



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

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

Transcript of Proceedings
Public Inquiry Hearing,
held at the Winnipeg Convention Centre,
375 York Avenue, Winnipeg, Manitoba

MONDAY, MARCH 11, 2013

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1 MARCH 11, 2013

2 PROCEEDINGS CONTINUED FROM FEBRUARY 26, 2013

3

4 THE COMMISSIONER: Good morning, everybody.

5 Now let's see if we can move this to a side
6 somewhere, it's -- either at one corner or the other, if we
7 can. We can see people that way.

8 All right, Mr. Gange, I guess these are your
9 motions this morning.

10 MR. GANGE: Thank you, Mr. Commissioner. We are
11 here with respect to the two notices of motion that I have
12 brought; one on behalf of witnesses that I have referred to
13 as DOES #1, 2, 3 and 4 and then a second motion which I
14 guess could be considered an amendment to the first motion
15 on behalf of DOE #3, asking that she be declared an SOR for
16 the purposes of her testimony.

17 THE COMMISSIONER: Now if you are successful in
18 your first motion with respect to DOE #3 --

19 MR. GANGE: It becomes irrelevant, quite frankly,
20 Mr. Chair, or Mr. Commissioner.

21 THE COMMISSIONER: You've answered my question.

22 MR. GANGE: Yes. What I would like to do this
23 morning is to start off by reviewing who these people are
24 and why it is that the request for a publication ban with
25 respect to their evidence and the making of a -- making

1 them or allowing them to testify in the same fashion as the
2 SORs testified by virtue of being anonymous and in order to
3 set the background for this motion.

4 So you have in front of you four affidavits from
5 the individuals, DOEs #1, 2, 3 and 4. And I just want to
6 make sure, Mr. Commissioner, that you have all the material
7 that I believe should be available and that is the four
8 affidavits with respect to this first motion, then secondly
9 the notice of motion for DOE #3 as an SOR and an affidavit
10 by Kalyn Bomback, who is my assistant or assisting me with
11 this as an assistant lawyer from my firm and is with me at
12 the counsel table.

13 THE COMMISSIONER: Yes, I have those materials.

14 MR. GANGE: And as well you should have motions
15 briefs with respect to both motions. You also should have
16 the cross-examination, the transcript of the cross-
17 examination of DOE #3, which was conducted by Mr. Khan --

18 THE COMMISSIONER: Yes, I have that.

19 MR. GANGE: -- on February 26th, 2013.

20 THE COMMISSIONER: I'm just looking for your
21 motion brief. Yes, I have that. I have everything, yes.

22 MR. GANGE: Great, thank you. Then with that --

23 THE COMMISSIONER: Just let me get the -- there's
24 the cross-examination, yeah. All right.

25 MR. GANGE: Thank you, Mr. Commissioner.

1 I'm going to review briefly, DOE #1 is the son of
2 Wesley McKay. At the time of Phoenix Sinclair's death,
3 DOE #1 was 12 years old. I expect that you will hear
4 evidence eventually from DOE #1 which will tell you that he
5 was present in the house at the time when Phoenix Sinclair
6 was murdered by his father and by Samantha Kematch. DOE #1
7 testified at the criminal trial. He did not have a
8 publication ban with respect to his testimony. I want to
9 have that out on the table right off the bat. In my view,
10 he should have had a publication ban with respect to his
11 testimony at the criminal trial.

12 THE COMMISSIONER: Was one sought?

13 MR. GANGE: No. Now as you know, at a criminal
14 trial an individual does not have legal counsel, so it's up
15 to the Crown to take the necessary steps to seek a
16 publication ban. One was not sought. As I say, in my
17 view, with respect to the evidence of DOEs #1, 2 and 3,
18 there ought to have been publication bans. That ought not
19 to be held against them.

20 He swears in his affidavit that giving testimony
21 when he was approximately 14 years of age, testimony that
22 convicted -- was in large measure the testimony that, that
23 convicted his father, was very stressful to him and how
24 could it not be. I would invite everybody in this room to
25 attempt to put themselves into the shoes of DOE #1, a boy

1 at the age of 12 years of age. It, it overwhelms me and I
2 -- and when DOE #1 testifies I can assure everybody in this
3 room they will not want to be here. It will not be the
4 most pleasant day of this most unpleasant inquiry. It
5 probably will be the most horrible day of this unpleasant
6 inquiry.

7 DOE #1 swears that he experienced harassment as a
8 result of that. He swears that he is working at the
9 present time and that no one knows of his involvement. He
10 swears as to his concerns with respect to his personal
11 safety, both mental and physical. He swears as to his
12 concerns as to his relationship at the workplace. And none
13 of that evidence, Mr. Commissioner, is challenged. It goes
14 before you completely accepted by everybody at this
15 inquiry. I want to make sure that, that I stress that
16 enough for you. Completely unchallenged.

17 DOE #2 is DOE #1's brother. He was 14 at the
18 time of the murder of Phoenix Sinclair. He has the same
19 concerns as DOE #1, that is, he testified against his
20 father which resulted in the conviction of his father for
21 murder. He was not present when Phoenix Sinclair was
22 murdered, but I expect that you will hear that he is the
23 person that eventually notified his, his mother, DOE #3, of
24 what had happened.

25 DOE #1 advised DOE #2. I expect that you will

1 hear -- let me go back to DOE #1. I expect that you will
2 hear testimony from DOE #1 as to why he did not reveal the
3 death of Phoenix Sinclair, that he was threatened, and I
4 expect that you will hear evidence that anybody in this
5 room will understand why a boy at the age of 12 would not
6 come forward after being threatened by his father.

7 DOE #2 is going to school. He has concerns with
8 respect to his own safety, both his mental health and his
9 physical health. Again, the evidence with respect to
10 DOE #2 is completely unchallenged.

11 That then takes us to DOE #3. DOE #3 is the
12 mother of DOEs #1 and 2. She testified or she swore in her
13 affidavit that she experienced harassment and I want to go
14 to her affidavit, please. Paragraph 3 of the affidavit of
15 DOE #3.

16 THE COMMISSIONER: Yes.

17 MR. GANGE: It says:

18
19 "Following the arrest of Wes McKay
20 for the murder of Phoenix
21 Sinclair, I experienced instances
22 of bullying and harassment from
23 people that knew of my
24 relationship to Wes McKay."
25

1 Complete unchallenged.

2 You have the transcript of the cross-examination
3 of DOE #3. I trust, sir, that you've reviewed that
4 transcript or that you will before you make a ruling.
5 There is nothing in the cross-examination of DOE #3 that
6 challenges in any fashion her allegation that she
7 experienced instances of bullying and harassment.

8 She also advises, on information and belief from
9 me, that this inquiry received threats with respect to the
10 safety of witnesses testifying at the inquiry. She says
11 that she has serious concerns that she may suffer physical
12 harm if her identity is disclosed by virtue of her
13 testimony at the inquiry. Completely unchallenged.

14 If you review the cross-examination, you will see
15 that paragraph 5 is the only portion of her evidence where
16 there were questions. Paragraph 5 --

17 THE COMMISSIONER: What page is that on?

18 MR. GANGE: If you look at question 39.

19 THE COMMISSIONER: Yes.

20 MR. GANGE: So on my transcript I have it at page
21 12.

22 THE COMMISSIONER: That's all right.

23 MR. GANGE: So starting at question 37, Mr. Khan
24 asked DOE #3 to refer to paragraph 5. And at paragraph 5,
25 the cross-examination then said, in question 38, confirms

1 that no one at her place of employment is aware of her
2 relationship to Wes McKay. Question 39 confirms that
3 nobody at her place of employment currently has questioned
4 her about her relationship with Wes McKay.

5 Question 40: Has anyone at your workplace ever
6 told you that they know that you testified at the criminal
7 trial? Answer: No.

8 Question 41: Now are you concerned of possibly
9 losing your job if your employer knows of your former
10 relationship with Wes McKay? Yes.

11 So the cross-examination, Mr. Commissioner, only
12 reinforced the evidence that was put before you in the
13 affidavit of DOE #3.

14 Question 47 -- or let me go to 46, because
15 Mr. Khan asked: And you don't know if your employer's
16 aware whether or not you testified at the criminal trial?
17 Answer: No, I'm not aware.

18 Question 47: Can you say either way whether they
19 are aware or whether they are not aware? Answer: They're
20 not aware.

21 So that the evidence that you have is that DOE #3
22 is working, and good for her. She's working in a job where
23 nobody knows her relationship to Wes McKay and her
24 affidavit confirms that she has a serious concern that she
25 could lose her job. So that the cross-examination only

1 reinforced what was said in the affidavit. There is
2 nothing else in this cross-examination that challenges in
3 any way any of the statements made in that affidavit. The
4 only thing that was brought out in that cross-examination
5 is that DOE #3's name was mentioned when she testified at
6 the trial. That's true, her name was reported, it would
7 appear in a rather limited fashion but her name was
8 reported. And my learned friend, Mr. Khan, asked whether,
9 whether she would confirm that her name appears in written
10 cases on CanLII with respect to the decision. Yes, it
11 does. That's not the issue that's before you today. The
12 issue is at this inquiry whether she should be allowed to
13 testify anonymously.

14 Paragraph 6 and paragraph 7 are very important
15 paragraphs with respect to her affidavit. Paragraph 6
16 says:

17

18 "I am very concerned about the
19 health and safety of my two
20 children ... My children suffer
21 from time to time from anxiety and
22 depression. A part of that
23 anxiety and depression is, in my
24 view, directly related to their
25 fears and concerns about

1 testifying at the Inquiry."

2

3 No challenge.

4 So that in considering this issue,
5 Mr. Commissioner, you must accept the evidence that has
6 been provided because there is no challenge to it. In
7 spite of you granting the ability to give cross-
8 examination, in spite of the ability of my learned friend,
9 Mr. Khan, to provide contradictory evidence, in spite of
10 the ability of my learned friend, Mr. Khan, to challenge
11 whether or not this statement is accurate, not a question.
12 So that in, in due course I'll get to the Mentuck/Dagenais
13 test and, and what you have to take from that is that there
14 is no challenge to this, that those concerns are real and
15 they are well founded and how could they not be?

16 Paragraph 7:

17

18 "I have serious concerns that my
19 mental health, my physical health
20 and my safety may be affected if I
21 have to testify at the Inquiry
22 without the protection of a
23 publication ban."

24

25 Again, no challenge.

1 DOE #4 is the daughter of Wes McKay. Her
2 affidavit says that she is the mother of four children
3 under the age of 10. Her affidavit material says that her
4 children do not know that Wes McKay is their grandfather.
5 Her affidavit says that she experienced incidents of
6 harassment and bullying, following the, the conviction and
7 trial of Wes McKay. There's no challenge to that evidence
8 as well.

9 That's the background to this matter. You have
10 already reviewed in extensive detail the law with respect
11 to publication bans. This application is slightly
12 different, but I'm going to refer you, Mr. Commissioner, to
13 paragraph 99, which is on page 32 of your ruling.
14 Paragraph 99, Mr. Commissioner.

15 THE COMMISSIONER: I have it.

16 MR. GANGE: Do you have that, sir?

17 THE COMMISSIONER: Yes.

18 MR. GANGE: Thank you. Paragraph 99:

19
20 "The Dagenais/Mentuck analysis is
21 meant to be applied in a 'flexible
22 and contextual manner'."

23

24 Paragraph 100:

25

1 "... 'the authorities establish
2 that the standard is not one mere
3 convenience of expediency; in
4 order to displace the public
5 interest in an open-court process,
6 an applicant must provide cogent
7 evidence to support the alleged
8 necessity for anonymity'."

9
10 It seems to me that those two paragraphs are at
11 the heart of what my application is. And with respect to
12 paragraph 99, the statement that you quoted from the
13 Toronto Star case, I think is, is the guiding principle
14 that the application must be brought, must be considered
15 in, in the contextual manner. So that the analysis that
16 you might have provided to whether social workers should be
17 given a publication ban, is going to be, in my respectful
18 submission, significantly different than the analysis that
19 is required of you with respect to these four witnesses.
20 These four witnesses, Mr. Commissioner, are not part of the
21 system. Your analysis is to investigate the tragedy of
22 Phoenix Sinclair's death and to consider it in the context
23 of the child and welfare system in Manitoba. These four
24 people are not part of that analysis of the child welfare
25 system. They have information with respect to the tragic

1 and gruesome death of Phoenix Sinclair. They have
2 information. I think that you're going to hear from DOE #4
3 some fascinating evidence about her relationship with
4 Phoenix Sinclair and what a lovely little girl she was.
5 But you're not going to hear from them why Phoenix Sinclair
6 was not, why it was not known that, that she was living
7 with Wes McKay. I don't think that you're going to hear
8 evidence as to whether or not there was supposed to be
9 people coming to visit. They are not part of the system,
10 they are not, these are not people who undertake a job --
11 and I'll say this because I believe it from my review of
12 this, I sure wouldn't want to be a social worker. It's a,
13 it's a job that I would never -- at this stage in my life
14 I'm glad that it's one of the choices that I didn't make in
15 life. But the people that do make that choice know that
16 they are going into a very dangerous situation and know
17 that they have certain responsibilities resting upon them
18 and that they have to fulfill certain obligations. That is
19 not the situation with respect to DOEs #1, 2, 3 and 4.
20 Their only connection with this is that they're related to
21 the murderer.

22 So that the context that you must, that you --
23 that I'm going to urge you, not that you must but that I'm
24 going to urge that you apply in this situation, is the
25 context of four people whose lives have been horribly

1 damaged by the actions of Wes McKay and they ought not to
2 be victimized again by having to testify in public. They
3 are going to give their testimony if this order, if this
4 motion is successful, Mr. Commissioner, they are going to
5 give their evidence truthfully, candidly.

6 My learned friends that so choose --

7 THE COMMISSIONER: And, and it can be reported
8 publically.

9 MR. GANGE: Absolutely it can be reported
10 publically. The press -- the only restriction that I have
11 asked is that their identity not be disclosed. And that
12 they -- that their faces not be seen. But their voices
13 will be heard just as the SORs' voices were heard. If any
14 of my learned friends choose in their wisdom to cross-
15 examine any of these people, they can do so under your
16 guidance. They can ask any question that you allow them to
17 ask. They are not going to be hampered. They are not
18 going to be hindered. The process of justice is not going
19 to be affected whatsoever other than their identity is not
20 going to be displayed to the world.

21 The cogent -- so that the Dagenais/Mentuck case
22 requires an analysis that, and as you said there must be
23 cogent evidence. Now I know that a previous attendance my
24 learned friend, Mr. Kroft, said that he was not going to
25 challenge, they were not going to -- the press was not

1 going to take a position on this, but he said the evidence
2 falls far short of what's required. With great respect to
3 Mr. Kroft, I'm going to suggest to you that statement is
4 wrong. The evidence before you goes in unchallenged and it
5 goes to say to you that they have serious concerns about
6 their physical safety and their mental health and as I said
7 before, how could they not have those concerns?

8 THE COMMISSIONER: Based upon the substance of
9 their application, whether I accept it or whether I don't
10 is put aside for the moment, but how could they have said
11 more?

12 MR. GANGE: How could they have said more,
13 exactly right. The, the -- as I've been thinking about
14 this and wondering whether in reviewing those affidavits
15 and preparing those affidavits for those individuals,
16 whether I could have said more, whether I could have put in
17 something more for them, and the answer to that is how
18 could it be? How do they know what will happen after they
19 testify? They can't say that. And what horror, and I
20 don't want to, I don't want to be accused of melodrama here
21 but this has to be said, what horror would be rained down
22 upon all of us if something happened to any of those
23 people? It's, it's just inconceivable.

24 Now the second test, the second part of the test
25 is the balancing interest. I've already touched upon that

1 to a certain degree by saying that they will testify, the
2 press will be able to report fully on what they testify
3 about. My learned friends will be able to cross-examine.
4 So that the question that has to be asked is how does that
5 affect the process of justice? Yes, there is an open court
6 principle. This is a very, very minor imposition to that,
7 to that principle and it is a, it is a restriction on the
8 open court principle that is completely, in my view, and in
9 my respectful submission understandable, not only
10 understandable but required.

