



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

The Honourable Edward (Ted) Hughes, Q.C.,
Commissioner

Transcript of Proceedings
Publication Ban and Redaction Hearing,
held at the Winnipeg Convention Centre,
375 York Avenue, Winnipeg, Manitoba

WEDNESDAY, JULY 4, 2012

APPEARANCES

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G. SMORANG, Q.C.	Manitoba Government and General Employees Union
MR. K. SAXBERG	General Child and Family Services Authority
MR. H. COCHRANE	First Nations of Northern Manitoba Child and Family Services Authority
MR. L. BERNAS	First Nations of Southern Manitoba Child and Family Services Authority Child and Family All Nation Coordinated Response Network
MR. H. KHAN	Intertribal Child and Family Services
MR. J. GINDIN	Mr. Nelson Draper Steve Sinclair and
MR. D. IRELAND	Ms. Kimberly-Ann Edwards
MR. J. FUNKE	Assembly of Manitoba Chiefs and
MS. J. SAUNDERS	Southern Chiefs Organization Inc.
MR. G. JULIANO and	University of Manitoba, Faculty of Social Work
MS. M. VERSACE	
MS. V. RACHLIS	SOR #1, SOR #2, SOR #4, PHN & TM
MR. S. PAUL	SOR #3
MR. W. GANGE	SOR #5, SOR #6, SOR #7
MR. J. KROFT	Canadian Broadcasting Corporation, CTV Winnipeg,
MS. B. CHISICK	Global Winnipeg and Winnipeg Free Press

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1 JULY 4, 2012

2

3 THE CLERK: Please be seated.

4 THE COMMISSIONER: Good morning, ladies and
5 gentlemen. I think we're ready to start this morning's
6 proceedings and I think Commission counsel has some opening
7 remarks to make.

8 MS. WALSH: I do, Mr. Commissioner. Good
9 morning. Just a few preliminary remarks before I turn the
10 proceedings over to other counsel.

11 The purpose of this public session is to allow
12 you to hear and rule upon the applications which have been
13 filed on behalf of various parties and witnesses for
14 publication bans, in-camera proceedings, and redaction of
15 documents regarding testimony to be heard and evidence to
16 be adduced in the public record once the hearings commence
17 on September 5.

18 So as to ensure that everyone understands the
19 context in which these applications are being made, I want
20 to confirm the media and communications protocol that the
21 Commission has indicated so far will apply at the public
22 hearings and I say so far because, of course, the protocol
23 will be subject to the ruling you make at the end of
24 hearing these applications.

25 The media and communications protocol which is

1 proposed to be used at the public hearings is essentially
2 unchanged from the protocol which is being relied upon at
3 all of the public sessions the inquiry has held to date,
4 starting at the hearing of the applications for standing
5 last June.

6 I am just going to take a moment to review the
7 most relevant aspects of that protocol, leaving out the
8 references to the most technical aspects.

9 The most recent version of the protocol was
10 provided to counsel and to the media yesterday and it's
11 dated July 3rd, 2012. Starting at point number two, it
12 reads:

13

14 Unless otherwise directed by the
15 Commissioner, only one video
16 camera and operator, selected and
17 supplied by the media, is allowed
18 to be set up in a designated area
19 in the hearing room. It must
20 provide a pool video feed to all
21 media outlets at the proceeding.
22 The pool video camera must remain
23 fixed on a tripod in the
24 designated area within the hearing
25 room. It must be in place prior

1 to the hearing being called into
2 session and must not be removed
3 from the tripod at any time during
4 the hearing. The camera may only
5 be removed during a break in the
6 proceedings and only the available
7 room light is permitted as
8 lighting.

9 An audio feed will be provided,
10 media must not place microphones
11 or tape recorders at the counsel
12 tables, clerk's table, witness
13 stand or on your dais, Mr.
14 Commissioner.

15 Live streaming of the hearing with
16 a five minute delay in
17 broadcasting is permitted, subject
18 to any ruling that you make during
19 the hearing.

20 Scrums will not be permitted in
21 the hearing room. Still
22 photography and video cut away
23 shots will not be allowed.
24 Subject to your rulings, they may
25 be permitted at the start of the
26 public session.

1 Cell phones and other electronic
2 devices must be turned off when
3 entering the hearing room.
4 Alternatively, so long as the
5 ringers are turned off, and they
6 are not used to communicate orally
7 or to take pictures, or video,
8 these devices may be used in the
9 hearing room unless otherwise
10 directed by you.

11

12 And finally, subject to any rulings that you
13 make:

14

15 Documents entered into the public
16 record and transcripts available
17 in an electronic format will be
18 posted on the Commission's
19 website.

20

21 This protocol, as I indicated, is of course
22 subject to your exercising your discretion to follow a
23 different process at any point during the hearings.

24

25 For example, in the event you determine that any
 portion of the evidence should be heard at an in-camera

1 session, then a different set of procedural provisions
2 regarding media and communications would apply.

3 So that's the procedural context in which the
4 applications you are about to hear are being made.

5 Now, prior to these proceedings, counsel were
6 provided by my office with a hearing calendar which
7 identified the names of witnesses we plan to call to
8 testify at the public hearings. This calendar was sent to
9 all counsel for the parties and intervenors who have
10 standing. In the case of individuals who do not have
11 standing, but will nonetheless be called as witnesses to
12 testify, we have advised those individuals or their counsel
13 as to the proposed date of their testimony.

14 The seven witnesses who are identified in today's
15 proceedings by the designation SOR and a number, SOR
16 standing for source of referral, are identified in that
17 same manner on the hearing calendar which was sent to
18 counsel. In other words, Mr. Commissioner, the identity of
19 those witnesses has not been disclosed even to counsel for
20 participants with standing.

21 To date a somewhat broad view as to who falls
22 within the definition of a source of referral or informant,
23 to use the language of the Child and Family Services Act
24 has been accepted by counsel. This has been the case since
25 December of 2011, when you issued your ruling on redaction

1 of documents for the purposes of distribution to counsel
2 for their use in preparing for the public hearings.

3 In that ruling you ordered, among other things,
4 that as a category of witnesses informant's identities
5 should be redacted. I am advised that some counsel will be
6 addressing the issue as to who falls within the category of
7 SOR or informant, at least on a preliminary basis, during
8 the course of submissions to be heard over the next few
9 days.

10 In terms of the order of appearance, counsel have
11 agreed to the following agenda for the next three days.
12 The first application will be the application for a
13 publication ban, and you will hear from counsel in the
14 following order.

15 Counsel for the Manitoba Government Employees
16 Union, counsel for the Authorities and ANCR, All Nations
17 Coordinated Response, counsel for Intertribal Child and
18 Family Services and counsel for the University of Manitoba.

19 Responding to those applications you will hear
20 from counsel for a coalition of media outlets, counsel for
21 the parties Steve Sinclair and Kim Edwards, and counsel for
22 the intervenors, the Assembly of Manitoba Chiefs and
23 Southern Chiefs Organization.

24 Following those submissions, counsel for the
25 applicants will have a right of reply.

1 The next application will be one made by the
2 Department of Family Services and Consumer Affairs
3 regarding redaction of documents which will be entered into
4 the public record.

5 The third application you will hear is an
6 application made on behalf of sources of referral, or
7 informants, who have been identified by the Commission as
8 SORs numbered five, six and seven, and SOR number three.
9 Responses to those applications will be made by counsel for
10 the media, Steve Sinclair and Kim Edwards, and the AMC,
11 SCO.

12 And finally, Mr. Commissioner, you will hear
13 applications made by counsel for witnesses who have been
14 identified as SORs numbered one, two, and four and two
15 witnesses who, for the purposes of today's session, have
16 been identified by their counsel as PHN and TM.

17 And again, responses will be made to those
18 applications by counsel for the media, Steve Sinclair, and
19 Kim Edwards and the AMC, SCO, with a right of reply from
20 the applicant.

21 I have one final piece of information to convey,
22 Mr. Commissioner, I have been advised by one witness, who
23 has chosen not to be represented by counsel, that that
24 witness is not requesting a publication ban. It would not
25 be appropriate, however, in my view, to disclose that

1 witness' identity at this point in order to preserve the
2 integrity of your ultimate ruling on this issue in light of
3 the arguments which will be before you today.

4 Unless you have any questions, Mr. Commissioner,
5 I am ready to turn the hearings over to counsel for the
6 MGEU.

7 THE COMMISSIONER: I just have one. Where is the
8 motion to strike parts of the material to fit into the
9 order that you have outlined?

10 MS. WALSH: That motion, Mr. Commissioner, will
11 be heard in the hearing of application number one and will
12 be raised by counsel for the media in their response to
13 those applications and then we'll be responded to by the
14 applicants in their reply. So that would be in the first
15 application.

16 THE COMMISSIONER: And you've got consensus with
17 counsel, it will be dealt with in that manner?

18 MS. WALSH: Yes, I do.

19 THE COMMISSIONER: Thank you.

20 MR. KROFT: Just one housekeeping detail, when we
21 met as a group to discuss how the -- this was going to
22 proceed, each of the counsel representing people --
23 applicants who were seeking a publication ban were going to
24 be submitting a list of the people to whom the order would
25 apply if, if it is granted, to you, I believe, and the

1 Commissioner and I'm just wondering if you can confirm that
2 all of the applicants have indeed submitted the names of
3 the people who will be bound by the order?

4 MS. WALSH: Yes, I have received a list from
5 counsel for the MGEU, identifying that their application
6 applies 24 witnesses and I have the names of those
7 witnesses.

8 MR. KROFT: And there are though other applicants
9 who are also to submit the names. The concern, Mr.
10 Commissioner, is that while the names aren't disclosed to
11 us for, for reasons that you understand, it has been a
12 position of the media, from the beginning, that this isn't
13 a theoretical matter, there are real applicants who will be
14 bound at the end by your decision, whichever way it goes,
15 and it's important that somewhere there be a record of who
16 those people are and that they are bound by the result.
17 And so the agreement that I had understood was that anybody
18 who is making a publication ban would be submitting the
19 names of the real people who will be affected, in secret,
20 to the Commission and I'm hoping that that will happen so
21 that we will know --

22 THE COMMISSIONER: Hasn't that happened now?

23 MR. KROFT: Well, apparently it's happened with
24 one group only and that's why I raise the concern.

25 MS. WALSH: I've only received that information

1 from counsel for the MGEU.

2 THE COMMISSIONER: All right. Who else are you
3 waiting for?

4 MS. WALSH: Well, I don't know. I mean, it's up
5 to counsel to advise if there are other individuals.

6 MR. KROFT: Mr. Commissioner, I'm (inaudible).
7 We have just two witnesses that this application is applied
8 to. There's four witnesses in total that -- as defined
9 (inaudible) from the (inaudible). I can provide the list
10 but it's, it's the only two workers that, that the
11 Commission counsel has identified as, as witnesses at the
12 inquiry so ...

13 MS. WALSH: On the calendar. So if there are any
14 others I would suggest that perhaps at the break counsel
15 advise me so that I have that in hand.

16 THE COMMISSIONER: Sounds reasonable.

17 MS. WALSH: Okay.

18 THE COMMISSIONER: Does that settle the matter
19 for the moment, Mr. Kroft?

20 MR. KROFT: Well, it does. I think that I would
21 be objecting, for example, to -- if there are two other
22 counsel who I understand are representing applicants, if
23 they don't submit names I would suggest that they don't
24 have standing to make submissions. I'm assuming they do
25 have names and they'll submit them but I would appreciate

1 confirmation of that.

2 THE COMMISSIONER: Well, those counsel are here
3 today, are they?

4 MR. KROFT: They are here today.

5 THE COMMISSIONER: Well, then as I understood
6 what Commission counsel just said, that when we have our
7 mid-morning break she would expect those names to be given
8 to her.

9 MR. KROFT: Yes. And so long as they have names,
10 we're good to go.

11 MS. WALSH: So I will be here at the break to
12 receive those names.

13 THE COMMISSIONER: Thank you.

14 MS. WALSH: Okay. We're just waiting to hear
15 from counsel for the MGEU.

16 THE COMMISSIONER: That's fine, we can wait.

17 THE CLERK: Mr. Commissioner, with respect to
18 recording counsel, we're not picking them up in the gallery
19 so they'll have to come up to the microphone to speak.

20 THE COMMISSIONER: Oh, all right.

21 THE CLERK: And identify themselves.

22 THE COMMISSIONER: All right. I see we're set up
23 differently and I think quite appropriately with one mike
24 for counsel who are speaking but I guess when counsel at
25 the speaking table are -- when someone else wants to make a

1 point, counsel will have to just move over and make
2 accommodation for them to use the mike.

3 THE CLERK: Thank you.

4 MS. WALSH: So that was Mr. Kroft.

5 THE CLERK: Thank you.

6 THE COMMISSIONER: Is -- it's not necessary to
7 repeat everything that has been said, is it?

8 THE CLERK: No.

9 THE COMMISSIONER: No.

10 THE CLERK: No.

11 MR. SAXBERG: Good morning, Mr. Commissioner.

12 THE COMMISSIONER: Good morning.

13 MR. SAXBERG: If I may, it's Kris Saxberg.

14 THE COMMISSIONER: Yes, Mr. Saxberg.

15 MR. SAXBERG: Representing the authorities in
16 ANCR.

17 THE COMMISSIONER: Yes.

18 MR. SAXBERG: But we also, we being D'Arcy and
19 Deacon, the law firm, represent certain individual
20 witnesses. Those individual witnesses that we represent,
21 that are seeking the, the relief of the publication ban,
22 the names were submitted to Mr. Smorang, who then included
23 those names in his list of 24, that has been provided to
24 Mr. Kroft and to Commission counsel. However, the
25 authorities and ANCR, as entities, have made their own

1 notice of motion, and in that notice of motion we've listed
2 who we believe that a publication ban should apply to, and
3 one of the groups is any social worker who had an
4 involvement in this file. So it's a global request. And
5 what we've indicated in our protocol but we've advanced in
6 our materials as to how the media, how the, the ban would
7 actually work, on a practical basis, in that document what
8 we have suggested is that before a witness takes the stand,
9 if it's a witness that was a social worker, that worked on
10 the Phoenix Sinclair file, then at that point in time it
11 would be indicated that they would be a witness under which
12 the publication ban would apply. So we're asking for
13 global relief in terms of any social worker who touched the
14 file.

15 THE COMMISSIONER: All 24? And any others who
16 are identified, I take it?

17 MR. SAXBERG: That's right, any, any other
18 workers who are coming forward. And we're, we're asking
19 for that relief as the authorities on the basis of the
20 arguments that we will be submitting that it's in the
21 system's interest that that anonymity apply to all of the
22 workers that worked on the case.

23 THE COMMISSIONER: Well, when you make your
24 submission on your motion, I'll expect you to outline the
25 actual relief you're asking for --

1 MR. SAXBERG: Right.

2 THE COMMISSIONER: -- and I'll certainly make a
3 note of it at that time.

4 MR. SAXBERG: Yes. I just wanted to be clear for
5 the record that there is that global request that's out
6 there, as well as the request relating to certain
7 individuals.

8 THE COMMISSIONER: Well, you, you -- when you get
9 to winding up your submission, you just make that point
10 again and it will be fairly recorded within that material,
11 at that time but I, I appreciate you drawing that to my
12 attention now.

13 MR. SAXBERG: Yes, sir. Thank you.

14 MR. KROFT: Just so that the position of the
15 media is, is clear and I, I hear you, that we can argue it
16 further, from the outset the position of the media has been
17 that it is the right of individual people to ask for a
18 publication ban, they may not get it but that is their
19 right. But people who don't want a publication ban can't
20 be forced to have one and, and more importantly, to us, it
21 would be unfair and it would be also quite awkward, if
22 there was a whole hearing on the issue of publication bans
23 but all kinds of people who are not represented at that
24 hearing then came up and said well, very nice that that's
25 what the Commissioner ruled then but they didn't have my

1 evidence and that person wasn't representing me.

2 And so our position is that unless there was a
3 real person making a real application, there is no basis
4 for some organization to make an application on their
5 behalf and we want to avoid the difficulty of us having to
6 come back and refight applications based on new evidence
7 because the people who are not represented by counsel,
8 today, and that was the purpose of the entire process of
9 giving everybody notice that if they wanted to make an
10 application they needed to step forward now and to get
11 counsel now, and that every person who was making the
12 application needed to appoint a counsel to represent them.

13 THE COMMISSIONER: All right, what has happened
14 to, to -- as you see it, that interferes with that result?

15 MR. KROFT: My friend has just made a submission
16 that, in fact, he's seeking an order that would apply to
17 people who have not asked for a publication ban and who
18 have not authorized any counsel in this room to represent
19 them at this time on that point.

20 THE COMMISSIONER: Other than people he
21 represents?

22 MR. KROFT: Well, he's saying that he's making
23 the application on behalf of people that he does not
24 represent, that's his -- that was his point, and I am
25 objecting to applications made by counsel on behalf of

1 people whom they do not represent. I think that's as
2 simply as I can put it.

3 THE COMMISSIONER: All right, I, I, I must
4 confess that I didn't appreciate that that was his point.
5 Mr. Saxberg, is that correct, what you're endeavouring to
6 do?

7 MR. SAXBERG: Well, that's one way to
8 characterize it. It's -- in my -- from my perspective,
9 it's a jaundiced view. What we're asking for, as the
10 authorities, as the bodies that regulate social workers in
11 this province, what we're saying is that the publication
12 ban is important to the system and it should apply globally
13 to all of the workers that had conduct of the Phoenix
14 Sinclair file.

15 THE COMMISSIONER: Even someone who doesn't want
16 it to apply to them?

17 MR. SAXBERG: No. As a matter of fact in the
18 notice of motion we make that as, as an exception. We say
19 any social worker who worked on the file. We also list
20 other categories of individuals to whom the publication ban
21 should apply, including sources of referral and including
22 people that are testifying about services that they
23 received from Child and Family Services. We, we also
24 believe it would apply to foster parents, if there was a
25 foster parent that was, that was testifying at the hearing.

1 So we've listed that clearly in our notice of
2 motion and we're going to address it in our submissions.

3 THE COMMISSIONER: All right. Well, well, Mr.
4 Kroft's objection to whatever you do is on the record and
5 I'll hear you and I'll deal with that in due course but I
6 hadn't appreciated that you were casting your net that wide
7 and whether you're going to be able to do so or not will be
8 something I'll have to consider when I've heard everything
9 and make a ruling on it.

10 MR. SAXBERG: Precisely. And, and just in terms
11 of procedural fairness, Mr. Kroft has the material and
12 he'll have the opportunity to respond to the relief that
13 we're seeking and it will be after he's had the benefit of
14 receiving -- hearing our oral submissions on why we believe
15 that it's important that there be consistency in terms of
16 the application of the publication ban, subject to that one
17 exception, that if an individual doesn't want it to apply
18 to them, then they can make that election.

19 THE COMMISSIONER: Yeah. I'm just wondering, you
20 know, one individual doesn't how can you purport to say
21 that, that others who are going to come forward wants,
22 wants it to apply to them when you haven't received
23 instructions from them?

24 MR. SAXBERG: The -- that's what we have included
25 in our protocol, in terms of how the publication ban would

1 work, from a practical perspective. When a witness is
2 called, that witness would indicate whether or not it --
3 they are wanting the publication ban, if it has been so
4 ordered, to apply to them.

5 THE COMMISSIONER: All right. Well, we'll --
6 I'll, I'll hear you further on that and Mr. Kroft, I'm
7 making no ruling on that at this point in time.

8 MR. SAXBERG: Thank you.

9 THE COMMISSIONER: Mr. Smorang, I guess your time
10 has come to be under way.

11 MR. SMORANG: Good morning, Mr. Commissioner.

12 Mr. Commissioner, this is a motion for an order
13 prohibiting any form of publishing, broadcasting or
14 otherwise communicating the name, face, or identity of any
15 social worker who is a witness at this inquiry, whom we
16 represent and just to kind of segue backwards, those names
17 have been provided to Commission counsel.

18 And the order we seek is an order prohibiting
19 that publication by way of television, internet, radio, in
20 print or by any other means, including in documents that
21 become exhibits at this inquiry.

22 In the alternative, we have an alternative in our
23 notice of motion, if you decide not to make that order,
24 then we ask you to prohibit video or audio recording, or
25 broadcasting of the testimony of social workers at this

1 inquiry.

2 To take us backwards for a moment, Mr.
3 Commissioner, this motion was first brought to your
4 attention at the standing hearing that occurred last June
5 and I brought that to you orally, advising you that on
6 behalf of the MGEU, I would be bringing such a request
7 forward in conjunction with the redaction process that was
8 discussed and has evolved since last June, through the
9 order of the Court of Queen's Bench, the documentary
10 disclosure, et cetera.

11 A motion was formally filed before you on August
12 18th of 2011, that's about 11 months ago, and since then
13 similar motions regarding social workers have been filed,
14 firstly by the four authorities with standing, that is Mr.
15 Saxberg's clients, the General, the Northern, the Southern
16 and ANCR, which were filed in April of this year, and by
17 Intertribal Child and Family Services, represented by Mr.
18 Khan. Also filed in April of this year.

19 Shortly after MGEU's motion was filed last
20 August, MGEU issued a mass letter, by fax, to all of the
21 media organizations that we could possibly think of in
22 Manitoba, including all of the radio, television,
23 newspapers within the major centres and regionally and
24 rurally, including the national media, national media
25 organizations, advising of our motion and advising that if

1 they wish to take a position that they were certainly being
2 put on notice of our, of our motion. And shortly after
3 that, also in August of last year, we were contacted by Mr.
4 Kroft advising us, at that time, that he represented a
5 number of media. The only media that have come forward out
6 of the large group, and there is an affidavit somewhere on
7 file showing you exactly who we sent it to, there were at
8 least 80. The only media that have come forward are CBC,
9 CTV Winnipeg, Global Winnipeg, Winnipeg Free Press and the
10 Winnipeg Sun. Since Mr. Kroft was retained and has been
11 participating in this process, the Winnipeg Sun has
12 withdrawn from that group and it remains the other members
13 that I indicated.

14 In the last 11 months, a number of affidavits
15 have been filed in support of or in opposition to the
16 motion. In opposition, all have been filed by the media
17 and there are three. Ms. Hastings, who is a social worker,
18 Mr. Rosner, who is a CBC managing editor, and Mr. Bear, who
19 is the chief of staff of the Southern Chiefs Organization,
20 none of which are brought forward to you as expert
21 witnesses.

22 In support you have eight witnesses who have
23 given evidence. You have two affidavits sworn by Janet
24 Kehler, who is a social worker and, as you are aware, a
25 representative of staff at MGEU.

1 Elizabeth McLeod, who is a social worker and who
2 is the president of the Manitoba Institute of Registered
3 Social Workers, the professional organization, if you will,
4 of social workers.

5 Ms. Evelyn Wotherspoon, a social worker and an
6 expert in child protection, who comes from Calgary.

7 Shirley Cochrane, a social worker and the
8 executive director of Intertribal Child and Family
9 Services.

10 Gwendolyn Gosek, an expert witness put forward,
11 who is a faculty member at the University of Manitoba,
12 Faculty of Social Work. Teaches, researches, et cetera, at
13 the University of Manitoba.

14 Bruce Rivers, social worker and executive --
15 former executive director of Toronto Children's Aid Society
16 for 16 years and also on faculty at the University of
17 Toronto, Faculty of Social Work.

18 Dr. Cheryl Regehr, an expert witness from
19 Toronto, who is currently the vice-provost at the
20 University of Toronto, former dean of the Faculty of Social
21 Work and a current member of the Faculty of Social Work at
22 the University of Toronto.

23 And Regan Spencer, who is a social worker and who
24 is the director of Social Work at Health Sciences Centre in
25 Winnipeg, which you will appreciate is a large, perhaps the

1 largest, acute care facility within the province.

