

**IN THE COURT OF APPEAL**

IN THE MATTER OF: **The Commission of Inquiry into the Circumstances Surrounding the Death of Phoenix Sinclair (the “Commission of Inquiry”)**

BETWEEN:

**THE SOUTHERN FIRST NATIONS NETWORK OF CARE, THE GENERAL CHILD AND FAMILY SERVICES AUTHORITY, THE FIRST NATIONS OF NORTHERN MANITOBA CHILD AND FAMILY SERVICES AUTHORITY and CHILD AND FAMILY SERVICES ALL NATIONS COORDINATED RESPONSE NETWORK (THE “AUTHORITIES AND ANCR”),**

Applicants,

- and -

**THE HONOURABLE EDWARD HUGHES, in his capacity as Commissioner under The Manitoba Evidence Act and as appointed pursuant to Order in Council No. 89-2011, dated the 23<sup>rd</sup> day of March, 2011**

Respondent.

APPLICATION UNDER Section 95(2) of *The Manitoba Evidence Act*, C.C.S.M. c. C225 and Rule 43.1 of *The Court of Appeal Rules*, Man. Reg. 555/88

**NOTICE OF MOTION**

The Applicants will make a motion before a judge of the Court of Appeal on Thursday, August 23, 2012 at 10:00 a.m, or as soon after that time as the motion can be heard, at the Law Courts Building, 408 York Avenue, Winnipeg, Manitoba.

THE MOTION IS FOR:

- 1) An Order for short leave for the hearing of the herein Motion, if necessary;
- 2) An Order pursuant to s. 95(2) of *The Manitoba Evidence Act*, C.C.S.M. c. C225 directing the Respondent to state a case to the Manitoba Court of Appeal pursuant to s. 95(1) of the said Act, to answer, among other things, the following questions:

- a. Did an apprehension of bias exist with respect to the Commissioner hearing and determining the Authorities and ANCR's motion requesting the disclosure of witness interview transcripts when Commission Counsel had taken an oppositional position on the record?
  - b. Do the Commission's Amended Rules of Procedure and Practice require the disclosure of witness interview transcripts to the Parties and Intervenors?
  - c. Do the principles of natural justice and procedural fairness require the disclosure of witness interview transcripts to the Parties and Intervenors?
- 3) An Interim Order directing that the Commission is able to continue its proceedings while the stated case is being heard and determined;
  - 4) The costs of this Motion on a solicitor and client basis; and
  - 5) Such further and other relief as counsel may advise and this Honourable Court deems just.

THE GROUNDS FOR THE MOTION ARE:

- 1) Short leave is required if necessary for the hearing of this motion in order to allow the Commission of Inquiry to begin its public hearing phase as quickly as possible in a procedurally fair manner;
- 2) The Applicants are parties to the Commission of Inquiry with joint standing;
- 3) The principles of natural justice and procedural fairness apply to the Commission of Inquiry and to the Respondent;

- 4) The Commission of Inquiry, and the Respondent himself, have a legal duty to be procedurally fair to the Applicants;
- 5) The Applicants have a right to procedural fairness with respect to their participation in the Commission of Inquiry;
- 6) The Applicants filed a Notice of Motion with the Respondent on July 4, 2012 (the "Transcript Motion") requesting an order compelling the production of the transcripts of witness interviews (the "Transcripts") conducted by the Commission to the Parties and Intervenors to the Inquiry upon request;
- 7) The Respondent's own counsel ("Commission Counsel") opposed the Transcript Motion by way of filing written argument before the Commissioner on July 19, 2012 and providing oral argument before the Respondent on July 24, 2012;
- 8) The Applicants raised the issue of an apprehension of bias existing with respect to the Respondent determining the Applicant's Transcript Motion given that his own Counsel had taken an adversarial position to the Applicants;
- 9) The Respondent declared that no apprehension of bias existed and then proceeded to hear and determine the Applicants' Transcript Motion on its merits;
- 10) The Respondent, by way of written reasons provided on August 1, 2012, determined that he would not compel the production of the Transcripts to the parties and intervenors;
- 11) An apprehension of bias existed with respect to the Respondent hearing and determining the Applicants' Transcript Motion and, accordingly, the Respondent's decision with respect to the Applicants' notice of motion is void;

