

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

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

VOLUME 1

TRANSCRIPT OF PROCEEDINGS before the Commission,
held at the Winnipeg Convention Centre, 375 York Avenue,
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1 JUNE 28, 2011

2

3 THE COMMISSIONER: Good morning, ladies and
4 gentlemen.

5 THE CLERK: This hearing of this commission of
6 inquiry into the circumstances surrounding the death of
7 Phoenix Sinclair is now in session. Please be seated.

8 THE COMMISSIONER: As, as has just been said,
9 this is the first session convened under the Order-in-
10 Council, establishing this commission of inquiry into the
11 circumstances surrounding the death of, of Phoenix
12 Sinclair.

13 Today is the first of two days that are set aside
14 to deal with issues relating to the granting of standing,
15 as parties and/or interveners, and also dealing with any
16 other preliminary matters that counsel or any others may
17 wish to raise.

18 It has been left to Commission counsel, Sherri
19 Walsh and her team of Madeline Lowe and Kathleen
20 McCandless, to make the arrangements for this day to run
21 smoothly. I know that she has an opening statement to make
22 that will lay out how we are going to get to where we want
23 to arrive at by the end of tomorrow and I will ask her now
24 to come forward and make that statement and indicate the
25 procedures that we will be following in the immediate
26 future.

27 Please.

28 MS. WALSH: Thank you. Good morning, Mr.
29 Commissioner. The purpose of the next two days of
30 hearings, as you have identified, is to address a number of
31 preliminary matters which are necessary to the commencement
32 of this inquiry. There are five issues we want to address
33 over the next two days. They are as follows:

34 First, of course, will be the applications for

1 standing. Next will be the settlement of the rules of
2 procedure and practise that have been circulated, including
3 those rules which pertain to the media. Then we will hear
4 from any counsel, with respect to any other preliminary
5 matters that counsel wish to advance.

6 I expect we will cover these three areas by the
7 end of today and this will allow you to consider the
8 applications for standing overnight and hopefully be in a
9 position to deliver your ruling tomorrow at 1:00 p.m.

10 Following the delivery of that ruling, we will
11 address the fourth issue which deals with any funding
12 requests and the process that is to be followed with
13 respect to those requests and finally, the fifth issue to
14 be addressed tomorrow will be to set out the process which
15 will be followed by those participating in the hearing from
16 here on and to discuss how that process can proceed in the
17 most expeditious and practical way possible.

18 I have one document that I am going to be
19 tendering as an exhibit today. It is entitled Hearings on
20 Standing and Preliminary matters. All of the applicants
21 for standing have received a copy of the document, I
22 believe you have a copy at your table, as well, Mr.
23 Commissioner. The Commission clerk has it on her table and
24 I would ask that it be made Exhibit 1 in the inquiry into
25 the circumstances surround the death of Phoenix Sinclair.

26 THE COMMISSIONER: I so direct.

27 MS. WALSH: Thank you.

28

29 **EXHIBIT 1: DOCUMENT ENTITLED**
30 **HEARINGS ON STANDING AND**
31 **PRELIMINARY MATTERS**

32

33 MS. WALSH: For the record, Mr. Commissioner,
34 Exhibit 1 contains a list of tabs, as follows:

1 Tab "A" is the order-in-council.

2 Tab "B" contains the calls for applications for
3 standing that were circulated in the media and posted on
4 our website.

5 Tab "C" contains the draft rules of procedure and
6 practise. Those rules are also posted on the Commission
7 website and are referred to in the calls for standing.

8 And then Tab "D" contains the applications for
9 standing that were received, numbered one through 17, with
10 some supporting documents, where relevant.

11 I want to begin, Mr. Commissioner, by providing
12 some context to the proceedings we are about to hold. So
13 that the public can understand the standing decisions that
14 you will be making, I am going to set out, briefly, how
15 this inquiry came to be called and what the terms of
16 reference for this inquiry require you to do. And then
17 before we hear from the applicants I will take a minute to
18 set out the test for standing, which you should consider as
19 you listen to the applicant's submissions.

20 So, Mr. Commissioner, it is important for us all
21 to remember, today, and throughout the course of these
22 proceedings, that what prompted this inquiry into the
23 tragic death of a five year old child was the child,
24 herself, Phoenix Victoria Hope Sinclair.

25 We will hear about Phoenix and the type of child
26 she was, as these hearing progress. We know already that
27 she was a child of First Nations background and that in
28 that culture children are sacred. As a society at large we
29 also recognize that not only are children sacred but also
30 that their families must be supported and encouraged.

31 In the declaration of principles, which is set
32 out in the Child and Family Services Act of Manitoba, the
33 first two fundamental principles state:

34

1 "The safety, security and
2 well-being of children and their
3 best interests are fundamental
4 responsibilities of society."
5

6 And,

7
8 "The family is the basic unit of
9 society and its well-being should
10 be supported and preserved."
11

12 Unfortunately, Phoenix Sinclair's life was not
13 treated as sacred and she died a horrible death which then
14 went undiscovered for nine months. Children and the
15 welfare of children are matters of great public interest.
16 In this case, however, the public has not had an
17 opportunity to know how it is that a small child can become
18 invisible to the scrutiny and concern which our society
19 recognizes she was owed.

20 On October 11th, 2006 Premier Gary Doer issued a
21 press release announcing that a formal commission of
22 inquiry would be ordered by cabinet into the circumstances
23 surrounding the death of Phoenix Sinclair and the handling
24 of that case by the child welfare system. He stated:

25
26 The public has a right to know how
27 a child could go missing for nine
28 months without it being noticed,
29 and it is my hope that a
30 commission of inquiry will enable
31 us to learn from issues arising
32 from this matter and provide us
33 with any direction needed to

1 ensure it does not happen again.

2

3 As well, within days after Phoenix's death was
4 discovered, the minister for Family Services and Housing,
5 at that time, the Honourable Christine Melnick, announced
6 the commissioning of two reviews of the child welfare
7 system. The first, an external review to be conducted
8 jointly by the Ombudsman, the Children's Advocate and an
9 Ontario Child and Family Services director, and the second,
10 an internal review conducted pursuant to Section 4 of The
11 Child and Family Services Act.

12 Although the Premiere's announcement came out on
13 October 11th, 2006, the province was not able to formally
14 initiate the inquiry until all of the criminal proceedings
15 surrounding the charges of murder had been dealt with.

16 On December 12th, 2008 Samantha Kematch,
17 Phoenix's mother, and Carl Wesley McKay, Ms. Kematch's
18 common-law husband, were convicted of first degree murder
19 in Phoenix's death.

20 The gruesome details that came out in that murder
21 trial attracted a tremendous amount of press and public
22 scrutiny but reading the media coverage from the days of
23 the trial it is apparent that the public needed to know
24 more. Specifically, it needed to know what was the
25 involvement of the child welfare system in this tragedy and
26 how would the government who was responsible for that
27 system take action to reassure the public, whose confidence
28 in the child welfare system was clearly shaken.

29 Accordingly, the criminal proceedings, having
30 come to a conclusion at the end of 2010, the province
31 issued an order-in-council on March 23, 2011 which
32 appointed you, Mr. Commissioner, to conduct this inquiry
33 and which set out the specific terms of reference for the
34 inquiry.

1 The applications for standing which are being
2 made today, Mr. Commissioner, must be considered, having
3 regard to those terms of reference.

4 In defining the scope of this inquiry,
5 consideration must be given to the first three paragraphs
6 of the order-in-council, which is tab "A" of Exhibit 1.

7 Paragraph one provides that you are to inquire
8 into the circumstances surrounding the death of Phoenix
9 Sinclair and, in particular, to inquire into the child
10 welfare services provided, or not provided, to Phoenix
11 Sinclair and her family under the Child and Family Services
12 Act, any other circumstances apart from the delivery of
13 child welfare services directly related to the death of
14 Phoenix Sinclair and why the death of Phoenix Sinclair
15 remained undiscovered for several months.

16 Paragraph two provides that you must report your
17 findings on these matters and make such recommendations as
18 you consider appropriate to better protect Manitoba
19 children, having regard to the recommendations as
20 subsequently implemented, made in the reports done after
21 the death of Phoenix Sinclair. Those six reports are
22 listed in paragraph three of the order-in-council.

23 Paragraph three goes on to provide that to avoid
24 duplication in the conduct of this inquiry and to ensure
25 recommendations relevant to the current state of child
26 welfare services in Manitoba, you must consider the
27 findings that were made in those six reports and the manner
28 in which the recommendations from those reports have been
29 implemented and you may give the reports any weight,
30 including accepting them as conclusive.

31 Now, Mr. Commissioner, in defining the scope of
32 the mandate which has been given to this commission, it is
33 clear that the terms of paragraphs two and three of the
34 order-in-council must be read in light of the wording of

1 the first paragraph which specifically requires you to
2 inquire into the circumstances surrounding the death of
3 Phoenix Sinclair. This means that in reviewing the
4 findings and recommendations of the reports listed in
5 paragraph three you must have regard to those findings and
6 recommendations which specifically address the child
7 welfare services provided or not provided to Phoenix
8 Sinclair and her family and any recommendations about child
9 welfare services which are in the nature of the services
10 provided to Phoenix and her family. This would include any
11 systemic recommendations about those aspects of the child
12 welfare system which were engaged in the services provided
13 to Phoenix and her family.

14 I believe that summarizes the scope of the
15 subject matter of this inquiry. In terms of the timeframe
16 to be looked at, you are required to look at the five years
17 of Phoenix's life during which she and her family received
18 child welfare services, the nine months during which her
19 death remained undiscovered, and the following five and a
20 half years in which internal and external reports were
21 commissioned and findings and recommendations were made and
22 implemented, a total time span of 11 years.

23 Clearly, to accomplish this mandate, in a
24 practical and effective manner, you will require the
25 anticipated cooperation of all parties and their counsel.

26 Now, while the conduct of every commission of
27 inquiry is a unique process, conducted pursuant to its own
28 terms of reference and based on specific facts, this
29 particular inquiry is unique for another reason and that is
30 the fact that the majority of the records and documents
31 which relate to the subject matter of this inquiry,
32 including several of the reports which are listed in the
33 order-in-council, are subject to the statutory
34 confidentiality which is set out in Section 76 of The Child

1 and Family Services Act of Manitoba. And so while much has
2 been said about Phoenix's murder and death, very little has
3 been able to be said about the involvement in or response
4 of the child welfare system to this tragedy.

5 This, then, is a very important function of this
6 inquiry. Although the statutory confidentiality involved
7 with the provision of child welfare services serves an
8 important function for the protection of the privacy of the
9 individuals who are involved with the system, that
10 protection must be balanced in this case by the public's
11 right and need to know how such a tragedy could have
12 occurred.

13 So, Mr. Commissioner, as will be outlined
14 tomorrow, when we deal with the procedure going forward,
15 once the preliminary issues involving standing and the
16 rules have been addressed, we will need to make an
17 application to the Court of Queen's Bench for an order,
18 pursuant to Section 76 of The Child and Family Services
19 Act, which will allow us to lift the statutory
20 confidentiality and allow us to make the necessary public
21 disclosure of information which is relevant to this
22 inquiry.

23 Mr. Commissioner, in one of the reports which was
24 made public when it was released in September of 2006, the
25 report entitled Strength and the Commitment, an External
26 Review of the Child Welfare System, which is found at 3(c)
27 of the order-in-council, the authors state, in their
28 introduction that:

29

30 "The level of public knowledge and
31 support for the child and family
32 services system does not reflect
33 its value and importance to our
34 society."

1 And so it is hoped that this inquiry will, among
2 other things, serve to remedy the level of public
3 understanding of the child welfare system by shining a
4 light on the services which were or were not provided to
5 Phoenix Sinclair and her family while, at the same time,
6 affording you the information which will enable you to make
7 recommendations to better protect Manitoba children in the
8 future.

9 Finally, Mr. Commissioner, one other aspect of
10 the order-in-council, which I want to highlight, is that
11 you are mandated to perform your duties without expressing
12 any conclusion or recommendation about civil or criminal
13 liability of any person.

14 This is consistent with the nature of commissions
15 of inquiry, generally. Such commissions are established to
16 report and recommend, they do not adjudicate disputes or
17 determine rights, although in making recommendations you
18 may, in fact, comment on the conduct of persons or entities
19 in a way that could adversely affect their reputations or
20 other interests. When doing so, of course you are legally
21 bound to treat such persons fairly and certainly, in
22 drafting the rules of procedure and practise by which this
23 commission will be conducted, principles of fairness were
24 of paramount concern to us.

25 This takes us, Mr. Commissioner, to the
26 applications for standing, themselves. As set out in the
27 call for applications in our -- and in our draft rules, a
28 person may be granted standing as a party if you are
29 satisfied that the person has a direct and substantial
30 interest in all or a part of the subject matter of the
31 inquiry.

32 Alternatively, a person may be granted standing
33 as an intervener if you are satisfied that the person does
34 not have a direct and substantial interest but does have a

1 genuine and demonstrated concern about the issues raised in
2 the inquiry mandate and has a particular perspective or
3 expertise that may assist you.

4 In granting standing you have the discretion to
5 determine on what terms a party or an intervener may
6 participate and the nature and extent of such
7 participation.

8 You may also direct that a number of applicants
9 share in a single grant of standing, whether as a party or
10 an intervener.

11 As provided in our rules, Mr. Commissioner, in
12 order to ensure the orderly conduct of the inquiry,
13 Commission counsel has standing throughout. As Commission
14 counsel, I have the primary responsibility for representing
15 the public interest at this inquiry, including the
16 responsibility to ensure that all matters that bear upon
17 the public interest are brought to your attention.

18 Professor Ratushny, in his text, the Conduct of
19 Public Inquiries states that:

20

21 Of course Commission counsel have
22 standing since they act according
23 to the instructions given by the
24 commissioner and are responsible
25 for adducing the evidence before
26 him. Through the participation of
27 Commission counsel in that manner,
28 you will have the benefit of
29 hearing all of the relevant facts
30 or evidence, unvarnished by the
31 perspective of someone with an
32 interest in a particular outcome.

33

34 Turning to some of the authorities on the issue

1 of standing, Mr. Justice Linden, in a 1983 decision, Royal
2 Commission on the Northern Environment, held that:

3
4 A direct and substantial interest
5 requires that a participant have
6 more than a general or academic
7 interest in the subject matter of
8 the inquiry and must not be
9 interested merely as a member of
10 the public. What will amount to a
11 direct and substantial interest is
12 contextual and will depend on the
13 terms of reference for the
14 inquiry. As a result, the
15 findings of previous inquiries are
16 of limited assistance.

17 In the Arar inquiry, the
18 Commissioner, Associate Chief
19 Justice O'Connor, stated: It is
20 neither possible nor desirable to
21 set out a comprehensive list of
22 the types of interests that will
23 come within this test for public
24 inquiries. In each case a
25 commissioner conducting a public
26 inquiry will have to consider a
27 number of factors, including his
28 or her mandate, the nature of that
29 aspect of the public inquiry for
30 which standing is sought, the type
31 of interest asserted by the
32 applicant and the connection of
33 the particular applicant to the
34 inquiry's mandate. At the same

1 time, merely being a witness --

2

3 He said,

4 -- does not, itself, constitute a
5 substantial and direct interest,
6 nor does having a genuine concern
7 about the issues raised in the
8 subject matter of the inquiry or
9 having an expertise in those
10 issues necessarily amount to a
11 substantial and direct interest in
12 the subject matter of the inquiry.

13

14 He said:

15

16 There will necessarily be a degree
17 of judgment involvement. That
18 judgment should have regard to the
19 subject matter, the potential
20 importance of the findings or
21 recommendations to the individual
22 or organization, including whether
23 their rights, privileges or legal
24 interests may be affected and the
25 strength of the factual connection
26 between the individual or group
27 and the subject matter involved.

28

29 Commissioner O'Connor also recognized the need to
30 proceed expeditiously which means that the extent of
31 participations by parties may be somewhat restricted by you
32 in your discretion. So having standing does not mean that
33 every single time a party wishes to produce a witness or
34 ask a question in cross-examination it has a right to do so

1 indiscriminately. You are always, of course, Mr.
2 Commissioner, in charge of the process.

3 Simon Rule, in his text, The Law of Public
4 Inquiries in Canada, refers to the following criteria.
5 Very similar.

6
7 The degree of practicality and
8 concreteness of the inquiry for
9 the person, the potential
10 importance of the inquiry, its
11 findings or recommendations to the
12 person, the value or importance of
13 the interests of that person that
14 may be affected, whether the
15 person is individually affected,
16 and whether the person has crucial
17 information to give or has brought
18 forward the allegations that the
19 commission is inquiring into. The
20 participation of parties may
21 contribute to the thoroughness of
22 hearings.

23
24 So, for example, in the Walkerton inquiry,
25 Commissioner O'Connor again stated:

26
27 I wanted to ensure that a broad
28 range of interests and
29 perspectives would be represented
30 so that the inquiry was inclusive
31 and thorough.

32
33 Professor Ratushny, in the text I referred to
34 earlier, identifies that the number of parties granted

1 standing may be reduced by grouping common interests. For
2 example, in the Walkerton inquiry, Commissioner O'Connor
3 reported:

4
5 In cases in which several
6 applicants for standing appeared
7 to have similar perspectives, they
8 were given a single grant of
9 standing on the understanding they
10 would form a coalition.

11
12 This approach, Professor Ratushny identifies, can
13 avoid duplication, by encouraging cooperation.

14 With respect to interveners, Ratushny's text
15 points out that normally they do not participate in the
16 hearings, themselves, but instead make written submissions
17 and may be called upon by the Commissioner, as required.
18 This is consistent, Mr. Commissioner, with our draft rules.

19 As Professor Ratushny identifies:

20
21 Interveners' contributions are
22 likely to be more relevant to
23 systemic aspects although they
24 might also be able to bring
25 perspectives to bear on the
26 investigative side. They may also
27 be grouped together for the
28 purpose of shared standing if they
29 demonstrate similar interests and
30 attributes.

31
32 Now, the grant of party status includes the
33 following rights: To be represented by counsel; to make
34 opening and closing submissions; to present evidence,

1 including cross-examining witnesses; to obtain advanced
2 notice or copies of the documents to be introduced as
3 evidence and of any statements or summaries of the
4 anticipated evidence of witness; and to have a seat at
5 counsel table.

6 The grant of party status also comes with a
7 number of obligations, which include: Adherence to the
8 rules of procedure; the obligation to cooperate with the
9 commission and its counsel; the obligation to provide the
10 Commission with all documents relevant to the subject
11 matter of the inquiry; and suggestion of witnesses who have
12 relevant information, including providing summaries of
13 their potential evidence.

14 The rights afforded to interveners are not as
15 extensive. In this case the extent of their participation,
16 while always at your discretion, is contemplated to involve
17 the right to have access to the transcripts and evidence
18 adduced before the Commission and to make a final
19 submission, in either oral or written form, at the close of
20 the hearings.

21 In her ruling on applications for standing in the
22 commission of inquiry into certain events at the prison for
23 women, in Kingston, the Honourable Louise Arbour identified
24 that:

25
26 Entitlement to standing must also
27 be assessed in light of the
28 function of Commission counsel.
29 Their mandate is to bring to the
30 hearings all relevant information
31 that they believe will assist in
32 the discharge of the commission's
33 mandate without the evidentiary
34 constraints that would apply in a

1 trial. They do not represent a
2 particular interest or point of
3 view. There role is not
4 adversarial or partisan. The need
5 for separate standing, therefore,
6 arises when it cannot be expected
7 that Commission counsel will be
8 able to press a point of view as
9 forcefully as it deserves to be
10 pressed, without jeopardizing
11 their neutrality and independence.
12 It is only then that the public
13 interest requires that persons or
14 groups with that point of view be
15 separately represented at the
16 hearings in order to ensure their
17 interest is not lost or ignored.

18

19 Justice Arbour went on to say that it may also,
20 in some cases, be appropriate to give standing to persons
21 whose conduct is directly at issue in the proceedings so as
22 to permit a liberal and generous compliance with both the
23 letter and the spirit of what she referred to as Section 13
24 of the Federal Inquiries Act, which provided that:

25

26 "No report shall be made against
27 any person until reasonable notice
28 has been given to the person of
29 the charge of misconduct alleged
30 against him and the person has
31 been allowed full opportunity to
32 be heard in person or by counsel."

33

34 And I point out, Mr. Commissioner, that that

1 section is consistent with Section 47 of our proposed rules
2 of procedure and practise regarding notice of potential
3 findings of misconduct as that term has come to be known in
4 the context of Commissions of Inquiry. And I'll take a
5 minute to elaborate on that.

6 That was rule 47, Section 47 of our rules.

7 THE COMMISSIONER: I have it.

8 MS. WALSH: The Supreme Court of Canada, in its
9 1997 decision, Attorney General v. Commissioner of the
10 Inquiry on the Blood System, addressed the role of findings
11 of misconduct, as that term has come to be known, in the
12 context of commissions of inquiry. That case, Mr.
13 Commissioner, dealt with the Krever inquiry respecting the
14 tainted blood scandal.

15 Justice Cory, in his reasons, had the following
16 to say:

17
18 Commissions of inquiry have a long
19 history in Canada and have become
20 a significant and useful part of
21 our tradition. They have
22 frequently played a key role in
23 the investigation of tragedies and
24 made a great many helpful
25 recommendations aimed at
26 rectifying dangerous situations.
27 Undoubtedly the ability of an
28 inquiry to investigate, educate
29 and inform Canadians benefits our
30 society. A public inquiry before
31 an impartial and independent
32 commissioner, which investigates
33 the cause of tragedy and makes
34 recommendations for change can

1 help to prevent a recurrence of
2 such tragedies in the future and
3 to restore public confidence in
4 the industry or process being
5 reviewed. The inquiry's roles of
6 investigation and education of the
7 public are of grave importance yet
8 those roles should not be
9 fulfilled at the expense of the
10 denial of rights of those being
11 investigated. The need for
12 careful balancing --

13

14 Mr. -- or Justice Cory quotes Justice Decary, when he
15 stated, at paragraph 32:

16

17 The search does not excuse the
18 violation of the rights of
19 individuals being investigated.
20 This means that no matter how
21 important the work of an inquiry
22 may be, it cannot be achieved at
23 the expense of the fundamental
24 right of each citizen to be
25 treated fairly.

26

27 And as I stated earlier, Mr. Commissioner, considerations
28 of fairness were paramount when my colleagues and I drafted
29 our rules of procedure and practise.

30

31 Justice Cory, in looking at the procedural
32 protections offered to parties to the Krever inquiry and to
33 individual witnesses, found that they were extensive and
34 exemplary. He identified that the Commission, with the
full consent of the parties, offered what he called a

1 commendably wide range of protections which included such
2 matters as all parties with standing and all witnesses
3 appearing before the inquiry had the right to counsel, both
4 at the inquiry and during their pre-testimony interviews.
5 Each party had the right to have its counsel cross-examine
6 any witness who testified and counsel for a witness who did
7 not have standing was afforded the right to examine that
8 witness.

9 All parties had the right to apply to the
10 Commissioner to have any witnesses called, whom Commission
11 counsel had elected not to call. All parties had the right
12 to receive copies of all documents entered into evidence
13 and the right to introduce their own documentary evidence,
14 and all hearings would be held in public, unless
15 application was made to preserve the confidentiality of
16 information.

17 And you will note, Mr. Commissioner, that the
18 draft rules of procedure and practise that we have
19 proposed, include all of the rights which Justice Cory
20 described as a commendably wide range of protections.

21 In discussing the scope of a commissioner's power
22 to make findings of misconduct, Justice Cory went on to say
23 that:

24

25 A commission of inquiry is neither
26 a criminal trial nor a civil
27 action for the determination of
28 liability. Rather, it is
29 investigation into an issue,
30 event, or series of events and the
31 findings of a commissioner
32 relating to that investigation are
33 simply findings of fact and
34 statements of opinion reached by

1 the commissioner at the end of the
2 inquiry. As such, they are
3 unconnected to the normal legal
4 criteria.

5 As Justice Cory stated:

6
7 Even if a commissioner's findings
8 could possibly be seen as
9 determinations of responsibility
10 by members of the public, they are
11 not and cannot be findings of
12 civil or criminal responsibility.

13

14 And indeed, Mr. Commissioner, as I indicated earlier, this
15 is specifically set out in the order-in-council.

16 However, Justice Cory went on to say that:

17

18 It is clear that commissioners
19 must have the authority to make
20 those findings of fact which are
21 relevant to explain and support
22 their recommendations, even though
23 they reflect adversely upon
24 individuals.

25

26 Now, in that case regarding the Krever inquiry,
27 the commission was established pursuant to the Federal
28 Inquiries Act, which contained the Section 13 that I
29 referred to in discussing Justice Arbour's ruling. That
30 section does specifically provide that commissioners have
31 the power to make findings of misconduct. But Simon Rule,
32 in his text, indicates that:

33

34 The inclusion in inquiry statutes

1 of provisions dealing with the
2 issuances of notices of alleged
3 misconduct and an associated right
4 to respond, is simply a
5 codification of common law
6 procedural fairness requirements.
7

8 So what does the term misconduct mean? In
9 defining the term, Justice Cory referred to the concise
10 Oxford dictionary, the 8th edition from 1990, as improper
11 or unprofessional behaviour or bad management. He went on
12 to say that it simply would not make sense for the
13 government to appoint a commissioner who necessarily
14 becomes very knowledgeable about all aspects of the events
15 under investigation and then prevent the commissioner from
16 relying upon this knowledge to make informed evaluations of
17 the evidence presented.

18 According to Rule, in his text:
19

20 A finding of misconduct involves a
21 comparison between the actions,
22 conduct or inaction of a person
23 with some norm or standard of
24 conduct. For an organization,
25 misconduct may also involve
26 failing to establish a norm or
27 standard of conduct when there
28 should reasonably have been one or
29 establishing or maintaining a norm
30 or standard that is deficient.
31

32 The order-in-council in this case, Mr.
33 Commissioner, requires that you must report your findings
34 on a variety of factual matters and make such

1 recommendations as you consider appropriate to better
2 protect Manitoba children. Clearly, therefore, you are
3 required to draw the appropriate evaluations or conclusions
4 which flow from the facts discovered in your investigation.

