IN THE MATTER OF:	Commission of Inquiry into the Circumstances Surrounding the Death of Phoenix Sinclair			
OF THE MANITOBA GO	REPLY BRIEF OVERNMENT AND GENERAL EMPLOYEES' UNION (MGEU)			

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Phone: 942-0501 Fax: 956-0625 IN THE MATTER OF:

Commission of Inquiry into the Circumstances Surrounding the Death of Phoenix Sinclair

REPLY BRIEF OF THE MANITOBA GOVERNMENT AND GENERAL EMPLOYEES' UNION (MGEU)

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PARTI

LIST OF DOCUMENTS RELIED UPON

In addition to the documents set out in the Motion Brief filed August 22, 2011 the Applicant will rely upon the following further documents:

Affidavits

- 4. Affidavit of Elizabeth McLeod, sworn April 3, 2012 (filed by the MGEU)
- 5. Affidavit of Evelyn Wotherspoon, sworn March 29, 2012 (filed by the MGEU)
- 6. Supplementary Affidavit of Janet Kehler, affirmed April 4, 2012 (filed by the MGEU)
- 7. Affidavit of Allison Lamontagne, sworn May 22, 2012 (filed)
- 8. Affidavit of Bruce Rivers, sworn/affirmed March 30, 2012 (filed by the ANCR)
- 9. Affidavit of Cecil Rosner, sworn May 9, 2012 (filed)
- 10. Affidavit of Cheryl Regehr, sworn/affirmed March 30, 2012 (filed by the ANCR)
- 11. Affidavit of Gwendolyn M. Gosek, sworn April 4, 2012 (filed by the Faculty of Social Work, University of Manitoba)
- 12. Affidavit of Michael Bear, sworn May 11, 2012 (filed)
- 13. Affidavit of Scott Clark, affirmed April 4, 2012 (filed by the Canadian Union of Public Employees)
- 14. Affidavit of Shirley Cochrane, affirmed April 3, 2012 (filed by ICFS)
- 15. Affidavit of Shavonne Hastings, sworn May 10, 2012 (filed)

Cross Examinations

- 16. Cross Examination of Cecil Rosner, sworn May 28, 2012 (filed)
- 17. Cross Examination of Evelyn Wotherspoon, sworn May 22, 2012 (filed)
- 18. Cross Examination of Gwendolyn Gosek, affirmed June 1, 2012 (filed)
- 19. Cross Examination of Janet Kehler, affirmed May 22, 2012 (filed)
- 20. Cross Examination of Michael Bear, affirmed May 30, 2012 (filed)

- 21. Cross Examination of Shavonne Hastings, affirmed May 30, 2012 (filed by ICFS)
- 22. Cross Examination of Shirley Cochrane, affirmed May 24, 2012 (filed)

Briefs

- 23. 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 Nations Coordinated Response Network Motion Brief ("ANCR Motion Brief") (filed by the ANCR)
- 24. Intertribal Child and Family Services Motion Brief ("ICFS Motion Brief") (filed by ICFS)
- 25. Motion Brief of the Canadian Broadcasting Corporation, CTV Winnipeg, Global Winnipeg and the Winnipeg Free Press ("Media Motion Brief")
- 26. Motion Brief of the Assembly of Manitoba Chiefs and Southern Chiefs Organization ("AMC/SCO Brief")
- 27. Motion Brief of Kimberley Ann Edwards and Nelson Draper Steve Sinclair ("Sinclair/Edwards Brief")

PART II

ARGUMENT

A. INTRODUCTION

- 1. This Reply Brief is supplementary to the MGEU's Motion Brief dated August 22, 2011, filed in support of the MGEU Notice of Motion.
- 2. Since the MGEU's Motion Brief was filed, eight (8) Affidavits have been filed by various parties in support of MGEU's motion and the Media has filed four (4) Affidavits opposing MGEU's motion. Cross-examinations have taken place, where requested, and Briefs have been filed by the Media, Sinclair/Edwards and AMC/SCO opposing MGEU's motion for a limited publication ban.
- 3. The purpose of this Reply Brief is primarily to address facts, issues and arguments raised in the material filed subsequent to the Media's August 2011 Motion Brief.

B. INQUIRY vs COURT - EVIDENTIARY DIFFERENCES

a) Evidence in Court

- 4. Courts in Canada serve a specific and distinct function. Whether a trial court or an appeal court, the primary task of the court is to decide upon a winner and a loser in every case, and on every issue. Whether it is a civil, family, or criminal court or an appellate court, the court must hear testimony and receive documents in accordance with strict rules of evidence, and considering that evidence in conjunction with the onus of proof and the applicable law, make a decision in favour of one party over the other.
- 5. As such, whether the standard of proof is on the balance of probabilities or proof beyond a reasonable doubt, the strict evidentiary rules must be adhered to in all cases that go to court. Failure to follow the strict rules of evidence in receiving testimony and

documentary evidence is a fatal flaw if committed by a trial court, which will provide good and sufficient grounds for that decision to be overturned on appeal.

