itself.

22 Ultimately it is instead to the public whom they
23 serve, the people of Manitoba, that these workers in the
24 child welfare system, within which their services are
25 provided are accountable.

1 We don't deny that as the Commissioner of this
2 inquiry you possess a variety of powers to adduce evidence,
3 compel appearances before the inquiry, et cetera, but in
4 the end these workers and the system that they represent
5 are not accountable to you as you have no power or
6 authority to directly affect change to the child welfare
7 system if at the conclusion of this inquiry you feel that
8 such change is necessary to improve the system.

9 The only power you possess, Mr. Commissioner, in
10 that regard is to make recommendations, which may or may
11 not be implemented by the province. Further, there's no
12 guarantee that those recommendations even if implemented
13 will necessarily be implemented as you intended, or if they
14 are there's no guarantee that the public will agree with
15 the recommendations that you ultimately make, or the manner
16 in which those recommendations are implemented.

17 Ultimately if there are changes to the system
18 that are made or not made as a result of this inquiry,
19 which produces a system that no longer enjoys the
20 confidence of the public, it is open to the public to
21 replace the government with one that better reflects its
22 views and convictions regarding the delivery of child
23 welfare services, and it is because of this fundamental,
24 democratic power that the ultimate responsibility for
25 ensuring the security, safety, well being and best

1 interests of children vests with the public.

2 THE COMMISSIONER: And you say that arrives on
3 election day?

4 MR. FUNKE: Correct. We submit to that end the
5 public must be afforded an untrammelled opportunity to fully
6 assess the evidence adduced before the inquiry, otherwise
7 its ability to ensure the accountability of the very system
8 designed to achieve these ends will be compromised.

9 So assuming the publication ban is granted what
10 would the effect be of that ban on the public's ability to
11 assess the evidence, and in this regard I focus somewhat
12 differently than counsel who have presented prior to me,
13 and I'm not so focused on the names of the witnesses being
14 prohibited from publication. I'm much more concerned with
15 respect to the ability to show video on television, or
16 streamed over the internet, so if we start by examining the
17 media arrangements and communication protocol that has been
18 produced by Commission counsel, it indicates that on line a
19 broadcast screening of the proceedings will be permitted,
20 subject to a five minute delay and any other ruling that
21 you may make during these proceedings.

22 Without the ability to accommodate the public's
23 participation in these proceedings that would be afforded
24 by that streaming video it would be impossible for the
25 public to discharge its obligation to evaluate the services

1 provided, or not provided to Phoenix Sinclair and her
2 family, and assess whether in the circumstances of this
3 case the child welfare system operated sufficiently to
4 ensure, to the extent possible, her safety, security, well
5 being and best interests. And I say that for two reasons.

6 First, and this was something that was touched on
7 by Mr. Gindin, and, and also by Mr. Kroft in their
8 submissions, a significant portion of Manitobans do not
9 reside in close proximity to these hearings, and cannot
10 reasonably attend the proceedings in, in person. This
11 obviously raises an access to justice issue, but more
12 importantly without some form of being able to watch the
13 proceedings live it interferes with their ability to
14 perform an independent assessment of that evidence, and to
15 be better informed when it comes to, as you say, election
16 day.

17 We also submit that (inaudible) that the ability
18 to assess viva voce testimony is significantly enhanced by
19 the ability to directly observe the witness' demeanour in
20 delivering that evidence. It is for this reason that
21 appellate courts routinely show such deference to trial
22 courts, however, if the relief being sought were granted
23 much of the proceedings could not be broadcast in a manner
24 that would allow the public to observe the demeanour of the
25 witnesses giving testimony, and would therefore

1 significantly deprive the public of the opportunity to
2 properly assess that evidence, and that's because the
3 specific publication ban being sought prohibits the
4 likeness of that person from being broadcast, and the
5 proposed media protocol that the applicants have submitted
6 to the, to the Commission for your, your consideration
7 suggests that where one of those protected witnesses were
8 to give evidence there would be a notification offered in
9 advance, and the camera would -- instead of being directed
10 onto the witness would instead be deflected elsewhere, so
11 that their image would not be shown.

12 THE COMMISSIONER: But the voice would be
13 carried?

14 MR. FUNKE: The voice would still be carried, but
15 you were a judge for years, Mr. Commissioner, I don't need
16 to explain to you the significant advantage of being able
17 to observe the demeanour of a witness while they're giving
18 evidence. Certainly being able to hear their testimony is
19 better than reading a transcript, but being able to hear
20 and see them affords the assessor of that evidence a much
21 superior advantage in being able to assess what weight or
22 credibility that that witness ought to be afforded.

23 As a result the AMC and SCO submit that contrary
24 to the submissions of the applicants the publication ban
25 being sought is not a minimal interference with the

1 public's opportunity to conduct its own assessment of the
2 evidence tendered in the proceedings at this inquiry.

3 Now, in addition to the shared public
4 responsibilities that I've already discussed the province
5 has acknowledged the unique rights and responsibilities
6 that First Nations peoples have with respect to the
7 delivery of child welfare services and programs to their
8 community members. Following the report of the Aboriginal
9 Justice Inquiry of Manitoba, which has come to be known
10 simply as the AJI Report, the Aboriginal Justice Inquiry
11 Child Welfare Initiative was established. That in turn is
12 now commonly known as the AJICWI. Central to that
13 initiative were the memorandums of understanding entered
14 into between the province and First Nations' leadership.
15 One such MOU was signed between the province and the AMC,
16 and I have provided a copy of that MOU as part of my brief
17 in this matter at tab 4. I would ask that you refer to
18 that.

19 Now, the MOU reads as follows, and I'll just read
20 the first five paragraphs in the preamble:

21

22 1. Whereas the parties agree that
23 a process shall be established to
24 implement changes in the delivery
25 of Child and Family Services

1 programs in Manitoba based upon
2 the child welfare recommendations,
3 as set forth in the report of the
4 Aboriginal Justice Inquiry of
5 Manitoba, 1991 AJI report.

6 2. The parties acknowledge that
7 they are governed by the Child and
8 Family Services Act, and The
9 Adoption Act in the delivery of
10 Child and Family Services and
11 programs in Manitoba, in
12 accordance with the declaration of
13 principles as set forth in The
14 Child and Family Services Act, as
15 well as the purposes of The
16 Adoption Act as set forth in
17 Section 3 thereof.

18 3. It is acknowledged that
19 delivery of Child and Family
20 Services and programs to First
21 Nations people within Manitoba
22 must occur in a manner which
23 respects their unique status, as
24 well as their cultural and
25 linguistic heritage.

1 4. The family is sacred and the
2 first resource for the well being
3 of children.

4

5 And five and I submit that this is the most
6 important one.

7

8 5. The parties acknowledge that
9 the First Nations' people have a
10 right to control the delivery of
11 Child and Family Services and
12 programs for their respective
13 community members.

14

15 So I submit to you, Mr. Commissioner, that that
16 MOU is significant for a number of reasons, but for the
17 purposes of this application the most salient portions are
18 the acknowledgement of the applicability of the CFS Act in
19 paragraph 2, and the recognition of the right of First
20 Nations people to control the delivery of child welfare
21 services to their community members contained in paragraph
22 5, which I've just read.

23

24 Now, I suggest that the applicability of the CFS
25 Act is significant insofar as it acknowledges that the
recognition in paragraph 5 of the unique right of First

1 Nations people to control child welfare services operates
2 in addition to, and not instead of, their responsibility in
3 ensuring the safety, security, well being and best
4 interests of children throughout the province, so it isn't
5 -- it doesn't supplant the shared responsibility that First
6 Nations people have, as do all the other residents of
7 Manitoba, under the CFS Act and The Authorities Act. This
8 is in addition to the responsibilities that they also have
9 under those Acts, and that is with respect to the specific
10 control over the delivery of services to children and
11 families in their communities.

12 However, it's submitted that in order for First
13 Nations people to be able to exercise meaningful control
14 over the delivery of those services and programs to the
15 community members they must be afforded an opportunity to
16 examine the circumstances under which those services are
17 provided in an open, transparent and unfettered manner. As
18 a result we submit that the child welfare system therefore
19 owes a special duty of accountability to First Nations
20 people of Manitoba with respect to the services provided,
21 or not provided to its community members, and in the
22 context of this inquiry to Phoenix Sinclair and her family
23 both prior to and following her disappearance and death.

24 Because of the special rights and
25 responsibilities recognized in that memorandum of

1 understanding of the First Nation people to control the
2 delivery of those services we submit that there was a
3 fundamental obligation to facilitate their ability to
4 evaluate the evidence presented at this inquiry without
5 interference, so that they may not only assess the
6 recommendations that flow from this process, but also make
7 their own recommendations regarding changes to the delivery
8 of child welfare services to their community members.

9 As a result to the extent that the relief sought
10 interferes with the ability of First Nations people to make
11 those assessments it is not a minimal infringement on their
12 right to control the delivery of child welfare services to
13 the children and family members of their communities.

14 Now, that's not to say that there are never
15 appropriate limits on the First Nations people's right to
16 monitor child welfare proceedings, and we accept the
17 Dagenais/Mentuck test is the correct analysis for you to
18 apply in this application, but as was alluded to by
19 previous counsel that test must be applied in a contextual
20 and flexible manner. Our submission is that it is the
21 shared public responsibilities to ensure the safety,
22 security, well being and best interests of children, and
23 the special responsibility that First Nations have to
24 control the delivery of services -- I'm sorry, to control
25 the delivery of child welfare services to its community

1 members, which provide the context within which you must
2 apply the Dagenais/Mentuck analysis and consider the
3 application presently before you.

4 Those are my submissions with respect to the
5 first topic that I wanted to address.

6 The second topic I alluded to earlier was the
7 relationship between child --

8 THE COMMISSIONER: Maybe that last statement I'll
9 just take down, I think you have it your notes there.

10 MR. FUNKE: Certainly.

11 THE COMMISSIONER: With respect to the, the --
12 what you're applying to the -- the flexible and, and the
13 interpretation --

14 MR. FUNKE: Certainly.

15 THE COMMISSIONER: -- of, of the test.

16 MR. FUNKE: We're saying that it's not merely a
17 consideration of the right of expression that the media
18 enjoys under section 2 versus the potential risk to
19 children. We're saying that the context --

20 THE COMMISSIONER: Section 2 versus what?

21 MR. FUNKE: Versus the risk, the potential risk
22 to children experienced by the system should the
23 publication ban not be granted.

24 THE COMMISSIONER: But, but rather, but rather is
25 what?

1 MR. FUNKE: It's rather that this is the context
2 within which that analysis must be conducted. You must
3 always be vigilant and, and cognizant of the shared
4 responsibilities that the public has with respect to
5 ensuring the safety, security and well being, and best
6 interests of children, and the special rights and
7 responsibilities that First Nations people have to control
8 the delivery of child welfare services to its community
9 members, and that is the context within which you must
10 apply the Dagenais/Mentuck test.

11 THE COMMISSIONER: Okay.

12 MR. FUNKE: I can advise that I'm almost done,
13 Mr. Commissioner.

14 THE COMMISSIONER: Right.

15 MR. FUNKE: As I indicated the second topic I
16 wanted to address was the relationship between child
17 protection proceedings and these hearings, and there are
18 three very brief issues I'd like to address, and that is
19 first of all with respect to the applicability of section
20 75(2) and 76(3) of the CFS Act.

21 THE COMMISSIONER: Just a minute. 75(2) and
22 what?

23 MR. FUNKE: 76(3). The effect, if any, that the
24 application of those sections have on this inquiry to the
25 onus, that both Mr. Saxberg, Mr. Khan and Mr. Smorang made

1 with respect to the shifting of the onus onto those who are
2 opposed to the application as opposed to the onus resting
3 on the applicants, and finally with respect to comments
4 that were made by previous counsel regarding the best
5 interests test.

6 Now, ANCR and the Authorities at the outset of
7 these hearings this week provided a booklet entitled The
8 Authorities ANCR Selected Documents for Publication Ban
9 hearings, and I'm going to refer you, Mr. Commissioner, if
10 you don't mind, to tab 2 of their materials. It's the most
11 convenient place to find the section 75(2) --

12 THE COMMISSIONER: Yes.

13 MR. FUNKE: -- and 76(3). So the second page
14 that they have provided under tab 2 -- it shows 75(2), so
15 counsel for both the MGEU and ANCR and the Authorities have
16 suggested that with respect to this application you must
17 commence your analysis of the Dagenais/Mentuck test from
18 presumption in favour of confidentiality, and they say that
19 that is so by virtue of the provisions of the CFS Act
20 regarding the confidentiality of records made and kept
21 therein.

22 The problem as previously indicated by Mr. Kroft
23 is that section 75(2), which would operate to prohibit the
24 disclosure of the names of parties or witnesses, is
25 specifically limited to proceedings taken under the Act,

1 and that can be found directly in a plain reading of
2 section 75(2), which says:

3

4 "No press, radio or television
5 report of a proceeding under Part
6 II, III or V --"

7

8 And referring to the CFS Act in that case.

9

10 "-- shall disclose the name of any
11 person involved in the proceedings
12 as a party or a witness or
13 disclose any information likely to
14 identify any such person."

15

16 Now, that statutory provision contains its own
17 limiting clause which says it deals only with respect to
18 proceedings under this Act, so any attempt to try to
19 suggest that that section has any application to this
20 inquiry simply cannot be found within the plain reading of
21 the section.

22 Contrast to that was section 76(3) which is found
23 on the next page. 76(3) says:

24

25 "Subject to this section, a record

1 made under this Act is
2 confidential and no person shall
3 disclose or communicate
4 information from the record in any
5 form to any person except --"

6

7 And then it lists a number of exceptions, and we
8 don't need, for the purpose of my argument, to go through
9 what those exceptions are.

10 Now, that is a blanket prohibition under section
11 76(3) unless, and as in subsection (2), there's an order of
12 the court that says you may do so.

13 Well, that blanket prohibition no longer applies
14 here by virtue of the fact that a referral was made to
15 Chief Justice Joyal who ruled that you have the discretion
16 to deal with those documents in the fashion that you see
17 fit.

18 So my submissions are that so far as I'm aware no
19 one who has presented this week is suggesting that these
20 hearings constitute a proceeding under the Act. Section
21 75(2) would then not apply. The application before you
22 right now with respect to a publication ban on the identity
23 of social workers who may testify at this inquiry does not
24 relate to records made as a result of the Act, or under the
25 Act, and so it would not engage a section 76(3) analysis,

1 so our position is is that this entire examination of 75(2)
2 and 76(3) is a complete red herring designed to confuse the
3 issues. Neither section has any application to this
4 proceeding.

5 With respect to the onus whether that falls on
6 the applicants or the respondents counsel for MGEU and ANCR
7 and the Authorities have suggested to varying degrees that
8 the onus in this application shifts to the media and those
9 opposed to the relief being sought, and in that regard they
10 have relied upon the Manitoba Court of Appeal decision in
11 CBC and the Attorney-General of Manitoba, however, we
12 submit that upon a closer reading that decision does not
13 support such proposition. We say that for two reasons.

14 First, the CBC case deals with an application by
15 the media for access to records otherwise protected under
16 section 76(3), which is not the case here, which had been
17 filed at an inquest, which is not the case here, presided
18 over by a provincial court judge pursuant to The Fatalities
19 Inquiries Act, which is not the case here, and as a result
20 we say that that case isn't distinguishable, it has no
21 application to these proceedings.

22 Nevertheless -- or I could be wrong in that
23 regard. If you actually read the case more closely than it
24 was presented earlier it does not support the proposition
25 that either MGEU or ANCR and the Authorities have suggested

1 that, that supports. It does not suggest that there is any
2 shifting of the onus. In fact it says precisely the
3 opposite.

4 You can find a copy of the decision at tab 3 of
5 MGEU's original brief, and I'll read to you just briefly
6 from paragraphs 37, 38 and 39. The court says:

7

8 "Whichever court is engaged in a
9 sec. 76(3) analysis under the [Act](#),
10 the process and criteria to be
11 applied are precisely those set
12 forth by the Supreme Court in
13 Dagenais/Mentuck (...)

14 As the Supreme Court noted in
15 Dagenais itself, 'publication bans
16 should not always be seen as a
17 clash between two titans --
18 freedom of expression for the
19 media versus the right to a fair
20 trial for the accused' (at p.
21 881); rather, it is a question of
22 determining firstly whether a ban
23 of some sort is necessary to guard
24 the fairness of the trial and, if
25 so, to strike the right balance

1 'between the salutary and
2 deleterious effects of a
3 publication ban' (at p. 884),
4 keeping in mind that there should
5 be as minimal an interference as
6 possible with the public's right
7 to know what is going on in their
8 courts.

9 In other words, in this instance,
10 the benefit of not permitting
11 disclosure or communication of
12 information under [sec. 76\(3\)](#) of
13 the [Act](#) or of imposing a
14 protective order at common law
15 must outweigh the potential
16 negative impact on public access
17 to the courts."

18

19 So in that case even where section 76(3) applied,
20 which is a blanket prohibition, not a limited prohibition
21 such as 75(2) is within the confines of proceedings under
22 the CFS Act, even where Judge Guy at that time was sitting
23 as a provincial court under The Fatalities Act, even in
24 those circumstances there was no modification of the onus,
25 and the application of the Dagenais/Mentuck test.

1 As a result we submit that there is no basis
2 whatsoever to suggest to you, Mr. Commissioner, that the
3 onus in any way is displaced from the applicants in this
4 matter.

5 And, finally, with respect to the best interests
6 test. Counsel for MGEU, ANCR, and the Authorities, and
7 Intertribal CFS have all argued that the best interests of
8 children take precedence in all matters involving -- in
9 child welfare, and each has relied upon a number of
10 authorities for support in that regard. I do not intend to
11 go through each authority individually, but suffice to say
12 that a review of those cases will demonstrate that in each
13 case the subject matter in dispute was either a child
14 protection proceeding under the Act, or a custodial dispute
15 between parents and/or guardians.