11 I, quite frankly, do not understand what kind of
12 an argument can be advanced against this. I see from the
13 evidence that was submitted by Mr. Khan's secretary that
14 the challenge seems to be their name is already known
15 because years ago when they testified there was some
16 mention in the press of their names. And that argument is,
17 in my view, completely covered by the Morin decision.

18 THE COMMISSIONER: Well just let me -- so the,
19 the -- anyone reading what's reported will quickly realize
20 the family relationship to the murderer.

21 MR. GANGE: Yes.

22 THE COMMISSIONER: It's the fact on the street
23 who those individuals are --

24 MR. GANGE: Yes.

25 THE COMMISSIONER: -- that's your point.

1 MR. GANGE: That's the point.

2 THE COMMISSIONER: But you can't hide the fact
3 that they are sons and a daughter and a one time spouse.

4 MR. GANGE: That's correct, and I'm not
5 attempting to.

6 THE COMMISSIONER: No.

7 MR. GANGE: I'm not attempting to do that,
8 because that evidence is critical to, to their
9 presentation. And I have canvassed that issue with them,
10 especially DOEs #1 and 2, because those are the two people
11 that, that are most at risk here.

12 THE COMMISSIONER: Yeah, but it will be reported
13 that the murderer's son said such and such.

14 MR. GANGE: Yes, that's correct.

15 THE COMMISSIONER: Yeah.

16 MR. GANGE: That's correct. They understand
17 that. They're not afraid of that.

18 THE COMMISSIONER: No.

19 MR. GANGE: They're not afraid of that,
20 Mr. Commissioner. It's who they are.

21 THE COMMISSIONER: On the street.

22 MR. GANGE: On the street, absolutely.

23 I just want to refer to the Morin decision, which
24 is at tab 4 of the supplemental brief that we filed.
25 You've made reference to the Morin decision previously, but

1 there's one fact of the Morin decision that, that in your
2 previous reference to it does not seem to have played a
3 role.

4 THE COMMISSIONER: Just let me find your
5 supplemental brief here.

6 MR. GANGE: Yes, thank you.

7 THE COMMISSIONER: Supplemental motions. Oh a
8 brief, yes, okay. Paragraph what?

9 MR. GANGE: Tab 4.

10 THE COMMISSIONER: Oh, tab 4.

11 MR. GANGE: I hope that you have tabs.

12 THE COMMISSIONER: Well, I guess they're in one
13 of those books.

14 MR. GANGE: Do you have the Morin decision there?

15 THE COMMISSIONER: No, but it's in the materials
16 somewhere. I'll have it.

17 MR. GANGE: Thank you. I think --

18 THE COMMISSIONER: I know what the Morin decision
19 is.

20 MR. GANGE: Yes. The critical point of the Morin
21 decision is this, X, the jailhouse informant, testified at
22 the first trial --

23 THE COMMISSIONER: Yeah.

24 MR. GANGE: -- of Guy Paul Morin. His name was
25 reported in the newspaper. I'm not sure if his picture

1 was, was displayed, I can't tell that from, from the
2 decision, but his identity was made known. On the second
3 trial the Crown asked for a publication ban. So that just
4 as DOEs #1, 2 and 3 testified and their name was made known
5 public in, in the trial of Wes McKay and Samantha Kematch,
6 so X had his name recorded. Because of that, there were
7 threats to his life, threats, threats to his physical
8 safety, let's put it that way.

9 At the second trial the Crown applied for a
10 publication ban. The fact that his name was already on the
11 street was not a basis to reject the publication ban
12 request. And as I see it, that -- as I read the material,
13 that is the only basis upon which Mr. Khan says that, that
14 this publication ban should not be granted to DOE #3.

15 The fact that the name was made public previously
16 is of no relevance to you. This is your inquiry. You are
17 the person in charge. You are the one setting the
18 procedure and these people at this inquiry have made this
19 application. I should have made this application earlier,
20 I acknowledge that. I didn't quite -- well, I didn't
21 understand the process and, quite frankly, the idea that
22 they had testified publically when this first came on to my
23 desk was a problem to me. I wasn't aware of the Morin
24 decision. I am aware of it now and I understand better why
25 a publication ban can be granted and in this case ought to

1 be granted.

2 THE COMMISSIONER: Well, you're not a constant
3 attender at these hearings.

4 MR. GANGE: No, I certainly am not, sir.

5 THE COMMISSIONER: No.

6 MR. GANGE: I've only been here on, on the rare
7 occasions when, when the witnesses that I have been hired
8 to represent have testified. So I'm not one that has the
9 experience and the day to day knowledge that most of my
10 learned friends have with respect to this. But I do take
11 responsibility, I should have made this application
12 earlier. But that does not change the fact their evidence
13 is coming up and, and it has become clear to me from my
14 discussions with these witnesses how critical it is that
15 they testify anonymously. That was not something that was
16 on their radar screen when this process started. It has
17 become very, very important to them as this inquiry has
18 been going on and as they have watched the newspapers and
19 the television reporting and the pictures of people coming
20 into this room and leaving this room. They understand how
21 much publicity this inquiry has been having. So that, yes
22 it is late, but it's the appropriate for it.

23 With respect -- that is my submission with
24 respect to the publication ban just on the grounds of the
25 Dagenais/Mentuck decision. I'll be very brief with respect

1 to the application with regarding DOE #3 and the SOR
2 status.

3 We have provided to you an affidavit sworn by
4 Ms. Bomback, which attaches from Intertribal Child and
5 Family Services material when, when DOE #3 called ICFS to
6 advise of Phoenix Sinclair and what she had learned from
7 DOEs #1 and #2. And that material discloses that ICFS
8 treated this as a reporting of abuse and that steps were
9 taken to investigate the claims that were made. My learned
10 friend, Mr. Khan, says well Phoenix Sinclair was dead by
11 the time that that report was made and that is true. My
12 learned friend, Mr. Khan, has provided to you a decision
13 which says that in a similar review of legislation, courts
14 have interpreted the, the legislation saying that a report
15 with respect to a dead child does not raise the same level
16 of protection. I'm going to suggest to you that in my view
17 that decision is wrongly decided. Section 17 and 18 of the
18 act, the protection that is given is not protection that is
19 meant with respect to the child, it's giving protection to
20 the informant, saying that the, that the identity of the
21 informant is not to be disclosed except in judicial
22 proceedings. I previously argued before you that this is
23 not a judicial proceeding, you didn't have to make a
24 decision on that, or at least I don't think from my review
25 of your decision, I don't think you, you had to decide

1 that. But this is not a judicial proceeding, so that if
2 the protection of section 18 applies, than this is an
3 automatic situation where DOE #3 is an informant and is
4 then to be provided with the protection offered under the
5 act and in this inquiry referred to as a source of
6 referral.

7 THE COMMISSIONER: What you said, if one applies
8 then your order goes? What -- you said ...

9 MR. GANGE: I'm saying that if section 17 and
10 18 --

11 THE COMMISSIONER: Yes, yes.

12 MR. GANGE: -- of the act apply -- and what I
13 mean by that, Mr. Commissioner, is I acknowledge that
14 Mr. Khan has raised the argument that because Phoenix
15 Sinclair was dead at the time that, that DOE #3 made the
16 phone call, he says well the Child and Family Services Act
17 does not apply.

18 THE COMMISSIONER: Was she reported as being dead
19 in that call?

20 MR. GANGE: Yes, yes. Now whether or not -- let
21 me put it this way. DOE #3 was relying upon the
22 information that she had received from DOE #1 and DOE #2.
23 She had no firsthand knowledge of whether or not Phoenix
24 Sinclair was dead. She accepted her sons' advice that in
25 fact Phoenix was dead. But the protection that is granted

1 by that act, and Mr. Khan makes a very good point, that
2 there is no protection under the fatal, I think the -- I
3 can't remember the, the act that he cites that says that it
4 has to be reported but there is no protection under that
5 act.

6 There's -- in my view the protection that is
7 afforded under the Child and Family Services Act ought to
8 apply to an informant. Whether that informant is, is
9 giving advice to a Child and Family Services agency, such
10 as DOE #3 did, whether that person is alive or dead, the
11 need for protection is just as great and there is no reason
12 as to why it would apply if, if DOE #3 called and in fact
13 the information was wrong, and so that DOEs #1 and 2, or
14 pardon me, DOE #1 had seen Phoenix Sinclair being injured,
15 but had not died, so that he tells his mom I think she died
16 but in fact she's still alive, the protection would apply.
17 It makes no logical sense whatsoever that the fact that she
18 was dead at the time of the phone call should strip away
19 the protection that the act gives for providing that
20 information and that's the submission with respect to the
21 SOR status.

22 I don't know if you want to hear from me now or
23 later as to the ability of Mr. Funke as an intervenor to
24 make submission. As you know, I oppose that and I can make
25 that submission now or I can wait and I'm totally at your,

1 at your beck and call on that point.

2 THE COMMISSIONER: Well, Mr. Funke is going to
3 apply to be heard. Perhaps we'll hear from him and have
4 you respond then and then I'll deal with that.

5 MR. GANGE: Thank you. That concludes my
6 submission unless you have any questions, Mr. Commissioner.

7 THE COMMISSIONER: No.

8 MR. GANGE: Thank you, sir.

9 THE COMMISSIONER: Mr. Khan?

10 MR. KHAN: Mr. Commissioner, I wondering if I
11 could have just 10 minutes to collect my notes and, and
12 from what Mr. Gange has said in his submissions.

13 THE COMMISSIONER: All right. Well, we'll take
14 our mid-morning break now then for 15 minutes.

15 MR. KHAN: Thank you.

16 THE COMMISSIONER: And we know stand adjourned.

17 MR. KHAN: Thank you.

18

19 (BRIEF RECESS)

20

21 THE COMMISSIONER: All right, Mr. Khan.

22 MR. KHAN: Good morning, Mr. Commissioner. Just
23 before I proceed I just wanted to make sure that you had
24 the documents that I submitted. I have two, two briefs, a
25 motions brief and a supplementary motions brief.

1 THE COMMISSIONER: I think I do. Just one
2 moment. There was a -- I have your motion brief and the
3 affidavit of, of Bobbi Lee.

4 MR. KHAN: Right. And I filed, I subsequently
5 filed a supplemental motion brief.

6 THE COMMISSIONER: All right. Well, it will be
7 here somewhere then. I thought I had that. Wait a minute,
8 I may -- it may be here. Yes, I have it.

9 MR. KHAN: Great. And of course the transcript
10 of the cross-examination has been filed.

11 THE COMMISSIONER: Pardon?

12 MR. KHAN: The transcript of the cross-
13 examination has been filed.

14 THE COMMISSIONER: Yes.

15 MR. KHAN: I take it you've had an opportunity to
16 read both my motions brief and the supplemental brief,
17 Mr. Commissioner?

18 THE COMMISSIONER: I'm not certain I've read the
19 supplemental brief. I may have, but I'm not, I'm just not
20 certain I have.

21 MR. KHAN: Okay. The briefs are, they don't,
22 they're not repetitive. The motions brief deals with
23 preliminary issues that I have raised, that being
24 res judicata. The supplemental brief deals with the merits
25 of the case itself. So it goes to the Dagenais/Mentuck

1 test as well as the SOR.

2 THE COMMISSIONER: No, I don't, I don't think I
3 have read the supplemental brief.

4 MR. KHAN: Okay.

5 THE COMMISSIONER: But you certainly have the
6 privilege to argue it.

7 MR. KHAN: Okay, thank you. Now I don't, I don't
8 want to go through all of the materials regarding, and the
9 case law regarding publication bans. I think that's been
10 dealt with in great detail back in July of 2012. My
11 motion, my supplemental brief just attempts to just go
12 through some of, what I think are some of the relevant
13 portions, but otherwise I believe the commission is well
14 aware of the law.

15 THE COMMISSIONER: Well I can tell you this, that
16 other than the res judicata issue that's dealt with in your
17 first brief, I am most interested to know why you're
18 opposing this motion, having heard the reasons put forward
19 by Mr. Gange.

20 MR. KHAN: Okay. Well, Mr. Commissioner, with
21 respect, it's our position that this motion, like any other
22 application, must be decided on the merits of the case.
23 Here there is evidence in fact submitted before you. You
24 must look at the law and determine whether and how the law
25 applies to the facts. In our respectful view the facts are

1 simply insufficient to warrant the granting of an order.

2 Firstly, the issues that are before you today
3 have already been decided by the commission. We've dealt
4 with this back in December of 2011. We've also dealt with
5 this in July of 2012.

6 MS. WALSH: I'm not sure, is your microphone on?

7 MR. KHAN: Is my mic on? Can you hear me?

8 THE CLERK: (Inaudible).

9 THE COMMISSIONER: No, I --

10 MR. KHAN: Have you been able to hear,
11 Mr. Commissioner?

12 THE COMMISSIONER: It hasn't been on but I think
13 it's now on.

14 MR. KHAN: Okay, perfect.

15 THE COMMISSIONER: So we'll just move it up just
16 a bit.

17 MR. KHAN: How's that, Mr. Commissioner?

18 THE COMMISSIONER: I think that will be fine.

19 MR. KHAN: So we've, we've dealt with these
20 issues already. Also is, quite frankly -- unlike the Morin
21 case, the Morin case that was brought up by Mr. Gange, the
22 evidence before you is simply evidence of concerns.
23 There's no link between the risk that's alleged and the
24 publication ban.

25 In the Morin case, and that's at, that's at tab 4

1 of Mr. Gange's supplemental motions brief, that case dealt
2 with the revocation of a publication ban order. So there
3 was an existing publication ban order in place. Now
4 Mr., Mr. Gagne explains how he thinks this case is exactly
5 on point. I actually agree also that it's exactly on
6 point. But the point being, the evidence before the court
7 in that case was very specific and it was very clear and it
8 linked a risk to prior publication ban.

9 So in this case we have actually a wonderful
10 example of, of a situation where a person testified without
11 a publication ban and was able to provide evidence as to
12 the impact of their identity being publicized widely.

13 If I could bring to your attention paragraph 8 of
14 that case and paragraph 8 actually goes through the
15 evidence that was before the court. One is that Mr. X was
16 threatened with death and that's in paragraph 8. So he
17 was, he was physically threatened. He was constantly
18 harassed by his fellow employees. So we know who this
19 harassment is from. The evidence is detailed. In the
20 workplace he was assaulted in the sense that a fellow
21 workman deliberately dumped a bucket of bolts all over him.
22 So he suffered a physical assault. Fires were set beside
23 him, cigarette butts were thrown at him. He suffered from
24 their vandalism. It goes on and on. Also what's very
25 important and which we don't have here, is there is, there

1 is psychological evidence as to his mental state and that's
2 key. Mr. Commissioner, nobody doubts the concerns that the
3 applicants have, that's not at issue. I think it's easy
4 for anyone to be put to, to consider what it would be like
5 and testify. The same applies to all, I mean clearly
6 nobody --

7 THE COMMISSIONER: Well, why, why is it your
8 client doesn't want those names made public, when they'll
9 give evidence in the public forum, everything they can be
10 reported will, will go into the newspapers or on the
11 television or on the radio. But the fact of the matter is
12 that if Mr. Gange's motion were granted their identity
13 would not be known to those that they associated with in
14 the workplace and at school. I want to know why your
15 client wants to put those people through that when they
16 are, they had nothing to do with this grievous, disastrous
17 murder and they're linked by family and want to put that
18 event behind them so it's not known to all those we
19 associate with today. This is some years later. Why is it
20 your client takes the position that they shouldn't get the
21 protection they're seeking?