5 And so it is within this context that we have set
6 out the provisions in part four of the draft rules on
7 procedure and practise, which require that you will not
8 make a finding of misconduct on the part of a person unless
9 the person has had reasonable notice of the substance of
10 the alleged misconduct and has been allowed full
11 opportunity during the inquiry to be heard in person or by
12 counsel. Any such notices will be delivered on a
13 confidential basis.

14 Finally, Mr. Commissioner, although I know that
15 we are going to be discussing the specific aspects of how
16 the inquiry is going to proceed tomorrow, after standing
17 has been determined. I think it is appropriate to outline
18 that we envision the evidence at the hearings of the
19 commission being divided into the following three phases.

20 Phase one will deal with the factual
21 circumstances surrounding the death of Phoenix Sinclair,
22 the child welfare services provided or not provided to her
23 and her family, any other circumstances relating to her
24 death, and how it is her death remained undiscovered for
25 nine months. All as per paragraph one of the
26 order-in-council.

27 Phase two will deal with the findings and
28 recommendations set out in reviews and reports which were
29 commissioned following Phoenix's death in the manner and to
30 the extent that I have identified to you in speaking a few
31 minutes ago about the scope of the inquiry.

32 And phase three will deal with the implementation
33 of those recommendations to date.

34 So this takes us, Mr. Commissioner, to the

1 applications, themselves. The applicants have all been
2 advised that you have read their submissions, that you
3 welcome giving each applicant an opportunity to provide a
4 brief oral submission in support of their application, and
5 that you may have questions for them with respect to their
6 application.

7 I can advise, Mr. Commissioner, that Samantha
8 Kematch and Karl Wesley McKay were provided with notice of
9 the opportunity to apply for standing and they have
10 indicated they do not want to make such an application.

11 As well, in the interest of ensuring a wide
12 circulation of our investigation, I made certain that
13 notice of our inquiry came to the attention of other
14 potential applicants in order to give them an opportunity
15 to consider applying for standing. Some of those entities
16 are here today. Those entities who have chosen not to
17 apply for standing but to whom specific notice was sent,
18 are: The federal government, through the Department of
19 Aboriginal Affairs and Northern Development Canada. The
20 Manitoba Institute of Registered Social Workers and the
21 Office of the Children's Advocate. At this point none of
22 these entities has chosen to apply for standing in any
23 capacity.

24 I should point out, however, that while the
25 Office of the Children's Advocate has not submitted an
26 application for standing, I have been told that both the
27 former Children's Advocate and the current Children's
28 Advocate will make themselves available as witnesses and
29 are prepared to cooperate in any way required.

30 So, Mr. Commissioner, I propose to call each
31 applicant, in alphabetic order, to come up to the podium,
32 to the lectern on my right and present their application.
33 There is, you will see, a second table with a lectern and a
34 mike, which is available for any applicant who wishes to

1 speak in opposition once an applicant has made their
2 submission.

3 So if you are ready, Mr. Commissioner, I will
4 begin calling the applicants.

5 THE COMMISSIONER: Well, I thank you for that
6 very full review of the background of the formation of this
7 inquiry, the reasons we're here, and the manner in which
8 you propose to present the evidence to reach the objectives
9 that are laid out.

10 You are correct that I have read all of the
11 applications, there was one that came in yesterday, very
12 brief, that I'm not sure I fully comprehend what is being
13 requested, but we'll get to that.

14 We -- I certainly plan to, when these hearings
15 get going, and this will apply to today and tomorrow, if
16 we're in session those full days, two days, to take a
17 mid-break during morning and mid-afternoon. Do you, do you
18 and your colleagues want to have a break now before we
19 start these submissions? There, there might be a wish to,
20 to digest what you had to say and or are -- how do you --
21 what order do you propose to call the, the, the applicants?

22 MS. WALSH: Well, we have 17 and I thought the
23 fairest way was simply to call them in alphabetical order,
24 which is the order they're listed, in Exhibit 1 at tab "D".
25 I, I am happy to, to proceed unless somebody needs a five
26 minute break.

27 Are we okay? We'll carry on then.

28 THE COMMISSIONER: Well, then I think we'll carry
29 on, it's, it's --

30 MS. WALSH: Unless you want a break, Mr.
31 Commissioner?

32 THE COMMISSIONER: We'll take a break quarter to
33 11:00, to 11:00. I know how these breaks extend, when we
34 break each time we'll break for 15 minutes but it will be

1 only 15 minutes, unless there are extenuating circumstances
2 and because we want to move forward so we'll let you call
3 your first applicant and, as I say, I read the applications
4 but I wish to have counsel perhaps just highlight their
5 reasons, if any questions occur to me in the presentation,
6 I'll ask them, otherwise we'll move through the agenda, as
7 you laid it out, and as you've said, assuming we get
8 through all that today, and we certainly should be able to,
9 with 16 or 17, with 10 to 15 minutes each, I, based upon
10 the reading I've done and added to that will be what I hear
11 today, I would expect to be able to make my rulings
12 tomorrow afternoon and then we can make plans from where
13 we're going from there.

14 MS. WALSH: Good. Okay, thank you, Mr.
15 Commissioner.

16 So the first applicant is the Assembly of
17 Manitoba Chiefs.

18 MR. HAIGHT: Mr. Commissioner, my name is Bill
19 Haight. Paul Edwards, my partner and I, are legal counsel
20 to the Assembly of Manitoba Chiefs. I am assisted today by
21 Jessica Marcellais-Saunders, a newly minted lawyer, here in
22 the Province of Manitoba, as of last week.

23 THE COMMISSIONER: Well, welcome.

24 MR. HAIGHT: As well as two representatives from
25 the Assembly of Manitoba Chiefs, Ms. Irene Linklater and
26 Mr. Bailey Colon.

27 Last week, sir, I attended a meeting with
28 Commission counsel that was very helpful and informative in
29 terms of directing my comments today, particularly helpful
30 was from Ms. Walsh, who explained the three phases of this
31 inquiry, and as she has done again today, and that has
32 permitted me to refine, somewhat, the application that is
33 being made by the Assembly of Manitoba Chiefs, and that is
34 this, sir, is that for phase one, the investigative stage,

1 I would submit that the Assembly of Manitoba Chiefs
2 requires only intervener status. We -- the Assembly of
3 Manitoba Chiefs would not -- we don't perceive having any
4 direct information or knowledge or witnesses that would be
5 called, requiring examination or cross-examination for --
6 but with one small condition. As you know, sir, rulings on
7 standing are perspective rulings and often times when you
8 are seeking standing in these proceedings it is done
9 without the full benefit of all of the facts and
10 circumstances that are going to be presented. So, so the
11 only condition I would put on phase one would to say that
12 AMC only requires intervener status, however, if there were
13 to be a witness that was presented, where it was clear that
14 a direct and substantial interest is held by the Assembly
15 of Manitoba Chiefs, then we would at least have permission
16 to stand before you and make request to have broader
17 participatory rights for that witness.

18 So intervener status but with ability to, in the
19 future, when witnesses are called, to make an application
20 for a broader participatory right, as it relates to that
21 witness or witnesses. But, but for all intents and
22 purposes, in phase one, the investigative stage, AMC, in my
23 respectful view, requires only intervener status, sir, and,
24 and that is what we are seeking today on the understanding
25 that, of course, we would be provided with all the
26 documentary disclosure that is -- that would be provided to
27 all others.

28 Phase two and phase three, the policy oriented
29 phases, is where AMC can provide more information, more
30 assistance. It does have a direct and substantial
31 interest, I would submit, in these phases.

32 AMC was formed in 1988, to act on behalf of the
33 First Nations of Manitoba. All First Nations in Manitoba
34 have the right to seek membership in AMC and as you saw in

1 our materials, sir, 59 of the 63 Manitoba First Nations are
2 members in the Assembly of Manitoba Chiefs.

3 The Assembly has dedicated itself to the social,
4 cultural, educational and economic developments of First
5 Nation people, both on and off reserve, here in the
6 Province of Manitoba, and it has played a prominent role in
7 the development and implementation of policy for child
8 welfare services for First Nation children and families.

9 Its first committee that was ever formed by the
10 Assembly of Manitoba Chiefs was a child welfare chiefs
11 committee. It made numerous presentations before the
12 Aboriginal Justice Inquiry on the importance of culturally
13 appropriate child welfare services to First Nations people.
14 In partnership with the MMF, MKO and the Province of
15 Manitoba, it developed plans for the and implement the
16 Child and Family Services Authorities Act. It assisted in
17 drafting that legislation, sir. And, and it is currently,
18 through the Secretariat, the authority to appoint board
19 members to the Southern Authority which, of course, was
20 involved in, in Ms. Phoenix Sinclair's tragic
21 circumstances.

22 So, so in summary, sir, it's the umbrella
23 organization for First Nations people here in the province,
24 with significant experience in First Nation child welfare
25 issues. The issues to be dealt with by this inquiry are
26 very important to the AMC and its members. Its present as
27 a full participant during phase two and three, in my
28 respectful view, sir, will greatly assist this commission
29 of inquiry. And in that regard, I can tell you that it is
30 expected that AMC would be in a position to offer witnesses
31 on the policy stage, witnesses being contemplated, sir,
32 would be individual or individuals from within AMC that
33 have dealt with the systemic issues of child welfare
34 services here in the Province of Manitoba, issues such as

1 jurisdictional issues between the federal and provincial
2 governments, assistance to, to -- for the provision of
3 services and programs to children and families, both on and
4 off reserve. Support for the First Nations authorities
5 that administer those services. So it can give
6 institutional and systemic information to this commission
7 that will be helpful.

8 The second type of witness that would be
9 contemplated would be someone who can speak from within the
10 system, sir, a individual or individuals that are involved
11 with providing child welfare services to children, both on
12 and off reserves, and AMC is confident that such a witness
13 can be brought forward.

14 So for all of those reasons, sir, it's my
15 respectful submission to this commission that AMC ought to
16 be given status of, of full party at phase two and phase
17 three and, and conditional intervener status on phase one.

18 THE COMMISSIONER: Thank you very much, Mr.
19 Haight, you've, you've summarized your position fairly and
20 succinctly and I think I understand it.

21 MR. HAIGHT: Right.

22 THE COMMISSIONER: And will give it further
23 thought.

24 MR. HAIGHT: Thank you, sir.

25 THE COMMISSIONER: Thank you.

26 MS. WALSH: Next, Mr. Commissioner, the Child and
27 Family All Nation Coordinated Response Network, also known
28 as ANCR.

29 MR. COCHRANE: Thank you. Good morning, Mr.
30 Commissioner. My name is Harold Cochrane.

31 THE COMMISSIONER: Yes.

32 MR. COCHRANE: I'm counsel for Child and Family
33 All Nations Coordinated Response Network. The acronym for
34 that is ANCR, A-N-C-R, and I'll be referring to that

1 acronym, ANCR throughout my submission.

2 Just, as well, so you're aware, in your binder
3 which is now marked Exhibit 1, at tab two, and tab six, are
4 letters of application that I have provided. In addition
5 to ANCR, I have also provided a letter of application for
6 the Southern Authority. Mr. Saxberg, from my office, will
7 be speaking as number six on the agenda and making a
8 presentation on behalf of the Southern Authority. I will
9 be speaking with respect to ANCR.

10 THE COMMISSIONER: Right.

11 MR. COCHRANE: Right now. So there are two
12 separate parties, with respect to ANCR we are seeking full
13 standing, with respect to all three phases of the inquiry.
14 And we don't believe that shared standing with respect to
15 ANCR would be appropriate and I will talk to the reasons
16 for that.

17 The letter that I have submitted, June 6th, which
18 is at tab two, I don't propose to review that this morning,
19 however, if you do have any questions in that respect I
20 would be pleased to answer. I will supplement, however, my
21 letter in light of the comments made with respect to the
22 three phases that were talked about this morning.

23 So with respect to the, the first phase, Mr.
24 Commissioner, and that is the factual aspects of what
25 happened, inquiring as to what happened, inquiring as to
26 the child welfare services that were provided or not
27 provided to Phoenix Sinclair and her family, it's my
28 submission that ANCR has a direct and substantial interest
29 in this area.

30 As you may be aware, it's certainly mentioned in
31 my, in my letter, a number of ANCR's current employees,
32 which was up to 13 employees, were directly involved in the
33 child welfare services provided to Phoenix Sinclair and her
34 family.

1 Now, these workers at the time were workers of
2 Winnipeg Child and Family Services. They are now seconded
3 workers at ANCR and my understanding is that they will be
4 called to provide evidence to, to give -- to shed some
5 light on the factual aspects, that first phase of this
6 inquiry.

7 So the evidence of these employees, which are now
8 current ANCR employees, although they are seconded from
9 Winnipeg CFS, in my opinion is crucial to this inquiry and
10 in particular to the first phase that Ms. Walsh has talked
11 about.

12 The conduct of these current ANCR employees could
13 be directly at issue in this inquiry.

14 THE COMMISSIONER: And they are seconded from
15 whom?

16 MR. COCHRANE: They are seconded from Winnipeg
17 Child and Family Services.

18 THE COMMISSIONER: And who -- Winnipeg Child and
19 Family Services, today, is under the direction or
20 responsible to whom?

21 MR. COCHRANE: They are responsible -- they are
22 under the direction of the General Authority. Maybe I
23 should -- if you -- if it's okay, I'll take a moment --

24 THE COMMISSIONER: Yes.

25 MR. COCHRANE: -- just to back up.

26 THE COMMISSIONER: Yes.

27 MR. COCHRANE: In, in, in 2005, when this
28 incident occurred, the services provided were provided by
29 Winnipeg Child and Family Services, that agency. ANCR, my
30 client, at that point, did not exist. ANCR came into
31 existence after and assumed the role of Winnipeg CFS with
32 respect to intake services and that's explained a little
33 bit in my letter, June 6th, letter.

34 THE COMMISSIONER: Yes.

1 MR. COCHRANE: So my point is that the, the
2 workers that were involved with Winnipeg CFS, back at the
3 time, in 2005, are now seconded employees at ANCR. Okay?
4 They will be called and they will be able to provide the
5 factual background in, in many ways, that will be of
6 interest to this inquiry.

7 Any findings by this inquiry which may comment on
8 the standard of services provided by these employees, which
9 are now ANCR employees, will, in my opinion, have a direct
10 and substantial impact on ANCR.

11 THE COMMISSIONER: Right.

12 MR. COCHRANE: And for that reason we feel, with
13 respect to that first phase, we have a direct and
14 substantial impact.

15 Now, if I may comment, just very briefly with
16 respect to the second and third phase, and that is dealing
17 with the recommendations and the findings of the various
18 reports since the death of Phoenix Sinclair and their
19 implementation, again I would submit that ANCR has a direct
20 interest in these, in these areas.

21 One of the overarching purposes of this inquiry
22 is to make findings and recommendations in order to better
23 protect children today and in order to make findings and
24 recommendations, in my opinion it is not enough to, to, to
25 know how the system operated during the life of the
26 subsequent -- during the life of Phoenix Sinclair, you also
27 must understand the system as it operates today. And
28 there's been significant changes that have occurred since
29 the death of Phoenix Sinclair and it's ANCR that plays a
30 central role now in this system.

31 That's to say that it's critical, in my opinion,
32 to understand that operation of the Child and Family
33 Services system as it stands today. In Winnipeg, there are
34 19 CFS agencies, including ANCR, and they operate in the

1 City of Winnipeg --

2 THE COMMISSIONER: Nineteen what?

3 MR. COCHRANE: Nineteen Child and Family Service
4 agencies.

5 THE COMMISSIONER: Right.

6 MR. COCHRANE: Operating in the City of Winnipeg.

7 THE COMMISSIONER: And ANCR is one of them.

8 MR. COCHRANE: ANCR is one of them. And ANCR
9 provides a single point of entry into the CFS system in the
10 City of Winnipeg, Headingley, and East and West St. Paul.
11 And in the letter, Mr. Commissioner, I have set out very
12 briefly the services that ANCR provides. I won't get into
13 that this morning.

14 ANCR, briefly, provides crisis response services,
15 child abuse investigations, family enhancement services,
16 and this is on behalf of all four authorities and all their
17 agencies in the geographic area that I have mentioned.

18 So from my point of view if, if, if one wants to
19 understand the child welfare system today, one must
20 understand how ANCR operates, and the functions it
21 performs.

22 THE COMMISSIONER: Right.

23 MR. COCHRANE: Just maybe to wrap up then, there
24 has been a number of recommendations as, as you are aware,
25 following the -- flowing from reports that have been
26 completed since the death of Phoenix Sinclair. A number of
27 these recommendations have been implemented by the Southern
28 Authority at ANCR. Implementation of these recommendations
29 and the resulting CFS changes since the death of Phoenix
30 Sinclair is crucial, it is ANCR where these recommendations
31 have, have been made and it is ANCR, in my opinion, that
32 can provide evidence of how these -- what implement --
33 recommendations have been implemented and, quite frankly,
34 how effective they have been.

1 THE COMMISSIONER: So based upon what I've heard
2 you say, ANCR has a close working relationship with the
3 four authorities; is, is that correct?

4 MR. COCHRANE: Yes, ANCR provides the services
5 I've talked about, to the four authorities in the City of
6 Winnipeg, Headingley, West and East St. Paul. In other
7 words, if there are -- I'll give you one example, if there
8 is an intake that's required, after hours, in the City of
9 Winnipeg, it is ANCR that provides that intake service on
10 behalf of whatever other agency, on behalf of whatever
11 authority --

12 THE COMMISSIONER: Regardless of whether that
13 agency is being contracted for by the Northern Authority or
14 any other authority?

15 MR. COCHRANE: That's correct, yes. In the City
16 of Winnipeg, East St. Paul, West St. Paul and East St. Paul
17 (sic).

18 THE COMMISSIONER: What -- are you saying that
19 the, the applicant, the services required must be services
20 delivered in one of those three municipalities in order for
21 you to be involved?

22 MR. COCHRANE: That's correct. Yes.

23 THE COMMISSIONER: Well, then supposing -- what
24 contact do you have with service agencies that, say the
25 Northern Authority is contracted with?

26 MR. COCHRANE: Okay, so let's use an example that
27 we have a child who requires services, it happens to be in
28 the City of Winnipeg, as an example.

29 THE COMMISSIONER: Yes.

30 MR. COCHRANE: Okay? And this child is from,
31 from the north.

32 THE COMMISSIONER: Yes.

33 MR. COCHRANE: Falls under the jurisdiction of
34 the Northern Authority.

1 THE COMMISSIONER: Yes.

2 MR. COCHRANE: This child happens to be in
3 Winnipeg during the weekend, requires services, it is ANCR
4 that is that first point of contact. ANCR will do the
5 intake, ANCR (inaudible) will do the assessment and at some
6 point ANCR would then do the transfer to the appropriate
7 agency and authority.

8 THE COMMISSIONER: Right.

9 MR. COCHRANE: So ANCR is the intake.

10 THE COMMISSIONER: So you, you are in a working
11 relationship with the authorities, all four authorities, up
12 to a point?

13 MR. COCHRANE: Yes.

14 THE COMMISSIONER: Yes, thank you.

15 MR. COCHRANE: So in, in summary then, it's our
16 submission that ANCR ought to receive standing in all
17 phases of the inquiry. If necessary, we would be calling
18 witnesses to talk about the recommendations, the changes
19 that have occurred as a result of those reports. And
20 subject to any questions, that's our submission.

21 THE COMMISSIONER: Thank you very much, counsel.

22 MR. COCHRANE: Thank you.

23 MS. WALSH: Next, Mr. Commissioner, is the
24 Department of Family Services and Consumer Affairs.

25 THE COMMISSIONER: Thank you.

26 MR. MCKINNON: Good morning, Mr. Commissioner, my
27 name is Gordon McKinnon, I'm with the law firm of Thompson,
28 Dorfman and Sweatman. With me is my partner, Sasha Paul,
29 we are representing the Department of Family Services and
30 Consumer Affairs and we are seeking full standing at all
31 three phases of this inquiry.

32 In order for you to understand the potential role
33 of the department in this inquiry, Mr. Commissioner, some
34 background information is required. As you are aware,

1 Phoenix Sinclair was born on April 23rd, 2000.
2 During her life she was apprehended and placed in care on
3 two occasions. Firstly at the time of her birth, in April
4 of 2000 she was apprehended by Winnipeg Child and Family
5 Services and was in care in a foster home for approximately
6 four and a half months.

7 Secondly, in June of 2003, Phoenix Sinclair was
8 again apprehended and was in care for approximately three
9 and a half months. Both of those apprehensions were by
10 Winnipeg Child and Family Services.

11 At other times during her life, until
12 approximately March of 2005, Phoenix Sinclair and her
13 family received services from Winnipeg Child and Family
14 Services and there were numerous contacts by employees of
15 Winnipeg Child and Family Services, probably 30 to 40
16 employees have potential evidence, all former employees of
17 Winnipeg Child and Family Services, some perhaps even
18 current.

19 THE COMMISSIONER: Who all who had some
20 contact --

21 MR. MCKINNON: Some contact.

22 THE COMMISSIONER: -- with Phoenix or her family.

23 MR. MCKINNON: Either by telephone or by
24 attendance or by being involved in the apprehension or in
25 the court proceedings, they all had some degree of contact.
26 They could have worked in the CRU, they could have worked
27 in intake, they could have provided general services. So
28 there was a myriad of employees of Winnipeg Child and
29 Family Services who had contact with Phoenix Sinclair
30 during -- or her family, during her lifetime.

31 THE COMMISSIONER: And what would the nature of
32 those services be that were provided up until sometime in
33 2005 and following the second time of her having been in
34 care?

1 MR. MCKINNON: The nature of the services were
2 primarily calls received by the agency which required some
3 follow up, either in the form of checking on her status or
4 in the form of providing services to her family. There was
5 in-home services provided by a family support worker, there
6 was -- resources in the community were made available to
7 the family. It was the myriad of services that one might
8 expect from a family services agency to a family that, from
9 time to time, had crisis. So that, that was the role of
10 the Winnipeg Child and Family Services and I'm going to
11 explain now how that relates to the department.

12 THE COMMISSIONER: Yes.

13 MR. MCKINNON: In April of 2000, that is at the
14 time of Phoenix Sinclair's birth, Winnipeg CFS was a family
15 service agency that was mandated by the department. So in
16 the initial phases, the department was the mandating
17 authority that gave the agency its, its authority to
18 operate.

19 In that era, from 2000 until 2003, Winnipeg Child
20 and Family Services was a separate legal entity, it had a
21 board of directors, some elected by the community and some
22 appointed by the government, the lieutenant governor in
23 council, the cabinet. So it was a board that was mixed, of
24 community members and appointments by government but it was
25 a separate legal entity, separately chartered, and, and
26 managed by the board of directors.

27 On March 31st of 2003, approximately halfway
28 through Phoenix Sinclair's life, the Government of Manitoba
29 assumed direct control of Winnipeg CFS and that occurred
30 under Section 6(12) of the former CFS Act. And I say the
31 former act because if you look in the continuing
32 consolidation you will see that section is now repealed,
33 Mr. Commissioner. But what it used to provide is authority
34 for the government to dissolve an agency and -- which

1 points to the assets and liabilities of the agencies -- of
2 the agency and the duties and responsibilities of the
3 agency were assumed by the department.

4 So that's what's -- what happened factually in
5 this case, on March 31st, 2003, the former agency, Winnipeg
6 Child and Family Services became a branch of the
7 department.

8 So Winnipeg CFS ceased to exist as a separate
9 legal entity and became then and now continues as a branch
10 of the department. So to the extent that Winnipeg CFS was,
11 was involved in this case after March 31st, the partner is
12 directly responsible.

13 THE COMMISSIONER: Right.

14 MR. MCKINNON: To the extent that it was involved
15 prior it is indirectly responsible as the mandating
16 authority.

17 And as I mentioned to you, Mr. Commissioner,
18 there were perhaps 30 to 40 individuals at Winnipeg CFS,
19 I'm not certain all of them will need to be witnesses in
20 these proceedings, that will be up to Commission counsel,
21 but a number of them will be witnesses. I would submit
22 that every one of them would potentially have an interest
23 in standing, at least for that first phase of the inquiry.
24 What you will hear from me and later from Mr. Smorang, who
25 is representing the union, is that some of those
26 individuals will end up being represented by me as counsel
27 for the department, some will end up being represented by
28 Mr. Smorang as counsel for the union and I'll let him
29 address that more fully.

30 But fundamentally, the first role of the
31 department in these proceedings is that it was responsible
32 for the child welfare services provided or not provided to
33 Phoenix Sinclair and her family, as referenced in clause
34 1(a) of the order-in-council. That responsibility fell on,

1 on Winnipeg CFS which is now part of the department. So to
2 the extent that there is anyone to answer for that, it is
3 the department.

4 THE COMMISSIONER: Well, I know Commission
5 counsel anticipates interviewing all those witnesses and
6 making some determination who has something they can
7 contribute as witnesses to this inquiry.

8 MR. MCKINNON: Right, and we don't -- we're not
9 second guessing which ones those will be, she will review
10 their files and decide which ones may need to be
11 interviewed and then which ones need to be called but
12 certainly some will be called, that will be the --
13 respectfully, that will be all of the evidence at phase one
14 of this inquiry will come from former employees of Winnipeg
15 CFS. All of the services that were granted or, or were
16 delivered in this case, were from Winnipeg CFS. If
17 services were not provided CFS was the responsible
18 authority.

19 THE COMMISSIONER: Right.

20 MR. MCKINNON: Or the responsible agency.

21 The second role of the department in this inquiry
22 will be in relation to the recommendations arising out of
23 the six reviews of the child welfare system referred to in
24 the order-in-council. The department is not -- does not
25 say it alone is responsible for implementing those
26 recommendations but it, it had a key role in implementing
27 those recommendations. It worked in cooperation with the
28 authorities and agencies in implementing those
29 recommendations and we'll have much evidence to provide to
30 the Commission on the changes and improvements that have
31 taken place in child welfare in Manitoba in the last five
32 years.

