



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

TUESDAY, MARCH 12, 2013

APPEARANCES

MS. S. WALSH, Commission Counsel

MS. K. MCCANDLESS, Associate Commission Counsel

MR. R. MASCARENHAS, Associate Commission Counsel

MR. G. MCKINNON and **MR. S. PAUL**, for Department of Family Services and Labour

MR. T. RAY, for Manitoba Government and General Employees Union

MR. K. SAXBERG and **MR. S. SCARCELLO**, for General Child and Family Services Authority, First Nations of Northern Manitoba Child and Family Services Authority, First Nations of Southern Manitoba Child and Family Services Authority and Child and Family All Nation Coordinated Response Network

MR. H. KHAN and **MR. J. BENSON**, for Intertribal Child and Family Services

MR. J. GINDIN and **MR. D. IRELAND**, for Mr. Nelson Draper Steve Sinclair, and Ms. Kimberly-Ann Edwards

MR. J. FUNKE and **MS. J. SAUNDERS**, for Assembly of Manitoba Chiefs and Southern Chiefs Organization Inc.

MR. W. GANGE and **MS. K. BOMBACK**, for DOE #1, DOE #2, DOE #3 and DOE #4

MR. A. LADYKA, for Ms. Jan Christianson-Wood

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RULING BY THE COURT

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1 MARCH 12, 2013

2 PROCEEDINGS CONTINUED FROM MARCH 11, 2013

3

4 THE COMMISSIONER: Two motions are before me.
5 The first is a motion filed on behalf of witnesses
6 identified as DOE #1, DOE #2, DOE #3 and DOE #4. The
7 relief sought in the first motion is for an order, one,
8 that I prohibit any form of publishing, broadcasting or
9 otherwise communicating by television, internet, radio, in
10 print or by any other means the name, face or identity of
11 witnesses DOE #1, DOE #2, DOE #3 and DOE #4.

12 Two, that I order that DOE #1, DOE #2, DOE #3 and
13 DOE #4 provide their testimony by means of video
14 conferencing, the video portion of which shall be visible
15 only to me and the audio portion of which shall be audible
16 in the hearing room.

17 And three, that the witnesses be referred to, for
18 the purpose of this hearing, as DOE #1, DOE #2, DOE #3 and
19 DOE #4.

20 After filing the motion for a publication ban on
21 behalf of DOES #1, #2, #3 and #4, counsel for DOE #3 filed
22 a further motion to have DOE #3 declared a source of
23 referral, SOR, in the context of this inquiry, along with a
24 request for a publication ban with respect to DOE #3's
25 testimony in the same form as requested in the first

1 motion.

2 The two motions are opposed by Intertribal Child
3 and Family Services, ICFS, and the Assembly of Manitoba
4 Chiefs and the Southern Chiefs Organization, AMC/SCO.

5 ICFS has filed affidavit evidence in response and
6 counsel for ICFS conducted a cross-examination on the
7 affidavit of DOE #3. Counsel for the AMC/SCO attended the
8 cross-examination. The transcript of the cross-examination
9 has been filed with the Commission.

10 ICFS and AMC/SCO have filed briefs in opposition
11 to the two motions filed. The media group has not taken
12 any position with respect to the two motions before me.

13 Each of DOES #1, #2, #3 and #4 has provided
14 direct evidence in support of the first motion. In their
15 affidavits they set out the concerns they have should their
16 identity be made known when they are called to testify in
17 this inquiry. The affidavit evidence is as follows:

18 (a) Affidavit of DOE #1

19 DOE #1 is the son of Wes McKay. He testified at
20 the criminal trial of Wes McKay and Samantha Kematch. DOE
21 #1 was 12 years old at the time that he observed Phoenix
22 Sinclair with Wes McKay and Samantha Kematch. DOE #1 found
23 testifying at the criminal trial very stressful. Following
24 the arrest of Wes McKay for the murder of Phoenix Sinclair,
25 he experienced harassment from people who knew he was a

1 child of Wes McKay. DOE #1 is currently employed and no
2 one connected with his employment is aware that he is
3 related to Wes McKay. DOE #1 states that he has serious
4 concerns that his mental health, physical health and safety
5 may be affected if he has to testify at the inquiry without
6 a publication ban.