- 12) The Transcripts are relevant, non-privileged documents in the possession of the Respondent;
- 13) The principles of natural justice and procedural fairness together with the purpose and function of the Commission of Inquiry require copies of the Transcripts to be disclosed and made available to the Applicants and all other parties and intervenors to the Commission of Inquiry;
- 14) Both the Commission Counsel and the Respondent's failure to allow for or order the disclosure of the Transcripts to the parties and intervenors with standing amounts to a breach of the Respondent's duty to be procedurally fair;
- 15) The disclosure of the Transcripts is in the best interests of children in Manitoba;
- 16) The disclosure of the Transcripts is in the public's interest;
- 17) The disclosure of the Transcripts is required in order to allow the Commission of Inquiry to fulfill its mandate and to ensure that the Inquiry is thorough, fair and timely;
- 18) The disclosure of the Transcripts is required to ensure that all matters that bear upon the public interest are brought to the Respondent's attention;
- 19) The disclosure of the Transcripts is required to ensure that the Commission of Inquiry's process and result is subject to public scrutiny and exposure;
- 20) The open, truth finding function of the Commission of Inquiry requires the disclosure of the Transcripts;

- 21) The Respondent's failure to disclose the Transcripts to the Applicants prevents the Applicants, as parties with joint standing, from participating as they are entitled to in the Commission of Inquiry and prevents the evidence from being fully and properly explored;
- 22) On August 3, 2012, pursuant to section 95(1) of *The Manitoba Evidence Act*, the Applicants, as parties affected by the decisions, orders, directions, and/or other actions of the Respondent, sent a written request to the Respondent to state a case to this Court on the following questions:
  - a. Did an apprehension of bias exist with respect to the Commissioner hearing and determining the Authorities and ANCR's motion requesting the disclosure of witness interview transcripts when Commission Counsel had taken an oppositional position on the record?
  - b. Do the Commission's Amended Rules of Procedure and Practice require the disclosure of witness interview transcripts to the Parties and Intervenors?
  - c. Do the principles of natural justice and procedural fairness require the disclosure of witness interview transcripts to the Parties and Intervenors?
- 23) On August 9, 2012, the Respondent sent a written reply to the Applicants refusing to state a case to this Court on the questions provided, or at all;
- 24) The questions and matters proposed to be determined by the Applicants are of sufficient importance to warrant the attention of this Court;
- 25) The Applicants have an arguable case that has a reasonable chance of success with respect to all matters put forward, namely,

- a. That an apprehension of bias existed with respect to the Commissioner hearing and determining the Applicant's motion requesting the disclosure of the Transcripts given that Commission Counsel had taken an oppositional position on the record;
  - b. That the Commission of Inquiry's own Amended Rules of Procedure and Practice require the disclosure of the Transcripts to the Parties and Intervenors;
  - c. That the principles of natural justice and procedural fairness require the disclosure of the Transcripts to the Parties and Intervenors;
- 26) This Court has the jurisdiction to grant the Interim Order sought by the Applicants directing that the Commission proceedings may continue while the stated case is being heard and determined;
  - 27) All parties to the Inquiry agree that it is essential that the Inquiry hearing commences as scheduled and that the Inquiry proceedings not be stayed;
  - 28) *The Manitoba Evidence Act*, C.C.S.M. c. E150 and in particular, sections 1, 87, 88(1), 93(1), 95 and 96;
  - 29) *The Court of Appeal Act*, C.C.S.M. c. C240;
  - 30) *The Court of Appeal Rules*, Man. Reg. 555/88, and in particular rules 42, 43.1 and 44;
  - 31) *Order in Council 89/2011* and in particular section 9;

- 32) *The Commission of Inquiry's Amended Rules of Procedure and Practice (August 23, 2011)*, including, without limitation, Rules 6, 7, 14, 16, 19 and 23-28;
- 33) Such further and other grounds as counsel may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the Motion:

- 1) The First Affidavit of Sandie Stoker, sworn August 15, 2012;
- 2) The Second Affidavit of Sandie Stoker sworn August 15, 2012;
- 3) Such further and other documents as counsel may advise and this Honourable Court may permit.