16 Part of the confusion arises due to the
17 similarity in language used in the Act. The declaration of
18 principles, which we've already reviewed, talks about the
19 best interests of children, and that being part of this
20 overarching responsibility that society has to ensure, but
21 it also talks about the best interests of children in
22 section 2 of the Act, and I'll ask you to turn to the ANCR
23 and Authorities' selected documents booklet, which I had
24 referenced earlier, tab number 5.

25 THE COMMISSIONER: Yes.

1 MR. FUNKE: And that sets out the best interests
2 test, and it's --

3 THE COMMISSIONER: Just a minute. Tab 5 of what?

4 MR. FUNKE: Tab 5 of the document entitled
5 Authorities, ANCR's Selected Documents for Publication Ban
6 Hearing.

7 THE COMMISSIONER: And that is the declaration
8 of principles?

9 MR. FUNKE: If you turn to the next page --

10 THE COMMISSIONER: Ahh.

11 MR. FUNKE: -- it has an excerpt --

12 THE COMMISSIONER: Oh, yes, all right.

13 MR. FUNKE: -- that has section 2(1) regarding
14 the best interests, and it's useful to read that, at least
15 the preamble to it. It says:

16

17 "The best interests of the child
18 shall be the paramount
19 consideration of the director, an
20 authority, the children's
21 advocate, an agency and a court in
22 all proceedings under this Act
23 affecting a child, other than
24 proceedings to determine whether a
25 child is in need of protection,

1 and in determining best interests
2 the child's safety and security
3 shall be the primary
4 considerations. After that, all
5 other relevant matters shall be
6 considered, including --"

7

8 And then it lists a number of other factors that
9 the court should consider.

10 Now, the distinction to be made is that in each
11 of the cases cited by counsel for the applicants in this
12 matter the best interests that are being considered by the
13 court in those cases are in relation to individual children
14 involving disputes relating to their apprehension, their
15 placement, and/or their custody, and in all such cases the
16 courts have held that the interests of the guardians, the
17 parents, agencies, et cetera, are all subordinate to the
18 best interests of that particular child who was the subject
19 of the dispute.

20 Those cases do not use the term "best interests
21 of the children" in the generic and a morphs sense that
22 counsel for the applicants before you have used the term,
23 and I'm confident that upon a closer reading of those
24 authorities you will come to the same conclusion.

25 Thank you, Mr. Commissioner.

1 THE COMMISSIONER: Thank you, Mr. Funke.

2 MR. FUNKE: Those are my comments.

3 THE COMMISSIONER: All right. Now, what have we
4 got left next, Commission counsel?

5 MS. WALSH: Next we have the, the applicants'
6 opportunity to reply. They've indicated that they all
7 understand the nature of what reply means, and -- but they
8 haven't been able to indicate how much time they're going
9 to take.

10 I wonder if we could just take a very short break
11 now. I'm also advised that the other remaining
12 applications have been the subject of discussion amongst
13 counsel such that they shouldn't take too much time.

14 THE COMMISSIONER: All right. So what do you
15 want, a 10 minute adjournment?

16 MS. WALSH: Ten minutes, please.

17 THE COMMISSIONER: And then we'll take the
18 replies.

19 MS. WALSH: Yes. Thank you.

20 THE COMMISSIONER: Now, look -- on, on the, on
21 the time for replies there are three of you. Maybe amongst
22 -- I mean we'll come back here at, at 20 to three, and the
23 other isn't going to take too long, so what -- at the most
24 we've got an hour and a half for replies to -- somewhere in
25 that area. You, you might -- Mr. Smorang, have you any

1 idea how long you might be?

2 MR. SMORANG: I've never been right, so I will
3 continue to guess wrong. I would say half an hour to 45
4 minutes.

5 THE COMMISSIONER: Well, that's not unreasonable,
6 and, and Mr. Saxberg is half an hour going to do you?

7 MR. SAXBERG: Yes.

8 THE COMMISSIONER: Fair enough. And Mr. Khan?

9 MR. KHAN: I'll be much less than that now.

10 THE COMMISSIONER: Well then we're going to be
11 all right.

12 MS. WALSH: And the University of Manitoba might
13 have a, a brief response as well.

14 THE COMMISSIONER: Oh quite -- I, I didn't -- I'm
15 sorry, I, I didn't pick that up, and you'll have that
16 opportunity without question. All right. Thank you.
17 We'll adjourn for 10 minutes.

18 MS. WALSH: Thank you.

19

20 (BRIEF RECESS)

21

22 THE COMMISSIONER: Now, I understand -- go ahead.

23 MS. WALSH: Yes, Mr. Commissioner, there's been a
24 slight amendment to the agenda, with your -- subject to
25 your approval, and that is that before we hear the replies

1 from the MGEU, Authorities and ANCR, and ICFS we will hear
2 the applications made on behalf of the SORs, and so that
3 will be -- the order will be to hear the application made
4 on behalf of SORs 5, 6 and 7, represented by Mr. Gange.

5 THE COMMISSIONER: Yes.

6 MS. WALSH: Followed by responses from the media,
7 counsel for Mr. Sinclair and Ms. Edwards, and AMCSO.

8 MS. WALSH: So responses from the media, then
9 who?

10 MS. WALSH: Counsel for Mr. Sinclair and Ms.
11 Edwards.

12 THE COMMISSIONER: Yes.

13 MS. WALSH: And AMCSO.

14 THE COMMISSIONER: Yes.

15 MS. WALSH: And there may be other responses, if
16 someone else wants to respond they'll, they'll make that
17 known.

18 THE COMMISSIONER: Yes.

19 MS. WALSH: Again with an opportunity for reply,
20 and the application by SOR number 3 represented by Mr.
21 Paul.

22 THE COMMISSIONER: SOR number 3. Mr. Paul?

23 MS. WALSH: Yes. Perhaps it makes sense to hear
24 the -- Mr. Gange and Mr. Paul one after the other, and then
25 hear the responses, if counsel are available.

1 THE COMMISSIONER: Are there not some -- is that
2 all of the SORs?

3 MS. WALSH: No, no.

4 THE COMMISSIONER: Okay.

5 MS. WALSH: And then, and then separately an
6 application on behalf of SORs 1, 2, and 4.

7 THE COMMISSIONER: Yes.

8 MS. WALSH: And two parties who have been
9 identified for the purposes of this application as PHN and
10 TM, and they're represented by Ms. Rachlis.

11 THE COMMISSIONER: Yes.

12 MS. WALSH: And, again, there will be an
13 opportunity for responses, if any, and an opportunity for
14 reply.

15 THE COMMISSIONER: Why do you separate that one
16 from the other two?

17 MS. WALSH: They have -- because PHN and TM have
18 not been identified as sources of referral, but they're
19 represented by Ms. Rachlis.

20 THE COMMISSIONER: I see.

21 MS. WALSH: And then once those applications have
22 been heard then we'll go back to hear the replies from the
23 three applicants for the first application, and we will
24 finish with the brief application which is being made by
25 the Department regarding redaction of documents to be

1 entered into the public record.

2 You're amenable to this change in the agenda?

3 THE COMMISSIONER: Yes.

4 MS. WALSH: Thank you.

5 THE COMMISSIONER: All right. Mr. Gange.

6 MR. GANGE: Thank you, Mr. Commissioner. My name
7 is Bill Gange. I, I will be attending the Commission of
8 Inquiry from time to time on behalf of perhaps as many as
9 seven different people. Three of those people are
10 identified as SOR number 5, number 6, and number 7. The
11 other four individuals are not sources of referral, but I
12 will see you from time to time, God willing.

13 THE COMMISSIONER: Right.

14 MR. GANGE: The -- I, I would like to thank my
15 friends for accommodating this application. This
16 application is somewhat different than, than what you have
17 heard so far, and I believe that, that counsel --
18 Commission counsel has put on your desk some material with
19 respect to SOR 5, 6, and 7.

20 THE COMMISSIONER: Yes.

21 MR. GANGE: The three SORs that I represent on
22 this are individuals who are expected to testify with
23 respect to contacts that they had with Child and Family
24 Services, and I, I think that's really about as far as I
25 need to go on that point.

1 I do want to say, however, that Mr. Saxberg has
2 advised me that he has concerns with respect to one of the
3 potential SORs as to whether or not that, that individual
4 does qualify as an SOR. I do believe, Mr. Commissioner,
5 that once the, the can says are circulated that that issue
6 may well be cleared up, and, and I personally do not expect
7 that that will be an issue when that person comes to
8 testify, but Mr. Saxberg is not conceding, and nor do I ask
9 him to concede at this point that in fact that particular
10 witness is quite properly a source of referral, so with
11 that the question -- the first question that I believe has
12 to be considered by you, in considering the applications of
13 these three individuals, is whether or not this Commission
14 of Inquiry is a judicial proceeding.

15 I am going to suggest to you, Mr. Commissioner,
16 that this is not a judicial proceeding, this is quite
17 rightfully called a Commission of Inquiry. There's nothing
18 as far as I can tell, and I've searched The Interpretation
19 Act of Manitoba, I've searched the child and welfare
20 legislation, and there's no definition of, of what a
21 judicial proceeding is, so that I believe that you're going
22 to have to go what is a judicial proceeding pursuant to
23 basic common law, and a judicial proceeding is something
24 that happens in court, and, and so that if that is the case
25 it has significant impact pursuant to the legislation.

1 What you have heard so far with respect to the
2 requests made by the, the -- by MGEU, by Mr. Saxberg, on
3 behalf of the Authorities, has to -- and Mr. Khan, on
4 behalf of Intertribal, is dealing with section 75 of the
5 Act. These people that I represent come to you under
6 section 18 of the Act, and you will recall, sir -- and, and
7 in the motions brief on behalf of, of my clients I have
8 attached section 17 and 18 and 18.1, and -- well 18.1 of
9 The Child Protection Act.

10 THE COMMISSIONER: At a, at a tab or ...

11 MR. GANGE: It's just at the end -- it's right at
12 the end -- it's a very, it's a very short brief, Mr.
13 Commissioner. There's only four pages to the brief and --

14 THE COMMISSIONER: On, on behalf of, of 5 and 6?

15 MR. GANGE: Yes, that's correct. Right at the
16 end of that brief, you'll see that the brief itself is only
17 four pages.

18 THE COMMISSIONER: Yes, I have that.

19 MR. GANGE: And then right at the end you ought
20 to have -- right at the end of the brief itself, if you
21 just turn back one page ...

22 THE COMMISSIONER: I don't.

23 MR. GANGE: Oh, okay.

24 THE COMMISSIONER: It ends, it ends with your
25 signature on the middle of page 4.

1 MR. GANGE: Then in that case, Your Honour --

2 MS. WALSH: He has the Act.

3 MR. GANGE: You have the Act --

4 THE COMMISSIONER: Yes.

5 MR. GANGE: -- and if you can just turn to
6 section 17 of the Act itself.

7 THE COMMISSIONER: Of ...

8 MS. WALSH: In the blue binder.

9 THE COMMISSIONER: Oh, this one.

10 MS. WALSH: Yes.

11 THE COMMISSIONER: Yes.

12 MR. GANGE: Thank you, Mr. Commissioner. Now,
13 you'll recall that under section 17 section 17 defines in
14 general terms when a child is in need of protection, and
15 then section 18 makes it a mandatory requirement, upon any
16 individual that has knowledge of -- information with
17 respect to a child in need of protection that, that any
18 individual with that knowledge must report that knowledge.

19 And any person who does so the Act creates a, a
20 system of confidentiality, and it says under section
21 18.1(2) ...

22 THE COMMISSIONER: Yes.

23 MR. GANGE: If you take a look at that, Your
24 Honour, "except as required in the course of judicial
25 proceedings," I am going to say to you that that does not

1 apply because we are not in judicial proceedings, "or with
2 the written consent of an informant," there's not going to
3 be written consent of any of my three clients, so that all
4 that you're left with under section 18.1(2) is no person
5 shall disclose the identity of an informant under
6 subsection 18(1) or (1.1).

7 THE COMMISSIONER: Just a minute now.

8 MR. GANGE: That's under (a), sir.

9 THE COMMISSIONER: Under what?

10 MR. GANGE: Under 18.1(2) (a).

11 THE COMMISSIONER: Yes.

12 MR. GANGE: "No person shall disclose the
13 identity of an informant."

14 THE COMMISSIONER: Yes.

15 MR. GANGE: So these people all qualify, and
16 subject to discussions with Mr. Saxberg, in due course, but
17 these people I will submit will all qualify under section
18 18(1.1).

19 THE COMMISSIONER: 18.1(2) (a). No -- yes.

20 MR. GANGE: 18.1(2) (a) creates --

21 THE COMMISSIONER: Yes.

22 MR. GANGE: -- a cloak of confidentiality, and --

23 THE COMMISSIONER: And under, under (a), (1) or
24 (2)?

25 MR. GANGE: Under 18.1(2) (a).

1 THE COMMISSIONER: But is -- I, I notice (1) and
2 (2) are --

3 MR. GANGE: Oh, I see, My Lord.

4 THE COMMISSIONER: Yes.

5 MR. GANGE: Well, it, it qualifies under section
6 18.1 -- or pardon me, bracket (1).

7 THE COMMISSIONER: Yes.

8 MR. GANGE:

9

10 "A person shall forthwith report
11 the information to an agency or to
12 a parent or guardian of the
13 child."

14

15 Do you see that?

16 That's under 18, bracket 1.

17 THE COMMISSIONER: 18, bracket 1. 18 -- no, no
18 point, just 18 bracket 1?

19 MR. GANGE: That's correct.

20 THE COMMISSIONER: All right.

21 MR. GANGE:

22

23 "Where a person has information
24 that leads the person reasonably
25 to believe that a child is or

1 might be in need of
2 protection ..."

3

4 THE COMMISSIONER: You're reading 18(1)?

5 MR. GANGE: That's correct.

6 THE COMMISSIONER: Yeah, and how are you tying
7 that to 18.1(2), or, or are you?

8 MR. GANGE: That, that it says -- well I'm saying
9 that any time that somebody reports a child in need of
10 protection.

11 THE COMMISSIONER: Under 18(1)?

12 MR. GANGE: Bracket 1, that's correct, Your
13 Honour.

14 THE COMMISSIONER: Yes.

15 MR. GANGE: That any time that somebody does that
16 there's a cloak of confidentiality that is created by this
17 legislation, and that cloak of confidentiality is found in
18 18.1, point 1, bracket 2, and the confidentiality is that
19 the identity of an informant cannot be disclosed.

20 THE COMMISSIONER: Cloak of confidentiality found
21 in ...

22 MR. GANGE: 18.1 --

23 THE COMMISSIONER: 18.1 ...

24 MR. GANGE: -- (2) --

25 THE COMMISSIONER: -- (2) --

1 MR. GANGE: -- (a).

2 THE COMMISSIONER: -- (a). Let me read that.

3 Okay, I'm with you.

4 MR. GANGE: So if you're with me, Your Honour,
5 there's, there's a cloak of confidentiality. The
6 legislation has only one exception, without consent, only
7 one exception, and that is except as required in the course
8 of judicial proceedings.

9 THE COMMISSIONER: Yeah.

10 MR. GANGE: And so if this Commission of Inquiry
11 is not a judicial proceeding there is no provision that
12 permits the disclosure of identity of, of an informant.

13 And if that is the case, Mr. Commissioner, then,
14 then my application stops there full stop because you do
15 not have the jurisdiction, pursuant to this Act, to permit
16 the disclosure of the identity of the informants.

17 THE COMMISSIONER: Because they're entitled to
18 the benefit by statute?

19 MR. GANGE: That's correct. And so it's not a
20 question of balancing, it's not a question of Charter
21 rights, it's a question that this legislation prevents
22 disclosure.

23 Now, Your Honour, if you were to have concerns to
24 say, well, I'm not sure that -- perhaps a Commission of
25 Inquiry does fall under the heading of judicial proceeding,

1 I don't think it does, but let me, let me go there, then
2 you are only permitted to disclose the identity of an
3 informant where it is required in the course of judicial
4 proceedings, and so the fallback position that I have
5 advanced in the motions brief is to say, well, the names of
6 my clients are quite irrelevant. It is their evidence that
7 is necessary for you to hear.

8 On either test, either the total prohibition test
9 or on the required test, I'm going to suggest to you that
10 there is no need for the names of my clients to be
11 disclosed, and that is part (A) of my notice of motion.

12 Part (B) of my notice of motion, Your Honour, was
13 that, that I asked you to exclude all members of the public
14 from the hearing room during the testimony of the three
15 sources of referral or informants, or make other order as
16 you may see fit, and what I'm going to suggest to you, Your
17 Honour, is, is this -- this is how I see this as being a
18 workable solution, and, and I must say that I do not expect
19 my three SORs to testify until quite a bit later in this
20 proceeding, quite likely near the end of the proceeding.

21 MS. WALSH: Well, phase one.

22 MR. GANGE: Yes, phase one, thank you. And so
23 there may be some tweaking to do, and, and I can work that
24 out with Commission counsel and with counsel for the
25 others, but, but what I am going to suggest as my starting

1 point is that my three witnesses would testify off site.
2 They would not enter this room. You would be in this room,
3 or perhaps you would be with them in the other room, I'm,
4 I'm not exactly sure how we would work that. That's,
5 that's a detail to work out, but if, if they were to
6 testify by for instance a television feed for my clients I
7 would like that television feed to be seen by you, and only
8 by you. I would suggest that, that counsel will be able to
9 hear the testimony of my clients, but would not see them.

10 I'm going to suggest that the public can be in
11 attendance and listen to the testimony, but not see them.
12 The press, Mr. Commissioner, would be able to listen to the
13 testimony, but would not see the witnesses, and of course
14 would not be permitted to communicate anything about them
15 in terms of who they are, or their, their name, their face,
16 or their identity, and if, and if that -- if, if those
17 arrangements can be made that would suit me as counsel to
18 those individuals quite well.

19 That's my submission, Your Honour. I'm, I'm
20 happy to answer any questions or concerns that you have.

21 THE COMMISSIONER: No, I think that's -- you've
22 put your case and I haven't -- you know, your, your point
23 about judicial proceeding I'll, I'll give some thought to
24 that. I'm rather inclined to think this is not, but we'll,
25 we'll look at it.