7 (b) Affidavit of DOE #2

8 DOE #2 is a child of Wes McKay and testified at
9 the criminal trial of Wes McKay and Samantha Kematch. As
10 his counsel, Mr. Gange, mentioned in his oral submissions,
11 DOE #2 is a brother of DOE #1. DOE #2 was 14 years old at
12 the time that he observed Phoenix Sinclair with Wes McKay
13 and Samantha Kematch. DOE #2 found testifying at the
14 criminal trial very stressful. Like DOE #1, DOE #2 has
15 always said that he experienced harassment from people who
16 knew he was a child of Wes McKay. DOE #2 is currently
17 attending school and his evidence is that no one connected
18 with his schooling is aware that he is related to Wes
19 McKay. DOE #2 believes that his mental health, physical
20 health and safety may be affected if he has to testify at
21 this inquiry without a publication ban.

22 (c) Affidavit of DOE #3

23 DOE #3 is the mother of DOE #1 and DOE #2. She
24 was in a common-law relationship with Wes McKay for
25 approximately seven years. DOE #3 testified at the

1 criminal trial of Wes McKay and Samantha Kematch, which she
2 found very stressful as she was concerned about possible
3 retribution that might result to her because of her
4 testimony. DOE #3 states, like DOE #1 and DOE #2, that
5 following the arrest of Wes McKay for the murder of Phoenix
6 Sinclair, she experienced instances of bullying and
7 harassment from people that knew of her relationship to Wes
8 McKay. DOE #3 is currently employed and no one at her
9 place of employment is aware of her relationship to Wes
10 McKay. She is very concerned about the health and safety
11 of DOE #1 and DOE #2 as they suffer, from time to time,
12 from anxiety and depression. DOE #3 also states that she
13 has serious concerns that her mental health, physical
14 health and safety may be affected if she has to testify at
15 the inquiry without the protection of a publication ban.

16 In cross-examination on her affidavit conducted
17 by Mr. Khan, counsel for ICFS, DOE #3 gave evidence that
18 she is concerned about the possibility of losing her job if
19 her employer was to learn of her former relationship with
20 Karl Wesley McKay.

21 (d) The affidavit of DOE #4

22 DOE #4 is a child of Wes McKay and has four
23 children under the age of 10 who do not know that their
24 grandfather was convicted of the murder of Phoenix
25 Sinclair. DOE #4 does not wish to have this information

1 made known to them at this time. DOE #4 further states:

2

3 "When Wes McKay was charged with
4 the murder of Phoenix Sinclair I
5 experienced harassment from people
6 who knew that Wes McKay was my
7 father. As a result, I do not
8 tell people that I am a child of
9 Wes McKay."

10

11 As well, at paragraphs 6 and 7 of the affidavit,
12 she states:

13

14 "I have very, very serious
15 concerns that if I am identified
16 during my testimony at the
17 inquiry, my children will
18 experience instances of
19 harassment, bullying, verbal and
20 physical assaults. I require a
21 publication ban to protect my own
22 safety and to prevent my children
23 from being put at risk as a result
24 of my appearance at the inquiry."

25

1 There is also before me the affidavit of Kalyn
2 Bomback. In support of the second motion for a declaration
3 that DOE #3 is a source of referral, counsel for DOE #3 has
4 filed the affidavit of Kalyn Bomback, a lawyer employed by
5 his firm. The affidavit attaches an excerpt of a document
6 which is a record of a phone call that DOE #3 made to a
7 Child and Family Services worker employed by ICFS on March
8 6, 2006. The document references DOE #3 as the "referral
9 source" and identifies that the issue presented by DOE #3
10 to the ICFS worker was the physical abuse of a five-year-
11 old female.

12 There is also before me the affidavit evidence
13 filed by ICFS, being the affidavit of Bobbie Rachelle Lee,
14 filed in opposition to the two motions. The affidavit
15 attaches a number of exhibits, including news reports
16 created at the time of the criminal proceedings against
17 Karl Wesley McKay and Samantha Kematch. Those news reports
18 refer to DOES #1, #2 and #3 by name. Ms. Lee's affidavit
19 also attaches an excerpt of DOE #3's testimony at the
20 criminal proceedings and records of a phone call that DOE
21 #3 made to the Winnipeg Police Service on March the 6th,
22 2006 in which DOE #3 advised the police that her sons may
23 have witnessed a murder that occurred on the Fisher River
24 Reserve.