6. The stakes in court are high and as such evidentiary rules are strictly applied.

b) Inquiry

- 7. The Inquiry is not a court. It does not function as a court and its job is significantly different than that of a court. Its goals do not include picking a winner and a loser. While people's actions (and inactions) can be examined in an inquiry, their safety, financial wellbeing, and careers ought not to be at risk.
- 8. This inquiry, as in virtually all inquiries, requires the Commissioner to perform his duties without expressing any conclusion or recommendation about civil or criminal liability of any person.
- 9. By virtue of the Order in Council establishing this Inquiry:
 - The commissioner is to consider the findings made in previous reviews authored by numerous individuals. He may give the reviews <u>any weight, including</u> <u>accepting them as conclusive</u> (OIC No. 3);
 - The commissioner may, in his discretion, rely upon a transcript of an interview of any person, conducted prior to the public hearings and <u>may rely on the evidence</u> gathered in this manner as an alternative to having that person appear before the inquiry (OIC No. 9);
 - The commissioner may consider any documents (not subject to legal privilege)
 and may give those documents any weight including accepting them as
 conclusive (OIC No. 4);

- All reports issued by the commissioner must be in a form appropriate for public release, but that release is subject to the Freedom of Information and Protection of Privacy Act (FIPPA) and other relevant laws (OIC No. 6).
- 10. In accordance with the Amended Rules of Procedure and Practice adopted by this Commission:
 - The commissioner <u>may receive any evidence he considers to be helpful</u> in fulfilling his mandate whether or not such evidence would be admissible in a court of law (OIC No. 14);
 - The commissioner <u>may attend pre-inquiry interviews</u> conducted by Commission Counsel if he chooses (OIC No. 21);
 - A summary of Commission Counsel's interview of a person, prior to the commencement of the Inquiry, <u>may be tendered as evidence</u> as the Inquiry and the commissioner may consider the information in the summary when making his final findings, conclusions and recommendations (OIC No. 25);
 - All non-privileged documents that are released to the parties and intervenors
 (disclosure of documentary evidence) is only released on condition that the party
 sign an undertaking to use the documents only for the purposes of the inquiry, to
 keep the contents confidential, and to abide by other restrictions on disclosure
 and dissemination that the commission considers appropriate. All copies of the
 documents disclosed are to be returned to the commission at the end of the
 inquiry (OIC Nos. 27 & 28);
 - The commissioner can exclude all or any members of the public from the hearing room and/or direct that portions of the hearing be held in the absence of the public (OIC No. 43);

- Transcripts of the testimony and copies of all exhibits are posted on the Commission's website (OIC No. 45).
- Virtually none of the evidentiary rules set out above would be applicable in a Canadian court.

C. THE EVIDENCE THE COMMISSION WILL HEAR IN PHASES I, II AND III

12. Pursuant to the Order in Council the inquiry will be conducted in three separate phases. As the date for the commencement of the inquiry nears, it has become clearer to the parties as to the form that each of the three phases will take. In summary, the three Phases are as follows:

Phase I – in order to inquire into the circumstances surrounding the death of Phoenix Sinclair and the Child Welfare services provided or not provided to her and her family, the Commissioner will hear testimony from a number of witnesses.

Phase II – the Commissioner will hear from the report writers, as set out in paragraph 3 of the Order in Council, and as well there will be witnesses brought forward from the Department, the Authorities, MGEU, the Assembly of Manitoba Chiefs, and the Manitoba Metis Federation.

Phase III – is now entitled "The Community – Its Needs and Responsibilities: Protecting and Promoting Children and Families". Individual expert witnesses as well as panels of individuals will come forward to discuss their views and experiences.

13. It is already clear that the rules of evidence that will be applied at each Phase of the Inquiry will be in accordance with the excerpts set out above from the Order in Council and the Amended Rules of Procedure and Practice, and not in accordance with the evidentiary rules that would be applied in a Canadian court of law.

Phase I

- 14. MGEU represents approximately 23 of the social workers who are expected to testify during Phase I. At this point, 78 witnesses are listed in the most recent Witness Schedule as contemplated during Phase I.
- 15. Commission counsel has interviewed all 23 of the social workers who are represented by MGEU. MGEU legal counsel attended at all of those interviews.
- 16. During the course of those interviews Commission Counsel repeatedly asked social workers questions that elicited both hearsay and opinion evidence.

(1) Hearsay

17. The following are examples of hearsay evidence that was sought / obtained from social workers during interviews with Commission Counsel:

(a) Workload

- 18. Social workers were asked questions about their workload and workload generally both at the time of their involvement with the Phoenix Sinclair file and subsequent to recommendations made as a result of various reports issued since Phoenix Sinclair's death.
- 19. In some instances, the responses of social workers to the question will constitute hearsay.

(b) Training

- 20. Social workers were asked whether there have been, or if they are aware of improvements that have been made to the Child Welfare system.
- 21. The response of these witnesses will be hearsay and opinion evidence.

(c) Statements from Kematch and McKay

- 22. Ms. Kematch and Mr. McKay are currently incarcerated for the murder of Phoenix Sinclair. It is expected that they will not testify nor be interviewed by Commission Counsel.
- 23. Multiple witnesses had discussions with both Ms. Kematch and Mr. McKay. The basic nature of those discussions is recorded in the various case files that will be entered into evidence. Witnesses will no doubt be asked about their recordings and what Ms. Kematch and Mr. McKay said to them on various occasions.
- 24. To the extent social workers describe their conversations with Ms. Kematch or Mr. Sinclair, neither of whom are expected to testify, their evidence will be hearsay.

(d) Statements from Other Witnesses Who May Not Testify

- 25. There are several other people who were involved with Phoenix Sinclair's file. Many of these individuals had discussions with witnesses that have been recorded in various case files and which will likely form part of the testimony of witnesses.
- 26. At this time, based on the current witness list, it does not appear that all (or perhaps any) of these individuals are expected to testify at the hearing.
- 27. To the extent social workers describe their conversations with these people, their evidence will be hearsay.