1 MR. GANGE: And, and I can only tell you -- if
2 you wish, Your Honour, I can give you a Black's Law
3 Dictionary. Unfortunately it comes -- it's from 1968. I
4 don't know that any changes have been made in, in Black's
5 Law Dictionary, but, but Black's Law Dictionary, and I'll,
6 I'll leave this with, with Ms. Walsh, takes what seems to
7 be the words.

8

9 "Any proceeding wherein judicial
10 action is required. Any step
11 taken in a court of justice in the
12 prosecution or defense of an
13 action."

14

15 That's not what we're dealing with, so -- but --

16 THE COMMISSIONER: I'll, I'll look at it.

17 MR. GANGE: Thank you very much.

18 THE COMMISSIONER: Thank you, Mr. Gange.

19 Now -- oh, yes, you're going to go next, Mr.
20 Paul?

21 MR. PAUL: Yes indeed, Mr. Commissioner. My name
22 is Mr. Sacha Paul. I appear on behalf of source of
23 referral on number 3. In light of Mr. Gange's submissions
24 I'm not going to rehash what he has stated.

25 All I will say is that I believe that there's no

1 opposition, as I understand it, to the relief that source
2 of referral number 3 is seeking, is my understanding, but
3 of course I'll let my learned friends speak for themselves.
4 Just as Mr. Gange has pointed out we are seeking a
5 publication ban for source of referral number 3. We
6 believe that the evidence clearly indicates that source of
7 referral number 3 is indeed a source of referral under
8 section 18 of The Child and Family Services Act, and
9 accordingly would be afforded the protections under those
10 Acts.

11 We also note that the evidence indicates that the
12 name of source of referral number 3 was of course redacted
13 during the disclosure of I think about 45,000 pages of
14 material that Commission counsel had to go through quite
15 diligently. The only thing that I will add with respect to
16 source of referral number 3 is that while it's not in the
17 evidence as an of the officer of the court I can advise
18 that source of referral number 3 was an employment -- an
19 Income Assistance case coordinator at the time of the
20 referral. To put it I guess in simple terms someone who
21 administers social assistance files, but nonetheless made
22 a, a protected disclosure to CFS agencies.

23 Accordingly we're seeking the publication ban.
24 The only thing that, that I will add, which differentiates
25 us, makes this different from Mr. Gange, is that we are

1 content to have of course the public and the press
2 available to see source of referral number 3 give their
3 evidence, and we don't need the same type of accommodations
4 that Mr. Gange is seeking.

5 THE COMMISSIONER: But without identifying them?

6 MR. PAUL: Yes, of course.

7 THE COMMISSIONER: That person?

8 MR. PAUL: Yes.

9 THE COMMISSIONER: So you, you don't mind ...

10 MR. PAUL: People may see in terms of open court
11 what source of referral number 3 looks like, but of course
12 there will be that prohibition in terms of publication of
13 that person's name and identity.

14 THE COMMISSIONER: Man or woman?

15 MR. PAUL: Sorry?

16 THE COMMISSIONER: Man or woman?

17 MR. PAUL: Woman. And I hope that I've kept my
18 submissions less than five minutes.

19 THE COMMISSIONER: So, so that they can see her,
20 but the ban requested relates only to her identification
21 of, of name?

22 MR. PAUL: Yes, of name and her -- yes, identity,
23 yes.

24 I believe I made a promise to Commission counsel
25 to keep my submissions under five minutes, and I hope --

1 THE COMMISSIONER: I think you made it.

2 MR. PAUL: -- that I did it.

3 THE COMMISSIONER: I think you have.

4 MR. PAUL: Thank you.

5 THE COMMISSIONER: Thank you. Now, is Ms.
6 Rachlis going to speak now to her application, or is that
7 to come after other counsel?

8 I'd prefer to hear her now.

9 And this relates to 1, 2, 4, PHN and TM?

10 MS. RACHLIS: Correct. Good afternoon,
11 Commissioner.

12 My name for the record, Mr. Commissioner, is
13 Vivian Rachlis, and I am in the position of associate
14 general counsel with the Winnipeg Regional Health
15 Authority. In today's attendance I act for five former or
16 current employees of the Winnipeg Health Region who have
17 been advised that they are expected to be called as
18 witnesses to this inquiry.

19 On their behalf a motion for a publication ban
20 has been filed, and this is on behalf of --

21 THE COMMISSIONER: This is actually to do with
22 informants then?

23 MS. RACHLIS: Yes, it does.

24 THE COMMISSIONER: Oh, sorry, all right.

25 MS. RACHLIS: I act on behalf of five witnesses

1 that have been identified, three of them have been
2 identified as sources of referral, and those three
3 witnesses have been known in the materials as SOR 1, SOR 2
4 and SOR 4.

5 THE COMMISSIONER: I follow you.

6 MS. RACHLIS: And the other two that I also act
7 for have been identified in the materials that I have
8 provided to you, Mr. Commissioner, as PHN and TM, and I am
9 going to divide my remarks in the next few minutes, and I'm
10 hoping to take very few minutes with respect to those two,
11 those two different motions, or those -- the aspects of the
12 motion.

13 I, I think the reason why I was not invited to
14 sit at the table with Mr. Gange and Mr. Paul is that while
15 the first aspect of my motion is really very similar for
16 all intents and purposes to the motions that those two
17 gentlemen have put forward the second part of my motion are
18 not with respect to individuals that have been identified
19 as sources of referral.

20 THE COMMISSIONER: Right.

21 MS. RACHLIS: All right. So I, I want, if, if I
22 can, just to start because I think it provides some context
23 as to the submission that I want to leave you with this
24 afternoon, Mr. Commissioner.

25 I want to just spend a minute to give you the

1 context and background to my representation of these five
2 individuals, and how I came to appear before you today. Of
3 course as you know my clients do not have standing at this
4 inquiry. The Winnipeg Health Region has neither sought
5 standing -- official standing nor have they sought
6 intervener status and my clients, the five individuals that
7 I'm applying on behalf of this afternoon, my clients' first
8 involvement in these proceedings was by contact from
9 Commission counsel indicating that they were expected to be
10 subpoenaed as witnesses to this proceeding, so, you know,
11 in the vernacular, Mr. Commissioner, I'm a bit player, my
12 clients are bit players, and their involvement in these
13 proceedings are as, are as factual witnesses.

14 I was -- when I was first contacted with respect
15 to my clients' potential involvement I was referred to the
16 various rulings that had been made prior to that time,
17 including your own ruling on redactions, and I was referred
18 to the Commission's amended rules, and, and at some point
19 in this chronology, Mr. Commissioner, I was, I was being --
20 I was provided with the information that SOR number 1, 2
21 and 4 were being treated as source of referrals, and that
22 these designations had been applied on documentation that
23 involved these potential witnesses, and that their names
24 had been redacted, so again I, I come before you this
25 afternoon with, with a little history, or investment, other

1 than that these three sources of referral that I represent
2 have been -- and, and by the way I, I can now indicate that
3 having seen the history of this, and seen the
4 documentation, and, and being aware of the involvement, I,
5 I accept that they are sources of referral, and, and rely
6 on it, Mr. Commissioner.

7 Without being involved in these proceedings in
8 any detail we've not been privy to the detailed ongoing
9 procedural arrangements, and it was in this context that I
10 was made aware that an application for a publication ban
11 had been applied for by other witnesses who are expected to
12 be involved in this proceeding, and to, and to put an even
13 finer point on my clients' involvement, and my clients'
14 position in this motion my initial reaction to the question
15 of whether any motions for a publication ban would be
16 forthcoming from the -- all of the -- any or all of the
17 individuals that I represent was that I had no doubt, but
18 that you, Mr. Commissioner, would -- you have the tools and
19 the discretion, and if I might say the track record to be
20 able to make whatever order would be fair and just to my
21 clients in all of the circumstances, or as counsel for the
22 media put it this morning the people of Manitoba are
23 confident that you will run these proceedings in a way that
24 is fair and will treat everyone involved with respect.

25 So with all of that by way, by way of background

1 and introduction, and all of the arguments that have been
2 made previously over the course of these days, and
3 including most relevantly the submissions immediately
4 before me by Mr. Gange and Mr. Paul I have little to add,
5 and other than to say that my clients are asking that you
6 consider exercising your discretion in, in favour -- or,
7 sorry, to the extent that you're considering exercising
8 your discretion in favour of any of the applicants here
9 that you simply consider whether my clients are similarly
10 situated to these other circumstances.

11 So in the minutes remaining what I think would be
12 most helpful, and constructive to the exercise of your
13 discretion is for you to hear very briefly about the, the
14 positions of SOR 1, 2 and 4 on the one hand, and PHN and TM
15 on the other hand. There have been two supporting
16 affidavits filed with respect to the application by SOR --
17 the SORs, SOR 1, 2 and 4. You have the affidavit of Regan
18 Spencer --

19 THE COMMISSIONER: Yes.

20 MS. RACHLIS: -- and with respect to the
21 application of PHN and TM you have the affidavit of Linda
22 Tjaden. With respect to the SORs the delightful thing
23 about coming as third in line, after two skillful counsel,
24 is that I find myself with little to say, other than what
25 has been said about the legal treatment of SORs under The

1 Child and Family Services Act.

2 With respect to the specific nature of these
3 witnesses of course I'm not here to give evidence, and nor
4 would it be appropriate for me to provide any detailed
5 explanation about the nature of these witnesses, but I can
6 indicate, as is indicated in the affidavit of Regan
7 Spencer, that SOR 1, 2 and 4 were all -- or continue to be
8 medical social workers in the employ of the Health Sciences
9 Centre in Winnipeg.

10 You have, you have heard, as I, as I said, from
11 Mr. Gange about the section 18 and following of The Child
12 and Family Services Act, and we rely on those submissions,
13 and so that that leaves me with nothing further to say with
14 respect to the sources of referral other than I can
15 indicate, as I believe Mr. Paul did, that the, the names
16 have already been redacted with respect to those
17 individuals in the documentation that has been produced.

18 THE COMMISSIONER: But what about the appearance
19 of those three people vis-à-vis Mr. Paul's distinction
20 about his client can be present in this, in this hearing
21 room?

22 MS. RACHLIS: I was going to be dealing with that
23 at the end because --

24 THE COMMISSIONER: Oh, that's fine.

25 MS. RACHLIS: -- my submission applies to all of

1 them --

2 THE COMMISSIONER: That's, that's --

3 MS. RACHLIS: -- but I'm, but I'm going to
4 respond immediately --

5 THE COMMISSIONER: No, no, no, you deal with it
6 when you want to.

7 MS. RACHLIS: All right. I take no different
8 position, Mr. Commissioner, with respect to arrangements
9 for any -- among any of the witnesses that I represent.

10 THE COMMISSIONER: All right. You can speak to
11 it at the end then.

12 MS. RACHLIS: Thank you.

13 Now, with respect to PHN and TM you, you have the
14 materials, by the way I can indicate that those are not
15 initials that identify their names, these are initials that
16 identify their job titles at the relevant time. They -- as
17 I've indicated at the beginning we do not dispute that
18 these two potential witnesses are not -- I don't want to
19 put it in a double negative. They have not been identified
20 as sources of referral, and we are not taking the position
21 that these two potential witnesses are sources of referral
22 within the meaning of the CFS Act, Child and Family
23 Services Act, in the circumstances of this case. You have
24 the affidavit of Linda Tjaden. It's a fulsome affidavit.
25 Ms. Tjaden explained in detail about the nature of the work

1 that these individuals do, and how they come into contact
2 because of the nature of the work they do with the child
3 welfare system with some relative frequency, and although
4 PHN and TM work -- do come into contact because of the
5 nature of the work they do with the child welfare system.
6 They are not part of the child welfare system, they provide
7 their services within the health care system.

8 The, the position that we're taking is that from
9 a policy point of view the, the arguments that have been
10 advanced by other applicants in this proceeding have some
11 analogy to these individuals, and I recognize that under
12 your constituting order in council you have been appointed
13 to inquire into the child welfare system, as it concerned
14 Phoenix Sinclair, and that additionally you are appointed
15 to inquire into any other circumstances directly related to
16 the death of Phoenix Sinclair, but all I intend to leave
17 you with, Mr. Commissioner, is the point that I'm assuming
18 that you will want to be mindful of how, if at all, these
19 proceedings may impact on other systems other than the
20 child welfare system, so I am going to leave it at that in
21 terms of the arguments with respect to PHN and TM.

22 With respect to any comments with respect to
23 actual procedural arrangements I believe that, that
24 Commission counsel can skillfully work, work out those
25 arrangements, other than I do want to let you know, and

1 this now responds to your specific question that we are not
2 seeking for any of these five witnesses to testify other
3 than in this room, and the specific arrangements at that
4 point can be worked out, and our position would be the same
5 as the position taken by Mr. Paul with respect to his
6 client, and indeed with respect to the, the main
7 applicants.

8 I'm sorry, I should stop there, I want to correct
9 myself. The, the -- there is a nuance that I, that I
10 should clear up. The sources of referral ought not to have
11 their names mentioned in the room at all because they are
12 sources of referral, and in that respect the position that
13 we would be taking is no different than the position that
14 had been taken by Mr. Paul on behalf of his client.

15 With respect to PHN and TM the arrangements that
16 had been advanced by the applicants in the main motion
17 sound suitable to me, but I think that's something that can
18 be left to -- those are the kind of logistical arrangements
19 that can be left.

20 THE COMMISSIONER: That is PHN and TM would
21 pretty much fall on the same basis of social workers, and
22 so on that are encompassed in, in this band of motions?

23 MS. RACHLIS: Yes. So with that, Mr.
24 Commissioner, I want to circle back to what I said at the
25 outset, which is that you have complete discretion to make

1 these orders. You have to be guided, as Mr. Gange
2 indicated, by The Child and Family Services Act with
3 respect to sources of referral, so in that respect you, you
4 wouldn't strictly speaking have a discretion. You -- we
5 leave it to you, as I said at the outset, to make orders
6 that concern my clients as you see fit.

7 And subject to that, unless you have any
8 questions, Mr. Commissioner, those are my comments.

9 THE COMMISSIONER: Thank you, Ms. Rachlis.

10 MS. RACHLIS: Thank you.

11 THE COMMISSIONER: Mr. Gindin, are you ...

12 MR. GINDIN: Mr. Commissioner, on behalf of
13 Edwards and Sinclair, firstly with respect to the motion by
14 Mr. Gange, part A of his motion, insofar as people are
15 classified as SORs we have no objection, for obvious policy
16 reasons.

17 Part B of his submission as to the method of
18 process I'm content to leave that entirely to your
19 discretion and I have no position to take.

20 With respect to Mr. Paul's motion, since it all
21 deals with SORs, again we have no objection.

22 Ms. Rachlis' motion our position is the same
23 insofar as it relates to the SORs that she represents.

24 With respect to PHN and TM our position is simply
25 the same as it was before, that there ought not to be any

1 publication ban with respect to anyone who isn't classified
2 as an SOR.

3 Rather than repeating the entire submission we'll
4 just leave it at that, and that's our position.

5 THE COMMISSIONER: Thank you, Mr. Gindin. Who's
6 going next?

7 MR. FUNKE: Yes, Mr. Commissioner, thank you. I
8 can advise on behalf of the AMC and the SCO they take no
9 position with respect to the collective applications
10 brought this afternoon by the last three counsel that
11 you've heard from. Thank you.

12 THE COMMISSIONER: Thank you. All right.

13 MR. KROFT: Mr. Commissioner, in respect of the
14 two applications by Ms. Rachlis for witnesses who are not
15 SORs what we said this morning is the same as we say for
16 them, and so I share Mr. Gindin's position on that point.

17 THE COMMISSIONER: Yes, they're, they're --

18 MR. KROFT: The same boat.

19 THE COMMISSIONER: As, as you have spoken to
20 previously?

21 MR. KROFT: Yeah. I, I think everything we said
22 applies.

23 MR. COMMISSIONER: Yes.

24 MR. KROFT: In respect to the SORs I addressed
25 that point in my clients' positions on April 18th, and

1 referred to that in my motions brief, which is effectively
2 that so long as we can reserve our right we are going to
3 not participate in that and hear what they have to say, and
4 if it becomes a matter of issue we'll make an application
5 at that time as appropriate, and that seemed reasonable to
6 you on April 18th, and it's in my motions brief, and we
7 haven't changed that position, so if you haven't changed
8 yours I have nothing further to say.

9 THE COMMISSIONER: No, I haven't, so I thank you
10 very much.

11 So then that completes the -- everything to do
12 with the SORs?

13 MS. WALSH: It does, Mr. Commissioner. Counsel
14 for the department, if you want to make your application
15 now, it's a brief one.

16 MR. MCKINNON: I'm completely in your hands if --
17 whatever you would prefer.

18 THE COMMISSIONER: Well, maybe we should have
19 that now, and then -- and just have the three replies to
20 deal with after that.

21 MS. WALSH: Why don't we.

22 MR. MCKINNON: Thank you, Mr. Commissioner. For
23 the record it's Gordon McKinnon, representing the
24 Department of Family Services. Mr. Commissioner, the other
25 motions you've dealt with today have been concerned with

1 protecting the identity of witnesses. Our motion is
2 different. Our motion is concerned with documents that may
3 be filed at the inquiry. And in a nutshell,
4 Mr. Commissioner, you made a ruling previously on the
5 redaction of documents.

6 THE COMMISSIONER: Yes.

7 MR. MCKINNON: And in a nutshell what we are
8 suggesting is that ruling should continue through to the
9 public portion of the inquiry, that is, that which you saw
10 fit to order redacted previously, those documents should be
11 the ones filed at the public portion of the inquiry. I'm
12 not aware of any objection to this motion that I make today
13 that the redacted documents be the ones that are filed in
14 the public arena, so to speak. I can elaborate on that if
15 you wish.