2 Of those eight, only Cochrane and Kehler are
3 employed by parties who have brought motions regarding the
4 publication ban, all of the others have brought their years
5 of expertise and experience in the child welfare system to
6 bear on the question that is before you and they've done
7 that to assist you, Mr. Commissioner, in the determination
8 you must make.

9 So we've had an evolution of sorts, which began
10 last June with my notification that we wished you to
11 consider this question and we've had a great deal of
12 evidence brought forward, some cross-examined upon, some
13 not, transcripts prepared and I expect and trust that all
14 the material is before you and has been made available to
15 you.

16 THE COMMISSIONER: I certainly read all of the
17 affidavits and the cross-examinations.

18 MR. SMORANG: Before reviewing the issue before
19 you in detail, Mr. Commissioner, and addressing all of the
20 legal and the factual issues that are comprised in the
21 question that is before you, I want to spend a few minutes
22 underlying what I believe are two realities that are the
23 root of this motion.

24 The first of those two realities is that this
25 inquiry concerns child protection in Manitoba and we must

1 never stray too far from the core of this inquiry which is
2 to examine and to make recommendations concerning the
3 protection of our children.

4 The protection of children is paramount, it
5 trumps all other rights and interests that are before you
6 in this matter. The Child and Family Services Act, itself,
7 sets out the best interests of the child shall be the
8 paramount consideration for everyone, including a court of
9 law, in considering child protection matters.

10 And our courts have repeatedly emphasized the
11 paramountcy of the interests of the child in child
12 protection matters and so in considering the rights and the
13 interests of everyone who is going to speak before you over
14 the next three days and considering the question before
15 you, you must always look back to the first and most
16 important question. If I do this, or alternatively if I
17 don't do this, how might that affect protection of
18 children?

19 The second underlying reality before you in this
20 motion is that the media of 2012 is not the media of days
21 gone by. The media has changed significantly and recently
22 in a number of ways. First, the on-line or internet
23 edition of the newspaper or of the television news item or
24 the radio news item is equally if not more popular than the
25 traditional form of media.

1 Newspapers, t.v. stations and radio stations
2 create and sponsor and foster and promote on-line forums
3 whereby anonymous contributors can submit just about
4 whatever they would like and comment upon stories and
5 people within those stories. And the media then publishes
6 those comments on its websites, for all to see and all to
7 read in perpetuity.

8 THE COMMISSIONER: Is there any responsibility to
9 police what's proposed to put forward on, on, on the
10 website or on the --

11 MR. SMORANG: Well --

12 THE COMMISSIONER: -- commenting on the stories?

13 MR. SMORANG: -- ultimately the media purports to
14 create its own responsibility and in our materials I have
15 filed for you, for example, from the Winnipeg Sun, terms
16 and conditions and code of ethics which, quite frankly, I
17 say the Winnipeg Sun has ignored in the course of the
18 material that they've let stay on their website, clearly in
19 violation of those terms and conditions. And the only
20 other restriction, quite frankly Mr. Commissioner, is the
21 law of defamation which becomes quite a bit of tricky
22 business when you're dealing with anonymous contributors
23 but at the end of the day it's not the anonymous
24 contributor that publishes the statement, it's the media
25 outlet and the law of defamation, of course, can apply

1 there.

2 So this has become extremely key to media
3 exposure. As I indicated in my brief, gone are the days
4 when you're only infamous until garbage day because on
5 garbage day the papers get thrown out. Now when you're
6 infamous, you're infamous in perpetuity.

7 And, of course, the effect of publishing or
8 broadcasting a person's name and face on the internet is
9 multiplied exponentially as opposed to the traditional
10 forms. It is immediate. It is worldwide and it is
11 permanent. And through the use of search engines, and I'm
12 not sure how internet savvy you are, Mr. Commissioner, but
13 these are sites you can go to and type in --

14 THE COMMISSIONER: Limited, I have to confess.

15 MR. SMORANG: Well, a search engine, in essence,
16 is if I go onto the internet and type in Ted Hughes, I will
17 immediately be given a series of places on the internet
18 where I can find the name Ted Hughes, generally with the
19 most references to Ted Hughes being the first, going for
20 many, many pages. So I will learn a lot about Ted Hughes
21 if I type that in.

22 THE COMMISSIONER: Likely a lot of them will
23 refer to the now late poet laureate by the name of Ted
24 Hughes.

25 MR. SMORANG: That's true. That's true. That is

1 the advantage of having the name Smorang because there's
2 not a lot of poet laureates named Smorang.

3 THE COMMISSIONER: But I follow you.

4 MR. SMORANG: Yes. And so that, that is
5 immediate and it is, it is virtually worldwide, it's not
6 any more like if your name appeared in the Los Angeles
7 Times, the people in Los Angeles read it. If your name
8 appears in the Los Angeles Times I, in Winnipeg, can Google
9 Ted Hughes and I will immediately get Los Angeles Times,
10 yesterday, here's the article about Ted Hughes.

11 As an attachment to the reply brief, I gave you a
12 recent article that illustrates the effect of this
13 phenomenon and that is a recent article that was written by
14 a Winnipeg Free Press columnist by the name of Lindor
15 Reynolds and that is appendix one to the reply brief.

16 Ms. Reynolds was commenting in her article about
17 a series that the newspaper ran about essentially whether
18 or not Winnipeg has changed much since the 1919 general
19 strike and that is whether the divide between rich and poor
20 still exists and exists in the -- to the extent that it did
21 in 1919.

22 And for the purposes of the article an individual
23 was interviewed who happened, by chance, to live in a
24 fairly rundown house, today, that at one time was a mansion
25 that was lived in, at that time, by a fellow by the name of

1 Dafoe, who was with the Winnipeg Free Press. And this
2 fellow was kind enough to answer the door and tell his
3 story, he was on welfare. He has had some tragedies in his
4 life and he told the reporter all of those things and his
5 name and his tragedies were published in the Winnipeg Free
6 Press. And as a result of that, the commentary, that is
7 the on-line comments that were generated and published by
8 the Winnipeg Free Press ravaged this individual.

9 And the story that Ms. Reynolds wrote speaks to
10 that and she talks about the effect of commentary on an
11 individual. And if -- I'm not sure if it's before you but
12 I'm going to read, briefly, from three portions of
13 Reynolds' article, which are attached as appendix one of
14 the reply brief and I believe in your copy are highlighted
15 in grey.

16 THE COMMISSIONER: Just a minute, I have them
17 here. It's attached to the, to the --

18 MR. SMORANG: Reply brief of the Manitoba
19 Government General Employees Union. It is a non-bindered
20 document, I believe, with a staple.

21 THE COMMISSIONER: Yes, okay, I know where it is.

22 MR. SMORANG: It's the last two pages of the
23 document, the very last two.

24 THE COMMISSIONER: The document, itself, is 17
25 pages long; correct? Your, your, your supplemental brief?

1 Or your reply brief?

2 MR. SMORANG: It's -- no, it's --

3 THE COMMISSIONER: No, no, I've got the wrong one
4 here.

5 MR. SMORANG: -- 29 pages.

6 THE COMMISSIONER: I've got it here.

7 MS. WALSH: I've got a copy here.

8 THE COMMISSIONER: No, I have it. All right.

9 MR. SMORANG: Do you have the page with the grey?

10 THE COMMISSIONER: Yes.

11 MR. SMORANG: Excellent, thank you. So just
12 again, in context, Mr. Commissioner, this is a fellow, a
13 fellow on welfare, who opened his door and spoke to a
14 reporter and told the reporter about his life, and that was
15 published, including his name.

16 So Ms. Reynolds says, in her article:

17

18 "Reaction to the series was swift
19 and, in many cases, harsh. In the
20 online world, anonymous commenters
21 slammed a welfare recipient who
22 lives in poverty in what was once
23 the mansion owned by late Free
24 Press editor John Dafoe."

25

1 Later on she says:

2

3 "With any luck he won't read
4 comments by people who know
5 nothing about him but think they
6 should judge him anyway."

7

8 And then she goes on to say, and I won't mention
9 his name but "Mr. S. opened his door and he became game for
10 the bloody-minded. He won't make that mistake again."

11 So this is a reporter, Mr. Commissioner, for the
12 Winnipeg Free Press, who was pointing out that the
13 commentaries that appeared after an article have
14 unnecessarily and unjustly judged and in a bloody minded
15 fashion, pilloried an individual. Yet the irony is that in
16 her own -- her own employer, the Winnipeg Free Press,
17 created, sponsored and published all of the vitriolic
18 comments that she now describes.

19 And I wish to stress that, in my submission, the
20 reporter in this article was absolutely correct when she
21 says that by telling his --

22 THE COMMISSIONER: You say they, they published
23 all those vitriolic comments, my question is where?

24 MR. SMORANG: They published them on the website,
25 and so it might have been useful for me to have a laptop

1 here for you to see on a screen but if you can imagine a
2 newspaper article on a computer, and at the end of the
3 article there's a big, in large print, says comments.

4 THE COMMISSIONER: Yes, yes, I understand.

5 MR. SMORANG: And then you scroll down, and down,
6 and down.

7 THE COMMISSIONER: Yes.

8 MR. SMORANG: And pages and pages and pages of
9 comments.

10 THE COMMISSIONER: But, but does that say that
11 the newspaper published those comments?

12 MR. SMORANG: It's the newspaper's website.

13 THE COMMISSIONER: Okay.

14 MR. SMORANG: Paid for by the newspaper.

15 THE COMMISSIONER: Okay.

16 MR. SMORANG: On line because the newspaper puts
17 it on line. No different, conceptually at least, Mr.
18 Commissioner, for those of us who remember the pre-internet
19 days of letters to the editor.

20 THE COMMISSIONER: Yes.

21 MR. SMORANG: And I can well imagine that in days
22 gone by the editor received a lot of letters that he or she
23 threw in the garbage and very few made the newspaper.

24 The difference, today, is there's no garbage,
25 they all make it. Apparently, if they don't, they must be

1 amazingly defamatory and vitriol because the ones that make
2 it are at least defamatory and vitriol by people who, of
3 course, are anonymous, and that's what the Free Press and
4 other media organizations sponsor, promote and ostensibly
5 make a pretty good living doing.

6 And again, I wish to stress that in my submission
7 Ms. Reynolds, in this article, was correct when she
8 described this individual as becoming game for the bloody
9 minded because that is exactly what the media allowed to be
10 posted on their website about this individual. And my
11 point, Mr. Commissioner, is that's exactly what the media
12 will allow to be posted and published on their websites
13 about social workers, who are identified, if they are
14 identified by name and face, in this inquiry. Those social
15 workers will become game for the bloody minded.

16 And the third major change to the media of late,
17 in my respectful submission --

18 THE COMMISSIONER: Now, just one moment while I,
19 I put that back because there's so much material that I
20 have got it where I can readily get at it.

21 Now, you say -- oh, yes, number three, okay.

22 MR. SMORANG: The third change to the media, and
23 I will say of late, I won't define of late but it certainly
24 is the situation now, that the media appears, Mr.
25 Commissioner, to no longer be particularly interested in

1 the accuracy or the truth of the facts that it prints or
2 publishes or broadcasts. It is primarily interested --

3 THE COMMISSIONER: No longer interested in the
4 truth or?

5 MR. SMORANG: Accuracy.

6 THE COMMISSIONER: Okay, carry on.

7 MR. SMORANG: It is primarily interested, in my
8 respectful submission, in the sensationalization of stories
9 and the laying of blame.

10 A good example of that change is a recent article
11 in the Winnipeg Free Press, about three weeks ago, and if
12 you can find the brief filed by the reply motion brief by
13 the authorities, by Mr. -- by D'Arcy and Deacon.

14 THE COMMISSIONER: Yes.

15 MR. SMORANG: It's in a -- mine's in a black
16 binder, I'm not sure.

17 THE COMMISSIONER: Yeah, I have my copy here.

18 MR. SMORANG: I suspect my secretary did that so
19 I don't know where -- what yours is in but it's the reply
20 brief by the four authorities, filed by D'Arcy Deacon and
21 it has 13 tabs.

22 THE COMMISSIONER: Yeah. Oh, okay, now ...

23 Maybe you -- do Commission counsel know just
24 which one it is? Could you just come up and get that for
25 me?

1 And you're talking about?

2 MR. SMORANG: Talking about an article that
3 appeared --

4 THE COMMISSIONER: At, at tab what?

5 MR. SMORANG: -- at tab 12.

6 THE COMMISSIONER: Tab 12.

7 MR. SMORANG: Tab 12.

8 THE COMMISSIONER: All right, just a minute.

9 Oh, yes, I see that, yes.

10 MR. SMORANG: Now, my copy is not great and the
11 font is quite small.

12 THE COMMISSIONER: Yeah.

13 MR. SMORANG: So what I'm going to do is give you
14 an excerpt from that, which is larger font, which I hope
15 will be of assistance to you.

16 THE COMMISSIONER: All right. Oh, this is just
17 an extract from it, is it?

18 MR. SMORANG: That is an extract and I'll show
19 you where that is. If you look at the first page on, on
20 tab 12, the last paragraph in the bottom third of the, of
21 the text, which begins: "The story has continued getting
22 sadder."

23 THE COMMISSIONER: Yes.

24 MR. SMORANG: That is the excerpt that you have.

25 THE COMMISSIONER: Yes.

1 MR. SMORANG: So just to give you some background
2 before we get into that excerpt, this is an article in the
3 Winnipeg Free Press, about three weeks ago, written by a
4 reporter, Dan Lett. Mr. Lett is well known in Winnipeg,
5 he's as senior reporter, his articles appear almost daily
6 in the Winnipeg Free Press.

7 This article appeared in the Winnipeg Free Press
8 just after the inquiry was put over until September, that
9 is just after the decision was made to move it from July to
10 September at the request of Ms. Sinclair (sic) and Mr.
11 Edwards (sic), through their counsel, Mr. Gindin, and with
12 the agreement of parties.

13 And in discussing that and discussing the history
14 of this, Mr. Lett says, and this is the part that I have
15 given you and that appears for everyone else at tab 12. He
16 says:

17

18 "The story has continued getting
19 sadder as various interested and
20 affected parties have manipulated
21 the inquiry process to try to
22 generate some cover for misdeeds
23 in the Phoenix case. First,
24 public-sector unions representing
25 social workers attempted to have

1 the inquiry itself quashed because
2 it was too broad in its mandate.
3 That bid failed, only to see the
4 unions press for a publication ban
5 to shield the names of the social
6 workers. Consideration of the
7 motion for a publication ban has
8 pushed opening testimony in this
9 case from early July ... into the
10 fall."

11

12 Now, what Lett is saying in that, in that
13 paragraph is first the MGEU tried to scuttle the inquiry
14 entirely and when that didn't work now they're bringing a
15 motion for a publication ban. And as we know, as I've
16 mentioned to you and you will know already, of course,
17 through the process, that's wrong. It's wrong in fact.
18 This motion was before you last June and has been before
19 you since last June and what Mr. Lett is saying in his
20 article is incorrect and lends to the impression that the
21 MGEU, having lost its attempt to scuttle the entire inquiry
22 has now come up with a new and different and final attempt
23 to scuttle things by way of a publication ban.

24 And so I can only assume that Mr. Lett didn't
25 bother to check the facts before he came to those

1 conclusions as he did in the article that things are
2 getting sadder. And what's odd and I guess makes the
3 point, is that the Winnipeg Free Press' employer knew that
4 those facts were wrong. They knew because they've been
5 reporting on this case since last June. The Winnipeg Free
6 Press knew that this paragraph was factually inaccurate.

7 So his employer knows it, he, I assume, doesn't
8 know it, didn't bother to check, yet him and his employer
9 publicize it in the Winnipeg Free Press. And so that is an
10 example, just one of many that are before you where truth
11 and accuracy take a back seat and the conclusion and the
12 laying of blame become the focus. The story is getting
13 sadder, the parties are manipulating the inquiry to
14 generate cover for misdeeds. That's the kind of conclusion
15 that sells newspapers, that's the kind of conclusion that
16 the media comes to, without checking the accuracy of their
17 facts daily.

18 And that's what the media does. And there's
19 really nothing we can do about that. They have a right,
20 subject only to the laws of defamation, to report stories
21 as they see fit, to allow anonymous contributors to make
22 people game for the bloody minded, and if people like what
23 they hear and what they read, they'll buy the paper,
24 they'll watch the t.v. or they'll visit the internet site,
25 that's the freedom of the press and that's the freedom of

1 the marketplace.

2 But you, sir, have the power, in this inquiry,
3 for the purposes that you have undertaken by virtue of the
4 order in counsel that you accepted, more you have the
5 mandate to control your process and to control what
6 information the media can and cannot broadcast and blame
7 that it can lay and will lay in its various forms.

8 And you have the power, sir, to decide whether
9 the best interests of the children and the child welfare
10 system are served by you not allowing witnesses who appear
11 before you to be pilloried in the media of today, for the
12 sake of the witnesses, for the sake of the system in which
13 they work, for the sake of the child protection system, in
14 general.

15 And I say to you, sir, that those two realities,
16 the paramountcy of the best interests of the children and
17 the state of the media today are the backdrop to your
18 consideration of the legal issues before you, including the
19 analysis that you must conduct in accordance with the
20 principles set forth in Dagenais/Mentuck.

21 I would like to spend some time then, before
22 getting into the facts of the matter, talking about the
23 process and Dagenais/Mentuck.

24 We all know that the Dagenais/Mentuck test is a
25 process and it is a process that results from two Supreme

1 Court of Canada cases, R. v. Dagenais, R. v. Mentuck. And
2 it is a process intended to be used where a court is
3 considering limiting the full open court principle. And as
4 I indicate in my reply brief, in my respectful submission
5 the test is no more and no less than a balancing act. To
6 put it another way, a cost benefit analysis.

7 Where a court is considering a request before it
8 to somehow limit the open court principle, it looks at the
9 risk, it looks at the reduction of that risk by doing what
10 it's being asked to do, if the limitation is granted and it
11 considers any negative effect that the limitation might
12 cause.

13 Instructive and useful for you, in my submission,
14 is the Manitoba Court of Appeal decision in CBC v.
15 Manitoba, which is at tab 3 of our motion brief, and I
16 would ask that you please turn to that, as I will be
17 quoting from it.

18 THE COMMISSIONER: All right. Now, just a
19 minute, while I find that? Is that in this, is that in
20 this binder?

21 MR. SMORANG: The motion brief of MGEU.

22 THE COMMISSIONER: I have the, I have the brief
23 here. Just a minute, maybe I have it. Yes, okay.

24 Yes, yes, I have it.

25 MR. SMORANG: Thank you.

1 THE COMMISSIONER: Tab?

2 MR. SMORANG: Tab three.

3 I'll take you to it in a few moments but --

4 THE COMMISSIONER: Yes, I have it.

5 MR. SMORANG: -- to give you some background.
6 Firstly, the Manitoba Court of Appeal, in this case,
7 considered the Dagenais/Mentuck test and cases since and
8 noted that the Supreme Court, in a subsequent case, Toronto
9 Star, emphasized that Dagenais/Mentuck was meant to be
10 applied in a flexible and contextual manner which I think
11 is extremely important to consider.

12 The court, the Supreme Court was not saying this
13 is it and this is how it shall be and you shall all follow
14 it this way, no matter where you are, and what the issue
15 is, the court has said this is the process and the process
16 needs to be flexible and contextual.

17 In the CBC case, as I am sure you are aware, the
18 Manitoba Court of Appeal was considering an appeal by CBC
19 from an order of a Provincial Court Judge, Judge Guy, who
20 was sitting in his capacity as an inquest judge at a
21 Fatality Inquiries Act, involving the death of a child in
22 care or the death of a child.

23 The CBC applied to Judge Guy, in the context of
24 the inquest, to be given copies of all exhibits filed
25 during that inquest. Once they were filed the CBC said

1 they were public, once they were public, the CBC could walk
2 in, ask for copies and get copies of all of the exhibits,
3 unredacted.

4 Judge Guy considered their application and
5 refused. The CBC appealed to the Court of Queen's Bench
6 and lost, at that stage and appealed to the Court of Appeal
7 and lost at that stage.

8 The case is useful on a number of points for you,
9 I suggest. Firstly, as the Court of Appeal noted, in
10 paragraph nine of the decision, and elsewhere, paragraph
11 nine on page three, Judge Guy considered the media's
12 request, conducted his analysis, made his decision and
13 issued his reasons all without ever mentioning
14 Dagenais/Mentuck.

15 And the court endorsed that, they said what he
16 did was, in essence, the Dagenais/Mentuck analysis, without
17 ever saying those two words. And that's important, I
18 suggest, because it's not about the test, or the words,
19 the, the specific words that the Supreme Court used, it's
20 about the process of balancing interests. That's the
21 message we should get from the Supreme Court, you balance
22 interests, you consider the cost and the benefit of going
23 one way or the other. And that's exactly what Judge Guy
24 did in the Court of Appeal, endorsed.

25 The second important thing to take from CBC, I

1 submit, and as the Court of Appeal sets out throughout its
2 decision, is that Judge Guy conducted that analysis,
3 considered that request from the media, with full knowledge
4 and consideration that he was an inquest judge involved in
5 a system based on confidentiality at its root.

6 Judge Guy was keenly aware that an important
7 factor for him to consider in this request was that he was
8 involved in a confidential process and a confidential
9 system and the court sets that out at paragraph six of the
10 decision at page three where the court says:

11

12 "In reviewing the relevant
13 provisions of the Act --"

14

15 And that is the Child and Family Services Act.

16

17 "-- and the Fatality Inquiries
18 Act, the inquest judge noted ...

19 All of the sections try to put
20 forward a balanced approach to
21 receiving information normally
22 considered confidential in order
23 to fulfill the purposes of an
24 inquiry without causing undue harm
25 or prejudice.

1 In other words an inquest open to
2 the public with conditions
3 attached to the material
4 submitted, rather than an
5 in camera inquest with a report to
6 follow."

7
8 Again, Mr. Commissioner, a balancing act. And at
9 paragraph seven, the court quotes from Justice (sic) Guy,
10 acknowledging the role of the media in society, and the
11 role of the media in reporting but at paragraph eight, the
12 court recognizes that Judge Guy found in favour in the
13 balancing act he did, of refusing the media's request and
14 the court says:

15
16 "He endeavoured in the exercise of
17 his discretion to 'reach a balance
18 in light of the nature of
19 proceedings and of the
20 subject-matters.' ... that is to
21 say, the inherently public nature
22 of an FIA inquiry on the one hand,
23 and the importance of
24 confidentiality of CFS records and
25 the sec. 10 report on the other.

1 He concluded (at para. 36):
2 ... The social value of affording
3 confidentiality with respect to
4 Child and Family Services
5 documentation is of superordinate
6 importance to society that
7 justifies curtailment of public
8 accessibility."

9
10 He went on to say:

11
12 "... [T]he balance must be struck
13 in favour of denial of access with
14 respect to [the exhibits in
15 question] which exhibits contain
16 the material provided with
17 understanding of and reliance upon
18 confidentiality."

19
20 And so the court was asked to consider,
21 essentially, whether Judge Guy got it right and they did
22 so. The court, beginning at page four of the decision,
23 around paragraph 15 -- this is our Court of Appeal -- sets
24 out and considers the statutory context of the inquest.

25 The court cites Section 75 and 76 of the Child

1 and Family Services Act regarding confidentiality of child
2 protection proceedings and the persons involved as
3 witnesses in those proceedings. And the court notes the
4 arguments made before it by the Attorney General of
5 Manitoba, beginning at page six, paragraph 28.

