IN THE MATTER OF: **Commission of Inquiry into the Circumstances Surrounding the Death of Phoenix Sinclair**

REPLY MOTION BRIEF
of
The General Child and Family Services Authority, First Nations of Northern Manitoba Child and Family Services Authority, First Nations of Southern Manitoba Child and Family Services Authority and Child and Family All Nation Coordinated Response Network

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PART I

LIST OF DOCUMENTS AND AUTHORITIES TO BE RELIED UPON

TAB 1 *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Inquiries), [1992] 1 S.C.R. 623 (S.C.C.) at p. 645*

TAB 2 *Ed Ratushny, The Conduct of Public Inquiries: Law, Policy and Practice (Toronto: Irwin Law Inc., 2009), pp. 220, 222, 226, 241, 246-247, 286-287, 288-289, 291*

TAB 3 *Transcript of Commission Press Conference, April 15, 2011*

TAB 4 *Transcript of June 28, 2011 Standing Hearing, page 10*

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TAB 6 *Simon Ruel: The Law of Public Inquiries in Canada (Toronto: Thomson Reuters Canada Ltd), 2010, pp. 48-50*

TAB 7 *Clifford v. Ontario (Attorney General)* (2008), 90 O.R. (3d) 742 at para 10

TAB 8 *David M. Paciocco and Lee Stuesser, The Law of Evidence (Fourth Ed., Toronto: Irwin Law Inc., 2005) p. 203*

PART II

POINTS TO BE ARGUED

I. INTRODUCTION

1. This Brief is supplementary to the Authorities/ANCR's Motion Brief dated July 4, 2012. Commission Counsel served her own Brief upon all Parties and Intervenors on July 19, 2012 opposing our within motion. The purpose of this Brief is to reply to the Commission Counsel's argument and to raise issues and argument with respect to procedural fairness and an apprehension of bias.

II. APPREHENSION OF BIAS

2. For the following reasons, it is the position of the Authorities and ANCR that, by Commission Counsel taking a position with respect to this motion, a reasonable apprehension of bias has been established with respect to the Commission and its ability to provide a fair hearing of this matter on the merits.

3. The principles of natural justice and procedural fairness apply to this Inquiry.

Hudson Bay Mining and Smelting Co. v. Cummings, P.C.J., 2006 MBCA 98 at para 91 ("*Hudson Bay*")
(See Tab 3 to ANCR/Authority Brief dated July 5, 2012)

4. It is impossible to have a fair hearing or to have procedural fairness if a reasonable apprehension of bias has been established.

*Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Inquiries), [1992] 1 S.C.R. 623 (S.C.C.) at p. 25 (**Tab 1**)*

5. The test with respect to allegations of an apprehension of bias is as follows:

> What would an informed person, viewing the matter realistically and practically - and having thought the matter through – conclude? Would she think that it is more likely than not that the decision maker, whether consciously or unconsciously, would not decide fairly?

*Ed Ratushny, The Conduct of Public Inquiries: Law, Policy and Practice (Toronto: Irwin Law Inc., 2009) pp. 286-287, ("Ratushny") (**Tab 2**)*

The Evidence Supporting an Apprehension of Bias

6. On April 15, 2011, the Honourable Commissioner Hughes publicly stated the following with respect to the Commission Counsel:

a. The Commissioner appointed Commission Counsel;

b. Commission Counsel assists the Commissioner in carrying out his mandate;

c. The Commission Counsel acts on behalf of and under the instructions of the Commissioner;

d. Commission Counsel, in carrying out her role, is in effect an extension of the Commissioner;

e. Commission Counsel is in constant touch and communication with the Commissioner;

f. Commission Counsel is not to advance any particular point of view and has no interest in any particular outcome.

g. Commission Counsel may assist the Commissioner in writing the final report.

*Transcript of Commission Press Conference, April 15, 2011 (**Tab 3**)*

7. At the Standing Hearing on June 28, 2011, Commission Counsel herself publicly acknowledged that she acts in accordance to the instructions given by the Commissioner.

*Transcript of June 28, 2011 Standing Hearing, page 10 (**Tab 4**)*

8. Furthermore, at the Standing Hearing on June 29, 2011, the Commissioner also publicly acknowledged the Commission Counsel's duty to maintain public confidence in the integrity and impartiality of the inquiry.