25 I now return to the arguments advanced by the

1 applicants and respondents on the two motions before me.
2 In his brief and in oral argument, counsel for DOES #1, #2,
3 #3 and #4 has argued on behalf of his clients that a
4 publication ban is necessary to protect his clients' own
5 safety and wellbeing. He argues that his clients have
6 legitimate concerns that revealing their identity in the
7 context of these proceedings will subject them to certain
8 risks.

9 In the context of the application to have DOE #3
10 declared a source of referral, counsel has also argued that
11 the evidence shows that DOE #3 is, in fact, an SOR and
12 ought to have been identified as such early in the course
13 of the inquiry. Counsel for DOE #3 further argues that
14 because DOE #3 is an SOR, she is entitled to certain
15 protections pursuant to the Child and Family Services Act,
16 CCSM Chapter 80, which I will discuss in further detail
17 later in these reasons.

18 Counsel for ICFS focuses his client's main
19 opposition to these motions on an argument that the matters
20 are res judicata. The doctrine of res judicata generally
21 holds that a litigant is estopped from bringing forth an
22 issue or cause of action on a matter that has already been
23 decided in a previous proceeding. Counsel for ICFS
24 clarified that his argument with respect to res judicata
25 was not applicable to DOE #4.

1 Counsel for ICFS has also argued that DOES #1,
2 #2, #3, #4 have failed to meet the legal test establishing
3 the basis for a publication ban. He argued that the
4 identity of DOES #1, #2, #3 and #4 is already known as a
5 result of their testimony at the criminal trial. Counsel
6 for ICFS further argued that DOE #3 is not an SOR or
7 informant as defined in the Child and Family Services Act.

8 Counsel for AMC/SCO supported the submission of
9 counsel for ICFS and placed great emphasis on his position
10 that DOE #3 is not a source of referral under the Child and
11 Family Services Act.

12 I will address each of these points in turn but
13 will begin by addressing the argument that has been
14 advanced that these matters a res judicata.

15 The doctrine of res judicata is described by the
16 Manitoba Court of Appeal in Glenko Enterprises v. Keller,
17 2008 M.B.C.A. 24, and I quote:

18
19 "Res judicata has two distinct
20 forms: issue estoppel and cause
21 of action estoppel. Donald J.
22 Lange, in his leading text, *The*
23 *Doctrine of Res Judicata in*
24 *Canada*, 2nd ed. (Markham:
25 LexisNexis Canada Inc., 2004),

1 explains the differences (at pp.
2 1-2):
3 issue estoppel means that a
4 litigant is estopped because the
5 issue has clearly been decided in
6 the previous proceedings, and
7 cause of action estoppel means
8 that a litigant is estopped
9 because the cause has passed into
10 a matter adjudged in the previous
11 proceeding."

12

13 ICFS argues that DOES #1, #2 and #3 are estopped
14 from bringing their motion based upon the application of
15 the issue estoppel form of res judicata.

16 In Glenko, the Manitoba Court of Appeal held that
17 in order for issue estoppel to apply, the following three
18 requirements must be satisfied:

19

20 "(1) the same question has been
21 decided in both actions;

22 (2) the judicial decision which
23 is said to create the estoppel was
24 final; and

25 (3) the parties to the judicial

1 decision or their privies were the
2 same persons as the parties to the
3 proceedings in which the estoppel
4 is raised ..."

5
6 ICFS argues that all three requirements for issue
7 estoppel have been satisfied with respect to the
8 publication ban. ICFS' argument is that my ruling on
9 redactions dated December 2, 2011 dealt with the same
10 matter that I am being asked to decide in this motion for a
11 publication ban by DOES #1, #2 and #3. Essentially, they
12 argued the same question has been decided in both actions.