16 THE COMMISSIONER: Just repeat that again.

17 MR. MCKINNON: That the redacted copies of the
18 documents --

19 THE COMMISSIONER: Yes.

20 MR. MCKINNON: -- which have been exchanged,
21 redacted at some --

22 THE COMMISSIONER: In redacted form.

23 MR. MCKINNON: In redacted form, redactions
24 having been done by Ms. Walsh's staff --

25 THE COMMISSIONER: Yes.

1 MR. MCKINNON: -- a considerable effort, I would
2 suggest.

3 THE COMMISSIONER: Yes.

4 MR. MCKINNON: Many hundreds of pages of
5 documents have been redacted to remove names of sources of
6 referral, to remove names of children under the age of 18,
7 to remove names of foster parents where there's no
8 relevance to this inquiry, to remove those names that
9 disclose personal information about individuals that would
10 have no relevance to this inquiry. That's the proposal
11 that's being advanced by the department is that those
12 documents should be the ones filed in the public session,
13 not the unredacted copies that would disclose the
14 confidential and personal information of those types of
15 individuals.

16 THE COMMISSIONER: Would anybody take objection
17 to that?

18 MR. MCKINNON: I'm not aware of any objection.

19 THE COMMISSIONER: I wouldn't expect there'd be
20 any.

21 MR. MCKINNON: And I see this more as a
22 housekeeping matter, Mr. Commissioner. I think that we
23 want to obviously protect the privacy of those kinds of
24 individuals because it's my understanding that when we get
25 to the public portion of this inquiry, once those documents

1 become entered in evidence at this inquiry, they will be
2 posted on the commission's website and to the extent
3 possible we are trying to preserve the confidentiality of
4 those, those types of people's whose names have been
5 recorded, whose confidential information has been recorded
6 but may not be or will not be relevant to this inquiry.

7 THE COMMISSIONER: I think that's a reasonable
8 and if you require a formal order why I so direct at this
9 point.

10 MR. MCKINNON: Okay, thank you, Mr. Commissioner.
11 I won't elaborate further, I think you have the point and I
12 see no objections.

13 THE COMMISSIONER: I hear none.

14 MR. MCKINNON: Thank you.

15 THE COMMISSIONER: Thank you, Mr. McKinnon.

16 Commission counsel, you made the same mistake as
17 I did and forgetting the University of Manitoba to make
18 their submission. Didn't they want to make a submission
19 this afternoon?

20 MS. WALSH: That will be --

21 THE COMMISSIONER: Oh, that's coming.

22 MS. WALSH: -- with respect to their --

23 THE COMMISSIONER: That's on the next piece.

24 MS. WALSH: -- replies. They're still to come.

25 THE COMMISSIONER: Yes, okay.

1 MS. WALSH: Yes.

2 THE COMMISSIONER: Fair enough. You didn't
3 forget anything.

4 MS. WALSH: Not yet, not this time.

5 THE COMMISSIONER: No, not this time. All right.
6 So Mr. Smorang will come forward.

7 MR. SMORANG: Thank you, Mr. Commissioner. To
8 begin, and I do recollect your comments this morning where
9 you thought there would be value in discussion between
10 counsel vis-à-vis the scope of the motion, the main motion,
11 and also the discussion of to what individuals it would
12 apply, the identified 32 and all of that. You indicated
13 there might be some value in some discussion on that.

14 THE COMMISSIONER: Yes.

15 MR. SMORANG: At least amongst the three
16 applicants, myself, the authorities ANCR and Intertribal,
17 we have been able to, I think, assist by coming to a
18 consensus on narrowing the relief sought. The question of
19 to whom will your order apply, the 32 or others, has yet to
20 be discussed. We haven't had an opportunity to do that
21 amongst the larger group. I'm not sure how we're going to
22 do that or when. I thought this morning it was going to
23 happen at the afternoon break but that obviously is behind
24 us, at least the first one.

25 And I should just mention --

1 THE COMMISSIONER: If there's a need to break
2 later in the afternoon for that, to allow that to happen,
3 I'll certainly be prepared to do that.

4 MR. SMORANG: Yes, yes. But in terms of the
5 actual motion, what we've done is we've amended the wording
6 somewhat as it regards the phrase name, face or identity.

7 THE COMMISSIONER: Have you got, you've got a new
8 motion prepared or?

9 MR. SMORANG: I don't, but if you have my old
10 motion handy, you could probably --

11 THE COMMISSIONER: Let me just get it out.

12 MR. SMORANG: And I'm doing this perhaps just as
13 much for other counsel so they can consider that and
14 whether that clears up some of the concerns raised by my
15 friends in opposition this morning.

16 THE COMMISSIONER: All right. I'm looking at
17 your original motion. Go ahead, please.

18 MR. SMORANG: So the motion read that: The
19 commissioner prohibit any form of publishing, broadcasting
20 or otherwise communicating by television, Internet, radio
21 and print or of any other means the name, face or identity
22 of any witness at the inquiry who is or was a social
23 worker ... We're going to change the three words "face or
24 identity" and replace those with the word "image". And so
25 the motion would read: ... or by any other means the name

1 and/or image of any witness at the inquiry who is or was a
2 social worker.

3 And at first blush that may seem to be a minor
4 change but we were alive to the concerns raised by some
5 counsel about identity and in particular, and for example,
6 would you truly be protecting the identity of a social
7 worker if you said the female social worker from Fisher
8 River when in fact there may only be two and one may be a
9 male. And so what we're really trying to achieve here and
10 the minimalist theme of our motion is to simply protect
11 people from that mass media that would result in names and
12 images being broadcast. So I certainly don't expect that's
13 going to result in anybody in opposition all of a sudden
14 changing their mind, but I think it will give you a clearer
15 idea of exactly what we're trying to protect and may take
16 away some of the argument about well, what if someone is
17 asked during the hearing in what area of the province do
18 you work and then we could get into a debate about well
19 does that help identify the person and should we ask that
20 and do we have to turn off the camera and all the rest of
21 that. So we're just talking about the names and the
22 images.

23 THE COMMISSIONER: Now the others, and maybe they
24 will speak to it, but they have got other wordings and
25 other requests other than your alternative. Has it been

1 agreed that, that this one clause, your (a), will be it for
2 everything but the alternative by Mr. Saxberg and Mr. Khan?

3 MR. KHAN: (Inaudible) my notice of motion but I
4 thought I had used the same wording as Mr. Smorang.

5 MR. SMORANG: You did. So Mr. Khan's indicating
6 yes.

7 MR. SAXBERG: Perhaps I could speak to it.
8 There's just one small little exception, but the answer is
9 yes except for the small exception and I can speak to it
10 (inaudible).

11 THE COMMISSIONER: All right.

12 MR. SMORANG: Perhaps Mr. Saxberg will address
13 that then when he speaks.

14 And then as to that second piece, who will it
15 apply to, I think we will probably benefit from some
16 further discussion on that. And I should just point out, I
17 mean for your benefit, Mr. Commissioner, and also for the
18 benefit of those in opposition, we are still in the process
19 of discovering witnesses, that is, there are people yet to
20 be interviewed and it is possible that your ban may apply
21 to someone not yet identified to someone who will testify
22 and that's a reality and it may even be a reality in the
23 middle of phase one, it might be in mid-October, and all of
24 a sudden might discover the name of somebody who becomes
25 important and is called as a witness. And so I will adopt,

1 at least for now without getting into the detail of it,
2 Mr. Saxberg's comments earlier which were we really need to
3 focus on a category of individual rather than Joe, Fred,
4 Sally and Bill.

5 THE COMMISSIONER: Is that what you say you will
6 spend a little time speaking to your colleagues about?

7 MR. SMORANG: We will discuss that.

8 THE COMMISSIONER: Okay.

9 MR. SMORANG: Exactly. But I mean one of the
10 realities, and I appreciate Mr. Kroft's concern, at least
11 at face value, that you know, I have to know who we're
12 talking about here in general terms at least. Part of our
13 problem is, and part of Ms. Walsh's problem is, we don't
14 know yet. We know probably a vast majority but there may
15 well be others who come up and if they do, well we
16 certainly don't want to be back here for three days every
17 time we come up with a new witness. So at any rate ...

18 My reply will, I hope, be truly a reply in the
19 sense that I intend to respond by and large to comments
20 made by Mr. Kroft and Mr. Gindin and Mr. Funke. Mr. Kroft
21 began with a statement early on in his argument that he
22 said to you stood for the proposition that the MGEU is
23 opposed to a public hearing into the issue surrounding
24 Phoenix Sinclair and he took you to an excerpt from the
25 cross-examination of Janet Kehler and I've asked commission

1 counsel to put the documents I'm going to ask you to see or
2 have regard to in front of you or near you and the first
3 one you need to see is the cross-examination of Janet
4 Kehler.

5 MS. WALSH: We may have this in the order that we
6 related.

7 THE COMMISSIONER: I have, I have -- it's her
8 cross-examination, is it?

9 MR. SMORANG: Yes, it is.

10 THE COMMISSIONER: All right, I have that here.
11 I've got my own all marked, so.

12 MS. WALSH: And some are in binders that I think
13 you've put behind you.

14 THE COMMISSIONER: No, I have it here. You see
15 these copies were all, of these were all sent to me to read
16 as they came in and that's why I have my own set here and
17 all these coloured folders and that's really what the
18 confusion is. These are my copies that I marked when I was
19 able to read them, but anyway, that's just by way of
20 explanation. I have Kehler's cross-examination in front of
21 me.

22 MR. SMORANG: If you would go to page 8.

23 THE COMMISSIONER: Yes.

24 MR. SMORANG: Mr. Kroft read to you from page 8,
25 question 35, as the proposition that the MGEU does not want

1 a public inquiry and he read to you question 35 which was:

2

3 "35 Q Okay. You have committed
4 to the members of the MGEU, and
5 the public, because it was a
6 public letter, you have committed
7 to oppose the public review of the
8 facts of the Phoenix Sinclair
9 case.

10 A That's correct."

11

12 Now that's where Mr. Kroft stopped. If you carry on,
13 question 36, he says:

14

15 "36 Q Now, I take it you are
16 aware that in the course of
17 preparing for --"

18

19 And then Ms. Kehler interrupts him,

20

21 "A Sorry --

22 37 Q Sorry to?

23 A Sorry to interrupt.

24 When you say we have committed to

25 not having a public review, and

1 even before, when I said you have
2 to define what going public is, I
3 guess the reason I want to qualify
4 that response is we did suggest
5 that an inquest, which is also a
6 review, would be an appropriate
7 way, but that the format in which
8 Phase 1 was being handled, we
9 didn't think was appropriate.

10 Q Okay. But an inquest in
11 the normal course is a public
12 proceeding. Right? You are aware
13 of that?

14 A Yes, I am.

15 39 Q And you are fine with
16 that?

17 A Yes."

18

19 And so clearly I didn't want you to be left with
20 the impression from question 35 alone that the answer that
21 Ms. Kehler gave was that MGEU is opposed to a public review
22 of the facts. As she's indicated in the following answers,
23 it was merely the forum of the review, MGEU at that point
24 preferring an inquest, but understanding that even an
25 inquest would be a public process. So I wanted to clear

1 that up.

2 Mr. Kroft then spoke of the dangers of preventing
3 the media from broadcasting the identities of social
4 workers and he said, and I think I quoted him, he said:
5 The true danger would be to permit civil servants to be
6 non-accountable to the public they serve.

7 And then later on, not much later, he was
8 reviewing the Mentuck case and he took a quote I think from
9 Mentuck that said: Society does not benefit from non-
10 accountable and anonymous police officers.

11 And from those statements that Mr. Kroft made,
12 Mr. Commissioner, we can see that although Mr. Kroft didn't
13 specifically at any time try to explain or defend his
14 client's motive in terms of its reporting, that their
15 motive and his submission are essentially the same, that is
16 it's about personal accountability to the media. And I
17 would go so far, sir, as to say that in the media the words
18 "public inquiry" are synonymous with "trial by public
19 opinion". And when they say trial, they clearly mean the
20 trial of individuals. Bring the individuals forward and
21 make them stand publically or as Ms. Reynolds said in her
22 Free Press column, let's find out who aided and abetted the
23 murderers of Phoenix Sinclair. And I'm not faulting the
24 media for that, I'm simply pointing out that is their
25 focus. Their focus, and Mr. Kroft on their behalf made

1 this clear, is personal accountability, that's what they
2 want to look for, who done it. But as we've agreed and I
3 think I'll speak about Mr. Juliano later, but I thought
4 Mr. Juliano's submission and his answer to your question
5 was particularly apropos, that that is not what this
6 inquiry is about. It's not an inquiry into individual
7 accountability. It's an inquiry into a system and it
8 requires you, as the finder of fact and the considerer of
9 information, to get information from the people on the
10 ground and those are the people that I represent and those
11 are the people that I'm trying, on behalf of my client, to
12 ensure are best able and prepared and ultimately, yes,
13 willing to come and sit in that chair and tell everything
14 they know comforted, as Mr. Juliano used that word, in the
15 fact that they will not be pilloried or that their co-
16 worker had not been pilloried the night before.

17 And so whereas the media's focus is on personal
18 accountability, this inquiry, while it will consider
19 actions taken by people, is not to focus on personal
20 accountability. And as Mr. Juliano said there are other
21 forums for that. There is criminal court if someone
22 committed a crime. There is civil court if someone
23 committed an act that is, that is capable of being taken
24 there. There is employment responsibility if someone did
25 something that might justify them being fired or

1 disciplined or anything like that. Those are all outside
2 of your consideration by the order in council and clearly
3 by the mandate of inquiries generally. So I point that out
4 because I think that is a fundamental difference between
5 this inquiry and the media's motivation.

6 Then Mr. Kroft gave us a bit of a history lesson
7 and quoted from Wigmore and some of the lofty principles
8 of, of trials and I don't take issue with anything he said.
9 Clearly an open courtroom where people do not testify in
10 secret, where they are challenged, where they must sit and
11 be seen to give answers is exactly what is needed and is
12 exactly what is going to happen in this case. But what
13 Mr. Kroft then did, and I give him credit for this but I
14 have to call him on it, is that he said that is a public
15 inquiry and anything different than that is not. In other
16 words, what Mr. Kroft is trying to say to you, sir, is that
17 the threshold of your motion is either this is a public
18 inquiry or if you set the motion it is not and therefore
19 everything that Wigmore stood for, all of those principles
20 will just go down the drain and he's wrong. And Mr. Gindin
21 said the same thing. Mr. Gindin actually ended off with
22 that, this must be in all respects a public inquiry, that
23 is critical they say. And I suggest to you, sir, that they
24 are incorrect on two counts.

25 First, the hearing is public, this is going to be

1 a public hearing in all respects but for one, if you grant
2 our motion. It will be public, there will be full exposure
3 of all facts, of all details, of all identities before you
4 and there will be a full opportunity for everyone to cross-
5 examine and examine and review. There will be no
6 impediment upon the fact finding process. So all of those
7 lofty principles that Mr. Kroft espoused are true and will
8 happen. But more to the point, because they're trying to
9 set this up as if you do this you will change this somehow
10 fundamentally from what it is, which is a public inquiry,
11 into something else and something lesser and something not
12 desirable. There are already, as we've just spent the
13 afternoon hearing, significant restrictions on the
14 information that this inquiry will release to the public,
15 already, and those are not found in other inquiries.
16 Documents that have been obtained through the court order
17 from the files of the workers and the agencies and the
18 authorities have been redacted and will remain redacted.
19 Information and names on those documents have been deleted
20 and for good reason in the context of child protection.
21 That won't change. Sources of referral, both who appear in
22 documents and who testify, will not have their names
23 revealed and at least in the case of Mr. Gange's clients,
24 may well have their people testify offsite. Again, all for
25 good reason and all within the context of the Child and

1 Family Services Act, section 18, and the policy behind the
2 system.

3 If Ms. Rachlis is successful for her last two
4 individuals identified by initials but recognized in her
5 affidavit to be not social workers but nurses, if she's
6 successful on those two, those individuals will have the
7 benefit of their names and identities not being revealed.

8 And so by Mr. Kroft's definition and Mr. Gindin's
9 definition, we already do not have a public inquiry because
10 the public is already going to be deprived of some critical
11 information it may think is critical in terms of redacted
12 documents, in terms of names of individuals who will come
13 forward and identities of them that will not be released to
14 the public.

15 And so this motion, sir, is not about the abyss
16 between public and non-public. This motion really, and the
17 question before you, is do you add to an existing list of
18 already redacted information and already protected
19 identities, social workers? It's not a question of going
20 from zero to a hundred. We're already at 60, we're talking
21 about going to 80. In other words, the list exists, the
22 redaction exists, the withdrawal of information for the
23 public exists. We've just gone through it this afternoon.
24 Do you add to it or not? And that's where your
25 Dagenais/Mentuck analysis comes in.

1 And I don't want to beat it to death but a really
2 good example of that exercise is what Judge Guy went
3 through in the CBC case and that's at tab 3 of our motion
4 brief and again I'll be referring to that very briefly, if
5 you could find tab 3 --

6 THE COMMISSIONER: Yes.

7 MR. SMORANG: -- of our motion brief, the MGEU
8 motion brief, tab 3, the CBC case. I thought it was before
9 the commissioner. Is the brief out there somewhere that
10 may assist?

11 MS. WALSH: It was. It was one of the binders
12 that was on the top here.

13 THE COMMISSIONER: Oh yes.

14 MS. WALSH: Got it?

15 THE COMMISSIONER: Volume 1? Yeah, okay.

16 MS. WALSH: Good.

17 THE COMMISSIONER: Tab 3?

18 MR. SMORANG: Tab 3 which is Canadian
19 Broadcasting Corp. v. Manitoba (Attorney General).

20 THE COMMISSIONER: No, no, wait a minute, that's
21 not it. That's the publication ban motion.

22 MR. SMORANG: It's called the motion brief of
23 Manitoba Government and General Employees' Union.

24 MS. WALSH: Now, Mr. Commissioner, we found the
25 case. I believe it's in the ICFS binder right on the

1 corner on the top. No, on the right. I think there's a
2 Post-it that -- is there a Post-it that indicates -- was it
3 in that one?