33 In summary, it is expected the department will
34 have important evidence, both with respect to the

1 circumstances surrounding the tragic death of Phoenix
2 Sinclair and with the improvements that have been
3 implemented in the last five years, in an effort to prevent
4 a similar tragedy in the future. So we seek full standing,
5 Mr. Commissioner.

6 THE COMMISSIONER: Thank you, Mr. McKinnon.

7 MR. MCKINNON: Any questions, sir?

8 THE COMMISSIONER: No.

9 MR. MCKINNON: Thank you.

10 THE COMMISSIONER: Thank you.

11 We'll take one more counsel before we break for
12 mid-morning.

13 MS. WALSH: All right, Mr. Commissioner. Then
14 the next is Ms. Kimberly-Ann Edwards.

15 MR. DERWIN: Good morning, Mr. Commissioner,
16 George Derwin appearing on behalf of Kim Edwards, she's
17 seated at table here. Kim Edwards is the real mother that
18 Phoenix Sinclair has only known. Phoenix Sinclair lived
19 with Kim Edwards until she was taken away by Samantha
20 Kematch on April 15th, 2003 and since then Kim Edwards has
21 tirelessly tried to get Phoenix Sinclair back, with the
22 father, who she is friends with, who is also seated at
23 counsel table, Steve Sinclair.

24 She has been the voice of Phoenix Sinclair,
25 tirelessly lobbying to make sure that this very inquiry
26 takes place. She has lobbied the provincial government,
27 the child welfare authorities, the minister's office and
28 the federal government and she has many unanswered
29 questions and as the de facto mother of Phoenix Sinclair
30 she has done a great deal of searching for questions -- for
31 answers to questions she's had and comes here today for
32 answers and she brings a different perspective to this
33 commission, a very important perspective.

34 When you look around this room you see agencies

1 here. She comes as an individual, an individual who was
2 deeply involved in this child's life and deeply involved in
3 ensuring that this child's death was not in vain. I keep
4 hearing the tragic death, that is not what Kim Edwards
5 says, we're here for spirit of renewal, we're here to
6 celebrate her life, and ensure that something positive
7 comes of it. We're not here to take down the child welfare
8 system, it will always be around, there will always be
9 families in need, there will be addictions, of -- abuse,
10 there will be all sorts of issues requiring children to be
11 in care.

12 But let's fix what's wrong. She has many
13 questions, she wishes to find out why the local child
14 welfare agency failed to monitor what was going on at the
15 residence of Samantha Kematch and Karl McKay. How could
16 the child welfare authorities fail to notice a child who
17 had gone missing?

18 She seeks answers on how this child could have
19 been subjected to long term abuse in a Cree Nation of a
20 relatively small population, I believe it's around 1700,
21 without anyone noticing.

22 She's here to make sure that Child and Family
23 Services makes the appropriate systemic changes to prevent
24 children from falling between the cracks. She's concerned
25 that children, even today, may not be adequately protected
26 by the child welfare system and she wants the public to
27 learn about what happened to her daughter and to promote
28 social change and she wishes to ensure that this inquiry
29 doesn't get sidetracked by other issues. If the
30 adequacy --

31 THE COMMISSIONER: Like, like what?

32 MR. DERWIN: Racial issues, for example. We want
33 to make sure that, that we will get -- instead of -- this
34 is not an aboriginal versus non-aboriginal issue, what we

1 want to insure is to look at the global child welfare
2 system from the top down because Child and Family Services
3 knew about Samantha Kematch in April of 2000, Winnipeg
4 Child and Family Services was involved back then. There
5 was a number of agencies involved, and we need to look at
6 all the agencies.

7 The Province of Manitoba has the ultimate
8 authority and so they will want to hear the answers from
9 them, and not only what these reports have to say but what
10 they're doing about it today.

11 And I submit that the views of the child
12 protection agencies here today requires a balance and
13 alternative perspectives put forward and the perspective of
14 a parent and, and I submit that Kim Edwards is a parent
15 because she is the true mother that Kim -- that Phoenix
16 Sinclair knew. The perspective of a parent who lost a
17 daughter --

18 THE COMMISSIONER: Was she ever -- had foster
19 mother status or was it a case of, of --

20 MR. DERWIN: It was, it was a de factor
21 relationship and she looked after -- I think there was a
22 brief period of time where it was a foster mother -- and I
23 mean very brief. But she -- Phoenix Sinclair lived with
24 Steve Sinclair, lived with Kim Edwards, she moved freely
25 between the houses and it was a happy relationship. And
26 after Phoenix Sinclair passed away, it was Kim Edwards that
27 organized the funeral, it was Kim Edwards that's done all
28 the speaking on behalf of Phoenix Sinclair. She's founded
29 a Phoenix Sinclair Foundation to, to ensure that this never
30 happens again.

31 She has had contact with dozens of families who,
32 who have been involved with, with Child and Family
33 Services, she has met with and assisted families who have
34 had other, other children who have died in care, and Kim

1 Edwards has always been there.

2 And she doesn't want to disband the child welfare
3 system, the problem needs to be addressed and one of the
4 issues is, you will see, devolution of services and
5 ensuring that there is not a diffusion of responsibility.
6 And she's given herself the mandate to protect children so
7 that this never happens to another child again.

8 She's not a member of the general public, she's
9 much closer. She's not an academic but she has looked
10 after Phoenix Sinclair from the -- from firstly the date of
11 birth until the date she was taken away. She wants to see
12 improvements in the system, real improvements, not just
13 policy written.

14 So I would ask that she should receive full
15 standing in all three phrases, certainly on the factual
16 basis she has a substantial and direct interest. In the
17 reports that followed, certainly she has a great deal of
18 interest in that, and implementation because that is what's
19 important. What's important is that Phoenix Sinclair's
20 death not be in vain, that we use it as a tool to ensure
21 that Child and Family Services looks within and makes
22 what's wrong right.

23 That's my submission.

24 THE COMMISSIONER: Thank you very much, Mr. --
25 counsel. All right, I think we're making good progress
26 working our way through. We'll take a 15 minute
27 adjournment and then we'll probably run through till 12:30
28 and any that we haven't heard by then, we'll take after
29 lunch.

30 THE CLERK: Order all rise. The commission of
31 inquiry is now in recess.

32

33 (BRIEF RECESS)

34

1 THE CLERK: This commission of inquiry is now
2 back in session. Please be seated.

3 THE COMMISSIONER: Good morning.

4 MR. HARVIE: Good morning, sir. My name is John
5 Harvie, I appear on behalf of the First Nations of Northern
6 Manitoba Child and Family Services Authority. The material
7 that we filed, the written material, is contained in tab
8 five --

9 THE COMMISSIONER: Yes.

10 MR. HARVIE: -- of Exhibit 1 in this matter. I
11 would also like to point out to the Commission that I am
12 accompanied by Anthony Lafontaine Guerra, who is sitting at
13 counsel table, an associate of mine.

14 Seated with him at counsel table is Dr. Kathy
15 Jones, who is a manager, the differential response manager,
16 with the Northern Authority, and seated in the gallery is
17 Mr. Eugene Peterson, he might have stepped out for a
18 minute, who is the community relations manager for the
19 Northern Authority. And when I say Northern Authority, Mr.
20 Commissioner, the First Nations of Northern Manitoba Child
21 and Family Services Authority is always known as the
22 Northern Authority in my remarks.

23 THE COMMISSIONER: Yes.

24 MR. HARVIE: Thank you, sir.

25 To begin with, the Northern Authority is seeking
26 part -- status in these -- this inquiry as a party with
27 full standing for all phases that have been identified by
28 Commission, by inquiry counsel.

29 We would submit for your consideration, sir, that
30 that status as a party not be shared. For the reasons that
31 are set out in the written material that I have filed with
32 you, the Northern Authority has a very unique perspective
33 and perhaps I should -- a unique perspective and very
34 onerous responsibilities under the act and regulations,

1 which I have provided in my material to you.

2 I should say perhaps, as well, by way of
3 introduction, that the, the communities that the Northern
4 Authority serves are identified in Schedule "A" of the
5 Regulations to the Authorities Act and for your benefit,
6 Mr. Commissioner, I have brought a copy of Schedule "A"
7 with you -- with me today.

8 THE COMMISSIONER: Yes.

9 MR. HARVIE: Perhaps I could be permitted to
10 provide you with a copy of it.

11 THE COMMISSIONER: Yes.

12 MR. HARVIE: I'll just provide this to Madam
13 Clerk and -- there we are, thank you.

14 THE COMMISSIONER: She can look after
15 distribution.

16 MR. HARVIE: Thank you. And I do have some
17 copies to distribute, thank you very much.

18 THE COMMISSIONER: Do you want to mark that as
19 Exhibit 2?

20 MS. WALSH: We can mark that, Exhibit 2.

21

22 **EXHIBIT 2: CHILD AND FAMILY**
23 **SERVICES AUTHORITIES REGULATION**

24

25 MR. HARVIE: Thank you very much, Mr.
26 Commissioner. Then with reference to Exhibit Number 2 in
27 these proceedings, you'll see that there are 26 communities
28 identified in this schedule to the regulation. These are
29 the communities that the Northern Authority is responsible
30 for in providing services as mandated under the Act and the
31 Child and Family Services Act and the Authorities Act.
32 Twenty-six in number and if, if you were to look at the, at
33 the map with respect to the location of those communities,
34 sir, you find that many of them are extremely remote,

1 hundreds and hundreds of kilometres away from Winnipeg.

2 I would also like to provide, at this time, a
3 copy of -- that I actually reproduced from the website of
4 the Northern Authority, just for ease of reference, if I
5 may, and kindly ask that it be marked as Exhibit 3 in these
6 proceedings. Copies for distribution to counsel, as well.

7 So this is a list, Mr. Commissioner, of the
8 agencies that serve those communities and these agencies
9 are all under the supervision of the Northern Authority.
10 There are six in number that are set out in the document
11 that is Exhibit 3 in this matter, and I would point out, if
12 I may please, for your consideration that -- and if I might
13 have a moment, please.

14 If you -- in reference to the first page of
15 Exhibit Number 3, Mr. Commissioner, you'll see reference to
16 Cree Nation Child and Family Caring Agency.

17 THE COMMISSIONER: Yes.

18

19 **EXHIBIT 3: AGENCY LISTING OF**
20 **FIRST NATIONS OF NORTHERN MANITOBA**
21 **CHILD AND FAMILY SERVICES**
22 **AUTHORITY**

23

24 MR. HARVIE: Earlier you heard my learned friend,
25 Mr. Cochrane, make reference to ANCR as an intake agency.
26 The fact is, sir, that the Northern Authority has four
27 intake agencies and when I draw your attention to Cree
28 Nation Child and Family Caring Agency, that is one such
29 intake agency. That would be -- and their responsibility,
30 therefore, Mr. Commissioner, is to make the after hours
31 apprehensions and apprehensions at first instance, with
32 respect to their catchment area after hours so they, they
33 occupy that position.

34 The, the area that they serve is The Pas and the

1 surrounding area in the Province of Manitoba. With respect
2 to page two of Exhibit 3, reference is made to the Island
3 Lake First Nation Family Services, that is also a
4 designated intake agency. It serves the Island Lake and
5 surrounding area and when I say the surrounding area, sir,
6 it's a very large geographic area. Beneath that you'll
7 Kongsao Sipi Minisowin Agency. That agency is the
8 designated intake agency for Norway House and the
9 surrounding area. And beneath that you will see
10 Nisichawayasihk Cree Nation Caring Agency or Family
11 Wellness Centre, I beg your pardon, but that particular
12 agency is also a designated intake agency for Thompson and
13 the surrounding area.

14 I bring that to your attention, sir, because it
15 is our submission that in the phases that this inquiry will
16 investigate, as they have been identified by inquiry
17 counsel, the first phase will involve not just the facts of
18 what actually happened in this terrible tragedy but they
19 will also involve an analysis, one would presume, of the --
20 and has, as been expressly stated, of the services provided
21 and not provided to -- in this -- in these circumstances.

22 THE COMMISSIONER: And was the Northern Authority
23 or any agencies whom it contracts involved in the delivery
24 or -- of any of those services?

25 MR. HARVIE: No, sir. The Northern Authority was
26 not involved in this particular event. The Northern
27 Authority, however, is responsible, as you see from the,
28 the material that we have provided, the Northern Authority
29 is responsible for supervising the agency, supervising the
30 intake agencies, and will have particular interest with
31 respect to the transfer between agencies that occurred
32 perhaps in this particular case and also with respect to
33 the systems, the actuarial tools such as risk assessments
34 that were used or not were -- or were not used, I beg your

1 pardon, with respect to the facts surrounding the, the
2 tragedy in this circumstance.

3 THE COMMISSIONER: Do not all three authorities
4 who have applied for standing have that kind of
5 responsibility in common?

6 MR. HARVIE: They do, Mr. Commissioner, they do
7 have that responsibility in common. Of course it's
8 important, I would submit with respect, to bear in mind
9 that there was originally a very good reason why there are
10 three different authorities or, in fact, four.

11 THE COMMISSIONER: Oh, yes.

12 MR. HARVIE: Because they have unique
13 perspectives. What I have -- trying to demonstrate and
14 perhaps anticipate your, your line of thought in this
15 regard, is that there is a big difference between the -- we
16 would suggest, the perspective that perhaps the Southern
17 Authority might have, with respect to communities that are
18 largely served by road and within a short distance of a
19 major metropolitan area, and all of the, all of the assets
20 that can be --

21 THE COMMISSIONER: With respect to what kind of
22 issues?

23 MR. HARVIE: With respect to, with respect to
24 issues of services to children, with respect to resources,
25 including police resources that are available in large
26 police agencies in the City of Winnipeg and other
27 municipalities.

28 In some of the areas that are served, as you will
29 see with reference to the -- Exhibit 2 that I have provided
30 to the court, these are extremely remote communities, they
31 are in large part, I am very sad to say, riven (phonetic)
32 with extreme difficulties and problems and unemployment and
33 other social issues that have to -- that require and did
34 require, at first instance, the establishment of a separate

1 authority to deal with their particular needs.

2 In this particular case then, when we're
3 analyzing the systems that were utilized with respect to
4 phase one of the inquiry, such a risk -- let's say there is
5 a risk assessment or you're, or you're assessing the risk,
6 risk assessment tool that was or wasn't used with respect
7 to Phoenix Sinclair, that you will be hearing evidence, I
8 would presume, with respect to how that particular tool
9 works, why it was or wasn't appropriate.

10 It would be useful, we would suggest for your
11 consideration, at that time to hear input from the Northern
12 Authority with respect to whether or not that particular
13 actuarial tool is culturally sensitive, whether it's
14 appropriate with respect to the resources that are
15 available in the communities that we serve. It would be --
16 we would suggest, for your consideration, it would be
17 perhaps difficult, after the fact, to -- if we didn't
18 participate in phase one of the proceedings, to go back and
19 revisit what particular aspects of a given actuarial tool
20 did or didn't work.

21 So again, as my learned friend Mr. Haight said,
22 this particular application and applications of its nature
23 are prospective. I don't know what the evidence will be,
24 but I would suggest for your consideration that given the
25 perspective of the Northern Authority, its immense
26 responsibilities over a wide geographic area, with very
27 limited resources, that our, our -- the Northern Authority
28 would be a valuable participant, in all three phases,
29 including phase one.

30 And with respect to -- it's really with respect
31 to the systems failure or what systems were not utilized
32 that I see and would submit on behalf of the Northern
33 Authority where it would be of benefit to this inquiry to
34 participate in phase one.

1 With respect to phases two and three, I would
2 suggest for your consideration that the necessity of the
3 participation of the Northern Authority is manifest by the
4 recommendations and because I wasn't sure, Mr.
5 Commissioner, as to there -- whether or not you had access
6 to the particular recommendations already, I did include
7 them in my material that I filed and they are, of course,
8 found in Exhibit 1.

9 I would suggest for your consideration that when
10 you review the recommendations that are contained in those
11 reports and will form the basis of parts -- phases two and
12 three of the inquiry, that in almost each and every case
13 that will have a bearing on the Northern Authority and the
14 Northern Authority's activities.

15 In case, and again not to, to be repetitive or
16 overly lengthy in my submission, we have, at page five of
17 tab five of Exhibit 1, starting at paragraph 14, set out
18 the duties of the Northern Authority and, indeed, of all
19 authorities and they have been identified, as well, by my
20 learned friend, Mr. Cochrane, but we've set them out for
21 you. They are -- they involve the oversight of the
22 delivery of services to families, by agencies, training for
23 agencies under its jurisdiction, that is the jurisdiction
24 of the Northern Authority in this instance. Ensuring
25 agencies under its jurisdiction follow standards, practises
26 and procedures. Supervision of children in care. Issuing
27 directives to agencies, and the power to require agencies
28 to carry out their duties in accordance with standards
29 established by the authority or the director.

30 And beneath that I've cited, for your ease of
31 reference and attached to the document, the particular
32 sections of the Act, the Child and Family Services Act and
33 the -- as well, the Authorities Act that demonstrate that.

34 In particular, if I may carry on, at page seven

1 of our submission we identify for your consideration
2 paragraph 17 of page seven, in particular what we believe
3 are the areas where the Northern Authority could be
4 affected by a finding of recommendation and, therefore,
5 would have a direct and substantial interest in these
6 proceedings as that has been defined in the case law and
7 referred to by Commission counsel.

8 They are how child and family services are
9 delivered to rural and remote communities in Northern
10 Manitoba, the sufficiency of present standards and
11 procedures for child protection and the carrying out of
12 mandated services. Funding, caseload and staffing of
13 agencies serving remote First Nations communities. How
14 Manitoba children receiving child and family services are
15 reunified with their biological parents or guardians, to
16 ensure that the process is consistent with the safety and
17 best interest of children and also respectful to First
18 Nation cultures.

19 How Child and Family Services staff are trained
20 and educated to ensure a balance between the need for staff
21 who understand the practicalities of the communities they
22 serve and the need for staff who are well trained and also
23 the implementation of the recommendations, of course, that
24 are all contained in tab "B" which we've already provided
25 and I've already made reference to.

26 In the circumstances, therefore, Mr.
27 Commissioner, we would suggest that for the reasons that I
28 have set out, that the Northern Authority ought to be
29 granted status as a party with full standing in these
30 proceedings for all three phases of this inquiry.

31 Those are my remarks, subject to any question
32 that you may have, sir.

33 THE COMMISSIONER: No, you've answered any
34 questions I had in my mind and I thank you for your

1 presentation.

2 MR. HARVIE: Thank you, sir.

3 MS. WALSH: Next the First Nations of Southern
4 Manitoba Child and Family Services Authority.

5 THE COMMISSIONER: Which will become known here
6 as the Southern Authority.

7 MR. SAXBERG: That's correct. I won't have to go
8 through that. My name is Chris Saxberg, and I, along with
9 Luke Bernas, who is sitting at the table right behind me,
10 will be acting as counsel for the Southern Authority,
11 provided, Mr. Commissioner, you grant us what we are
12 seeking here, which is a full standing with respect to all
13 three phases of the inquiry.

14 The submission is found at tab six of Exhibit 1.

15 THE COMMISSIONER: Yes, I have it before me.

16 MR. SAXBERG: And I'm just going to elaborate on
17 it in terms of the division of the inquiry into three
18 phases.

19 THE COMMISSIONER: Right.

20 MR. SAXBERG: Firstly, with respect to the
21 factual aspect of the hearing, that is the inquiry
22 involving Phoenix's birth to the discovery of her death,
23 and what services were provided or not provided, the
24 Southern Authority has, and I think to be bold it's
25 self-apparent, a direct and substantial interest in this
26 aspect of the hearing because the abuse and the death of
27 Phoenix Sinclair occurred in Fisher River. The agency with
28 the mandated jurisdiction in Fisher River is Intertribal
29 CFS, the Southern Authority oversees Intertribal and, in
30 particular, it's the Southern Authority that was
31 responsible for the policies, practise standards and
32 procedures that were in place in that jurisdiction, at the
33 time that Phoenix Sinclair was murdered and following,
34 during the period that that murder was undiscovered.

1 So in that regard the Southern Authority has
2 crucial information to provide the Commission in terms of
3 those policies and whether they were being implemented and
4 applied correctly and what the Southern Authority did to
5 ensure that those policies were, in fact, firmly in place
6 and again, implemented by the frontline social workers.

7 Given the importance of this aspect of the
8 inquiry, I believe that that -- the value of that evidence
9 will be very important. It would be the Southern
10 Authority's intention to call witnesses in that regard and
11 subject to further elaboration on the process, to -- with
12 the Commissioner's approval and, and would be to act -- do
13 the direct evidence of those witnesses with respect to that
14 phase and the other phases.

15 THE COMMISSIONER: Did any agencies have a
16 responsibility or contracted with the Southern Authority,
17 either prior to or subsequent to devolution, I guess I
18 would have to put it that way, have any direct contact with
19 Phoenix and her family, anyone that you're, you're
20 representing today, have any direct contact with the little
21 girl?

22 MR. SAXBERG: Well, that's an issue, I suppose,
23 with respect to whether there was -- whether there ought to
24 have been contact.

25 THE COMMISSIONER: I see.

26 MR. SAXBERG: Because, as I said, the Southern
27 Authority is the authority that was in charge of
28 intertribal CFS which was the agency with the jurisdiction
29 in Fisher River.

30 THE COMMISSIONER: And --

31 MR. SAXBERG: There's also an issue that comes
32 into play with respect to whether there were any -- there
33 was information that was provided, or phone call in
34 particular that was made at a given time which I won't get

1 into but there's that issue.

2 THE COMMISSIONER: I understand you.

3 MR. SAXBERG: So that's with respect to phase
4 one. I should also, parenthetically, add that the Southern
5 Authority is the authority at this time that is -- that has
6 the responsibility for ANCR.

7 With respect to the other two phases of the
8 hearing, I don't want to be repetitive of Mr. Harvey's
9 comments but -- so I'll just adopt them, as it were, and
10 reiterate that there is a reason where they are separate
11 authorities in -- that have been created and that it's very
12 important for the Commissioner to recognize that those
13 authorities have the ability to adopt different policies
14 and to implement them differently. And so although at
15 first one might consider that they have a very connected
16 participation in this hearing, in fact, that isn't the
17 case, in my submission.

18 Subject to any questions, those are my comments.

19 THE COMMISSIONER: No, I have to tell you, I, I
20 am concerned that -- about the, the, the public interest
21 being well served by a multitude of, of grants of full
22 standing as distinct from some joining in separate
23 grants -- joining in, in joint grants because of both the,
24 I guess, particularly because of the, of the time factor
25 that would -- that could possibly be involved, so I hear
26 you, I understand your issue but I have to say that I am --
27 I am going to look at, at whether there is a basis for, for
28 making some grants here that are, are joint between parties
29 whose similar -- whose interests are not identical but have
30 substantial similarities.

31 MR. SAXBERG: And I --

32 THE COMMISSIONER: And if you want to respond to
33 that, why fair enough.

34 MR. SAXBERG: If I may?

1 THE COMMISSIONER: Yes.

2 MR. SAXBERG: I would just submit that with
3 respect to the Southern Authority, it's going to have a
4 unique involvement with respect to the first phase, as I
5 have described it, because of its direct responsibility for
6 the community in which Phoenix Sinclair was murdered. And
7 those -- that -- it does not hold true with respect to the
8 other authorities. So in combination with respect to the
9 intervention at that phase, I don't think can work.

10 THE COMMISSIONER: Do you say that bearing in
11 mind that, that Intertribal has applied for its own
12 separate standing?

13 MR. SAXBERG: Well, that's -- I was speaking at
14 the authorities, vis-a-vis each other --

15 THE COMMISSIONER: Yes.

16 MR. SAXBERG: -- in terms of their connection.

17 THE COMMISSIONER: Yeah.

18 MR. SAXBERG: With respect to the connection with
19 Intertribal, I think that I would agree that there can
20 definitely be a joint representation on certain parts of
21 the case with respect to phase one. Then with respect to
22 the phase two and phase three, there would be a divergence
23 between the Southern Authority and Intertribal.

24 THE COMMISSIONER: Thank you very much, counsel.

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

26 MS. WALSH: Next we'll hear from the General
27 Child and Family Services Authority.

28 THE COMMISSIONER: Yes.

29 MR. GUTKIN: Good morning, Mr. Commissioner. My
30 name is Terry Gutkin. I'm with the law firm of Taylor
31 McCaffrey. I am appearing on behalf of the General Child
32 and Family Services Authority. I expect, Mr. Commissioner,
33 that I will be assisted in this matter by my associate,
34 Robynne Kazina and I have with me here today, sitting at

1 counsel's table, Jessica Schofield, who is an articling
2 student in my firm.

3 THE COMMISSIONER: Thank you.

4 MR. GUTKIN: At tab seven, Mr. Commissioner, is
5 the General Authority's application for standing. I am
6 going to try to be brief in my comments this morning
7 because I submit that the basis for the application for
8 standing is set out in some detail in the written material
9 before you.

10 Suffice it to say that the General Authority is
11 empowered, by law, to administer and supervise all
12 non-Aboriginal, non-Metis Child and Family Services
13 agencies in the Province of Manitoba. That includes, Mr.
14 Commissioner, the Child and Family Services Agency of
15 Winnipeg, Winnipeg Child and Family Services Agency or as
16 I've referred to in the brief, the branch.

17 The General Child and Family Services authorities
18 powers and duties are set out in the Child and Family
19 Services Authorities Act and in the regulations made under
20 that Act, counsel for some of the other authorities this
21 morning have taken you through those powers and
22 authorities, powers and responsibilities and I am not going
23 to repeat it again, today but again, as I said at the
24 outset, the General Authority is responsible for
25 supervisory -- supervising and administering all non-
26 aboriginal, non-Metis agencies in the Province of Manitoba.

27 The, the powers that it has, with respect to
28 standards, with respect to supervision, with respect to
29 resource allocation are broad. They're set out in the
30 legislation and in the regulations. In many instances, the
31 General Authority has sole jurisdiction over these issues
32 in other instances the General Authority has jurisdiction
33 in conjunction with the director of, of Child and Family
34 Services. All of that is set out in the brief and it's

1 also set out in the legislation.