6 And at paragraph 30 the court quotes from the
7 Attorney General's argument. It says:

8
9 "The Attorney General argues that
10 there is a discretion for the
11 inquest judge to make an order for
12 media access to such
13 "confidential" records, as we are
14 dealing with here, using the
15 Dagenais/Mentuck test in the
16 context of sec. 76(3)(b) of the
17 Act. The Dagenais/Mentuck test
18 must be flexible to accommodate
19 the different interests at play at
20 an inquest such as this. Whenever
21 access is an issue, the public
22 interest and confidence in the
23 administration of the child
24 protection regime in place in
25 Manitoba under the Act must be

1 delicately balanced with the
2 public's right to know why a child
3 in care committed suicide. This
4 is an inquest into the death of a
5 child, not a trial where rights
6 are in issue and "fault" may need
7 to be determined. Therefore, one
8 must start with the "context" that
9 the documents sought to be
10 disclosed to the media are
11 statutorily protected child
12 protection records."

13

14 That is the starting point for Judge Guy, that is
15 the appropriate starting point, says the Attorney General
16 and adopted by the Court of Appeal.

17 Paragraph -- sorry, on page seven, flipping the
18 page, the court, just at the end of the first paragraph, on
19 page seven, cites three cases the Attorney General relies
20 upon, including RJR-McDonald, which stands for the
21 proposition that freedom of expression does not trump other
22 rights. And the quote from the Supreme Court of Canada, in
23 RJR.

24

25 "Although freedom of expression is

1 undoubtedly a fundamental value,
2 there are other fundamental values
3 that are also deserving of
4 protection and consideration by
5 the courts. When these values
6 come into conflict, as they often
7 do, it is necessary for the courts
8 to make choices based not upon an
9 abstract, platonic analysis, but
10 upon a concrete weighing of the
11 relative significance of each of
12 the relevant values in our
13 community in the specific
14 context."

15

16 It goes on, at paragraph 31:

17

18 "In this instance, given the high
19 degree of privacy and
20 confidentiality in the CFS records
21 and the report of the medical
22 examiner under sec. 10 ... there
23 is an elevated expectation of
24 privacy."

25

1 It goes on, in that same paragraph, paragraph 31,
2 about the fourth line down:

3

4

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 "While the statutory right to confidentiality is attenuated to some extent given the public interest in the child's death and the purpose of an inquest, it is wrong to say that confidentiality was automatically lost once the documents became exhibits at the inquest. While freedom of the press should be given a very high level of protection, preservation of the efficacy of the child protection system is of at least equal importance. This likely explains why no reported decision has been found where a court has granted media access to exhibits that were protected by statutory confidentiality."

 The Manitoba Court of Appeal, in its decision, also conducts a balancing act and it does so at paragraph

1 35 at the bottom of page seven.

2 The court says:

3

4 "It can be seen that the Act --"

5

6 That is the Child and Family Services Act --

7

8 "-- and the Fatality Inquiries Act
9 in combination ensure that a
10 significant amount of information
11 is available to the media, while
12 at the same time leaving it to the
13 court to determine access to the
14 records, themselves. For example,
15 should cross-examination take
16 place with respect to the contents
17 of a particular document, the
18 media, subject to court order, are
19 in a position to publish such
20 details so long as the identity of
21 the person is not disclosed.
22 Similarly, if reference is made to
23 the document in the inquest
24 report, these references, too, are
25 in the public realm."

1 So, again, Mr. Commissioner, the court is saying,
2 you know, what are we losing by not giving the media what
3 they're asking for, and in this paragraph the court is
4 saying not very much.

5 The decision of the Court of Appeal, at paragraph
6 42, supports Judge Guy, it says:

7
8 "While the inquest judge did not
9 specifically refer to the
10 Dagenais/Mentuck analysis, it is
11 clear from reading his extensive
12 reasons that this is precisely the
13 exercise that he undertook. He
14 carefully weighed and balanced the
15 competing constitutional and
16 common law imperatives. He noted
17 that the sec. 10 report had been
18 given a "full and fair public
19 hearing" and "[t]here was, in my
20 view, a full, frank and candid
21 review of the report. The public
22 will not suffer from lack of
23 information with respect to that
24 report" ..."

25

1 He concluded that:

2

3 "... in considering "the effect of
4 that legislation if the
5 confidential material is provided
6 to Court as an exhibit within the
7 legislative framework of the
8 Fatality Inquiries Act" ... the
9 balance favoured denial of access
10 with respect to the exhibits
11 because ...

12 To hold otherwise would destroy
13 the safeguards of providing such
14 information where such
15 confidentiality is essential. The
16 legislation was meant to provide
17 this protection."

18

19 He goes on to say:

20

21 "Secondly, in my view, allowing
22 access because the confidential
23 material was contained in exhibits
24 used in the ... hearing would
25 destroy a social value of

1 superordinate importance -
2 confidentiality of disclosure used
3 to assist child and family in
4 abusive and neglectful
5 situations."

6

7 I ask you to give that case a full read and
8 thorough consideration, Mr. Commissioner, because I suggest
9 to you that your job is very much like Judge Guy's job and
10 that your consideration of the statutory framework and the
11 system under which this information was collected and will
12 be -- and testified about is very similar to that before
13 Judge Guy.

14 Commission counsel advised, at the outset, that a
15 break would be taken at 10:45. I am about to change
16 topics, if it suits you we can take a break now.

17 THE COMMISSIONER: Yes, it, it -- that's fine.
18 Anywhere, 10:45, 11:00, we will always have a mid-morning
19 break and mid-afternoon break but I am -- usually will
20 defer to counsel who is speaking at the time when it's
21 appropriate and if this is an appropriate time we'll do
22 that.

23 MR. SMORANG: In the sense that I am
24 transitioning to a new topic, it's probably appropriate.

25 THE COMMISSIONER: Fine.

1 MR. SMORANG: Thank you.

2 THE COMMISSIONER: Now, let me just say this
3 about adjournments. We're not a court of law and we can do
4 things a little differently if we decide to. One of the
5 things, when I announce an adjournment, I sometimes have
6 papers I want to gather up and, and collect and so on, so
7 when I announce an adjournment, counsel are free to make a
8 move from their desks and do whatever they want, rather
9 than waiting while I do what I want to do here. So that
10 will be the format we'll run throughout and I now announce
11 the first adjournment.

12 MR. SMORANG: We're back in 15?

13 THE COMMISSIONER: Fifteen minutes.

14 MR. SMORANG: Thank you.

15 MS. WALSH: Thank you.

16

17 (BRIEF RECESS)

18

19 THE CLERK: Please be seated.

20 THE COMMISSIONER: All right, Mr. Smorang,
21 please.

22 MR. SMORANG: Thank you, Mr. Commissioner.

23 During the break I have -- just wanted to clean
24 up one matter that I dealt with earlier before I go on, and
25 that is the matter involving the use by the media of the

1 internet to not only post their stories but also to
2 broadcast the comments that arise. And I've asked
3 Commission counsel and I believe she has been able to put
4 before you the supplementary affidavit of Janet Kehler. It
5 should be in the binder right in front of you, open to the
6 front page of it.

7 THE COMMISSIONER: Yes.

8 MR. SMORANG: If you go to tab A ...

9 THE COMMISSIONER: Yes.

10 MR. SMORANG: Tab A is printed from the Winnipeg
11 Sun website, and it's called Terms and Conditions. And
12 you'll see it starts off by saying:

13

14 "Thank you for visiting
15 winniegsun.com. Please read the
16 terms and conditions set forth
17 below carefully ..."

18

19 And then it goes through copyright issues, trade and
20 service mark rights, links; prohibited uses on the second
21 page, obligations; a whole bunch of rules and regs
22 purportedly set up by the Winnipeg Sun for those who wish
23 to comment and have those comments broadcast by the
24 Winnipeg Sun on their internet site.

25 So you had asked me earlier, you know, what, if

1 any, restraints or restrictions there are. This is an
2 example of what the Winnipeg Sun at least purports to have
3 in place for terms and conditions for those people who wish
4 to anonymously comment.

5 And if you go to tab B ...

6 THE COMMISSIONER: Yes.

7 MR. SMORANG: Tab B is a document again found on
8 the Winnipeg Sun website around the area where readers can
9 comment, and it's called Netiquette and purports again to
10 have rules about comments.

11 THE COMMISSIONER: This is the Sun also.

12 MR. SMORANG: This is the Sun also. And if you
13 look, for example, under the rules -- I won't go through
14 them all, but they talk about respect, they talk about not
15 tolerating vulgarities, or threats, or personal attacks, or
16 discriminatory comments, or slanderous or insulting or
17 obscene comments. They don't tolerate any of that. You're
18 not to put that on their website, says the Winnipeg Sun.
19 So that's the Netiquette page on the Winnipeg Sun website.

20 Now, if you go to tab C ...

21 Tab C -- now, again, I, I don't mean to patronize
22 you, sir, but I don't know how much time you spend on
23 websites so I'm going to take you through tab C, which
24 is --

25 THE COMMISSIONER: No, you're, you're following a

1 wise course.

2 MR. SMORANG: Okay. Tab C is a photocopy of what
3 would appear on your screen if you were to be on the
4 Winnipeg Sun website and looking at the story, "MGEU won't
5 appeal Sinclair inquiry decision." That's an article that
6 first appeared on March 2nd, but if you go to the Winnipeg
7 Sun website right now today and you type in "MGEU won't
8 appeal," you will get exactly what you're looking at right
9 now, word for word, including the picture.

10 And so this was an article the Winnipeg Sun
11 posted in its newspaper and on its internet site on March
12 2nd, and in it the topic of the article, as the headline
13 suggests, is that the MGEU has decided not to appeal the
14 Court of Appeal's ruling on the stated case application
15 that went to the Court of Appeal.

16 What the Sun has done is they've gone to the MGEU
17 website -- my client's website -- and they've reproduced a
18 letter that MGEU put on its website, and it starts at the
19 bottom of the first page, the full letter: "The MGEU has
20 decided not to appeal," and the letter continues on the
21 second page, and on the third page, and then the letter's
22 ultimately signed by three people from MGEU: Janet Kehler,
23 whose name you'll remember because she's sworn
24 affidavits --

25 THE COMMISSIONER: Yeah.

1 MR. SMORANG: -- Jan Henley, who we expect will
2 be a witness in one of the phases of these proceedings; and
3 Lois Wales, who's the president.

4 And again, if you were on the website you'd see
5 that, and just below that you'd see Reader's Comments. Are
6 you there?

7 THE COMMISSIONER: Yes.

8 MR. SMORANG: And then we have -- it says:

9

10 "By adding a comment on this site,
11 you accept our terms and
12 conditions and our netiquette
13 rules."

14

15 Those are the documents we just looked at earlier.

16 And there are 32 comments, and they encompass the
17 next seven pages of tab C. And in some cases you'll see --
18 the first comment, for example, was put in by a person who
19 put in a name; I don't know if that's her real name, but
20 it's a name. The second comment on the, on the next page
21 is, is submitted by a person who's known as "butitstrue."
22 And the third comment is "Thunderleg2." The fourth comment
23 is by "Jim." And there are comments by "jumpin_jimmy" and
24 "my_two_cents_74" and all of those things. But these
25 comments are, are submitted and are put on the website by

1 the Winnipeg Sun and they are there for us all to read.

2 Now, within these comments and these seven
3 pages --

4 THE COMMISSIONER: Well, the Sun puts them on or
5 the individual puts them on the Sun's website?

6 MR. SMORANG: Well, the individual has an
7 opportunity, by clicking on a button, to go to a submission
8 box.

9 THE COMMISSIONER: Yes.

10 MR. SMORANG: Types in the submission --

11 THE COMMISSIONER: Yes.

12 MR. SMORANG: -- submits it.

13 THE COMMISSIONER: And it immediately goes
14 public?

15 MR. SMORANG: I don't know that, but I know that,
16 that the Sun then at some point -- whether there's a filter
17 system or somebody looks at it first, I don't know, but the
18 Sun puts it on, reserving the right, of course, under its
19 rules, to take it off at any time if it violates. And in
20 fact, there's even an opportunity for you to write to
21 Winnipeg Sun -- and we'll get to that in a minute -- if you
22 believe someone has offended the rules.

23 Understand, sir, that the Sun controls the
24 website. It's the Sun's website. It's no one else's. No
25 one else has any power to put things on, take things off.

1 It is their website.

2 THE COMMISSIONER: But you don't know whether an
3 individual's comment, once they type it in, goes directly
4 -- and hit the button, whether it goes public forthwith or
5 whether the Sun has some period of time to do some
6 filtering.

7 MR. SMORANG: I don't.

8 THE COMMISSIONER: All right. Maybe we'll find
9 that out.

10 MR. SMORANG: At any rate, this particular
11 article which appeared on March 2nd elicited a number of
12 comments that my client found to be offensive. One of them
13 in particular said, and this is on the fourth page in:

14

15 "whoever was the case worker that
16 took that poor kid back should be
17 shot."

18

19 Another comment refers to the three authors of
20 the letter, Ms. Kehler, Ms. Henley, and Ms. Wales, as
21 "scummy bitches." And there are others that I will get to
22 later as I'm talking about the way the media has acted so
23 far in this matter.

24 THE COMMISSIONER: Scummy, what was that?

25 MR. SMORANG: "Scummy bitches." Which I guess is

1 worse than just plain bitches. At any rate, if you go back
2 to the affidavit, and in particular to paragraph 17 at page
3 6 ... Well, you know what, let's move back to page 5,
4 paragraph 16.

5 THE COMMISSIONER: Yes.

6 MR. SMORANG: Paragraph 16 sets out some of the
7 comments that my client found offensive, that appear in, in
8 tab C. So:

9
10 "Useless A\$\$ HOLES. They
11 don't give a \$hit about a little
12 [child's] life."
13 "... home and family
14 wreckers."

15
16 The reference to "nothing but scummy bitches" is
17 the second-last bullet.

18 The last bullet:

19
20 "Whoever was the caseworker
21 that took that poor kid back
22 should be shot."

23
24 So once these comments amassed on the website and
25 my client saw them -- and this starts at the next page on

1 paragraph 17 -- on March 8th MGEU communications officer
2 Jerry (sic) Peterson wrote to the Winnipeg Sun's general
3 e-mail on the contact desk page on their website, and he
4 said:

5

6 "Hello:

7 "I am writing in response to
8 some of the comments posted on a
9 story on your website. After the
10 following story, 'MGEU won't
11 appeal Sinclair Inquiry decision'
12 there is a comment that refers to
13 MGEU members as 'scummy bitches'
14 and another that says 'whoever was
15 the caseworker that took that poor
16 kid back should be shot'. Given
17 that both of these comments
18 violate the terms of use of your
19 site, I flagged both for your
20 moderator earlier this week, but
21 when I bring up the story both
22 comments are still there. Can
23 someone please look into this?"

24

25 So that was on March 8th Mr. Peterson wrote and

1 said, you know, these are offside.

2 As of the date this affidavit was sworn, which
3 was April the 4th, some one month later, the comments were
4 still on the website.

5 As of today, Mr. Commissioner -- and we checked
6 this during the break on the internet -- those comments are
7 still on the website. So --

8 THE COMMISSIONER: Who, who is the moderator?

9 MR. SMORANG: I don't imagine that the person is
10 named, but may well be identified on the website as
11 moderator.

12 THE COMMISSIONER: You don't know what the role
13 or responsibility of the moderator is.

14 MR. SMORANG: As I understand it, the moderator's
15 responsibility is to enforce the terms and conditions and
16 the netiquette.

17 And so just to illustrate, Mr. Commissioner, if
18 we were to be looking at a computer right now and we were
19 on a search engine, perhaps Google, and we were to type in
20 "Janet Kehler scummy bitch," we would get this article. We
21 would go right to it.

22 So I hope that's of assistance to you in
23 understanding the dynamics of the media today as compared
24 to the print media and the letters to the editor which we
25 -- you know, some of us are more used to.

1 THE COMMISSIONER: I understand.

2 MR. SMORANG: So back to where I was before the
3 break, I had spoken of the CBC case and, of course, Judge
4 Guy's analysis in the context of an inquest. I don't know
5 that this is seriously going to be challenged by Mr. Kroft,
6 but clearly an inquiry of this nature bears much
7 resemblance to an inquest in terms of its mandate, its
8 purpose, and, and its general jurisdiction.

9 Of course, this inquiry is grounded in, in
10 jurisdiction established by an order-in-council, whereas an
11 inquest is under the Fatal Inquiries Act. But in our brief
12 at page 24, we analyze the comparisons. I won't go through
13 them today in the interests of time, but perhaps if you
14 would just make a note that paragraphs 62 to 83 of our
15 brief we compare and ultimately conclude that an inquiry of
16 this nature is very much like an inquest such that you
17 should go through the same process that Judge Guy did.

18 But I would -- just to highlight a few points --

19 THE COMMISSIONER: At paragraph 62 to what?

20 MR. SMORANG: Sixty-two to 83, page 24 of the --

21 THE COMMISSIONER: Yes.

22 MR. SMORANG: -- motions brief.

23 THE COMMISSIONER: Yes.

24 MR. SMORANG: Just so you know -- and I'll try
25 and make a point of this, I'll refer to our motions brief

1 and I'll refer to our reply brief, which are the --

2 THE COMMISSIONER: Yes.

3 MR. SMORANG: -- two separate briefs --

4 THE COMMISSIONER: Yes.

5 MR. SMORANG: -- we filed.

6 THE COMMISSIONER: I know that. Yeah.

7 MR. SMORANG: So in terms of a couple of the
8 points that are in our brief and, and the comparison,
9 certainly, inquests into the death of a child in care and
10 inquiries -- in this case, the Phoenix Sinclair inquiry --
11 have the same fundamental goals; that is, improvement of
12 the system.

13 But the system in both is founded in
14 confidentiality and works primarily because of
15 confidentiality. The order-in-council that gave you
16 jurisdiction, sir, allows you fair latitude in terms of the
17 information that you garner, including that you can
18 interview witnesses even before public hearings place.
19 That is, you are not mandated to put everything before the
20 public. And ultimately, your report, while to be in a form
21 for public release, must ultimately be in a form that
22 complies with the Freedom of Information and Protection of
23 Privacy Act, commonly acronymed FIPPA, before it is
24 released to the public.

25 And as we point out in our brief at paragraph 79

1 on page 30, FIPPA requires -- in section 42 of FIPPA
2 requires that when you are disclosing information that is
3 personal, you must limit that disclosure to the minimum
4 amount of information necessary to accomplish the purpose
5 for what is -- which it is used or disclosed.

6 So again, FIPPA creates its own balancing act.
7 That is, if you are disclosing information, it must be the
8 minimal amount that is necessary to accomplish the purpose,
9 recognizing the privacy and the rights to privacy that
10 exist.

11 And so I would suggest to you, sir, that the
12 process that you must undertake is to strike that right
13 balance, keeping in mind, as my client acknowledges, that
14 your interference in the open court principle should be as
15 minimal as possible so that the public has a right to know
16 what is going on.

17 So I would now turn to the evidence that is
18 before you for your consideration on the merits of the
19 analysis you must undertake. First, the evidence as to the
20 risk of allowing identities of social workers to be
21 publicized and --

22 THE COMMISSIONER: The risk in what?

23 MR. SMORANG: The risk of allowing the identities
24 of social workers to be publicized.

25 THE COMMISSIONER: Yes.

1 MR. SMORANG: And, and connected to that, the
2 benefit of not allowing that publication, because the two
3 are entwined.

4 You have evidence from Janet Kehler. Janet
5 Kehler swore two affidavits, one back in 2011 when we first
6 brought our motion and, more recently, supplementary
7 affidavit we looked at earlier. Ms. Kehler is a social
8 worker by profession. She is also a staff representative
9 at the MGEU, and part of her job is to represent the social
10 workers who will be testifying at this inquiry who are MGEU
11 members.

12 In her affidavit and in her supplementary
13 affidavit she outlines a number of negative effects that
14 will result if the identity of social workers is published.
15 Those are summarized in our brief at page 11, paragraph 23
16 and following, and they include both, both personal
17 negative effects and systemic or job-related negative
18 effects.

19 Personally, Ms. Kehler speaks of invasion of
20 personal privacy both in and outside of the workplace for
21 workers. She speaks of a compromise of worker's personal
22 safety, and of their families and their children. She
23 speaks of stress caused by publication of identity. She
24 speaks of low morale, not only for the social workers who
25 testify but for other social workers in the child

1 protection system, as an effect of publication. She speaks
2 of a disincentive to actually give this inquiry their full
3 and true opinion and observations about how the system is
4 running now and what could or should be changed to improve
5 it.

6 Regarding negatives and risks of publication for
7 the system, Ms. Kehler talks about public identification
8 seriously and negatively affecting social workers' ability
9 to protect children. She points out that social workers
10 are often the first point of contact for families whose
11 children may be in need of apprehension, and how important
12 it is for the social worker to be able to create a trusting
13 relationship with that family in what is and must be a very
14 negative and perhaps often hostile situation. She points
15 out that social workers routinely work in high risk and
16 potentially violent situations and that they are often
17 threatened.

18 And in our brief at page 34 -- sorry, at page 14,
19 paragraph 34, we summarize Ms. Kehler's testimony as
20 follows: Having their names, faces, and identities widely
21 publicized and broadcast will negatively impact the ability
22 to perform their job. In normal situations, parents or
23 other adults, and sometimes children, react very strongly
24 to allegations of child neglect and child abuse. Child
25 apprehensions in particular have the potential to quickly

1 develop into dangerous situations for social workers,
2 children, and their families. Social workers place
3 themselves in extremely volatile situations, usually
4 unannounced, which are unpredictable, given the nature of
5 the people with whom they are dealing and the obligation of
6 social workers to challenge a person's ability to properly
7 care for their own children or children in their care. At
8 minimum, it is common for anger and emotion to be expressed
9 by families in these situations.

10 Ms. Kehler points out that if identities of
11 social workers are published, it increases the risk that a
12 social worker will be recognized, by people that they are
13 dealing with, as being a person connected to the death of
14 Phoenix Sinclair. And that connection, Mr. Commissioner,
15 cannot have any positive effect on the ability of a social
16 worker to do their job. It can only have a negative
17 effect.

18 Ms. Kehler points out that it can affect the
19 trust relationship that often must be established within
20 minutes of entering a home. It can affect the degree of
21 cooperation a social worker receives from families. It can
22 affect the trust that the social worker has with sources of
23 referral.

24 And you will hear more about sources of referral
25 over the next few days, but these people are critical to

1 the child protection system. Their participation is, by
2 and large, the way agencies and authorities and workers
3 find out about situations at first instance, and they need
4 to trust that by making that phone call they're doing that
5 child a benefit, not a detriment.

6 Ms. Kehler essentially is the spokesperson for
7 all of the nameless, faceless people who will be testifying
8 before you in phase one, and she has met on many occasions
9 with that group and, by and large, that group has all been
10 interviewed separately by commission counsel, and many of
11 them are expected to testify. As of now, approximately 20
12 of them are MGEU members we represent. There are others;
13 we'll get the numbers issue worked out, I'm sure. But the
14 vast majority of them are still employed, some six years
15 later, by the child protection system as frontline social
16 workers. They are there and they are going out in the
17 community daily, and will be doing so during and after this
18 inquiry.

19 The media in its brief -- Mr. Kroft in his brief
20 has been somewhat critical that the social workers did not
21 come forward themselves. I think that he has only
22 mentioned that a time or two because he recognizes, as will
23 you, that that would, of course, defeat the purpose of this
24 motion. They have to be represented at this point by a
25 spokesperson; that spokesperson has been Ms. Kehler.

1 In addition, however, to Ms. Kehler, support for
2 the concept that there is serious risk in publicizing
3 identities of social workers has come from a variety of
4 sources and, in fact, across Canada. Summaries of the
5 evidence that has been brought forward are set out at page
6 15 and following of the reply brief.

7 THE COMMISSIONER: Yes.

8 MR. SMORANG: And as I indicated, they come from
9 a variety of backgrounds. But the common theme is, these
10 are people, Mr. Commissioner, who, by and large, are
11 unconnected to any direct interest in this matter, to any
12 party in this matter, and these are individuals, Mr.
13 Commissioner, who have dedicated their professional
14 careers, their academic lives in some cases, their study,
15 their research, their analysis, to the protection of
16 children.