4 THE COMMISSIONER: No, I don't think ...

5 MS. WALSH: No. Then it was the other one that
6 was up here. Then it's in the authorities, the other one
7 that's on the top shelf.

8 THE COMMISSIONER: This?

9 MS. WALSH: No, the shelf below.

10 THE COMMISSIONER: This?

11 MS. WALSH: The big one should be it. Here it
12 is, this Post-it of the CBC case.

13 THE COMMISSIONER: Which tab?

14 MS. WALSH: Down here where this Post-it is.

15 THE COMMISSIONER: Oh, I see. Okay.

16 MR. SMORANG: You're at tab 3?

17 THE COMMISSIONER: Yeah.

18 MR. SMORANG: Now just before we get into the
19 case, let's go through the background of this again.

20 THE COMMISSIONER: Wait a minute that's tab,
21 that's tab 4. Wait a minute. Tab --

22 MS. WALSH: No, it was the CBC case.

23 THE COMMISSIONER: Yes, it is.

24 MR. SMORANG: CBC case.

25 MS. WALSH: Yes, you've got the case.

1 THE COMMISSIONER: Yeah, all right, okay.

2 MR. SMORANG: Now as we know, sir, and you will
3 know, having been a trial judge, that in the normal course
4 court documents are public documents. That applies in the
5 Queen's Bench and in the Provincial Court. Once filed in
6 the normal course, an exhibit can be viewed by the public
7 or the media, it becomes a public document. That's the
8 normal rule in court.

9 Judge Guy was dealing with an inquest on the
10 Fatality Inquiries Act and he was sitting, of course, as a
11 court, Provincial Court of Manitoba, and the CBC walked in
12 and said that document and those documents have been filed
13 as exhibits. The normal rule is once they're exhibits,
14 they're public, we want access. That was what they said.
15 Follow the normal rule. Now not only were there CFS
16 records in those documents but there was a section 10
17 report done under the Fatality Inquiries Act that were
18 already marked as an exhibit in that case and they said,
19 essentially, this is truly a public hearing, if it's truly
20 a public hearing, Judge Guy, and it's a court hearing in
21 the normal rule we get to see them.

22 Now as a side note, when the CBC's application
23 was refused and they went all the way to the Court of
24 Appeal, if you look at page 6 of the Court of Appeal
25 decision, paragraph 27.

1 THE COMMISSIONER: Yes.

2 MR. SMORANG: If you have paragraph 27 -- you'll
3 remember Mr. Kroft yesterday went to pains to say to you
4 there is no hierarchy amongst Charter rights.

5 THE COMMISSIONER: Yes.

6 MR. SMORANG: In paragraph 27 we have the Court
7 of Appeal reviewing the CBC's argument and the last four
8 lines or so of paragraph 27, this is the court explaining
9 the CBC argument, the court says:

10

11 "Freedom of expression, we were
12 reminded, is one of the most
13 important rights in our democratic
14 society, per Cory J. in Edmonton
15 Journal ... Indeed, counsel ..."

16

17 And this is counsel for the CBC,

18

19 "... says the important role
20 played by the media to inform the
21 public about the operation of the
22 courts should operate 'much as a
23 trump card.'"

24

25 And that paragraph ends with that quoted phrase.

1 Now that was a different lawyer acting for the
2 CBC, perhaps doesn't share the same views as Mr. Kroft, but
3 in any event at that point the CBC was certainly taking the
4 position that the important role that the media played in
5 terms of informing the public should be a trump card in
6 that case. But that's a side note, I want to get back to
7 the case.

8 What Judge Guy did is he performed that
9 Dagenais/Mentuck balancing act and decided not to follow
10 the standard traditional rule of court which is once a
11 document is filed as an exhibit people get to see it,
12 people get access to it and he refused to give them access
13 to those exhibits. And of course he did so as a result of
14 the context in which his court was operating, which was at
15 that point an inquest that had received confidential
16 records and reports. That is his inquest, sir, like your
17 inquiry, already had restrictions built in. It was
18 different. He saw that. He took that into account.

19 Did the fact that that inquest already had
20 certain restrictions built in make it any less of a public
21 inquest? It didn't and the CBC didn't argue that it did.
22 The CBC argued all the way to the Court of Appeal that what
23 Judge Guy did not do was conduct a proper Dagenais/Mentuck
24 analysis and the court says that at paragraph 25 on page 5,
25 where the court says:

1

2

"The sum total of these

3

errors ..."

4

5 These are errors the CBC attributes to the motions court

6

judge,

7

8

"The sum total of these errors,

9

the CBC argues, is that the

10

inquest judge failed to perform a

11

proper Dagenais/Mentuck analysis

12

and to give proper weight to the

13

fact that the documents were

14

already in the public realm and

15

accessible by the media by virtue

16

of the operation of secs. 75 and

17

76 ..."

18

19

So what you are doing, sir, is very much like

20

what Judge Guy did and where you sit at this moment is very

21

much where Judge Guy sat. I'm in the middle of something,

22

it's not the norm, it's cloaked with certain

23

confidentiality, both statutory and by virtue of the system

24

under which these records were gathered, and I must take

25

that into account and I will take that into account and

1 ultimately Judge Guy said, the balance favours protecting
2 the system. Even though in any other case, in any other
3 court the media could walk in and say let me see Exhibit 1
4 and I want to read Exhibit 6. In this case, Judge Guy said
5 no and the Court of Appeal agreed.

6 I urge you to read Judge Guy's reasons for
7 decision in that particular motion. Not his report per se
8 that ultimately came out as a result of the inquest but his
9 actual reasons for denying that motion and I won't take you
10 to them but just if you'd make a note, they are at the ANCR
11 reply brief at tab 11.

12 THE COMMISSIONER: Just a minute.

13 MR. SMORANG: That was Judge Guy's reasons for
14 denying the media motion. And again, without ever even
15 mentioned Dagenais/Mentuck, Judge Guy goes through that
16 analysis in the context of the child protection system.

17 The next point that I want to address for
18 Mr. Kroft is he talked about rules of evidence before you
19 and he said because Charter rights are at play on this
20 motion, you must adhere to the strict rules of evidence
21 even if later on in this hearing, phase 1, 2 and 3, you
22 will be relaxing those rules, just because Charter rights
23 are at play. And therefore what Mr. Kroft says is ignore
24 the powers, the relaxed powers that you were given under
25 the order in council and that have been adopted by your

1 rules of procedure and stick to the very strict rules that
2 would apply in a court of law because Charter rights are at
3 play. Now I want to examine that concept.

4 Mr. Khan took you through a number of cases to
5 illustrate that any time a child is apprehended, Charter
6 rights are at play. Therefore in every child protection
7 case in our court in Manitoba, in our family division of
8 our Queen's Bench, Charter rights are at play. And in our
9 courts in Manitoba, pursuant to the Child and Family
10 Services Act, there are relaxed rules of procedure and
11 evidence that apply and I want to take you briefly to the
12 Intertribal Child and Family Services reply brief, Mr.
13 Khan's reply brief, and in particular tab 9.

14 THE COMMISSIONER: Just a minute.

15 MR. SMORANG: Reply brief of Intertribal Child
16 and Family Services.

17 MS. WALSH: Mr. Commissioner, I think it's open
18 in front of you.

19 THE COMMISSIONER: Is that what it is?

20 MS. WALSH: No, that ICFS right behind you.

21 THE COMMISSIONER: This one?

22 MS. WALSH: That one, yes.

23 THE COMMISSIONER: But that's the -- that's not
24 the reply brief or is it in there?

25 MS. WALSH: I think it might be, I think it is.

1 THE COMMISSIONER: It's marked the ban motion.

2 MS. WALSH: I think it has both. Motion brief --
3 not the reply brief?

4 THE COMMISSIONER: No.

5 MS. WALSH: It was on here earlier today. What
6 else is behind you? Right in front of you then, that one.

7 THE COMMISSIONER: Yeah, it's not marked reply
8 brief, that's the problem.

9 MS. WALSH: I know.

10 THE COMMISSIONER: Here it is.

11 MS. WALSH: Good.

12 THE COMMISSIONER: Yeah, okay.

13 MR. SMORANG: If you could go to tab 9 of that
14 brief.

15 THE COMMISSIONER: Yes.

16 MR. SMORANG: Tab 9 is a decision of Justice
17 Aquila of our Court of Queen's Bench Family Division. It's
18 entitled Métis Child and Family Community Services v.
19 A.J.M. and A.J.D.I.

20 THE COMMISSIONER: Yes.

21 MR. SMORANG: This was a case where counsel was
22 seeking to have Justice Aquila removed for bias because of
23 judicial intervention in the course of the trial. Plainly,
24 he was interfering too much, thought, thought the lawyer.

25 THE COMMISSIONER: Not good.

1 MR. SMORANG: Well, apparently not so bad in
2 child protection --

3 THE COMMISSIONER: Okay.

4 MR. SMORANG: -- because if you look at
5 paragraph 4 on the third page of the decision, Justice
6 Aquila speaks of and cites sections 36 and 37(1) and (2) of
7 the Child and Family Services Act. These are sections that
8 give a judge in child protection matters, again, where
9 Charter rights are at play, gives that judge wide powers,
10 36, proceedings may be as informal as the judge or master
11 may allow; 37 the judge can call evidence on his or her own
12 motion; 37(1)(b) judge can accept affidavit evidence. And
13 then goes on at paragraph 5, which is on the next page, to
14 quote from our Court of Appeal, Justice Twaddle in the
15 Winnipeg Child and Family Services v. L.L. case where
16 Justice Twaddle said, concerning informality in child
17 protection cases in our courts:

18

19 There is nothing in either the
20 Child and Family Services Act or
21 any other piece of legislation
22 that deals with hearsay evidence
23 in child protection cases. The
24 reception of such evidence is not
25 expressly authorized nor is it

1 expressly forbidden. The
2 legislature has simply left it to
3 the court hearing a child
4 protection case to apply its own
5 rules of evidence.

6

7 Further, Twaddle says, and this is at paragraph 6:

8

9 The use of inherent power of the
10 Queen's Bench to bypass the
11 technical rules of evidence when
12 dealing with the welfare of
13 children is consistent with the
14 legislative mandate contained in
15 s. 36 of the act.

16

17 So what is being said here is we've got the
18 leeway, we can take hearsay, we can be informal, the best
19 interests in the welfare of the children is the most
20 important thing and that's what we're going to do in court
21 cases, in child protection matters when Charter rights are
22 at play. That's what our courts do.

23 I'm just going to spend a brief time on the
24 motion to strike.

25 THE COMMISSIONER: Well, I don't know if

1 Mr. Kroft is standing by expecting me to strike. I, I
2 never heard him place great emphasis on that. I thought it
3 came down to weight, but are you, is your motion to strike
4 still, still with us, Mr. Kroft?

5 MR. KROFT: Yes, the motion to strike is still
6 alive. You're correct, I didn't spend a great deal of time
7 on it and you're also correct that -- you've read it and I
8 will argue that if you consider it at all then it does it
9 go to weight then that's what Mr. Gindin said as well, but
10 I'm not withdrawing those motions.

11 MR. SMORANG: I'll be brief, because I, I took
12 the same impression from listening to Mr. Kroft yesterday
13 in terms of the emphasis he placed on this and the time he
14 spent. But in any event, the Mohan case, speaking of
15 expert evidence, requires an opinion that requires special
16 training or education to formulate. This is all in
17 Mr. Kroft's brief.

18 THE COMMISSIONER: What, what case is that?

19 MR. SMORANG: The Mohan case, M-O-H-A-N.

20 THE COMMISSIONER: M-O-H ...

21 MR. SMORANG: A-N.

22 THE COMMISSIONER: Yes, yes.

23 MR. SMORANG: So you need some, there's some
24 essentials. First of all, it's an opinion that requires
25 special training or education to formulate. So you could

1 have somebody before you who's got special training or
2 education. Number two, it is necessary to assist the trier
3 of fact. Obviously, as we all know, experts do not
4 substitute for judges, they assist judges, so it's
5 necessary for you to have that, that is a prerequisite.
6 Thirdly, it's relevant to the question before you.
7 Fourthly, the expert is qualified. And fifthly, there's no
8 exclusionary rule that would be offended by admitting the
9 opinion.

10 With regard to the experts in this case, you have
11 essentially four of them: The social worker expert from
12 Alberta, Wotherspoon; the former director of Toronto
13 Children's Aid for 16 years, Rivers; Dr. Regehr, faculty at
14 University of Toronto and former dean of the Faculty of
15 Social Worker; Gosek, faculty at the University of
16 Manitoba. And you have McLeod, McLeod is not brought to
17 you as an expert but McLeod comes in part to represent the
18 professional body and to communicate to you a resolution
19 made by the professional body in Manitoba for social
20 workers supporting this motion.

21 So I suggest to you, sir, that based in part on
22 information I gave you when I first spoke and I won't
23 repeat, each one of these individuals is eminently
24 qualified, each one of them does have the necessary
25 information that is relevant that will assist you in your

1 Dagenais/Mentuck analysis and that they are all qualified.
2 Certainly expertise is, it can be narrow and can be wide,
3 but in each one of these cases you will see their years of
4 service in this area, the area of child protection,
5 measured in the multiple decades, not in years but in
6 decades. And I'm going to assume, sir, that you have very
7 little knowledge of the profession of social work and you
8 have not personally researched the effect of publicity on
9 social workers in public inquests. These folks have done a
10 lot of research. I think Mr. Saxberg will talk a little
11 bit more and will focus you on some of the points that
12 they've made and I will leave that to him.

13 As for hearsay, I would simply repeat the point I
14 made earlier about our courts in Manitoba under child
15 protection proceedings and the jurisdictional documents
16 that give you the power to hear virtually any kind of
17 evidence, whether it would be applicable or received in a
18 court of law or not.

19 I want to talk a bit about quality of evidence
20 because Mr. Kroft had that as one of his headings, what is
21 the quality of evidence required. And he quoted from the
22 Supreme Court case in the Toronto Star, that the evidence
23 must go beyond a general assertion and I don't disagree
24 with that. It wouldn't matter if I did, it's our Supreme
25 Court. But at any rate, our evidence and the evidence

1 before you clearly goes beyond general assertion.
2 Certainly if the evidence has to go so far as to prove that
3 harm will definitely occur, then that is an unrealistic and
4 too high a standard and as Mr. Khan said, if we come to you
5 and say harm has already occurred, then perhaps we're too
6 late. We have to come to you with risks, that's why the
7 word risk appears in Dagenais/Mentuck. It means an
8 assessment of probability or possibility based on evidence.

9 Mr. Kroft gave you several topics under the
10 category of what this case is not about and what he said
11 was, one of them at least, this case is not about the
12 identity of children, families or sources of referrals,
13 just about paid civil servants. And he used that phrase
14 many times in his, in his submission, paid civil servants.
15 And I suggest that Mr. Kroft would like you to focus on
16 that and he'd like you to focus on the individual social
17 worker, not the effect that the publicity may have on the
18 system and on child protection and on the profession. In
19 other words, he'd like you to focus in on these people.
20 These are perhaps government paid people who --

21 THE COMMISSIONER: Well, as far as I know, all
22 civil servants are paid, so I'm not going to be making any
23 reference to the fact that the civil servants were all
24 paid.

25 MR. SMORANG: Well, I guess, I guess the point

1 he's making is because we're paying for them, we, the
2 public of Manitoba, they have some overriding and special
3 duty to come forward and, and tell us everything,
4 irrespective of the negative consequences that that might
5 have on anybody, them, the system, whatever, just because
6 they fall into that category of paid civil servant. And I
7 urge you, of course, not to accept that at all. We're not
8 focusing here totally among individuals. We're focusing on
9 generic, the ability of the social worker to do their job,
10 the ability of other social workers to do their job in
11 light of what media firestorm is going to occur should
12 their names and faces be broadcast.

13 Regarding our expert evidence, and again I'll
14 leave this much to Mr. Saxberg, but he certainly tried to
15 minimize their message, but again I emphasize that their
16 message is clear and unambiguous. He, Mr. Kroft, cherry
17 picked from, for example, the Regehr affidavit. I'll just
18 give you one example. If you can pull Dr. Regehr's
19 affidavit.

20 THE COMMISSIONER: Oh that's, Regehr was, that
21 was filed by Intertribal, was it?

22 MR. SMORANG: That was filed by ANCR.

23 THE COMMISSIONER: ANCR, yeah, yeah. All right.

24 MR. SMORANG: If you can go to tab I.

25 THE COMMISSIONER: Just a minute.

1 MR. SMORANG: There's an article entitled "Child
2 Protection in the Media: Lessons from the Last Three
3 Decades".

4 THE COMMISSIONER: Yes.

5 MR. SMORANG: Mr. Kroft read to you just from the
6 first paragraph, the summary.

7

8 "This paper explores the
9 contribution of the media to the
10 creation of the climate of
11 fear ..."

12

13 Et cetera. Then he went on say nowhere in this paper do
14 you hear anything about the negative effect of publicity on
15 the profession. And if you just go three pages in to the
16 document at page 889, there's a heading "A Climate of
17 Fear". Do you see that on page 889?

18 THE COMMISSIONER: Yes, yes.

19 MR. SMORANG: If you go down to the last
20 paragraph on that page, the authors say:

21

22 "It is important to recognize that
23 the climate of fear is not
24 confined to the general public,
25 but extends also to the policy

1 makers and professional groups
2 most closely involved. Close
3 scrutiny of developments in child
4 protection in England and Wales
5 over the last two and a half
6 decades may suggest that the
7 allocation of resources during
8 this period has been driven
9 primarily by the desire of
10 politicians and senior managers to
11 avoid featuring on the front page
12 of the tabloid press following the
13 latest celebrated child abuse
14 scandal ..."

15

16 And he cites the authors. He goes on:

17

18 "The development of services
19 offering a balanced and confident
20 professional response is not
21 promoted by the fear of seeing
22 your picture on the cover of a
23 mass circulation daily above the
24 headline 'Sack her, child abuse
25 doc must go'."