(2) Expressions of Opinion

- (a) Opinion Regarding Improvements to the Child Welfare System
- 28. Nearly every social worker was asked questions about the operation of the Child Welfare System. In many instances their answers are opinion evidence.

- 29. Social workers were asked (and expressed) their opinion as to the following:
 - 1. Whether Manitoba Children are better protected now as compared to pre-2006 (when 200+ recommendations were released following the death of Phoenix Sinclair and related investigation)?
 - 2. Whether certain levels of training offered (or not offered) by their employer was adequate to prepare them for their respective position within Child and Family Services?
 - 3. Whether additional training in specific areas would have assisted them in their job, in particular as it relates to the goals of protecting children?
 - 4. Whether changes to the CFS computer system are an improvement?
 - 5. What changes could be made to the Child Welfare system that, in the workers opinion, could improve services to children and families?
 - 6. What societal impediments exist that, in the workers opinion, impact the services provided to families and children and how those societal impediments could be improved or eliminated?
 - 7. Whether it would be beneficial to be registered (formally) as a Social Worker?
 - (b) Opinion Regarding Services Provided to Phoenix Sinclair and her Family
- 30. Social workers were asked to express an opinion on various services provided or not provided to Phoenix Sinclair and her family. Their responses to these questions will constitute opinion evidence.
- 31. As these questions were asked of most, if not all, of the social worker witnesses it is expected that they will be asked by Commission counsel of the same witnesses at the inquiry.

Phase II

32. Commission counsel has identified at least four Report Writers, as set out in paragraph 3 in the Order in Council, who will testify. They are scheduled to speak at the inquiry for either 1½ or 2 days each.

- 33. It is submitted that their evidence will be virtually entirely opinion evidence which will encompass each individual's opinion and views about the services provided and whether those services were an example of "best practice", met CFS Standards or Policies, and whether certain allegations respecting Phoenix Sinclair were properly dealt with by social workers.
- 34. It is not MGEU's expectation that each of these Report Writers will be formally qualified as experts and their area of expertise identified prior to them giving testimony, nor is it expected that the parties with standing will be entitled to cross-examine or contest each or any of the Report Writers as to their expertise or qualifications.
- 35. What MGEU does expect is that each report writer will come forward, provide information to the Commissioner as to their background, and then deal with the report each wrote, the considerations made and the opinions contained therein. As such, the formal Rules of Court for the qualification and limitation of testimony of an expert witness will not be followed in Phase II.
- 36. After the Report Writers give evidence, witnesses will then be forthcoming from the Department, the Authorities, MGEU, leadership, AMC and Manitoba Metis Federation. Once again, it is expected that the individuals who come forward on behalf of each of those entities will not be formally qualified as experts prior to giving testimony, nor will any of the parties have the opportunity to contest their expertise or their ability to provide opinion evidence.
- 37. Once again, it is expected by MGEU that these people will come forward and provide the Commissioner with information. The Commissioner will then, as is his mandate, weigh and give consideration to the information that he receives from these individuals.

Phase III

38. Commission counsel has indicated that there will be a number of individuals who might well be experts in their field who will testify. It is not expected that these individuals will be prohibited from testifying unless and until they are formally qualified as experts in their particular area and subjected to cross-examination by other parties.

- 39. In addition, Commission counsel has indicated that information and evidence will be forthcoming by way of panel discussions. These panels are expected to include a panel of elders, a panel of community agencies, and a panel of young women who are clients or potential clients within the system.
- 40. Once again, it is expected by MGEU that none of the individuals on these panels will, prior to be allowed to participate, be expected to formally qualify as an expert, nor will their ability to provide their opinions be contestable by any of the parties on the basis of lack of proof and expertise such as would be required for expert witnesses in a court of law.
- 41. Accordingly, it appears clear from the preparatory work and information provided by Commission counsel to the parties that all three Phases of the inquiry will be conducted in accordance with the relaxed and flexible evidentiary structure set out in the Order in Council and the Amended Rules of Procedure and Practice and not as would be conducted in any Canadian court of law.

D. MEDIA MOTIONS TO STRIKE

- 42. The Media seeks to strike portions of, and in some cases entire, Affidavits filed in support of the partial publication ban on the grounds that affiants are offering hearsay evidence and opinion evidence without being properly qualified as an expert in a particular area. In Appendices A E of its Brief, the Media sets out the details of its objections to the alleged hearsay evidence and/or opinion evidence which, the Media says, affiants were not qualified to give.
- 43. In response to this, MGEU makes three points.
- 44. First, as regards the expert witnesses, MGEU does not accept that these individuals are not expert in their field and, as discussed below, are able to assist the Commissioner in providing evidence which is properly before the inquiry concerning the question of publication ban. Gwendolyn Gosek, Bruce Rivers, Dr. Cheryl Regehr, and Evelyn

Wotherspoon are each highly educated in the area of social work, have dedicated their professional lives to the practical and academic study of child protection, and are eminently qualified to speak on the effects of publication of social worker names during an inquiry into the death of a child in care.