17 You have, beginning at the bottom of page 15 of
18 our reply brief, Gwendolyn Gosek, who holds both a Bachelor
19 and a Master's degree in social work and is a faculty
20 member at the Faculty of Social Work at the University of
21 Manitoba. She has also, prior to becoming an academic
22 full-time, been a frontline family support worker. And her
23 focus is particularly on indigenous child welfare and she
24 has researched stress on childcare workers and she notes
25 that they work in a highly stressful environment and that

1 burnout is very common.

2 She notes, based on her research, that child
3 welfare professionals must constantly assess their
4 environment due to threats of violence from angry parents
5 who are under investigation. Ms. Gosek notes that child
6 death inquiries can be devastating to the morale of the
7 social worker involved and to co-workers.

8 Ms. Gosek opines that many media sources resort
9 to the use of drama and sensationalizing of traumatic
10 events such as child death inquiries, rendering the social
11 work profession under intense siege, resulting in
12 degradation to its image and a subsequent lack of public
13 support.

14 She notes that extensive negative press impacts
15 at the individual social worker and agency levels, even in
16 other jurisdictions. And there's a quote in our brief in
17 the middle of page 16 from Ms. Gosek's affidavit where she
18 says:

19

20 "A review of the literature and
21 anecdotal information support the
22 need to ensure anonymity for
23 social workers involved in the
24 inquiry process. Publication of
25 names of individuals would serve

1 the purpose of the media in
2 sensationalizing the loss of a
3 child's life at the expense of
4 individuals rather than focusing
5 on a more comprehensive set of
6 circumstances."

7
8 So that's what a professor from the University of
9 Manitoba has to offer to you, Mr. Commissioner, in terms of
10 her research and her opinion.

11 Mr. Bruce Rivers, his affidavit is before you,
12 and he was for 16 years the executive director of Toronto
13 Children's Aid Society. He also holds a Master's degree in
14 social work and has spent 37 years in child welfare related
15 work.

16 He speaks directly in his affidavit of the effect
17 of inquests being detrimental, and notes that the effects
18 could include a growing aversion by workers to taking any
19 risk. And he notes a pattern of workers leaving child
20 welfare and general retention problems.

21 He notes a chilling effect throughout the
22 workplace, even going so far that volunteers are less
23 likely to commit to CIS work. And he notes in terms of his
24 capacity as faculty at the University of Toronto Faculty of
25 Social Worker -- Social Work, that students are not

1 choosing to go into social work given these chilling
2 effects.

3 Mr. Rivers was not cross-examined by media
4 counsel.

5 Dr. Regehr, paragraph 57 of our reply brief. Dr.
6 Regehr holds a Master's social work and a Doctor of
7 Philosophy. She is the vice provost at the University of
8 Toronto. She was the dean of the Faculty of Social Work,
9 and she was and remains a professor in the Faculty of
10 Social Work at the University of Toronto. She has
11 conducted research regarding public inquiries into deaths
12 of children in care and she notes, in paragraphs 11 and 12
13 of her affidavit, the injurious effects on childcare
14 workers of an inquiry into the death of a child in care.

15 And she says:

16

17 "The inquiry process was
18 identified by participants in the
19 qualitative component of this
20 study as highly stressful
21 resulting in repeated exposure to
22 highly distressing memories,
23 criticism of their professional
24 integrity, and a sense of
25 isolation. This distress was not

1 only experienced by workers
2 undergoing the review but ...
3 radiated to others in the
4 organization."

5

6 As to the effect of the media, Dr. Regehr says:

7

8 "The media attention was viewed by
9 these workers as intensifying the
10 distress of workers that were
11 subjects of the review as well as
12 others in the organization. There
13 was a sense that media reports
14 weakened the public support for
15 child welfare services, had far
16 reaching impacts on the personal
17 lives of workers, and in the end
18 resulted in workers choosing to
19 leave the field -- thereby
20 undermining the delivery of child
21 welfare services in general."

22

23 Paragraph 18 of our brief, third paragraph down,
24 we reference another aspect of Dr. Regehr's affidavit,
25 where in paragraph 26 she quotes an article which says:

1 "... while naming and shaming
2 professionals in the child abuse
3 field may provide benefits, its
4 effects on individuals and
5 professions can be corrosive'."

6

7 She quotes a second article in the next paragraph
8 indicating:

9

10 "... that media reports are not
11 intended to record events but
12 rather are focused on selling
13 news."

14

15 And in her conclusion, which is at the bottom of
16 page 18 in our brief, from paragraph 33 of her affidavit,
17 Dr. Regehr says:

18

19 "In summary, there is strong
20 support from qualitative research
21 conducted by myself and others
22 that media coverage of tragic
23 events and post-mortem reviews of
24 child protective services produces
25 a variety of negative outcomes.

1 These include increased distress
2 in workers, decreased commitment
3 to the job, and negative impacts
4 on the personal lives of workers
5 and their families. Further,
6 qualitative evidence points to
7 increased bureaucracy, damaged
8 morale, and weakened public
9 support as a result of
10 persistently negative media
11 attention."

12

13 This person was not cross-examined on her
14 affidavit.

15 At paragraph 58 we outline briefly the evidence
16 of Shirley Cochrane, who is the Executive Director of
17 Intertribal Child and Family Services, who herself has
18 invested 24 years into the child welfare system, both
19 frontline, supervisory, and ultimately as an executive
20 director.

21 She outlines in her affidavit a number of
22 concerns expressed to her by her own staff social workers
23 concerning media publication, including -- and they're set
24 out in bullet form in paragraph 58 of our brief so you
25 don't need to take notes of this:

1 Members of the public will be less likely to
2 report child abuse-neglect concerns due to the perception
3 that Intertribal is not competent;

4 Existing families may become more resistant due
5 to perceived connections with the death of Phoenix
6 Sinclair, putting both workers and children at risk;

7 Publication of social worker names and faces will
8 directly impact their abilities to maintain relationships
9 with families;

10 Historic prejudices against First Nations people
11 will again be stirred up due to anticipated heightened
12 media exposure;

13 Workers' families and children will be
14 stigmatized due to the anticipated media reports;

15 Privacy of workers and their families will be
16 infringed upon.

17 Ms. Cochrane's concern, at the end, Mr.
18 Commissioner, is that there will be detrimental impacts of
19 publishing the names and the physical appearances of
20 workers testifying at the inquiry.

21 The list continues on page 20, Mr. Commissioner.

22 Regan Spencer, who is the Director of Social Work
23 at Health Sciences Centre in Winnipeg, who holds both a
24 Bachelor and a Master's degree in social work. Ms. Spencer
25 speaks of the critical importance that patients feel safe

1 and trust the social worker and, moreover, the importance
2 that the social worker feels safe as a source of referral
3 to child care agencies.

4 She expresses her concerns that publication or
5 broadcasting social worker names, faces, or identities
6 could potentially jeopardize the protection under the CFS
7 Act according to sources of referral which could --
8 accorded, sorry, to sources of referral which could have
9 direct consequences to the protection of children coming
10 into contact with Health Sciences Centre.

11 She's concerned, Mr. Commissioner, that the
12 publication of these names and faces has the potential to
13 destabilize the critical trust relationship between Health
14 Sciences Centre's medical social workers and patients at
15 the hospital. She, the Director of Social Work, was not
16 cross-examined on her affidavit.

17 Elizabeth McLeod. Ms. McLeod is a registered
18 social worker. She's been in the business for 30 years.
19 She's currently the manager of the Child and Adolescent
20 Treatment Centre in Brandon. She's also the current
21 president of the professional body for social workers, the
22 Manitoba Institute of Registered Social Workers,
23 approximately a thousand social workers members in
24 Manitoba. That entity, the professional body, has adopted
25 and enforces both a code of ethics and standards of

1 practice for social workers. She emphasized in her
2 affidavit that confidentiality is a cornerstone of social
3 work relationships. It's at the core of the practice of
4 social work.

5 Her affidavit came as a result of a resolution
6 that was passed by the Board of Directors of MIRS
7 in September of last year supporting the position taken by
8 MGEU and the authorities to prohibit media identifying
9 social workers who are called to testify at the inquiry.
10 So again, Mr. Commissioner, this is the professional body
11 for social workers in Manitoba bringing a motion,
12 considering it, and passing it at their Board of Directors
13 in September 2011, saying, We support the position taken by
14 MGEU and the authorities. And the rationale for that
15 support is identified in the minutes of that meeting, and
16 included:

17

18 "... that public identification of
19 social workers who testify ...
20 will interfere with their ability
21 to provide anonymous service to
22 other clients, in that people who
23 see a social worker visiting a
24 residence may recognize that
25 person as a social worker, and

1 thereby know that the family is in
2 some way involved with the child
3 welfare system."

4

5 She was not cross-examined on her affidavit.

6 Evelyn Wotherspoon, paragraph 61 of our brief,
7 holds a Bachelor of Social Work and a Master of Social
8 Work. She is a social work person who has dedicated 32
9 years of her professional career to social work, has been a
10 social worker, a child protection consultant, a case
11 worker, a supervisor, an infant mental health consultant,
12 and a clinical consultant, and she's testified in Alberta
13 as an expert witness and has written numerous papers
14 regarding child welfare.

15 Ms. Wotherspoon advises -- and this is at the top
16 of page 22 of our brief -- that she has studied and
17 witnessed several child welfare tragedies unfold in
18 Alberta. She says that:

19

20 "Exposing case workers who may
21 have failed in their task in some
22 way is appealing at an emotional
23 level and will satisfy many
24 onlookers. ... [But] if the real
25 objective is to prevent future

1 tragedies, exposing front line
2 professionals to public censure is
3 not the way to go about it."

4

5 She says it has a chilling effect on
6 professionals, that:

7

8 "... when frontline workers see
9 their colleagues pilloried in the
10 public arena, the natural instinct
11 is to avoid taking decisive action
12 and to defer decisions to higher
13 levels in the bureaucracy."

14

15 She says:

16

17 "Permitting the public
18 condemnation of individual
19 caseworkers results in the entire
20 organization from top to bottom
21 becoming focused on avoiding
22 mistakes instead of on serving
23 children."

24

25 She says:

1 "... it makes little sense to
2 publish the names of individuals
3 who may or may not have erred in
4 this tragedy."

5
6 So you have before you not just the affidavit of
7 the MGEU and Ms. Kehler on its behalf, not just the
8 affidavit of Intertribal and Ms. Cochrane on its behalf,
9 but a variety of experts from a variety of backgrounds, all
10 of whom, as I've indicated, have dedicated their
11 professional lives to social work, to the protection of
12 children, all saying to you: Don't do this. There is a
13 risk. It is a real risk.

14 And when you consider risk, which is, of course,
15 the first part of the Dagenais/Mentuck analysis, you are
16 entitled and in fact must ask yourself: What has the media
17 done so far in its reporting of this inquiry? Because that
18 behaviour is the best indicator to you, Mr. Commissioner,
19 of how the media is likely to behave in the future.

20 In our initial motion brief filed last year, at
21 tab 2 -- and you don't need to turn to it; you can just
22 make a note if you'd like. At tab 2 of that brief is an
23 article by Lindor Reynolds, the same Lindor Reynolds that
24 wrote recently on the fellow who unfortunately opened his
25 door and talked to the media and has become game for the

1 bloody-minded.

2 And in this article back in July of last year,
3 Ms. Reynolds said, regarding this inquiry:

4

5 "It is up to [the] inquiry to
6 determine who else aided and
7 abetted the couple in their
8 depraved action",

9

10 the couple being the murderers of Phoenix Sinclair.

11 Clear from that sentence, Mr. Commissioner, that
12 from the point of --

13 THE COMMISSIONER: Where is that in the article?

14 I --

15 MR. SMORANG: It is --

16 THE COMMISSIONER: I have it in front of me.

17 MR. SMORANG: You have tab 2?

18 THE COMMISSIONER: Yes.

19 MR. SMORANG: Now you put me on the spot.

20 THE COMMISSIONER: Oh, yes, I have it. It's,
21 it's just about the fifth paragraph down from the start.

22 MR. SMORANG: There you go. Thank you.

23 In her supplementary affidavit, Ms. Kehler sets
24 out a number of media comments that can fairly be
25 characterized as sensationalistic and blameful and, in

1 fact, slanderous. And in both -- and these appeared in
2 both the Winnipeg Free Press and the Winnipeg Sun, and in
3 our --

4 THE COMMISSIONER: This is, this is in her second
5 affidavit?

6 MR. SMORANG: It's in her second affidavit but
7 you can find a synopsis at page 27 of the reply brief.

8 THE COMMISSIONER: Yes, I have it.

9 MR. SMORANG: And again, some of them were in the
10 material we looked at earlier.

11 THE COMMISSIONER: Yes, I think so.

12 MR. SMORANG: I won't repeat some of the
13 profanities. But this isn't just commenters. These
14 include reporters who say things like:

15

16 "If you screwed up, you should
17 just have to face the music, just
18 like everybody else."

19

20 Or:

21

22 "Why would you want your name
23 protected if you didn't do
24 anything wrong"

25

1 Whereas the Winnipeg Sun said, "Cowards."

2 And so it's very clear from how the media has
3 acted so far, both in terms of what they've allowed on
4 their websites and what they've printed in their articles,
5 that it's about blame, it's about finding somebody at
6 fault, and we need that public hanging, if you will.

7 And it's certainly not difficult, Mr.
8 Commissioner, to envisage how a person who testifies at
9 this inquiry will be treated in the media and on the
10 internet, if and when their identity and name and face are
11 widely broadcast by the media.

12 Recently, in the sentencing of a notorious child
13 abuser, Graham James, there was an application for cameras
14 in the courtroom during the sentencing, and Judge Carlson
15 of our Provincial Court, in declining the application, made
16 comments that I think are appropriate before you, and they
17 are at paragraph 83 of our reply brief.

18 She said, "[This case] is not going to become a
19 spectacle."

20 She said:

21

22 "We all know that internet
23 postings may not be effectively
24 erased."

25

1 She said:

2

3 "If victims have to worry that
4 there may be a camera anywhere
5 near the Court proceedings, it is
6 reasonable to expect they may not
7 come forward."

8

9 The risk, Mr. Commissioner, is real.

10 Experts who have dedicated their careers and
11 professional lives to child protection are telling you
12 that. Social workers in Manitoba, through Janet Kehler,
13 are telling you that. The professional body for social
14 workers in Manitoba is telling you that. And the actions
15 of the media up until now are telling you that.

16 And so if the risk is real and these people who
17 have come forward with their credentials and their opinions
18 are to be given weight, you must move to the other side of
19 the balance. That is, what would the negatives, the
20 deleterious effects of such an order be.

21 THE COMMISSIONER: That's the second prong.

22 MR. SMORANG: Yes. And again, I'm in her hands,
23 Mr. Commissioner. It is noon. I can quit now or I can
24 carry on for a while.

25 THE COMMISSIONER: No, I think we'll run till

1 about 12:30.

2 MR. SMORANG: I, I can tell you I likely won't
3 finish by 12:30, but I'm happy to go --

4 THE COMMISSIONER: Carry on.

5 MR. SMORANG: -- until then, yes.

6 THE COMMISSIONER: You can --

7 MR. SMORANG: Thank you.

8 THE COMMISSIONER: You can resume when we come
9 back.

10 MR. SMORANG: Thank you.

11 So the other side of the balance. What would the
12 effect of not publicizing the names and faces of social
13 worker witnesses be on the various interested parties?

14 First of all and, of course, of most importance,
15 what would the effect be on you? And that effect would be
16 zero. You will still be privy to all information. You
17 will see all people testify. You will have the opportunity
18 to look at them as they testify, and do what triers of fact
19 do and individuals in your position do in terms of
20 assessing body language, voice, response time, reaction,
21 tone of voice, et cetera. None of that will be taken from
22 you whatsoever.

23 And the public will know that. The public will
24 know that you, as gatekeeper of all information, much of it
25 already before you in documentary form, is confidential and

1 would not be released to the public in the form that you
2 have seen it. The public will know, as gatekeeper, that
3 you have all of the information and have been deprived of
4 nothing.

5 What would the effect be on the hearing itself?
6 Again, none. Everyone in this room will see and hear all
7 the witnesses. They will see the faces, they will hear the
8 names. This will be public.

9 What about the effect on the media?

10 THE COMMISSIONER: As per the people attending,
11 there'd be no prohibition on them going out and making
12 reference to the names of those people, would there?

13 MR. SMORANG: There's no way to prohibit that.
14 It's simply not possible. And, and so the answer is no.

15 What we are seeking as a practical -- and
16 recognizing that we are trying to find the most minimal
17 restriction, is simply the mass broadcast by the commercial
18 media, which, of course, would cause the mass damage, in
19 our submission.

20 THE COMMISSIONER: You were going to say the
21 effect on the media.

22 MR. SMORANG: Effect on the media. Very little.
23 First of all, the media attending the hearing will know the
24 names of the social workers who testify. If they need to
25 do background check or any other research on an individual

1 before writing a story, they'll be able to do that.
2 They'll have all the information they need.

3 But in terms of reporting either in the newspaper
4 or on the TV, on the radio, the only difference, Mr.
5 Commissioner, is instead of turning on your radio and
6 hearing today at the Phoenix Sinclair inquiry, Jane Smith,
7 social worker, testified that she did the following. And
8 in the case of TV or, or print, a picture of Jane beside
9 the story.

10 Instead of that the public will get: Today a
11 social worker testified that she did the following. And
12 all of the information about what she said and what she did
13 and how she did and what she did and didn't do, will be
14 available to the media and to the public. What happened,
15 what was known, what was not known, what should have been
16 known, what could have been done, what ought to be done,
17 all will be reportable firsthand by the media to the
18 public.

19 What they won't get to do is to give those
20 reporters who choose to do so and those media outlets that
21 choose to foster and publish commentators and commentaries
22 the right to pillory people individually by name. And
23 anonymously, in many cases.

24 The MGEU has sought a very minimal order by
25 design. Although you'd never know it by reading the media,

1 the MGEU wants its members to testify. It has been
2 encouraging its members to testify. It wants its members
3 to feel safe in saying what they really think about what
4 was done and what should change.

5 These are the workers. They didn't create the
6 system. They don't fund the system. They didn't organize
7 nor do they manage the system. They work in the system.
8 They are an excellent and critical resource for you.

9 And so in seeking a minimal order, the MGEU has
10 not sought a maximum degree of privacy or lack of exposure
11 for its membership. It has tried to strike a balance.
12 We're not asking for social workers to testify in-camera.
13 Not asking for a screen to hide peoples' faces from the
14 public and from the media who are in the room.

15 What the MGEU doesn't want is (a) members feeling
16 that they are unable to speak the truth and their minds
17 about what they have experienced, and what it doesn't want
18 especially, Mr. Commissioner, is the chilling effect that
19 will undoubtedly be felt very soon after the first or
20 second or third social worker is pilloried in the
21 newspaper, on those yet to testify.

22 Sir, in conducting the Dagenais/Mentuck analysis,
23 the only conclusion you can come to is that the benefit of
24 granting this minimal order sought far outweighs any
25 negative effects of that order. The negatives are minimal

1 to non-existent, and certainly will not in any way affect
2 your ability to do your job at this inquiry, which,
3 ultimately, in, in a word, is to do good.

4 There are evidentiary issues before you, and the
5 media has raised those by way of motions to strike. I wish
6 to comment briefly on that now. I will reserve, of course,
7 my right, once I've heard Mr. Kroft on that motion, to
8 reply as commission counsel has indicated I will be given
9 an opportunity after he and those that support his motion
10 to strike speak.

11 The media is seeking to limit the information
12 that you have before you in conducting the Dagenais/Mentuck
13 analysis. It does so by seeking to strike part or all of
14 the evidence before you by way of the experts and the other
15 social workers who have filed affidavits.

16 I must say that's not surprising to me that they
17 are making that request. Not only is it in their interest
18 to try and set the evidentiary standard as high as possible
19 to limit information you have, but also, Mr. Commissioner,
20 in the 11 months since Mr. Kroft was retained, the media
21 has not come up with even one expert who will come forward
22 and say, I've been doing this all my life, I have the
23 credentials, and what all those other people are saying is
24 hogwash. Not one, in 11 months.

25 So of course, the media has to attack those

1 individuals that have come forward from a variety of
2 backgrounds to explain to you why there is a risk and you
3 ought not to allow publication.

4 The only evidence the media has been able to
5 garner are three affidavits. One by a CBC manager, Mr.
6 Rosner, who basically says to you it's been done before,
7 you should do it again; Ms. Hastings, a social worker, who
8 says, I've never had any negative experiences where people
9 knew who I was; and Mr. Bear, the Executive Director of the
10 Southern Chiefs Organization. If you've read the cross-
11 examinations, I don't have anything else to say about Mr.
12 Bear.

13 THE COMMISSIONER: I read it.

14 MR. SMORANG: The question of the standard of
15 evidence in court versus before a commission of inquiry, we
16 address beginning at page 4 of the reply brief. Trite to
17 say, sir --

18 THE COMMISSIONER: Just let me get that.

19 MR. SMORANG: -- you are not a court; you don't
20 function as a court. You were a trial court judge long
21 enough; I don't need to give you any further information on
22 the differences. You will know them well.

23 Your mandate does not include you deciding in
24 favour of one party over the other, nor considering onus of
25 proof, nor considering standard of proof such as balance of

1 probabilities or beyond reasonable doubt. You are an
2 inquiry. Your job is to consider everything you hear, from
3 every source, and to weigh it and to consider it and to
4 work it through, ultimately, to a conclusion.

5 You are not, as you, as you know well, to express
6 any conclusion or recommendation about civil or criminal
7 liability. You have wide powers given to you by the order-
8 in-council to perform your duties, including that you can
9 consider what previous reviews have done and authors have
10 said, and give those any weight you'd like.

11 You can review transcripts of interviews of
12 people even before the hearing and rely on that evidence as
13 an alternative to bring the person before you. You can
14 consider any documents and you can give those documents any
15 weight, including accepting them as conclusive.

16 According to your amended rules of procedure and
17 practice -- and this is from paragraph 10 of our reply
18 brief -- you can receive any evidence you consider to be
19 helpful. Any evidence whatsoever, Mr. Commissioner. You
20 can attend pre-hearing interviews conducted by Commission
21 counsel if you'd like. You can tender those summaries as
22 evidence. Documents that are released to parties have to
23 be returned at the end of the inquiry. You can exclude
24 anybody from the public from the hearing and direct any
25 portion of the hearing to be held in the absence of the

1 public. You will be posting transcripts of the testimony
2 and copies of the exhibits on the Commission's website.

3 Virtually all of what I just said would not
4 happen in a Canadian court as a result of court
5 proceedings.

6 THE COMMISSIONER: I can tell you I have not
7 attended any pre-inquiry interviews. I, I want to hear it
8 all here for the first time.

9 MR. SMORANG: Absolutely, but from the point of
10 view of those that appointed you, you have that ability and
11 that sets the context for the standard of evidence that you
12 must adhere to.

13 THE COMMISSIONER: I understand your point.

14 MR. SMORANG: Because essentially what you're
15 being asked to do, Mr. Commissioner, is to decline to hear
16 relevant evidence on a rule of evidence that would be
17 applied in a court of law.

18 THE COMMISSIONER: What's that again?

19 MR. SMORANG: You're being asked by the media to
20 decline to hear information. It might be useful, might be
21 relevant, might help you in the end --

22 THE COMMISSIONER: Oh, I see.

23 MR. SMORANG: -- but, but I won't hear that. I
24 won't hear it because of a rule that I may agree with or
25 not, but it binds me. You don't have that binding rule

1 upon you. As I said in my material, Mr. Commissioner,
2 trial court would be appealed from instantly, and
3 successfully, if a trial judge were to accept hearsay or
4 opinion evidence from someone not qualified to give it.