13 The purpose of my ruling on redactions on
14 December the 2nd, 2011, was to deal with certain classes or
15 categories of information that ought to be redacted prior
16 to having the documents distributed internally amongst
17 counsel for the parties and intervenors in this Commission.
18 This was not a determination of what information was to
19 ultimately make its way into the public record. This is
20 further evidenced by the fact that subsequent to my ruling
21 on redactions I received and adjudicated upon motions for
22 publication bans brought by some of the parties to this
23 inquiry, which I heard in July of 2012 and for which I gave
24 a ruling on July 12th, 2012. This included a motion for a
25 publication ban on the identity of social workers brought

1 by counsel for them.

2 These previous publication ban motions were
3 requests for a ban on any form of publication or
4 broadcasting of the identity of any social worker called to
5 testify as a witness in the public hearing phase of the
6 inquiry. This was a separate process which dealt with a
7 different question than that dealt with in my ruling on
8 redactions. ICFS' argument, therefore, fails to note the
9 distinction between the two separate processes.

10 Counsel for ICFS also argued that either one or
11 both of my rulings on redactions of December 2, 2011 and my
12 adjudication of July 11, 2012 on these earlier motions
13 amount to a final decision which was meant to be conclusive
14 and applied to the inquiry proceedings. They also argue
15 that the applicants had an opportunity to apply for a form
16 of a confidential status at any time of my ruling on
17 redactions and the publication ban hearing and they failed
18 to do so.

19 Mr. Gange, in his submissions, argued that the
20 matter could not have been decided because none of DOES #1,
21 #2 and #3 made any application for a publication ban either
22 in July of 2012 or at any other time. I agree with counsel
23 for the applicants. No application for confidentiality was
24 brought on behalf of DOES #1, #2 and #3 in regards to
25 either my ruling on redactions or my ruling on publication

1 ban. The matter was, therefore, not adjudicated nor was a
2 decision given. As such, it cannot be said that the matter
3 was decided and it follows that no final determination
4 could have been made. For these reasons, I find that the
5 doctrine of res judicata does not apply to the motion for a
6 publication ban brought by the applicants.

7 The respondent also argues that res judicata
8 applies to the motion by DOE #3 in which she seeks to be
9 declared a source of referral. For reasons set out below,
10 I do not need to rule on that issue.

11 I now turn to the arguments advanced by the
12 applicants and respondents on the substantive issues in
13 these motions, first with respect to the motion for a
14 publication ban brought on behalf of DOES #1, #2, #3 and #4
15 and then to the motion declaring DOE #3 an SOR and the
16 relief sought as a result of it.

17 My analysis of the substantive arguments in the
18 motion filed by DOES #1, #2, #3 and #4 for a publication
19 ban requires that I conduct what has become known as the
20 Dagenais/Mentuck analysis.

21 In my ruling on publication bans of July 12th,
22 2012, I set out the legal test that applies in the case of
23 a request for a publication ban as follows, and I quote:

24

25 The Supreme Court of Canada has

1 held that the Dagenais/Mentuck
2 analysis applies to all
3 discretionary orders that limit
4 freedom of expression and freedom
5 of the press in relation to legal
6 proceedings, Toronto Star
7 Newspapers Ltd. v. Ontario 2005
8 S.C.C. 41, paragraph. 7.

9

10 The applicants and respondents to these motions
11 have agreed that this is the analysis to be applied by me
12 in adjudicating on the relief requested by the applicants.
13 The Dagenais/Mentuck analysis provides that a publication
14 ban may only be ordered when

15 (1) such an order is necessary in order to
16 prevent a serious risk to the proper administration of
17 justice because reasonable alternative measures will not
18 prevent the risk; and

19 (2) the salutary effects of the publication ban
20 outweigh the deleterious effects on the rights and
21 interests of the parties and the public, including the
22 effects on the rights to free expression, the right to a
23 fair trial and the efficacy of the administration of
24 justice.