- 45. Second, as is set out above, all three phases of the inquiry will be conducted in accordance with rules of evidence normally utilized at inquiries, not those employed in a court of law. For the Commissioner to impose a standard of evidence at the pre-hearing stage and then to abruptly relax that standard for all three phases of the inquiry would be inappropriate and inconsistent.
- 46. The scope and purpose of the inquiry governs the rules of evidence and should do so at every stage of the proceeding including at the preliminary stage when considering redaction of names and identities of social workers and sources of referral.
- 47. Third, in its own affidavit material filed in opposition to the motion, the Media seeks to put forward hearsay and opinion evidence.
- 48. Examples of opinion and hearsay evidence from the Affidavit of Michael Bear include:
 - Paragraph 8 "Social workers providing services in rural communities and reserves...identities and occupations are very well known to the people in the communities they serve."
 - Paragraph 14 "...the affected community was already well aware of the Tracia
 Owen tragedy and of the agencies and social service professionals who played
 key roles in the case."
 - Paragraph 15 "Agency staff and the other professionals involved in the case of Tracia Owen and her family were extremely upset by this tragic death.
 - Paragraph 15 "It was no surprise to me or my colleagues that such an event would attract public scrutiny..."
 - Paragraph 16 "In the end the agency, its staff and the community learned from the experience."
- 49. Examples of opinion and hearsay evidence from the Affidavit of Shavonne Hastings include:

- Paragraph 6 "Social workers providing service in small communities and on reserve...identities and their jobs are well known throughout the community."
- Paragraph 7 "...people recognize us as social workers before we even introduce ourselves."
- Paragraph 8 "Social workers providing frontline Child and Family Services do find themselves in emotionally-charged circumstances."
- Paragraph 9 "It is difficult to imagine realistic circumstances where prior publication of an identity would make a material difference to the safety of a social worker in an intervention...(opinion)."
- Paragraph 10 "I am not aware of any instance and cannot think of any circumstances likely to occur where the prior publication of a worker's identity would affect the risk in this type of situation..."
- Paragraph 16 "One of the stresses shared by many, is that we are accountable
 for the judgments we make and the way we exercise the powers or
 responsibilities we are given."
- Paragraph 50 Media Motion Brief "Social workers entering the field generally know and ought to know that their names may be public in connection with an incident or tragedy." (attributed to paragraph 16 Affidavit of Shavonne Hastings)
- 50. For the above reasons, the Media's motions to strike should all be dismissed. The Commissioner is well-equipped, both in terms of his expertise and his mandate at this inquiry, to consider and give appropriate weight to all of the evidence put before him by all parties on all issues.

E. DAGENAIS/MENTUCK – A BALANCING ACT

- 51. The Dagenais/Mentuck test as developed by the Supreme Court of Canada is set out in MGEU's main Motion Brief of August 2011. It is also discussed in the Media Motion Brief.
- 52. At its root the Dagenais/Mentuck test is no more or less than balancing the positive effects of a publication ban with any negative effects it might have on the rights and

interests of the parties and the public. As the scope of the publication ban sought is narrowed or lessened, the threshold that the applicant must meet is reduced because the negative effects of the ban are reduced.

53. There is significant and credible evidence that has been brought before this Commission that, properly considered, should tip the balance in favour of the Applicant and the remedy sought.

F. WHAT THE EXPERTS ARE SAYING

A) Affiants in Support of the Publication Ban

Outside of the Affidavit material filed directly by MGEU (two Affidavits of Janet Kehler, Affidavit of Elizabeth McLeod and Affidavit of Evelyn Wotherspoon) five other Affidavits have been filed in support of the publication ban, all by credible individuals. Each of these individuals has dedicated his or her professional life to child welfare and the protection of children. Each is well educated and each has direct evidence and experience to offer to the Commissioner in this case in considering the minimalist publication ban being sought by MGEU. Further, none of these witnesses have any reason to be biased for or against the media in this case or, for or against the particular social workers who are seeking the publication ban.

55. Gwendolyn M. Gosek

Ms. Gosek holds a Bachelor of Social Work and a Master of Social Work and is in the PhD program. She is a faculty member at the University of Manitoba where she teaches, researches and advises graduate students in the Faculty of Social Work. She has worked as a frontline family support worker. Her focus of her career is on indigenous child welfare.

Ms. Gosek has researched stress on child care workers. She notes that they work in a highly stressful environment and burn-out is common. She notes there are high turnover rates for social workers, up to 60% per year.

She notes, based on her research, that child welfare professionals must constantly assess their environment due to threats of violence from angry parents who are under investigation for child abuse or have had their child apprehended.

Ms. Gosek further notes that child death inquiries can be devastating to the morale of the social worker involved and to co-workers.

Her belief is that many media sources resort to the use of drama and sensationalizing of traumatic events such as child death inquiries rendering the social work profession under intense siege resulting in degradation to its image and a subsequent lack of public support. She notes that extensive negative press impacts at the individual social worker and agency levels in other jurisdictions.

In her affidavit Ms. Gosek states at paragraph 10(z) her belief that:

"A review of the literature and anecdotal information support the need to ensure anonymity for social workers involved in the inquiry process. Publication of names of individuals would serve the purpose of the media in sensationalizing the loss of a child's life at the expense of individuals rather than focusing on a more comprehensive set of circumstances."

56. <u>Bruce Rivers</u>

Mr. Rivers was the Executive Director of Toronto Children's Aid Society for 16 years. He holds a Master of Social Work and has spent 37 years in child welfare related work.

Mr. Rivers speaks directly of the effect of inquests as being detrimental. He notes these effects could include a growing aversion by workers to taking any risk. He notes a pattern of workers leaving child welfare and general retention problems.