2 Child and Family Services of Winnipeg is a
3 mandated agency, as I said, under the authority of the
4 General Authority.

5 In terms of the phases of this inquiry, Mr.
6 Commissioner, I do not anticipate that during phase one,
7 and my client will have a tremendous amount of factual
8 evidence to give as to its involvement in a supervisory
9 capacity. As explained in the written material, the
10 Authorities Act was proclaimed in force in November of
11 2003, that's when the four authorities, including the
12 General Authority, was created.

13 There was a transition period, over a number of
14 years, dealing with the various protocols in the
15 Authorities Act and the transfer of cases to, to
16 responsible agencies. During the time period leading up to
17 the -- to at least March of 2005 and, in fact, until May of
18 2005, insofar as the Winnipeg Child and Family Services
19 Agency is concerned, you will hear evidence that it was the
20 director of Child and Family Services who had direct
21 responsibility, up until that point in time on a de facto
22 basis, although legally the General Authority was already
23 in existence and had been in existence from November of
24 2003 onwards.

25 So what is the, the interest of the General
26 Authority in the first phase? Well, to begin with, once
27 the tragic death of Phoenix Sinclair came to light, the --
28 you will hear evidence that the General Authority conducted
29 its own review. It, at that point in time, posed a number
30 of substantial questions to its mandated agency, the
31 Winnipeg Child and Family Services Agency and detailed
32 responses were obtained from its agency. So in terms of
33 the investigative stage, although most of its fact finding,
34 in fact almost all of its fact finding, was after the death

1 came to light, that is relevant, I would respectfully
2 submit, to the investigative stage.

3 You will hear from the General Authority, and
4 it's more germane to the second and third phases of this
5 inquiry, the various initiatives, policy directives, et
6 cetera, that went into place after the death of Phoenix
7 Sinclair and certainly in light of the various reports that
8 are already before this Commission, as well as, I believe,
9 other reports that will be forthcoming.

10 To deal with those recommendations and the
11 implement of -- implementation of those recommendations,
12 it's my submission that you have to do this on a contextual
13 -- in a contextual basis, you have to look at the facts
14 giving rise to those -- to that -- to those recommendations
15 in order to properly deal with the recommendations,
16 themselves, and their implementation. And so that's
17 another reason, Mr. Commissioner, why the General Authority
18 is applying for full standing with respect to all three
19 phases.

20 The most significant role that you will hear, in
21 terms of the General Authority's involvement in this
22 matter, will deal with phases two and three. As counsel
23 for the department has said, there were significant changes
24 made to the Child and Family Services system after the
25 death of Phoenix Sinclair and, in particular, after various
26 studies and recommendations and reports came out. There is
27 a division of authority under the legislation as to who is
28 responsible for many of these changes, some of the changes
29 and many of them, in fact, were made in conjunction with,
30 with branches of government but the General Authority was
31 intimately involved in dealing with the issues arising from
32 the recommendations in the various reports, was intimately
33 involved in dealing with recommendations arising from the
34 death of Phoenix Sinclair and, as result, you will hear

1 evidence of numerous initiatives, of changes in standards,
2 of staff hiring policies, of additional resources put into
3 the system and I could go on and on.

4 THE COMMISSIONER: Are they generally changes
5 that were implemented province-wide?

6 MR. GUTKIN: I can't speak to that, the
7 department can speak to that, but insofar as the General
8 Authority is concerned, with respect to all non-Aboriginal
9 agencies, all non-Metis agencies, these would be changes
10 implemented province-wide. The --

11 THE COMMISSIONER: What relationship do the
12 authorities have, one with the other? Do they have a sort
13 of council of authorities who meet --

14 MR. GUTKIN: Yes.

15 THE COMMISSIONER: -- and cooperate and work
16 together?

17 MR. GUTKIN: Yes, they do. And there are
18 various, there are various counsels, I believe one was
19 called the Leadership Council, where the, where the
20 executive directors of the various authorities meet and,
21 and discuss the issues, yes. But in terms of, in terms of
22 the General Authority, and more specifically its mandated
23 agency the, the Child and Family Services Agency of
24 Winnipeg, as I said before you will hear evidence of the
25 review that the authority, pursuant to the legislation,
26 conducted with respect to the death of Phoenix Sinclair and
27 you will hear evidence of the numerous changes that have
28 been made to date, insofar as the agencies under the
29 General Authority's mandate. You will also, Mr.
30 Commissioner, I expect, hear evidence on all of the things
31 that are in the works in terms of future changes, both
32 policy-wise, standard-wise, supervision-wise, competency
33 based training, all of those things. And that's, that's
34 the type of evidence I expect you will hear.

1 THE COMMISSIONER: From departmental officials?

2 MR. GUTKIN: You will hear them from the
3 authority that, that -- from, from the policies and
4 directions and resource changes and training that's gone
5 into play, from their vantage point, that they are
6 responsible for, that they have implemented.

7 There is consultation with, with departmental
8 officials, it's not done in a vacuum. One of the
9 responsibilities of the Authority is to make sure that
10 standards are implemented in accordance with the objectives
11 of the Act which are, which are set departmentally.

12 But you are going to hear what the role of the
13 Authority, which has the -- and I'm talking about the
14 General Authority has, with respect to the mandated agency
15 that's really at issue in this particular case. It was
16 Winnipeg Child and Family Services Agency that is a
17 mandated agency of the General Authority and you will hear
18 from the General Authority's perspective, what it has done
19 with respect to all of the agencies it must supervise and
20 deal with.

21 THE COMMISSIONER: Well, the Winnipeg Child and
22 Family Agency is now, I think your term is, a branch of,
23 of, of, of the, of the department. Is that correct?

24 MR. GUTKIN: This is where in, in, in -- and I
25 can understand the confusion that this creates. As Mr.
26 McKinnon told, told the inquiry, the -- up until, I believe
27 it was some time in 2003, the branch was a separate agency
28 with its own board of directors and, at that time, because
29 the Authorities Act had not yet come into existence or had
30 just come into existence, the director of Child and Family
31 Services would have overriding responsibility.

32 When the Authorities Act came into existence, in
33 November of 2003, much of the Director of Child and Family
34 Services powers, duties and authority were transferred to

1 the four authorities, including the General Authority. So
2 legislatively, under the Authorities Act, Winnipeg Child
3 and Family Services Agency is under the supervision and
4 control of the General Authority.

5 THE COMMISSIONER: Now --

6 MR. GUTKIN: The anomaly, the anomaly is that
7 they are also a branch of government --

8 THE COMMISSIONER: That's the point.

9 MR. GUTKIN: -- because the government has taken
10 over all of its assets and liabilities but that doesn't
11 exempt the Winnipeg Child and Family Services Agency from
12 being subject to policies put in place by the General
13 Authority, does not exempt it from being subject to the
14 initiatives put in place by the General Authority, it does
15 not exempt it from being subject to standards and how those
16 standards are being implemented by the General Authority,
17 it's the subject matter of staff training, of competency
18 based training, and a whole plethora of initiatives in that
19 regard, much of which have arisen in regards to
20 implementing the reports that you have before you and is
21 part of the inquiry mandate.

22 So I hope that explains it.

23 THE COMMISSIONER: Yes.

24 MR. GUTKIN: It is confusing --

25 THE COMMISSIONER: It is, yeah.

26 MR. GUTKIN: -- but I hope it explains it.

27 THE COMMISSIONER: Yeah, I, I think I'm there,
28 yeah.

29 MR. GUTKIN: I know I have scratched my head on
30 it, as well, but it's --

31 THE COMMISSIONER: Well, I --

32 MR. GUTKIN: That's the legislative framework.

33 THE COMMISSIONER: -- I have the, the benefit of
34 Commission counsel to give some advice from -- on the point

1 and I, I have already drawn on that source and will do so
2 again.

3 MR. GUTKIN: I am hoping that in the course of
4 evidence this whole framework and the breakdown of
5 responsibilities and who is responsible for what will also
6 become apparent. My client should be able to add to that
7 significantly.

8 So I hope that answers --

9 THE COMMISSIONER: Yes.

10 MR. GUTKIN: -- any questions you have, Mr.
11 Commissioner, if not I, I am here to answer any further
12 ones.

13 THE COMMISSIONER: No, I think you've answered
14 everything I've put and I thank you kindly.

15 MR. GUTKIN: Thank you, sir.

16 MS. WALSH: Next is the Intertribal Child and
17 Family Services Agency.

18 MR. KHAN: Good morning, sir.

19 THE COMMISSIONER: Good morning.

20 MR. KHAN: My name is Hafeez Khan, I'm here as
21 counsel for Intertribal Child and Family Services.

22 THE COMMISSIONER: Yes.

23 MR. KHAN: I am accompanied by Mr. James Benson,
24 who is just sitted -- seated in the middle.

25 THE COMMISSIONER: Right.

26 MR. KHAN: Our submissions are at tab eight of
27 Exhibit "A".

28 THE COMMISSIONER: Yes.

29 MR. KHAN: And today I would just like to
30 elaborate on our submissions and I would also like to
31 respond to certain comments made with respect to our
32 involvement earlier today by other counsel.

33 First of all as, as, as everyone is aware, the,
34 the tragedy occurred in the area of service or

1 jurisdiction, if I may say, of Intertribal Child and Family
2 Services. Both the abuse and the death occurred in our
3 area of service. And I would submit that that, in itself,
4 gives us a very distinct and unique perspective in this
5 case. In that regard, Intertribal is applying for
6 standing, full standing on all three aspects of the
7 inquiry, as well as separate standing.

8 We would submit that, that the very locus of the,
9 of the tragedy raises some questions that -- and I, and I
10 would -- I don't want to assume but I would think likely
11 and probably that it would be necessary for the, for the --
12 well, sorry, ask questions that the inquiry be wondering
13 with respect to our involvement. Certainly the public
14 would be so.

15 Assuming that the questions that come to mind are
16 whether the agency was aware that the child was in our
17 jurisdiction, how is it that this abuse took place without
18 anyone's knowledge and, as well, with of course why did it
19 take so long before anyone discovered about this death.

20 Now, I can advise that the agency had some
21 minimal contact with the home, we apprehended Phoenix
22 Sinclair's step-brothers. This was after the death. Also,
23 the Intertribal was the first agency to --

24 THE COMMISSIONER: But were they living at Fisher
25 River at that time?

26 MR. KHAN: They were living at Fisher River at
27 that time. Intertribal was also the first agency to obtain
28 information on the death of Phoenix Sinclair and that was
29 forwarded onto the, the police services.

30 And I am sure the, the Commission is aware but I
31 would just like to note, point out, that the children --
32 the child was never under Intertribal care, the child was
33 returned to the mother's care from Winnipeg CFS, the mother
34 then moved to Fisher River and that is, that is where the

1 tragedy occurred.

2 In addition to what has already been submitted, I
3 would just like to point out that it is our respectful
4 submission that Intertribal has -- truly has a distinct
5 interest in this matter. I understand that the Commission
6 has concerns with respect to multiple grants of standing.
7 The, the entire CFS system is really developed, it's made
8 for services to families, essentially. In the -- that's
9 the end result of all the work that's done.

10 THE COMMISSIONER: That's the purpose.

11 MR. KHAN: It's the whole purpose. Intertribal
12 Child and Family Services, we are at that front line and
13 unlike ANCR, and, and there are some differences with
14 Winnipeg CFS, we are the only parties seeking standing
15 today with this perspective. We're, we're -- we are a
16 First Nations front line CFS agency.

17 In addition to that, the fact that the death
18 occurred in our jurisdiction has had a tremendous and I
19 would say devastating impact on the agency and on the
20 community. In order for Intertribal to, to maintain and,
21 and, and for some members of the community, regain the
22 trust and operate effectively, in our, in our -- it is our
23 submission that it is imperative that we have full standing
24 at this inquiry.

25 I would submit that if the, if the agency is left
26 sidelined with respect to any of the phases of the inquiry
27 it will have a direct impact on how we are viewed in our
28 community, in our, in our ability to operative effectively
29 within that community.

30 Now, I have heard the comments with respect to
31 whether there are similar interests between Southern
32 Authority and Intertribal Tribal Child and Family Services.
33 I would submit that they are distinct for the reasons I
34 have, I have mentioned and particularly that we are, we are

1 there. Only Intertribal, in this circumstances, will have
2 the perspective that we have and if, if we are joined with
3 other parties, I think it would affect the ability or it
4 would affect the thoroughness of this inquiry. Not only
5 does the inquiry, inquiry need to be just, fair and
6 impartial and thorough but it must be see -- must seen to,
7 to be that way and again if, if Intertribal is removed as a
8 party, or is joined with another party, I believe it will
9 affect that impression.

10 So subject to any further questions you may have,
11 those are our submissions.

12 THE COMMISSIONER: No. I thank you, I understand
13 your point and I understand, as you have put it, the
14 situation with respect to that geographic location.

15 MR. KHAN: Thank you.

16 THE COMMISSIONER: Thank you.

17 MS. WALSH: Next we have the Manitoba Government
18 and General Employees Union, MGEU.

19 THE COMMISSIONER: Good morning.

20 MR. SMORANG: Good morning, Mr. Commissioner, my
21 name is Smorang, I appear on behalf of the Manitoba
22 Government and General Employees Union, MGEU. We are
23 seeking full standing as a party in all three phases of
24 this matter. We have filed a comprehensive brief at tab
25 nine of your materials.

26 THE COMMISSIONER: Yes, I have it before me.

27 MR. SMORANG: Which I trust you have read.

28 The brief sets out the factors to be considered
29 by a commissioner of inquiry in circumstances of this
30 nature, that is standing applications, at page 13,
31 paragraph 48. I will not review those, to a certain extent
32 they were covered in addition by Ms. Walsh this morning.

33 THE COMMISSIONER: Yes.

34 MR. SMORANG: The brief also, at paragraph 37 of

1 page 10, sets out specific facts in this case that show
2 that direct and substantial interest that these -- have
3 been identified as 30 to 40, perhaps, MGEU members have,
4 themselves and the union itself has in this matter. And
5 just to remind you, Mr. Commissioner, these MGEU members
6 are employees of the department, were of Winnipeg CFS, now
7 of the department with regard to certain of them. They
8 are, in essence, and will be referred to by -- by me as the
9 front line social workers. These are the witnesses who you
10 will hear from in phase one, for sure, and in all
11 likelihood in the other phases, as well.

12 And so the factors that we point out, in
13 paragraph 37, which give rise to that direct and
14 substantial connection, first the knowledge and the
15 anticipated evidence of those members about the care and
16 the services provided to Phoenix Sinclair and her family,
17 the knowledge of MGEU members about the system, generally,
18 from the perspective of a front line worker. The knowledge
19 and participation of those members respecting the reviews
20 and the reports that were covered and set out in paragraph
21 three of your terms of reference, the simple requirement of
22 all of those individuals to be prepared by interviews with
23 Commission counsel, by preparation of can say evidence, the
24 type of things that were envisaged in the opening statement
25 and representation, as needed, in support and preparation,
26 as needed, by legal counsel through that process.

27 The potential for conflict between MGEU members,
28 that is potential for conflict between front line workers
29 and their employer, and I'll, I'll elaborate on that in a
30 few moments.

31 The importance of this inquiry and its potential
32 findings to these individuals. This is their workplace,
33 this is their chosen profession, this is what they do, and
34 of course your findings will have a profound and hopefully

1 significant effect on the future of, of Child and Family
2 Services. And finally, the likelihood that the reputation
3 of these MGEU members could be affected and the potential
4 impact on their day-to-day workplace setting as a result.

5 Now, we start from the presumption that, and
6 accept that in many respects MGEU and the department will
7 not be in conflict, there are many aspects of this inquiry
8 where there will not be a conflict.

9 THE COMMISSIONER: And when there -- and where
10 there is no conflict, there wouldn't be -- there would be
11 no need to repetitious.

12 MR. SMORANG: Absolutely. There would no need to
13 be asking questions in cross-examination that had already
14 been asked, there's no doubt of that. But there are
15 possible and in fact I would suggest probable situations
16 where there will be conflict between those employees and
17 the department and those include, firstly, evidence, that a
18 social worker who is a MGEU member failed in some respect
19 to meet standards, or expectations, or policies or
20 procedures of its own employer or his or her own employer
21 and those are set out in, in paragraph 27 of our brief.

22 Secondly, evidence, that is views or actual
23 evidence of a social worker, that that person may wish to
24 give, that may be critical of the department as employer or
25 critical of the system, generally, in some manner. And in
26 either of those two situations, Mr. Commissioner, that
27 person clearly needs direct representation for their own
28 personal interests and protection and that cannot be
29 offered by legal counsel for the employer.

30 As you know, I am sure, this is a unionized
31 workplace, hence the union, and in most respects in a
32 unionized workplace, the terms and conditions of
33 employment, the rights, the aspirations, the concerns of
34 employees, are brought forward and pursued by their union

1 in, in terms of discussions with the employer, sometimes
2 public campaigns unions bring in order to effect change and
3 those types of things.

4 As Ms. Walsh highlighted in her opening, the
5 principles of natural justice that apply in a courtroom
6 will apply equally in an inquiry. This means, as she
7 highlighted, a person whose conduct is at issue in this
8 matter will be granted standing and full opportunity to be
9 heard and full opportunity to be represented by legal
10 counsel.

11 Rule 47 of the, of the rules of procedure, as
12 drafted, incorporates that principle already when it
13 provides that no person who may be the subject of a finding
14 of misconduct shall be denied reasonable notice and
15 reasonable right to be heard in person or by counsel. So,
16 in essence, in seeking standing what the union is doing,
17 together with the employer in some respects, but separately
18 in others, is seeking to represent those 30 to 40 members
19 whose conduct is at issue in this matter. Some of these,
20 and it will have to be worked out in due course, some of
21 these will choose the union as its counsel, if you will,
22 some will choose the employer as its counsel, but in any
23 event, all will be represented in all respects, given that
24 it is their conduct that will be the subject matter of
25 this, of this inquiry.

26 So what I guess I'm offering to you is that
27 granting standing to the union, in conjunction with the
28 department, reduces what might be 40 standing applications,
29 40 individual standing applications, to two.

30 In addition to providing support and legal
31 counsel for these individuals, both pre-hearing and during
32 the hearing, the MGEU, in its own right, can play a role in
33 this inquiry and has, through the material we've filed,
34 historically had an interest in workload and staffing

1 issues regarding social workers, funding to the system and
2 the use of those funds. And organization of the system,
3 itself. You've heard already very complicated evidence of
4 the system, as it is, and how it evolved into what it is,
5 and there's been a lot of change and there -- MGEU has a
6 lot to offer, I would suggest, in terms of analyzing some
7 of that change and whether that has created a system that
8 is the best system.

9 THE COMMISSIONER: Related to those
10 recommendations that were made in the reports that are
11 identified in paragraph three of the order-in-council, in
12 the main, is that what you are speaking to in that --

13 MR. SMORANG: Yes.

14 THE COMMISSIONER: Yes.

15 MR. SMORANG: Yes.

16 THE COMMISSIONER: That's where you would like to
17 go with respect to getting into those kind of areas you are
18 discussing now.

19 MR. SMORANG: Yeah. What I'm trying to highlight
20 for you, sir, is that --

21 THE COMMISSIONER: This isn't a wide open
22 inquiry --

23 MR. SMORANG: No, no, no, no.

24 THE COMMISSIONER: -- that must be understood.

25 MR. SMORANG: Absolutely. No, but what I was
26 trying to point out is that MGEU has a representation
27 capacity but then has a capacity in its own right.

28 THE COMMISSIONER: Yes, yes.

29 MR. SMORANG: And that would involve those very
30 things you have just discussed.

31 THE COMMISSIONER: Yeah, that's, that's -- I
32 think we're ad idem on that.

33 MR. SMORANG: Absolutely. So we seek to
34 contribute in a manner, as we have indicated in our brief,

1 similar to the Winnipeg Police Association in the Taman
2 inquiry, the Manitoba Nurses Union in the Brian Sinclair
3 inquest and the Public Service Alliance of Canada in the
4 Kingston prison inquiry by providing that legal advice and
5 counsel to our members and also offering our own
6 perspective on the system in respect of the second and
7 third phase.

8 So unless you have questions I -- that is all I
9 intended to, to highlight from our brief.

10 THE COMMISSIONER: Well, of course, much of where
11 this is going to go is -- and, and the witnesses that will
12 be called are, at this point, shrouded by the
13 confidentiality provision in files that nobody has seen.

14 MR. SMORANG: Yes.

15 THE COMMISSIONER: So I take it that, that if
16 Commission counsel is successful in dealing with that issue
17 before the court, then you and Mr. McKinnon will work out,
18 if you each were to get separate standing, who would be
19 representing whom, is that --

20 MR. SMORANG: That is exactly --

21 THE COMMISSIONER: -- the way you see it?

22 MR. SMORANG: -- what we expect to work out.
23 Based primarily on the wishes of the individual but also in
24 consideration of that individual's role in the process. In
25 fact, some individuals who would have started as front line
26 workers, are now perhaps supervisors, managers, even
27 outside of the bargaining unit, so there's all that --

28 THE COMMISSIONER: Yeah.

29 MR. SMORANG: -- that comes into play, as well.

30 THE COMMISSIONER: I understand. Thank you for
31 your submission.

32 MR. SMORANG: Thank you, sir.

33 THE COMMISSIONER: All right.

34 MS. WALSH: Next we have the North End Action

1 Group.

2 MR. GREYEYES: Hello Commissioner. My name is
3 Jules Greeyes, I am the chair of the North End Action
4 Group. We are not represented by counsel here today and we
5 are seeking full standing on phase one and three.

6 The -- we're a human rights, children's rights
7 advocates within the City of Winnipeg, we've been
8 advocating for 50 to 100 families in the last couple of
9 years and we're also the advocate for Gage Guimond, another
10 child who experienced the same, you know, end result of
11 being in care, which was the death of a child, and the
12 reason why we were requesting standing is because we have
13 studied the system, we have come up with a lot of very
14 questionable, I guess, conduct by agencies, government and
15 lawyers that are all, as I feel, I think they are trying to
16 protect the system at all costs.

17 As you can see here there is several lawyers
18 representing several agencies and you've got several
19 lawyers under the Southern Authority who are also in charge
20 of ANCR and Intertribal, also seeking standing, so the --
21 like I said, this inquiry into Phoenix Sinclair, it, it, it
22 has been a long time coming and it should have, it should
23 have happened quite, you know, quite a long time ago
24 because the changes to the system that are happening are
25 not happening as a result of consultation with anybody,
26 except with, with those within child welfare. And the
27 services that were or were not provided, that is still an
28 issue today within today's child welfare system.

29 THE COMMISSIONER: Well, now tell me this, your,
30 your group is an incorporated body, I take it, you --

31 MR. GREYEYES: Yes.

32 THE COMMISSIONER: -- are you, are you a
33 charitable organization?

34 MR. GREYEYES: Yes, we're a non-profit charitable

1 group.

2 THE COMMISSIONER: Yes.

3 MR. GREYEYES: We became --

4 THE COMMISSIONER: Now, did you -- did your
5 agency have any contact of any kind, at any time, with
6 Phoenix Sinclair or her family?

7 MR. GREYEYES: Not during the timeframes of when
8 the incidents occurred. I do know Steve Sinclair, the
9 father, through the community, and Kim Edwards, through the
10 Phoenix Sinclair Foundation that they had started, they
11 started together so --

12 THE COMMISSIONER: Yes. And all those, those
13 individuals and the foundation, they have made separate
14 applications to, to be allowed to appear here.

15 MR. GREYEYES: Yes.

16 THE COMMISSIONER: But insofar as, as the North
17 End Action Group is concerned, you have had no relationship
18 with, with, with Phoenix and her family with respect to the
19 services they did or did not receive from the welfare
20 system in this province.

21 MR. GREYEYES: Not --

22 THE COMMISSIONER: Is that a fair statement?

23 MR. GREYEYES: The justice system, itself, like I
24 said we didn't -- dealing with the system, like I said
25 through several, several families and like I said, Gage
26 Guimond, is another one of our children that we have been
27 advocating for.

28 And like I said, we're not directly related to
29 Phoenix Sinclair, but like I say the, the issues that we're
30 going to bring forward and the testimony that we want to
31 provide is related to this system today and how the system
32 hasn't changed from, you know, what services were or were
33 not provided to Phoenix. I don't if you can say that
34 apprehending a child is a service or placing that child,

1 taking it out of Kim Edwards' care and placing it elsewhere
2 is a service of the industry. So that's where we've --
3 we're, we're coming from is it's -- we're coming from the
4 systemic side; right? So I mean, why it remained unsolved
5 for so long, that's another question that needs to be
6 answered here and I think we have the, the knowledge of, of
7 why it remained, you know, unfounded for so long.

8 THE COMMISSIONER: Well, I hope we're going to
9 hear that.

10 MR. GREYEVES: You know, nine months. Yeah,
11 totally. So and I know we have direct knowledge in regards
12 to the act, itself, and like I said if, if granted
13 standing, like I said, we do intend on bringing a number of
14 our clients to provide testimony to the inquiry so that you
15 can see exactly what these families have gone through and,
16 and as opposed to --

17 THE COMMISSIONER: Yeah, but, but those
18 witnesses, do any of them relate to the Phoenix Sinclair
19 situation?

20 MR. GREYEVES: Not directly, no.

21 THE COMMISSIONER: Okay. I hear you.

22 MR. GREYEVES: So -- but yes, that's my
23 application for standing and, as I said, we're not
24 represented by legal counsel and, like I said, it's --
25 that's where we stand as far as the group is concerned --

26 THE COMMISSIONER: And, and do I take it that --

27 MR. GREYEVES: -- and we do want to be heard.

28 THE COMMISSIONER: -- in the work that your group
29 does and, and you, the leadership you give to it, you have
30 had -- you were sort of in step with Mr. Sinclair on, on a
31 number of issues?

32 MR. GREYEVES: Oh, absolutely, yeah, totally.
33 Like I said, we -- the issues that we have identified
34 within the child welfare system, like I said the --

1 THE COMMISSIONER: But you're -- you have been
2 and are in communication with him, I take it?

3 MR. GREYEYES: Pardon me?

4 THE COMMISSIONER: You are -- you have been and
5 are in communication with the Mr. Sinclair?

6 MR. GREYEYES: Oh, I see him around the community
7 all the time.

8 THE COMMISSIONER: Yeah. Well, yeah, you see but
9 you -- have you been in communication with him about child
10 welfare issues?