25 I went on to say in my July ruling as follows:

1 "In R. v. Mentuck it was
2 recognized that the test should be
3 applied in a case-specific manner.
4 R. v. Mentuck is also clear as to
5 the evidentiary standard in
6 applications such as those before
7 me. The onus lies on the party
8 seeking to displace the general
9 rule of openness. There must be a
10 convincing evidentiary basis for
11 issuing a ban. Paragraphs 34 of
12 R. v. Mentuck makes clear the type
13 of evidence that is required in
14 order to displace the general
15 rule:"

16

17 And the court in that instance said this:

18

19 "...One required element is that
20 the risk in question be a serious
21 one or, as Lamer C.J. put it at p.
22 878 in Dagenais, a 'real
23 substantial' risk. That is, it
24 must be a risk the reality of
25 which is well-grounded in the

1 evidence. It must also be a risk
2 that poses a serious threat to the
3 proper administration of justice.
4 In other words, it is a serious
5 danger sought to be avoided that
6 is required, not a substantial
7 benefit or advantage to the
8 administration of justice sought
9 to be obtained."

10

11 The court, in R. v. Mentuck recognized that there
12 may be cases that raise interest other than the
13 administration of justice for which a similar approach
14 would be used, see, e.g., Sierra Club of Canada v. Canada
15 (Minister of Finance), 2002 S.C.C. 41.

16 All counsel appearing here are in agreement that
17 the Dagenais/Mentuck is the appropriate analysis to apply
18 in determining whether DOES #1 to #4 ought to be granted
19 the publication bans they seek. The Dagenais/Mentuck
20 analysis is meant to be applied in a flexible and
21 contextual manner.

22 In considering the context in which each of DOES
23 #1, #2, #3 and #4 will be called to give evidence, I would
24 note that these individuals are not being called to give
25 evidence about work performed in the course of a public

1 duty, unlike the social workers who applied for a
2 publication ban in July of 2012. DOES #1, #2, #3 and #4
3 are being called to testify in their personal capacities as
4 a result of their familial association with Karl Wesley
5 McKay. DOE #1 and DOE #2 were children during the time
6 they saw Karl McKay and Samantha Kematch interact with
7 Phoenix Sinclair.

8 I also note that in contrast with the evidence
9 that was tendered on behalf of the social workers in their
10 application for a publication ban last July, each of DOES
11 #1, #2, #3 and #4 has provided their own firsthand
12 affidavit evidence in support of their motion. The nature
13 of this evidence was summarized by their counsel in his
14 brief as follows:

15

16 "2. The four witnesses all have a
17 connection with Wes McKay. Three
18 are his children. One is a former
19 common-law spouse. Certain of the
20 witnesses may provide evidence
21 that comments to a limited extent
22 upon the child welfare system.
23 The main purpose of their evidence
24 will be, however, to comment upon
25 the relationship of Phoenix

1 Sinclair with Wes McKay and
2 Samantha Kematch. It is expected
3 that their evidence will help the
4 Commissioner appreciate to a
5 greater degree the life of Phoenix
6 Sinclair during the final few
7 months of her life.

8 3. The application is brought by
9 all of the witnesses with respect
10 to their own safety and well-
11 being. In addition, witness DOE
12 #4 brings the application as a
13 result of a parent's concern to
14 protect their own children."

15
16 Each of these witnesses has raised a concern
17 about health and safety risks resulting from publication of
18 their identities in the context of this inquiry. DOE #4
19 has raised a concern about potential risk to her children.
20 I accept that as stated in paragraph 111 of my ruling on
21 publication bans of July 12th, 2012 that where there is
22 significant evidence of a potential for harm arising out of
23 the publication of a witness' identity, a publication ban
24 may be ordered. See R. v. Morin 1997 Carswell Ontario 400.
25 A risk to personal health or safety is the type of "serious

1 risk" sufficient to fulfill the first branch of the
2 Dagenais/Mentuck analysis.

3 Based on the direct affidavit evidence before me,
4 I find that there is a risk to the personal health and/or
5 safety that could result from revealing the identities of
6 DOES #1, #2, #3 and #4 to the public in the context of
7 their inquiry testimony.

8 Each of the witnesses has given their own
9 evidence that they have previously experienced instances of
10 harassment as a result of their connection to Karl Wesley
11 McKay. I find that their concerns that they might be
12 subject to further instances should they be identified in
13 this most public inquiry are legitimate. I further accept,
14 as was suggested by counsel for the applicants in his oral
15 submissions, that these four witnesses have been damaged by
16 their association with Karl Wesley McKay and to subject
17 them to publicity in this inquiry would be to victimize
18 them further.