1 So clearly these authors have spent time
2 considering the effect of the fear on the system, on the
3 profession, on the management of the profession associated
4 with the media sensationalistic headlines and articles
5 following highly emotional inquiries and inquests. And I'm
6 sure Mr. Saxberg will give you other quotes for you to
7 review.

8 Mr. Kroft attempted to, I'll say, pigeonhole my
9 argument into three areas. He said there was the stress
10 argument, the negative association argument and the
11 managing public debate argument. I don't accept that. I
12 certainly don't accept that my argument is in three
13 categories. My argument encompasses all of the negative
14 consequences of identifying social workers personally, the
15 effect on other social workers, that radiated effect that
16 Mr. Saxberg spoke of, to the system and ultimately to the
17 ability of the inquiry to get as much information as it can
18 to better equip you to make relevant and significant
19 recommendations. So I do not accept Mr. Kroft's attempt to
20 frame my argument as one, two and three. It just wasn't
21 presented that way and if he saw it that way, that's fine,
22 but I don't accept that.

23 So I'm now going to move to Mr. Kroft's
24 continuation this morning and I only have a few comments on
25 that and I'll soon be ready to sit down.

1 For a moment, listening to Mr. Kroft, I thought I
2 acted for the government because he kept saying the
3 government is managing and censoring and the government in
4 a free and democratic society is trying to do things. My
5 client is not the government; to the contrary. My client
6 often spends time and money criticizing the government and
7 my client will be giving evidence in phase 2 of this
8 hearing which will be critical. And in phase 1, the social
9 workers who were going to be asked, I presume, similar
10 questions to those they've been asked in interviews will be
11 asked their opinions about the system and hopefully will be
12 forthcoming and will feel comfortable and secure in being
13 forthcoming. Nor are the authorities, nor the University
14 of Manitoba the government. So I'm not sure where
15 Mr. Kroft decided that the government was behind some plot
16 to turn us into Stalinist Russia.

17 I will only mention the filming, the decisions,
18 the CBC v. Canada cases, those cases that he just sent us
19 the other day and you had mentioned. I don't see the
20 Supreme Court case as overturning Pilarinos and I would
21 simply refer you to paragraph 85 of the CBC case where I
22 think the court -- certainly the court doesn't mention the
23 Pilarinos decision, certainly doesn't overrule it. Look at
24 paragraph 85. I think the court kind of sums up what it's
25 doing in that case and I don't believe Pilarinos is bad law

1 and certainly the other case, the APTN case does not
2 overturn Pilarinos either.

3 THE COMMISSIONER: So you say Pilarinos is still
4 good law.

5 MR. SMORANG: I do. The principles in it --

6 THE COMMISSIONER: Standing for what proposition?

7 MR. SMORANG: Standing for the proposition that
8 while there is freedom of expression, the method of freedom
9 of expression is not guaranteed such that the CBC can say
10 is an extension of my freedom of expression to walk in
11 here, or for that matter any citizen, because the CBC would
12 have no more Charter rights than any other citizen, to say
13 it is my Charter rights, Mr. Brodbeck accepted, walk in
14 here with a video camera and take video. That is not a
15 Charter right under Pilarinos, it's not a Charter right
16 under CBC.

17 Mr. Kroft talked about the enforceability of the
18 ban but if you can't enforce it to every single person, if
19 one person sends an email to a friend saying I saw James
20 Smith today, that your ban is therefore breached and
21 therefore, what's the use in essence. He did cite to you
22 from, I believe it was Dagenais, where the court said the
23 enforceability of the ban is but one factor to take into
24 account when balancing the positives and the negatives and
25 if one of the realities is the ban simply won't be able to

1 be enforced well that doesn't bode well for a positive
2 consideration. In our respectful view, the ban we seek and
3 will be seeking, will cover 99.9 percent of the problem
4 that we envisage and the email that goes from Sally to Fred
5 and mentions the name of a witness is not what we're
6 concerned about and should be of no concern to you. That
7 will not affect and have the negative consequences that we
8 say will result from the mass publication of names and
9 images.

10 Mr. Gindin made much of, you know, what's your
11 report going to look like if you don't name names.
12 Although we haven't go to the evidentiary stage yet, we
13 have seen a number of reports that will be produced in
14 phase 2 that were done by credible individuals that have
15 good information in them, none of which names social
16 workers. There seems to be a way to do that, they've done
17 it. I don't think that's a particularly important
18 consideration for you.

19 Public perception, Mr. Gindin also focused on
20 public perception. Let me offer you this in response. And
21 what he said was, you know, what would the public
22 perception be if, if what they were hearing on the news was
23 a social worker said, instead of James Smith said, and not
24 seeing James Smith's picture. I ask you to consider the
25 alternative which is what would the public perception be

1 knowing that the confidentiality associated with this
2 system and integral to it is in fact maintained and is
3 always maintained. Wouldn't that give the public some
4 comfort that a confidential system is confidential and will
5 always be so and protections will always be in place to
6 ensure that if you do take the somewhat drastic step of
7 phoning an agency and telling them about your neighbour or
8 your sister or your aunt or your ex, that your name will
9 never be used, and that if you are involved in a
10 confidential system it stays that way because that is
11 important to the system. No one's denying that today and I
12 suggest to you that would be something that the public
13 would take comfort in.

14 Finally, from Mr. Gindin he said at the end of
15 his submission that there is no rational connection between
16 naming witnesses and future harm to children and I found
17 myself asking myself and making a note, how could such a
18 rational connection be established if not by bringing
19 forward experts from across Canada? When I argue cases as
20 I often do and I hear a lawyer that is saying Smorang
21 hasn't given you enough, I always think to myself well what
22 more could I have given? And if I can't come up with an
23 answer I'm usually satisfied that I've given enough and I
24 think that's the answer to this case. The rational
25 connection is we've given you experts from across the

1 country, from a wide variety of completely unbiased and
2 uninterested backgrounds, academics, executive directors of
3 Children's Aid Society of Toronto, individuals who have no
4 stake in this. And if that isn't a rational connection, my
5 question to Mr. Gindin would be what would you suggest?
6 And if he has no answer, then of course the test could
7 never be met.

8 So in conclusion, and I've mentioned that I would
9 speak about Mr. Juliano again and I didn't hear anyone
10 really criticize Mr. Juliano's submission today. I think
11 he best capsulized what we're up to here and he did that in
12 answer to your question about how will allowing the motion
13 served to better protect children. That's a question you
14 asked of all of us.

15 Mr. Juliano said the inquiry's mandate is not to
16 achieve personal accountability of social workers. That
17 can be achieved in other ways if need be outside of the
18 inquiry process. The inquiry, said Mr. Juliano, is to
19 examine the system and get evidence from those witnesses
20 within the system as to what happened and why and how it
21 can be changed and as such, said Mr. Juliano, your order
22 would send a comforting message to the social worker
23 profession that it is about the system and not about the
24 individuals and you agreed with him that it was in fact
25 about the system. This isn't a criminal or a civil trial

1 or a disciplinary hearing. But for the media this is, and
2 always has been and always will be, about personal
3 accountability. It is about the people. Who aided and
4 abetted? Who should be fired? And that's fine. If they
5 want to play that, that's their business, they have every
6 right in this country to do that. And those are questions
7 that they will continue to ask and they will continue to
8 report on. But the question that you need to decide, sir,
9 is whether assisting the media by allowing them to even
10 further personalize the question of blame by publishing
11 names and faces, is outweighed by the danger that all the
12 experts are telling you can and may well be caused if you
13 do.

14 Either way you go, sir, this hearing will be
15 virtually the same, but the media's effect on the system
16 and ultimately on the interests of children, families, who
17 come into contact with the child welfare system by
18 reporting and blaming individuals will be greatly enhanced
19 or diminished by your decision. Thank you for your
20 patience.

21 THE COMMISSIONER: Thank you, Mr. Smorang.

22 Well, we've still got three more replies so I
23 think we'll take a 10 minute break.

24

25

(BRIEF RECESS)

1 THE CLERK: Please be seated.

2 THE COMMISSIONER: Yes, Mr. Juliano.

3 MR. JULIANO: Mr. Commissioner, I've managed to
4 trick --

5 UNIDENTIFIED PERSON: Stand by the mic.

6 MR. JULIANO: Oh sorry. Mr. Commissioner, I
7 managed to trick my fellow counsel into allowing me not to
8 be last today and I just have a very, one minute submission
9 for you. I'm going to leave the reply to the main motion
10 to my colleagues. I, I certainly adopt the comments that
11 Mr. Smorang has made. The only reason I felt it necessary
12 just to stand up today was simply because there is still a
13 motion to strike outstanding which does, at least on paper,
14 seek to strike out virtually the entire affidavit of
15 Ms. Gosek.

16 THE COMMISSIONER: Yes, and I know that you have
17 filed an extensive brief on that point.

18 MR. JULIANO: Yes.

19 THE COMMISSIONER: And I read it but I'm
20 certainly prepared to listen to anything you want to say
21 about it, but you may have already gathered from what I've
22 said, I'm not leaning to doing some striking, I'm leaning
23 to dealing with a substantive motion.

24 MR. JULIANO: All right. And so I won't, I won't
25 spend any time at all on it.

1 THE COMMISSIONER: But I'll listen to you as long
2 as --

3 MR. JULIANO: Yeah.

4 THE COMMISSIONER: -- within reason.

5 MR. JULIANO: No, I only need just a few seconds,
6 I think. I just -- in Mr. Kroft's submission he did
7 actually cite Ms. Gosek's affidavit as example of something
8 that was fairly well researched and authoritative and in
9 fact relied upon it several times in his submission. So I
10 suspect that really he is not seeking to strike out all of
11 it. I think it's more a question of whether or not she
12 went beyond the areas that are within her expertise. I
13 don't believe she did. I, I believe the paragraphs that he
14 has cited are simply ones that are quite closely related to
15 her area of expertise and it's of course possible to
16 characterize some of those statements a little differently
17 and I would, as you said, just urge you to consider that
18 with regard to weight rather than striking something out.

19 THE COMMISSIONER: I think you'll likely find
20 that's what I do.

21 MR. JULIANO: Okay, and I did. Just the only,
22 the only other thing I wanted to mention was just in terms
23 of the law as it applies. We did provide you in our brief
24 the Supreme Court case of Abbey which with regard to all of
25 the expert witnesses that have been submitted, we've heard

1 some argument that some of what they're relied upon is
2 hearsay. If you look at the Abbey case you'll see that the
3 Supreme Court cautions against treating something as
4 hearsay when it's really part of an expert affidavit. In
5 fact they say it really isn't hearsay because it's not
6 submitted so much for the purposes of proving as truth the
7 statements therein but simply just to provide the
8 background or the information which shows what the expert
9 opinion is based upon. So that's really all I had to say
10 on that point. Thank you, Mr. Commissioner.

11 THE COMMISSIONER: All right. Thank you very
12 much, Mr. Juliano. I appreciate your participation.

13 All right, Mr. Saxberg.

14 MR. SAXBERG: Thank you, Mr. Commissioner. If we
15 can begin with the remedy question.

16 THE COMMISSIONER: Oh, yes, the remedy. Yes, of
17 course.

18 MR. SAXBERG: I think I can --

19 THE COMMISSIONER: Let me get that out.

20 MR. SAXBERG: What you'd want to have before you
21 is Mr. Smorang's notice of motion, the notice of motion of
22 MGEU.

23 THE COMMISSIONER: Yeah. All right, I have it
24 and I have the change that is agreed upon and you had one
25 other point.

1 MR. SAXBERG: Yes. Through discussion with the
2 other two applicants, we've all, we've reached a consensus
3 on agreeing to the identical form of order which would be
4 that which is before you in Mr. Smorang's affidavit with
5 the change that he's already noted.

6 THE COMMISSIONER: In his, in his notice of
7 motion.

8 MR. SAXBERG: In his notice of motion, sorry, I
9 said affidavit. In this notice of motion with that change
10 and another that we've all agreed to as well. And that
11 change is that it would read that the commissioner prohibit
12 any commercial media organization --

13 THE COMMISSIONER: Prohibit any?

14 MR. SAXBERG: Commercial media organization.

15 THE COMMISSIONER: Media organization?

16 MR. SAXBERG: Yes. And then it would continue on
17 -- from publishing, broadcasting or otherwise communicating
18 by television, et cetera, and then it would, the exclusion
19 is the name and image. So as I say, all three have agreed
20 to the language then --

21 THE COMMISSIONER: And that would suit, that
22 would remove the relief you asked for under your first
23 round in your own notice of motion and also the same for
24 Intertribal. In other words, this is it.

25 MR. SAXBERG: This is it.

1 THE COMMISSIONER: All right.

2 MR. SAXBERG: And that social workers as
3 indicated here, and a list as you know has been provided.

4 MR. KROFT: Sorry, I'm --

5 THE COMMISSIONER: Yes, I'll give you a chance to
6 speak to this.

7 MR. KROFT: No, no, I don't want to speak to it.
8 I, I'm just not following it. I'm wondering if he could
9 read how the paragraph would work so we can --

10 THE COMMISSIONER: Well, as I understand it, he
11 tells me there's consensus -- and since you didn't come
12 here to meet this wording, I will give you the opportunity
13 to respond if you've got some objection. But the question
14 of relief will be that the commissioner prohibit any
15 commercial media organization and that should be instead of
16 "form", "from" --

17 MR. SAXBERG: Right.

18 THE COMMISSIONER: No, no, form apology -- any
19 commercial media organization form -- what is it now you --
20 just, just -- you said those words were to go in after
21 "any" didn't you?

22 MR. SAXBERG: Yeah, that's right. You were
23 correct to say strike out "form of" and so that it could
24 read -- and maybe I'll just read what I think the wording
25 should be.

1 THE COMMISSIONER: Yes, yes.

2 MR. SAXBERG: I'll try to do it slowly. That the
3 commissioner prohibit any commercial media organization
4 from publishing --

5 THE COMMISSIONER: From publishing.

6 MR. SAXBERG: Right. And I'll continue on
7 then -- broadcasting or otherwise communicating by
8 television, Internet, radio, in print or by any other means
9 the name and/or image of any --

10 THE COMMISSIONER: And/or?

11 MR. SAXBERG: Yes, I believe that's correct.
12 I'll continue then -- name and/or image of any witness at
13 the inquiry who is or was a social worker, as well as the
14 name of any social worker identified in documents produced
15 at the inquiry. And when I spoke of consensus, I meant the
16 consensus between the three applicants.

17 THE COMMISSIONER: I understand that.

18 Now you've all heard Mr. Saxberg and the change
19 that Mr. Smorang indicated with respect to image and now in
20 the first line with respect to commercial media
21 organization. Does anyone want to speak to that or,
22 because I would like to do that now if anyone has got any
23 concern with that wording. Mr. Kroft?

24 MR. KROFT: Yes. This is, this is a rather
25 significant, a concept that's been introduced here, the

1 question of commercial, and I'm not sure I'm going to be
2 able to speak to it this afternoon. For example, I
3 represent the CBC in this motion and I'm not sure if they
4 fall within this matter or not, this wording or not. And I
5 think the question of whether the publication is for profit
6 or not, which is I'm thinking what commercial might refer
7 to, raises a whole range of issues in terms of
8 distinguishing between section 2(b) rights of some and not
9 others, that I'm going to need to consider as a matter of
10 law. The other issue that comes up when you talk about the
11 question of commercial has to do with the efficacy. If
12 that means that, for example, all community --

13 THE COMMISSIONER: I think you should come to a
14 mic.

15 MR. KROFT: I'm sorry, yes. I apologize. I'm
16 speaking and I'm not entirely sure what I'm going to say
17 because I've just heard this, but the other point I was
18 going to make, one is the distinction in rights based upon
19 the profit or non-profit motive of the, or that the
20 institution I believe is something that needs to be
21 carefully considered in terms of constitutional law. The
22 other point that I was going to make that this raises goes
23 to the quote that I gave you from Dagenais about efficacy.
24 If, for example, every community newspaper in Manitoba that
25 isn't for profit, can publish the names but those that are

1 for profit can't in terms of whether this achieves any
2 purpose whatsoever other than to give community newspapers
3 an advantage over ones that have shareholders, I'm not sure
4 that there can be any justification for any ban on this
5 basis. So I'm somewhat taken aback because it does add a
6 complex question that has not to this point been on the
7 table.

8 THE COMMISSIONER: Well, I'll ask Mr. Saxberg if
9 he can give an explanation for the change in the first line
10 and that might be of some assistance to you, Mr. Kroft. I
11 know it's, the motion is that of the applicants, but by the
12 same token other counsel must have an opportunity to speak
13 if they wish because they didn't come here to meet a motion
14 with this phraseology in it. So, Mr. Saxberg, tell us
15 what, what your purpose is in adding those words.

16 MR. SAXBERG: Yes. You heard two criticisms of
17 the form of order that's being sought and one of them dealt
18 with the criticism that if the order was granted it would
19 cover off anyone who wanted to email some, something about
20 what they had seen at the hearing. And what this change is
21 doing, and there's no magic to the word "commercial". I'm
22 not -- I worked in broadcasting for 10 years. I'm not
23 aware of any broadcasting, charitable broadcasting
24 organizations but maybe Mr. Kroft is. All we meant to say
25 was a media organization --

1 THE COMMISSIONER: Well, do you need the word --

2 MR. SAXBERG: -- as opposed to an individual.

3 THE COMMISSIONER: Do you need the word
4 "commercial" there?

5 MR. SAXBERG: I don't think so.

6 THE COMMISSIONER: Well, let's strike that and
7 see.

8 MR. SAXBERG: The point was just can we simply
9 address the concern that was raised because the intention
10 of the applicants is agreed amongst the applicants. What
11 we're trying to do is avoid the mass communication of the
12 name and picture, image, of these witnesses. We're not
13 trying to stop people from coming to the hearing, seeing
14 the witness, hearing the name, we're not trying to stop
15 them from talking about it afterwards and we're all in
16 agreement on that. Because it's the mass publication that
17 creates the mass --

18 THE COMMISSIONER: But doesn't that, doesn't that
19 -- you get into that with your reference to Internet in
20 there?

21 MR. SAXBERG: No, because now it's the media
22 organization and its Internet web page that's being
23 referred to as opposed to anything on the Internet.