11 MR. GREYEYES: Not, not like full meeting-wise
12 but I mean me and Kim have discussed the issues from time
13 to time --

14 THE COMMISSIONER: Right.

15 MR. GREYEYES: -- when we first met so -- and we
16 agree that a lot of the issues are, you know.

17 THE COMMISSIONER: Yeah, I was just trying to
18 make the connection, yeah.

19 MR. GREYEYES: So like I said, it's based on,
20 like I said, the services not provided. Like I said, it's
21 still a big problem in today's child welfare system. Like
22 what is the service, what exactly are they providing to the
23 people? And I have found out, like I said, children are
24 dying, like at such high rates as opposed to just
25 mainstream society within child welfare.

26 THE COMMISSIONER: Well, we know that one little
27 girl did die --

28 MR. GREYEYES: Um-hum.

29 THE COMMISSIONER: -- and we know that we know
30 that a lot of investigative reports were done following
31 that and we know that a lot of recommendations were made
32 relating to that death for improvement and we're going to
33 find out here what -- where those recommendations have gone
34 and whether the improvements indeed have done what those

1 who have made intended them to do.

2 MR. GREYEVES: Yes, exactly. And like I said,
3 they say that a lot of changes have happened, I have yet to
4 see any changes, except to the structure of the
5 authorities, the, the passing of responsibility such as
6 ANCR being under the Southern Authority as opposed to the
7 General Authority. You know, like I said, there has been
8 very little changes that have been made. You know, they
9 put the best interests of, of the child first but nobody,
10 except child welfare officials, are -- you know determines
11 what's in the best interests of children; right? So I
12 mean, it also says the principle or responsibility,
13 protection of children is the responsibility of society as
14 a, as a whole so I mean, why is child welfare taking the
15 role as society in the act and the principles and why not
16 community groups such as the Phoenix Sinclair Foundation,
17 North End Action Group, why are we not involved in those
18 changes or, you know, giving our advice to, to these
19 authorities and agencies in regards to changes that need to
20 happen? I mean, a child's death being, you know,
21 unreported for nine months, I mean, that's one of the
22 atrocities that, you know, we hope we get answers to, as
23 well, because you know, that should have never happened,
24 especially in a country like Canada.

25 You know, like I said the Child and Family
26 Services Act was designed supposedly to protect children
27 but right now it's being used to protect the whole system
28 as a whole and that's what I found out, it protects the
29 agencies, it protects lawyers, it protects executive
30 directors and, unfortunately, like I said, when the
31 principles that -- the only principle that they rely on are
32 bests interests, who are they to determine what is the best
33 interests of our children?

34 Obviously, in Phoenix Sinclair's case they failed

1 in that sense so -- and that's why I think that we have
2 direct knowledge because, like I said, we've been involved
3 with, like, several families including Gage Guimond and
4 Natasha and I founded the group.

5 And I guess that would be it for my, my
6 submission.

7 THE COMMISSIONER: Thank you, Mr. Greyeyes, for
8 your presentation. Now, I think we'll take one more before
9 we break for lunch.

10 MS. WALSH: Sure. That would be the Phoenix
11 Sinclair Foundation.

12 MR. DERWIN: Good afternoon --

13 THE COMMISSIONER: Yes, Mr. Derwin.

14 MR. DERWIN: -- Mr. Commissioner. George Derwin
15 appearing behalf of the Phoenix Sinclair Foundation Inc.

16 THE COMMISSIONER: Yes.

17 MR. DERWIN: The Phoenix Sinclair Foundation Inc.
18 was founded as a direct result of the death of Phoenix
19 Sinclair. It's an advocacy and a community group that
20 promotes certain awareness of issues that are directly
21 related to the death of Phoenix Sinclair and its mission is
22 to foster healing to Aboriginal families grieving the death
23 of a child, it is to promote their social wellbeing and
24 build a spirit of renewal, to meliorate the condition of
25 Aboriginal people suffering from violence, death of a loved
26 one. To promote and provide a means for the educational
27 assistance to the aboriginal community to cope with the
28 issues arising out of the violent death of a family member.
29 To promote and enhance services to persons that may be of
30 assistance to the aboriginal community in order to learn
31 about grieving and the prevention of violence. To
32 facilitate volunteer educators to provide awareness of
33 family violence in the Aboriginal communities and to
34 operate a non-profit learning and resource centre.

1 Kim Edwards and Steve Sinclair are the driving
2 force behind the Phoenix Sinclair Foundation, they have
3 helped dozens of people. They recently, in January of
4 2010, were up at Hollow Water, speaking to, to groups about
5 how to be empowered in terms of dealing with the Child and
6 Family Services system. They organized a toy drive, in
7 December of 2010, to bring awareness to the issues facing
8 children in care.

9 THE COMMISSIONER: Now --

10 MR. DERWIN: It's -

11 THE COMMISSIONER: -- just let me stop you. You
12 spoke this morning on -- as counsel for Ms. Edwards --

13 MR. DERWIN: That's correct.

14 THE COMMISSIONER: -- and will you be speaking
15 this afternoon as counsel for Mr. Sinclair?

16 MR. DERWIN: Yes, yes, I will be.

17 THE COMMISSIONER: All right. And, and you have
18 just said to me that, that they are the driving forces
19 behind the foundation.

20 MR. DERWIN: Yes.

21 THE COMMISSIONER: Now, my question to you is,
22 what is it that the foundation could add to the work of
23 this inquiry that Ms. Edwards and Mr. Sinclair could not
24 add, assuming they get party standing?

25 MR. DERWIN: For phase of the, of the proceeding,
26 the Phoenix Sinclair Foundation would only be seeking
27 intervener status, however, for phase two and phase three,
28 what the Phoenix Sinclair Foundation is interested in is to
29 look at the findings and recommendations and ensure that
30 implementation takes place.

31 The previous presenter of, of -- on behalf of
32 NAG, mentioned the Gage Guimond case, I'm certainly -- the
33 Phoenix Sinclair Foundation is aware of the Gage Guimond
34 case and the, the concerns that the foundation has is, is,

1 is the implementation, things must change, not just that
2 recommendations be made, some 289 recommendations followed
3 the death of Phoenix Sinclair, the question is, are these
4 recommendations being followed and the Phoenix Sinclair,
5 Phoenix Sinclair Foundation has an interest in this,
6 directing interest.

7 THE COMMISSIONER: But, but, but I come back to
8 this, if the driving forces behind the, the, the, the
9 foundation were, were given full standing, as parties, what
10 -- and that would allow them to lead evidence into the
11 second and third phases, insofar as those recommendations
12 and implementation related to the Phoenix Sinclair
13 situation, I'm trying to find out why it is, or is it as a
14 precaution in case they don't get party standings, that
15 you're also asking that the foundation have standing?

16 MR. DERWIN: You're bang on, yes.

17 THE COMMISSIONER: Okay.

18 MR. DERWIN: And yes. And no, no doubt.

19 THE COMMISSIONER: Yes.

20 MR. DERWIN: Phoenix Sinclair Foundation is Steve
21 Sinclair and Kim Edwards.

22 THE COMMISSIONER: Yes.

23 MR. DERWIN: And Kim Edwards is the driving force
24 and Steve Sinclair is the driving force.

25 THE COMMISSIONER: Yes.

26 MR. DERWIN: So I will tell, tell Mr.
27 Commissioner, that originally the application was one and
28 we separated it out into, into three separate applications.

29 THE COMMISSIONER: And, and they -- if they were
30 witnesses here, as this -- or I read the material, I would
31 be very surprised if they weren't, they would be in a
32 position to speak about the Foundation's interest insofar
33 as those recommendations and the implementation of them
34 that I have just referred to.

1 MR. DERWIN: That's correct.

2 THE COMMISSIONER: Yeah.

3 MR. DERWIN: Yes.

4 THE COMMISSIONER: Okay.

5 MR. DERWIN: So the Foundation attempts to
6 monitor and rectify the factors that led to the death of
7 Phoenix Sinclair so that no other child will suffer the
8 same fate and the, the motto of the, the Foundation is
9 building a spirit of renewal. So we're not here to mourn
10 the death of Phoenix Sinclair but rather to celebrate her
11 life through making positive social change, that is the
12 mission of this foundation.

13 Thank you.

14 THE COMMISSIONER: That's a very admirable
15 approach to take --

16 MR. DERWIN: Yes.

17 THE COMMISSIONER: I might say.

18 MR. DERWIN: Thank you.

19 THE COMMISSIONER: Thank you kindly.

20 All right. Now, what time will we adjourn to?
21 It's quarter -- it's nearly quarter past 12:00. Do you
22 want to adjourn till 1:30 or 1:45?

23 MS. WALSH: 1:30 is fine with me, if that works.

24 THE COMMISSIONER: Is that -- 1:30 will suit the
25 folks? All right, we'll stand adjourned now till 1:30.

26 THE CLERK: Order all rise. The commission of
27 inquiry is now in recess.

28

29 (LUNCHEON RECESS)

30

31 THE COMMISSIONER: Thank you.

32 THE CLERK: This commission of inquiry is now
33 back in session. Please be seated.

34 THE COMMISSIONER: Now, on our list we've --

1 MS. WALSH: We have Ms., Ms. Billie Schibler.

2 THE COMMISSIONER: Yes.

3 Now, this is the application that came in
4 yesterday.

5 MR. BRODSKY: Mr. Commissioner, my name is Greg
6 Brodsky, I'm appearing on Billie Schibler's behalf. The
7 reason that came in yesterday is because I was contacted on
8 Friday, this past week, and advised by Ms. Schibler that
9 her previous counsel had left a message for her, saying
10 that he had a conflict and was no longer able to represent
11 her. She made arrangements to come into the office the
12 following day, which was Monday, yesterday, and she did.
13 In the meantime, I called Ms. Walsh, on Friday, to advise
14 her of the phone call and the fact that she was coming in.

15 THE COMMISSIONER: Well, we -- I think that will
16 not be a prohibitive factor, the time factor is not
17 prohibitive at all. I'm, I'm interested in, in, in hearing
18 more from you about what actually it is you're asking.

19 MR. BRODSKY: Well, we say, first of all, that
20 the role of the Child Advocate in Manitoba is different
21 than the role of Child and Family Services, and one can't
22 supersede or take control of the other one. The Office of
23 the Children's Advocate was created under the Child and
24 Family Services Act and in 1996, consistent with the
25 legislative requirements, there was a review of the office
26 and in 1999, in response to recommendations from the
27 review, the Office of the Children's Advocate became an
28 independent office of the legislative assembly.

29 It currently operates in an arm's length
30 relationship with Child and Family Services, it exists to
31 represent the rights, interests and viewpoints of children
32 and youth who are receiving or are entitled to receive
33 services, as prescribed under the Child and Family Services
34 Act and the Adoption Act and is empowered to review,

1 investigate and provide recommendations on matters relating
2 to the welfare and interests of these children.

3 It prepares an annual report and my client was
4 elected for a three year term or appointed for a three year
5 term which has now concluded. There is now a new child
6 advocate.

7 She wrote -- was commissioned to write or asked
8 to write a number of reports, five in 2006. I take it
9 your --

10 THE COMMISSIONER: Yes, I'm fully familiar.

11 MR. BRODSKY: -- you have them. And by
12 order-in-council they are referred to and you are going to
13 be taking account of them.

14 The basis of the findings aren't in them, it is a
15 report based on conclusions that she made, after an
16 investigation that was conducted by her and some other
17 people in her office and when I spoke to Ms. Walsh about
18 whether she was going to be supporting the reports she told
19 me it would depend on the evidence that was presented.

20 I asked her, I said you're independent, aren't
21 you? She said she certainly is. So she is going to wait
22 until the evidence is presented to make the presentations.

23 The report, reports that --

24 THE COMMISSIONER: Just a minute, who is going to
25 wait to make them --

26 MR. BRODSKY: Ms. Walsh.

27 THE COMMISSIONER: To make what --

28 MR. BRODSKY: Your counsel.

29 THE COMMISSIONER: Okay, to make what
30 presentation?

31 MR. BRODSKY: No, to see if she is going to
32 support the reports that Ms. Schibler filed and that you've
33 looked at.

34 THE COMMISSIONER: Oh, well, we haven't heard

1 evidence about that, parts two and three are going to go
2 exhaustively into recommendations out of those --

3 MR. BRODSKY: Yes.

4 THE COMMISSIONER: -- reports that, that bear on
5 the Sinclair matter.

6 MR. BRODSKY: That's exactly --

7 THE COMMISSIONER: So I would -- I would be not
8 pleased if my counsel had done some prejudging on what
9 we're going to hear and where it's going.

10 MR. BRODSKY: She absolutely took the position
11 that she was independent, she appeared independent to me
12 and --

13 THE COMMISSIONER: Yeah.

14 MR. BRODSKY: -- and, therefore, I wanted it to
15 not take anyone by surprise so I wrote the letter, as short
16 as it was, because I didn't have all or any of the material
17 until yesterday.

18 THE COMMISSIONER: Well, you're, you're, you're
19 assuming, and I assume, and I think quite correctly, that
20 your client will be a witness here.

21 MR. BRODSKY: She will be a witness here.

22 THE COMMISSIONER: All right. Now, what is it
23 you want with respect to her?

24 MR. BRODSKY: She wants to not just be a witness.
25 Because she did the investigation that was necessary for
26 the implementation of those reports, such as what should
27 the role of the Child Advocate's office be, such as should
28 there be a paper review within the office of the Chief
29 Medical Examiner or the review that is conducted now by
30 examining and talking to witnesses? Should there be file
31 reviews, when should they be? Should there be -- what
32 should the definition of abuse be? When you talk about so
33 many abused children --

34 THE COMMISSIONER: Well, how are we going to get

1 into that with respect to her? She's written her report.

2 MR. BRODSKY: She has.

3 THE COMMISSIONER: She's going to come here and
4 be cross -- be examined and cross-examined on it, and under
5 rule 36, counsel -- or rules that we hopefully confirm
6 today, counsel for a witness may apply to the Commissioner
7 for permission to present that witness' evidence in chief
8 and you, you, you could -- you, you would have the right,
9 if you are her counsel, to take her through her evidence.
10 But it is something more than that that you want?

11 MR. BRODSKY: I suspect there is going to be more
12 than that because there are a good number of other
13 witnesses that will be testifying that she has had the
14 opportunity of examining against the backdrop of the
15 interviews she has conducted, the studies that she has
16 read, matters that were not contained in the reports that
17 she wrote.

18 THE COMMISSIONER: Well, is she, is she applying
19 to be a party to this proceeding?

20 MR. BRODSKY: Yes. Yes. But I can --

21 THE COMMISSIONER: For, for --

22 MR. BRODSKY: -- I can tell you that -- and the
23 reason that I put in the letter that it's limited standing
24 is she doesn't want to go into and we're not going to go
25 into how the child died, the police investigation, we're
26 not going to go into that. We're not going to go into
27 matters of First Nations' concerns, she's just going to
28 stay within the parameters of the reports that she wrote
29 and if there is any explanation that needs to be uncovered
30 or detailed, or gotten through the witnesses, she wants to
31 be able to participate in that fashion.

32 She doesn't want to be here in a -- she doesn't
33 want me to be here for the whole of this inquiry or for
34 most of it. We don't want to be prolixed in, in repeating

1 what somebody else has already done --

2 THE COMMISSIONER: Well, you know the
3 interesting --

4 MR. BRODSKY: -- but it's an independent office.

5 THE COMMISSIONER: -- the interesting thing is
6 that the, the, the advocate of today has not applied for
7 standing here.

8 MR. BRODSKY: Yes. She didn't do the report, she
9 at the time --

10 THE COMMISSIONER: Oh, I know, but there are
11 certain responsibilities that rest with the Advocate under
12 the statute but -- so what you're, you're, you're here
13 representing the former Advocate, based upon the report she
14 wrote following the, the death we're dealing with here.

15 MR. BRODSKY: Not a report but reports.

16 THE COMMISSIONER: Yes, reports.

17 MR. BRODSKY: Quite a number of reports, five of
18 them, yes.

19 THE COMMISSIONER: I agree.

20 MR. BRODSKY: Yes, she wants to be here because
21 she was the child advocate up until this past year. The
22 present child advocate was an employee of the department of
23 Child and Family Services, at the time being its CEO, and
24 is now the advocate.

25 I don't know and she doesn't know what this issue
26 of the conflict was or wasn't but I suspect, and this is, I
27 agree, a total guess, that it's an issue of conflict
28 because of representation of different departments and
29 that's why I wanted to express at the outset that the
30 Office of the Children's Advocate is independent.

31 THE COMMISSIONER: Oh, I understand that, I read,
32 I read, I read the Act.

33 MR. BRODSKY: Yes.

34 THE COMMISSIONER: But, but well then spell out

1 for me exactly what privileges, or rights, or whatever, you
2 want attached to a limited grant of standing.

3 MR. BRODSKY: I want her to be able to
4 cross-examine witnesses who want to testify or make
5 recommendations to you. If they are inappropriate she
6 wants to be able to say where they are inappropriate, or
7 appropriate or have to be expanded. She wants to be able
8 to say --

9 THE COMMISSIONER: You're not talking about her
10 recommendations as being inappropriate?

11 MR. BRODSKY: No. But in order to understand
12 recommendations that other people make, she wants to be
13 able to comment on those, if necessary. Because she has
14 the background. She is the only one in this room that
15 speaks for all children or at the time of the report spoke
16 for all children. She had the respect obviously of
17 government because they asked her to do those reports and
18 she submitted them.

19 She doesn't want them vetted through one
20 department, through one agency, or a combination of them.
21 She wants to be able to help and assist this commission in
22 understanding why recommendations are necessary and what's
23 wrong with recommendations that are made that aren't fact
24 based or procedurally sound.

25 THE COMMISSIONER: That is recommendations that
26 may come to this inquiry from persons other than herself?

27 MR. BRODSKY: Yes. But that are dealt with in
28 the course of the reports that she has submitted.

29 THE COMMISSIONER: What does that mean?

30 MR. BRODSKY: She dealt with it -- I expect that
31 she's dealt with most of the matters of concern that most,
32 or that most -- or all of the parties will be raising
33 already. She's made recommendations in connection with
34 those. Where they, where they need amplification or

1 support she wants to be able to support them, where they
2 don't, where they're ineffective or impractical, she wants
3 to be able to tell you.

4 THE COMMISSIONER: Well, who are the -- who, who
5 does she think these recommendations are going to come
6 from?

7 MR. BRODSKY: Well, we haven't started the
8 inquiry yet.

9 THE COMMISSIONER: But you're asking for a
10 limited grant.

11 MR. BRODSKY: As an example. I see that Kim
12 Edwards is here and she's one of the people that were, were
13 interviewed, was interviewed by my client. I don't know
14 what it is she is going to be saying in connection with the
15 circumstances surrounding the death or after the death but
16 this is part of her report and her independent assessment,
17 aside from Child and Family Services, that she wants to be
18 able to participate in. And again, I don't know what
19 anyone is going to say because we haven't even started the
20 inquiry yet. And I'm not saying we're going to be here to
21 participate or ask any questions, it may all go like you
22 would hope most examinations-in-chief go, should go.

23 THE COMMISSIONER: So if you're granted standing
24 it's -- it would -- as a party, it would not be your
25 intention to take part in the entire proceedings?

26 MR. BRODSKY: That's correct.

27 THE COMMISSIONER: Okay, I'll, I'll consider it,
28 I, I -- it's, it's a different request than we've had and
29 I, I can certainly understand that your client will be a
30 witness and that you would have the right to, to lead her
31 through her evidence if, if that was your choice but what
32 you're asking for, in addition, I'll -- I think I'll get a
33 -- order a transcript, available to me today, of what you
34 had to say so I can put it together and, and see if I can,

1 you know, get to understand exactly what you would like to
2 do.

3 MR. BRODSKY: For instance, I can -- the Office
4 of the Child Advocate, I don't know that anybody else is in
5 a position to advocate on behalf of -- or make
6 recommendations on behalf of changes that she's suggested
7 on her own -- on the office that she occupied for six years
8 and as you have already and correctly pointed out, the
9 Child Advocate is not making representations because they
10 are not asking to be party to these proceedings or even a
11 witness. Without my client it's going to be lost.

12 In the example, again, of -- you're going to be
13 dealing with systemic delay. What took so long to come to
14 a report, what's happened so long. She can tell you,
15 although she hasn't in the reports that you've seen, she
16 can tell you that the Office of the Chief Medical Examiner,
17 for instance, went from a paper review to a review that her
18 office has taken over, because of the lengthy delay it took
19 to get a report back, the lengthy delay it took, and
20 sometimes that's years, to get a report back meant that
21 there were many children at risk that shouldn't have been.

22 THE COMMISSIONER: But she can tell us as she
23 gives evidence, as a witness.

24 MR. BRODSKY: Yes.

25 THE COMMISSIONER: And I have no problem with
26 that.

27 MR. BRODSKY: But she can't dispute it as a
28 witness in connection with evidence that she hasn't heard
29 yet. She can't.

30 THE COMMISSIONER: Can't dispute what?

31 MR. BRODSKY: If someone's -- takes a contrary
32 position to her findings, she's unable to dispute it in
33 advance because she's a witness. She's not going to be
34 testifying 10 times, she's a witness and once she's

1 finished, she's finished.

2 THE COMMISSIONER: Well, I think there's a role
3 here for Commission counsel to be ferreting out the truth
4 and --

5 MR. BRODSKY: Yes.

6 THE COMMISSIONER: -- and weigh divergent things
7 that come to Commission counsel's attention through
8 interviews. Commission counsel has got the responsibility
9 of interviewing all the witnesses before they, before they
10 testify.

11 MR. BRODSKY: And you have a very good Commission
12 counsel, I'm not suggesting that she's inadequate at the
13 job, I'm not saying that at all.

14 THE COMMISSIONER: Oh, I, I wouldn't, I wouldn't
15 listen to you on that vein.

16 MR. BRODSKY: I think you made a good choice and
17 I have nothing further to say about that.

18 How it's operating, how the Children's Advocate,
19 Child Advocate's office is, is operating since it took
20 control of the Chief Medical Examiners -- the autopsies and
21 the reports and findings from them. You won't hear that
22 from other witnesses, there's nobody on your list that can
23 testify to that, appropriately.

24 I mean, I can go through the, the
25 recommendations, the hundreds of recommendations she's
26 made, you won't see and I don't see that you have or have
27 referred to the responses as to how well or how many that
28 were carried out, how many yet are to be carried out, what
29 the response is. I see that Child and Family Services has
30 said what they are doing in connection with some of the, of
31 the recommendations but it's the Child Advocate's Office,
32 it's my client's office, that promoted those requested
33 changes in the first place, pursuant to those reports, and
34 at the request of Christine Melnyk, the then minister, and

1 other ministers, as we went along.

2 She can tell you the difference between what they
3 say they are doing, what they are doing. I think you get
4 my point, at least the point I'm attempting to make.

5 THE COMMISSIONER: Well, I certainly get your
6 point about the value she can and will be to his Commission
7 in giving evidence.

8 MR. BRODSKY: Yes.

9 THE COMMISSIONER: I certainly get that pretty
10 clearly.

11 Okay, well, if that's, that's your presentation,
12 why I thank you for it, Mr. Brodsky, and I'll give
13 consideration to it, as I will all the others before I make
14 some ruling, hopefully tomorrow.

15 MR. BRODSKY: Thank you.

16 MS. WALSH: Next, Mr. Commissioner, Mr. Carman
17 S., who we are identifying simply by the initial of his
18 last name, to preserve the confidentiality of some of the
19 information that might come out in his submission.

20 THE COMMISSIONER: Oh, okay, I ...

21 MR. CARMAN S.: Good afternoon.

22 THE COMMISSIONER: Good afternoon, sir.

23 MR. CARMAN S.: I'm not really sure on what I can
24 contribute to this thing but I have experience dealing
25 with, with Peguis Child and Family Services. I am a band
26 member of Peguis.

27 I understood it be a choice I had on whether I
28 wanted to deal with, with I believe it was Gimli Child and
29 Family Service or my own band and I chose to deal with the
30 band, which at this point in time, I think was a pretty big
31 mistake.

32 I expected probably a lot more than what I got.

33 THE COMMISSIONER: And who did you select
34 services from?

1 MR. CARMAN S.: Peguis Child and Family Services.

2 THE COMMISSIONER: Right.

3 MR. CARMAN S.: But I've been dealing with them
4 for a number of years and I'm really not getting
5 satisfaction from them. I, I worry about my, my kids being
6 in their care or at this point in time, I've only got one,
7 one daughter that's still in care.

8 I've had two of my kids attempt suicide on the
9 same day, Peguis did not appear to be in any big hurry to
10 look me up. It was just a fluke that I found out. I don't
11 know if, if it -- the workers are the same workers that
12 were dealing with Phoenix Sinclair, but like I said, I'm
13 not very happy with the whole situation.

14 I keep thinking that if we have a complaints
15 commission for the RCMP how come we don't have one for
16 Child and Family Services? You know, it's -- appears to me
17 just as important one as the other.

18 THE COMMISSIONER: Because you see this is an
19 inquiry that is -- has its emphasis on that child's death
20 and what services she got and didn't get -- get, and how
21 they were provided and whether they were provided in a
22 satisfactory way to her, and then these, these various
23 reports were commissioned by the government to, to look at
24 the system and see what improvements could be made and
25 there are a series of recommendations in the reports that
26 apparently bear on the, on the interfacing and service
27 that, that this family got from the department and we're
28 going to be looking at as to whether, in fact, there, there
29 has been an implementation of those that, that are -- have
30 a bearing on all that went on in the, in the Sinclair case
31 and whether they really are improving the situation. So I
32 hear what you're saying about you wish there was a place
33 like the RCMP where you can take a public complaint,
34 insofar as welfare services are concerned, I'm afraid that

1 this Commission is not that place because of the attention
2 it's directed to the Sinclair situation.