22 MR. KHAN: Mr. Commissioner, the commissioner
23 doesn't want to -- my client does not want to put them
24 through that. The issue is with respect to one of, one of
25 the applicants. It's anticipated that that applicant will

1 be providing evidence that's inconsistent with other
2 evidence that will be brought forward during this inquiry.
3 The evidence that these applicants are providing are not,
4 they're not peripheral. It's relevant evidence. And in
5 addition, if the, if an order was granted on this evidence,
6 it would be inconsistent with the, with the decisions
7 you've already made on publication bans. If this evidence
8 were sufficient to grant the publication ban, quite frankly
9 any of the witnesses we're about to, that are about to
10 testify could provide similar, similar type of evidence.

11 THE COMMISSIONER: Where's the inconsistency with
12 this order if it were to be granted with what I've already
13 said and done?

14 MR. KHAN: Well, Mr. --

15 THE COMMISSIONER: You just said --

16 MR. KHAN: Yes, yeah.

17 THE COMMISSIONER: -- it would be inconsistent.

18 MR. KHAN: Well, Mr. Commissioner, in your ruling
19 on publication bans you made it clear that the evidence has
20 to be well grounded, the risk has to be well grounded in
21 the evidence. That's clear. I don't see how that's, how
22 that applies here.

23 THE COMMISSIONER: Well, do you want to refer me
24 to a particular paragraph in my publication ban ruling?

25 MR. KHAN: Well, first of all, Mr. Commissioner,

1 it's the general acceptance of the Dagenais/Mentuck test,
2 that the evidence has to be well founded. And I apologize,
3 I didn't highlight the --

4 THE COMMISSIONER: What you're saying is what
5 Mr. Gange has put in front of me doesn't meet the test?

6 MR. KHAN: It just doesn't meet the test.

7 THE COMMISSIONER: All right.

8 MR. KHAN: And we have to consider,
9 Mr. Commissioner, that this case, this inquiry, has --
10 we've gone to the Court of Appeal on two occasions. We've
11 had a number of preliminary motions. This inquiry will
12 set, will set a precedent for future inquiries as well. I
13 mean we have often quoted Mr. Ruel in his book on public
14 inquiries which makes reference to public inquiries how the
15 law applies, how inquiries are held. Publication bans at a
16 public inquiry, is -- I mean this is an issue that will
17 apply in the future and any decision this commission makes
18 on a publication ban based on the evidence that's before it
19 will affect or may possibly affect future inquiries.

20 THE COMMISSIONER: Well I doubt you're ever going
21 to get a repeat of the fact patterns that we're dealing
22 with here.

23 MR. KHAN: I, I hope not, Mr. Commissioner, but
24 there have been a number of inquiries that deal with,
25 unfortunately that have dealt with deaths, deaths of

1 infants. There has been an inquest in Manitoba that has
2 dealt with deaths of infants. I do think it's possible
3 that there will be future inquests or inquiries across
4 Canada that deal with, certainly with deaths of infants,
5 that deal with situations where witnesses have observed or
6 have knowledge on those deaths in the way that we have
7 here.

8 And, Mr. Commissioner, the onus, the onus remains
9 on the applicant. Mr. Gange has made a lot of reference to
10 the fact that his evidence is unchallenged. Firstly,
11 there's no reverse onus. The case of Mentuck at paragraph
12 38, which was, which was often quoted --

13 THE COMMISSIONER: Paragraph 38 of?

14 MR. KHAN: Paragraph 38 of the Mentuck decision,
15 R. v. Mentuck.

16 THE COMMISSIONER: Oh Mentuck itself.

17 MR. KHAN: Yes.

18 THE COMMISSIONER: Yes.

19 MR. KHAN: It clearly states that first of all,
20 the lack of any evidence opposing a ban doesn't really
21 matter and secondly, there doesn't need to be anyone
22 opposing the publication ban. Your analysis,
23 Mr. Commissioner, is the same whether or not I'm standing
24 here, whether or not Mr. Funke is standing here. The
25 considerations you have to make, I don't need to bring them

1 forward essentially. As Mr. Kroft said in July, the same
2 applies. Mr. Kroft explained he did not need to be here
3 before you, neither does anyone else. With respect, the
4 decision must be made based on the evidence before you,
5 Mr. Commissioner. And clearly it's a sympathetic
6 situation, that's clear, but unfortunately there's no
7 evidence that would certainly would have assisted in making
8 this determination. One which I would expect would have
9 been somewhat easy to obtain would be psychological
10 evidence. There's none before you.

11 There is no doubt that the applicants have
12 concerns, have anxiety and have concerns of their mental
13 health in testifying, there's no doubt about that, but
14 those are concerns. There's no hard evidence before you,
15 Mr. Commissioner, otherwise you're making assumptions and
16 the decision shouldn't be based on assumptions, with
17 respect, Mr. Commissioner.

18 Mr. Gange talked about the contextual application
19 of the test. There's no doubt that is the law if you look
20 at it from a contextual basis, but that doesn't change the
21 fact of the onus remains on Mr. Gange, doesn't change that.

22 Now, Mr. Commissioner, with respect to the first
23 part of the Dagenais/Mentuck test, one element that's
24 crucial is that the evidence be well rounded, the risk be
25 well rounded in the evidence. If I could bring you to

1 page 7 of the supplemental motions brief and I'll start at
2 paragraph 12. Now, Mr. Commissioner, before I continue, I
3 just want to advise that I'm sure that you'll be reading my
4 supplemental motions brief and I don't want to spend the
5 entire morning reviewing it. I think it's quite detailed
6 in terms of the law that's applicable and the facts that
7 are before you but I will go through a few points. So
8 let's go through the risks that are raised by the
9 applicants. Do you have it before you, Mr. Commissioner?

10 THE COMMISSIONER: Yes.

11 MR. KHAN: At paragraph 12?

12 THE COMMISSIONER: Yes.

13 MR. KHAN: Well clearly they have risk for their
14 safety and well-being without the protection of a
15 publication ban. They also have concern that they will,
16 concerns that they will suffer from verbal and physical
17 harassment. DOEs #1 and #3 are concerned that they will
18 lose their employment. And then there's a general concern
19 for their mental health and physical health and safety. So
20 those are, those are the concerns raised.

21 If we go to the next page, let's go through the
22 evidence that's before you, Mr. Commissioner. Now it's
23 clear that they've testified and Mr. Gange has advised you,
24 they testified in the criminal court and their names were
25 publicized with respect to that testimony. So that, that

1 we, that we know.

2 At paragraph 18 they explain they have
3 experienced instances of harassments, of harassment after
4 Wes McKay was arrested and that's at paragraphs 3 of each
5 of the affidavits. I'm sure you've read the affidavits and
6 the affidavits are almost identical with some differences
7 in DOE #3 and DOE #1 affidavits, but otherwise they're
8 quite similar. The importance of this, Mr. Commissioner,
9 is that there is no leave to the publication of their --

10 THE COMMISSIONER: No what?

11 MR. KHAN: There's no leave to prior publication
12 of the names. This harassment occurred after Wes McKay was
13 arrested, not during the criminal trial. This harassment
14 occurred after Wes McKay was arrested and not during the
15 criminal trial. And it leads to certain questions that we
16 don't have the details of, is how did these people, how
17 were these people aware of the relationship and what, what
18 constituted harassment in their, in their eyes? We don't
19 have that information, Mr. Commissioner. And again, the
20 onus is on the applicants. They're required to bring forth
21 the best evidence.

22 THE COMMISSIONER: And you say that they would
23 need professional evidence?

24 MR. KHAN: Not necessarily but with respect to
25 this concern alone we can only make assumptions as to what

1 they mean. We don't know what harassment means. Was it
2 just someone calling them a name? Was it, was it more than
3 that? We don't know. We don't know how these people were
4 of the relationship. Were these family members of Wes
5 McKay, for example. We don't know. So the evidence
6 that's, that's put before you is, quite frankly,
7 insufficient. We can only make assumptions as to what that
8 could mean.

9 When I refer to professional evidence, I'm
10 referring more to the, in terms of concerns of mental
11 health. Again, unfortunately there's nothing there and I
12 can't imagine it would have been difficult to provide to
13 you, Mr. Commissioner. I mean these, these individuals
14 have experience, or have already experienced, having
15 testified at a criminal trial. They've experienced,
16 they've had prior experience of their names being
17 publicized. Their names are still publicized and they're
18 not difficult to find on the Internet. The motion itself
19 is not seeking to stop anyone from going to the public
20 record and reporting what's on the public record. It would
21 simply have been helpful, Mr. Commissioner, if there was
22 more detailed information and you're being asked to make a
23 decision on this evidence.

24 Unlike the Morin case, Mr. Commissioner, there's
25 no evidence before you that explains what risks or harm of

1 any sort occurred as a result of prior publication of their
2 names and again that's where I would say that the Morin
3 case is on point. That case there was evidence, very
4 detailed.

5 THE COMMISSIONER: Which case?

6 MR. KHAN: The Morin case.

7 THE COMMISSIONER: Morin case, yes.

8 MR. KHAN: Morin, sorry, I'm pronouncing it with
9 a rolling "R". That doesn't, that simply doesn't exist
10 here.

11 And, Mr. Commissioner, in your ruling on
12 redactions in December of 2011, you also made reference to
13 the fact that the identity of these individuals simply
14 cannot be protected. That's already been decided upon.

15 THE COMMISSIONER: Refer me to where that is,
16 please.

17 MR. KHAN: Yes. I believe it's page 8 or 9 of
18 the redaction ruling. I'll bring you to the exact page.
19 It's at page, it's at page 9.

20 THE COMMISSIONER: Yes.

21 MR. KHAN: And it's in the large paragraph in the
22 center.

23 THE COMMISSIONER: Starting the next category?

24 MR. KHAN: Yes.

25 THE COMMISSIONER: Yes.

1 MR. KHAN: Starting the next category -- one,
2 two, three -- five lines down.

3 THE COMMISSIONER: Yes.

4 MR. KHAN:

5 "One instance where it cannot be
6 avoided is in the case of Phoenix
7 Sinclair herself. Another is the
8 two sons of the male participant
9 in the murder of Phoenix Sinclair.
10 They gave evidence at the criminal
11 proceeding and their identity is
12 known and cannot be protected."

13

14 So with respect, Mr. Commissioner, this commission's put
15 its mind to it, to this issue.

16 THE COMMISSIONER: But I did go on to say that I
17 am mindful that prior to or during the public phase of the
18 inquiry it could become apparent that the identity of a
19 child named in one or more of the documents is relevant to
20 the work of the inquiry and that a lifting of a redaction
21 of that name should be considered. An application for such
22 an order could be made to me on notice at an appropriate
23 time. And I closed the decision by saying if there are any
24 unresolved issues they could be submitted to me for a
25 resolution.

1 MR. KHAN: Right. The remaining of that
2 paragraph, Mr. Commissioner, my understanding refers to
3 names that were redacted pursuant to your order and were
4 then decided to be unredacted.

5 THE COMMISSIONER: Well I guess all I'm saying is
6 I don't view that, I don't -- in light of that passage and
7 the one that's the last sentence in the decision, it would
8 not appear to me to have been a final decision, so as to
9 speak.

10 MR. KHAN: I understand. And, Mr. Commissioner,
11 the redaction order was continued on July 6th of 2012 and
12 that was as a subsequent, as a consequence of the motion
13 brought by the department.

14 THE COMMISSIONER: Yes.

15 MR. KHAN: And at that stage nobody raised any
16 issues either and I would submit that it's at that point
17 that that became a final decision because clearly this
18 redaction order in and of itself on December 2nd referred
19 to simply redaction before the documents were distributed
20 and so there was the issues of how to deal with these
21 documents before they were tendered during the, during the
22 inquiry. That motion was meant to deal with that. The
23 order was granted, so then that continued, basically became
24 a publication ban order. And so I would submit that that,
25 the rationale therefore applies and it continues.

1 Mr. Commissioner, not only do the risks raised by
2 the applicants, they must also -- they cannot be merely
3 subjective. There's a certain sense of reasonableness
4 that's required and that's, and that's a principle I think
5 that applies in all, in all evidence when applications are
6 being made before any sort of judicial or quasi-judicial
7 body. And what I'm referring to is the concern that they
8 may lose employment if, if somehow their identities are
9 made public. With respect, if an employer were to fire
10 somebody because they testified at this inquiry or because
11 they somehow had some, some former relationship or somehow
12 related to an individual who was then something bad, I
13 think the employment laws are quite clear on that issue.

14 THE COMMISSIONER: Well wouldn't that be sad if
15 one of these boys lost their, lost their job because of the
16 publication that flowed out of here with their names being
17 attached on the street. Wouldn't that be a sad occasion
18 when these boys ultimately did their duty?

19 MR. KHAN: I think that would be horrible, but I
20 think the employer would themselves be in a bit of hot
21 water if they were to fire someone on that basis. And the
22 evidence doesn't explain why they think they would lose
23 their job on that basis. Have they, have they lost
24 employment in the past for the same reasons? Does their
25 supervisor or their employer have a specific view with

1 respect to this matter? We don't know. With respect, it's
2 speculation and again if an employer were to do, take such
3 action, I think they would find themselves in some legal
4 issues, with some legal issues.

5 And, Mr. Commissioner, as part of the second half
6 of the Dagenais/Mentuck test, we're required to consider
7 what limit or how far we should go with respect to the
8 publication ban. Now the publication ban being sought by
9 the applicant is really the most extreme ban you can obtain
10 or that has been granted at this hearing, at this inquiry.
11 Only the SORs have been granted a publication ban to date
12 and those SORs are subject to specific protection under the
13 Child and Family Services Act which we've gone through in a
14 fair amount of detail.

15 The concerns raised by the applicants deal with
16 the publication of their identities. The applicants are
17 seeking that they'll testify by videoconference. The law
18 is pretty clear that we want -- if a publication ban is
19 going to be ordered, it should be as minimal as possible.
20 I don't think there is a basis to provide the drastic
21 remedy they're seeking when perhaps alternatives exist.
22 And, Mr. Commissioner, I would submit that that also has to
23 be considered prior to making a publication ban.

24 THE COMMISSIONER: What alternative do you have
25 in mind?

1 MR. KHAN: Well, for example, they can still
2 testify, the media would not be allowed to disclose their
3 identities. That was the publication ban that was being
4 sought by, by the, by all the social workers in July. In
5 July those motions dealt with witnesses testifying in
6 person, with simply that the media not be allowed to
7 disclose their identities. The rules, and I don't have, I
8 don't have the act provision with me but the rules provide
9 for in-camera hearings. So, Mr. Commissioner, if you felt
10 that a hearing should be held in-camera, that could be
11 done.

12 And this leads us to the issue of the SOR
13 application. With respect, SOR determinations have already
14 been done. My understanding of the process at this inquiry
15 was that SORs had been identified by commission counsel at
16 the outset prior to the disclosure of the documents. Those
17 names have been redacted. I go through in a fair amount of
18 detail the law on SORs and having read the transcript of
19 July 6th when Mr. Gange presented his application on behalf
20 of the SORs he represents, I do wish to add for the record
21 more detail on the law. And, Mr. Commissioner, if you want
22 to follow me I'm going to refer to my supplemental brief.

23 THE COMMISSIONER: Yes.

24 MR. KHAN: At page 17, it starts at paragraph 43.
25 Now an informant or a source of referral is a person who

1 because of a reasonable belief that a child is or might be
2 in need of protection is under a legal obligation to report
3 the information to an agency, parent or guardian of the
4 child.

5 Now apart from the confidentiality provisions of
6 section 75 and 76, the protection that's given to an
7 informant relates only to, and is only against the parent
8 of that child or the person who has placed that child in
9 need of protection or believed to have placed that child in
10 need of protection.

11 So there's two key points to this. One is there
12 must be a reasonable belief that a child is or might be in
13 need of protection. The act goes through that at section
14 17 and it's on the following page, at page 18. Section 17
15 provides a concise statement of what is a child in need of
16 protection and that is,

17

18 "Where the life, health or
19 emotional well-being of the child
20 is in endangered by the act or
21 omission of the person."