*Transcript of June 29, 2011 Standing Hearing, page 4 (**Tab 5**)*

9. These statements of both the Commissioner and Commission Counsel are entirely consistent with the leading authorities on point. For example, Ruel in his text *The Law of Public Inquiries in Canada,* confirms that:

a. Commission Counsel is, at all times, subject to the direction of the Commissioner;

b. Commission Counsel has no authority independent of the Commissioner;

c. Commission Counsel is an agent of the Commissioner;

d. Commission Counsel is the alter ego of the Commissioner;

*Simon Ruel: The Law of Public Inquiries in Canada (Toronto: Thomson Reuters Canada Ltd), 2010, pp. 48-50 (**Tab 6**)*

10. Furthermore, Ratushny, in his text *The Conduct of Public Inquiries, Law Policy and Practice,* says as follows:

a. Commission Counsel acts on behalf of and under the instructions of the Commissioner;

b. Commission Counsel is an extension of the Commissioner;

c. Commission Counsel has a duty to be impartial;

d. Every task undertaken by Commission Counsel must be infused with an impartiality inseparable in degree from that of the Commissioner (emphasis added).

e. Commission Counsel is the Commissioner's alter ego.

*Ratushny, at p. 220 and 222 (**Tab 2**)*

Application of the Reasonable Apprehension of Bias Test

11. Given the foregoing, a reasonable person in this situation would know that:

a. Commission Counsel was appointed by the Commissioner;

b. Commission Counsel was assisting the Commissioner in carrying out his mandate;

c. Commission Counsel was acting on behalf of, under and in accordance to the instructions of the Commissioner;

d. Commission Counsel was carrying out her role, which would necessarily include her role in opposing this motion, as an extension of the Commission itself;

e. Commission Counsel was the alter ego of the Commissioner;

f. Commission Counsel was in constant touch with the Commissioner who will be deciding this issue;

g. Commission Counsel was supposed to remain impartial;

12. A reasonable person, with this information, would conclude that there is a real likelihood or probability of bias and that the Commissioner would not decide this matter fairly.

13. This is especially glaring given the evidence that Commission Counsel is an admitted extension of the Commissioner and that she operates under the Commissioner's instructions. As was articulated by The Law Reform Commission of Canada and cited in Ratushny's aforementioned text, 'we all know that no man should be a judge in his own cause'.

*Ratushny,at p. 226 (**Tab 2**)*

Proposed Remedy

14. The mere fact that Commission Counsel has taken a position makes it difficult, if not impossible, to ignore or remove the apprehension of bias that is now present. However, at the very least, the position of Commission Counsel and her written argument should be ignored by the Commissioner and stricken from the Record. Obviously, she should not be granted the opportunity to make an oral argument on this issue.

15. This proposed remedy is advanced without prejudice as it is the Authorities and ANCR's position that the mere fact that the Commissioner has knowledge of his Commission Counsel's position is enough that a reasonable apprehension of bias exists.

III. REPLY WITH RESPECT TO THE REFUSAL TO DISCLOSE THE TRANSCRIPTS

16. If the Honourable Commissioner refuses to ignore and/or remove Commission Counsel's position and argument from the Record, the following is offered in Reply.

The Commission's Decisions with Respect to Procedure Must be Procedurally Fair

17. Commission Counsel has argued that, with respect to 'marshalling the evidence' the Commission is the master of its own procedure and is therefore able to streamline its disclosure procedures.

See Commission Counsel's Brief at para 4

18. In support of this position, Commission Counsel relies on a decision of the Ontario Divisional Court, namely *Clifford v. Ontario (Attorney General)* (2008), 90 O.R. (3d) 742.

19. Two comments need to be made with respect to this authority and its proposed use by Commission Counsel.

20. First, it must be understood that the above comments were made in response to a motion that was brought by one party seeking full oral discovery of witnesses under oath prior to the hearing.

Clifford v. Ontario (Attorney General) (2008), 90 O.R. (3d) 742 at para 10 (**Tab 7**)

21. It was not, as the case is here, in response to a request for full pre-hearing disclosure of all relevant non-privileged documents. In fact, Justice Molloy held that the request was not granted since the pre-hearing disclosure process of exchanging all relevant documents was fair and reasonable in the circumstances.