3 I hear you and, and, and I, and I'm sure you're
4 likely not alone in wishing there was a place you could go
5 because, you know, child welfare and one's children are,
6 are, are the precious possessions one's going to have --

7 MR. CARMAN S.: Very important.

8 THE COMMISSIONER: -- in this life. And I, I, I
9 hear you but I, I don't think that, that probably we can
10 help you here because we're not a catchall for all of the
11 complaints with what's wrong with the welfare system
12 because we're zeroing in on what services did this -- did
13 they provide for her or what didn't they provide, was there
14 a falling through the cracks, if so, why was there, and
15 what's been done to prevent it in the future. That's what
16 we're here about.

17 MR. CARMAN S.: I just found there's a vast
18 difference between when I first got custody of my three
19 kids, I raised them by myself, but it was, it was, it was
20 not First Nations Family -- Child and Family Services who I
21 was dealing with but after my, my, my girls became
22 teenagers and started having problems, and Child and Family
23 Services got involved then I, I, I thought, at the time,
24 that Peguis Child and Family Services would be the one
25 better (inaudible) and it wasn't. And you know I'm really
26 not, not too sure what to do about it at this, at this
27 point or if I can even -- even if I can do anything. But
28 if I had a choice, I wouldn't have, I wouldn't have -- like
29 if I knew things -- if I would have known the way things
30 were going to turn out, I would not have gone through
31 Peguis CFS, would have not -- would not have asked for
32 their help or expected anything from them, you know.

33 THE COMMISSIONER: Because it hasn't worked out
34 to your, to your advantage or satisfaction.

1 MR. CARMAN S.: No, it's -- none of it's worked
2 out good at all, no.

3 THE COMMISSIONER: I hear you.

4 MR. CARMAN S.: And I don't, I don't know, like I
5 said, if I can even contribute anything to this situation.

6 THE COMMISSIONER: Well, I, I think probably this isn't the
7 place because you, you, you have no involvement at all with
8 the, with the Sinclair situation. I know what you're
9 telling me is because you're -- you had services from
10 another agency, operating on another reserve, but you have
11 some experiences you would like to put on the public record
12 and see what can be done to help you. I -- that's what I
13 hear and I understand you. But I, I just don't think this
14 is going to be able to be the place for that because of the
15 limitations put upon the, the mandate I have been given.

16 MR. CARMAN S.: I see.

17 THE COMMISSIONER: But I, I thank you for coming
18 and I will speak specifically to your request tomorrow
19 afternoon.

20 MR. CARMAN S.: Okay.

21 THE COMMISSIONER: Now, is there anything else
22 you wanted to say?

23 MR. CARMAN S.: No, that's all I can think of for
24 now and I appreciate the time.

25 THE COMMISSIONER: Thank you very much.

26 MR. CARMAN S.: Thank you.

27 MS. WALSH: Next we'll hear on behalf of Steve
28 Sinclair.

29 THE COMMISSIONER: Right.

30 Welcome back.

31 MR. DERWIN: Good afternoon, Mr. Commissioner,
32 George Derwin appearing on behalf of Steve Sinclair.

33 THE COMMISSIONER: Yes.

34 MR. DERWIN: Steve Sinclair is --

1 THE COMMISSIONER: Yes.

2 MR. DERWIN: -- seated in the second row. As
3 biological father of Phoenix Sinclair, Steve Sinclair is a
4 victim with a direct and substantial interest in all of the
5 subject matter before the inquiry, so phases one, two and
6 three.

7 There is an additional issue here in that Mr.
8 Sinclair has been tainted by the actions of Samantha
9 Kematch and Mr. Karl McKay and members of the public
10 believe, and some members of the public believe that he is
11 a child abuser and a child killer. Well, nothing could be
12 further from the truth, and in fact, if you look at Steve
13 Sinclair's work with the Phoenix Sinclair Foundation he is
14 on a mission to see that, that we have a better society.

15 He has a number of questions that are both
16 personal but also to seek a larger purpose than just him as
17 a, as a, as a mere witness to the matter and he has very
18 important questions about the monitoring that CFS provided.

19 Child and Family Services was aware of some of
20 the issues pertaining to Samantha Kematch at the time of
21 the birth of Phoenix Sinclair and, in fact, Phoenix
22 Sinclair was taken away, immediately following birth, and
23 then subsequently returned to the family and that's -- in a
24 matter of months that's where Steve and -- Sinclair and,
25 and Kim Edwards started co-parenting Phoenix Sinclair.

26 So the, the issues were resolved, Family Services
27 was, was (inaudible) but they knew about the issues related
28 to it. And so when Phoenix Sinclair was taken in, in April
29 15th of 2003 the questions would be why, why did it -- the,
30 the child welfare agencies fail to notice when Phoenix
31 Sinclair went missing for nine months? How could long term
32 serious abusive treatment take place without Child and
33 Family Services being noted. And he seeks appropriate
34 systemic changes to the child welfare system to ensure that

1 children are not at risk, the children are appropriately
2 cared for, if they are either under the supervision or in
3 care of Child and Family Services.

4 And I mentioned earlier on in my submission on
5 behalf of Kim Edwards that the majority of the parties
6 before this Commission have a singular vested interest and
7 I submit an interest to protect themselves. The views of
8 the child protection agencies require a balance and
9 alternative perspectives put forward and the perspective of
10 a parent who has lost his daughter is crucial to this
11 inquiry.

12 This death was preventable. While 20/20
13 hindsight cannot bring Phoenix Sinclair back, her death
14 must be used as a call to action. Steve Sinclair feels
15 that the perspective of the agencies will be more for their
16 own protection and he wants to ensure that what, what
17 happens gets placed under a microscope to see what
18 happened, what went wrong, and what could be done to
19 prevent this again.

20 So we're not here -- he's not here to cast
21 aspersions on anyone, he's not here to take down anybody or
22 take down the system, he's there to say it's a, it's a
23 reasonably necessary system, it will always be there, will
24 always be necessary, but it can be better.

25 That's my submission.

26 THE COMMISSIONER: Thanks, Mr. Derwin. All
27 right, number 15.

28 MS. WALSH: Yes, Southern Chiefs Organization.

29 MR. FUNKE: Good afternoon, Mr. Commissioner. My
30 name is Jay Funke of Funke Poudrier Law Offices. I am
31 counsel for the Southern Chiefs Organization, also known as
32 the SCO at these proceedings. I am accompanied today by
33 SCO Chief of Staff, Mike Bear, who is seated in the
34 gallery. We would like to start off by thanking the

1 Commission for this opportunity to present our application
2 for standing at the commission of inquiry into the
3 circumstances surrounding the death of Phoenix Sinclair.

4 I'll open my remarks by providing the Commission
5 with a brief introduction to the organization.

6 The Southern Chiefs Organization, SCO, is an
7 incorporation political entity that advocates and lobbies
8 on behalf of its 33 First Nation member communities in
9 Southern Manitoba. SCO was established and incorporated in
10 1998, to support the development of Southern First Nations
11 political, community, human, social and economic
12 development needs and capacity.

13 The SCO is governed by the elected chiefs of the
14 33 member communities, who in turn elect a grand chief to
15 advocate -- sorry, to advance their political agenda and
16 mandate. Bill Traverse was the SCO's first grand chief and
17 served a three year term, from 1998 to 2000. Following
18 that, Ms. Margaret Swan, Chris Henderson and Morris J.
19 Swan-Shannacappo. Current grand chief, Morris
20 Swan-Shannacappo is in his second term and was first
21 elected in 2000.

22 The SCO adopted its constitution in 2000 at a
23 gathering of the chiefs, which gatherings continue to be
24 referred to as the chiefs in summit.

25 The mandate of the SCO can be summarized as
26 follows:

27 First, to assist member First Nations in the
28 advancement and achievement of their goals, as mandated by
29 the chiefs in summit. To provide a common front for
30 initiatives mandated by the chiefs when meeting in summit.
31 To promote and assist member First Nations in providing
32 good government for their First Nations. To assist member
33 First Nations in promoting and defending treaty and
34 Aboriginal rights as mandated by the chiefs in summit, and

1 to assist member First Nations in holding the federal and
2 provincial governments, their agents and departments
3 responsible for the fulfilment of their fiduciary duties
4 and other responsibilities and obligations to their member
5 communities. The SCO also provides support to off reserve
6 individuals and affiliated communities in advocacy issue
7 and policy development.

8 Since its formation, the role of the SCO and
9 Aboriginal child welfare has been formalized by the
10 province through the passing of the Child and Family
11 Services Authorities Act which created the First Nations of
12 Southern Manitoba Child and Family Services Authority
13 which, as you have already heard this morning, is referred
14 to as the Southern Authority.

15 Section 6(3) of the CFS Authorities Act stipulates
16 that the board of the Southern Authority is to be appointed
17 by the Assembly of Manitoba Chiefs Secretariat Inc., also
18 known as the AMC, who you have heard from today. Based on
19 the recommendations of the Southern First Nation members of
20 the Assembly.

21 Insofar as the Southern Chiefs Organization is
22 the body that represents these members of the Assembly, the
23 AMC accepts nominations for appointment to the Southern
24 Authority Board from the SCO and, in turn, appoints those
25 nominees to the board.

26 Furthermore, the Minister of Family Services and
27 Housing, as he was then known, in meetings with the
28 Leadership Council established under the CFS Authorities
29 Act, has acknowledged the province's intent to amend the
30 legislation in order to afford a transfer of this power of
31 appointment from the AMC to the SCO. This anticipated
32 legislative amendment would recognize the proper role of
33 the SCO in the governance and oversight of the Southern
34 Authority and the unique position of the SCO in

1 representing the interests of their membership in the
2 appointment of its board.

3 The minister has also recently issued an
4 invitation to the SCO as a member of the Leadership Council
5 to meet for an organizational review with the four CFS
6 authorities which will include a specific focus on the
7 current government structures.

8 In keeping with this initiative, a resolution was
9 passed by the SCO Chiefs in Summit on October the 6th, 2010
10 supporting the amendment of the CFS Authorities Act to
11 transfer this responsibility from the AMC to the SCO. And
12 more recently, on May 25th and 26th, the chiefs of the SCO
13 once again met and a resolution was passed by the Chiefs in
14 Summit with respect to this inquiry.

15 THE COMMISSIONER: Well, let me stop and ask you,
16 are the, are the chiefs who belong to the organization that
17 you represent today --

18 MR. FUNKE: Yes.

19 THE COMMISSIONER: -- also members of the
20 Assembly of Manitoba Chiefs?

21 MR. FUNKE: They are.

22 THE COMMISSIONER: So they, they've got a dual
23 membership?

24 MR. FUNKE: That's correct.

25 THE COMMISSIONER: So they're applicants under,
26 under two separate submissions to, to me?

27 MR. FUNKE: No, they're not.

28 THE COMMISSIONER: Okay.

29 MR. FUNKE: And the distinction is, and I'll get
30 to that in my submission.

31 THE COMMISSIONER: All right.

32 MR. FUNKE: The distinction is, is that we carry
33 their mandate, whereas the AMC does not.

34 THE COMMISSIONER: You what?

1 MR. FUNKE: We have their mandate whereas the AMC
2 does not, and that was the point I was just about to make,
3 was that when the Chiefs of the Southern Chiefs
4 Organization met, in May of this year, they passed a
5 specific resolution giving the mandate to advance their
6 interests with respect to this inquiry to the SCO.

7 THE COMMISSIONER: To the?

8 MR. FUNKE: Southern Chiefs Organization. So the
9 33 member First Nations of the SCO met in summit, in May of
10 this year, represented by the chiefs of those communities.
11 They then passed a resolution giving their mandate to
12 represent their communities' interests before this inquiry
13 to the Southern Chiefs Organization, not to the AMC.

14 THE COMMISSIONER: So you're saying that the, the
15 AMC is not representing the members of your organization?

16 MR. FUNKE: No. They specifically have chosen
17 the SCO to be their advocate.

18 THE COMMISSIONER: And what was the reason that
19 they're not prepared to join with the, with the larger
20 organization?

21 MR. FUNKE: I'll get to that again later in my
22 submission but there are a number of issues. First of all,
23 the AMC doesn't represent only the Southern First Nation
24 members of the Assembly, they have also an obligation to
25 the Northern First Nation members of the Assembly.

26 THE COMMISSIONER: Oh, that's right, that's
27 right. But I --

28 MR. FUNKE: And their interests are not
29 necessarily the same.

30 THE COMMISSIONER: -- I got to be concerned in
31 the public interest that, that the, the grants here are not
32 so divergent that (a), it's going to take an inordinate
33 amount of time to get the work done, and (b), going to cost
34 money that is from the public purse.

1 MR. FUNKE: I appreciate that, Mr. Commissioner.
2 The other difficulty, of course, is that we are currently
3 bound up in litigation on the very subject matter that this
4 inquiry will look into, which is the governance structures
5 and the appropriate path forward for Aboriginal child
6 welfare in this province. We're currently in litigation
7 where the Southern Authority has sued the AMC, the province
8 and the members of the SCO.

9 THE COMMISSIONER: I thought that was over a
10 governance issue?

11 MR. FUNKE: Well, it is but one of the issues
12 that this inquiry may look at, as part of its inquest, are
13 issues relating to the future of, of child welfare in this
14 province insofar as Aboriginal child welfare is concerned.

15 If, if that's the case --

16 THE COMMISSIONER: What, what are, what are they
17 in court about? Is it -- if you could just phrase that for
18 me.

19 MR. FUNKE: Sure. It's an issue --

20 THE COMMISSIONER: Who is the plaintiff?

21 MR. FUNKE: The plaintiff is the Southern
22 Authority.

23 THE COMMISSIONER: Okay.

24 MR. FUNKE: Yeah, it's a notice of application
25 that they've brought, requesting clarification of the roles
26 and responsibilities --

27 THE COMMISSIONER: And, and --

28 MR. FUNKE: -- of the board, vis-a-vis the people
29 who --

30 THE COMMISSIONER: -- who is the defendant or
31 defendants?

32 MR. FUNKE: The AMC is a defendant, specifically
33 named, the Province of Manitoba is a defendant,
34 specifically named, and five member chiefs of the SCO are

1 specifically named, as well.

2 THE COMMISSIONER: Oh, of your organization?

3 MR. FUNKE: Of our organization.

4 THE COMMISSIONER: They're suing five of their
5 own chiefs?

6 MR. FUNKE: Well, they're suing five of the
7 chiefs whose communities they are responsible to and, and
8 accountable to. These five chiefs have been nominated by
9 the SCO for appointment to the Board, the AMC accepted that
10 nomination from the SCO and, in turn, appointed them to the
11 Board. The Southern Authority then sought injunctive
12 relief, preventing those chiefs from taking their seats on
13 the Board.

14 The CEO of the Southern Authority has gone on
15 record and said to the media that there is no role for the
16 chiefs of these communities in child welfare, in that
17 capacity. So their interest could not be more divergent
18 from those of my client. My client takes the position that
19 as leaders of the community they are more than just
20 political representatives and as a result they say that
21 they have a vested interest in the outcome, not only of
22 these proceedings but any inquiry into the future of
23 Aboriginal child welfare.

24 The whole notion of devolution was brought about
25 as a result of the AGICWY report and it recognizes the
26 unique role of Aboriginal communities with respect to child
27 welfare and the obligations that the government has with
28 respect to giving them an opportunity to be heard on any
29 matter that could affect the future of child welfare
30 insofar as those services are provided, not just in their
31 communities but to members of their communities, wherever
32 they may reside.

33 So, so I think that the, the interests are
34 clearly divergent and we are the only organization that can

1 speak on behalf of these communities. They have voted,
2 they have indicated that we are the group that they want to
3 speak on their behalf.

4 I don't want to be too lengthy so I'm going to
5 skip ahead.

6 THE COMMISSIONER: No, I've held you up with my
7 questions so --

8 MR. FUNKE: All right.

9 THE COMMISSIONER: -- you're okay.

10 MR. FUNKE: Thank you very much.

11 I'm just going to skip ahead somewhat in my
12 presentation to deal specifically with the test for whether
13 a potential party has a direct and substantial interest in
14 the subject matter.

15 The Commissioner has already had the decision of
16 the Ontario Royal Commission on Northern Environment
17 referred earlier this morning so I don't plan to go through
18 that at length but there are a number of factors that, that
19 are set out in that decision that I would like to
20 specifically draw the Commission's attention to.

21 Justice Linden, in paragraph eight, wrote the
22 following:

23

24 The potential importance of the
25 findings and the recommendations
26 to the individual involved would
27 have to be considered. If a
28 particular person --

29

30 Or as in our case a group of persons --

31

32 -- would be greatly affected by a
33 recommendation or a finding in
34 relation to him or his interests

1 and that would be taken into
2 account in deciding whether he had
3 a substantial and direct interest.

4

5 And a little further in the same paragraph:

6

7 It seems to us that the value of
8 the potential interest that is
9 being affected would have to be
10 considered in arriving at its
11 conclusion. Similarly, if one
12 person is potentially affected,
13 that might be viewed differently
14 than if 100 or 1000 or more
15 persons may be affected. None of
16 these specific items would be
17 controlled. It is necessary to
18 look at all of these factors as
19 well as any others in the context
20 of each inquiry. The decision
21 must be made after examining all
22 of the circumstances. Essentially
23 what is required is evidence that
24 the subject matter of inquiry may
25 seriously affect an individual --

26

27 Or as in our case a group of individuals.

28

29 As I have indicated, the SCO represents not just
30 the chiefs of the 33 member First Nations of Southern
31 Manitoba but, more importantly, the communities that they
32 represent. This accounts for tens of thousands of First
33 Nation families across the southern half of this province
34 and represents the majority of First Nation peoples in
 Manitoba. In turn, their chiefs have met in summit and

1 they have given their mandate to the SCO to represent their
2 interests at this inquiry. As a result, I am here on
3 behalf of the SCO, representing all of the families in each
4 of their communities to represent -- sorry, to request,
5 rather, that they be granted standing at this inquiry which
6 has been tasked with making recommendations that will
7 almost certainly impact the delivery of child and family
8 services in their communities.

9 More than any other group, these are the people
10 whose lives will be most directly affected by any
11 recommendation that this Commission may make. Furthermore,
12 it's hard to overstate the significance of my client's
13 interest in the subject matter of this inquiry. As
14 indicated, any recommendation made by this Commission will
15 likely impact the delivery of CFS services in these
16 communities and by extension to the families with whom
17 these agencies work.

18 The disproportionate representation of these
19 families in the CFS system across the province only serves
20 to further magnify the potential impact of any
21 recommendation the Commission may make.

22 Moreover, the Aboriginal Justice Inquiry, Child
23 Welfare Initiative further recognizes that child welfare
24 services must be delivered to First Nation peoples in a
25 manner that reflects their unique status as well their
26 cultural and linguistic heritage and the First Nation
27 peoples have unique authority, rights and responsibilities
28 to honour and care for their children.

29 The recognition of this right to control the
30 delivery of child and family services and programs for the
31 respective community members requires that the effective
32 communities be consulted on any manner of process that
33 affects the delivery of those services. As a result it is
34 similarly difficult to overstate not only the importance of

1 the subject matter of this inquiry to the communities
2 represented by the SCO but also on the obligation of the
3 Commission to provide them an opportunity to be involved in
4 any process that may result in changes to the delivery of
5 child welfare services in their communities.

6 Finally, the Minister's invitation of the CSO to
7 meet as a member of the Leadership Council for an
8 organizational view -- review, pardon me, of the four
9 authorities, which will include a specific focus on the
10 existing governance structures recognizes the role of the
11 SCO in helping to form the future direction and development
12 of Aboriginal child welfare in this province.

13 To the extent that this commission will make
14 recommendations that may impact upon these issues, the SCO
15 has a direct and significant interest in the subject matter
16 of this inquiry.

17 The final part of my submission deals with why
18 we're looking for separate and distinct standing but I
19 think you have my, my position on that point so I don't
20 intend to go to it in any great of length.

21 In closing, I would just like to thank the
22 Commission for the opportunity to make the request on
23 behalf of the SCO, Grand Chief Morris Swan-Shannacappo, the
24 Assembly of Chiefs, comprising the 33 First Nation members
25 of the SCO, their communities and their families.

26 THE COMMISSIONER: And is that reason have as its
27 base the, the difficulties the two organizations are having
28 which is now resulted in litigation?

29 MR. FUNKE: Well, that litigation focuses on one
30 of the core areas that I anticipate the inquiry to be --

31 THE COMMISSIONER: Well, that's the, the root of,
32 of why you're seeking separate standing, because you're
33 litigating on that issue in the courts.

34 MR. FUNKE: That's one of the two reasons, I

1 think the other reason that's just as salient is the fact
2 that we have the specific mandate of these people and their
3 agency and organization does not. They can't claim to
4 speak on their behalf because they haven't received their
5 mandate. These communities have come together and they
6 have said we do not want an organization that is not solely
7 answerable to us to advocate our position before the
8 inquiry.

9 THE COMMISSIONER: Well, you say that, that the,
10 that the Assembly of Manitoba Chiefs that spoke at the
11 outset this morning, gave their client instructions to
12 speak as he did without the authority of their -- of his
13 client?

14 MR. FUNKE: They didn't have the authority of my
15 client or the member, member communities of my client.

16 THE COMMISSIONER: They may have well had a
17 majority vote of their own council.

18 MR. FUNKE: What process they followed is not
19 disclosed in their materials and they didn't comment on it
20 today. I don't know what process they followed, I don't
21 know how they claim to have that mandate. What I know is
22 that the 33 member communities of the SCO met in summit and
23 they have made a decision about the fact that they want the
24 SCO organization to speak on their behalf because the SCO
25 organization is answerable to them and only to them. I
26 don't know what process the MC may have followed they, they
27 haven't expanded upon that in their submissions and it's
28 not for me to comment.

29 THE COMMISSIONER: Right. I hear you. Thank
30 you, Mr. Funke.

31 MR. FUNKE: Thank you.

32 MS. WALSH: Next we have Mr. Lawrence Traverse
33 and Ms. Janelle Sutherland.

34 MR. DERWIN: Good afternoon, Mr. Commissioner, my

1 name is George Derwin. I appear in amicus curiae, I do not
2 have authority to speak on behalf of Lawrence Traverse and
3 Janelle Sutherland, however they are clients of the Phoenix
4 Sinclair Foundation and they were intending on being here
5 today to do oral representations. Our last contact with
6 them was yesterday at 11:00 p.m., they advised that they
7 may have some transportation issues getting here so I am
8 advising, Mr. Commissioner, that they did intend to proceed
9 but had alerted us to transportation issues.

10 Thank you.

11 THE COMMISSIONER: Well, I'll certainly give
12 consideration to the written submissions they have made and
13 if you wish to say anything in support of it, I would
14 certainly hear you, Mr. Derwin.

15 MR. DERWIN: I can't speak on their behalf --

16 THE COMMISSIONER: Right.

17 MR. DERWIN: -- but they are -- all I can say is
18 they are a client of Phoenix Sinclair Foundation but they
19 were going to make their own representations but --

20 THE COMMISSIONER: Well, I'll --

21 MR. DERWIN: -- they're not represented by legal
22 counsel.

23 THE COMMISSIONER: -- I'll certainly give their
24 written submission the attention that I will other written
25 submissions.

26 MR. DERWIN: Thank you.

27 MS. WALSH: Finally, the University of Manitoba
28 Faculty of Social Work.

29 THE COMMISSIONER: Yes, sir?

30 MR. FRANKEL: Good afternoon, sir. My name is
31 Harvey Frankel and I'm Dean of the Faculty of Social Work
32 at the University of Manitoba.

33 The -- my letter of response to, to the
34 invitation to apply for intervener status is on tab 17, I

1 believe.

2 THE COMMISSIONER: Yes, I have it here.

3 MR. FRANKEL: But I am here on, on behalf of the
4 University and specifically the Faculty of Social Work, to
5 apply for intervener status for, for the entire inquiry.

6 The Faculty of Social Work at the University of
7 Manitoba is the only accredited social work education
8 program in the province. Therefore, most -- certainly the
9 majority of social workers with university degrees who
10 practise in child welfare are graduates of, of our
11 programs. Of course, there are social workers in the
12 province who do not have social work degrees and still
13 practise in child welfare.

14 It's my hope that, that I guess two things can
15 happen. One is that we can be of assistance to the inquiry
16 in terms of providing general information about the
17 education of social workers to practise in Manitoba's child
18 welfare system and it may also be that particular faculty
19 members have specific expertise related to, to child
20 welfare and so we have a long tradition and reputation of,
21 of doing research in the area of child welfare.

22 Secondly, it's my hope and, and my conviction
23 that the proceedings of the inquiry will be of great
24 relevance to the faculty. We are in the midst of reviewing
25 our programs and restructuring our, our programs, both
26 graduate and undergraduate and, of course, child welfare is
27 one of the, the largest employers or social work graduates
28 in the province so the proceedings could be very
29 informative for the faculty and, and could help us meet the
30 needs of -- the educational needs of, of child welfare in
31 the province.

32 That's, that's really the basis of our request,
33 sir.

34 THE COMMISSIONER: Well, thank you, I have read,

1 I have read your application and appreciate that it's the
2 intervener status you seek, so you could make some
3 submission to us at the close of the hearing --

4 MR. FRANKEL: Exactly.

5 THE COMMISSIONER: -- and I'll indicate my
6 response tomorrow when I deal with the others.

7 MR. FRANKEL: Thank you very much.

8 THE COMMISSIONER: Thank you for being here.

9 MS. WALSH: Mr. Commissioner, I was advised by
10 counsel for the Northern Authority that he had one
11 clarification, if you would permit him to make.

12 THE COMMISSIONER: Yes, certainly.

13 MR. HARVIE: Thank you, Mr. Commissioner. For
14 the record, Harvie, appearing on behalf of the Northern
15 Authority, of course.

16 THE COMMISSIONER: Welcome back.

17 MR. HARVIE: Thank you, sir.

18 With respect to the reason that we're speaking to
19 you, there's been a change in the instructions that I have
20 received, as a result of some of the comments and
21 observations that were made this morning. The Northern
22 Authority is no longer instructing me to advocate for their
23 standing in the first phase of the -- of this particular
24 inquiry. It is, however, Mr. Commissioner, of vital
25 importance to the Southern -- beg your pardon, the Northern
26 Authority to participate in phases two and three and that
27 remains their position.