Mr. Rivers notes chilling effects throughout the workplace and even that volunteers are less likely to commit to CAS work given the chilling effect. He notes, in his capacity as

faculty at the University of Toronto Faculty of Social Work, that students are not choosing to go into social work given these chilling effects.

Mr. Rivers was not cross-examined on his affidavit by Media legal counsel.

57. Dr. Cheryl Regehr

Dr. Regehr holds a Master of Social Work degree and a Doctor of Philosophy. She is currently the Vice Provost at the University of Toronto and for 11 years prior was a faculty member in the Faculty of Social Work where she served as Dean for three years. She is currently a professor in the Faculty of Social Work in addition to her duties as Vice Provost.

Dr. Regehr has conducted research regarding public inquiries into deaths of children in care. She notes, in paragraphs 11 and 12 of her Affidavit, the injurious effects on child care workers of an inquiry into the death of a child in care. She states:

"The inquiry process was identified by participants in the qualitative component of this study as highly stressful resulting in repeated exposure to highly distressing memories, criticism of their professional integrity, and a sense of isolation. This distress was not only experienced by workers undergoing the review but also radiated to others in the organization."

As to the effect of media coverage of the inquiry process, Dr. Regehr states in paragraph 13 of her Affidavit:

"The media attention was viewed by these workers as intensifying the distress of workers that were subjects of the review as well as others in the organization. There was a sense that media reports weakened public support for child welfare services, had far-reaching impacts on the personal lives of workers, and in the end resulted in workers choosing to leave the field – thereby undermining the delivery of child welfare services in general."

In paragraph 21 of her Affidavit, Dr. Regehr speaks of interviews with police officers, fire fighters and paramedics also involved in public inquiries and the impact of media attention on them and their family members including their children.

In paragraph 23 Dr. Regehr quotes the article "The Vicious Cycle" which is described as a sequence of events including interactions amongst the media, politicians, the public, and Child Welfare Services organizations in the United States, in response to grievous incidents of child maltreatment.

In that article the author describes the use of "sensationalistic stories" and reporting aimed at "castigating agency personnel for allowing grievous events to unfold". The author points to media coverage creating a heightened sense of fear, dread and danger about the safety of children and a subsequent climate of mistrust concerning child welfare agencies in the eyes of the public." (Paragraph 24, Cheryl Regehr's Affidavit).

In paragraph 26 of her Affidavit, Dr. Regehr quotes an article which states:

"While naming and shaming professionals in the child abuse field may provide benefits, its effects on individuals and professions can be corrosive."

In paragraph 28 of her Affidavit, Dr. Regehr quotes from an article entitled "Child Protection and the Media: Lessons from the Last Three Decades", and in particular that media reports are not intended to record events but rather are focused on selling news.

In an article published in Ireland, summarized in paragraph 29 of her Affidavit, Dr. Regehr quotes an author citing media reports which urged readers to "join in our crusade to have these workers kicked out of their jobs". After the article was published, threats were subsequently made that one employee's daughters would be killed and the same employee received communications suggesting that she should commit suicide.

In her conclusion regarding the question of a publication ban, Dr. Regehr says in paragraph 33 of her Affidavit as follows:

"In summary, there is strong support from qualitative research conducted by myself and others that media coverage of tragic events and post mortem reviews of child protective services produces a variety of negative outcomes. These include increased distress in workers, decreased commitment to the job, and negative impacts on the personal lives of workers and their families. Further, qualitative evidence points to increased bureaucracy, damaged

morale, and weakened public support as a result of persistently negative media attention."

Dr. Regehr was not cross-examined on her Affidavit by Media legal counsel.

58. Shirley Cochrane

Ms. Cochrane is the Executive Director of Inter Tribal Child and Family Services. She has invested 24 years in the child welfare system, both as a frontline worker and as a supervisor and ultimately as Executive Director.

In paragraph 21 of her Affidavit she outlines a number of concerns expressed to her by her staff associated with media publication of the inquiry including:

- Members of the public will be less likely to report child abuse/neglect concerns due to the perception that Inter Tribal is not competent.
- Existing families may become more resistant due to perceived connections with the death of Phoenix Sinclair, putting both workers and children at risk.
- Publication of social worker names and faces will directly impact their abilities to maintain relationships with families.
- Historic prejudices against First Nations people will again be stirred up due to anticipated heightened media exposure.
- Workers' families and children will be stigmatized due to anticipated media reports.
- Privacy of workers' and their families will be infringed upon.

As a result, it is Ms. Cochrane's concern that there will be detrimental impacts of publishing the names and physical appearances of workers testifying at the inquiry. The impact on individual workers will be severe and there is a serious possibility that ICFS relationships with the community and with parents will be significantly affected.

59. Regan Spencer

Ms. Spencer is the Director of Social Work at the Health Sciences Centre in Winnipeg. She holds a Bachelor of Social Work degree and a Master of Social Work.

Ms. Spencer speaks of the critical importance that patients feel safe and trust the social worker and moreover the importance that the social worker feels safe as a source of referral to child care agencies.

In paragraph 14 of her Affidavit, Ms. Spencer expresses her concerns that publication or broadcasting of social worker names, faces or identities could potentially jeopardize the protection under *The Child and Family Services Act* accorded to sources of referral which could have direct consequences to the protection of children coming into contact with Health Sciences Centre. Moreover, she is concerned that the publication has a potential to destabilize the critical trust relationship between the Health Sciences Centre's medical social workers and the patients at the hospital.

Ms. Spencer was not cross-examined on her Affidavit by Media legal counsel.