22

23 Section 17(2) goes through examples of what could
24 constitute a child in need of protection.

25 What's also important is a closer look at section

1 18.1, that's at paragraph 47 on the following page. This
2 is the section that deals with what protection is given to
3 an SOR under the CFS Act and I've bolded the relevant
4 portion of that section:

5

6 "... no person shall disclose
7 (a) the identity of an
8 informant ..."

9

10 So here SOR,

11

12 "(i) to the family of the child
13 ... or
14 (ii) to the person who is believed
15 to have caused the child to be in
16 need of protection ..."

17

18 That's where the protection lies. Otherwise, protection of
19 SORs are governed the same way witnesses or documents,
20 records, information under the act were governed by section
21 76 and by section 75 if a matter is to go to trial.

22 So we really have three different umbrellas of
23 protection: The one afforded specifically to SORs is very
24 limited. It says that information can be disclosed to the
25 parent or the person who has caused that child to be in

1 need of protection but that, but the identity of the
2 informant can be released to other people if it's required
3 under the act and that would be under section 76(3)(g) of
4 the Child and Family Services Act. I believe it's
5 paragraph (g).

6 THE COMMISSIONER: Seventy-six brackets what?

7 MR. KHAN: Sub (3) --

8 THE COMMISSIONER: Yes.

9 MR. KHAN: -- (g).

10 THE COMMISSIONER: Where a disclosure or
11 communication is required for the purpose of this act.

12 MR. KHAN: Right.

13 THE COMMISSIONER: Right.

14 MR. KHAN: Sort of a catch-all provision. And
15 indeed, Mr. Commissioner, information, all information
16 that's created under the act is confidential under section
17 76, but of course in dealing with collaterals or when it's
18 required, information can be released. So SOR protection
19 only deals with the parents and the person who has placed
20 the child in need of protection. Otherwise, they're
21 covered by section 76. Really a large umbrella protection
22 under the act.

23 And I think this is helpful just to understand
24 the protection afforded to SORs. In CFS, in Child and
25 Family Services trials, SORs of course must testify if

1 they're required to testify. The protection afforded to
2 them at a CFS trial is governed by section 75 of the Child
3 and Family Services Act. That refers to the publication of
4 witnesses. So under section 75 the media is not permitted
5 to publish the names of the witnesses under the act. So if
6 that was the case here, Mr. Commissioner, we would be, we
7 wouldn't be acting contrary to how CFS matters are dealt
8 with. So in other words, if, if the witness, if the
9 witnesses' names were not allowed to be, would not be
10 allowed to be publicized then SORs would be, in the sense
11 would be treated the same way they would otherwise be
12 treated under the Child and Family Services Act. The way
13 SORs are treated at this inquiry is beyond the treatment
14 they receive at a Child and Family Services trial. So with
15 that in mind, Mr. Commissioner, my submission is that the
16 treatment given to SORs is really an extreme one. It goes
17 beyond what the law otherwise would be giving to them at
18 this public inquiry.

19 Now DOE #3, for her to be considered an SOR under
20 the act, we have to look at both the information she
21 provided and her belief at the time. Mr. Commissioner, my
22 research of the law on SORs hasn't brought up any cases, so
23 we're dealing with somewhat of a novel issue here. I
24 haven't been -- there may exist some case law. I haven't
25 been able to find case law specifically on SORs, certainly

1 not in Manitoba. We've looked a little bit across, across
2 the country in terms of what case law exists on SORs. But
3 it's clear that from reading the act the person must
4 believe that the child is or might be in need of
5 protection. That's not the case here. The applicant
6 DOE #3 believed the child to be deceased and reported that.

7 Contrary to what Mr. Gange has submitted,
8 Mr. Commissioner, the evidence is not that, the evidence
9 before you is not that Intertribal treated that call as an
10 abuse, as an abuse call. The evidence is that they treated
11 it as a death and that they reported that immediately to
12 the police. So this -- so there was -- the evidence before
13 you is not that there was a child who might, or is or might
14 be in need of protection. That's not why the call was made
15 and that's not how the call was treated and by virtue of
16 that, it doesn't make the, it doesn't make DOE #3 an SOR.
17 We're expanding the definition to something it doesn't
18 apply to. If we did, then the relevant provisions of the
19 Fatality Inquiries Act somewhat has no meaning. The
20 Fatality Inquiries Act requires -- the obligation to report
21 a death is found in the Fatality Inquiries Act and that
22 also is discussed in my supplemental brief. If everybody
23 who reports a death of a minor, so if anyone reports the
24 death of an individual under 18 is now subject to the, the
25 limited confidentiality protection of the Child and Family

1 Services Act, I think it would somewhat be adding meaning
2 to the Fatality Inquiries Act that the legislature did not
3 put in that act.

4 Now on that point, Mr. Commissioner, the case law
5 that Mr. Gange refers to is not, is not the arguments that
6 I have brought forward. Those are the arguments that
7 Mr. Funke has brought forward. So Mr. Funke is in a better
8 position to deal with the interpretation of the Fatality
9 Inquiries Act, so I'll leave that to him. I didn't, I
10 haven't presented that case law to you, that's Mr. Funke.

11 THE COMMISSIONER: But in an SOR application it's
12 the protection of the informant that's --

13 MR. KHAN: That's correct.

14 THE COMMISSIONER: -- critical, is it not?

15 MR. KHAN: Yeah, and you have to look at why, why
16 the protection of the informant exists.

17 THE COMMISSIONER: And why do you think that is?

18 MR. KHAN: Well, I think policy reasons are
19 pretty clear. This is to encourage individuals who
20 normally would have a close relationship or be in a close
21 relationship perhaps with families where children are in
22 need of protection and they report that and it's obvious.

23 THE COMMISSIONER: So it wouldn't be known that
24 they were the whistle blower?

25 MR. KHAN: That's correct.

1 THE COMMISSIONER: Well then isn't that same
2 protection, shouldn't that same protection be available to
3 report that as a result of abuse, death has occurred and
4 the child is now deceased?

5 MR. KHAN: The death of a minor, and here we're
6 dealing with the death of a child, but by implication to
7 deal with any death of a minor with respect is different.
8 It's not the same thing. It doesn't require the same type
9 of protections and certainly reporting a death, one should
10 not obtain the same protections as you can obtain under the
11 Child and Family Services Act. An informant under the
12 Child and Family Services Act does not always testify. In
13 many cases perhaps, perhaps most cases, those informants
14 are never known to the family because the evidence that's
15 required in a Child and Family Services matter is that
16 there was a need of protection at the time of apprehension,
17 that there's a need of protection at the time the order was
18 granted and that the plan is in the best interests of the
19 child. That's what's required for an order under the Child
20 and Family Services Act. Criminal matters are very
21 different. The informant is always a witness in a criminal
22 matter and I would submit that the legislature had that in
23 mind when they drafted the legislation.

24 Mr. Commissioner, you've read my arguments on
25 res judicata?

1 THE COMMISSIONER: Yes.

2 MR. KHAN: Okay. I don't think I need to go
3 further into it apart from my comments that these decisions
4 have already been made.

5 THE COMMISSIONER: Oh, I'd like to hear you as
6 to, as to what makes res judicata applicable here.

7 MR. KHAN: Okay. Well with respect to the SOR
8 issue.

9 THE COMMISSIONER: You're through with the SOR
10 issue, are you?

11 MR. KHAN: Yeah, so I'll --

12 THE COMMISSIONER: Yeah, all right.

13 MR. KHAN: -- I'll finish up with the SOR issue.

14 THE COMMISSIONER: All right.

15 MR. KHAN: It's a decision that's already been
16 made by the commission, by this commission.

17 THE COMMISSIONER: You're going to res judicata
18 now?

19 MR. KHAN: Yes. So the determination of the
20 status of DOE #3 has already been determined, has already
21 been made.

22 THE COMMISSIONER: All right. I want you to take
23 me to where it is that I've made a decision that prevents
24 me dealing with this now based upon the res judicata
25 principle.

1 MR. KHAN: Okay. I'll start with the ruling on
2 redactions.

3 THE COMMISSIONER: The redaction decision?

4 MR. KHAN: Yeah.

5 THE COMMISSIONER: Yes.

6 MR. KHAN: And I'll direct you back to page
7 number 9 in that same paragraph.

8 THE COMMISSIONER: Yes.

9 MR. KHAN: Oh sorry, it's the line above that
10 paragraph, so right at the top of the page.

11 THE COMMISSIONER: Yes.

12 MR. KHAN: It starts with "I agree".

13 THE COMMISSIONER: Yes.

14 MR. KHAN: So this was, Mr. Commissioner, this
15 was after your review of the policy reasons behind why
16 section 18 exists and why source of referrals should be
17 redacted and you write, Mr. Commissioner:

18
19 "I agree and before distribution
20 of the documents the identities of
21 those determined by Commission
22 Counsel as falling within the
23 'informant' category will be
24 redacted."

25

1 So that there was a direction to do so and,
2 Mr. Commissioner, the documents that were provided, they
3 were redacted. In fact, the law requires that they be
4 redacted because they cannot be, they cannot be divulged.
5 They can be divulged to my client, they can be divulged to
6 the department, they can be divulged even to Mr. Gange. Oh
7 no, in fact they cannot be divulged to Mr. Gange.

8 THE COMMISSIONER: But we're not dealing with any
9 documents on Mr. Gange's motions before me this morning,
10 are we?

11 MR. KHAN: Well there are some documents that
12 have already been tendered before the inquiry that disclose
13 the names of the applicants, so it would have to apply
14 retroactively to those documents and to, and to the
15 transcripts.

16 THE COMMISSIONER: But the motions in front of me
17 relate to the appearance of those witnesses in this hearing
18 room. Isn't that what his motions deal with? Instead of
19 them coming into the public forum to reveal their identity,
20 he's asking that their identity not be disclosed but still
21 give their evidence in the public forum in a reportable
22 form.

23 MR. KHAN: Right.

24 THE COMMISSIONER: Documents don't come into
25 that, do they?

1 MR. KHAN: Well documents will be tendered,
2 they're going to need, they're going to need to be
3 redacted, documents with the applicants' names on them.

4 THE COMMISSIONER: Yeah, okay.

5 MR. KHAN: But what I'm referring to is the fact
6 that on the res judicata argument this is an issue that's
7 already been dealt with. Commission counsel has, and the
8 commission has already determined who are the SORs. In
9 fact, they're legally required to do so. What Mr. Gange is
10 essentially saying in his second motion, that's the motion
11 on the SOR, what he's essentially saying is that commission
12 counsel made an error. I say that with respect. I don't
13 agree. I don't think there is any because the law requires
14 that those determinations be made.

15 THE COMMISSIONER: What about, what about SORs 1,
16 2 and 4 who, for whom SOR status is not be sought?

17 MR. KHAN: No, they weren't seeking a publication
18 ban.

19 THE COMMISSIONER: Yes.

20 MR. KHAN: So Mr. Gange isn't saying that one,
21 two and three are SORs, he's saying that -- sorry, one, two
22 and four are SORs. He's saying that number three is an
23 SOR. The argument, with respect, is somewhat, somewhat odd
24 because the interpretation of an SOR given at this inquiry
25 includes both the person who physically, who actually made

1 a call to an agency but also the individuals who provide
2 information to the caller. So, for example, there was the
3 SOR, I don't recall the numbers, the numbers, it will come
4 back to me, but there was a situation that the two
5 witnesses who testified, one SOR did not call the agency,
6 provide information to a foster parent who was also an SOR.
7 They were both granted SOR status. That's a determination
8 made by the commission. I would submit that that's in
9 accordance with the policy rationale behind, behind the SOR
10 provision of the CFS Act. Mr. Gange isn't, isn't seeking
11 that numbers one or two be granted SOR status, yet they are
12 the ones who provided the information to SOR #3. He's only
13 saying that SOR #3 is an SOR. Regardless --

14 THE COMMISSIONER: So I'm saying where in my
15 redaction ruling are you referring to related to DOEs 1, 2
16 and 4, with respect to what Mr. Gange is asking for on
17 behalf of those three clients? You say that there's an
18 order made that prohibits him from receiving the relief
19 he's asking on behalf of those clients.

20 MR. KHAN: And that deals with the publication
21 ban, res judicata with respect to the publication ban. And
22 I can get to that now but I would prefer to finish on the
23 SOR issue.

24 THE COMMISSIONER: Well, but are you saying that
25 the, the redaction -- your point on the application of

1 res judicata relating to the, what I said in the redaction
2 decision relates only to SORs, is that what you're saying?

3 MR. KHAN: No, no. I'm only bringing your
4 attention to that paragraph because I'm only, right now I'm
5 only arguing res judicata with respect to SOR status for
6 number three.

7 THE COMMISSIONER: Well --

8 MR. KHAN: I will get to res judicata as it
9 applies to one, really one and two.

10 THE COMMISSIONER: Well, does there --

11 MR. KHAN: There is no -- number four, from my
12 understanding, hasn't been dealt with previously.

13 THE COMMISSIONER: Well are you saying one and
14 two were dealt with in the, in the redaction decision?

15 MR. KHAN: Yes.

16 THE COMMISSIONER: As well as number three?

17 MR. KHAN: Yes.

18 THE COMMISSIONER: All right.

19 MR. KHAN: But I'll continue with, with number
20 three, whether or not this commission has already
21 determined that she is not an SOR. I'm not sure if I'm
22 losing you on this, Mr. Commissioner.

23 THE COMMISSIONER: No, I'm not sure I follow you
24 but I'm prepared to listen and learn and endeavour to
25 follow you.

1 MR. KHAN: Can we go to the, my motions brief?

2 THE COMMISSIONER: Yes.

3 MR. KHAN: It's at paragraph 4, there starts my
4 written arguments --

5 THE COMMISSIONER: Yes.

6 MR. KHAN: -- with respect to DOE #3.

7 THE COMMISSIONER: All right, go ahead.

8 MR. KHAN: Well firstly we're arguing that the
9 issue has been, the issue has been determined, that, that a
10 determination as to whether DOE #3 is an SOR has already
11 been made. That's my reference to page 9 just now of your
12 redaction, ruling on redaction, that there was a direction
13 that commission counsel determined who are the SORs and
14 that's the part I agree, and before distribution of the
15 documents the identities of those determined by commission
16 counsel as falling within the informant category will be
17 redacted. So that's where it starts from. So there was --
18 it was already determined at SOR 9, sorry, that DOE #3 is
19 not an SOR by this commission.

20 THE COMMISSIONER: By the omission of commission
21 counsel?

22 MR. KHAN: Yes. Now that decision was final in
23 terms of commission counsel's determination on that. This,
24 this ruling on redaction again was continued on July 6th of
25 2012. At that stage the documents had already been

1 distributed to the parties and DOE #3's name was not
2 redacted and that's because DOE #3 is not an SOR. I don't
3 think there can be any doubt that the commission as well as
4 the parties are aware of the law and SORs, the legal
5 significance and the obligation to not disclose those
6 names. In this case the only party that they would not be
7 permitted to disclose those names to would be the party
8 represented by Mr. Gindin and that's the father, because
9 remember the SOR provision provides that the identity of
10 the informant cannot be provided to the family of the
11 family, of the child who is in need of protection. So in
12 this case that's Mr. Sinclair. That has been done and
13 there's no issues with it because once again DOE #3 is not
14 an SOR.

15 Despite the name being unredacted when the
16 documents were disclosed and that this issue was revisited
17 on July 6th, 2012, no concerns were raised by any of the
18 parties, including Mr. Gange who was present. So at this
19 stage, with respect for Mr. Gange to be saying that DOE #3
20 is now an SOR, he's essentially saying that this commission
21 made an error. He's asking the commission to revisit its
22 determination. One, is that there was clear opportunity to
23 bring this earlier.

24 THE COMMISSIONER: Pardon?

25 MR. KHAN: One is there was clear opportunity to

1 bring this issue up earlier, and number two -- well, again,
2 it's already, essentially it's a final decision on the
3 issue.

4 Now, Mr. Commissioner, in accordance with that
5 determination or that non-determination, this inquiry has
6 proceeded with DOE #3 not being considered an SOR and
7 DOE #3's name, and in fact DOE #1's name has been disclosed
8 during the publication ban hearings.