28 I would -- earlier in my remarks had, in answer
29 to some of the questions that the Commissioner had of me,
30 regarding the fact, the interest that the Northern
31 Authority might have in this matter, I made a remark that
32 there was a reason why there were these separate
33 authorities. If I may be very briefly permitted?

34 THE COMMISSIONER: Yes, yes.

1 MR. HARVIE: Thank you. To begin with, it is
2 presumed that the recommendations that the Commissioner
3 will make, pursuant to paragraph two of the
4 order-in-council will be as stated, that there will be such
5 recommendations as you consider appropriate to better
6 protect Manitoba children.

7 The recommendations, therefore, are presumed to
8 lead to potentially -- they may lead to new intake and
9 service models which will have a direct impact on, on the
10 operations of the Northern Authority.

11 Intake and service models and standards are all
12 or are matters that are dealt with and implemented by the
13 Northern Authority. As to the Northern Authority and why
14 it exists of course the Commissioner is well aware, a
15 reference was made by Mr. Funke to the AGI and the
16 initiatives that gave rise to this very important piece of
17 legislation, the Authorities Act which, to some extent,
18 it's obvious, was done to set to right some of the
19 horrendous issues of the past in child welfare involving
20 First Nations people which, of course, are known to you.

21 In the preamble to the Child and Family Services
22 Authorities Act, which is found at tab "D" of tab five of
23 Exhibit 1 in this matter, the Act, itself, Mr.
24 Commissioner, states, in the third paragraph of the
25 preamble, and I'll wait until you have that, that's tab "D"
26 of our submission, tab five of Exhibit 1.

27 THE COMMISSIONER: Yes, I have it.

28 MR. HARVIE: Thank you, sir.

29 Now, paragraph three:

30

31 "WHEREAS the development and
32 delivery of programs and services
33 to First Nations, Metis and other
34 Aboriginal people must respect

1 their values, beliefs, customs and
2 traditional communities and
3 recognize the traditional role of
4 women in making decisions
5 affecting family and community."
6

7 And then to carry on and,
8

9 "WHEREAS it is important to
10 recognize peoples' needs and
11 preferences in all aspects of the
12 management and delivery of child
13 and family services, including
14 preferences based on ethnic,
15 spiritual, linguistic, family and
16 cultural factors."
17

18 It's those references, Mr. Commissioner, to the
19 development and delivery of programs. It is our respectful
20 submission that your recommendations may very well find
21 their way into the establishment of new models.

22 We would suggest, with respect, and for your
23 consideration, that to embark upon those recommendations
24 without the input of the Northern Authority with respect to
25 the special role that it has in this system, would not be
26 appropriate, as it may offend the preamble, it may not take
27 into account the, the specific needs, beliefs, customs and
28 traditions of the communities that are served by the
29 Northern Authority and we would suggest for your
30 consideration that it is, therefore, important for the
31 Northern Authority to be a party with full standing with
32 respect to phases two and three of this inquiry.

33 To further direct your attention, if I may,
34 please, very briefly, at tab "D", again in the same tab

1 that I have been referring to, Section 17(1) --

2 THE COMMISSIONER: Of the same Act?

3 MR. HARVIE: That's right, sir, the Authorities
4 Act.

5 THE COMMISSIONER: Yes.

6 MR. HARVIE: Sets out that:

7

8 "The Northern Authority is
9 responsible for administering and
10 providing for the delivery of
11 child and family services to the
12 following persons.

13 ... people who are members of the
14 Northern First Nations specified
15 in the regulations."

16

17 That's Exhibit 2.

18

19 "... persons who are identified
20 with those Northern First Nations
21 and

22 ... other persons;

23 as determined in accordance with
24 (the) protocol(s) established ..."

25

26 And then if I may please, again, paragraph --
27 Section 19 of the Act, on the following page, stipulates in
28 19(b), that it is the Northern Authority which:

29

30 "develop(s) objectives and
31 priorities for providing child and
32 family services consistent with
33 provincial objectives and
34 priorities."

1 And then, following that:

2

3 "(to) ensure that culturally
4 appropriate standards for
5 services, practises and procedures
6 are developed."

7

8 Now, it's that requirement of the Northern
9 Authority, requirement made of them, to ensure that
10 consistency between the provincial standards and the, the
11 culturally appropriate standards that are necessary and
12 that are respected and enshrined in this particular
13 legislation.

14 I wanted to bring that to your attention because
15 we would suggest, for your consideration, that to lump the
16 authorities together in, in one particular grant of
17 standing would, to the -- in the view with respect of the
18 Northern Authority, be to diminish what was very hard
19 fought for and negotiated for in establishing them in the
20 first place to protect the particular cultural needs and
21 community needs of the, of the communities that are
22 identified in the regulations.

23 It may very well be that an intake model or
24 perhaps a recommendation that you would make, sir, would
25 give rise to a new intake model, or mode, or method.
26 Without -- that would seem to perhaps to be appropriate in
27 the City of Winnipeg, however, without the input of the
28 Northern Authority, without their participation in
29 examining those issues, the fear would be, sir, that this
30 would potentially lead to a disconnect, a disregard, that
31 again is actually enshrined in the legislation.

32 We bring this to your attention, and I appreciate
33 the opportunity to amplify that concern, and also to
34 clarify the standing that we're seeking. Those are my

1 remarks, unless you have any questions, sir.

2 THE COMMISSIONER: Thanks, Mr. Harvie.

3 MR. HARVIE: Thank you, sir.

4 THE COMMISSIONER: Well, I gave Mr. Harvie the
5 opportunity of a final word, I hope we're not going to go
6 on indefinitely but if anyone else feels they want to get
7 something else on the standing issue, this is the final
8 chance. And I see nobody so motivated so we'll consider,
9 with reasonable view of the room, that we have reached the
10 stage where we move to the next item and thank you for your
11 presentations this morning and this afternoon.

12 MS. WALSH: Mr. Commissioner, if we might take
13 just a brief recess and then come back to deal with the two
14 remaining issues, the rules and any other preliminary
15 matters --

16 THE COMMISSIONER: Yes.

17 MS. WALSH: -- that counsel might identify.

18 THE COMMISSIONER: Ten minutes?

19 MS. WALSH: Sure.

20 THE COMMISSIONER: Ten minutes it will be.

21 THE COMMISSIONER: Thank you.

22 THE CLERK: Order all rise. This commission of
23 inquiry is now in recess.

24

25 (BRIEF RECESS)

26

27 THE CLERK: This commission of inquiry is now
28 back in session. Please be seated.

29 MS. WALSH: All right, Mr. Commissioner, now that
30 we have completed the applications for standing, as I
31 indicated this morning, we are going to take a minute to
32 talk about the draft rules of procedure and practise that
33 have been circulated and posted on our website.

34 I recognize that at this point the parties,

1 themselves, have not been confirmed and so to that extent
2 we are looking for the commentary of individuals and
3 entities who have not been given status but in the
4 interests of time, because we're likely not going to come
5 back until tomorrow at 1:00 and we have other matters to
6 deal with after you deliver your ruling, I did want to
7 raise a few issues with respect to the rules, if that's all
8 right with you, and to hear from others.

9 THE COMMISSIONER: Yes. And I think it would be
10 helpful to me to know if there are objections or concerns
11 about any of them, what those are. I, I just don't want to
12 proceed with the work I am going to do tonight and tomorrow
13 morning assured that there's no problems here and everyone
14 agrees with these rules. So I would like to do that and
15 bearing in mind that, that the decisions you speak of have
16 not been made.

17 MS. WALSH: Thank you. Before we hear from
18 others I do want to identify for counsel two changes which
19 I suggest be made to the rules that they already have. The
20 first is to Section 21 of the rules, under the heading
21 Witness Interviews and Disclosure.

22 THE COMMISSIONER: Yes.

23 MS. WALSH: That rule reads:

24

25 "Commission counsel may interview
26 persons believed to have
27 information or documents bearing
28 on the subject-matter of the
29 Inquiry. The Commissioner may
30 choose whether or not to attend an
31 interview ..."

32

33 I propose to end the rule there. The rest of it,
34 as it's written, says:

1 witness or --"

2

3 And I want to insert the word if. If the person
4 interviewed is not otherwise able to be called to testify
5 at "in the public hearings referred to in paragraph 2" and the
6 rest is the same, Mr. Commissioner, as it appears in the rules
7 as they are at tab "C" of Exhibit 1.

8 So it's just that first line would read or if the
9 person interviewed is not otherwise able to be called to
10 testify.

11 And I identify, Mr. Commissioner, that of course our
12 do also make reference to issues involving the media and
13 access of the media and the public to the hearings and those
14 are at rules 42 through 44.

15 Those are my only comments with respect to any
16 changes or things that I want to point out in the rules. If
17 anyone wants to come forward to speak to something at this
18 point, this would be the time.

19 THE COMMISSIONER: Is there any problem with the
20 two changes that Commission counsel wants to make to those
21 rules, the first to Section 21, the section -- second to
22 Section 25?

23 All right, we'll consider those changes made. I
24 am not asking for a full confirmation of those set of rules
25 yet --

26 MS. WALSH: Right.

27 THE COMMISSIONER: -- but we'll consider that
28 they have been revised pro tem.

29 MS. WALSH: Thank you. And, and after your
30 ruling tomorrow I will be asking for an approval of the
31 rules in a formal way, subject to anything that we hear
32 today that might need to be addressed.

33 THE COMMISSIONER: All right. Now, I see counsel
34 on his feet, I would be -- this is a new matter, relating

1 to the rules?

2 MR. SMORANG: Yes.

3 Mr. Commissioner, again Smorang --

4 THE COMMISSIONER: Yes.

5 MR. SMORANG: -- and I appear on behalf of the
6 Manitoba Government and General Employees Union, MGEU. I
7 just want to take a minute or two to put the Commissioner
8 and the parties on notice and this, of course, is assuming
9 that my client gains standing --

10 THE COMMISSIONER: Yes.

11 MR. SMORANG: -- that my client will be seeking
12 certain restrictions on the scope of the media reporting of
13 the inquiry, particularly as it relates to witnesses who
14 are social workers.

15 I want to start by saying that my client is fully
16 supportive of this inquiry being a public inquiry and that
17 the media be allowed to attend and report and the public be
18 allowed to attend in, in -- as completely as, as is
19 appropriate, recognizing that you do have the power
20 throughout to take the hearing in camera, from time to
21 time, if that situation would arise. But that's not what
22 I'm talking about today.

23 To begin, there's a few parts, a few points that
24 I would like to highlight from what Ms. Walsh said this
25 morning in terms of inquiries that bear repeating. First,
26 that this inquiry is unique, that is it is unlike previous
27 inquiries, in that the majority of reports and documents
28 that will be amassed and will ultimately be before you, are
29 subject to statutory confidentiality, strict prohibition
30 against disclosure under Section 76 of the Child and Family
31 Service legislation.

32 Ms. Walsh also indicated that there must be a
33 balance between confidentiality and the public's right to
34 know. She advised you that as to those documents and

1 reports the Court of Queen's Bench will be asked to make an
2 order lifting, in part, such aspects of those reports as
3 can be disclosed, as are necessary and I think that was a
4 key phrase that she mentioned this morning because that,
5 again, incorporates that balance between confidentiality
6 and necessity.

7 She also indicated that we will be shining a
8 light on services provided or not provided to Phoenix
9 Sinclair. Again, we are fully supportive of that concept.
10 But in shining that light and in striking that balance, Mr.
11 Commissioner, our position is that the public can know what
12 it needs to know, the light can be shone on the Acts but it
13 is dangerous and, in fact, potentially damaging to the
14 child welfare system if the light is shone on the actors in
15 a very wide and public way.

16 Without compromising the ability of the social
17 workers who were involved and who will testify to continue
18 to do their jobs, to continue to function, in an atmosphere
19 without undue workplace stress, or anxiety, or potential
20 exposure to risk. And, of course, and foremost for these
21 people to continue to deliver services to children and
22 families in Manitoba. And I, I -- to that point, Section
23 75 of the legislation may come into play, which is the
24 section of the legislation dealing with court proceedings
25 and the normal child protection proceedings and the strict
26 rules about confidentiality and production and broadcast,
27 publication that is, of, of names of individuals who
28 participate in that.

29 Now, I appreciate we're not going to deal with
30 this issue today.

31 THE COMMISSIONER: Yes.

32 MR. SMORANG: I understand that. But I, I have
33 provided you, yesterday, I believe you had it --

34 THE COMMISSIONER: Yes.

1 MR. SMORANG: -- with a copy of an affidavit and
2 that is an affidavit that I have not circulated to the
3 parties primarily because, (a), I knew that it wouldn't be
4 dealt with today, and (b), we won't know until tomorrow
5 afternoon who the parties are, in fact, whether even my
6 client will be a party.

7 Once we know who the parties are, I am absolutely
8 prepared to have that affidavit shared with everyone, it is
9 the affidavit of Janet Kehler, and it outlines a number of
10 concerns and likely effects that testifying will have on
11 the social worker's ability to do their job.

12 So I'm just raising that --

13 THE COMMISSIONER: Yes.

14 MR. SMORANG: -- because at the end of the
15 matter, and I know that there, there are -- has to be some
16 consideration of this, I imagine the media may even want to
17 weigh in at some point on this, but we will be asking for
18 an order --

19 THE COMMISSIONER: Is it an order that amends a
20 specific rule?

21 MR. SMORANG: Well, it will to the extent that it
22 will prohibit any form of publicizing -- publication or
23 broadcasting by t.v. or radio, or print or internet, of any
24 likeness or photograph or the name of any of the social
25 worker witnesses. And so -- and although there isn't that
26 specific a rule there, it talks about the hearing being
27 public.

28 THE COMMISSIONER: Yes.

29 MR. SMORANG: We received a second piece of paper
30 that's not officially part of the rules but it was a piece
31 of paper that the Commissioner (sic) counsel prepared for
32 the purposes of the media at today's hearing which spoke,
33 for example, of a fixed camera but as we've seen today --

34 THE COMMISSIONER: Oh, yes.

1 MR. SMORANG: -- that fixed camera is also moving
2 around and we're not opposed to a camera, we are opposed to
3 a camera that would move to the point where a witness
4 sitting there would end up being broadcast.

5 So I've put you on notice of it, I put the other
6 parties on notice of it, I suspect we'll have to deal with
7 it at some point.

8 THE COMMISSIONER: All right. Would -- I, I
9 appreciate you doing that because, as I say, as I frame my
10 remarks for tomorrow, I, I wanted to know whether I would
11 be transgressing any problems anyone has with the rules and
12 that's why I wanted to get this out this afternoon or, or
13 anything anyone has of that kind.

14 Then I want to ask you this question. Would you
15 then anticipate that you, you besides the affidavit that
16 you will circulate to parties, assuming you get standing,
17 would you be framing an actual application as to what it is
18 you're asking for?

19 MR. SMORANG: My answer, if you can call it an
20 answer is I'll do what Commission counsel things is
21 necessary in terms of the process. If it's an application
22 -- certainly notice is important to everybody --

23 THE COMMISSIONER: Yeah.

24 MR. SMORANG: -- including the media.

25 THE COMMISSIONER: Yes.

26 MR. SMORANG: And so if it needs to be done by
27 way of formal application and a separate hearing on the
28 question of media access and on the question of
29 broadcasting, I'm fine with that, I'm in the hands of the
30 Commissioner.

31 THE COMMISSIONER: It, it would just be the
32 method of doing it?

33 MR. SMORANG: Yes.

34 THE COMMISSIONER: All right. Well, I'm glad you

1 raised this but -- today. Let me make this clear, that
2 this is not an issue that will be argued and dealt with
3 tomorrow. It is correct, as, as counsel says, that this
4 affidavit was given to Commission counsel, yesterday, who
5 passed it -- a copy to me. I, I have really not studied it
6 but I know the issue is -- relates to media and you -- I, I
7 must agree that I am sure with what you said that the media
8 will have an interest in this and, therefore, there will be
9 quite sufficient time, and indeed, tomorrow we may well set
10 a date when we could hear the issue resolved over the
11 course of the next few weeks, while the other matters are
12 proceeding that Commission counsel is going to address
13 tomorrow.

14 MR. SMORANG: Yes.

15 THE COMMISSIONER: All right?

16 MR. SMORANG: Thank you.

17 THE COMMISSIONER: I thank you for, for the heads
18 up.

19 MS. WALSH: Just while you're there, and if I
20 might clarify, Mr. Commissioner. The rules -- I gather
21 that you're not taking issue with the rules, themselves.
22 For instance, I think what you're looking to do is
23 consistent with Section 44, applications from witnesses or
24 parties to hold any part of the hearing in the absence of
25 all or any members of the public should be made in writing
26 to the Commission at the earliest possible opportunity. Is
27 that a form of that or --

28 MR. SMORANG: Well, this is --

29 MS. WALSH: I mean, I want to know --

30 MR. SMORANG: -- a bit like a non-disclosure
31 order that you would --

32 MS. WALSH: Um-hum.

33 MR. SMORANG: -- see in another court proceeding
34 where the proceeding is open to the public but the media

1 can't report the names.

2 MS. WALSH: Um-hum.

3 MR. SMORANG: That's what I'm looking for. And
4 in my case, the faces like this is identifies of, because
5 of the effect that will have on these people. So if you
6 want to -- quite frankly, my interpretation would be that
7 that doesn't close the hearing to members of the public.

8 MS. WALSH: Right.

9 MR. SMORANG: It simply restricts in some way,
10 and then I would say in a balanced way, the ability of the
11 media to report specifics.

12 THE COMMISSIONER: If those -- if this goes
13 forward I'm sure you and Commission counsel can work out an
14 appropriate document to communicate the issues to those
15 that would be interested.

16 MR. SMORANG: I'm sure we can.

17 MS. WALSH: And, and my concern more was just
18 whether, in terms of the rules, themselves, once you've
19 given your ruling on standing, Mr. Commissioner, will be in
20 a position to finalize the actual rules.

21 THE COMMISSIONER: I see what you're saying.

22 MS. WALSH: And, and then, of course, be able to
23 deal with any application that Mr. Smorang might bring --

24 MR. SMORANG: Yeah, I don't think --

25 MS. WALSH: -- after that.

26 MR. SMORANG: -- my application falls squarely
27 under these rules.

28 MS. WALSH: Okay.

29 MR. SMORANG: I think these rules are fine. As
30 long as no one says but because you --

31 MS. WALSH: You can't do this.

32 MR. SMORANG: -- agreed to them you can't bring
33 your application.

34 MS. WALSH: No, that's fine. Thank you.

1 MR. SMORANG: Thank you.

2 THE COMMISSIONER: All right. Would any -- yes,
3 we'll, we'll take this and then, and then you come next.

4 MR. MCKINNON: Thank you.

5 THE COMMISSIONER: Mr. McKinnon.

6 MR. COCHRANE: Mr. Commissioner --

7 THE COMMISSIONER: Yes.

8 MR. COCHRANE: -- Harold Cochrane.

9 THE COMMISSIONER: Yes, Mr. Cochrane.

10 MR. COCHRANE: I do have some comments to add
11 with respect to the rules.

12 THE COMMISSIONER: Yes.

13 MR. COCHRANE: I do appreciate, thank you, for
14 just clarifying that it's unlikely this matter will be
15 dealt with tomorrow because I think it is very complex,
16 it's really a matter that, to my knowledge, has not been
17 considered thoroughly in this province. We do have, of
18 course, some case law and I'll leave with a case this
19 afternoon.

20 THE COMMISSIONER: Are you dealing with a
21 confidentiality matter?

22 MR. COCHRANE: I'm dealing with a
23 confidentiality.

24 THE COMMISSIONER: Yes.

25 MR. COCHRANE: Specifically, I can provide some
26 comments and maybe I could just do so briefly and if you
27 have any questions I, I would be pleased to give you my
28 interpretation. But if I look at the rules, themselves, I
29 would highlight the following:

30 Section 17, on page four.

31 THE COMMISSIONER: Yes.

32 MR. COCHRANE: That, that rule -- I should say
33 before I make any other comments, that of course my client,
34 and that is ANCR and the Southern Authority are not opposed

1 to providing information to this inquiry. We have to make
2 sure, though, that we do so within the confines and as
3 permitted, as permitted, subject to the Act. So that's
4 important to note, we're not opposed to it, we just want to
5 make sure we do it without contravening Section 76.

6 So I would say Section 17 on page four, there
7 could be an issue there and that is producing records to
8 the Commission. I would say that if you -- in light of
9 Section 76(3), we probably need a court order to effect
10 that. Ms. Walsh talked about that this morning so I think
11 that is being contemplated.

12 THE COMMISSIONER: Well, are you saying there --
13 you, you have some specific amendment in mind to rule 17?

14 MR. COCHRANE: I don't have a particular
15 amendment in mind but I think it has to be -- and I'm
16 talking only with respect to information from CFS records,
17 it has to be subject to a court order, because as I read
18 Section 76(3), it prohibits the disclosure and
19 communication of information from the CFS record to anyone,
20 to any person, except as provided for in that Act or in
21 that section, sorry.

22 THE COMMISSIONER: Well --

23 MR. COCHRANE: I would say that what's
24 contemplated in Section 17 may be captured by that
25 prohibition.

26 THE COMMISSIONER: I don't think Commission
27 counsel has any issue with that. Am I right?

28 MS. WALSH: That's correct, Mr. Commissioner. As
29 I identified this morning, we won't be able to do anything
30 with disclosure until we have applied to the Court of
31 Queen's Bench --

32 THE COMMISSIONER: Right.

33 MS. WALSH: -- pursuant to Section 76 of the
34 Child and Family Services Act, other than -- I was going to

1 get into this tomorrow but we can certainly deal with it as
2 -- if it's viewed as an interpretation of the rules, in
3 order to be able to make that application to the court we
4 are going to need to know from the parties which of their
5 documents they say fall within the provisions of Section
6 76. Otherwise it's pretty impossible to identify to the
7 court what we're seeking disclosure of and while I
8 recognize that that will require a certain careful
9 description, I don't think it's any different than
10 describing, in a affidavit of documents. In, in our
11 province, for instance, our court rules require that you
12 itemize those documents over which you claim privilege, you
13 can't just make a blanket and all documents over which we
14 claim privilege. So I think the same thing, obviously not
15 an identification that's going to reveal or threaten the
16 confidentiality that we're seeking a court order regarding,
17 but sufficient identification to allow us to make the court
18 application.

19 THE COMMISSIONER: So --

20 MR. COCHRANE: And I have no issue, I will
21 certainly work with Commission counsel too.

22 THE COMMISSIONER: I think you're both on the
23 same wavelength here.

24 MR. COCHRANE: Yeah.

25 MS. WALSH: I think so.

26 MR. COCHRANE: I think we're on the same
27 wavelength.

28 THE COMMISSIONER: Yeah, okay.

29 MR. COCHRANE: I'm just identifying --

30 THE COMMISSIONER: Yes.

31 MR. COCHRANE: -- some of the rules. The next
32 one I would point to is Section 19 on page four.

33 THE COMMISSIONER: Yes.

34 MR. COCHRANE: Again, I don't know if there is,

1 is an issue but that is one that I would flag as a
2 potential 76 -- Section 76 issue, and that is:

3

4 "All documents received by the
5 Commission will be treated as
6 confidential unless or until --"

7

8 Sorry.

9

10 "unless and until they are made
11 part of the public record or as
12 the Commissioner otherwise
13 directs."

14

15 I identify that section again as something we may
16 want to address in the court order that Ms. Walsh has, has
17 just mentioned.

18 THE COMMISSIONER: But at the moment you're not
19 proposing any specific change?

20 MR. COCHRANE: It's, it's virtually -- in my
21 view, it's virtually impossible because I don't -- at this
22 point have no idea what the records are or will be but I am
23 saying that there is a potential Section 76 issue with
24 respect to that rule.

25 THE COMMISSIONER: All right, I think -- I would
26 think your position, Commission counsel, is the same, as
27 you just spoke to with respect to the matter in rule 17?

28 MS. WALSH: Yes.

29 MR. COCHRANE: Yeah.

30 MS. WALSH: Yes.

31 THE COMMISSIONER: Okay.

32 MR. COCHRANE: And these are two issues I would
33 see us dealing with in the form of the order that we will
34 work out or we will submit to the --

1 THE COMMISSIONER: To the court.

2 MR. COCHRANE: -- to the court, that's correct.

3 MS. WALSH: If I may then, maybe just for
4 clarification, just to be clear, how we envision that
5 application, going forward, as I said is we will ask the
6 parties, once they are in place, to provide us with a list
7 setting out their documents, in other wise -- in other
8 words documentary disclosure identifying which documents
9 fall under a claim for privilege, if any, and which
10 documents fall under a claim for statutory confidentiality
11 and that would be the confidentiality pursuant to Section
12 76 of the Child and Family Services Act, any documents that
13 do not fall within either a claim for privilege or
14 confidentiality can be produced to us. Once we have seen,
15 as I said, had identified those documents which do fall
16 within the statutory confidentiality, then we will work
17 with counsel for all the parties to find the best way to
18 bring this application to the Court of Queen's Bench in the
19 most efficient and principled way to allow us to, as I
20 said, balance or have the court balance the needs of a
21 public inquiry with the needs served by the confidentiality
22 in the Child and Family Services Act and, and I do look
23 forward to working with counsel, ultimately, in, in putting
24 that together.

25 THE COMMISSIONER: Seems reasonable.

26 MR. COCHRANE: Yeah. I, I don't see us being at
27 issue there.

28 THE COMMISSIONER: Okay.

29 MR. COCHRANE: Maybe then, for my purposes, I was
30 just intending to run through two or three other rules here
31 that I would see potential issues with. If you don't think
32 that's useful then I can --

33 THE COMMISSIONER: No, no, you go ahead.

34 MR. COCHRANE: Okay, sure then. The next one I

1 would raise would be on page -- sorry, rule Number 27, and
2 I have the page, page six.