5 Moreover, the inquiry itself -- and we begin at
6 paragraph 12 on page 7 of the reply brief -- will be full
7 of opinion and hearsay evidence, and that's fine. It ought
8 to be. That will help you get to where you need to get to.

9 Examples of, of questions that have been asked to
10 social workers that we represent are set out beginning at
11 paragraphs 14 and following on page 8. Commission counsel
12 has asked our social worker witnesses for hearsay answers,
13 for opinion answers, and so she should, because that
14 information is relevant. And these people are prepared to
15 give it and you will have to weigh it.

16 And as I've indicated already, it will be not
17 only useful for you to hear that evidence, but it will be
18 far more likely that you will hear that evidence -- hearsay
19 evidence, opinion evidence -- from frontline social workers
20 if they know that their name and face will not be on the
21 six o'clock news or in tomorrow's paper replete with what
22 opinion they have or comment that they offered about the
23 system as it is or how it ought to be.

24 In phase two of the inquiry, we know that you
25 will hear from at least four of the report writers. Again,

1 it would be surprising to me if you required each of those
2 individuals to be qualified formally as an expert, subject
3 to challenge by any other counsel with standing, before
4 that person was able to come forward and testify.

5 You will be hearing from witnesses from the
6 department, from the authorities, from MGEU, from the
7 Assembly of Manitoba Chiefs, from the Manitoba Métis
8 Federation. All of those people will brought forward to
9 help you in phase two. And again, I would be surprised to
10 hear that those individuals will not be able to testify
11 unless they are qualified as experts or they are limited to
12 just firsthand information and no hearsay whatsoever.

13 In phase three the rules, if you will, will be
14 even looser. We will have panel discussions. We will hear
15 from elders. We will hear from young people in the system,
16 or potentially involved in, in the system, who will offer
17 to you their experiences, their opinions, anecdotal
18 information, none of which would be admissible in a court
19 of law, all of which will be helpful to you.

20 The media itself, in the three affidavits that it
21 has filed, has put before you hearsay and opinion evidence
22 from Mr. Bear and Ms. Hastings, and those are set out at
23 pages 13 and 14 of our reply brief. I won't go through
24 them.

25 At the end, I urge you to dismiss the motions to

1 strike and to accept all of the evidence that is before you
2 now, on the question that is before you today, because it
3 is helpful, because it comes from credible sources, because
4 it does what an expert is supposed to do, which is to help
5 the trier of fact in an area that he or she is not expert,
6 and it will be highly instructive in assisting you with the
7 balancing act that you must undertake.

8 So the primary remedy that we seek, as I
9 indicated at the outset, is an order prohibiting the
10 publication, broadcasting or otherwise communicating by
11 television, internet, radio, and print, or by other means,
12 the name, face, and identity of social worker witnesses.

13 We were asked by Commission counsel quite
14 properly and we have attempted to make clear the exact
15 relief we are seeking as it would play out in the hearing.
16 And if you could be directed to the ANCR brief, tab 13.

17 THE COMMISSIONER: Yes. Just allow me to find
18 that.

19 MR. SMORANG: It's the reply motion brief filed
20 by the authorities.

21 THE COMMISSIONER: That's their original brief?

22 MR. SMORANG: I believe that is their supplemental
23 -- it's a reply motion brief, it's called.

24 THE COMMISSIONER: Just a minute, now.

25 MR. SMORANG: Just filed recently.

1 THE COMMISSIONER: Oh.

2 UNIDENTIFIED PERSON: I believe it's not in there
3 (inaudible).

4 THE COMMISSIONER: Is it this one?

5 MR. SMORANG: Tab 13.

6 THE COMMISSIONER: Just a minute. This is tab 13
7 of?

8 MR. SMORANG: The ANCR brief. Or the authorities
9 brief.

10 THE COMMISSIONER: Yes.

11 MR. SMORANG: You are there?

12 THE COMMISSIONER: Yes.

13 MR. SMORANG: What, what tab 13 is, is a result
14 of a consensus reached between my client, the ANCR and
15 authorities, and the Intertribal Child and Family Services,
16 the three applicants before you, on how our restrictions
17 would play out. And what we've done is we've taken the
18 media protocol that existed prior to yesterday -- and there
19 were some very minor changes, I think, in yesterday's
20 document, like a few words here or there so, by and large,
21 this is the protocol before you.

22 THE COMMISSIONER: Yes.

23 MR. SMORANG: And then we've added, in bold type,
24 how our proposed motion and the publication ban would play
25 out. And so if you look at paragraphs 1 through 5, for

1 example, they are virtually identical to the document that
2 we received from Commission counsel that was amended
3 yesterday. There's a couple of words added, but they don't
4 change the intent.

5 But beginning at paragraph 6 is our proposed
6 remedy as to how you would -- essentially how your order
7 would play out. So we say at paragraph 6 that all
8 witnesses will testify in person, that their identities
9 will be revealed to those in attendance, and there'll be no
10 restrictions placed on who can attend the hearing. It'll
11 be a open public hearing subject to any subsequent in-
12 camera ruling you may make.

13 Paragraph 7, prior to calling a witness
14 Commission counsel will advise as to whether the witness is
15 subject to a publication ban. If so, there'll be a ban on
16 the media publishing, broadcasting, streaming, or otherwise
17 communicating by television, internet, and radio, in print,
18 or by any other means, the name, face, or identity of any
19 such witness.

20 So essentially Commission counsel will say, This
21 is a person subject to the ban, Mr. Commissioner. The ban
22 will then apply to that witness.

23 Paragraph 8, the live streaming will continue,
24 but when a witness is subject to a publication ban when
25 they are testifying, the pool video camera can remain on

1 but it cannot show the witness's face nor can the name be
2 mentioned. If by accident the face or name is revealed,
3 the five-minute delay will be used -- don't ask me how, but
4 I believe the technical people can do that -- to allow for
5 the stream to be edited before it is publicly streamed.

6 During the -- this is number 9 now. During the
7 swearing in of a witness subject to a publication ban, the
8 pool video camera will be turned off.

9 Paragraph 10. Once a witness subject to the ban
10 has been sworn in, the witness will be given a pseudonym
11 based on the order in which they testify. For example,
12 first social worker will be SW1, SW2, et cetera. And
13 again, that's because the camera's now back on, Mr.
14 Commissioner, and so that their name does not get live-
15 streamed onto the internet.

16 Paragraphs 11 and 12 are virtually the same as
17 the Commission counsel's, and then paragraph 13, we have
18 just added that exhibits and transcripts will be redacted
19 to remove the names of social workers testifying and will
20 be replaced by pseudonym before being posted on the
21 website.

22 So in our --

23 THE COMMISSIONER: When was this filed?

24 MR. SMORANG: This, this was filed with this
25 brief.

1 THE COMMISSIONER: Originally.

2 MR. SMORANG: Well, this brief was filed just a
3 week and a half, two weeks ago --

4 THE COMMISSIONER: Oh, yes, yes.

5 MR. SMORANG: But it, it is a result of us being
6 asked by Commission counsel to essentially get together and
7 agree on what exactly it is --

8 THE COMMISSIONER: Yeah, it's --

9 MR. SMORANG: How would this play out?

10 THE COMMISSIONER: It's one of the few things I
11 haven't read, so I, I will give attention to that.

12 MR. SMORANG: All right. So that becomes our
13 proposal. It's not written in stone, it is a proposal, but
14 we believe that it would effectively allow for both a full
15 and open hearing, and live stream without violating a ban
16 on publicizing names and faces through the, through the
17 media.

18 THE COMMISSIONER: Okay. Now, are we at a point
19 now to -- do you want to just finish something and, and
20 then break for lunch or ...

21 MR. SMORANG: I can tell you that if I go on I'll
22 be 15 minutes at most and I'll be done.

23 THE COMMISSIONER: What's your choice?

24 MR. SMORANG: I'd prefer to continue.

25 THE COMMISSIONER: All right.

1 MR. SMORANG: Unless anyone needs a break.

2 THE COMMISSIONER: Hearing none, we'll -- if it's
3 your choice to continue, by all means.

4 MR. SMORANG: Thank you.

5 We seek an alternative remedy and I won't spend
6 much time on it, but if you ...

7 THE COMMISSIONER: See, let me ask this. By
8 virtue of that document you just referred to at tab 13 --

9 MR. SMORANG: Yes.

10 THE COMMISSIONER: -- is that of assistance in,
11 in, in telling me that the three applicants -- well,
12 there's more than three, but the applicants, I guess, the,
13 the main three you've been in touch with, yourself and the
14 other two, are in agreement as to the relief being sought
15 on the motions?

16 MR. SMORANG: Yes.

17 THE COMMISSIONER: And what about the, the
18 applicants for SORs and so on? Have they -- has there been
19 any consensus there?

20 MR. SMORANG: There's been no attempts to reach
21 consensus there as we expect that the rules for SORs will
22 be, will be significantly different. This is just for
23 social workers.

24 THE COMMISSIONER: All right. And, and insofar
25 as, as you and the authorities, ANCR, and the Intertribal,

1 you're all agreed that -- on, on the relief being
2 requested.

3 MR. SMORANG: We are, although in our motion we
4 do have an alternative --

5 THE COMMISSIONER: Yes.

6 MR. SMORANG: -- relief.

7 THE COMMISSIONER: Yes.

8 MR. SMORANG: And that would, of course, not
9 encompass tab 13. If you were to ban cameras from the room
10 but not ban the right of the media to publish names and
11 whatever faces they can, they can find --

12 THE COMMISSIONER: All right.

13 MR. SMORANG: -- then, of course, tab 13 would
14 not make any sense at all.

15 THE COMMISSIONER: Yes. But, but in your motion
16 you're, you're asking for the main relief --

17 MR. SMORANG: Yes.

18 THE COMMISSIONER: -- that we've spent all
19 morning on, and the alternative now with respect to
20 cameras.

21 MR. SMORANG: Correct.

22 THE COMMISSIONER: And, and is there a third item
23 of relief or is that it?

24 MR. SMORANG: That's it.

25 THE COMMISSIONER: And, and that -- the, the

1 three of you agree that those -- you're -- there's
2 unanimity between the three of you that that's what you're
3 asking for from this --

4 MR. SMORANG: On the --

5 THE COMMISSIONER: -- from me in --

6 MR. SMORANG: On the main --

7 THE COMMISSIONER: -- my rule -- in my ruling.

8 MR. SMORANG: Yes. On the main motion, yes.

9 THE COMMISSIONER: Yes.

10 MR. SMORANG: Although I, I must admit I haven't
11 looked at the other motions, whether they've asked for the
12 alternative as well, but we have, as well.

13 THE COMMISSIONER: Well, well, I'm --

14 MR. SMORANG: So if, if you're going to give us
15 the ban, we see tab 13 as how it will play out.

16 THE COMMISSIONER: Right.

17 MR. SMORANG: If you're not, then my alternate
18 remedy --

19 MR. SMORANG: Yes, yes.

20 MR. SMORANG: -- sought, which is to prohibit TVs
21 -- television cameras and audio from the room entirely.

22 THE COMMISSIONER: Yes.

23 MR. SMORANG: And that is contained in our main
24 brief -- motion brief, beginning at page 32. I will not
25 review it in, in any detail before you today, but in

1 summary, it is our position and we believe to be fairly
2 settled law that the media has no Charter right to bring
3 cameras or recording devices into a hearing. The Pilarinos
4 case, the Brian Sinclair inquest decision that are in our,
5 in our brief stand for that proposition.

6 THE COMMISSIONER: Well, now, is the, the
7 Pilarinos case still good law, based upon that -- I think a
8 decision that was filed by Mr. Kroft in the last day or two
9 from the Supreme Court of Canada judgment of Madam Justice
10 Dechamps?

11 MR. SMORANG: If it was filed yesterday at 4:30,
12 which is when I got an e-mail, I haven't read it.

13 THE COMMISSIONER: I think you should look at it.

14 MR. SMORANG: I will.

15 THE COMMISSIONER: Because my view is that it
16 likely renders Pilarinos bad law.

17 MR. SMORANG: If it does, then I will readily
18 admit that when I've read it.

19 THE COMMISSIONER: Sure.

20 MR. SMORANG: Thank you.

21 THE COMMISSIONER: Okay.

22 MR. SMORANG: There is one final remedy that we
23 seek, and it's a minor remedy but, nonetheless, we were
24 asked to bring it to this event, and that is the costs of
25 bringing Evelyn Wotherspoon to Manitoba for her cross-

1 examination, and we set out our position on that remedy at
2 paragraph 24 of the reply brief.

3 And in essence, we seek the disbursements or the
4 out-of-pocket costs only. Not surprising to you, I'm sure,
5 is that Ms. Wotherspoon charged my client for her time to
6 come to Winnipeg and to be cross-examined by Mr. Kroft. We
7 do not seek reimbursement for that. We do, however, in
8 the, in the analogy being to the, to the rules of the
9 Manitoba Court of Queen's Bench vis-à-vis cross-
10 examination, seek her out-of-pocket costs which are set out
11 at paragraph 67, which are her airfare, hotel, ground
12 transportation, and meals. They are totalled there.

13 THE COMMISSIONER: Have I got the jurisdiction to
14 deal with costs?

15 MR. SMORANG: Yes.

16 THE COMMISSIONER: Where do I get it from?

17 MR. SMORANG: I already answered the first one.

18 THE COMMISSIONER: Eh?

19 MR. KROFT: Mr. Commissioner, I agreed that you
20 would have the jurisdiction -- or you probably don't have
21 the jurisdiction, but -- I'll be making contrary
22 submissions but I have agreed with Mr. Smorang to allow you
23 to determine whether Mr. Smorang's request is --

24 THE COMMISSIONER: You'll give me that privilege.

25 MR. KROFT: So I've given you that privilege,

1 yes, that -- I can write up an order-in-council if you'd
2 like, to supplement the other, but I have agreed with Mr.
3 Smorang.

4 MR. SMORANG: Just as a practical agreement
5 between counsel when we were trying to schedule the cross-
6 examinations, that was the agreement that was made, that if
7 they come in, they would come in at my client's cost --

8 THE COMMISSIONER: All right.

9 MR. SMORANG: -- at the first instance, subject
10 to you making a ruling. So, thank you, Mr. Kroft, that --
11 he's exactly right.

12 So in conclusion, Mr. Commissioner, on my
13 submission, I suggest to you that your task in regard to
14 this motion has been made significantly easier by the
15 wealth of information that has been put before you by
16 individuals who have come forward to assist.

17 You have detailed, supported, and clear guidance
18 from long-time social workers, from the director of social
19 work at the Health Sciences Centre in Winnipeg, from the
20 president of the professional body, from a professor at the
21 University of Manitoba, from professor and former dean of
22 the University of Toronto, from the director of Toronto
23 Children's Aid, from an expert social worker from Alberta
24 who's been in child protection for 32 years.

25 All of those individuals have come forward to

1 tell you one thing, and that is: Don't run the risk of
2 this inquiry being impaired in its work, of the system
3 being negatively effected in terms of social workers'
4 ability to protect children, of peoples' ability to work
5 and feel safe at work and in their daily lives, being
6 diminished.

7 The overwhelming evidence before you suggests
8 that the balance -- the Dagenais/Mentuck balance tips in
9 favour of granting this most minimal of orders and carrying
10 on with the hearing to maximize the chance that this
11 hearing and this inquiry will do the good that it's
12 supposed to, without any of the collateral damage that is
13 before you in terms of the advice you're getting from the
14 experts.

15 Subject to your questions and my reply, thank you
16 for your patience.

17 THE COMMISSIONER: I, I thank you. I just do
18 have two or three questions. I saved them to the end, as I
19 will for all counsel. One or two you may have answered,
20 although I only have three or four.

21 Who is intended, in your view, to be protected by
22 the confidentiality measures in the Child and Welfare
23 Services Act? Is it families, children, workers? Who is
24 it that, that's intended to get the benefit?

25 MR. SMORANG: My first reaction would be all of

1 those people, because they all work in a system that has a
2 single goal, and that is to protect children. And so the
3 protection of children involves workers feeling safe. It
4 involves sources of referral feeling safe. It involves
5 family feeling safe and being safe in the knowledge that
6 the information they convey will not be used against them
7 or broadcast or brought to public scrutiny so as to
8 potentially, now and in the future, diminish the system's
9 ability to do what it's supposed to do.

10 THE COMMISSIONER: And you see that being there,
11 besides children and families, to the benefit and
12 protection of workers as well, do you?

13 MR. SMORANG: Both Dr. Regehr and Ms. Wotherspoon
14 speak of systems where people do not have the ability to
15 take any risk. That is, that the risk of making a decision
16 is scarier than the risk of doing nothing. And because if
17 I make a decision and then subsequently I'm on the front
18 page of the newspaper for it, I'm not prepared to do that.

19 THE COMMISSIONER: I hear you.

20 MR. SMORANG: And that hurts the system. And so
21 the workers -- I mean, I represent the workers; that's
22 clear. And I am interested in morale, and I'm interested
23 in, in safety, and I'm interested in people being able to
24 do their jobs with a degree of understanding as to how it
25 will play out in the future, not just today. That's clear.

1 That's my client's position.

2 But these are the people, the frontline people
3 you're going to hear from, who are going to give you, in my
4 respectful submission, the best evidence you're going to
5 get on what's wrong and how can it be fixed. And I don't
6 want those people coming forward scared to death of, of, of
7 what's going to face them because of what they saw last
8 night to their co-worker on the news. It will not help
9 you.

10 THE COMMISSIONER: Thank you. That's a fulsome
11 answer. I didn't write it down because I'm going to make
12 sure I get it transcribed because I, I -- but most of these
13 -- I think the next question -- and I only have two or
14 three more -- I think you have answered it.

15 How is the risk to your clients reduced if the
16 public can still learn their identities by attending the
17 public hearings? I think you've indicated that there's
18 just no solution to that.

19 MR. SMORANG: It's magnitude. And with the
20 internet, it's multiple magnitude. Again, if your name was
21 in the Los Angeles Times in 1968, that's where it would sit
22 and we would never know it. Today we know it right away,
23 and it's just this magnitude of information that is not
24 only immediately worldwide, but can never be taken away.

25 THE COMMISSIONER: How is the risk to the child

1 welfare system and to children in the system reduced by a
2 publication ban?

3 MR. SMORANG: It's reduced in a number of ways
4 that I think I've given you already this morning, including
5 that people will come forward more freely, that co-workers
6 who are not anywhere involved in this matter will be able
7 to work safer in, in feeling that their ability to do their
8 job will not be subjected to a public microscope and the
9 kind of blame -- you know, this is a blameless process, we
10 all keep saying that, but it's not in the media, at all.
11 It's not.

12 And, and you can control what goes on in this
13 room, but once it's out of this room, you have no control,
14 nor do any of us. And that's where you have the ability,
15 through what I consider to be a very minimal intrusion into
16 the open court principle, to protect against that risk.

17 THE COMMISSIONER: And is there, is there
18 anywhere in your evidence that you haven't pinpointed this
19 morning where that would -- your position in that regard
20 would be supported?

21 MR. SMORANG: Only that I have very -- gone
22 through the evidence of the experts in very summary way,
23 and I know that you will read their affidavits carefully
24 because these are the people that, quite frankly, Mr.
25 Commissioner, if I was the trier of fact, I would look to.

1 These are the people who have dedicated their lives to
2 this, to this topic.

3 THE COMMISSIONER: And finally, are there cases
4 that you are aware of that have granted a publication ban
5 in these or similar circumstances?

6 MR. SMORANG: You say these or similar. I would
7 call an inquest such as before Judge Guy a similar
8 circumstance, and I would say that the Dagenais/Mentuck
9 test (inaudible) contextual has to develop and be
10 considered in context. And I would say that I've never
11 seen a situation where the media has acted in the way it
12 has till now in this case, and where I expect it will
13 continue to act.

14 THE COMMISSIONER: Well, thank you, Mr. Smorang.
15 You've been very helpful to me and I will give full
16 consideration to everything you had to say this morning.

17 MR. SMORANG: Thank you, sir.

18 THE COMMISSIONER: Now, it's about 20 minutes to
19 one. Do you want to adjourn till quarter to or two
20 o'clock? What do you say, Commission counsel?

21 MS. WALSH: Well, I've already had some counsel
22 approach me that our proposed one-hour lunch break that
23 we've advised will apply through the hearings, doesn't give
24 them enough time to get back to their offices, eat lunch,
25 take care of whatever they need to take care of that might

1 have arisen during the day. So perhaps we should come back
2 at two.

3 THE COMMISSIONER: Well, we'll adjourn till two
4 o'clock and see if that gives them enough time, and if we
5 have to revise that, we will, but I'm --

6 MS. WALSH: (Inaudible).

7 THE COMMISSIONER: I want to drive on and get
8 this job done. But we'll, we'll rise now till two o'clock.
9 We stand adjourned.

10 MS. WALSH: Thank you.

11

12 (LUNCHEON RECESS)

13

14 THE CLERK: Please be seated.

15 THE COMMISSIONER: Yes, Mr. Smorang?

16 MR. SMORANG: Mr. Commissioner, over the lunch
17 hour, it came to my attention that I misspoke in one aspect
18 of my comments this morning and I wanted to correct that
19 before I let Mr. Saxberg begin.

20 THE COMMISSIONER: All right.

21 MR. SMORANG: You will recall, sir, on several
22 occasions this morning, I referred to the various experts
23 who have provided affidavit material either in support of
24 my client's application, or the applications of the
25 authorities, NCR, or the Inter-Tribal Child and Family

1 Services applications. In error, I included the affidavit
2 of Regan Spencer, director of social work at the Health
3 Sciences Centre as being amongst affidavits filed in
4 support of my application. To be clear, you will be
5 hearing, of course, from counsel for HSC later in these
6 proceedings. The affidavit concerned was sworn in support
7 of that, that separate application, made for certain
8 sources of referral, those being SORs 1, 2 and 4 and so
9 that application and that affidavit have been placed before
10 you within those proceedings and I am informed that the
11 Health Sciences Centre takes no position on my client's
12 application. And I knew that and should have made that
13 clear. It is before you, but certainly not in support of
14 my application or those.

15 THE COMMISSIONER: Thank you.

16 MR. SMORANG: Thank you.

17 THE COMMISSIONER: Now, while you're on your
18 feet --

19 MR. SMORANG: Yes?

20 THE COMMISSIONER: -- there's, there's one
21 question that I, I missed to ask you this morning, it was
22 after the, my note on Pilarinos and I'll ask it to you now
23 and you can either answer it now, or give some thought,
24 whichever suits. But it is these: Are there not other
25 reasonable measures that your client's employer can take to

1 reduce the risk to workers? That is, remove them from the
2 front line on a temporary basis, or to provide counselling
3 to them to cope with the stress and morale issues that
4 arise? Is there just not some other reasonable measures,
5 other than the relief you're requesting?

6 MR. SMORANG: Well, because you're asking about
7 measures that my client's employer could take, I'll take
8 you up on your offer to let me consider that, because I
9 would like to, in fact, talk to counsel for the department,
10 which is my client's employer.

11 THE COMMISSIONER: That's reasonable.

12 MR. SMORANG: Thank you.

13 THE COMMISSIONER: All right. Mr. Saxberg
14 please.

15 MR. SAXBERG: Thank you, Mr. Commissioner and
16 good afternoon, ladies and gentlemen, good afternoon to
17 you, Mr. Commissioner. My name's Chris Saxberg and I'm
18 co-counsel for three of the authorities that are
19 responsible for the oversight and regulation of the Child
20 and Family Services agencies that have concurrent
21 jurisdiction throughout this province.