24 THE COMMISSIONER: So you're saying it would now
25 read: The commissioner prohibit any media organization

1 from publishing, broadcasting or otherwise communicating by
2 television, Internet, radio, in print, or by any other
3 means, the name and/or image of any witness at the inquiry
4 who is or was a social worker, as well as the name of any
5 social worker identified in documents produced at the
6 inquiry.

7 MR. SAXBERG: Yes.

8 THE COMMISSIONER: So that if identification went
9 out through, on the Internet from a source other than a
10 media organization, that would not be covered by the, by
11 the ban.

12 MR. SAXBERG: Precisely. And the media
13 organization wouldn't be able to then publish that name
14 even though they got it from a source other than, than at
15 the hearing. Because the ban is about what the media, the
16 mass media can do. And by the way, maybe, you know, the
17 word that we used when we -- let me just back up a second.
18 The three applicants met at the urging of commission
19 counsel. We went over all of this. We may not have
20 communicated as well as we ought to have but we certainly
21 reached a consensus on what we were trying to achieve. And
22 we then tried to put it into the revised protocol that
23 you've been looking at throughout these proceedings and
24 what we did was we said in item number 7, was that there be
25 a ban on the media publishing. So we had actually used the

1 word "media" in terms of our protocol in the past. So
2 this, this change really isn't inconsistent with what we
3 agreed to, we just didn't communicate it as well as we
4 ought to have.

5 THE COMMISSIONER: Well, listen, let's take the
6 rest of your reply and hear Mr. Khan and then I'll come
7 back to this and perhaps Mr. Kroft and any others who want
8 to do some thinking about this might have a chance to do
9 that. I see Mr. Kroft with still a, I would say, a puzzled
10 look on his face, if I'm not being unreasonable or unfair.
11 And so let's get on and hear you and then we'll, we'll
12 return to this as the last item of business.

13 MR. SAXBERG: Okay, thank you. So the next item
14 I want to address is Mr. Kroft's comments with respect to
15 the role of the best interests of children in your
16 determination, sir. And if you look at Mr. Kroft's brief,
17 you will not see within it any reference to a consideration
18 of the best interests of the children. Similarly, if you
19 delve deeper into Mr. Kroft's brief and look at the cases
20 that he's attached, you won't see any cases where the
21 court's dealing with children or making a decision that's
22 going to impact children.

23 On his feet, in reply to ANCR and the authority's
24 brief, which of course dealt with the concept of best
25 interests of the children and noted that it had to be at

1 the very forefront of your consideration in determining the
2 issue before you. And I will just refer you to ANCR and
3 the authority's book of selected documents.

4 THE COMMISSIONER: Is that the blue book?

5 MR. SAXBERG: It's the blue book.

6 THE COMMISSIONER: All right.

7 MR. SAXBERG: And I'm going to refer you to tab
8 12, page 5 of tab 12. The heading on this page is "Charter
9 Rights versus the Best Interests of Children".

10 THE COMMISSIONER: Yes.

11 MR. SAXBERG: Now in his presentation, Mr. Kroft
12 acknowledged that there you have to consider the best
13 interests of children. He acknowledged that although not
14 stated in his brief, he acknowledged it on his feet, you
15 have to consider that. What he said was it should be on a
16 equal level with freedom of the press. And I'm sure I'm
17 being fair with respect to his submissions. He took you to
18 the Dagenais case and in particular, a quote -- by the way,
19 that Dagenais case is tab 20. And he took you to a quote
20 that said, he indicated was authority for the proposition
21 that you can't have a hierarchy, you ought to have a
22 hierarchy of rights. It's at tab 20, paragraph 72. He
23 took you there and he said when you're considering the best
24 interests of the children --

25 THE COMMISSIONER: It's tab 20 in what?

1 MR. SAXBERG: Tab 20 of his brief, of, of the
2 media brief.

3 THE COMMISSIONER: The media brief, okay.

4 MR. SAXBERG: And that quote, what it, if you
5 look at it what it says is a hierarchy is to be avoided,
6 that's what it says first of all, hierarchy of rights is to
7 be avoided, that's what the Supreme Court is saying in
8 Dagenais. Well, in the case before you, the concept of
9 best interests of the children is not Charter right and
10 that's not what, the court in Dagenais wasn't referring to
11 that as being a Charter right that you couldn't put in a
12 hierarchal situation. The court was not considering what
13 happens when a decision involves a Charter right on the one
14 hand and best interests of the children on the other, it
15 wasn't. But let's look at the cases that were considering
16 that and there before you on page 5 of tab 12 that we had,
17 where I had asked you to open up to that.

18 THE COMMISSIONER: Yeah.

19 MR. SAXBERG: It's in the blue book, tab 12,
20 page 5. So let's see what the courts say when there's a
21 Charter right on the one hand and best interests of the
22 child on the other hand. In other words, a case involving
23 the court and children. And what we're saying to you as
24 loudly as we can is that the highest courts in Canada have
25 repeatedly held that the best interests of children take

1 precedence and are of paramount consideration for courts
2 even over Charter rights, such as, in this case, freedom of
3 the press.

4 THE COMMISSIONER: Now what, what court has said
5 it just like that?

6 MR. SAXBERG: If you look now on the page that's
7 before you.

8 THE COMMISSIONER: Yes.

9 MR. SAXBERG: We start with a case from the
10 Supreme Court of Canada, 1993, and the quote is --

11 THE COMMISSIONER: Wait a minute, 1993.

12 MR. SAXBERG: Yes, do you see --

13 THE COMMISSIONER: On page 5?

14 MR. SAXBERG: Yes, on page 5. Do you see that?

15 THE COMMISSIONER: A 1993 case, no, I don't.

16 MR. SAXBERG: Under paragraph 8.

17 THE COMMISSIONER: Yes.

18 MR. SAXBERG: You see a quote and then you see in
19 bold the citation for the quote.

20 THE COMMISSIONER: The French name?

21 MR. SAXBERG: Yes, it's a French name and then
22 the Supreme Court of Canada Reports --

23 THE COMMISSIONER: Yes.

24 MR. SAXBERG: -- 141, paragraph 107.

25 THE COMMISSIONER: All right.

1 MR. SAXBERG: It's at tab -- and it's indicated
2 here this is at tab 5 of our main brief.

3 THE COMMISSIONER: I see.

4 MR. SAXBERG: So if you want to look to the case.
5 Well, the quote from the court is:

6
7 "As the Court has reiterated many
8 times, freedom of religion, like
9 any freedom, is not absolute. It
10 is inherently limited by the
11 rights and freedoms of others.
12 Whereas parents are free to choose
13 and practise the religion of their
14 choice, such activities can and
15 must be restricted when they
16 are against the child's best
17 interests ..."

18
19 That's one quote for the proposition that I've
20 just given you. And then another quote from the Supreme
21 Court of Canada in a seminal family law case in which the
22 court is dealing with children. The court is dealing with
23 children and dealing with Charter rights.

24 THE COMMISSIONER: Now which case is this?

25 MR. SAXBERG: The next one is the excerpt from

1 Young v. Young.

2 THE COMMISSIONER: Yes.

3 MR. SAXBERG: And that quote is right below where
4 we last looked.

5 THE COMMISSIONER: Yes, I have it.

6 MR. SAXBERG: And it says:

7
8 "It would seem to be self-evident
9 that the best interests test is
10 value neutral, and cannot be seen
11 on its face to violate any right
12 protected by the Charter. Indeed,
13 as an objective, the legislative
14 focus on the best interests of the
15 child is completely consonant with
16 the articulated values and
17 underlying concerns of the Charter,
18 as it aims to protect a vulnerable
19 segment of society by ensuring that
20 the interests and needs of the
21 child take precedence over any
22 competing considerations in custody
23 and access decisions."

24

25 And I could go on, there's a whole series of

1 quotes here and cases which was attached to our brief in
2 which all the courts are saying --

3 THE COMMISSIONER: What you're saying is even
4 though that had referenced the remark in custody and access
5 decisions, you're saying by extension it applies to the
6 factual situation we're dealing with here, is that your --

7 MR. SAXBERG: Absolutely. And, you know, it
8 certainly deals with all child protection matters. As you
9 know, the CFS Act, which you just heard is applicable to
10 this proceeding, you have Mr. Gange's submission and others
11 that section 18, dealing with informants, applies to this
12 proceeding. Other provisions in the CFS Act apply to this
13 proceeding of course. The very first is section 2(1) the
14 best interests of children must be a paramount
15 consideration to any court dealing with decisions relating
16 to children. It's pretty trite to say that this inquiry is
17 dealing with children. It's dealing with how the province,
18 how the government, protects children and through the
19 experience of one specific example, the Phoenix Sinclair
20 case. But nonetheless, you're dealing with the safety of
21 children and when you're dealing with the safety of
22 children you are at the forefront of your considerations,
23 the paramountcy has to be the best interests of the
24 children. And it's not a question of competing Charter
25 rights and it is a question of the best interests of the

1 children have to be above everything else, including
2 Charter rights, including the freedom of the press. So
3 that's my response to Mr. Kroft's assertion that it's
4 starting at a, that they're equal. They're not equal.

5 So what you have to do here, let me -- going to
6 the next point that Mr. Kroft had made which is that there
7 is not a serious risk here. He said there's not a serious
8 risk here. Well, going to that point, I am asserting that
9 at the very forefront of your thoughts the main thing you
10 have to think about in making your decision here is, is
11 there a serious risk of harm to children if I do not allow
12 this application? Is there a serious risk to children?
13 Can it have a negative on children?

14 So the first point is is there a serious
15 potential risk to children, not has there already been
16 harm, it's is there a serious risk to children and on that
17 point, I want to take you then to that evidence of what
18 that serious risk is and the evidence all relates to media
19 coverage, media coverage of events like this, of inquiries
20 about the death of a child. You heard me say that the
21 academic literature said that there's a proclivity in these
22 situations for the media to sensationalize the story.
23 Mr. Kroft said in his submission that's not true. All of
24 that evidence, so says Mr. Kroft, is primarily focused on
25 the negative outcome of inquiries themselves and he says,

1 yes, that evidence says if there's an inquiry it can have
2 negative effects such as an increase in apprehensions and
3 people leave the social work field, et cetera. He agreed
4 with that. What he was saying was that academic
5 information wasn't about the effect of the media coverage
6 of those events and I couldn't disagree any more. And so
7 what I wanted to do is to put before you, in a form so that
8 we don't have to go over it in great detail, the
9 information that's attached, the specific quotes attached
10 to the Cheryl Regehr affidavit that deal with how the
11 academics have studied the media coverage of public
12 inquiries dealing with child deaths and how they have
13 concluded that media coverage is invariably sensational and
14 that that then has a direct effect on the provision of
15 services to children, a negative effect on the provision of
16 services to children.

17 So what I have done to save time is we've simply
18 culled out the exhibits and highlighted the portions of
19 them that provide the evidence that says that the media
20 sensationalizes the story whenever there is a public
21 inquest of this sort and that it has this harmful effect.
22 And so I'd like to present, to give this to you and to
23 review it just briefly and I've made copies that Mr. Burns
24 will hand out. If I could approach.

25 THE COMMISSIONER: And it's all cases that are

1 already before me, or not cases but articles.

2 MR. SAXBERG: Articles from the affidavit of
3 Cheryl Regehr. All we've done is condensed them for
4 because these are very long articles as you know from
5 looking at the affidavit. It would, it would take even the
6 speediest of readers probably all weekend to read all those
7 articles. What we've done is simply --

8 THE COMMISSIONER: Well have you got one for
9 commission counsel?

10 MR. SAXBERG: Yes. Mr. Burns has -- sorry, yeah.
11 She's the most important one.

12 So and I've put before you the document now and
13 it has tabs that I've put for you to help you with what I'm
14 just going to touch on here momentarily. I'm very mindful
15 of the time. Just leafing through it, (inaudible)
16 highlighted, and this is Exhibit "B", Cheryl Regehr's
17 affidavit. We've highlighted the section when she's
18 dealing with the media frenzy and this is to indicate that
19 her own study, of course, was looking at the fact of media
20 frenzy and its impact on workers. And I want to take
21 you -- I'm just going to try to get the best example. If
22 you turn to Exhibit "I", you'll have to leaf halfway
23 through the material to where it says Exhibit "I" and there
24 will be a tab on the right side.

25 THE COMMISSIONER: Is this Patrick Ayre's

1 argument?

2 MR. SAXBERG: Yes, indeed.

3 THE COMMISSIONER: Yes.

4 MR. SAXBERG: The entire article here, the
5 summary of it says it all:

6
7 "During the 1970s, 1980s and
8 1990s, sensationalistic coverage
9 of a series of celebrated child
10 abuse scandals in England and
11 Wales resulted in the repeated
12 vilification in the mass media of
13 those child welfare agencies
14 deemed culpable for the deaths of
15 the children involved. This paper
16 explores the contribution of the
17 media to the creation of the
18 climate of fear, blame and
19 mistrust which seems to have
20 become endemic within the field of
21 child protection."

22
23 And then I've highlighted for you key components
24 of the article and, and you can read that then at your
25 leisure.

1 THE COMMISSIONER: I'm not sure there's going to
2 be much leisure but I'll try to find time.

3 MR. SAXBERG: And I just want to make the one
4 other point from this document because -- and it is, if you
5 could just turn six pages, seven pages in and I will have
6 tabbed -- yeah, and there's a page number in the top right-
7 hand corner 169.

8 THE COMMISSIONER: Yes.

9 MR. SAXBERG: It's the article "The Vicious
10 Cycle" from David Chenot and which was attached as
11 Exhibit G to the affidavit of Cheryl Regehr. So on page
12 169, and this is important. This was a buzz term that I,
13 that you need to know. The first highlighted passage says:

14

15 "Agency administrators and line
16 personnel are also likely to
17 respond to this series of events
18 by becoming extremely conservative
19 in their decision making and
20 engaging in activities such as
21 placing a high number of children
22 in out-of-home care -- a reaction
23 otherwise known as foster care
24 panic ..."

25

1 And then you will see a cite beside that and
2 there are three authors who have done articles speaking to
3 this reaction of foster care panic. And if you go further
4 down where, on the same page where there's highlighting
5 there's a specific example.

6
7 "The cycle that unfolded over the
8 past two decades in Connecticut
9 provides a particularly pronounced
10 example of this recurring sequence
11 of events. In 1995, a nine-month-
12 old girl named Emily Hernandez
13 died after being sexually and
14 physically assaulted by her
15 mother's boyfriend ... This
16 horrible event and two other child
17 deaths due to abuse that followed
18 within an eight-day period
19 prompted a great deal of media
20 coverage and direct intervention
21 by the governor. Foster care panic
22 ensued when, within one month of
23 Emily Hernandez' death, 100
24 children were removed from their
25 families and over the next few

1 months the number of children
2 placed in foster care rose 20%."

3

4 That's the harm that we're talking about here.
5 That flows from media coverage that invariably seems to
6 occur when public inquiries of this sort look into stories
7 of child death. And of course there were other aspects of
8 the harm that the materials are full of that we had talked
9 to you about, but I just wanted to point that out to you
10 and commend you to read this package and if you have time
11 the full affidavit and articles. Because ultimately what
12 you have to decide is, is there a serious risk to children
13 and will the relief sought mitigate it? Will it not allow
14 the media to publish the name and image, is it going to
15 mitigate, is it going to reduce in any manner that risk?
16 And you already have our evidence that it will of course.

17 And I would just, on that point, will it reduce,
18 will it mitigate. I think it's been best said and most
19 succinctly, that is, at tab 24 of the material of the
20 selected book of documents. The question, the question
21 will anonymity reduce the risk? At tab 24 of the selected
22 book of documents you have the article from Lindor Reynolds
23 and at page 2 of that article --

24 THE COMMISSIONER: And you said -- what did you
25 say, you pose something will have reduced the risk.

1 MR. SAXBERG: Yes.

2 THE COMMISSIONER: Will what?

3 MR. SAXBERG: Will anonymity for social workers
4 reduce, reduce the risk that's been identified in the
5 evidence, the serious risk that academics have reported on
6 in other jurisdictions. And the Winnipeg Free Press
7 reporter, columnist, Lindor Reynolds, who has won awards
8 for her articles on child protection matters and is
9 involved in writing articles --

10 THE COMMISSIONER: And what, what part of that
11 article are you referring to?

12 MR. SAXBERG: So now I'm referring to the second
13 page --

14 THE COMMISSIONER: Yes.

15 MR. SAXBERG: -- of her article, about midway
16 through the page, five paragraphs down --

17 THE COMMISSIONER: Yes.

18 MR. SAXBERG: -- she says:

19

20 "The anonymity argument is a solid
21 one. Having your face in the
22 newspaper or on television in
23 connection with this hideous case,
24 no matter how insignificant a role
25 you played, could make it even

1 harder to walk through the next
2 stranger's house to remove their
3 children."

4
5 That's the Winnipeg Free Press's principal
6 columnist on child protection matters and she's agreeing
7 that it's, the anonymity argument is a solid one. And I
8 just want to, on that point, when it comes to responding to
9 Mr. Kroft's argument wherein he said you should weigh
10 certain information, give certain evidence significant
11 weight and discount other evidence, what I want to say on
12 that topic is at this stage in this inquiry, at your stage
13 in this inquiry, having only -- well the hearing not having
14 begun and you not having received or reviewed any of the
15 documents, at this point in the inquiry I suggest that
16 there is some deference, deference that you have to give
17 when all of the workers involved, the agency, one of the
18 agencies involved, the three main authorities whose job it
19 is to regulate --

20 THE COMMISSIONER: I've lost you. You started
21 out I have to give deference when all of the workers
22 involved -- and where did you go from there?