3 THE COMMISSIONER: Yes.

4 MR. COCHRANE: And again, if you look in that
5 third line, it begins "unless and until those documents
6 have been admitted into evidence ..." There is Court of
7 Appeal case law on that particular issue, in the context of
8 an inquest, not in the context of an inquiry, but I will
9 certainly have comment when we produce the court order or
10 when we work with Commission counsel on a court order, I
11 would have comment on the type of conditions that I think
12 would be appropriate to address that issue.

13 The issue is, of course, once a CFS record, which
14 is confidential, is tendered as an exhibit at this inquiry,
15 what then happens to the confidentiality that is attached
16 to that document? Does it lose its confidentiality by the
17 mere fact that it's tendered and that is the -- that's one
18 issue I would see. There is -- and I can leave the case
19 with, with you today, there is a Court of Appeal decision
20 on that case, in the context though of an inquest. I think
21 it has bearing on this.

22 THE COMMISSIONER: I think if you could give that
23 to Commission counsel --

24 MR. COCHRANE: Yes.

25 THE COMMISSIONER: -- that will be -- they may
26 well have that, they have --

27 MR. COCHRANE: Yeah, I'm --

28 THE COMMISSIONER: -- provided me with an awful
29 lot of cases so I --

30 MR. COCHRANE: Yeah.

31 THE COMMISSIONER: -- expect they have but that
32 would be appreciated.

33 MR. COCHRANE: Okay.

34 THE COMMISSIONER: And I take it you have no

1 problem with that rule standing as it is, with confirmation
2 of it tomorrow?

3 MR. COCHRANE: If the terms of the order that
4 we're going to obtain are satisfactory. In other words,
5 if, if the term of the order, itself, has protections, with
6 respect to those CFS documents, then I would say we don't
7 have an issue with that particular rule.

8 THE COMMISSIONER: Well, can we confirm -- I want
9 to, I want to confirm these rules tomorrow afternoon, if
10 you've got a specific change you want to make in them, I, I
11 would hear you but --

12 MR. COCHRANE: Well, maybe -- I'm sorry for
13 interrupting but maybe what we do then is if you want to --
14 the Commissioner wants to finalize these rules, perhaps
15 what we add is, is a catchall paragraph. I'm just thinking
16 -- I haven't thought of this ahead of time but perhaps --

17 THE COMMISSIONER: They can always be amended.

18 MR. COCHRANE: Yeah, could always be amended or
19 we, we insert paragraphs in that's subject to court orders.
20 This -- these rules are subject to court orders, something
21 along that line, that will capture. Because the way I
22 envision this, perhaps I'm mistaken, but we will obtain a
23 Section 76 order which will provide for disclosure of
24 confidential CFS records. We will and on my client's
25 behalf, we will have positions to put forth with respect to
26 the confidentiality once that document is tendered, once
27 it's disclosed and once evidence is given by CFS workers at
28 this inquiry.

29 We would want or we would, we would certainly be
30 asking for certain protections to be put in place with
31 respect to that evidence.

32 THE COMMISSIONER: Well, that's -- I, I hear you
33 and I -- it's quite reasonable for you to raise that but
34 there's nothing I can do about that today.

1 MR. COCHRANE: Yeah, that's an issue, and I
2 appreciate that's an issue that we will work out with
3 Walsh. There's nothing -- I agree there's nothing we can
4 do about it today but I am raising that as an issue.

5 THE COMMISSIONER: All right.

6 MR. COCHRANE: Then I would also move to page
7 nine -- or sorry, page 10, rules 45 and 46. I won't repeat
8 my comments but it's the same issue with respect to those
9 and that, again, is once the exhibits are tendered, and
10 those exhibits constitute confidential CFS records, what
11 then happens with those exhibits? Do they become public
12 documents, that's an issue.

13 And those are the two points, at 45 and 46.

14 I, I will -- I've already talked to Ms. Walsh, I
15 could add that my client, ANCR, deals with this on a
16 regular basis. We are often called upon to produce our CFS
17 records, which are confidential, we're asked to produce
18 them in the context of criminal proceedings, we're asked to
19 produce them in the context of child custody proceedings
20 which, as you know, are not proceedings closed to the
21 public. Child protection proceedings under the CFS Act
22 are, are closed to the public, subject to the media being
23 there but they can't identify names. So we deal with this
24 all the time in that context and we do have orders that
25 we've developed, over time, that I think appropriately
26 address our concerns. I will deal, I will of course
27 cooperate with Ms. Walsh to put forward our positions and
28 assist in any way that we can to, to ensure that the order
29 that comes forth is appropriate.

30 THE COMMISSIONER: Thank you.

31 MS. WALSH: Just on that point, Mr. Commissioner,
32 and I do appreciate the offer of assistance and will
33 certainly welcome it, from those who have experience in
34 dealing with Section 76 and certainly any court order is

1 going to take priority over our internal rules of
2 procedure, which are just there to make sure that the
3 process runs smoothly and fairly.

4 MR. COCHRANE: Yeah.

5 MS. WALSH: And, for instance, in rule 27 there
6 is a provision that, that the parties are:

7

8 "... to abide by such other
9 restrictions on disclosure and
10 dissemination that the Commission
11 considers appropriate."
12

13 So there is room for you to exercise your
14 discretion in light of whatever ruling we obtain from the
15 Court of Queen's Bench. But, but certainly we're not
16 looking to reinvent the wheel on, on how this process, and
17 of course every party is going to have a position on the
18 extent to which disclosure will be provided, whether there
19 will be redaction, all of that and we'll welcome that
20 input.

21 MR. COCHRANE: Thank you.

22 THE COMMISSIONER: Thank you, Mr. Cochrane. Mr.
23 McKinnon?

24 MR. MCKINNON: I was going to change the topic so
25 if there is anyone else who wants to talk about this then
26 I'll stand down.

27 THE COMMISSIONER: There's obviously two of you
28 so ...

29 MR. SMORANG: Oh, can I, I just make one quick
30 point? Garth Smorang, on behalf of MGEU. Just on this
31 rule 27, and I don't want to get into gang drafting because
32 then we'll be here till nightfall, but as I think I
33 understand Mr. Cochrane's concern, it might just be in the
34 way of the wording of the first couple of lines of rule 27

1 because it says that he or she must -- this is the second
2 line of rule 27:

3

4 "... he or she must undertake to use
5 the documents only for the purposes
6 of the Inquiry and to keep their
7 contents confidential unless and
8 until those documents have been
9 admitted into evidence ..."

10

11 I think what Mr. Cochrane was, was more concerned
12 with, perhaps, or at least equally concerned with was using
13 the documents for what purposes? In other words, even
14 after we've got them, even after they've been redacted,
15 everybody gets them, every party gets them, the inquiry is
16 over, your report is issued, we've all got binders of
17 material back in our offices, some of us who aren't
18 representing clients, the clients, themselves, have them,
19 what use is made of those. Can they be broadcast in the
20 paper; can they be the subject matter of someone's
21 autobiography? There's two concepts in article 27, it
22 seems to me. One is use and one is confidentiality and it
23 seems, to me, we could all agree upon use here and today,
24 that is we could put a period after the word inquiry so it
25 would simply say he or she must undertake to use the
26 documents only for the purposes of the inquiry, period.
27 And then as to confidentiality, we can talk later about
28 whether, once they are admitted into evidence, what rules
29 or what restrictions, depending on the type of evidence,
30 but, but as for the use of the document it seems to me we
31 could all agree right now that they should only be for the
32 purpose of an inquiry and then not used for any other
33 purpose.

34

I'm not sure if I'm speaking out of turn on your

1 concern but it seemed to me that's what you were saying.

2 THE COMMISSIONER: I would expect Commission
3 counsel to respond tomorrow afternoon and those remarks,
4 I'm sure, will be borne in mind.

5 MR. SMORANG: Thank you.

6 MR. GUTKIN: Terry Gutkin again, Mr.
7 Commissioner.

8 THE COMMISSIONER: Yes.

9 MR. GUTKIN: For the General Authority.

10 THE COMMISSIONER: Yeah.

11 MR. GUTKIN: I would like to speak to the issue
12 of confidentiality, as well. I wish to preface my remarks
13 by saying that the, the General Authority wishes to
14 cooperate with this inquiry in every respect and is
15 perfectly content with disclosing relevant documents but,
16 again, as expressed by other counsel acting for some of the
17 CFS parties of this proceeding or potential parties in this
18 proceeding, the issue is one of our clients abrogating a
19 very absolute prohibition in Section 76 of -- with respect
20 to confidentiality. So from my vantage point, and I
21 understand there's going to be a Court of Queen's Bench
22 order, that's obviously the appropriate way to deal with
23 this so that the various parties who are ordered to produce
24 documents have authority to do so and aren't running afoul
25 of the legislation.

26 The problem that I see is perhaps putting the
27 cart before the horse in how you're going to, to deal with
28 this. And I share these thoughts with the Commission. If
29 an application is made to the Court of Queen's Bench and my
30 client will certainly consent to a Section 76 application.
31 The problem is, if you have what's akin to an affidavit of
32 documents, listing in generic fashion, assuming you could
33 do that within disclosing confidential information, to the
34 Court of Queen's Bench in -- and then asking the court to

1 rule on this, my fear, as I expressed to you, Mr.
2 Commissioner, is that the process may bog down at the Court
3 of Queen's Bench level because the Court of Queen's Bench
4 is then going to have to look at a document by document or
5 a generic description of document by generic description
6 and make a determination where a confidentiality order
7 should be made in relation to any documents that are
8 objected to.

9 My preference, as I expressed to you, would be
10 that there be an order from the Court of Queen's Bench,
11 ordering the release of the documents to Commission
12 counsel, that would be stage one. And that when those
13 documents are then released to parties with standing, if
14 there are objections to the documents coming into the
15 public domain, objections to having those documents part of
16 the, the record of this inquiry, that the order from the
17 Court of Queen's Bench delegates to, to yourself, Mr.
18 Commissioner, the power to make the determination as to
19 whether those documents ought to be part of the public
20 record which will evolve, a case by case analysis applying
21 perhaps the Dagenais Mentuck test, the CBC case, but since,
22 sir, you will be in the position to best understand the
23 context of those documents in light of what's transpiring
24 at the inquiry, I would submit that that's a more efficient
25 process for a ruling on a case by case, document by
26 document basis, what should be public and what should not
27 be, rather than asking the Court of Queen's Bench to, to
28 deal with various descriptions of documents without looking
29 at them and without having any idea of how they would
30 necessarily impact on the various issues that are going to
31 arise at this commission of inquiry.

32 So those are some thoughts I have in terms of the
33 process. In terms of the, the release of the documents,
34 once an order is made, ordering the production of those

1 documents and protecting the various parties from Section
2 76 issues, the question is who they go to and the -- and
3 whether they are impressed with confidentiality in that
4 person's hands, and then at what stage and who makes the
5 decision as to whether they become public.

6 Obviously, parties with standing have to receive
7 the documents and there has to be some type of trust
8 condition or order imposed on them which could be
9 incorporated into the Court of Queen's Bench order which
10 imposes confidentiality obligations on anybody receiving
11 those documents before they become part of the public
12 realm, and then the next stage would be when those
13 documents, if they're tendered as evidence in the
14 proceedings, then we need a ruling. We'll need a ruling
15 from time to time if there is objection made to those
16 documents being made public and then we get into that
17 balancing act that the Supreme Court of Canada talked
18 about, in, in Mentuck and, and Dagenais.

19 So that's the process that I would envisage would
20 be more efficient. I am terribly afraid that if we do
21 what's akin to affidavit of documents, the process in the
22 abstract will bog down in the Court of Queen's Bench when
23 it's, when it's you, Mr. Commissioner, who will have the
24 best handle on whether a document, after hearing arguments
25 with respect to it, ought to be released.

26 That's the process that I would submit makes more
27 sense. I don't know, Mr. Commissioner, whether you have
28 the authority to -- absent the court order that delegates
29 that authority to you to make those case by case decisions.
30 My view is that the rules are only as good as the
31 order-in-council creating them, and the statute enabling
32 inquiries and those rules, in the absence of an order from
33 a higher power, from, from a court, can't abrogate Section
34 76(3) issues so --

1 THE COMMISSIONER: Unquestionably, that's
2 correct.

3 MR. GUTKIN: And so those are my, my thoughts on
4 the confidentiality issues, for whatever they're worth.

5 THE COMMISSIONER: Well, I think Commission
6 counsel will bear those in mind and it seems to me that
7 before that, that road is, is travelled, another meeting of
8 counsel convened by Commission counsel on that issue may
9 well be appropriate, once the standing issue is settled.

10 MR. GUTKIN: And I believe all the parties or the
11 parties who are applying for standing are certainly
12 prepared to work with Commission counsel and, quite
13 frankly, even if standing were not granted, if there are
14 records to be released that come within seventy -- Section
15 76 and the party isn't granted standing, those same rules
16 ought to apply because standing or not, that party can't be
17 in a position, or that person, or body, can't be in a
18 position to run afoul of Section 76.

19 THE COMMISSIONER: Yeah.

20 MR. GUTKIN: Thank you, Mr. Commissioner.

21 THE COMMISSIONER: All right, anyone else want to
22 speak on that issue before I call Mr. McKinnon on something
23 else?

24 All right, sir.

25 MR. MCKINNON: Thank you, Mr. Commissioner.
26 Gordon McKinnon for the department. Changing the topic
27 slightly, I have a modest suggestion with respect to a
28 possible change in the rules, and let me preface my remarks
29 by saying I'm going to be talking about the issue of
30 notices of alleged misconduct and I preface my remarks by
31 saying that I, I gave Ms. Walsh notice of my thoughts on
32 this and she spoke very eloquently in her opening remarks
33 about this topic of notice of alleged misconduct and I
34 agree with every word she said. She's completely correct

1 in the law, she has drafted a set of rules that are
2 imminently fair, that are of the highest standard of
3 fairness, so you might ask what am I up here talking about
4 then and, and I think the answer to that is this, that we,
5 as lawyers, understand what the intent of the notice of
6 alleged misconduct is. That is to, to be fair and, and as
7 Ms. Walsh pointed out, to essentially codify the common law
8 concept of natural justice.

9 So before you, Mr. Commissioner, would make an
10 adverse finding about any one or any organization they will
11 have amply notice and I think obviously that's fair. I
12 have two modest suggestions. One is, is a change of
13 wording and the other is perhaps just a bit of a change of
14 emphasis.

15 And the first is the, the word misconduct and the
16 concept that a finding of misconduct may be, and I can
17 certainly tell you the draft rules have been misinterpreted
18 by those with whom I've met who have read them, social
19 workers in particular, who see this as potentially
20 devastating. And they misinterpret that word as an
21 indication that perhaps, and I know the Commission counsel
22 is going to be fair and I know you are going to be fair,
23 and I know you fully understand that the order-in-council
24 doesn't require you to -- in fact, prohibits you from
25 making findings of criminal or civil liability but from the
26 point of view of social workers who are reading this, they
27 see this as they're going to be found to have misconducted
28 themselves and they're somehow going to be blamed.

29 So it's -- it is creating some difficulties in
30 that way. My suggestion is that the wording could be
31 softened to make it more reflective of what I think the
32 intention is here. The wording that I would propose -- and
33 let me, again, just backing up a little bit, we're dealing
34 here almost exclusively with social workers, who are

1 professionals and as you know, Mr. Commissioner, the word
2 misconduct, in a professional context, has a specific
3 meaning and it usually relates to professional discipline.
4 And, and I think what we're going to hear, when we get into
5 this case, is errors in judgment, a far less serious kind
6 of concern but I don't want to limit you to that language
7 either, my suggestion is that we modify the concept of
8 findings of misconduct to perhaps something more neutral,
9 like improper practise or perhaps mismanagement as it might
10 apply to an agency as opposed to an individual.

11 I agree with Ms. Walsh that the term misconduct
12 is tried and tested, it's well understood by the courts,
13 including the Supreme Court of Canada, but I think it might
14 be misinterpreted by the witnesses to this hearing and I
15 think for them to receive a letter from Commission counsel,
16 saying that, that they are being -- consideration is being
17 given to a -- making a finding of misconduct against them
18 will send a terrible chill over the proceedings that will
19 affect the ability of the Commission to have a
20 non-confrontational and open and full and fair discussion
21 of what happened in this case and the mistakes or errors in
22 judgment that may have, may have occurred.

23 So we're suggesting a modest change in terms of
24 the, the use of language. The other suggestion we have is
25 not a change of the rules but perhaps just a thought on the
26 way in which this rule might be applied.

27 And what I see as unique about this inquiry, Mr.
28 Commissioner, is that there are -- have already been six
29 other reviews, and by the time we get to hearing oral
30 testimony before you, there will have been disclosure made
31 through the Section 76 application, will -- which will
32 include the Section 10 report and a Section 4 report which
33 contained findings, they don't use the word misconduct but
34 they contain findings where there might have been a breach

1 of standards or an error in judgment. So the individuals
2 will have ample notice that they're entering into an
3 inquiry where there has already been a review and there are
4 some findings that have been made about their conduct.

5 So that the requirement to issue notices in every
6 case to every worker may be diminished somewhat by the fact
7 that Commission counsel can, when interviewing the
8 witnesses, tell them that there has been this finding made
9 in this report or there has been a finding made in that
10 report, and they will be asked about it at the inquiry.

11 And, and what I'm hoping to avoid, Mr.
12 Commissioner, is a situation where, you know, two weeks
13 before this inquiry starts, 20 or more letters go out to 20
14 or more individuals saying there is a potential finding of
15 misconduct. Those individuals are all -- not all but
16 almost all still working in the child welfare system in one
17 capacity or another, I think it will be alarming to them and
18 it will be difficult for their organizations to focus on
19 working in the -- and doing the day to day business of
20 child protection if these individual workers feel they are
21 now at risk of being scapegoated for this terrible tragedy.

22 So my suggestion is that we try -- and I'm not
23 suggesting that this evidence not come out in any way, but
24 we try to ameliorate the impact that this kind of a letter
25 would have on the various individuals who will by then well
26 know that their conduct is under scrutiny.

27 So those are my suggestions, Mr. Commissioner.

28 THE COMMISSIONER: And on your last point, giving
29 them the heads up with respect to findings that have
30 already been made, is that, is that your point?

31 MR. MCKINNON: That's my point, yes.

32 THE COMMISSIONER: Yes.

33 MR. MCKINNON: That, that the -- this -- the
34 notion in most inquiries is they are, they are really very

1 much de novo hearings. You would be making these findings
2 for the first time.

3 In this case I think you are by and large going
4 to be reviewing findings that have been made by others who
5 are quite expert in the area, who have made very clear and
6 strong findings and so long as the individuals are aware of
7 that and it has been disclosed to them, I don't think we
8 need the kind of, I'll call it upset -- and, and, and there
9 are those in the room who, who may say well, you know,
10 we're just dealing with the feelings of these social
11 workers but it's more than that, it's the ability of these,
12 of these institutions to function in the context of a high
13 pressure inquiry, in the context of a, of a high profile
14 case, in the context of potential media in the room and if
15 these individuals feel they, they are about to be
16 scapegoated it will be very difficult for these
17 organizations to function in that short run.

18 I think it might be different after they get your
19 report, Mr. Commissioner, but that could be six months
20 later, and in the meantime it will have had some adverse
21 impact on, on the ability of the, of the employers, of the
22 agencies, of the authorities, to continue to keep morale up
23 and keep these individuals working in very difficult
24 circumstances.

25 So my suggestion is wording and also approach.

26 THE COMMISSIONER: Okay.

27 MR. MCKINNON: And those are my comments.

28 THE COMMISSIONER: Well, my -- I'm not going to
29 ask other counsel, who have not heard of this proposal, to
30 react to it today because there's, there's considerable to
31 it and, and I think what I will suggest to Commission
32 counsel is tomorrow afternoon you will probably want to
33 address what process and what dates, perhaps, we'll, we'll
34 put in play for hearing the, the matter of the media

1 application and it seems to me that there's enough to this
2 proposed change, unless there's some measure of agreement
3 to it, which there may or may not be, that this accompany
4 that for a special consideration by all counsel on a
5 subsequent occasion when we look at the other matter with
6 respect to media participation.

7 MS. WALSH: That's fine with me, Mr.
8 Commissioner. We could still, tomorrow, approve the rules
9 subject to those relating --

10 THE COMMISSIONER: Yeah.

11 MS. WALSH: -- to this issue of misconduct in
12 part four.

13 THE COMMISSIONER: Yeah. There's no --

14 MR. MCKINNON: That would be fine with me, Mr.
15 Commissioner. Thank you.

16 THE COMMISSIONER: We'll deal with it on that
17 basis. Thanks, Mr. McKinnon.

18 MR. MCKINNON: Thank you.

19 THE COMMISSIONER: Now, has anyone else got
20 anything else they would like to raise that relate to the
21 rules today? Yes?

22 MR. SAXBERG: Thank you, Mr. Commissioner, it's
23 Chris Saxberg --

24 THE COMMISSIONER: Yes.

25 MR. SAXBERG: -- for the Southern Authority.

26 THE COMMISSIONER: Yes.

27 MR. SAXBERG: Just an amendment proposal to rule
28 37.

29 THE COMMISSIONER: Yeah.

30 MR. SAXBERG: That rule prohibits counsel other
31 than counsel for the Commission, discussing evidence of a
32 witness that is under oath and giving direct testimony.

33 THE COMMISSIONER: Yes.

34 MR. SAXBERG: And the proposal is to allow

1 counsel, the examining lawyer, when it's not the Commission
2 counsel, which will happen from time to time in this
3 proceeding, to discuss with the witness any matter during
4 direct testimony. And the reason --

5 THE COMMISSIONER: When, when, when the counsel
6 for the witness is examining the witness at the outset you
7 mean?

8 MR. SAXBERG: Exactly, yeah.

9 THE COMMISSIONER: Yeah.

10 MR. SAXBERG: If, for instance, the Southern
11 Authority has called a witness and it's agreed that the
12 Southern Authority then can --

13 THE COMMISSIONER: Lead.

14 MR. SAXBERG: -- lead -- do the direct evidence
15 of that witness before Commission counsel examines, in that
16 situation what I'm asking is that the rule be amended to
17 allow for counsel to speak with that witness about their
18 evidence during, say, a break or if, for instance, that
19 witness takes the stand at the end of the day and is going
20 to continue on with their direct the next day, further
21 preparation of the witness could be conducted at the --
22 after the hearing.

23 And the, the basis for this is in Manitoba the
24 Code of Professional Conduct has recently been amended and
25 a change was made to what was the traditional rule, which
26 was that you -- counsel could not talk to a witness that
27 they were examining in chief, except about perspective
28 evidence, that at least was my experience of what the rule
29 was, but it was changed and it's now been codified in the
30 Code of Conduct, at Section 4.04(2) which reads:

31

32 "Subject to the direction of the
33 tribunal, the lawyer must observe
34 the following rules respecting

1 communication with the witness
2 giving evidence:

3
4 (a) During examination in chief
5 the examining lawyer may discuss
6 with the witness any matter."
7

8 And,

9 "(b) During cross-examination of
10 the lawyer's own witness, the
11 lawyer must not discuss with the
12 witness the evidence given in chief
13 or relating to any matter
14 introduced or touched on during the
15 examination-in-chief."
16

17 And then (c):

18
19 "Upon the conclusion of (the)
20 cross-examination and during any
21 re-examination, the lawyer may
22 discuss with the witness any
23 matter."
24

25 That's the new rule in this jurisdiction.

26 And so then what I would propose to 37 is simply
27 to strike out after the comma on the second line and strike
28 out "no counsel other than the Commission."

29 THE COMMISSIONER: Yes.

30 MR. SAXBERG: And then continuing down, I would
31 put a period at the end of "evidence", in the four sentence
32 and strike out "except with the permission of the
33 Commission." And the first word of the next sentence
34 "Commission" and start that last sentence with counsel.

1 And then it would -- Section 37 would then read:

2

3 "After a witness has been sworn or
4 affirmed at the commencement of
5 his or her testimony ... counsel
6 may speak to that witness about
7 the evidence he or she has given
8 until the witness has
9 completed --"

10

11 Sorry, that, that would have to change, as well.
12 Has given, period, and then:

13

14 "-- counsel may not speak to the
15 witness about his or her evidence
16 while the witness is being
17 cross-examined by other counsel,
18 except with the permission of the
19 Commissioner."

20

21 In other words, I'm not -- you know and I'm not
22 fussed about the specific wording, I can leave that to
23 counsel, all I'm saying is that I think it would be
24 appropriate for Section 37 to be in line with the new code
25 of conduct on this matter.

26 And also, I, I do note that it -- Section 37 does
27 seem to allow the Commission counsel to talk to a witness
28 during cross-examination and I'm not sure that that's
29 appropriate.

30 MS. WALSH: I don't have a problem with that
31 change.

32 THE COMMISSIONER: Pardon?

33 MS. WALSH: I, I don't have a problem with that
34 proposal.

1 THE COMMISSIONER: You'll work that out and bring
2 it tomorrow?

3 MS. WALSH: Sure.

4 THE COMMISSIONER: Okay.

5 MR. SAXBERG: Thank you.

6 MR. COMMISSIONER: Thank you. Anything else?

7 All right. We've reviewed the rules, pro tem,
8 this afternoon. What else is on the agenda?

9 MS. WALSH: That's it for today's agenda, Mr.
10 Commissioner, unless there are any other preliminary
11 matters anyone wants to address?

12 THE COMMISSIONER: Yes, that's, that's the other
13 thing, I knew there was something. Are there any other
14 preliminary matters?

15 MS. WALSH: I think they all got addressed under
16 the discussion of the rules.

17 THE COMMISSIONER: I think they did. All right.
18 Well, then we'll stand adjourned until 1:00 p.m. tomorrow
19 and I'll make my ruling on the various matters dealt with
20 this morning and this afternoon.

21 Thank you.

22 THE CLERK: Order all rise. This Commission
23 inquiry is adjourned until tomorrow.

24

25 (PROCEEDINGS ADJOURNED TO JUNE 29, 2011)

CERTIFICATE OF TRANSCRIPT

I hereby certify the foregoing pages of printed matter, numbered 1 to 144, are a true and accurate transcript of the proceedings, transcribed by me to the best of my skill and ability.

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