22 Just before I start, I want to acknowledge the
23 contribution to the, this presentation and to the materials
24 that you have before you of the other co-counsel, Mr. Luke
25 Bernas, who's with me here to my right and lead counsel,

1 Harold Cochrane, who's just behind me.

2 Before we start, I want to make sure that you
3 have the material conveniently placed before you.

4 THE COMMISSIONER: Now, just a minute, you, you,
5 you started by saying you act for the three authorities?

6 MR. SAXBERG: Yes.

7 THE COMMISSIONER: And also for ANCR?

8 MR. SAXBERG: That's right.

9 THE COMMISSIONER: Now, what about the other
10 individuals you, you made mention of this morning? I, I'm
11 just not entirely clear who all you are acting for. Didn't
12 you indicate there were some individuals as distinct from
13 the, your two other clients?

14 MR. SAXBERG: Yes, there are certain social
15 workers that, for the most part, were in upper level, or
16 supervisory, or management functions at what was then
17 Winnipeg CFS and is today -- and that function being
18 performed today by ANCR. But we represent some of the
19 employees that are, were in those higher level positions
20 and had direct dealings on the Phoenix Sinclair file.

21 THE COMMISSIONER: Well, are you acting for some
22 social workers who are, are requesting that the publication
23 ban apply to them?

24 MR. SAXBERG: Absolutely.

25 THE COMMISSIONER: All right. Have you advised

1 Commission counsel who they are?

2 MR. SAXBERG: Yes, what, what we had done is
3 initially the authorities and ANCR weren't going to make a
4 motion of their own. We were intending merely on providing
5 evidence that would help the Commission in resolving this
6 difficult decision and what we had done then, with respect
7 to the individual witnesses that were seeking the
8 publication ban, is provide their names to MGEU counsel and
9 it was the intention that MGEU counsel would then forward
10 those names to Commission counsel.

11 Now, I spoke with Mr. Smorang earlier today
12 during the break and he wasn't a hundred percent sure
13 whether that happened or not, whether the names that we had
14 provided to MGEU counsel were then married with their own
15 names and provided to counsel. So that's something we'll
16 have to follow up on.

17 THE COMMISSIONER: Well, I would ask you to do
18 that during the current week, because as I understand it,
19 Commission counsel has Mr. Smorang's list and we -- I want
20 to know who -- I don't know the names of them and, and,
21 and, and won't at this time, but I think it's important
22 that, that, that Commission counsel have possession of that
23 so we know, if there's an order and ban made, who it's
24 applicable to.

25 MR. SAXBERG: Absolutely. We'll e-mail that

1 information to you, or to --

2 THE COMMISSIONER: Well, send it --

3 MR. SAXBERG: -- Commission counsel today.

4 THE COMMISSIONER: -- to Commission counsel.

5 MR. SAXBERG: Yeah, when we get back to the
6 office, we'll do that.

7 THE COMMISSIONER: Is that satisfactory,
8 Commission counsel?

9 MS. WALSH: It is, Mr. Commissioner, and I can
10 confirm that we do not have that information. Those names,
11 at least, of the ones that I can recall you represent,
12 they're not on the list that we've received. So if you'll
13 send that to me, that'd be great.

14 THE COMMISSIONER: Thank you.

15 Proceed.

16 MR. SAXBERG: Thank you, Mr. Commissioner. So
17 what I'd like you to have accessible to you, as I start my
18 submission, is, first and foremost, this light blue bound
19 document, which I provided --

20 THE COMMISSIONER: Yes.

21 MR. SAXBERG: -- to Commission counsel earlier.
22 It's titled: The Authorities/ANCR's Selected Documents for
23 Publication Ban Hearing.

24 THE COMMISSIONER: Yes.

25 MR. SAXBERG: And what I've done is I've culled

1 documents that I, that are all before you in, in various
2 forms, attached to affidavits, or part of briefs and I've
3 simply put them all together so we don't have to reach
4 around for documents.

5 THE COMMISSIONER: That will be very helpful and
6 I thank you.

7 MR. SAXBERG: And there's one other document
8 though that you'll be asked to refer to and it is the full
9 affidavit of Dr. Cheryl Regehr. So you might want to see
10 if you can turn that up. It has attached to it numerous
11 articles and I'll be making some --

12 THE COMMISSIONER: Yes --

13 MR. SAXBERG: -- reference --

14 THE COMMISSIONER: -- I think I could find that.

15 THE COMMISSIONER: Now, this one's got
16 Wotherspoon, McLeod, so it's not that. Well, it was, it
17 was filed by MGEU wasn't it?

18 MR. SAXBERG: No, it's filed by the
19 authorities/ANCR.

20 THE COMMISSIONER: Oh, okay, I'll have --

21 MS. WALSH: Mr. Commissioner, if I might, I
22 believe it's in the large binder on the, on your desk. I
23 think it's at tab 3.

24 THE COMMISSIONER: This one?

25 MS. WALSH: Yes. (Inaudible).

1 Are you referring to the one from --

2 THE COMMISSIONER: Yes, it is.

3 MS. WALSH: -- March 30th?

4 THE COMMISSIONER: No, it's, it's tab 4.

5 MS. WALSH: Well, in mine it's tab 3, but --

6 THE COMMISSIONER: Okay. All right. I, I have
7 it.

8 MR. SAXBERG: Okay. Thank you. And I, I, I just
9 wanted you to have that available so it doesn't disrupt the
10 flow.

11 THE COMMISSIONER: Yes.

12 MR. SAXBERG: But we will be starting with the
13 selected group of documents in the blue --

14 THE COMMISSIONER: All right.

15 MR. SAXBERG: The first point I want to make, Mr.
16 Commissioner, is on the subject of the onus. On the
17 subject of who is it that bears the responsibility of
18 seeking a change to the status quo, as it were.

19 Now, as you're aware, notices of motion have been
20 filed by MGEU, going way back to 2011, and then followed by
21 my client, the authorities and ANCR and ICFS. And those
22 notices of motion are asking for the relief that Mr.
23 Smorang outlined and that, as you now know, we're all in
24 agreement to, in terms of the principle relief being
25 sought.

1 THE COMMISSIONER: Is, is your notice of motion
2 in this book? In the blue book?

3 MR. SAXBERG: No, it isn't, it isn't. It should
4 be --

5 THE COMMISSIONER: Well, I have it here. Maybe
6 we --

7 MR. SAXBERG: Yeah.

8 THE COMMISSIONER: -- should look at it, just so
9 I understand the relief that you're seeking.

10 MS. WALSH: It's at tab 2 of the large binder,
11 Mr. Commissioner.

12 THE COMMISSIONER: Tab 2 of this binder?

13 MR. SAXBERG: If you turn to the second page,
14 you'll --

15 THE COMMISSIONER: Yes --

16 MR. SAXBERG: -- see the motion is for an order
17 and then we have a subheading: Regarding Witnesses.

18 THE COMMISSIONER: Right.

19 MR. SAXBERG: And we say:

20

21 "That the Commissioner prohibit
22 any form of publishing,
23 broadcasting, streaming or
24 otherwise communicating by
25 television, internet, radio, in

1 print, or by any other means, the
2 name, face or identity of any
3 witness at the Inquiry who is, or
4 was: ..."

5

6 And then the first item is:

7

8 "A child and family services
9 employee who had direct
10 involvement in the delivery of
11 services to Phoenix Sinclair; ..."

12

13 THE COMMISSIONER: Well, let me compare that to
14 the, to the morning, the motion that Mr. Smorang spoke to
15 this morning (inaudible) see. That's not the motion.

16 MS. WALSH: I have it, Mr. Commissioner, if you
17 want it (inaudible).

18 THE COMMISSIONER: Just -- I'll let you know if I
19 need it.

20 MS. WALSH: Okay.

21 THE COMMISSIONER: No, I have it here.

22 MS. WALSH: Good.

23 THE COMMISSIONER: Now, he seeks an order that
24 we:

25

1 "... prohibit any form of
2 publishing, broadcasting ...
3 [screening] ..."

4

5 Now, he, he makes reference to, which I thought
6 he did, and, and in my judgment, correctly:

7

8 "... the name, face or identity of
9 any witness at the Inquiry who is
10 or was a Social Worker, as well as
11 the name of any Social Worker
12 identified in documents produced
13 at the Inquiry."

14

15 Now, is your request of the same nature? In that
16 it, it is, it make, has reference to:

17

18 "... the name, face or identity of
19 any witness at the Inquiry who is
20 or was a Social Worker ..."

21

22 MR. SAXBERG: The, the only difference is that
23 we've fine tuned it a bit, because there are -- social
24 worker has certain connotations, in terms of
25 qualifications, where there are witnesses that will be,

1 that may be testifying who were working at the agency, had
2 involvement in the file, but they weren't, wouldn't be
3 called social workers. Administrative staff. So we've,
4 we've just, we, we -- there's a slight broadening there.

5 But if I may, to me, the issue is, where we're
6 all in, on the identical page, is the publication ban
7 itself, what is it, how will it work? We're on the
8 identical page.

9 THE COMMISSIONER: No, but who does it apply to
10 has to be relevant.

11 MR. SAXBERG: Right. And then the next question
12 is, who does it apply to? In, in my submission, I think
13 that we, we may be putting the cart ahead of the horse
14 here.

15 THE COMMISSIONER: Did you want to argue that
16 later?

17 MR. SAXBERG: Yes.

18 THE COMMISSIONER: I want to hear you on it, but
19 if you want to --

20 MR. SAXBERG: Yes.

21 THE COMMISSIONER: -- argue that later, that's
22 okay with me.

23 MR. SAXBERG: Sure, sure, I will, I --

24 THE COMMISSIONER: All right.

25 MR. SAXBERG: -- I think it's going to be part

1 and parcel of the issue with respect to source of referral.
2 Who is one, who isn't one? Who's, who's, should be the
3 subject of the protection of the publication ban, who
4 shouldn't be? Those are separate issues that I believe
5 should be dealt with on a case (sic) by case basis and I'll
6 argue that later.

7 THE COMMISSIONER: But one reason I raise that is
8 because you made some reference this morning, which I
9 didn't follow, about applying this application to unknown,
10 or as yet unidentified social workers, something to that
11 effect; am I correct?

12 MR. SAXBERG: Well, I, I don't -- we don't know
13 who the, what the final witness list is. Witnesses have,
14 are changing. New people are being interviewed. We --

15 THE COMMISSIONER: But you're, you're not trying
16 to cast your net beyond people who will be witnesses here;
17 or are you?

18 MR. SAXBERG: No, not, not --

19 THE COMMISSIONER: All right.

20 MR. SAXBERG: -- not at all, no.

21 THE COMMISSIONER: All right, all right.

22 MR. SAXBERG: What, what -- the way that we're
23 looking at it, conceptually, is -- and you'll, you'll see
24 this in the presentation, what we're saying is there's a
25 reason, in child protection matters, in matters where the

1 state is involving itself, interfering with Charter rights
2 of parents and involving itself in the protection of
3 children, in those situations and this is one of them,
4 we're going to argue, this is an extension of that state
5 power, that when you're doing that, there are, already
6 enshrined in the legislative framework, the common-law
7 framework, restrictions on the media and restrictions on
8 the public. Our overall point is that what this inquiry is
9 being asked to do is change that status quo, do something
10 different, do something that's never been done before.
11 And, and that's the first point that I want to start on and
12 that I had described as the onus point. And I think maybe
13 when you see our, or our, you have a, a more fuller
14 understanding of our point, that then, when we get to
15 remedy, it'll make a little more sense, in terms to how we
16 want to apply it.

17 THE COMMISSIONER: I, I have it noted that you
18 opened by saying who bears the responsibility for seeking
19 change to the status quo?

20 MR. SAXBERG: Right.

21 THE COMMISSIONER: So if you'd like to continue
22 right on from there, I, I would be pleased to have you do
23 that and hopefully uninterrupted.

24 MR. SAXBERG: I was just mentioning that the
25 notices of motions have been filed by MGEU and the

1 authorities and ICFS. And in the regular -- and those
2 notice of motions are for certain relief and they've been
3 called a publication ban.

4 In the regular course, the onus is on the
5 applicant, someone who's seeking some form of relief from a
6 court or a tribunal. The onus is always, as you know, as
7 a, as a former judge and with your long involvement in
8 legal affairs, the onus is a significant component of any
9 decision.

10 And in this case, the media has formed, put
11 forward all of their argument on one fundamental principle,
12 once starting point. And that is that this inquiry should
13 start with the principle of the open court, of the open
14 court principle and that that's your launching point and
15 that the applicants are asking for you to make modification
16 to what is the normal, that the applicants are coming to
17 you and saying, we want you to change the regular practice,
18 when it comes to the open court principle. And that's how
19 all of their material has been framed. And they're saying
20 that the onus is on the applicants to prove a restriction
21 on freedom of the press is appropriate and with respect, I
22 disagree.

23 THE COMMISSIONER: Say that again? They, they're
24 asking what?

25 MR. SAXBERG: They're saying that the onus is on

1 the applicants, it's on MGEU, the authorities, ANCR, to
2 prove that a restriction, i.e. a publication ban, on
3 freedom of the press is appropriate and warranted. And
4 they're saying, put forward the evidence to show that it's
5 warranted. It's an extraordinary measure. You're
6 interfering with Charter rights. You show us how it's
7 appropriate. Now, it's up to you to, to put forward that
8 evidence. And everything's been framed that way and for
9 the most part, I, Mr. Smorang was responding to it in,
10 within that framework.

11 What I want to say is, I, I want to bring this
12 Commission back to the child protection world. And I say
13 that the onus isn't, in this case, is not on the applicants
14 here. The status quo -- and this is significant -- the
15 status quo, in matters relating to child protection, in
16 this jurisdiction, and when -- and in relation to any kind
17 of hearing where the state is involving itself in how it's
18 going to interfere with parents' Charter rights, how the
19 state is going to interfere in order to protect children,
20 any matter that deals with that extremely important
21 subject, always, always, always carries with it
22 restrictions on public access to those proceedings and/or
23 that information and media restrictions. Always. There's
24 never been an exception.

25 THE COMMISSIONER: What's your authority for

1 that?

2 MR. SAXBERG: Well, I'm going to go through
3 that --

4 THE COMMISSIONER: Okay.

5 MR. SAXBERG: -- with you, right from the, the
6 CFS Act to determinations in --

7 THE COMMISSIONER: Just repeat --

8 MR. SAXBERG: -- inquests.

9 THE COMMISSIONER: -- repeat that proposition to
10 me again. I want to take it down.

11 MR. SAXBERG: Whenever there is a child
12 protection function by the state, whenever there's a --

13 THE COMMISSIONER: Just, just a minute, yeah.

14 MR. SAXBERG: -- a hearing or a proceeding --

15 THE COMMISSIONER: Just a minute, whenever
16 there's a child protection function --

17 MR. SAXBERG: Right.

18 THE COMMISSIONER: Yes?

19 MR. SAXBERG: Which includes child protection
20 hearings where the state is intervening --

21 THE COMMISSIONER: Hearing and, and -- or, and/or
22 hearings --

23 MR. SAXBERG: Right.

24 THE COMMISSIONER: -- where the state is
25 intervening; is that your word?

1 MR. SAXBERG: Yes.

2 THE COMMISSIONER: Yes.

3 MR. SAXBERG: Apprehending, taking a child --

4 THE COMMISSIONER: By --

5 MR. SAXBERG: -- away from their parents.

6 THE COMMISSIONER: -- intervening by, intervening
7 by apprehending --

8 MR. SAXBERG: Yes.

9 THE COMMISSIONER: -- yeah, okay.

10 MR. SAXBERG: That's one example, that's the
11 easiest. And that --

12 THE COMMISSIONER: Before --

13 MR. SAXBERG: -- matter is before a court, in
14 every situation there's a restriction on public access --

15 THE COMMISSIONER: Just a minute. And the matter
16 comes before the court --

17 MR. SAXBERG: Yes.

18 THE COMMISSIONER: -- then what?

19 MR. SAXBERG: There's a restriction on public
20 access. The public cannot see that proceeding --

21 THE COMMISSIONER: Whoa, whoa.

22 MR. SAXBERG: -- banned from the court house.

23 THE COMMISSIONER: By, by, by statute?

24 MR. SAXBERG: By statute, which I'm going to take
25 you to. And there are also media restrictions.

1 THE COMMISSIONER: Yes, I understand that.

2 MR. SAXBERG: And the media restrictions relate
3 to the identical relief that we're seeking here. And if
4 you're looking for wording, I'm going to take you to that.
5 It's going to be the identical wording that we're looking
6 for, that's in the Act and that every judge uses whenever
7 they issue reasons on a child protection matter.

8 THE COMMISSIONER: Okay.

9 MR. SAXBERG: And so when the state, when the
10 province does other things that are related to child
11 protection, for instance, the Children's Advocate,
12 preparing a report on the death of a child that's, has been
13 in care, or, or was in care at the time of the death,
14 that's the same kind of function. They're looking at
15 measures, they're reviewing that matter in order to
16 determine measures that will set up policies that will
17 determine when the state interferes, when and how the state
18 interferes in families and their right, a person's right,
19 security of the person, interferes and involves itself in
20 order to protect a child. So when the Children's Advocate
21 does a report, in the current legislative framework, it's
22 confidential. It's another restriction on the media being
23 able to report that matter. It's confidential, they don't
24 get to see it. The names of the social workers are not
25 included in those reports.

1 THE COMMISSIONER: By statutory prohibition?

2 MR. SAXBERG: Yes. The -- another example would
3 be reports prepared under Section 4 of the Child Family
4 Services Act. One of those reports you'll see in this
5 proceeding. Similarly, no mention of social workers' names
6 throughout that report and it was confidential and as you
7 know, the Commission had to go to court to itself get
8 access to it. Restriction again.

9 Then when you get to inquests, inquests, I'm
10 saying, are another extension where the state's doing the
11 same thing. The state is determining its -- what happened
12 with respect to its involvement in protection of a child
13 and how it can learn from that involvement, change
14 policies, change its procedures, in order to protect
15 children in the future. Inquests, sometimes, because
16 inquests deal with other matters as well, but they will,
17 when they're dealing with child protection matters, I'm
18 saying they're an extension of that same principle, which
19 is, which is when the state is dealing with child
20 protection matters.

21 And in an inquest, as well, as you heard this
22 morning, the matter has been adjudicated with respect to
23 the documents that an inquest receives from Child and
24 Family Services, dealing with the protection of children.
25 It was adjudicated at the inquest of, in the Tracia Owens

1 (sic) matter and Mr. Smorang was reviewing the decision of
2 Judge Guy there, which went through the Court of Queen's
3 Bench and all the way up to the Court of Appeal, the end
4 result of which was the Court of Appeal, euphemistically
5 speaking, giving its blessing to the decision of Judge Guy
6 that documents, CFS documents, even though they've been
7 marked as exhibits in an inquest, are confidential and
8 remain confidential. And the media cannot see them, cannot
9 have access. There's a restriction there, a significant
10 restriction on a proceeding which was dealing with the
11 state and its protection of children.

12 Another restriction, as you heard, and is in the
13 material is cameras, never allowed in those inquests.
14 Another restriction on the media.

15 And if I can get you to turn to the selected
16 documents, if you turn to tab 2, we have an excerpt from
17 the CFS Act and on the first page, under part 6, is
18 confidentiality, Section 75(1) and you will see this
19 section, 75(1) of the CFS Act says:

20

21 "All proceedings under Parts II,
22 III and V ... shall be closed to
23 the general public but shall be
24 open to representatives of the
25 press ..."

1 And Part, Part III is a significant part that
2 deals with the child protection sections in the CFS.

3 If you flip to the next page, you see Section
4 75(2), which puts a restriction on the media. The public
5 cannot attend these proceedings, the media may, however,
6 the media is subject to an important restriction, which is
7 Section 75(2), which is:

8

9 "No press, radio or television
10 report of a proceeding under Part
11 II, III or V shall disclose the
12 name of any person involved in the
13 proceedings as a party or a
14 witness or disclose any
15 information likely to identify any
16 such person."

17

18 And that's the relief that's being sought. It's
19 not specified who, in any particular proceeding, it applies
20 to. It's a general category of witnesses, to which this
21 statutory ban applies to.

22 Now, it applies, in this case, to child
23 protection hearings and if you then turn the page over one
24 more, to Section 76(3), this section deals with all CFS
25 records and it says:

1 "... a record made under this Act
2 is confidential and no person
3 shall disclose or communicate
4 information from the record in any
5 form to any person except ..."

6

7 And then there's a, a list of exceptions, one
8 being with an order of the court.

9 What's important there is it's not just the
10 document that's confidential, doesn't say a CFS document
11 can't -- is confidential and shall not be distributed or
12 disclosed. It's information from that document. It's
13 information about child protection matters. Any
14 information from that document cannot be communicated.
15 That is extremely significant.

16 Now, and, and Mr. Commissioner, you're aware of
17 the significance of that and if you turn to tab 1, you will
18 see the order that the Court of Queen's Bench pronounced in
19 favour of this Commission, allowing this Commission to see
20 the documents, which are otherwise confidential and to
21 communicate the contents of those documents, to deal with
22 those documents, in essence. And the order, at page 2,
23 which is three pages in, the order says, under (a), it says
24 that the respondents, being the parties to this Commission,
25 are ordered to disclose their confidential information to

1 the Commission. That's (a). And (b) says, the Commission
2 can then receive -- I'm paraphrasing, of course -- the
3 information and it is entitled -- for the purposes of its
4 mandate and then it is entitled to disclose some of that
5 information itself to other parties to the proceeding and
6 potential witnesses. That's (b)(i). And then in (b), it,
7 the next heading says, it's a, it can:

8

9 "... [enter] the Records and
10 information contained therein, or
11 portions of the Records and
12 information contained therein,
13 into evidence at the [hearing] of
14 the Commission;
15 on such terms as may be decided by
16 the Commissioner ..."

17

18 And that's the key here.

19

20 "... and in accordance with the
21 Amended Rules of Procedure ...
22 [that were placed before the court
23 when this order was taken out]."

24

25 So what is, what does this order say? Well, let

1 me start with what it doesn't say. It does not say the
2 documents that the Commission's been dealing with and has
3 received and has been using in the pre-hearing stages no
4 longer are the subject of a, of confidentiality. It does
5 not say that those documents are not confidential and can
6 be made public. It does not say that.

7 What was put before the court was that the
8 Commission needs to receive this information, put it into
9 evidence on such terms as to be decided by the
10 Commissioner, with respect to protecting the issue of
11 confidentiality. So when the Commission counsel and the
12 parties attended before the Queen's Bench, the idea was
13 produce the documents to the Commission, the Commissioner
14 will receive them and for the pre-hearing purposes, but
15 then there'll be a hearing at which the Commissioner will
16 determine the important constitutional issues with respect
17 to the disclosure of those documents and how, how and/or if
18 they get made public. And that's why we're here. That's
19 the reason we're here. They were --

20 THE COMMISSIONER: Well, we're here on a, on a
21 publication ban, aren't we?

22 MR. SAXBERG: Yes, yes. But the point is, the
23 documents are confidential until you order otherwise. I'm
24 talking about onus. I'm talking about --

25 THE COMMISSIONER: Oh, okay.

1 MR. SAXBERG: -- the status quo is
2 confidentiality and the Commission and the parties went to
3 the Court of Queen's Bench and said, listen, we're going to
4 have a hearing about this. We're going to consider the
5 constitutional test, to determine how far we go, in terms
6 of releasing these documents, or any contents. The, the
7 submissions made to the court were that we've put in place
8 safety measures to protect the confidentiality of these
9 documents. The first safety measure that was expressed to,
10 to the chief justice of the court was we're getting
11 everyone to sign confidentiality undertakings. Everybody
12 will sign a confidentiality undertaking with respect to the
13 use of the documents that are confidential and they will
14 all promise to give the documents back to the Commission at
15 the end of the proceeding. And, and holding true to that
16 commitment, everyone signed a confidentiality undertaking
17 and so that assurance is being met.