9 THE COMMISSIONER: Was that some way prejudicial
10 to your client?

11 MR. KHAN: No, if anything it's prejudicial to
12 Mr. Gange's client because --

13 THE COMMISSIONER: Well he's not complaining.

14 MR. KHAN: But the point being, Mr. Commissioner,
15 that Mr. Gange is now seeking an order with respect to SOR,
16 sorry, with respect to DOE #3 where this inquiry has
17 already disclosed the identity of that individual. That
18 fact, with respect, weighs against the motion itself. Just
19 like the fact that the publication of the names was
20 already, is already widely known, their names have been,
21 have been recently publicized, both on January 16th during
22 the examination of commission counsel and through documents
23 tendered by the commission or at the commission. There are
24 a minimum of four occurrences of that occurring,
25 Mr. Commissioner. We have document, commission disclosure

1 779, and this is in my materials, by the way, 781 --

2 THE COMMISSIONER: Is this in your brief or
3 supplemental brief?

4 MR. KHAN: It's in my, well I have the reference
5 in my book of documents. It should be my supplemental
6 brief. But just to go through the documents, it's 779,
7 781, 1801 in the (inaudible), 1801, and also through
8 questioning and that's at the transcript of January 16th.
9 And I make reference to that in paragraph 21 of my
10 supplemental brief.

11 THE COMMISSIONER: Yeah, the trouble was that
12 supplemental brief wasn't filed until, it's dated the 7th
13 of March and I unfortunately, I didn't, I didn't receive it
14 till --

15 MR. KHAN: No, it wasn't -- yeah, it wasn't filed
16 till the 8th.

17 THE COMMISSIONER: Pardon?

18 MR. KHAN: The 8th --

19 THE COMMISSIONER: It was filed on Friday.

20 MR. KHAN: -- your office received it on the 8th,
21 yes.

22 THE COMMISSIONER: Yeah, it didn't get to me and
23 that's my problem, I haven't had a chance of reading it,
24 but I will be reading it of course before I adjudicate.

25 MR. KHAN: Thank you.

1 THE COMMISSIONER: So you're going to paragraph
2 what of it?

3 MR. KHAN: At paragraph 21, make reference to, to
4 the documents I've just referred to.

5 THE COMMISSIONER: I see.

6 MR. KHAN: So now this doesn't deal specifically
7 with, with whether or not DOE #3 is an SOR, but I think
8 it's a factor that, that's relevant, it's a fact that's
9 relevant with respect to the overall relief sought by the
10 applicants. So we're dealing with the situation,
11 Mr. Commissioner, the fact situation where the names are
12 widely, have been widely published already in the media.
13 They're easily accessible. They're all on -- it's on the
14 Internet. There's the public record that's available. The
15 applicants are not seeking to restrict anyone from making
16 any reference to the public record. So my understanding of
17 the motion is that an individual could go to the public
18 record and simply repeat what's in the public record.
19 Mr. Gange specifically says during the cross-examination of
20 DOE #3 that the publication ban refers to evidence at this
21 inquiry. So on top of that we've got a situation where
22 this inquiry has already proceeded, having disclosed some
23 of these identities. So these are the facts that we're
24 presented with, Mr. Commissioner. I think, I think that's
25 relevant with respect to the effectiveness of the ban.

1 Now with respect to res judicata on the
2 publication ban issue ...

3 THE COMMISSIONER: You change to a consideration
4 of res judicata applying to the application with respect to
5 the publication ban?

6 MR. KHAN: Yes.

7 THE COMMISSIONER: Yes.

8 MR. KHAN: Firstly, my arguments do not deal with
9 DOE #4, they deal with DOEs #1, 2 and 3.

10 THE COMMISSIONER: And what do you say about
11 number 4?

12 MR. KHAN: I don't have any submissions with
13 respect to DOE #4. I'll leave it to the commissioner to
14 make a determination based on the evidence before it on
15 number 4. But --

16 THE COMMISSIONER: You're not making it --

17 MR. KHAN: On res judicata I'm not.

18 THE COMMISSIONER: You're not --

19 MR. KHAN: No. My -- unless I have missed
20 something, my understanding is, Mr. Commissioner, you
21 haven't ruled on DOE #4.

22 THE COMMISSIONER: Okay. Now I want you to take
23 me where, where it is and what I've said that makes it
24 applicable.

25 MR. KHAN: Okay. So we'll start off with the

1 same page, that's page 9 of your ruling on redaction.

2 THE COMMISSIONER: Yes.

3 MR. KHAN: And, and the same paragraph, that's
4 the large paragraph in the middle.

5 THE COMMISSIONER: I'll just find that now. Yes.

6 MR. KHAN: And it's the same quote I referred to
7 at the beginning of my submissions and that's at the top
8 middle of that paragraph:

9

10 "One instance where it cannot be
11 avoided is in the case of Phoenix
12 Sinclair herself. Another is --"

13

14 THE COMMISSIONER: Just a minute now, which
15 sentences are you referring to?

16 MR. KHAN: It's five lines down in the middle
17 paragraph.

18 THE COMMISSIONER: Yes. Starting with what?

19 MR. KHAN: One, one instance.

20 THE COMMISSIONER: One instance, all right.

21 MR. KHAN: So,

22

23 "One instance where it cannot be
24 avoided is in the case of Phoenix
25 Sinclair herself. Another is the

1 two sons of the male participant
2 in the murder of Phoenix Sinclair.
3 They gave evidence at the criminal
4 proceeding and their identity is
5 known and cannot be protected."

6

7 Now we have discussed this and I'm aware of your
8 comments when you make reference to the last paragraph of
9 your decision which, where you write:

10

11 "If there are any unresolved
12 issues, they can be submitted to
13 me for a resolution."

14

15 So we start there. This order was continued
16 during the publication ban hearings of July 6th. So my
17 submission, Mr. Commissioner, is at that stage this now no
18 longer applies to redaction of documents, it's part, it's
19 part of your publication ban rulings. At that time there
20 were no, no submissions made on that aspect, no concerns
21 were raised. The applicants, in particular, did not, did
22 not make any submissions on this point. That's on
23 July 6th, the publication ban hearings.

24

25 THE COMMISSIONER: But why wouldn't this be an
 unresolved issue that's now being submitted to me for a

1 resolution, i.e., the current Gange motions?

2 MR. KHAN: Well, the whole principle behind
3 res judicata is that there is finality to the issues.

4 THE COMMISSIONER: Yes.

5 MR. KHAN: The finality, I would submit that
6 occurred on July 6th.

7 THE COMMISSIONER: Well, show me where on
8 July 6th.

9 MR. KHAN: Yes. That's at tab 5 of my
10 authorities, Mr. Commissioner.

11 THE COMMISSIONER: Page what of, of the
12 publication ban ruling?

13 MR. KHAN: Oh, that would be -- we're at page
14 182, it's July 6th.

15 THE COMMISSIONER: Page 182. Well now a copy of
16 what I have only has 57 pages.

17 MR. KHAN: Well, Mr. Commissioner, in my -- I
18 have two books of authorities. In the first one I pull out
19 the excerpt and that's at tab number 5.

20 THE COMMISSIONER: Does commission counsel know
21 what pages of that?

22 MS. WALSH: I confess, I'm not following what
23 Mr. Khan is doing, sorry.

24 MR. KHAN: Oh that's okay. I can give you my
25 copy, Mr. Commissioner. I have an electronic version with

1 me.

2 THE COMMISSIONER: Well, here's my copy of the
3 publication ban. Find it for me in here, will you?

4 MR. KHAN: Oh no, I'm referring to the
5 transcript, Mr. Commissioner.

6 THE COMMISSIONER: Oh, oh, oh.

7 MR. KHAN: Your order was made on the spot
8 during, during the, during the hearing and I'll, I'll bring
9 you to it.

10 THE COMMISSIONER: Is it not in the publication
11 ban what you're referring to?

12 MR. KHAN: There is reference to it.

13 THE COMMISSIONER: That was made on the 12th of
14 July. You're talking about a transcript on the 6th of
15 July?

16 MR. KHAN: The 6th of July.

17 THE COMMISSIONER: Oh, all right.

18 MS. WALSH: That is tab 5, which you should have
19 in front of you.

20 THE COMMISSIONER: Pardon?

21 MS. WALSH: You should have tab 5 in front of you
22 in Mr. Khan's materials.

23 THE COMMISSIONER: In what book, in what book --

24 MS. WALSH: The same book that had your
25 publication ban decision. Your publication ban decision is

1 tab 6, so if you were looking at that ...

2 THE COMMISSIONER: Well, in which, in which
3 volume though?

4 MS. WALSH: It's in volume 3 of 4.

5 THE COMMISSIONER: And tab what?

6 MS. WALSH: Five, I think is where Mr. Khan is.

7 MR. KHAN: Yes.

8 MS. WALSH: Yeah.

9 MR. KHAN: Thank you.

10 THE COMMISSIONER: All right. Okay, Mr. Khan, I
11 have page 182 in front of me.

12 MR. KHAN: Okay. So at the bottom of 182,
13 Mr. McKinnon begins to present his motion and at the top of
14 183 and in the body of 183, Mr. McKinnon explains, explains
15 the motion and that's that the ruling on redaction
16 continue. On page 184, at line 16 and the lines after that
17 it's noted that there are no objections to the motion. And
18 on page 185, at line 7, Mr. Commissioner, the transcript
19 reads:

20

21 "I think that's a reasonable and
22 if you require a formal order why
23 I so direct at this point."

24

25 So the order is made right there.

1 THE COMMISSIONER: And the order was what?

2 MR. KHAN: That the, that the ruling on redaction
3 continue during the public hearings.

4 THE COMMISSIONER: Well, then wouldn't it,
5 wouldn't that last provision also apply as part of it that
6 further applications could be made? If there are any
7 unresolved issues they can be submitted to me for a
8 resolution? Wouldn't that continue to apply as part of
9 that original order that you say was confirmed on the, on
10 the 6th of July?

11 MR. KHAN: Well, Mr. Commissioner, there must be
12 some finality to the decisions. If not, it seems to me we
13 can revisit each motion at any time.

14 Mr. Commissioner, I just wish to point out that
15 submissions were made on behalf of DOEs #1 and 2 on the, on
16 the ruling on redaction of December 2nd, 2011. So
17 Mr. Gange did, did make some, rather cursory, but he did
18 make submissions on that point. Mr. Commissioner, the
19 commission put its mind to, to DOEs #1 and 2, and so I
20 would say the rationale continues to apply. Further, by
21 extension that rationale applies to DOE #3.

22 Mr. Commissioner, the briefs cover the rest of my
23 arguments. I don't think it's necessary for me to review
24 anything further and there's nothing further I wish to
25 point your attention to. Just in conclusion, I would

1 submit that the decision on this issue must be based on the
2 evidence that's before the commission and the evidence,
3 unfortunately, falls well below the standard that's
4 required under the Dagenais/Mentuck test.

5 THE COMMISSIONER: Your client wants these four
6 witnesses to appear here and be publically displayed?

7 MR. KHAN: No. We're saying that the evidence
8 doesn't meet the standard.

9 THE COMMISSIONER: Well then you're saying that
10 your client's position is that these four witnesses should
11 come into this forum and be physically here and examined
12 rather than by video?

13 MR. KHAN: Yes.

14 THE COMMISSIONER: That's, that's -- would be the
15 position of your client?

16 MR. KHAN: Yes.

17 THE COMMISSIONER: Okay, I understand.

18 MR. KHAN: We're not asking --

19 THE COMMISSIONER: I'm not sure I understand why,
20 but I do understand the position they take. But I'll look
21 at the res judicata argument, of course.

22 MR. KHAN: Thank you. And those are my
23 submissions.

24 THE COMMISSIONER: Thank you, Mr. Khan.

25 MR. KHAN: Thank you.

1 THE COMMISSIONER: Now, Mr. Funke, I guess the
2 first question is why I should hear you but I think
3 Mr. Gange wants to say something.

4 MR. GANGE: Well, I'm just not sure about the
5 procedure, Mr. Commissioner. It may be that the proper
6 timing of this should be that I should respond to
7 Mr. Khan's argument. Mr. Funke's argument is, he's
8 bringing a separate motion as to being granted standing to
9 be able to make a submission. Now, I'm -- again, you're
10 the one in charge of, of the order and if you think that it
11 would be better that Mr. Funke make his motion and then I
12 respond to his motion and, and if you rule in Mr. Funke's
13 favour, then you would hear his argument and then I would
14 respond to Mr. Funke's argument and Mr. Khan's argument,
15 that's fine. It just seems to me that it probably is
16 cleaner and tidier if I respond right now to Mr. Khan's
17 argument, as Mr. Funke's argument is going to require a
18 very separate and distinct analysis. So whatever you think
19 is the appropriate way of proceeding.

20 THE COMMISSIONER: Any comments on that,
21 Mr. Funke?

22 MR. FUNKE: I can advise, Mr. Commissioner, that
23 from my perspective it makes no difference whatsoever. I'm
24 prepared to proceed right now if you want to hear from me
25 or if you'd prefer to have Mr. Gange reply to Mr. Khan's

1 submissions, I'm content with returning this afternoon. It
2 makes no difference to me whatsoever.

3 THE COMMISSIONER: All right. Well having heard
4 that, and I take it that Mr. Gange's preference is to
5 respond to Mr. Khan now.

6 MR. GANGE: It would be.

7 THE COMMISSIONER: Well then I'll hear you now.

8 MR. GANGE: Okay, thank you.

9 Hopefully this mic is working as well. Thank
10 you, Diane.

11 THE COMMISSIONER: Yes.

12 MR. GANGE: Mr. Commissioner, let me deal first
13 with res judicata. You asked Mr. Khan several times where
14 in your ruling you've made a decision. You haven't. And
15 of course you haven't because these applicants have never
16 made a motion to be granted a publication ban. And if
17 they've not made a motion for a publication ban, there is
18 no ruling that you have made that can be considered to be a
19 final decision. So that your, your question of Mr. Khan on
20 several occasions was where in my ruling have I made a
21 decision and Mr. Khan could not respond to you on that,
22 other than to say that in paragraph, or page 9 dealing
23 with redactions there's a comment. That's it. But
24 res judicata -- the problem with Mr. Khan's argument is
25 that it's a fundamental misapprehension of what the rule or

1 res judicata is. Res judicata is primarily a matter dealt
2 with in civil courts where a lawsuit has been brought and
3 decisions have been made and then following that decision
4 there is a subsequent lawsuit brought. That's not what is
5 happening here. You are in the middle of a very fluid
6 process. What is happening today in March of 2013 is very
7 far away from what was happening in July of 2012, because
8 of the evidence that has been submitted, because of the
9 development of, of the production of documentation, and so
10 at no time did, did DOEs #1, 2, 3 or 4 ask for a
11 publication ban. And because they did not do that, there
12 is nothing that has been decided by you that could be said
13 to be res judicata and all that Mr. Khan could respond to,
14 your questioning of him, was that there must be some sort
15 of finality. Well, I'm sorry, but that is not res
16 judicata.

17 If you look at the Glenko case, which is an
18 excellent review by Madam Justice Hamilton of the law of
19 res judicata that Mr. Khan has provided it to you, there
20 are certain things that must be spelled out. There must be
21 an action and it must involve the same parties. There must
22 be a final decision or issues ought to have been decided.
23 Well none of those things apply here because this is not
24 civil litigation. And one of the cases that my learned
25 friend provided to you was the decision which, which in my

1 learned friend's first book of documents was included at
2 tab 9 and it was a decision -- you don't have to go there
3 because it's -- the point is just so self evident. It's a
4 case called R. v. Martin and it was dealing with a decision
5 regarding whether a ruling at a voir dire could be
6 revisited. And the court set out the various factors, that
7 is the question to be decided in the second proceeding is
8 the same question that has been decided in the first
9 proceeding. Mr. Khan's argument fails on that point. The
10 question decided in the first proceeding is fundamental to
11 the decision in the first proceeding, not collateral to the
12 decision. Well because there is no decision about this,
13 about the publication ban, it could not be considered to be
14 fundamental to the first decision.