60. Elizabeth McLeod

Ms. McLeod is a Registered Social Worker and has been practicing for approximately 30 years. She is currently a manager in the Child & Adolescent Treatment Centre in Brandon. She is also the current president of the Manitoba Institute of Registered Social Workers (MIRSW).

MIRSW has at present approximately 1000 social worker members who are registered in Manitoba. MIRSW has adopted and enforces both the Canadian Association of Social Workers Code of Ethics (2005) and the MIRSW Standards of Practice for Social Workers.

Ms. McLeod emphasizes in her Affidavit that confidentiality is a cornerstone of professional social work relationships. It is at the core of the practice of social work.

Supported by a resolution passed by the Board of Directors of MIRSW in September 2011, the Institute supports the position taken by MGEU and the Authorities to prohibit media identifying social workers who are called to testify at the inquiry.

A rationale for the motion discussed at the Board of Directors meeting included that public identification of social workers who testify will interfere with their ability to provide anonymous service to other clients in that people who see a social worker visiting a residence may recognize that person as a social worker and thereby know that the family is in some way involved with the child welfare system.

In addition, she advises in paragraph 16 of her Affidavit, identification of social workers by name will also impact negatively on their ability to provide anonymous service to clients, violating the Code of Ethics and diminishing the ability of the social worker to provide safe and confidential services.

Ms. McLeod was not cross-examined on her Affidavit by Media legal counsel.

61. Evelyn Wotherspoon

Ms. Wotherspoon has both a Bachelor of Social Work degree and a Master of Social Work. She has been involved in child protection for 32 years, since 1980, as a social worker, a child protection consultant, a case worker, a supervisor, an infant mental health consultant, and a clinical consultant. She has testified as an expert in Alberta and has written numerous papers and journals regarding child welfare matters.

Ms. Wotherspoon, in a report attached to her Affidavit, opines as follows:

- Her work has led her to examine the problem of human error in judgment and reasoning.
- In her private practice she has designed resources to design workshops and seminars for child protection workers, judges and family law professionals who are involved in critical decisions about pre-school children.

- She has studied and witnessed several child welfare tragedies unfold in the public arena in Alberta.
- Exposing case workers who may have failed in their task in some way is appealing at an emotional level and will satisfy many on-lookers.
- If the real objective is to prevent future tragedies exposing frontline professionals to public censure is not the way to go about it.
- Exposing child care workers publicly has a chilling effect on professionals.
- When frontline workers see their colleagues pillaried in the public arena the natural instinct is to avoid taking decisive action and to defer decisions to higher levels in the bureaucracy.
- Permitting the public condemnation of individual case workers results in the entire organization from top to bottom becoming focused on avoiding mistakes instead of on serving children.
- It makes little sense to publish the names of individuals who may or may not have erred in this tragedy.

62. Supplementary Affidavit of Janet Kehler

At the time of his or her involvement in the Phoenix Sinclair file all of the social workers represented by MGEU were employed with either Winnipeg Child & Family Services or a First Nation Child & Family Services Agency. Each person worked as either a frontline social worker or a supervisor.

Of the 28 social workers interviewed by Commission Counsel and represented by Myers Weinberg, 21 remain employed at present as frontline social workers whose jobs are to provide frontline services as a social worker or supervisor just as they did at the time of their involvement with the Phoenix Sinclair file. Only two are no longer employed in the child welfare or social work professions.

The concerns set out in Ms. Kehler's first Affidavit as expressed by social workers in paragraphs 16, 17 & 18 continue to be expressed by them today. These concerns include:

- Privacy both in the workplace and in their daily lives.
- Safety in the workplace for workers, clients and children.
- Stress.
- Morale.
- How televised identification of individuals will deter other frontline social workers from coming forward to provide evidence respecting ways to better protect Manitoba children.
- How identifying a social worker as a witness could seriously and negatively impact their ability to provide protection and services to children and their families.

B) Affiants in Opposition to the Publication Ban

- 63. The Media group has filed no evidence from any expert in social work or child protection. Presumably they were unable to find anyone who has dedicated their professional life in this field who would come forward and intellectually and rationally support the Media's position in this matter.
- 64. The Media did provide three affidavits as follows:

Cecil Rosner

A long-time CBC employee, now Managing Editor. Mr. Rosner's message is clear:

You should allow publication because others have done it in the past

Shivonne Hastings

A social worker for 11 years. She has never experienced any material difference in a volatile situation where her identity was known in advance.

Michael Bear

Mr. Bear is not educated as a social worker. Currently, he is the Executive Director of Southern Chiefs Organization, a political organization. On cross-examination he was unable to answer many questions and apparently would have preferred that his lawyer answer most of them.

65. The cumulative effect of all of the above evidence is that the Commissioner has before him significant weighty, persuasive, and well-reasoned evidence that publishing the identities of social workers will have significant negative impact on them, the system, recruitment into the profession of social work, and ultimately the children and families that are served by the system.

G. COSTS ASSOCIATED WITH THE CROSS-EXAMINATION OF EVELYN WOTHERSPOON

When counsel for the Media advised that he wished to cross-examine Evelyn Wotherspoon the question arose as to who would pay the costs associated with bringing her to Winnipeg to be examined, as the normal practice is that the party wishing to examine pays the conduct money (expenses associated with bringing the witness to this jurisdiction). It was agreed that this would be put before the Commissioner as part of the publication ban motion.