23 MR. SAXBERG: All right, I'll simplify it. You
24 have to give deference to the applicants because here's who
25 they are, they're all the people in Manitoba who know

1 anything about child protection. They're the workers, the
2 agency, the authorities and the Faculty of Social Work.
3 And then you add to that the lead columnist for the press
4 itself that deals with child matters. All of them are
5 saying to you this is important for children in Manitoba.
6 When the authority, the authority, the three authorities,
7 my clients, are saying this is important. Our job, their
8 job on a regular basis to protect children and they're
9 saying this needs to be done, I think you have to give that
10 some deference. Anybody who has an involvement in child
11 protection in this province is saying, is all on the same
12 side. They are all saying they recognize a potential harm,
13 a serious potential harm to the children that they're
14 responsible for looking after.

15 On the other side of the question you have the
16 media organizations, two individuals and AMC. So what I'm
17 saying is I think at this point in the proceeding you have
18 to give deference to these applicants because they have,
19 they are the organizations with the information, with the
20 experience, with the knowledge and it's their job to
21 protect children. So if someone else comes along and says
22 we know better than all those people running the business,
23 running the child protection in this province, if someone
24 comes along and says we know better than them, they better
25 have something pretty concrete to put forward to you to

1 say, no, there's no harm to children, don't worry about
2 that, don't worry about the children of Manitoba, I don't
3 know how you can trump.

4 And just on a final point about confidentiality.
5 I just -- this hearing has already, it's been recognized
6 that this public inquiry is a public inquiry like no other
7 that's happened. It's dealing with child protection and as
8 a result, the inquiry had to go to court, had to get the
9 documents by order of the court and the court entrusted
10 those documents to this commission to use for its purposes
11 with the assurance that you would carefully consider and do
12 a Dagenais/Mentuck test before you made any, before you
13 lifted any of the confidentiality from those documents.
14 That's why I say this isn't about the applicant's onus
15 here. This was a responsibility that was entrusted to you
16 by the Court of Queen's Bench with respect to these
17 confidential documents. It's your obligation now to
18 determine the level if you will lift confidentiality. And
19 you've done that with respect to the documents and with
20 respect to the documents you said, no, I will not lift
21 confidentiality with respect to certain information and
22 that's your redaction order that you now have ordered will
23 be applied to the hearing proper and with respect to
24 sources of referral. Because section 76 applies to this
25 proceeding. It never stops applying. Those documents, all

1 the documents, which by the way the documents provide --
2 it's not just the names on the documents, it's the content
3 of the documents, the information in the documents that has
4 to be kept confidential. So confidentiality has not left
5 the building. It's now in your hands. It's up to the
6 commission to determine the level that it will be lifted.
7 You've already determined it's not lifted outright. We're
8 still dealing with confidential matters.

9 And then in terms of the public perception, my
10 final response that Mr. Gindin, I think his best point
11 was --

12 THE COMMISSIONER: That's your judgment.

13 MR. SAXBERG: In my judgment, you're right. The
14 point that got my attention was his point about must you
15 consider the public perception. In other words, the
16 perception of your commission. And in answer to that I
17 would say for the same reasons that you have had to advise
18 the public that you had to go to court to get the
19 documents, and for the same reasons that you will indicate
20 that sources of referral will be confidential and for the
21 same reasons that you'll explain documents have been
22 redacted, the public, or I should say the public will
23 accept as easily social workers' names and images being
24 withheld, that they'll accept the rationale for that as
25 easily as they will accept the rationale for the source of

1 referrals and for the documents. They'll understand and
2 you will be able to communicate the very important reason
3 to the children of Manitoba as to why that measure has been
4 taken and that should leave the public perception with a
5 positive attitude, positive view that this commission is
6 protecting children and that's its first and foremost
7 objective and one means of doing that is by maintaining the
8 confidentiality and those are my comments.

9 THE COMMISSIONER: All right. Thank you,
10 Mr. Saxberg. I'm going to hear from Mr. Khan and then
11 we're going to come back to the wording of the relief
12 request.

13 MR. KHAN: Mr. Commissioner, well it's been three
14 days of lengthy submissions. I really don't have much to
15 finish the proceedings with. I just have a few comments
16 and some responses to of course the (inaudible) submissions
17 made by counsel for, for Ms. Edwards and Mr. Sinclair. One
18 is -- and first of all I just want to thank Mr. Gindin, and
19 I say this sincerely, not sarcastically. Mr. Gindin
20 brought to your attention some comments that I made during
21 my submissions and it appears that I may not have properly
22 explained where I was going on a few points. One of them
23 is when I discussed the K.L.W. case. So I just wanted to
24 clarify things and I'm hopeful that, or at least I'm hoping
25 that that you didn't -- that I was able to explain it

1 properly to you and if I haven't then I will explain it
2 now.

3 The first, the first is that Mr. Gindin had
4 mentioned that apprehensions, that I mentioned that
5 apprehensions are always harmful to children and that in
6 his view they weren't always, they would of course, they
7 can of course help children, they can save them. Now just
8 to explain, and this is in reference to the K.L.W. case.
9 Apprehensions are, in almost every case, they are harmful
10 in the sense that there is always a break in the bond
11 between the parent and the child in an apprehension, in a
12 physical apprehension. We allow this to occur because we
13 want to avoid the risk of greater harm for the child. And
14 so I'm not saying, and I'm hoping that they didn't take it
15 that way but I'm not saying that we shouldn't apprehend and
16 I'm not saying that apprehensions aren't justified, they
17 are, but it's something that we've accepted. So we've
18 accepted that we're going to breach one right for the sake
19 of a more important right.

20 Next is the issue of evidence and Mr. Gindin had
21 mentioned that I referred to the use of insufficient
22 evidence. I don't recall using the word "insufficient"
23 evidence when I was referring to the K.L.W. case. If I did
24 then I misspoke. What I was referring to is when
25 apprehensions are made, they're made on a limited amount of

1 evidence. Of course the worker still has to have
2 reasonable grounds to apprehend, but it's limited and so we
3 are breaching Charter rights with somewhat limited evidence
4 as long as it shows that there is a possible risk to the
5 child. So that's what I was referring to when I was
6 referring to evidence.

7 Also Mr. Gindin had commented on the effect of
8 death of a child versus the apprehension of a child. When
9 I was discussing that in my original submissions, I was
10 referring to the affidavit of Ms. Regehr, paragraph 11 of
11 her affidavit, and in her affidavit, she explained that to
12 social workers, and so in the context of social workers,
13 social workers had found, she had learned that social
14 workers felt that apprehensions were nearly as
15 stressful as a death of a child. So that's the context
16 from which I raise, I discuss that.

17 Mr. Funke had discussed briefly the concept of
18 the best interest of the child and that the case law that
19 we reply upon are all custody cases as well as child
20 protection cases and also that they relate to always one
21 specific child. My review of the cases, in my review of
22 the cases I do think that the generic sense of the best
23 interests of the child still does apply and each case is
24 different on its own, but the concept is the same and that
25 is that you're, we're considering the best interests of the

1 child and they may differ depending on the context. So I
2 think the cases are just as relevant to this inquiry.

3 Mr. Kroft discussed the hierarchy of rights. Now
4 Intertribal isn't asking you to say that one right is
5 greater than another or more important. We're not asking,
6 we're not asking you to conclude that either freedom of the
7 press or a parent's right to parent their child or even the
8 best interests of the child are more important in society.
9 We're not asking that. What we're saying is in the context
10 of this inquiry, and based on the case law, where the
11 evidence is sufficient the best interests of the child can
12 and usually does take precedence. Now Mr. Kroft discussed
13 the open court principle and the freedom of the press, but
14 if you note the case law that he's relying upon never
15 considers the best interests of the child. And I'm not
16 saying again that it means that the freedom of the press
17 isn't important, there's no doubt that it is. It's
18 essential in society. But in making the decision that
19 we're making on this issue, at this inquiry, and since
20 we're, really the inquiry is all about the best interests
21 of the child, we have, we have to look at the best case law
22 we have.

23 Now this is a, this is a unique inquiry, it's
24 unique for many reasons. One is that we're dealing with,
25 we're dealing with a situation that has never occurred,

1 which is we are asking for a restriction on the publication
2 of social workers' names. There is no case law on that.
3 That's, from the research I've done, that's never been
4 asked before. And in looking at what the relevant law is
5 and what principles should be applied, we have to look at
6 the next best thing and those are the case law that, the
7 case law that does balance the best interests of the child
8 and various Charter rights and we've seen a few of them.
9 We've seen where the best interests of the child has been
10 balanced against freedom of religion, section 7 Charter
11 rights, and the open court principle. And what I submit is
12 where the evidence does show real and significant risk,
13 Mr. Commissioner, in that circumstance, which I think
14 exists here, then serious thought should be put into the
15 remedy and of course the most minimal restriction in
16 reducing that risk.

17 And I would submit that in this situation, in
18 this case, the law is sufficiently clear for you to make
19 this decision. The evidence is all before you. I think
20 the evidence is sufficient to grant the relief that we're
21 seeking and the relief that we're seeking is, is minimal
22 work. There is no attempt to manage public discourse. In
23 no way could it manage public discourse. There's no
24 attempt to hide information. We're not asking to hide any
25 relevant information, but what we're mandated to do is

1 we're mandated to protect children and in the circumstances
2 such as this where we feel there's a significant risk to
3 that, we're obligated to take whatever measures that are
4 appropriate and I think in this case this is the
5 appropriate measurement. Subject to any questions, those
6 are my, that's my reply.

7 THE COMMISSIONER: Thank you, Mr. Khan.

8 MR. KHAN: Thank you.

9 THE COMMISSIONER: Well now we've just got left
10 the wording of this relief clause and there's consensus as
11 to its content as I understand it from the applicants for
12 relief and the wording has been read out two or three times
13 so I think we know what it is. The word "commercial" has
14 been deleted. In the usual instance those seeking relief
15 are entitled to come and ask for any relief they want.
16 They may not get it. But we've gone through three days
17 here of evidence without some of this terminology being in
18 the ask so to speak, or in the request. So that's why I
19 feel it important to ask if anyone else has any comment on
20 the request for relief, any way they have been prejudiced
21 by presenting what they have during the course of these
22 days, these three days, by now being met with this change
23 of wording. Mr. Kroft, do you want to speak?

24 MR. KROFT: Yes.

25 THE COMMISSIONER: I gathered that.

1 MR. KROFT: Yes. But I won't be long because I'm
2 not going to engage in a process of trying to draft relief
3 which I fundamentally oppose and my clients fundamentally
4 oppose, but I -- even if commercial comes out the other
5 question I would ask you to consider, because you, along
6 with the applicants in their ask will have to work this
7 out, is the question of media. We've talked about
8 commercial, I've made my points. On the question of media,
9 I'm just reading right now:

10

11 Don't like your job? Be thankful
12 you're not Ted Hughes. The
13 retired judge is presiding over
14 the Phoenix Sinclair inquiry ...

15

16 Et cetera. This was just posted. There are 11 other blogs
17 like that. Anyone in the world can look at them if they
18 have a computer. None of them are run by a media
19 organization in the context of what I think you're thinking
20 about when you hear media organization, but you know at the
21 beginning of his submissions, Mr. Smorang read to you from,
22 he called them comments and that's what the press calls
23 them. It's really just a blog and it doesn't have to be
24 run and they're mostly not run by media organizations in
25 the sense of a newspaper or in the sense of a television

1 station or radio station. Anybody can make an arrangement,
2 enter into a contract, and many do, with an Internet
3 service provider and they're given space and they run their
4 own blog, they're own digital newsletter, if you like.

5 Now, I don't what media means. Does media mean
6 those computer companies who effectively rent space on
7 their computers to allow people to post these things for
8 everybody to read? Does media mean Facebook? I know you
9 probably use Facebook a lot. I don't, so you may be ahead
10 of me. But Facebook, all our kids use it and is Facebook
11 media? Because I can tell you that my son, I can't, but my
12 son can put something up and everybody single person in
13 Winnipeg or in the world, which scares me, will read that
14 because the technology is there. Now is that media, is
15 Facebook media?

16 How about Twitter, because there's a number of
17 Twitters already that anybody can access that are talking
18 about what we've been discussing this afternoon. Is that
19 media? Does that apply to Twitter?

20 Or the bottom line, sir, and I think it goes to
21 the issue of whether this order should even be granted, is
22 there's no such thing as media anymore. Gone are those
23 days where you're either a newspaper or radio station or a
24 television station. You can be media, I can be media if I
25 knew how to work this stuff. So the gist of the request

1 that's being made to you even when they take out
2 commercial, is the people who run radio stations and
3 television stations and the press, I guess, can, can not
4 say certain things, but the source of news for most of
5 certainly the younger population in North America, they'll
6 still get all that information because the publication ban
7 won't restrict it.

8 My point is I think it's incumbent upon the
9 people who are asking for this order and ultimately
10 incumbent upon you to focus on the issue of what exactly it
11 is you're ordering and who it's going to apply to and
12 whether it's going to make any difference at all to the
13 question of whether people know the information that my
14 friends are asking you to suppress. And I'm suggesting to
15 you that before you make the order and before you accept
16 this wording or any other wording, we all make sure that
17 you understand and that they understand what they mean and
18 I have to tell you that I don't from this wording.

19 THE COMMISSIONER: Have you any comment on the
20 earlier request to replace the face or identity with and/or
21 image?

22 MR. KROFT: No, they've made that request. It's
23 less intrusive on freedom of speech, I suppose, than the
24 other. So I can't argue that it's -- it's less worse, but
25 I have no comment on it.

1 THE COMMISSIONER: All right. Well, Mr. Saxberg,
2 this last amendment you've raised, was it referred to in
3 any of the requested areas of relief by any of the three of
4 you? Or, Mr. Smorang, if you want to speak to it. Because
5 what Mr. Kroft has raised does concern me about where we're
6 getting into with this reference to a media organization.
7 I've got to tell you I prefer the former wording.

8 MR. SMORANG: And so do we.

9 THE COMMISSIONER: Okay, we're ad idem.

10 MR. SMORANG: We've caused more trouble than it
11 was worth.

12 THE COMMISSIONER: So that will read then that
13 the commission prohibit any form of publishing,
14 broadcasting or otherwise communicating by television,
15 Internet, radio and print or by any other means the name
16 and/or image of any witness at the inquiry who is or was a
17 social worker as well as the name of any social worker
18 identified in documents produced at the inquiry.

19 MR. SMORANG: Yes. Thank you.

20 THE COMMISSIONER: Thank you. All right. After
21 a long day, Madam Chair or Madam Commission Counsel, I
22 think that's what you still are.

23 MS. WALSH: I, I -- whatever you want to call me,
24 Mr. Commissioner, at this point. I will be very brief. I
25 just want to confirm, earlier in the day you had asked

1 counsel to get together with information as to whom the
2 application applies more specifically and I'm not sure if
3 that was something that Mr. Kroft wanted to speak to. My
4 colleague actually, Ms. McCandless, had a good suggestion
5 and that was that if that is something you still want to
6 hear, that the counsel for the applicants send a letter to
7 everyone, send it to my attention and copy everyone and it
8 can be provided to you, as to the categories that the 32
9 witnesses fall into and that they've identified. I'm not
10 sure if that would, if that deals with Mr. Kroft's concern
11 or with your concern. And in light of the comments that
12 were made that there may be other witnesses who have not
13 yet been formally added to the witness list and calendar, I
14 think the designation of category is something that would
15 be helpful, but perhaps Mr. Kroft wants to speak to that.
16 Is that something that would satisfy you, is that what
17 you're looking for in terms of ...

18 MR. KROFT: The suggestion was the
19 commissioner's --

20 MS. WALSH: Right.

21 MR. KROFT: -- and I should -- through the
22 commissioner's.

23 THE COMMISSIONER: I, I think I'm prepared to
24 leave it where it is.

25 MS. WALSH: Okay.

1 THE COMMISSIONER: Unless somebody wants to carry
2 that further.

3 MS. WALSH: That's, that's fine.

4 THE COMMISSIONER: In light of everything that
5 I've heard since.

6 MR. KROFT: Yeah, I don't think there is an
7 intelligible request before you right now as to who this
8 applies to and I think that's a reason not to grant the
9 order. That's my position.

10 MS. WALSH: And I just wanted to make sure that
11 we hadn't missed something so that when we do finally
12 finish. So I just wanted to confirm whether there was
13 something more you wanted to hear any information on.

14 THE COMMISSIONER: No. that's -- Mr. Smorang?

15 MR. SMORANG: I'm not disagreeing with you,
16 Mr. Commissioner, but I just want to point out, perhaps the
17 obvious, but the 32 that are in the hands of commission
18 counsel, commission counsel is also well in possession of
19 the information that those 32 have given her and her team
20 in terms of where they are, what they did, what they've
21 done and so she's well equipped to be in possession of that
22 information. I know you haven't seen it, but it is with
23 your lawyer.

24 THE COMMISSIONER: All right. We'll leave it
25 there. Now --

1 MS. WALSH: Mr. Commissioner, might I just say
2 thank you to the clerk who has stayed long beyond what
3 would ever be expected.

4 THE COMMISSIONER: Well I hope her dog is all
5 right.

6 MS. WALSH: And, and to all of the counsel who
7 worked very hard to finish within the three days. I
8 appreciate that.

9 THE COMMISSIONER: Now what is the time set for
10 Thursday morning to deliver my decision?

11 MS. WALSH: I believe it's 9:30.

12 UNIDENTIFIED PERSON: 9:30.

13 THE COMMISSIONER: 9:30, all right. We'll I'm
14 going to shut myself up for five days. It's a lot to go
15 through but I think this matter has gone on long enough and
16 that it requires immediate and forthwith attention and I
17 intend to spend five days reading everything you've told me
18 and hopefully be able to give a reasoned decision at 9:30
19 on Thursday morning and until that time we stand adjourned.

20 Commission counsel's got something else?

21 MS. WALSH: I'm sorry. I know that after you say
22 the words "we stand adjourned" everyone gets to leave, but
23 just want to clarify that we are not going to be hearing
24 any other motions on the 12th, just to clarify that because
25 we had at one point indicated that, that the only agenda

1 for the 12th will be the delivery of your ruling. Thank
2 you.

3

4

(ADJOURNED TO JULY 12, 2012)