August 16, 2012

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 Barristers and Solicitors  
 2200 – One Lombard Place  
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**HAROLD COCHRANE /**  
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 Telephone: 204-942-2271  
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 Counsel for the Applicants

TO: THE REGISTRAR OF THE MANITOBA COURT OF APPEAL  
 Law Courts Building  
 100E, 408 York Avenue  
 Winnipeg, Manitoba R3C 0P9

AND TO: THE HONOURABLE EDWARD HUGHES, COMMISSIONER  
 Phoenix Sinclair Inquiry – Commission Office  
 1801 – 155 Carlton Street  
 Winnipeg, Manitoba R3C 3H8  
 ATTENTION: SHERRI WALSH

Counsel for the Respondent

AND TO: DEPARTMENT OF FAMILY SERVICES AND CONSUMER AFFAIRS  
c/o Thompson Dorfman Sweatman LLP  
2200 – 201 Portage Avenue  
Winnipeg, Manitoba R3B 3L3  
ATTENTION: GORDON A. MCKINNON

AND TO: INTERTRIBAL CHILD AND FAMILY SERVICES  
c/o Booth Dennehy LLP  
387 Broadway  
Winnipeg, Manitoba R3C 0V5  
ATTENTION: HAFEEZ KHAN

AND TO: THE MANITOBA GOVERNMENT AND GENERAL EMPLOYEES' UNION  
c/o Myers Weinberg LLP  
724 – 240 Graham Avenue  
Winnipeg, Manitoba R3C 0J7  
ATTENTION: GARTH SMORANG

AND TO: KIMBERLY-ANN EDWARDS and NELSON DRAPER STEVE SINCLAIR  
c/o Gindin, Wolson, Simmonds, Roitenberg  
1200 – 363 Broadway  
Winnipeg, Manitoba R3C 3N9  
ATTENTION: JEFFREY GINDIN

AND TO: ASSEMBLY OF MANITOBA CHIEFS  
c/o Funke Poudrier  
402 – 171 Donald Street  
Winnipeg, Manitoba R3C 1M4  
ATTENTION: JAY FUNKE

AND TO: SOUTHERN CHIEFS' ORGANIZATION INC.  
c/o Funke Poudrier  
402 – 171 Donald Street  
Winnipeg, Manitoba R3C 1M4  
ATTENTION: JAY FUNKE

AND TO: UNIVERSITY OF MANITOBA, FACULTY OF SOCIAL WORK  
c/o University of Manitoba – Office of Legal Counsel  
E3 – 250 Engineering Building  
Winnipeg, Manitoba R3T 2N2  
ATTENTION: GREGORY JULIANO



AND TO: MANITOBA METIS FEDERATION AND METIS CHILD AND FAMILY  
SERVICES AUTHORITY INC.  
c/o Duboff Edwards Haight & Schachter Law Corporation  
1900 – 155 Carlton Street  
Winnipeg, Manitoba R3C 3H8  
ATTENTION: WILLIAM HAIGHT

**IN THE COURT OF APPEAL**

IN THE MATTER OF: **The Commission of Inquiry into the Circumstances Surrounding the Death of Phoenix Sinclair (the “Commission of Inquiry”)**

BETWEEN:

**THE SOUTHERN FIRST NATIONS NETWORK OF CARE, THE GENERAL CHILD AND FAMILY SERVICES AUTHORITY, THE FIRST NATIONS OF NORTHERN MANITOBA CHILD AND FAMILY SERVICES AUTHORITY and CHILD AND FAMILY SERVICES ALL NATIONS COORDINATED RESPONSE NETWORK (THE “AUTHORITIES AND ANCR”),**

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**NOTICE OF MOTION  
(COURT OF APPEAL MOTIONS LIST)  
HEARING DATE: AUGUST 23, 2012 AT 10:00 A.M.**

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