67. The costs associated with bringing Ms. Wotherspoon to Winnipeg are as follows:

1)	Airfare	\$950.51
2)	Hotel	\$186.43
3)	Ground Transportation	\$ 80.00
4)	Meals	\$ 50.00

Total \$1266.94

68. Under the Manitoba Queen's Bench Rules a party who cross-examines on an affidavit shall pay the costs of the party being examined in respect of the cross-examination regardless of the outcome of the proceeding unless the court otherwise orders. This would include disbursements (Rule 39.02(4)). MGEU is not seeking the full costs associated with the cross-examination of Evelyn Wotherspoon. It only seeks the out-of-pocket disbursements expended to bring her to Manitoba.

H. THE SENSATIONALISTIC MEDIA

- 69. Prior to the widespread publication of newspapers, television news and radio news on the internet, the publication of one's name in the media had immediate but time limited consequences. In the case of a newspaper article, one's name was in the public eye for a matter of days only (routinely until garbage day when newspapers were thrown out). Sometimes letters to the editor would result in a few subsequent letters being published in newspapers in the days following the original article. Generally speaking, the news item whether it be in print, on radio or television would die down within days.
- 70. Media has changed significantly with the advent of the internet. Newspapers publish their daily editions on the internet where they remain in perpetuity for all the world to see. Names that appear on the internet can be searched easily and articles dating back many years that contain a searched name will be readily available. Once put on the internet, a name cannot be removed.
- 71. Letters to the editor have largely been replaced by commentaries which newspapers set-up on their internet websites, and purport to regulate whereby individuals can anonymously provide comments (akin to letters to the editor in days gone by) without fear of identification or responsibility.
- 72. Media organizations, such as newspapers, support and apparently are in favour of ongoing commentary by anonymous readers. At very least they increase the number of people who visit the media organizations website whether to comment or to read existing comments.

- 73. A recent example of the effect of this phenomenon appeared in the Winnipeg Free Press print edition on June 20, 2012 by way of an article by reporter Lindor Reynolds. The entire article is attached as Appendix 1 to this Brief.
- 74. In the article at Appendix 1, Ms. Reynolds writes about an article which appeared in the Winnipeg Free Press days earlier considering the growing gap between Winnipeg's rich and poor. As part of the previous article Ms. Reynolds had interviewed a Winnipeg resident who is poor and on welfare and happens to live in a house that was once a mansion owned by late Free Press Editor John Dafoe.
- 75. As a result of the previous article, Ms. Reynolds notes, reader reaction was swift and in many cases harsh. She advises that "in the online world, anonymous commenters slammed a welfare recipient who lives in poverty..."
- 76. With regard to the individual who she had interviewed she notes "with any luck he won't read comments by people who know nothing about him but think they should judge him anyway."
- 77. As to whether the individual would have co-operated by being interviewed had he known or suspected as to the resulting reader backlash Ms. Reynolds notes "S____ opened his door and he became a game for the bloody-minded. He won't make that mistake again."
- 78. It is not in dispute that the Phoenix Sinclair Inquiry is the most sensational and publicized Inquiry in Winnipeg's recent history. Both daily newspapers, as well as TV and radio, have covered virtually every aspect of the Inquiry including all of the delays in its commencement, vigorously.
- 79. As is set out in the Affidavit of Janet Kehler, both the Winnipeg Sun (which was a party to the Media Motion for some time but has since withdrawn) and the Winnipeg Free Press have published articles and allowed commenters to add to those articles on their websites.

- 80. Beginning at paragraph 16 of her Supplementary Affidavit Ms. Kehler evidences a number of sensationalistic, blameful and slanderous comments which appear in both the Winnipeg Sun and the Winnipeg Free Press including:
 - References to social workers as useless assholes who don't give a shit about a little child's life.
 - Child & Family Services as home and family wreckers.
 - Describing MGEU union leaders as scummy bitches.
 - Recommending that the case worker that sent Phoenix Sinclair back to her mother "should be shot".
 - Referring to CFS workers as fat and over paid.
 - Describing MGEU's involvement in the inquiry as an attempted whitewash.
 - That social workers responsible for Phoenix Sinclair should have their heads roll and should be fired.
 - Referencing the inquiry as "judgment day".
 - Advising "If you screwed up, you should have to face the music just like everybody else".
 - Why would you want your name protected if you didn't do anything wrong.
 - Cowards unions attempt to hide identities of social workers at inquiry into tots death shameful.
- 81. It is clear from the above that the Media is interested both in selling its product (whether that be newspapers, radio time or television air time) and is keenly interested in increasing sales by blaming individuals. This is in stark contrast to the mandate of the Commissioner and the Inquiry itself and does nothing whatsoever to assist the public in understanding the true reasons and factual situation behind the tragic death of Phoenix Sinclair.

- 82. What is portrayed as charter values and the open court principle is nothing more, it is submitted, than an attempt by the Media to maximize profits and sell newspapers and increase viewership and readership.
- 83. Courts in Manitoba including the Provincial Court have commented on the effect of sensationalized media on court proceedings. Recently in March 2012 Provincial Judge Carlson in the sentencing of Graham James made a number of statements in her decision denying cameras in her courtroom including:
 - 1) This case is not going to become a spectacle.
 - 2) We all know that internet postings may not be effectively erased.
 - 3) If victims have to worry that there may be a camera anywhere near the court proceedings it is reasonable to expect they may not come forward.