Clifford at paras 9-11 (**Tab 7**)

22. Accordingly, the *Clifford* decision is supportive of the argument that the Authorities and ANCR are making, namely that the pre-hearing disclosure process must include the exchange of all relevant documents in order to be fair and reasonable.

23. The second comment that needs to be made is that, even if the Commission is the master of its own procedure, the Commission's power in this respect is subordinate to its duty and the requirements with respect to the principle of fairness.

*Ratushny, pp. 288-289 (**Tab 2**)*

24. Procedural fairness requires the disclosure of the Transcripts as relevant, non-privileged documents.

See ANCR/Authority Brief dated July 5, 2012

The Transcripts and the Information Contained therein are not the Sole Property of the Commission.

25. Commission Counsel has argued that the Transcripts are not "documents" in accordance with the Commission's Rules as they contain information "created by the Commission for its own internal purposes".

See Commission Counsel's Brief at para 10

26. This position is untenable. The information found in the Transcripts is not "created" by the Commission. The information is simply in the Commission's possession.

27. Also, as was argued in our July 5, 2012 brief, litigation privilege does not apply to the Commission Counsel as her role is non-adversarial. Even if litigation privilege could apply, it would not apply to the Transcripts as they are not the result of an analysis by Commission Counsel.

See the ANCR/Authority Brief dated July 5, 2012 at paras 14-22

28. The Manitoba Court of Appeal has clearly stated that transcripts of witness interviews are relevant and non-privileged documents.

Hudson Bay at paras 108-110
(See Tab 3 of ANCR/Authority Brief dated July 5, 2012)

29. The Commission's own rules require the disclosure of all relevant and non-privileged documents.

Commission of Inquiry Rules of Procedure and Practice, Rule 26
(See Tab 2 of ANCR/Authority Brief dated July 5, 2012)

30. It should also be pointed out that the Confidentiality Undertaking found at Tab 5 of Commission Counsel's brief states that the term "documents" is intended to have a broad meaning…" It would not make sense or be fair to narrow that definition when it comes to pre-hearing disclosure as is advocated by the Commission Counsel.

The 'Assurance' of Confidentiality Does Not Prevent Disclosure

31. Commission Counsel states that she provided assurances to all interviewed witnesses that she would keep their comments in confidence and that she would only disclose the information that she considered relevant. She has relied on these assurances as a reason to refuse the disclosure of the Transcripts.

See Commission Counsel's Brief at paras 21-26

32. Commission Counsel should not have made this assurance to the individuals she interviewed. In any event, the assurance does not meet the legal requirements for a claim of case-by-case privilege. There was no reasonable expectation of confidence and the disclosure of the Transcripts is of greater importance then any need to keep them secret.

See the ANCR/Authority Brief dated July 5, 2012 at paras 23-28

The Goudge and Taman Inquiries are Distinguishible

33. Commission Counsel has compared and contrasted the Goudge Inquiry, where no transcripts were ever prepared for anyone (including Commission Counsel) and the Taman Inquiry, where pre-hearing interviews were conducted under oath and transcribed by a court reporter. She has argued that this Inquiry should follow the Goudge Inquiry given the fact that the within interviews were not conducted under oath or in the presence of a court reporter. Furthermore, she has pointed out that the transcripts were used to cross-examine witnesses in the Taman Inquiry which is not allowed by the within Commission's Rules.

See Commission Counsel's Brief at paras 14-17

34. The Goudge and Taman Inquiries are distinguishable to the within matter. Unlike in the Goudge Inquiry, there are Transcripts here. Therefore, they should be produced. Further, unlike in the Taman Inquiry, where the witnesses were interviewed under oath, we do not propose to use the Transcripts for cross examination purposes.

35. Accordingly, if we are going to reference the Goudge and Taman Inquiries, an accurate position should be established with respect to the particular circumstances of this matter. Such a position would be that the Transcripts be produced but they should not be used for the purpose of cross examining witnesses on previous statements.

The Party's Agreement to the Commission's Rules Does Not Prohibit the Disclosure of the Transcripts

36. Commission Counsel has argued that, by signing off on the Commission's Rules, all parties have agreed that they will only be provided Witness Summaries.

37. In response, we reiterate that the Commission's Rules state that the Commission will disclose all relevant and non-privileged documents. The Transcripts are relevant, non-privileged documents. That is what was agreed to.