18 Another assurance that was promised was that
19 there would be redaction, a consideration, a hearing on
20 redaction of the documents to eliminate from the documents
21 certain information that is of a highly private nature
22 relating to children, sources of referral, et cetera, and
23 you're familiar with that. There were submissions made to
24 you, Mr. Commissioner, and you issued a redaction order.
25 So that was one of the assurances that was made to the

1 court as well. Give us the documents, we're going to
2 continue to treat them as confidential. We're going to do
3 a redaction hearing process and, and that was done, that's
4 another assurance that the court received about the
5 maintenance of confidentiality in this, of those important
6 records.

7 Another was the reference to your rules for the
8 conduct of the hearing, which were the amended rules of
9 procedure, which included a provision that said that you
10 will consider a publication ban and that was put to the
11 court -- I've included -- maybe I should've referred you to
12 this, tab 3 is, are excerpts of the brief of the Commission
13 to the court. So this is the, the brief that was put
14 forward and at paragraph 52, on page 27, at the top, this
15 Commission submission was:

16

17 As set out above, the Commission
18 has included, within its rules of
19 procedure and practice, certain
20 safeguards in order to maintain
21 confidentiality of documents and
22 information received ...

23

24 It's paragraph 52 on page 27, at tab 3. I'll
25 continue:

1 ... received within the context of
2 the Commission. All documents
3 received by the Commission will be
4 treated by the Commission as
5 confidential, unless and until
6 they are made part of the public
7 record or the Commission otherwise
8 directs.

9

10 And then in paragraph 53, you continue on:

11

12 By way of further assurance, the
13 court is told, in addition, while
14 inquiries should be, should
15 presumptively proceed in public,
16 the general power of the
17 Commissioner to control these
18 proceedings will include
19 discretionary authority to make
20 appropriate orders where
21 necessary, to protect the rights
22 of those affected by the inquiry,
23 including ordering an in camera
24 hearing and then next, a
25 publication ban, or other

1 confidentiality order when it
2 comes time to consider entering
3 the information into evidence at
4 the public hearing.

5
6 So I put all that forward to you, to say I know
7 that notices of motions have been filed. We obviously know
8 the media has been reporting that this is the initiative of
9 MGEU on its own, to protect workers or to, to somehow
10 insulate them from, from negative attention. That's,
11 that's the way that it's been perceived, but it's not the
12 case, that's not the history, that's not why we're here.
13 We're here, because these documents and anything said about
14 child protection matters, where the state is intervening in
15 the affairs of families and dealing with children and their
16 protection always, always begin with confidentiality.
17 Strict, statutorily imposed confidentiality, restrictions
18 on the public and restrictions on the media, always.

19 And you know, the media says, their whole
20 argument is, is, is, if, if you ask me, on the wrong
21 channel. They're saying that the applicants here are
22 trying to change the way -- the usual practice for
23 inquiries. The applicants are trying to change the usual
24 practice for inquiries. Well, this is certainly not the
25 usual inquiry. What inquiry has to go to Queen's Bench,

1 file a motion that takes six months to, to run its course,
2 in order just to see the documents to which the subject of
3 the inquiry applies? That's a legislative, statutory
4 framework that's requiring confidentiality in all matters
5 relating to the state intervention in, and protection of
6 children.

7 So that when I say who's got the onus here, what
8 I'm saying is, the status quo is confidentiality. The
9 status quo is no public access in a child protection
10 matter. The status quo is no access to documents. The
11 status quo are, are restrictions. And do you know why?
12 Because they're appropriate and important restrictions that
13 the legislature has enacted, that the, that the Province of
14 Manitoba's elected officials have put in place and for good
15 reason.

16 And so if you're saying -- if we're asking the
17 question, well, who's got to -- who's got to adduce
18 evidence to change the status quo? My submission is, it's
19 not the system, it's not the child protection system that,
20 that has to prove that this is an unusual or unique
21 situation and therefore things have to change. It's the
22 media that's going to have to say we're going to do
23 something that we have never done before in a, in a matter
24 where the state is dealing with the protection of children.
25 And that is, we're going to open it up and allow the, what

1 would otherwise be confidential information and documents
2 to be made public.

3 So my submission is that the starting point is
4 not the open court principle. That's the point. We're not
5 starting at the open court principle. We're starting at
6 the restriction with respect to the public and with respect
7 to the media that are always in place in every proceeding
8 where the state is dealing with the protection of children.

9 Because one thing that's, that has been lost in
10 all this is the, you know, the understanding that when the
11 state involves itself in the protection of children. It's
12 involving itself in significant Charter rights, and the
13 interference with significant Charter rights of parents.
14 And the, the CFS Act and various parts of it have been the
15 subject of Charter challenges, numerous Charter challenges
16 and in that context, provisions relating to how this system
17 operates, the confidentiality of the system, challenges
18 with respect to how quick a hearing has to be after an
19 apprehension, all of those types of challenges have been
20 vetted by our highest court.

21 And so I, I think that it's incredibly important
22 for, for the, the Commission to understand it's not MGEU
23 asking for something that's extraordinary, that's, you
24 know, an exception to the open court principle, it's quite
25 the opposite. This is a serious matter that the

1 Commission's got to consider very seriously, with respect
2 to how it's going to deal with the documents and
3 information that the Court of Queen's Bench allowed it to
4 receive on the assurances that it would have this type of
5 hearing, that it would consider redaction, that it would
6 have everyone sign undertakings.

7 And if you turn, just by way of -- let me just
8 say this, the, the lynchpin, really, of the argument that
9 I'm putting forward is what is it that this Commission's
10 doing? What, what's its purpose? Is this Commission
11 performing an extension, a derivative of that child
12 protection function where it's determining the state's
13 involvement and intervention, in terms of its protection of
14 children and its interference with families and the Charter
15 rights associated therewith? Is this Commission performing
16 that function? Of course it is. And all you have to do to
17 satisfy yourself of that is to look at the order in
18 counsel, which is at tab 4. And in paragraph 1, cabinet,
19 the state appoints you, sir, in order:

20

21 "... to inquire into the
22 circumstances surrounding the
23 death of Phoenix Sinclair and, in
24 particular, to inquire into:

25 (a) the child welfare services

1 provided or not provided to
2 Phoenix Sinclair and her family
3 under the Child and Family
4 Services Act; ..."

5

6 And it goes on.

7 But then if you look at 2, item number 2, it says
8 why we're doing this. The why is:

9

10 "The commissioner must report his
11 findings on these matters and make
12 such recommendations as he
13 considers appropriate to better
14 protect Manitoba children ..."

15

16 And it goes on. That's the point. This, this
17 proceeding is a further extension of a proceeding involving
18 the state determining its boundaries with respect to the
19 protection of children.

20 And in the submission to the Court of Queen's
21 Bench, which is on the tab prior to that, at tab 3, the
22 submission at, at paragraph 50, which is in the, found on
23 the third page, which was page 27 of the brief, at the top,
24 at page, at paragraph 50, the Commission indicated to the
25 Commissioner:

1 The Commission submits that its
2 goals are not at odds, but rather
3 are aligned with the goals of the
4 CFSA, the Child and Family
5 Services Act. In order to fulfill
6 its mandated goals, including to
7 make recommendations to better
8 protect Manitoba children, the
9 Commission must be able to make
10 use of the documents and the
11 information ...

12

13 And it goes on.

14 So this Commission is an extension, it's, it is a
15 similar purpose, if not identical, to child protection
16 hearings. You know, it's, it's not with respect to a
17 particular -- well, it is with respect to a particular
18 child and a particular family, but the ability of the
19 Commission here and its, its goals, is, is not any
20 different than at a child protection hearing. And so we
21 say that because, as we say at child protection hearings,
22 the legislature has determined that witnesses should not be
23 identified.

24 And if you look to, by way of example, tab 7,
25 this is a decision of the Court of Queen's Bench with

1 respect to a matter that had attracted a significant amount
2 of media attention and I just want to show you, if you, you
3 turn to tab -- to the second page of it, you will see the
4 restriction that's underneath the style of cause, it's on
5 page 2, you'll see a restriction. It says:

6

7 "RESTRICTION ON PUBLICATION

8 Please note that s. 75(2) of The
9 Child and Family Services Act
10 provides that no press, radio, or
11 television report of [this
12 proceeding] shall disclose the
13 name of any person involved in the
14 proceeding as a party or [as a
15 witness ... disclose any
16 information likely to identify
17 [that person]."

18

19 That admonition is contained on every single
20 Queen's Bench decision dealing with child protection, every
21 one. And it applies to all of the witnesses, doesn't just
22 -- it, it isn't in any way limited, as has been suggested
23 by Mr. Kroft, to lay witnesses. It applies to all
24 witnesses. And if you want to get a taste of that, all you
25 have to do is read the cases that I've put here at tab 7

1 and tab 8. Because what they involved was a situation
2 where there was a child protection hearing underway and as
3 you know, the press is allowed to attend those hearings and
4 a reporter from the Winnipeg Free Press attended at the
5 hearing and later caused a report to be made in the
6 Winnipeg Free Press which named a psychologist who had been
7 one of the witnesses in the proceeding. And you simply
8 need to read this decision to, in order to understand the
9 court's outrage at what had happened there, which led to
10 the judge banning the reporter from the proceedings as a
11 result of that. And --

12 THE COMMISSIONER: And this was all because of
13 the legislation that was in place?

14 MR. SAXBERG: It's because of the legislation
15 that's in place. And there's a, there's a penalty
16 clause --

17 THE COMMISSIONER: But how, how are you extending
18 that legislative provision to what we're doing here?

19 MR. SAXBERG: I'm extending it in the same way
20 that, that it's been extended to inquests where at the
21 Tracia Owen inquest, this matter was brought forward to the
22 judge, raised as an issue by the agencies and authorities
23 and the issue was raised, for the first time at that point,
24 hadn't been raised before, with respect to the importance
25 of maintaining confidentiality and maintaining the same

1 practices that are in place with respect to the CFS Act and
2 having them apply to the inquest. Because what's the
3 difference when the end goal is to protect children? We're
4 talking about the state holding a hearing for the purpose
5 of protecting children in --

6 THE COMMISSIONER: But remember this is a public
7 hearing.

8 MR. SAXBERG: Well --

9 THE COMMISSIONER: Maybe you don't think it is.

10 MR. SAXBERG: -- well, the, the -- there's no,
11 there's no legislative provision that says, as there are
12 with respect to other tribunals, that says this shall be a
13 public hearing. I know the Public Utility Board Act says
14 that hearings shall be public hearings.

15 The point is, we're in an absolutely unique
16 situation here. This is a matter of first instance.
17 There's never been an inquiry on the subject of -- where
18 you have the subject being the child welfare system and the
19 protection of children, which is a system which is
20 enshrined and based on confidentiality and where those
21 rules respect to confidentiality and the restrictions on
22 the public and the restrictions on the media are well
23 thought out. They've been put in place for a reason. They
24 are put in place by the elected officials who have set up
25 that system. So we have that world and that's the world --

1 I'm, I'm just trying to give you a taste of that world, to
2 put things, to bring things back to the child protection
3 system.

4 You've got that world and then you've got this
5 other world we'll call the inquest world, where you're
6 right, the, one of the principal ideas of an inquest is to
7 expose. It has this exposé feature to it. It's there to
8 provide for a public catharsis, to, to let out information
9 and show how -- show the public, or reassure the public
10 that the state is looking into how this event was allowed
11 to occur. And so you have inquiries and that's one of the
12 major functions of the inquiry is to let things out into
13 the public. So this inquiry, no doubt, has a dual
14 function. And, and, and that dual function is at odds.
15 It's, it's somewhat contradictory. One is the protection
16 of children. That function which always starts and I'm,
17 you know, I'm going to go through this, always starts with
18 the principle of the best interests of children.

19 If you're going to err in any way on the side,
20 on, on, on, on any side, on any issue, you err on the side
21 of doing as much as possible, everything you can think of,
22 in order to protect children. And if there was, if this,
23 you know, if there wasn't this inquiry side to it, it'd be
24 an easy decision to say well, this is about child
25 protection. This is about families, this is about private

1 issues. We're going to have all kinds of extremely private
2 information that's going to be adduced during this hearing.
3 People are going to testify about services they received
4 from Winnipeg CFS. There's going to be a lot of, of, of
5 information that's put forward with respect to sources of
6 referral and how they communicate to CFS and what, what CFS
7 does with that information, all of that information is
8 going to come forward. In the usual case, you would want
9 that all to be confidential, to maintain the efficacy of
10 the child protection system. You don't want to do anything
11 at all, anything, not one bit, that's going to stop people,
12 or make them reluctant to come forward with their concerns
13 about child protection matters. You, you don't want a
14 public spectacle wherein someone who has called CFS in the
15 past sees all this information hemorrhaging out of a, an
16 inquiry and says well, I'm not, tell you one thing, I'm not
17 calling again. I'm not going to be on the stand because I
18 made an allegation about my neighbour, or, or my, you know,
19 my in-law, or whoever it may be. I mean, so you, you --
20 it's, it's an obvious starting point that confidentiality
21 has to be maintained at all costs.

22 But here we are in this dual function hearing
23 where you have this aspect where you, where there has to be
24 an exposé. So you're, you're, you're, you're stuck with
25 two stark choices. Number one, do we deviate from the

1 usual practice in inquiries, which is about exposing
2 things, getting it all out? Do we deviate from that? Or
3 do we deviate from the legislative and common-law framework
4 which is ubiquitous, I would say, with respect to any
5 matter wherein a court, Queen's Bench, Provincial Court, or
6 a tribunal, or a medical examiner, or a children's
7 advocate, or an expert from outside, any of those matters
8 where the state is doing an investigation of child
9 protection and how it intervenes in the rights of, of
10 families? So where are we going to deviate? Are we going
11 to deviate from, from the inquiry world, or are we going to
12 deviate from the child protection world?

13 And so I, I just wanted to frame it that way, so
14 you understand, it's not about the onus on the applicants
15 coming forward and wanting something that they, that,
16 that's a pipe dream, that they shouldn't be entitled to.
17 This is about the status quo is confidentiality. I'll
18 explain why, why those concepts are important. We, we've
19 put it in our material all over the place, but the point
20 is, that what your job is in this decision, your job is to
21 strike a balance, because that's what you've got to do.
22 You've got a dual purpose. You can't live in one world
23 completely, where it's strict confidentiality, public's
24 not allowed into the room, the media can attend, but they
25 can't report the names of the witnesses. That's the way,

1 that's the usual world, that's the child protection world.
2 We're not suggesting that you be, live in that absolute
3 world.

4 But we can't go to the world that the media legal
5 team is urging you to go, which is the other end of the
6 spectrum, which is let's pretend that this is just an
7 inquiry in the usual sense, that this is just a usual
8 inquiry and we start with the open court principle.

9 THE COMMISSIONER: Well, are, are you talking --
10 when you say striking a balance, are you talking about the
11 Dagenais/Melnick (phonetic), Mentuck --

12 MR. SAXBERG: Mentuck?

13 THE COMMISSIONER: Yes, Mentuck, which talks
14 about the balancing? Is that what you're talking about?

15 MR. SAXBERG: Well, I am, but I, you know, I, you
16 could characterize it that way as well. What I'm saying
17 is, you see, the, the, the Dagenais/Mentuck situation, the,
18 the Supreme Court wasn't dealing with this matter, it
19 wasn't dealing with these facts, with this unique situation
20 of a child protection system, on the one hand and, and,
21 and, and with a, or with all of its confidentiality
22 requirements and then an inquiry. It wasn't dealing with
23 that. So what we have, as you heard, the, the Supreme
24 Court said you have to be flexible and contextual --

25 THE COMMISSIONER: Um-hum.

1 MR. SAXBERG: -- in applying the test. And the
2 flexibility that I would suggest is that this Commission
3 has a duty to do everything it can to maintain the
4 confidentiality while fulfilling its mandate and while
5 being seen to fulfill its mandate. And so the balance
6 really includes not living in the world where everything's
7 open, it's completely unrestricted open court principle and
8 not living in the world where it's the usual restricted
9 access to child protection hearings. There has to be a
10 blend, there has to be a balance.

11 What we've put forward for you, I believe, is a
12 balance that can work. It works from a practical
13 perspective and that it ultimately is an extremely minimal
14 interference with the function of this inquiry to expose.
15 And as Mr. Smorang argued and, and I would endorse, I think
16 that in terms of the Commission's work, it's a zero
17 restriction. It's no restriction whatsoever.

18 In terms of the media and are they restricted, in
19 terms of how they cover this Commission by not being able
20 to identify some witnesses, not being, be able to identify
21 or show pictures of certain witnesses, are they going to be
22 restricted? I'm going to take you to the evidence of the
23 managing editor of CBC, in his cross, where he explains it
24 could be a minimal, agrees it could be a minimal
25 restriction, or it could be something more significant.

1 And the reason is it, it's going to be minimal or no
2 restriction if the social worker testifying is testifying
3 about innocuous or regular, routine matters and
4 involvements in this file. And I can tell you and, and you
5 may know already, from if you've read any of the reports
6 on, on the matter, there are going to be a lot of witnesses
7 testifying, social workers, and their evidence is not going
8 to, in any way, be anything other than dealing with the,
9 their regular practices and --

10 THE COMMISSIONER: I know absolutely --

11 MR. SAXBERG: -- how they perform their work.

12 THE COMMISSIONER: -- nothing about the evidence.
13 I have read no reports and have -- don't, don't want to
14 know anything about it until I hear it in this courtroom,
15 in this hearing room.

16 MR. SAXBERG: Okay. Well, let me frame it this
17 way, I think that, that what was agreed by the
18 representative of the CBC was that the identity of someone,
19 of a witness, can be a crucial part of a story in certain
20 circumstances. In others, it's, it's not going to be
21 important at all. And the situation where the identity of
22 the witness would be important would be, for instance, and
23 this is just a hypothetical, this isn't something that's in
24 the evidence, I'm saying it's not, I'll tell you right now,
25 that it's not in the evidence, as far as I'm concerned, or

1 as far as I know, but if, for instance, a witness, who was
2 a social worker, had some familial relationship to, to
3 Samantha Kematch, or, or Karl Wesley McKay, that would be
4 significant part of any story relating to their testimony.
5 That's how identity and the name would be important. And
6 it would be important for the media to, to -- they'd want
7 to, to publish that connection. And however, to the extent
8 that the social worker is someone that doesn't have any
9 connection like that, the information about the, what the
10 social worker did, how they dealt with the file and all
11 those matters, is not in any way -- doesn't need to --
12 their identity doesn't need to be put forward in order for
13 the media to communicate what that social worker's done.

14 And so what had been, what's been suggested here
15 is that social workers take the stand that are subject to
16 this publication ban, would be, would testify in open
17 court, or in this open hearing, where their, they would be
18 sworn in under their names, but afterwards would, there
19 would be a pseudonym used, such as social worker number 1,
20 or social worker number 2, throughout the proceeding. The
21 camera could remain on, although not showing the social
22 worker's face. And all the evidence will be available --
23 the, the people at the hearing will see the social worker,
24 will have heard the social worker's name, including the
25 media, but the camera feed will not show the social worker

1 and the camera feed will only -- and from the point that
2 the camera feed is on, it will, the social worker will be
3 referred to by the pseudonym. And in that sense, we say
4 that's the only restriction that's going to occur on, in
5 terms of the media's coverage and it won't interfere with
6 the telling of the story. And we're suggesting that that's
7 a balance that then allows the Commission to maintain the
8 protections and the, the confidentiality that's already
9 there in, in other child protection hearings.

10 Otherwise, we're going to get into the situation,
11 and I will take you to tab 10 and at, in the first -- this,
12 this, by the way, is a transcript of the cross-examination
13 of Cecil Rosner, who's the managing editor at CBC and at
14 question 134, which is the second page, at tab 10, I asked:

15

16 "134 Q Well, I was just using
17 the Court of Appeal's term, but
18 consider the functioning, well-
19 being, to use a more
20 understandable term, of the child
21 protection system when you're
22 covering child protection
23 matters."

24

25 And the answer:

1

2

" A I don't think that
that's a primary objective of our
reporting when it comes to these
matters, to consider the efficacy
of the system.

3

4

5

6

7

Q And by efficacy I
mean the well-being of the system.

8

9

10

You don't want to hurt the system
in covering the news [stories] on
child protection cases?"

11

12

13

And the answer was:

14

15

" A Well, we generally don't
want to hurt individuals or
institutions, but sometimes
coverage of individuals and
institutions can cause harm to
those individuals and
institutions."

16

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And I put that forward to say, as we had alluded
to in our, in our brief, that the media's coverage of, of
this inquiry isn't going to be as sensitive to the

1 importance of confidentiality in child protection matters
2 as it ought to be. And it's up to the Commission to ensure
3 that appropriate safeguards are put in place so that that
4 confidentiality is maintained, so that the information that
5 was entrusted to this Commission by the Court of Queen's
6 Bench maintains its fundamental confidentiality and is
7 only, and it is only -- and that it is maintained to the
8 greatest extent possible with regard to the function of the
9 inquiry to expose the facts of this case.

10 And, and you, you had heard the quote earlier
11 from Mr. Smorang, the Court of Appeal, in the Tracia Owens
12 case, had been citing the argument of the Attorney General
13 of Manitoba and it wasn't just the Attorney General of
14 Manitoba, it was also the Department of Child and Family
15 Services, both of whom were represented, in other words,
16 the Government expressing its position to the Court of
17 Appeal. Mr. Smorang reviewed that the Court of Appeal had,
18 had recast the arguments made by the Government of Manitoba
19 and one of the things that the Government said and that in,
20 in my submission the Court of Appeal accepted and adopted,
21 was that the Court of Appeal said, yes, freedom of the
22 press is important, but of at least equal importance is the
23 maintaining the efficacy of the child protection system.
24 And that's the balance that you have to keep in mind.
25 That's the balance you have to strike in this inquiry. You

1 cannot -- it would be absolute irony if the Commission did
2 any harm to the system when its purpose is to act as a
3 vehicle to improve that system.

4 So if there's any measure that you can take, any
5 reasonable measure that you can take, you have to take it.
6 And you'll -- what we're suggesting is that the reasonable
7 measure here is the restriction on the identity of certain
8 witnesses. And it's not just social workers, as you know,
9 from having looked at our notice of motion, we're not
10 saying it's just social workers. We're saying that it's
11 those that work in the system, that were involved in the
12 delivery of services on this file, and it's those within
13 the broader system, the sources of referral, the foster
14 parents, any, any person who's received services relating
15 to their personal matters from, from CFS. All of those
16 matters that are in the regular course strictly
17 confidential, that when those individuals are testifying,
18 they should have anonymity. And it's an important, it's
19 important for them to have it, for the system.

20 THE COMMISSIONER: Is this is an important, a
21 relevant time to take our mid-afternoon break?

22 MR. SAXBERG: Yes.

23 THE COMMISSIONER: Or, or do you want to just
24 finish this line, or are you, are you --

25 MR. SAXBERG: No, I think it would be a good

1 idea --

2 THE COMMISSIONER: All right.

3 MR. SAXBERG: -- to have a break.

4 THE COMMISSIONER: We'll, we'll -- the, the
5 afternoon is moving on, so we'll try to hold it to 15
6 minutes. We're adjourned.

7

8 (BRIEF RECESS)

9

10 MR. SAXBERG: Thank you, Mr. Commissioner. Can
11 just start by looking at the actual Dagenais/Mentuck test.

12 THE COMMISSIONER: Yes.

13 MR. SAXBERG: Which I've included at tab 3,
14 second page.

15 THE COMMISSIONER: I have it.

16 MR. SAXBERG: I'm referring to the brief that the
17 Commission submitted to the court with respect to the
18 Dagenais/Mentuck test. It's conveniently set out so I've,
19 I'm referring to it. There's two branches "A" and "B".