I. A MINIMAL ORDER IS SOUGHT

- 84. Although the motion brought by MGEU is commonly referred to as a "publication ban motion" the ban on publication is extremely minimal.
- 85. The hearing room will be entirely open to the public and the media. Everyone will see the face and hear the name of all social worker witnesses. There will be no restriction whatsoever on any of the information available to the Commissioner either by way of testimony or documentation.
- 86. The only restriction sought by virtue of the motion is the mass publication of the name, face or identity of any social worker who testifies, and the redaction of their name from any exhibit that is ultimately put on the Commission website.
- 87. This will have no effect whatsoever on the hearing itself nor the information available to the Commissioner.
- 88. This minimal ban on publication is not inconsistent with the relief sought by the sources of referral and agreed to by the media.

89. Further, counsel for Steven Sinclair have sought to prevent the majority of Mr. Sinclair's Child In Care file from being entered into evidence at the inquiry despite the file already having been disclosed to the parties and despite the fact that portions of the file will likely be entered as evidence in the form of "admitted facts". The parties have agreed to extend to Mr. Sinclair this requested right of privacy notwithstanding that he is a party to the inquiry. Yet Steven Sinclair opposes the motion brought by MGEU.

PART III

CONCLUSION

- 90. The government's intention, the public's right, and the Commissioner's mandate in this inquiry is to make recommendations to better protect Manitoba children. In that respect there is a significant opportunity for this Commissioner of Inquiry to do good. There is, at the same time, a risk of doing damage. Publicising names and identifies of frontline social workers, so that the media can lay blame and sensationalize their involvement, will do damage to them, to the system and ultimately to the children and families they serve.
- 91. It is MGEU's respectful submission that the Commissioner should heed the advice given to him by the expert and other witnesses who support the publication ban. For the sake of children and social workers both, he must not allow social workers who were involved in this matter and who will testify at the inquiry to become "game for the bloody-minded" (as described by Lindor Reynolds of the Winnipeg Free Press).

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

This \mathcal{M}^{si} day of June, 2012.

MYERS WEINBERG LLP

Per: Garth H. Smorang, Q.C./Trevor Ray

Counsel for The Manitoba Government

and General Employees' Union

Winnipeg Free Press - PRINT EDITION

What happens when there are more of them than us?

By: Lindor Reynolds

Posted: 1:00 AM | Comments: 0 (including replies)g

If I believed everything I worked for was in peril, how hard would I fight to keep it safe? Would I lash out at the people I thought were after my slice of the pie? Would I convince myself they were inferior and undeserving?

On Saturday, the Free Press launched its Bottom Lines/Dividing Lines series. Over the next year, we'll look at the growing gap between Winnipeg's rich and poor. Reporter Mary Agnes Welch and I kicked things off by examining Winnipeg's social and economic picture during the 1919 General Strike and contrasted it with today's reality.

We found a city with a distinct underclass, one defined by race, poverty and neighbourhood. In the coming months, Free Press reporters will examine the contrasts in specific parts of the city, the difficulty finding affordable housing, the hardships of aging in poverty and a host of other topics.

Reaction to the series was swift and, in many cases, harsh. In the online world, anonymous commenters slammed a welfare recipient who lives in poverty in what was once the mansion owned by late Free Press editor John Dafoe. Some felt I should have provided more of Steve Swartz's story; others believed they'd read enough to judge him.

Here's part of what I posted Sunday after scrolling through 300-some comments:

"Steve Swartz... lives in John Dafoe's old mansion. That's why I knocked on his door. He was kind enough to answer... Swartz wasn't asking for your pity, understanding or scorn. With any luck he won't read comments by people who know nothing about him but think they should judge him anyway.

"He was injured several years ago and his hand nearly severed. Could he be retrained? Has he made poor choices? Should he be living in a crappy place because he's on welfare? Many of you have debated that and come to your own conclusions... Swartz opened his door and he became game for the bloody minded. He won't make that mistake again.

"This weekend's articles were the beginning of a series the Free Press believes is important. We need debate on policy, on social change, on whether we believe (as parents once did) that our children will have a better life than we did. It's a conversation happening around the world and I invite you to join it.

"Constructively, creatively, I'm hoping we can reach an understanding more complex than puerile insults and cheap shots. We need to. If it's always us versus them we have to be prepared for the day when there are more of 'them' than there are of 'us.' "

It wasn't just this series that got the knives unsheathed. In Tuesday's paper, Carol Sanders reported on a protest against the elimination of the Interim Federal Health Program. It provides temporary health-care coverage to eligible protected persons, refugee claimants and others who do not qualify for provincial or territorial health insurance.

Here's what one online commenter said:

"Advocates for refugees, meanwhile who advocates for the Canadian? Enhancing the culture that they chose to leave, we pay for special schools, the list just continues... taxpayers are asked to keep footing the bill.

"Why is it everyone wants to come to Canada and then insist on having what they left?"

In this case, the man featured in Sanders' piece "left" his leg in Congo following a machete attack. Canadians benefit from socialized medicine (as flawed as it may be), subsidized education, freedom from war and most violence, and the ability to practise our faiths and cultural beliefs without fear. We are all privileged.

If it's anxiety about their futures that is the root of the online community's wrath, we need to continue the conversation. Turning neighbours into caricatures and social programs into examples of the government favouring the lazy is easy. If we are divisive, we will be divided. If we are tolerant and respectful, we will be rewarded.

The hard work comes in understanding the causes of poverty and turmoil, in working toward solutions and in realizing we are all 'us' and all 'them.' Our places in this world could change in a heartbeat.

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