15 The question decided in the first proceeding
16 includes all subject matter encompassing the question
17 whether decided expressly or by necessary logical
18 consequence. Again, it fails.

19 It then goes on to say that, because in this case
20 an application was brought saying well the court decided
21 this on the basis of issue estoppel and the court said well
22 there's no appeal in a preliminary hearing so there's no,
23 there's no ability to test the decision so that if further
24 information comes about and the court has to look at this
25 issue, they're not stopped, they're not estopped from doing

1 so. You have never made a ruling so that under any kind of
2 analysis the question of res judicata or issue estoppel is
3 completely irrelevant and is not a legal principle that is
4 before you because the necessary foundation for the
5 argument has not been established.

6 I have a couple of comments to make in response.
7 You asked Mr. Khan on several occasions why is it that his
8 client wants these four people to appear in this room and
9 there was no answer. The closest that Mr. Khan came was to
10 say that one witness will testify in a manner that is
11 inconsistent with other witnesses that are going to testify
12 before you. That may be. That's the nature of the public
13 inquiry, that there is going to be differences of memory
14 and differences of recollection and that is going to
15 happen. Witness -- DOE #3 is going to give evidence. I
16 expect that is going to be different than that that is
17 going to be provided by Mr. Khan's witnesses.

18 THE COMMISSIONER: Well, that's not the first
19 time that's happened.

20 MR. GANGE: Absolutely, it's not. And it is not
21 a reason to drag DOE #3 through this process, given the
22 nature of her testimony, given the nature of her
23 involvement. But that is the only explanation that
24 Mr. Khan gave you to, other than to say that the evidence
25 must be satisfactory. And I said it in my original

1 submission and I don't want to run the wrath of you saying
2 to me, Mr. Gange you've already gone over that. The
3 evidence is more than sufficient to justify this
4 publication ban.

5 You asked Mr. Khan what alternatives there were
6 and I was fascinated by the response because Mr. Khan said
7 that what could be done is that the evidence could be given
8 in camera. So no press, no witnesses -- pardon me, no
9 spectators. It seems to me that the proposal that I have
10 made is much less restrictive to the open court policy than
11 Mr. Khan's suggested alternative.

12 Mr. Khan argues that, that section 75 of the act
13 is where this really, where the justification comes into
14 play and section 75 certainly does say that records made
15 under this act are confidential and no person shall
16 disclose or communicate information from the record in any
17 form where disclosure or communication is required for
18 purposes of this act. It seems to me, Mr. Commissioner,
19 that what you have been attempting to do is to balance the
20 legislative restrictions and requirements that were not
21 really designed for commission of inquiry under the Child
22 and Family Services Act. They're designed for criminal
23 proceedings. And what you -- it strikes me that what
24 you've been trying to do is to attempt to make this hearing
25 consistent with the protections that are given under the

1 Child and Family Services Act.

2 Section 75(2) says that,

3

4 "No press, radio or television
5 report of a proceeding under Part
6 II, III or V shall disclose the
7 name of any person involved in the
8 proceedings as a party or a
9 witness or disclose any
10 information likely to identify any
11 such person."

12

13 That's what the act says. Well, you're not
14 proceeding under, as I understand it, under parts 2, 3
15 or 5. You're doing a commission of inquiry that is
16 established pursuant to an order in council. But you have
17 been attempting to provide the protection to people as much
18 as possible as is afforded by this act. And it strikes me
19 that again the proposal that we've made, that these people
20 testify, that the press be allowed in the room, that
21 spectators be allowed in the room, that anybody interested
22 in this proceeding be allowed to hear the witnesses and the
23 only restriction is they cannot see them and they cannot
24 have their names. Seems to me that pursuant to section 75
25 and pursuant to the powers inherent in your appointment,

1 you have the authority to do what is being requested.

2 My learned friend says that this is not, that
3 DOE #3 is not an SOR and that, that Intertribal treated
4 this as a death. Well they did, but let's not forget there
5 were two other children in that house. When DOE #3 made
6 that phone call there were two other children there. And I
7 believe that the evidence, if you haven't already heard it,
8 I believe that the evidence that you are going to hear is
9 that those two children were apprehended as a result of the
10 information that was provided by DOE #3. Is she an SOR?
11 Absolutely.

12 THE COMMISSIONER: Is there evidence before me
13 that there were two other children in that house?

14 MR. GANGE: There's going to be.

15 MR. KHAN: Mr. Commissioner, and I apologize for
16 interrupting, but what Mr. Gange is now arguing is not in
17 evidence before you at all. He's adding evidence to his --

18 THE COMMISSIONER: No, there's no evidence --

19 MR. KHAN: -- his arguments.

20 THE COMMISSIONER: -- in front of me that I'm
21 aware of that there were two other children in that house
22 at that time.

23 MR. GANGE: And I just say that I believe that's
24 the evidence that is going to come to you.

25 THE COMMISSIONER: But I don't think I can take

1 that into account because --

2 MR. GANGE: Okay, fine, fair enough. Thank you.

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

4 MR. GANGE: Thank you.

5 THE COMMISSIONER: I haven't heard it.

6 MR. GANGE: Thank you, Mr. Commissioner. I then
7 will move on.

8 With respect to the documents that have already
9 been submitted, it, it may be, Mr. Commissioner, that when
10 -- that in considering this matter, I, quite frankly, was
11 not aware of the documents that Mr. Khan put in through his
12 book of documents, the second book of documents which
13 arrived, well I saw it last night.

14 THE COMMISSIONER: Which documents are you
15 referring to?

16 MR. GANGE: Documents number 11, 12, 13 and 14
17 or --

18 THE COMMISSIONER: Eleven, 12 --

19 MR. GANGE: Eleven, 12, 13.

20 THE COMMISSIONER: And thirteen. Now at those
21 tabs?

22 MR. GANGE: Yes. At the tabs in the book of
23 documents, volume 2 --

24 THE COMMISSIONER: Yes.

25 MR. GANGE: -- that just, that -- well as I say,

1 I saw it last night for the first time. I don't know that
2 you've seen it at all.

3 THE COMMISSIONER: No, I just -- it's been placed
4 here today for the first time.

5 MR. GANGE: Yes. It may be that if your, if
6 Your Honour makes the ruling that I am requesting, I
7 suspect that you may have to make a ruling to, to order
8 that redactions be made with respect to those documents
9 that have been placed on the public record.

10 THE COMMISSIONER: I'd ask commission counsel,
11 you follow that, do you?

12 MS. WALSH: Yes, Mr. Commissioner.

13 THE COMMISSIONER: And if Mr. Gange is correct
14 and if we get to that point, you'll deal with that in the
15 public forum, I take it, you'll make that request?

16 MS. WALSH: Well, I think Mr. Gange is making
17 that request right now.

18 MR. GANGE: I am. I think that it falls -- as I
19 said, Mr. Commissioner, I was not aware that there were
20 documents on the public record in this hearing.

21 THE COMMISSIONER: Well, my problem is I don't
22 know what documents they are. That's why I'm saying --

23 MR. GANGE: And, and I believe that --

24 THE COMMISSIONER: That's why I say I'll look to
25 commission counsel to give me guidance on that.

1 MR. GANGE: Thank you.

2 THE COMMISSIONER: Do you know what the documents
3 are?

4 MS. WALSH: Not off the top of my head, but we
5 would certainly be able to search and find them.

6 THE COMMISSIONER: All right. Well then we won't
7 lose track of that point if we get to that point, if we get
8 there.

9 MR. GANGE: Thank you. And the final point that
10 I would make is my learned friend, Mr. Khan, says that I
11 should have requested that DOEs #1 and #2 be named SORs as
12 well. I don't -- he may be right on that. DOE #3 does
13 receive the information that she relies upon in calling
14 Intertribal. She does rely upon the information provided
15 by DOEs #1 and #2. I did not make that as part of my
16 application. He may be right that I should have, but I
17 think that the evidence with respect to the publication ban
18 is satisfactory and I don't believe that I need to go any
19 further. Those are my comments in response.

20 THE COMMISSIONER: Thank you, Mr. Gange.

21 Now I'll hear Mr. Funke on your, your right to be
22 here, that is to participate.

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

24 I take issue, first of all, with Mr. Gange's
25 description of these proceedings as a motion that I'm

1 making on behalf of the AMC and SCO to participate in this
2 aspect of the inquiry. I don't believe that I require to
3 make a motion. An application was previously made before
4 you.

5 THE COMMISSIONER: You're coming forward as
6 counsel for an intervenor.

7 MR. FUNKE: Exactly. I've already made an
8 application to act on behalf of my clients, the AMC and the
9 SCO, during phase one as an intervenor and during phases
10 two and three as parties.

11 THE COMMISSIONER: Isn't the only question as an
12 intervenor do you have status to take part --

13 MR. FUNKE: Absolutely.

14 THE COMMISSIONER: -- in this phase one
15 proceeding.

16 MR. FUNKE: Absolutely. And rule number 10, or
17 paragraph 10 of the rules and procedures of this inquiry,
18 say that you have the authority to determine the
19 participation of the various parties and intervenors at any
20 stage of the inquiry. I see no distinction between the
21 applications that are being made today by Mr. Gange on
22 behalf of his clients, compared to the applications that
23 were made on July 4th, 5th and 6th before you when the
24 original publication ban and SOR applications were made.
25 They are dealing with the very same issues, exactly the

1 same issues. And you heard from me at that time with
2 respect to my client's position on the, both on the SOR
3 applications and the publication ban. My position is, is
4 that you sent a precedent that I have standing to make
5 submissions on these matters.

6 Now I respect the fact that we are intervenors
7 only for phase one and as a result, I do not intend to
8 repeat any of the submissions made by Mr. Khan and I'll
9 deal exclusively with matters that I bring a different
10 perspective or, or submissions that are distinct from those
11 submissions that you've already heard.

12 THE COMMISSIONER: Yes, I had the advantage of
13 getting your material.

14 MR. FUNKE: Okay, very good.

15 THE COMMISSIONER: Yeah.

16 MR. FUNKE: And I apologize, my material was
17 filed on Friday and the reason --

18 THE COMMISSIONER: Somehow it got to me but
19 Mr. --

20 MR. FUNKE: Very good.

21 THE COMMISSIONER: -- Mr. Khan's -- although I
22 wouldn't have expected to have got this big book --

23 MR. FUNKE: No.

24 THE COMMISSIONER: -- several hundred miles from
25 here.

1 MR. FUNKE: Sure. And I can advise that the
2 reason why materials were filed on Friday was in part
3 because of Mr. Gange's objections to our participation at
4 this application and because he raised concerns about me
5 repeating submissions made on behalf of Intertribal CFS, I
6 waited to file my materials until I had the benefit of
7 reviewing Mr. Khan's submissions and then I could determine
8 which of the submissions I anticipated making fell outside
9 the material that he had already covered and as a result,
10 my written material only deals with issues not raised by
11 Mr. Khan. And to, and as I indicated in my written
12 submissions, not only do we agree with but we adopt the
13 submissions made on behalf of Intertribal CFS by Mr. Khan
14 both in his written submissions and placed before you in
15 oral testimony today.

16 Mr. Gange objects to my participation saying that
17 the Queen's Bench rules require that I meet some further
18 and other tests and with respect my submission is that
19 you're not bound by the Queen's Bench rules. You have the
20 inherent authority to determine the rules of your own
21 process at this inquiry, you have done so and as I
22 indicated earlier, paragraph 10 of your amended rules and
23 procedures are quite clear with respect to your ability to
24 determine my level of participation at any, at any point in
25 the inquiry. Having already made that determination with

1 respect to the hearings on July 4th through 6th of last
2 year, I don't see why my involvement at this point should
3 be any different. So that's my, those are my submissions
4 on the issue of whether or not we have standing for this
5 motion.

6 THE COMMISSIONER: Thank you, Mr. Funke. I'll
7 hear Mr. Gange.

8 MR. GANGE: Thank you, Mr. Commissioner. An
9 intervenor is, is a party, is an entity distinct from a
10 party. A party has standing and can participate at all
11 levels and as Mr. Funke properly states, you, in the rules
12 and procedures, have the obligation to make a decision as
13 to whether or not an intervenor can take part at any stage
14 of this part of the process.

15 It is true that we made reference to the Queen's
16 Bench rules, but only for the purpose of saying this is
17 what an intervenor is. The Queen's Bench rules have been
18 interpreted and the rules with respect to intervenors are
19 very well known. They've been well developed over a period
20 of time. It is true that in July of 2012, Mr. Funke was
21 given the opportunity to make submissions.

22 THE COMMISSIONER: Does the record show whether
23 there was a discussion about that or how --

24 MR. GANGE: Well let me say this, there was no
25 objection. This is an application that I've brought and I

1 am making an objection and I am saying that the only
2 parties that have standing to make comments with respect to
3 the publication ban are those entities that are parties.
4 So now, an intervenor in law, in terms of when an
5 intervenor is, is pursuant to the rules, whether they be
6 Queen's Bench rules or whether they be the rules of
7 procedure, are they adding something to the process? Is
8 there a reason why an intervenor has the right, when they
9 don't have the standing as a party, to make submissions?

10 Let's say this, the press, so Mr. Kroft,
11 representing the media, would have the right because his
12 submission as a member of the press is distinct from the
13 position that is being advanced by parties. The parties to
14 his inquiry couldn't care less, generally speaking, about
15 what the rights of the press are. That's unique to the
16 press. And so when Mr. Kroft stood up and argued very
17 vociferously, opposing the publication ban that was being
18 requested by the MGEU, he was bringing a perspective that
19 was different than anybody else could bring and that is
20 when an intervenor is going to be given, pursuant to law,
21 the ability to make a submission.

22 So that we've given you, in the supplemental
23 brief, so, Mr. Commissioner, we've filed a supplemental
24 motions brief and at tab 3 we've provided to you the case,
25 Greyhound Canada Transportation Corp. v. Motor Transport

1 Board. And in that case the Burntwood Regional Health
2 Authorities sought leave to intervene at the hearing. The
3 court said -- or pardon me, at the time the RHA had
4 standing as a member of the public entitled to make
5 submissions at the public hearings with respect to the
6 fundamental process.

7 Justice Hamilton wrote and said that while the
8 RHA had an interest in the subject matter of the
9 application and its participation would not unduly delay or
10 prejudice the determination of the leave motion, its motion
11 to intervene was not to be allowed. And the court said
12 that what has to be shown is that the submission made by
13 the intervenor will be useful or different from the
14 arguments of the parties as to why its leave to appeal
15 should be denied. That is the fundamental rule and it
16 applies in all, it applies in regulatory hearings, it
17 applies in court proceedings and it also applies at public
18 inquiries.

19 THE COMMISSIONER: What Mr. Funke says what he
20 wants to advance is different than what Mr. Khan has put
21 forward on his application.

22 MR. GANGE: Yes, he does.

23 THE COMMISSIONER: Or his response to your --

24 MR. GANGE: He does. However, I don't know if
25 you've gone through the motions brief but the motions

1 brief, paragraph 3:

2

3 AMC and SCO adopt and rely upon
4 the submissions contained in the
5 motions brief filed by Intertribal
6 Child and Family Services.