19 The second branch of the Dagenais/Mentuck
20 analysis requires that I examine whether the salutary
21 effects of a publication ban outweigh the deleterious
22 effects on the rights and the interests of the parties and
23 the public, including the effects on the rights of free
24 expression and the efficacy of the administration of
25 justice. The salutary effect of the ban being sought by

1 DOES #1, #2, #3 and #4 is a reduction in the potential risk
2 to their health and safety, as previously identified.
3 These individuals will also be able to carry on their daily
4 lives, their employment and schooling without the stigma of
5 being widely known as a relative of Karl Wesley McKay.

6 The potential deleterious effects of the bans
7 sought are reduced by the fact that for each of these
8 witnesses their specific relationship to Karl Wesley McKay
9 and all aspects of their evidence, other than their
10 identities, will be fully reported on. The only thing that
11 the public will not see is these individuals' names and
12 images. I disagree with the submissions of counsel for
13 ICFS that this is an extreme ban. This evidence of DOES
14 #1, #2, #3 and #4 will be fully reported on as will their
15 familiar association with Karl Wesley McKay. I therefore
16 find that the salutary effects of the publication ban
17 outweigh any of its deleterious effects.

18 The law of this country as it is enacted and
19 applied has, as it should, a tough side to it. That was
20 displayed by the verdict of the jury and the sentencing by
21 the trial judge that sent Karl Wesley McKay and Samantha
22 Kematch to prison for the rest of their lives, denying them
23 the liberty and the freedom enjoyed by law-abiding
24 citizens. That same law, as it is enacted and applied,
25 also has, as it should, a compassionate side. That I

1 believe has been displayed in the reasoning I have
2 expressed in concluding that the two requirements of the
3 Dagenais/Mentuck test have been met and satisfied, thus
4 allowing me to grant, as I now do, a publication ban for
5 each of DOES #1, #2, #3 and #4 on the terms requested in
6 the first motion, terms that are deemed to include the
7 points advanced yesterday by Mr. Kroft when addressing the
8 inquiry as counsel on behalf of certain media outlets.

9 A consequence of what I have just ordered is that
10 reference to the names of any of these individuals will
11 need to be redacted from documents to be entered into
12 evidence at the public hearings of this inquiry. Counsel
13 for ICFS has pointed out that there are some instances in
14 which the names of some of the individuals have already
15 been entered in the public record at this inquiry. I would
16 direct Commission counsel to ensure that those documents
17 are redacted as well to reflect my decision.

18 Given my decision on the first motion, I do not
19 find it necessary to make the determination as to whether
20 DOE #3 is a source of referral. I make the following
21 comment, however: The arguments advanced by ICFS and
22 AMCO/SCO in opposition to this motion centred around the
23 fact that at the time that DOE #3 made a telephone call to
24 ICFS in March 2006, Phoenix was already unfortunately
25 deceased. As I understand their argument, the protections

1 afforded to sources of referral as found in Section 18 of
2 the Child and Family Services Act do not apply when a
3 person makes a report to an agency about a child who is no
4 longer alive. I do have a concern about interpreting the
5 provisions of the Child and Family Services Act narrowly,
6 given that part of the Commission's mandate is to inquire
7 into why the death of Phoenix Sinclair remained
8 undiscovered for nine months. It was seen that such a
9 narrow interpretation would not serve to encourage
10 reporting cases such as Phoenix's to the appropriate
11 authorities. This may well be something that I will
12 address when I make recommendations in my final report on
13 these proceedings.

14 Commission counsel can now make the necessary
15 arrangements to have DOES #1 to #4 testify in accordance
16 with the procedure I have sanctioned today. The timetable
17 for that to occur will be circulated to Commission counsel
18 subsequent to the directions I will deliver at 2:00 p.m.
19 tomorrow in this room on the conflict of interest issue
20 that is before me for resolution.

21 So that completes the proceedings for today, I
22 believe. Commission counsel, is there anything else?

23 MS. WALSH: No, Mr. Commissioner.

24 THE COMMISSIONER: All right. We'll stand
25 adjourned, then, till two o'clock tomorrow when I'll deal

1 with the other matter, as just indicated.

2

3 (PROCEEDINGS ADJOURNED TO MARCH 13, 2012)