Commission of Inquiry Rules of Procedure and Rules, Rule 26
(See Tab 2 of ANCR/Authority Brief dated July 5, 2012)

38. Furthermore, at the time the Rules were prepared, it was not known that Transcripts would be ever be in existence. Agreeing to receive Witness Summaries was not done in exchange of any party's rights to receive all relevant, non-privileged documents.

39. Finally, rules of procedure are not legally binding and are subordinate to the duty of fairness. Since fairness is a jurisdictional requirement, it cannot be satisfied by the consent of the parties. Procedural Fairness requires the disclosure of the Transcripts.

*Ratushny at p. 286 and 291(**Tab 2**)*

All the Relevant Information may not be in the Witness Summaries

40. Commission Counsel has argued that all of the relevant information from the witness interviews is contained in the Witness Summaries. Accordingly, she argues that disclosure of the Transcripts is unnecessary.

See Commission Counsel's Brief at para 23

41. This argument is without legal foundation. The authorities are clear that commissions of inquiry should be governed by the principle of complete and open disclosure in the absence of exceptional circumstances.

*Ratushny, p. 241 (**Tab 2**)*

42. When the Commission Counsel is determining what is relevant when preparing the Witness Summaries, there is no guarantee that she will take all the party's interests into account when assessing relevance. Commission Counsel may not consider certain information to be relevant but counsel to a party might find in it some aspects that are important to that party's interests.

*Ratushny, pp. 246-247 (**Tab 2**)*

43. Accordingly, the entire Transcript for each witness should be disclosed.

Disclosure of the Transcripts will not Create Delay or Increase Costs.

44. Commission Counsel has argued that the disclosure should be prohibited as it would lead to significant delay and escalated costs.

45. It is the position of ANCR and the Authorities that increased disclosure will actually streamline the public hearing and result in a faster process with less cost.

46. In support of this position are the comments of Ratushny where he urges Commission Counsel to provide maximum pre-hearing disclosure in order to avoid the hearing from becoming a "multi-party examination for discovery".

*Ratushny, p. 241 (**Tab 2**)*

47. Furthermore, the Manitoba Court of Appeal in *Hudson Bay* has stated on point that it is no excuse to argue that there is too much material to produce. The issue is the relevance of the document, not the amount.

Hudson Bay, para 105
(See Tab 3 of ANCR/Authority Brief dated July 5, 2012)

48. The Supreme Court of Canada has stated that no matter how important the work of an inquiry may be, it cannot be achieved at the expense of the fundamental right of each citizen to be treated fairly.

Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System), [1997] 3 S.C.R. 440 at para 31
(See Tab 5 of ANCR/Authority Brief dated July 5, 2012)

49. Accordingly, even if producing the Transcripts would lead to delay, which it is argued it would not, delay is no excuse for denying the fundamental right of procedural fairness to each party to this Inquiry.

50. Commission Counsel has commented that the Transcripts would have to be redacted before they could be disclosed. This, of course, is not necessary or fair. What is sought and required is full disclosure – not a different mode of redaction than that which is already present in the Witness Interview Summaries.

51. It is the position of the Authorities and ANCR that an adjournment of the hearing should not be necessary in order to allow for disclosure of the Transcripts. A process of disclosure that utilizes adequate electronic technology and one that identifies the Transcripts to be disclosed in the same order that the witnesses will be testifying should allow for full disclosure to occur without requiring an adjournment of the hearing.

Disclosure Must be Allowed where the Witness Consents

52. Commission Counsel has stated that, even if a witness consents to disclosure, the transcripts are not the property of the witness and the witness can therefore not consent to their disclosure.

See Commission Counsel's Brief at para 23

53. This is legally incorrect. If the Commission Counsel is alleging, as she appears to be, that the Transcripts should not be disclosed because they are confidential and therefore privileged, the law is clear that any privilege belongs to the individual witness– not the lawyer. What necessarily follows is that the privilege can only be waived by the individual who owns it.

*David M. Paciocco and Lee Stuesser, The Law of Evidence (Fourth Ed., Toronto: Irwin Law Inc., 2005) p. 203 (**Tab 8**)*

PART III

NATURE OF REMEDY SOUGHT

54. It is submitted that the Commissioner ought to order the disclosure of the unedited Transcripts with respect to all witness interviews conducted by the Commission and its Commission Counsel.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 24th day of July, 2012.

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