7

8 Paragraph 5:

9

10 AMC and SCO adopt and rely upon
11 the submissions.

12

13 Paragraph 6,

14

15 AMC and SCO adopt and rely upon
16 the submissions.

17

18 THE COMMISSIONER: So you're saying you're
19 throwing your weight behind what Mr. Khan has said.

20 MR. GANGE: That's right. This application is
21 not to be decided by the number of people that come up to
22 oppose it --

23 THE COMMISSIONER: No, no, no, no.

24 MR. GANGE: -- it's to be decided based on the
25 submissions.

1 Now I made reference to something that I
2 attributed to Mr. Khan. Mr. Funke, very kindly, told me I
3 was wrong, and that that submission with respect to the
4 death of Phoenix Sinclair was his submission and not
5 Mr. Khan's submission. That's correct. However, it is a
6 submission that Mr. Khan could have made. It's not unique
7 to AMC and SCO and that's the point, is it unique to those
8 people, to those intervenors? And the answer to that is
9 no, it's not. If it's a valid argument it should have been
10 made by Mr. Khan and anything that could have been argued
11 by Mr. Khan should have been argued by Mr. Khan and should
12 not be argued by Mr. Funke. So is there a different
13 perspective? I don't think so. And I don't see anything
14 in here other than that argument which, as I say, could
15 have been made by Mr. Khan. That's the reason why, with
16 respect to the general rules regarding intervenor status,
17 Mr. Funke's clients do not have the right to make a
18 submission to you. That's my submission, Mr. Commissioner.
19 Happy to answer any questions.

20 THE COMMISSIONER: No, I'm going to --

21 MR. GANGE: Thank you.

22 THE COMMISSIONER: Yes, Mr. Funke?

23 MR. FUNKE: I don't know if you need to hear to
24 hear further from me, Mr. Commissioner, but if you do I do
25 have some brief comments in reply to Mr. Gange's

1 submission.

2 THE COMMISSIONER: Well, if you want to put them
3 on the record, go ahead.

4 MR. FUNKE: Certainly. Thank you. First of all,
5 with respect to the different perspective that my client
6 brings to this proceeding, it should be noted that
7 Intertribal CFS has a very distinct and discrete interest
8 in these proceedings with respect to the role of its
9 agents. My clients, however, represent the tens of
10 thousands of First Nation families in this province. My
11 clients are the elected leadership of those families. As a
12 result, my clients bring a wholly different perspective to
13 this inquiry than does Mr. Khan's clients. Our clients
14 have an interest in seeing the law properly applied and
15 followed at this inquiry, particularly with respect to the
16 public's right to know and to be fully informed and engaged
17 in the process. So my client does bring a very distinct
18 perspective and I made submissions at length on that during
19 my July 6th submissions which you heard and received and
20 referenced in your July 12th ruling.

21 Secondly, with respect to the submission that my
22 argument is not distinct from Mr. Khan's, I think that's
23 entirely incorrect. Mr. Khan wasn't focusing on the
24 meaning of child within the act as I do in my submissions.
25 Mr. Khan was dealing more with whether or not section 17

1 applied in terms of in need of protection and that the
2 Fatality Inquiries Act more appropriately placed the burden
3 on, on DOE #3 to make the report that she made. And as I
4 indicated in my written submissions, I adopt and rely upon
5 Mr. Khan's submissions in that regard but I have further
6 argument to make that wasn't addressed by Mr. Khan.
7 Whether it could have been addressed by Mr. Khan or not is
8 irrelevant, he didn't do it. It's a matter that my clients
9 felt needed to be brought to your attention so that the
10 proper application of the law could be followed. Those are
11 my only other comments. Thank you.

12 THE COMMISSIONER: Well, my belief is that
13 there's no prima facie right invested in an intervenor to
14 take part in this current proceeding in which these
15 parties, Mr. Funke's clients, were denied standing as
16 parties. However, I am cognizant of the fact that back
17 some months ago when the publication ban itself relating to
18 the social workers before me, I did allow the participation
19 of the intervenor.

20 I also have in front of me the remarks I made at
21 the time that I granted the intervenor status saying this
22 with respect to the four parties involved whose
23 applications I -- and I'll read from that decision which
24 was made on the 29th of June:

25

1 "Because these four parties whose
2 applications I am now addressing
3 had neither responsibility for nor
4 other involvement in the life of
5 Phoenix, I limit their involvement
6 to that aspect of the foregoing
7 aspect of the inquiry's work. I
8 say that with the expectation that
9 her life and death and the
10 involvement of Phoenix and her
11 family with the delivery of family
12 welfare services will be, will be
13 fully explored by the commission
14 counsel and by those who had
15 responsibility for her care and
16 welfare. If circumstances should
17 arise indicating that there is a
18 need for the relaxing of that
19 limitation, that can be dealt with
20 by application to me at the
21 appropriate time."

22

23 Having heard Mr. Funke that the argument he
24 wishes to advance is separate and distinct from the
25 position that has been taken by Mr. Khan, notwithstanding

1 the fact that his brief confirms his position of supporting
2 that submission, what he wants to put before me is
3 something separate and different.

4 It is unusual that an intervenor would be
5 participating in this way at this time, but when I made the
6 order back on the 29th of June, I opened the door to an
7 application that would allow this to occur. I always lean
8 to wanting to hear and get the benefit of all of the
9 assistance I can in having just, in making decisions that
10 require my attention and when I weigh all those factors, it
11 tells me that, that I should hear Mr. Funke on his limited
12 participation with respect to grounds other than what has
13 been advanced by Mr. Khan and therefore we will hear him
14 this afternoon when we -- we'll reconvene, I guess, at 2:15
15 and following his participation, Mr. Gange will have the
16 opportunity to reply. So we'll stand adjourned now till
17 2:15 this afternoon.

18

19 (LUNCHEON RECESS)

20

21 THE COMMISSIONER: Now just before we start this
22 afternoon, I just want to clear up one error I made this
23 morning. When I referenced the standing hearing of the
24 29th of June and read a piece into the record from page 13,
25 I should have been reading from page 19 because 13, what I

1 read out, related to the intervenor status afforded at that
2 time to the authorities and ANCR, whereas on page 19 I said
3 much same thing with respect to the Manitoba, Association
4 of Manitoba Chiefs and the Southern Chiefs when I said:

5

6 "I do not see the Association of
7 Manitoba Chiefs having a direct
8 and substantial interest in the
9 central and critical component of
10 the assignment given to me, in
11 that this applicant has had no
12 involvement whatever in the facts
13 surrounding the life and death of
14 Phoenix Sinclair. The applicant
15 has not met the test to be
16 afforded party standing."

17

18 And then I went on and afforded the intervenor status.

19 What I didn't add on that page, as I had on 13
20 with respect to the others, was the statement "if
21 circumstances should arise" indicating that if there is a
22 need for the relaxing of that limitation that can be dealt
23 with by application to me at the appropriate time. I am
24 exercising my jurisdiction, I suppose I could say, under
25 the rules that the same (inaudible) going to apply here and

1 we're going to carry on just as we were based upon that
2 reasoning but in that I had made reference to the wrong
3 page I thought I should just put the record straight.

4 MR. FUNKE: Thank you, Mr. Commissioner. I can
5 advise that that didn't cause me any concern whatsoever but
6 I appreciate you clarifying it.

7 THE COMMISSIONER: Well, I figured that one out
8 myself and felt I better just make it correct. I made the
9 mistake.

10 MR. FUNKE: Consistent with my submissions
11 earlier this morning and your indication that you wished to
12 hear from me only on matters that were not addressed by
13 Mr. Khan, what I'll ask that you do, Mr. Commissioner, is
14 turn directly to page 10 of my written submissions that
15 deals specifically with the issue of the SOR application on
16 behalf of DOE #3 --

17 THE COMMISSIONER: Yes.

18 MR. FUNKE: -- and our arguments that she does
19 not qualify under the act as an informant.

20 And that brings me to my first point which is
21 that the motion filed on behalf of DOE #3 by Mr. Gange
22 seeks a declaration that she is a source of referral and
23 therefore entitled to a publication ban in these
24 proceedings with respect to the evidence that she may give.
25 And as I indicated in my written submissions and I point

1 out to you again today, is that a source of referral is a
2 term that appears nowhere in the act. What the act refers
3 to is an informant, as you've already indicated in your
4 comments earlier this morning. The Child and Family
5 Services Act sets out a framework for informants who come
6 forward with child protection concerns. That framework is
7 set out under section 17, 18 and 18.1 of the act. That
8 framework has two different components. First is the
9 requirement that a person with information which leads them
10 reasonably to believe that a child is --

11 UNIDENTIFIED PERSON: Turn the (inaudible), we
12 can't hear you very well back there.

13 MR. FUNKE: Is this mic on?

14 THE COMMISSIONER: Is it now.

15 MR. FUNKE: Sorry.

16 THE COMMISSIONER: Yeah, I guess I don't
17 appreciate it's not coming over. When you're speaking
18 directly to me I hear, but if that happens again let the
19 speaker know.

20 MR. FUNKE: Did everyone hear what I had to say
21 or should I start over? I'm particularly concerned about
22 Mr. Gange and his ability to respond. Are you --

23 MR. GANGE: I'm fine.

24 MR. FUNKE: You're fine?

25 MR. GANGE: I've been following what (inaudible).

1 MR. FUNKE: Very good. Perhaps I'll lean in a
2 little bit. Is that better?

3 UNIDENTIFIED PERSON: Yes.

4 MR. FUNKE: All right, very good.

5 MS. WALSH: I think it was always on, it's just
6 you need to raise the mic.

7 MR. FUNKE: Raise it up more. We'll see if that
8 improves.

9 THE COMMISSIONER: That's, that's much better.

10 MR. FUNKE: Very good. So as I was saying, the
11 framework has two components. The first component of that
12 framework is the obligation that's set out under the act
13 that requires a person who has information which leads that
14 person to reasonably believe that a child is or may be in
15 need of protection, that they must come forward forthwith
16 and report that information either to a child welfare
17 agency or the parent or guardian of the child. Section
18 18(1.1) modifies that and says where the concerns with
19 respect to the parent or the guardian of the child, the
20 person must come forward and report that to an agency.

21 The second component of that framework is the
22 protection that is afforded to a person who comes forward
23 as a result of the obligation that's imposed under
24 section 18. And with respect to the specific language
25 that's used, I can refer you to page 11 of my brief,

1 paragraph 19, and that sets out the exact language of the
2 requirement under 18(1) of the act. And it reads as
3 follows:

4

5 "Subject to subsection (1.1),
6 where a person has information
7 that leads the person reasonably
8 to believe that a child is or
9 might be in need of protection as
10 provided in section 17, the person
11 shall forthwith report the
12 information to an agency or to a
13 parent or guardian of the child."

14

15 Now section 17 deals with circumstances in which
16 a child might be in need of protection. Section 17 is
17 dealt with at paragraph 20 on page 11 of my brief as well.
18 The relevant section is 17(1). 17(1) says:

19

20 "For purposes of this Act, a child
21 is in need of protection where the
22 life, health or emotional well-
23 being of the child is endangered
24 by the act or omission of a
25 person."

1 So 18(1) imposes the obligation on a person to report a
2 child who is in need of protection as defined within
3 section 17 that I've just referred to.

4 Now 18.1 is the second component of the framework
5 which affords the protection that a person who makes a
6 report under 18.1 is entitled to. 18.1 is referred to at
7 paragraph 21 of my brief on page 12. And it reads as
8 follows:

9

10 "Except as required in the course
11 of judicial proceedings, or with
12 the written consent of the
13 informant, no person shall
14 disclose

15 (a) the identity of an informant
16 under subsection 18(1) or (1.1)

17 (i) to the family of the
18 child reported to be in need
19 of protection, or

20 (ii) to the person who is
21 believed to have caused the
22 child to be in need of
23 protection; or

24 (b) the identity of an informant
25 under subsection 18(1.0.1) to the

1 person who possessed or accessed
2 the representation, material or
3 recording that is or might be
4 child pornography."

5
6 Now the relevant passage in that is under
7 18.1(2)(a), the identity of an informant under subsection
8 18(1) or 18(1.1). It's not anyone who calls an agency and
9 reports information. It's not anyone who calls the agency
10 with a concern for a child. The protection is afforded
11 only to someone who acts under an obligation under 18(1) or
12 (1.1), which is, is that a person who has information which
13 reasonably leads them to believe that a child is or may be
14 in need of protection as defined under section 17. So it's
15 a very narrow protection. In order to be afforded that
16 protection you must first fall within the protected class
17 of people and that is specifically informants under 18.1 or
18 1.1. So what we need to do is we need to look at that
19 section and determine what are the criteria for falling
20 within that narrow class of individuals.

21 We submit that the witness DOE #3 is not entitled
22 to the protections afforded under 18.1 because we say that
23 she was not under an obligation to report the information
24 that she had under either 18(1) or 18(1.1).

25 THE COMMISSIONER: Because?

1 MR. FUNKE: Because Phoenix was no longer a child
2 at that time within the meaning of the act. She was
3 already deceased and as such she falls outside the scope of
4 the act.

5 Now you have to remember, Mr. Commissioner, that
6 the interpretation of this, of the term child has to be
7 within the context of the act in which it appears and
8 what's the purpose and intent of the Child and Family
9 Services Act? It's for the protection of children and
10 through the identification of child who might be in need of
11 protection. With all due respect, Phoenix at that time had
12 already died and she was outside the scope of anyone's
13 protection at that point.

14 The Child and Family Services Act is specifically
15 about bringing services to bear to assist children and
16 families who require assistance or, in circumstances where
17 protection concerns exist, apprehend children from those
18 people who are placing that child in need of protection.
19 18.1 deals specifically with the latter group of children,
20 children who are in need of protection and must be
21 apprehended from the circumstances in which they find
22 themselves. You can't apprehend a child who's already
23 deceased. A child who is already deceased is not in need
24 of protection.

25 To examine that a little further, you need only

1 look at the definition of a child under the act and under
2 section 1.1 of the act, the CFS act defines a child as a
3 person under the age of majority. Our submission is, is
4 that first of all in order to be a child you must be a
5 person and as we all know, a person has rights and duties
6 and obligations. A deceased person, or I'm sorry, a
7 deceased cannot be a person in law and if you cannot be a
8 person in law, you can't be a child within the definition
9 of the act.

10 But the same analysis was undertaken by the
11 Alberta Provincial Court, Judge Allen, in the decision of
12 R. v. CBC Radio One, which I've included in my materials at
13 tab number 4. And Judge Allen in that decision goes
14 through an extensive --

15 THE COMMISSIONER: What, what paragraph?

16 MR. FUNKE: Ninety-one, 92 and 99.

17 THE COMMISSIONER: Just a minute. Ninety --

18 MR. FUNKE: I'll bring you to that in just a
19 moment.

20 THE COMMISSIONER: No, but -- are you still on
21 your brief?

22 MR. FUNKE: Yes.

23 THE COMMISSIONER: At page 12?

24 MR. FUNKE: No, tab 4 --

25 THE COMMISSIONER: Oh, tab 4.

1 MR. FUNKE: -- of my brief is the actual ad, I'm
2 sorry, is the actual decision, I apologize.

3 THE COMMISSIONER: This is not your book, I don't
4 think.

5 MS. WALSH: Mr. Commissioner, just in terms of
6 how my materials are organized, if you've got Mr. Funke's
7 brief --

8 THE COMMISSIONER: Yes.

9 MS. WALSH: -- the same binder that has the brief
10 has the tabs with his authorities.

11 THE COMMISSIONER: Oh, okay. Well I have, I
12 have --

13 MS. WALSH: So it would be binder 4.

14 THE COMMISSIONER: I just printed these off on my
15 home office printer --

16 MS. WALSH: But I think the, I think the staff
17 also gave you four binders.

18 THE COMMISSIONER: Yes.

19 MS. WALSH: So if you find binder four of four
20 you'll find Mr. Funke's brief and authorities. It's a
21 smaller binder.

22 MR. FUNKE: Perhaps I can assist,
23 Mr. Commissioner. In my brief I've actually reproduced --

24 MS. WALSH: Just give him a moment to find it
25 then he'll --

1 THE COMMISSIONER: I have it.

2 MS. WALSH: -- be able to follow you.

3 MR. FUNKE: I was just going to say the
4 paragraphs I'm referring to have been reproduced in my
5 brief at page 13. If you'd like to turn --

6 THE COMMISSIONER: Oh, I've got page 13 in front
7 of me.

8 MR. FUNKE: Okay. It's at paragraph 23 -- sorry
9 paragraph 29, I apologize. So if you look at paragraph 29
10 on page 13 of my brief, I've reproduced a passage for your
11 benefit. So before getting to this point, Judge Allen went
12 through an extension analysis of the law on legislative
13 interpretation and determined that a child within the
14 meaning of that act meant as follows:

15

16 "'Child' is defined as 'a person
17 under 18 years.' I am in
18 agreement with the view that the
19 ordinary and grammatical meaning
20 of the word 'child' does not
21 include a deceased person ...

22 In other words, if a report (for
23 instance) concerns someone who is
24 more than 18, or deceased, then
25 the section does not serve to

1 protect that information ...

2 In summary ..."

3

4 He concluded at paragraph 99,

5

6 "... 'child' must be read in the
7 context of the section, as a
8 whole, as well as in light of the
9 scheme in the Act. The section
10 provides that the child is one who
11 has come to the attention of the
12 Minister or a director. The child
13 must be alive at the time he or
14 she has come to the attention of
15 the director or Minister. The
16 subsequent death of the child does
17 not mean that the information
18 serving to identify the child can
19 be published. The ban is
20 perpetual, unless one of the
21 exemptions in s. 126.2 is
22 applicable."

23

24 Now what they were considering in that case was
25 something very similar to this situation, where there was a

1 publication ban that was being considered in circumstances
2 where the child in that case was alive at the time that
3 they came to the attention of the agency but subsequently
4 died. In that case Judge Allen held that the publication
5 ban was appropriate because the child was alive at the time
6 that they came to the attention of the agency and the
7 subsequent death of the child did not remove the obligation
8 to protect that information. However, he distinguished
9 that and said had the child not been alive at the time that
10 they came to the attention of the agency, then that
11 protection would not be afforded simply because she's no
12 longer a child. And the definition of child in that act is
13 almost exactly the same as ours. Ours has a child under
14 the age, a person under the age of majority and that act it
15 says a child is a person under the age of 18. But
16 otherwise, the intents and purposes of the acts are the
17 same.

18 In Alberta the act is called the Child Youth and
19 Family Enhancement Act but it is essentially the same type
20 of legislation as the CFS act is and has the same purposes
21 and intent, it's for the protection of children, the
22 identification of children in circumstance where either
23 their families require additional services from the agency
24 or in protection cases where they need to be apprehended
25 because of the fact that they have either their life,

1 well-being or health is jeopardized.

2 So the analysis that Judge Allen goes through in
3 that case is directly applicable, I submit, to this case
4 before you. So our position is, is that because witness
5 DOE #3 did not believe Phoenix to be alive at the time that
6 she contacted the agency, she's been very clear about that.
7 Her belief was that Phoenix was dead and had been dead for
8 some time. The information that she received from her
9 children was that Phoenix had died in the summer of 2005.
10 She contacted the agency in March of 2006. She was cross-
11 examined on this point during Mr. Khan's cross-examination
12 and she confirmed that at the time she believed the
13 information that her children gave her and that she
14 believed that Phoenix had been murdered.

15 More importantly, when that information was
16 received by the agency, they confirmed Randy Murdock's
17 notes from that telephone call, confirmed that she related
18 to him that she believed the child was buried somewhere in
19 the yard of Karl McKay. So there's no question that at the
20 time that she was reporting that information she was not
21 reporting a child that she believed at the time to be in
22 need of protection, but rather she was reporting the death
23 of a child that she had become aware of and that is
24 significant, I submit, because the protections for
25 reporting a child in need of protection do not apply unless

1 you're calling to report a child in those circumstances.
2 And the reason for that is important to understand and one
3 of the questions that you put to Mr. Gange this morning was
4 well what was the purpose of 18.1 in affording that
5 protection. Mr. Gange suggested to you that it was an
6 inducement for people to come forward because this
7 protection exists. That is not the case. People are
8 obliged to come forward to provide this information. It is
9 not a situation where people need to be induced. There is
10 a statutory obligation to come forward and if people do not
11 they're subject to prosecutions and significant penalties
12 including custodial dispositions if they breach that
13 section of the act.

14 So it's not a situation where people need to be
15 encouraged to come forward, they have a legal obligation to
16 do so when they are in possession of information that leads
17 them to reasonably believe that a child is or may be in
18 need of protection. No, the reason that there is
19 protection afforded under 18.1, I submit to you, is because
20 the voluntariness of their coming forward has been removed.
21 They no longer have any free will in that regard, they have
22 an obligation to come forward. It's not a matter of a
23 voluntary involvement and because there's a statutory duty
24 to do so, the legislature, in my submission, has afforded
25 them protection because of the very fact that they can't

1 choose whether or not to come forward. It's not an
2 inducement. They have a legal obligation to do so.

3 And that's a significant distinction between the
4 Morin case and this one. One of the public policy
5 considerations that the court looked at in Morin was the
6 further and future effect of a decision, where if they
7 remove that protection what impact would that have on other
8 jailhouse informants coming forward and they were concerned
9 because although Mr. Gange didn't refer to it as such, it's
10 essentially the chilling effect that if other informants
11 knew that by coming forward they would have their
12 identities revealed that certain negative consequences may
13 accrue to them as well and for that specific reason, the
14 court considered the public policy implications of not
15 granting the publication ban. That doesn't apply in this
16 case. People don't have a choice whether or not to report
17 that information. It's an offence punishable in summary
18 conviction if they don't. It's a statutory obligation to
19 come forward and report that information. It's not a
20 situation where people need to be induced. There's a legal
21 obligation to act.

22 And that's why in order to be afforded that
23 protection you need to be very clear about whether or not
24 that person qualifies as an informant under 18(1) or
25 18(1.1). And I don't want to come across as being callous

1 or unsympathetic to the witnesses who have come forward and
2 sought the publication ban, but these matters aren't
3 determined on the basis of sympathy.

4 THE COMMISSIONER: But now you just made
5 reference to witnesses. You're speaking to Mr. Gange's --

6 MR. FUNKE: Yes.

7 THE COMMISSIONER: -- second application --

8 MR. FUNKE: Yes.

9 THE COMMISSIONER: -- where there's one party
10 involved.

11 MR. FUNKE: And that's fair.

12 THE COMMISSIONER: Yes.

13 MR. FUNKE: I don't mean to be unsympathetic to
14 DOE #3. Mr. Gange was quite correct, we all have sympathy
15 for witness DOE #3. But these applications aren't
16 determined on sympathy. They're determined on an
17 application of the law to the facts whether or not the
18 applicant has met the test that the applicant must meet and
19 I submit to you that they have not.

20 One of the comments that Mr. Gange also made this
21 morning was that in response to my argument he submitted
22 that whether the child is alive or dead, the protection
23 that's afforded to the informant under the act should
24 nevertheless apply. That clearly does not seem to be the
25 intent of the legislature and once again, we have to follow

1 what the legislature dictates in this regard in terms of
2 the application of the act. Whether or not we have
3 sympathies for DOE #3 again is not determinative. And
4 although he's quite correct that the protection afforded
5 under 18.1 is for the witness and not for the child that is
6 the subject of the report, nevertheless you can't escape
7 the requirement that at first must be information that is
8 being provided under 18(1), which is has to relate to a
9 child in need of protection. And as I've already
10 indicated, a child who is deceased cannot be in need of
11 protection, first of all because they don't have a life,
12 health or well-being to protect within this meaning of the
13 act and secondly because they're not a child within the
14 definition of the act.

15 Finally, I have one other comment to make with
16 respect to the submissions that were made this morning
17 relative to DOE #3. One of the exhibits filed to the
18 affidavit of Bobbi Rachelle Lee, that was filed by Mr. Khan
19 on behalf of Intertribal CFS relied upon him, refers to a
20 number of media articles that have been published. The
21 most recent article in his material was printed on November
22 the 15th, 2012, less than four months ago, and that article
23 refers to DOE #3 by name and very clearly sets out her
24 relationship to Karl Wesley McKay. So that raises two
25 issues. First, any publication ban that DOE #3 would be

1 entitled to would be, with all due respect, extremely
2 flimsy even --

3 THE COMMISSIONER: You're talking about the first
4 motion now, are you?

5 MR. FUNKE: No, no, because Mr. Gange has
6 requested as part of his remedy as an SOR declaration a
7 publication ban with respect to her identity because she's
8 an SOR. So the difficulty is, is that were you to grant
9 that remedy, it would be the flimsiest publication ban that
10 one could consider because all anyone would need to do is
11 have an Internet connection and have a rudimentary
12 understanding of how to operate a search engine, type in
13 the information that was now available in the event that a
14 publication ban was granted because it would not preclude
15 the media from reporting on the relationship between DOE #3
16 and Mr. McKay and a cursory search would result in an
17 article that was published less than four months ago. So
18 it's not a situation where we're dealing with articles that
19 were published back at the time of the trial only, but
20 rather very recent articles published in November of 2012.

21 More of the point, where is the evidence that any
22 negative consequences flowed as a result of the article
23 that was published in November? There's no evidence that
24 despite the fact that her name was published, that anything
25 deleterious happened or anything that caused her any

1 specific concern.

2 So those are all of the factors that I would ask
3 you to consider, Mr. Commissioner, in my submissions with
4 respect to the application for an SOR declaration as sought
5 by Mr. Gange on behalf of his client. Subject to any
6 questions or comments you may have those are my
7 submissions.

8 THE COMMISSIONER: No. Thank you, Mr. Funke.

9 Mr. Gange?

10 MR. GANGE: Thank you, Mr. Commissioner. I'm a
11 little bit surprised by the last commentary because that
12 was material that was covered by Mr. Khan in his submission
13 in terms of the previous publication and I thought that the
14 ruling that you had made was that Mr. Funke was, was able
15 to respond to matters that Mr. Khan had not brought up. So
16 I'm a little bit surprised by that.

17 The fact of the matter is, however, that, that an
18 article that is in the newspaper months ago is not the same
19 thing as having a witness testify in public with the press
20 here, with the photographs, with the publication of the
21 person's identity. It's a totally different perspective.
22 So that the fact that her identity has been made known is,
23 as I argued previously, quite irrelevant according to the
24 Morin decision.

25 With respect to the argument that Mr. Funke

1 advised you that he would advance, which deals with section
2 18 and whether or not the fact that Phoenix Sinclair was
3 dead at the time that DOE #3 made her call, as I've already
4 touched on it and so I'm going to be very brief.

5 THE COMMISSIONER: Yes, you have.

6 MR. GANGE: I'm going to be very brief. The
7 protection that is afforded under section 18 is for the
8 purpose of the informant and whether or not we use the
9 words "informant" or "source of referral" in this hearing
10 it seems to me from my limited experience the words
11 "informant" and "source of referral" have been
12 interchangeable so that the notice of application that was
13 brought is, with all due respect, quite appropriate to have
14 DOE #3 named as an SOR.

15 I said in my initial submission to you that in my
16 view, and I'm going to argue, I did argue that the CBC case
17 was wrongly decided because of the fact of this, that --
18 well I'm not sure that it's wrongly decided in terms of the
19 way that it was looking at it. That case was focusing on
20 whether the identity of the child could be disclosed and so
21 the court was looking at whether the identity would be, of
22 the child would be protected. Now at the time that the
23 report was made the child was alive and the court went
24 through and said the child was alive when the report was
25 made, died subsequently. If the child had been dead when

1 the report was made then the identity of the child could
2 have been released because it would not have been protected
3 pursuant to that act. That's not what I'm talking about.
4 I'm talking about the protection to the informant, the
5 source of referral, and in that analysis what you have to
6 do is to say well what is the purpose of section 18? And
7 the purpose -- I do not believe that I used the word
8 inducement or discussed that in any fashion in my argument
9 this morning. It may be a case of early Alzheimer's but I
10 don't believe that I made such a remark. What I said was
11 that the purpose of the act is to protect the informant and
12 when you look at those sections, there is no question that
13 is the purpose. And what I said was that it made no sense
14 to say that if a child is alive and a person makes a, a
15 report of, of concern, that there would be protection, but
16 if the child was dead and the person made the same kind of
17 report, that there would be any lesser need for the
18 protection of the informant. And the CBC case does not
19 address that issue, so that you have to look at it from the
20 perspective of DOE #3, when she makes that phone call
21 should her identity be protected. There is no policy
22 reason to distinguish between the two situations. There is
23 a policy reason for distinguishing the identity of the
24 child because in one case the child was alive and therefore
25 should be protected; in the other case the child was dead

1 and so the court in that decision said well they're dead
2 when that report was made, there is no need to protect that
3 child. Again, we're not -- we're talking about the person
4 who is obeying their responsibility to advise a Child and
5 Family Services agency of this situation.

6 That's my submission.

7 THE COMMISSIONER: Thank you, Mr. Gange.

8 MR. GANGE: Thank you, sir.

9 THE COMMISSIONER: All right. Commission
10 counsel, anything else with respect to these two motions?

11 MS. WALSH: Mr. Commissioner, I am advised by
12 counsel for the media that he wants to put the media's
13 position on the record.

14 THE COMMISSIONER: All right. Mr. Kroft?

15 MR. KROFT: Thank you, commission counsel. Thank
16 you, Mr. Commissioner. I won't be long. I did put the
17 position of the media on the record on February 6th when I
18 told you that the media would be sitting this one out, but
19 that the media, that should not be taken as agreement that
20 the evidence supports the motion. And I told you on
21 February 6th, and I just want to make sure we're clear,
22 that the basis for doing that were conversations I had
23 first with Mr. Gange and then on February 6th and that was
24 based on the understanding, which I think is still accurate
25 but I want to make sure, that the order that is sought, and

1 the only order that is sought is going to allow audio
2 evidence, if it's granted, to be available to the public
3 and I wanted to say that because there was some discussion
4 about alternative orders this morning. My --

5 THE COMMISSIONER: No, my understanding is that
6 that still stands.

7 MR. KROFT: All right. Next, that the order
8 sought does not restrict the reporting of the witness's
9 connection to Mr. McKay. I think that was already dealt
10 with this morning.

11 THE COMMISSIONER: Yes.

12 MR. KROFT: Next, the order sought does not
13 restrict reporting of the substance of the evidence as
14 opposed to the names.

15 THE COMMISSIONER: Correct.

16 MR. KROFT: And finally, that if the evidence
17 that is ultimately actually given by these witnesses goes
18 beyond what has been disclosed as the expected evidence,
19 the media group has the ability to move to you to ask you
20 to either set aside or reconsider the order in light of the
21 development.

22 THE COMMISSIONER: That's agreed?

23 MR. KROFT: Yes. And on that basis the media is
24 not participating. That's all I have to say.

25 THE COMMISSIONER: Thank you, Mr. Kroft. I think

1 that's all agreed to.

2 All right. I'm going to spend what is left of
3 today when I deal with another matter and tomorrow morning
4 I'm putting my thoughts together on these two applications
5 and I will deliver an oral ruling at two o'clock in this
6 room tomorrow afternoon.

7 Now the other matter that will require attention
8 this week is the conflict of interest matter. Mr. Saxberg,
9 I of course have received your letter. Is there anything
10 else you want to say on that matter or is it now with me
11 to, having got the Law Society's opinion and your response
12 to it, to then deal with it as I see fit?

13 MR. SAXBERG: Our complete response was included
14 in the letter that we forwarded to you --

15 THE COMMISSIONER: Yes.

16 MR. SAXBERG: -- that I forward to you on behalf
17 of all my clients.

18 THE COMMISSIONER: I have that.

19 MR. SAXBERG: I have nothing further to add to
20 that.

21 THE COMMISSIONER: All right, thank you. I'll
22 indicate tomorrow afternoon when I will deal with that
23 matter. It will likely be on Wednesday but I'll give that
24 indication tomorrow afternoon and when I've given the oral
25 ruling on the other matter.

1 MR. SAXBERG: Okay, thank you, sir.

2 THE COMMISSIONER: Thank you.

3 All right. We stand adjourned until two o'clock
4 tomorrow afternoon. I have a lot of papers to gather up,
5 so the adjournment is in force.

6

7 (PROCEEDINGS ADJOURNED TO MARCH 12, 2013)