20 THE COMMISSIONER: Yes.

21 MR. SAXBERG: And what the Supreme Court has said
22 is whenever there's an exercise of discretion, by a court
23 or an administrative tribunal such as this with respect to
24 limitation on freedom of the press, a publication ban, this
25 test should be applied to the particular circumstances in a

1 contextual and flexible manner.

2 So the first branch is "A", such an order is
3 necessary in order to prevent a serious risk to the proper
4 administration of justice because reasonably alternative
5 measures will not present the risk.

6 And, what's the administration of justice? That
7 is the state and its involvement in the protection of
8 children through the various proceedings that I outlined.

9 THE COMMISSIONER: Just repeat that again.

10 MR. SAXBERG: The administration of justice, in
11 terms of, of, of the way that the test is framed here, part
12 of the administration of justice is the child protection
13 system.

14 THE COMMISSIONER: I agree.

15 MR. SAXBERG: But what I had said earlier in the
16 first part of my presentation, was that the status quo is
17 the, is -- begins with the restriction. In child
18 protection matters, there's always the restriction on the
19 public and on the media. The risk is, if we deviate, what
20 happens if we deviate? Is there a risk of something
21 negative happening and to whom does that negative
22 consequence fall? And here, it's children, of course. If
23 there is a risk associated with deviating from
24 confidentiality, legislatively prescribed confidentiality,
25 the regular practice of confidentiality, if there's a risk,

1 the risk relates to harm that could befall children. And
2 that, of course, is because we're talking about a system,
3 the state, that intervenes to protect children. If that
4 system is impaired, if the efficacy of that system is
5 harmed in any manner, it obviously follows that that will
6 affect children and families.

7 And we're going to go through it but there is a
8 large amount of academic research on what happens when the
9 system, the child protection system, the state's function
10 in protecting children, is injured by virtue of media
11 coverage. That's what these studies are all about. When
12 the media over-sensationalizes and what effects does it
13 have on individual social workers or what effects does it
14 have on clients, on management, on, on management of those
15 social workers, on agencies and on governments, what effect
16 does it have? And they all say the same thing, it has
17 significant negative effects, significant negative effects.

18 So when the system is impaired, when the
19 child protection system is impaired, what you get is
20 services that are reduced in terms of protecting children.
21 You get families, for instance, and I'm jumping ahead
22 slightly here, but the point in these reports is, for
23 instance, after the Gove Inquiry in B.C. there was what was
24 described as an imbalance because of the heightened level
25 of media scrutiny of social workers and their work. There

1 arose an imbalance in the system wherein the number of
2 apprehensions spiked dramatically because there was a fear
3 amongst social workers that they were, that they were going
4 to be the next victims of an inquiry, asking, why didn't
5 you foresee the unforeseeable? Why didn't you know that
6 that parent was going to abuse that child? Why couldn't
7 you have known that? Why couldn't you have done something
8 earlier? As a result of that media coverage of that
9 particular inquiry the number of apprehensions increased,
10 which means that the system is acting out of order, that
11 it's, it's being overly cautious in terms of receiving the
12 information and acting upon it. It's erring on the side
13 of intervention and interference with family's rights, with
14 interference with security of the person, interference with
15 parents and families out of fear that the worker will be
16 the next victim of a media coverage of an inquiry.

17 And I'll go through that information because
18 there's a lot of these -- these are reports -- these aren't
19 expert reports that we filed, you know, as advocates trying
20 to put forward a case, these are existing academic reports.
21 And they're not just from the jurisdiction -- they're from
22 various jurisdictions that have lived this experience.

23 So if we're looking at that first branch and
24 we're talking about the risk, what's the risk? The risk
25 isn't the granting of the publication ban, it's, the risk

1 is doing something different than we usually do in child
2 protection, that is, allowing what is usually confidential
3 to be made public. It's the opposite of the way that it's
4 been cast by the media. The risk is of losing
5 confidentiality. And if we lose confidentiality, there is
6 a direct linkage to the prospect of children being harmed
7 and families being interfered with and backlogs rising in
8 court proceedings dealing with the state intervening in
9 family matters. That's the risk that we're worried about
10 here. That's the first branch.

11 The second branch, then "B", is the salutary
12 effects of the publication ban outweigh the deleterious
13 effects on the rights and interests of the parties and the
14 public. And it goes on.

15 So there it's saying the cost benefit analysis,
16 as Mr. Smorang put it, that the positive effects of a
17 publication ban outweigh the negative effects of a
18 publication ban. Well, I'm saying, remember we're, we're
19 applying this test in a contextual flexible manner and what
20 I say is that it has to be reversed again: What are the
21 positive effects of, of eliminating confidentiality versus
22 the negative effects of lifting confidentiality? That's
23 the way we have to be flexible here.

24 So we want to make sure that because it's an
25 inquiry and we're dealing with, in the usual case inquiries

1 you're dealing with exposé and they're highly public, we
2 want to be sure that the risk that we're managing here is
3 risking -- lifting of the confidentiality. We want to make
4 sure that lifting that has more positives to it than
5 negatives. Does lifting the confidentiality have more
6 positive than negative to it? That's the way we've got to
7 look at this, not the other way around, which is putting a
8 publication ban on -- does putting a publication ban on --
9 do the positives associated with that outweigh the
10 negatives. That's not the way to look at it; it's the
11 other way around. Does lifting confidentiality create a
12 positive? Well, what is it? And that's where I get back
13 to the onus.

14 I say it's the media that's going to have to come
15 forward and say, here's why we need to see Child and Family
16 Service documents that we've never been allowed to see
17 before in any proceeding in Manitoba and that the Court of
18 Appeal said we couldn't see at the Judge Guy run inquest.
19 There's a, there's a reason we need to put that forward.
20 There has to be some evidence from the media that it's
21 important, that there's going to be a benefit that's of
22 higher level than the, than the risk of pulling away the
23 confidentiality. And I submit there has been nothing,
24 nothing at all that's been put forward by the media as
25 displaying what will be the benefit of lifting

1 confidentiality here. What will be the benefit of lifting
2 confidentiality in terms of revealing identities of people
3 involved in the child protection system? Because that's
4 all we're talking about, we're --

5 THE COMMISSIONER: Exact --

6 MR. SAXBERG: -- not talking about the content.

7 THE COMMISSIONER: Exactly.

8 MR. SAXBERG: Just the identity, the identity of
9 the sources of referral, the identity of the social
10 workers, the identity of the children. That's all we're
11 talking about. So lifting that confidentiality with
12 respect to their identity, what's it going to get us?
13 Where's the positive that's going to outweigh that risk
14 that all of these academics have documented? The risk that
15 the academics documented became reality in other
16 jurisdictions wherein there were severe negative
17 repercussions to the state's ability to protect children
18 and that, in turn, had effects on families and, and
19 children. So that's how I'm saying we have to contextually
20 and flexibly apply the Dagenais/Mentuck test here. But
21 what has to be at the absolute, absolute forefront of your
22 thoughts in determining that balance is the best interest
23 of children.

24 And if you could turn to tab 5.

25 THE COMMISSIONER: Yes.

1 MR. SAXBERG: At tab 5, I've included the
2 declaration of principles from the Child and Family
3 Services Act. This is the first thing you read when you
4 look at the Child and Family Services Act, and the first
5 thing that you see on the first page, the first principle
6 is, quote:

7

8 "The safety, security and well-
9 being of children and their best
10 interests are fundamental
11 responsibilities of society."

12

13 The best interests of children are the
14 fundamental responsibility of society. They're the -- I
15 put to the managing editor of CBC that it therefore is a
16 fundamental responsibility of the media, in presenting its
17 stories, to consider the best interest of the children in
18 making sure that nothing that it does is going to, in any
19 way, harm the system, that it's going to impact the
20 efficacy of the system. And as we saw earlier in a quote
21 that I took you to, he disagreed.

22

23 So the declaration of principles is replete with
24 the notion that as a society we have to care and consider
25 the best interests of the children at the forefront.

25

As you know from being a judge of the Court of

1 Queen's Bench, Saskatchewan, you know about the court's
2 special authority and function when it comes to children's
3 parens patriae jurisdiction wherein, as an exceptional and
4 inherent jurisdiction to consider in cases that relate to
5 children, the court has an extra responsibility to act for
6 children in their best interests.

7 The second page in tab 5 is the clause from the
8 Child and Family Services Act Section 2(1) that is best --
9 that is titled "Best Interests" and that's where it
10 mandates that, quote:

11

12 "The best interests of [a] child
13 shall be the paramount
14 consideration of the director, an
15 authority, the children's
16 advocate, an agency and a court in
17 all proceedings under this Act
18 affecting a child, ..."

19

20 And the submission is that that, that law applies to this
21 tribunal, that the Child and Family Services Act -- and I
22 know you'd asked, you know, does the Child and Family
23 Services Act apply or, you know, do those provisions apply.
24 And they, much of the Child and Family Services Act has to
25 apply. It's a legislative framework within which you're

1 operating. It's, it's the framework that deals with how
2 the state intervenes and protects children. So of course
3 it applies. And that clause, that the best interest has to
4 be at the forefront, applies to the Dagenais/Mentuck test
5 and the weighing that you're going to have to do in terms
6 of will lifting the restriction on confidentiality produce
7 a benefit that outweighs the harm of lifting the
8 confidentiality. You've got to consider that in the
9 context of the best interests of children.

10 So the question, the real question becomes
11 another -- or an important question becomes how does not
12 publishing the identity of a social worker avoid a
13 potential harm to children? How is not publishing the
14 identity --

15 THE COMMISSIONER: Let me get that. How does not
16 publishing ...

17 MR. SAXBERG: The identity of a social worker ...

18 THE COMMISSIONER: Yes.

19 MR. SAXBERG: Avoid a potential harm to children.
20 Or, how is not publishing that identity in the best
21 interest of children?

22 THE COMMISSIONER: And you said that's the
23 question?

24 MR. SAXBERG: That's, that's -- it's a very, very
25 important question. And it is the question that we

1 believe, that the authorities and ANCR believe, is answered
2 by virtue of the evidence adduced by Cheryl Regehr,
3 Dr. Regehr, and the various academic articles that
4 she's introduced for your deliberation through her
5 affidavit.

6 And what we have here from Dr. Regehr is a
7 cautionary tale of what has happened in other jurisdictions
8 where they've had an inquiry of this nature or, more
9 importantly, where they've had a child protection matter --
10 because the fact that it's an inquiry isn't the be all/end
11 all, it's really about this: where there's a child
12 protection matter that's attracted an extreme level of
13 attention from the media, where there's a child protection
14 matter where something's happened and the media and the
15 exposure of it has resulted in a proceeding or a hearing
16 that has led to social workers having to give evidence and
17 being criticized in the media. That's happened in other
18 jurisdictions, and in particular, Ms. Regehr studied the
19 effects of that type of intense media scrutiny of child
20 protection workers in, in Ontario.

21 And this is where we can turn to her affidavit.

22 THE COMMISSIONER: Which tab is that at?

23 MR. SAXBERG: That would be in the, in the --

24 THE COMMISSIONER: In the blue book?

25 MR. SAXBERG: No, in, in the binder, the large

1 binder. I believe it was --

2 THE COMMISSIONER: Yes.

3 MR. SAXBERG: -- tab 3 or tab 4.

4 THE COMMISSIONER: Yes.

5 MS. WALSH: Tab 4.

6 THE COMMISSIONER: Yeah, I have it. Did you have
7 a tab?

8 MR. SAXBERG: Tab 4, I believe.

9 THE COMMISSIONER: That's it.

10 MR. SAXBERG: So we'll start at the start. As
11 you heard from Mr. Smorang, Ms., Dr. Regehr has significant
12 credentials, is a former dean, the Faculty of Social Work
13 at the University of Toronto. Most importantly, though, is
14 her research that she's done into the impact of media
15 coverage on child death inquiries or proceedings.

16 And she indicates that her research followed two
17 major inquiries into deaths of children in Ontario. The
18 first was the child mortality task force in 1996, and the
19 other was an event from 1997 that she deals with, which was
20 a very high profile case in which criminal charges were
21 laid against a social worker involved in providing care to
22 the child.

23 So Ms. -- or Dr. Regehr did a qualitative and a
24 quantitative study wherein she found that the inquiry
25 process and the media coverage were highly stressful to the

1 individual workers who had to testify in the proceedings
2 and to those who didn't have to testify but worked in the
3 child welfare system. And she describes the effect on
4 those other workers as radiated distress, which was one of
5 the findings that, that she made as a result of her
6 qualitative and quantitative analysis, that the stress of
7 the individual worker who had to testify radiated to all
8 others in the profession, which means that this isn't just
9 about a social worker testifying about something that
10 they've done or didn't do and being stressed by it, because
11 who isn't stressed by having to testify in a proceeding?
12 It's about the effect of the stress on that worker and on
13 the other workers in the system from seeing the media
14 coverage of that event. And what Dr. Regehr reports is
15 that the media attention intensifies the distress of the
16 workers and, and the radiated distress throughout the
17 organization, that what it can do is to exacerbate, to
18 amplify what is already, of course, a stressful matter, and
19 that the result of which, the result of that stress can
20 lead to serious negative consequences in terms of the
21 operation of the child welfare system.

22 What she also found from her studies and from her
23 review of the academic literature was that in other
24 jurisdictions, where there had been tremendous media
25 scrutiny of a child protection matter, what she found was

1 there's a, there's a trend or that there's a commonality in
2 terms of what happens in terms of the coverage of, of child
3 death reviews, and it's uniform throughout the academic
4 literature and it is that the media coverage of child death
5 reviews often involves sensationalistic stories and
6 reporting aimed at castigating agency personnel for
7 allowing grievous events to unfold.

8 Media sources are usually very critical of
9 agencies that are responsible for protecting children,
10 often implying that those agencies are not accountable.
11 And what it does, so says the academic literature, and I'm
12 going to take you to a couple of the other authors, is
13 creates what's been identified as a vicious circle in which
14 the work environment becomes more restrictive, stressful,
15 employees become angry and frustrated that they cannot
16 serve clients. Ultimately, this leads to more media
17 attention and other cases and, as a result, a vicious
18 circle unfolds. And what Dr. Regehr reports, amongst all
19 of the other studies, the academics that looked at the same
20 situation in other jurisdictions, what they found was the
21 media reports were not intended to record events but were,
22 rather, focused on the commercial aspect of selling news.
23 And there are examples from Britain and Welsh media
24 coverage that depict child welfare workers as child
25 stealers, abusers of authority, hysterical and malignant

1 and motivated by zealotry rather than facts.

2 Let me just take you to one of those, those
3 reports that I think, a quote that says it fairly well. If
4 you turn to tab "G" of this affidavit.

5 THE COMMISSIONER: Yes.

6 MR. SAXBERG: It's an article that was published
7 in the journal of public child welfare, and that's another
8 point to make, is that all of these articles are peer-
9 reviewed academic publications, and that the media has not
10 put forward a single article or academic piece of work that
11 disputes any of the findings or analysis in these articles
12 that, as I say, are published in significant academic
13 journals, have been peer-reviewed.

14 And so in this article, which is entitled "The
15 Vicious Cycle: Recurrent Interactions Among the media,
16 Politicians, the Public, and Child Welfare Services
17 Organizations", it was written by David Chenot. If you
18 turn to the third page, there is a abstract which reads,
19 quote:

20

21 "The vicious cycle is a sequence
22 of events that recurs to varying
23 degrees throughout the United
24 States. The cycle includes
25 interactions among the media,

1 politicians, the public, and child
2 welfare service organizations in
3 response to grievous incidents of
4 child maltreatment. These
5 interactions have a profound
6 impact on child welfare services
7 organizations and those who work
8 in them. The cycle and the
9 influence it has on child welfare
10 services organizations are
11 explored with a focus on the
12 climates and cultures in those
13 organizations, the cycle's impact
14 on the child welfare services
15 workforce, and the services they
16 provide."

17

18 And it goes on. That's the overview.

19 If you turn to page 170 within this article. At
20 paragraph one seventy -- or sorry, page 170, there's a
21 subheading "The Media and Child Welfare Services", and I'll
22 quote from there:

23

24 "The cycle outlined above has
25 produced many effects on child

1 protection in the United States.
2 For example, although it cannot
3 always be attributed to the cycle,
4 media reports about CWS agencies
5 and employees are often pejorative
6 and tend to locate culpability for
7 child abuse and neglect with these
8 agencies or personnel ... This
9 approach seems to be case even
10 when the incidents that are the
11 subjects of media reports could
12 not have been prevented by the
13 agencies or personnel in question
14 or little could have been done by
15 any professionals to prevent the
16 abuse or neglect ..."

17
18 That's a very important quote and it's a finding,
19 it's a finding by all of these academics in these articles
20 attached to Dr. Regehr's affidavit, the finding being when
21 you have a story about a child's death, the media coverage
22 appears, in these other jurisdictions, to be sensational;
23 that that's a proclivity of the media, it's something that
24 happens, maybe because of society's abhorrence with the
25 notion of child abuse and its outrage and the media feeding

1 on that outrage and reporting on it. It happens in these
2 other jurisdictions, where there's an event that's similar
3 to, to the Phoenix Sinclair event. It's documented in the
4 affidavit material.

5 Has it happened here? We know it has. It's
6 already happened and, and this child protection matter
7 hasn't started. That type of media response: shoot first,
8 ask questions later, has already occurred and all you have
9 to do is flip in the selected book of documents to tab 21.
10 And this is, of course, is the by now infamous front page
11 headline from the Winnipeg Sun which reads, shows a picture
12 of Phoenix and reads, "Cowards".

13 During cross-examination of Mr. Rosner from the
14 CBC, I asked him to acknowledge that this is an example of
15 sensationalistic journalism and he agreed. It's yellow
16 journalism.

17 If this -- the point is this: Imagine a social
18 worker testifying in this proceeding about the job that
19 they're performing and a decision that they've made in good
20 faith and based on information they had available, and
21 their picture winds up with the picture, the image of the
22 individual, winds up with a headline like this, how is that
23 not going to do damage to the efficacy of the child welfare
24 system? How is it not going to radiate distress to other
25 workers? How, how is a sensational piece of journalism

1 like that not going to ultimately impact a family somewhere
2 in Winnipeg where, as is the experience in other
3 jurisdictions, after that kind of coverage, workers tighten
4 the gate or, or broaden the gate, as it were, open the
5 floodgates in terms of their intervention in families?
6 Anything, if someone mentions the word "abuse", whether
7 it's specified or not, whether anyone has any details, you
8 better get in there and apprehend that family. You don't
9 want to be the next person with the headline and your
10 picture on the front. How is that not going to impact the
11 provision of child welfare services and how is that
12 ultimately not going to impact families and children? It
13 is. And this is just one example.

14 If you turn to the next page, the author Mr.
15 Brodbeck -- the next tab, sorry, tab 22. There's -- on
16 your copy you should have highlighting.

17 THE COMMISSIONER: Yes.

18 MR. SAXBERG: And the highlighting reads, quote:

19

20 "It's expected the inquiry will
21 expose massive holes and
22 incompetence within the child and
23 family services system, something
24 that will surely cause great
25 political embarrassment and harm

1 to the current government."

2

3 And then there's a subheading, "Judgment Day":

4

5 "And it will likely cause harm and
6 embarrassment to those working in
7 the system who failed to ensure
8 Sinclair was in safe hands,
9 despite obvious signs she was
10 not."

11

12 Now, I don't know where the reporter gets his
13 information here, and it's certainly not from anything that
14 I've seen in the information that -- or the reports on this
15 matter that we adduced. But the point is -- I'll continue
16 on to -- I'm going to read just a bit more before I make a
17 point. It's, it's the next highlighted area, where he
18 states:

19

20 "It's judgment day, people. And
21 everyone who works in the system
22 should have to account for their
23 actions. If you screwed up, you
24 should have to face the music,
25 just like everybody else. After

1 all, a little girl was tortured
2 and killed here."

3

4 It doesn't get anymore sensational than that. No
5 one in the child welfare industry in Manitoba had any
6 direct involvement in the torture or the tragic death of
7 Phoenix Sinclair. Nothing direct. There is no direct
8 involvement. And this is making it sound like these
9 workers somehow were directly responsible for Phoenix's
10 death.

11 And this -- I'm going to come to it in the -- you
12 may -- it, it sounds like you may not have had the
13 opportunity to review our reply brief, but in our reply
14 brief we have a section that says what's really driving the
15 media's opposition to the request for this limited
16 publication ban, what's really driving it is a false -- is
17 a misunderstanding, is a presumption, is a premise that is
18 fundamentally flawed. And that premise is that there was
19 some gross misconduct, that there was some major dropping
20 of the ball here by some worker or group of workers at
21 Winnipeg CFS. And if you turn to tab 24, it's best -- the
22 false assumption is best revealed in an article by Lindor
23 Reynolds, which is at tab 24. And the first two paragraphs
24 I'm going to read from. She writes:

25

1 "In legal terms, Phoenix was
2 killed by her mother, Samantha
3 Kematch, and her stepfather, Karl
4 McKay. They were convicted of
5 first-degree murder in the child's
6 2005 death."

7

8 Next paragraph:

9

10 "It would be nine months before
11 anyone, including the team of
12 child welfare workers who passed
13 through the child's short and
14 miserable life, noticed she was
15 missing. Her body was eventually
16 found near a dump."

17

18 It continues:

19

20 "If Phoenix's stepbrother hadn't
21 told the family secret, it's
22 impossible to know if anyone would
23 have come looking for the
24 child."

25

1 I'm going to have to look for my other reference,
2 but the point --

3 THE COMMISSIONER: I take it, I take it you're
4 not going to finish today? Or maybe I'm wrong.

5 MR. SAXBERG: I don't know. I guess it depends.

6 THE COMMISSIONER: I'm being too pessimistic.
7 But I was going to say that if you're coming back in the
8 morning to the podium, you could deal with that particular
9 point then.

10 MR. SAXBERG: Yeah, maybe I will.

11 THE COMMISSIONER: You, you can do that, in any
12 event, because there will be nobody following you today,
13 for sure.

14 MR. SAXBERG: Yes, thank you, Mr. Commissioner.

15 The point, the premise that I -- that is in these
16 reports and that I will point out to you is that there is a
17 presumption and a statement in many of these reports that
18 Phoenix Sinclair was in the care of CFS for most of her
19 short life and that then she was handed over to those that
20 murdered her. That's the Coles notes of what you see in
21 most of these stories.

22 Oh, okay, sorry. I guess it's just the sometimes
23 you get up, you get up in front and it's hard to
24 concentrate. But if we go back to that article I found --
25 my colleague has pointed out to me the paragraph that I was

1 looking for. We're on tab 24 and it's the fourth
2 paragraph.

3 THE COMMISSIONER: Yes.

4 MR. SAXBERG: Then. Where Ms. Reynolds writes:

5

6 "Before she died, she was caged,
7 forced to eat her vomit, kept in a
8 cold basement and had her bones
9 broken from pelvis to head. She
10 was under the care of CFS for most
11 of her life."

12

13 That statement right there is absolutely wrong. Absolutely
14 wrong. And it's absolutely wrong that she was returned,
15 after being in care for most of her life, to Samantha
16 Kematch and Karl McKay who then murdered her. That's
17 wrong, too. But that's the premise upon which the media is
18 starting.

19 There's a view that there was some serious
20 misconduct here that has occurred, and the coverage has
21 been sensational because they're saying, why isn't anyone
22 prepared to get up on the stand and answer for it. And if
23 there was a situation where there was some kind of gross
24 misconduct of that sort, where there was that type of
25 evidence that this commission was going to hear, or where

1 someone had done something, someone had done something that
2 was of that level, for instance --

3 THE COMMISSIONER: Well, we're going to hear
4 whether it was of that level or not.

5 MR. SAXBERG: Well, let me just, let me just
6 finish characterizing this and I'll answer that.

7 If you turn to the next tab, tab 25, it's an
8 article by Dan Lett, and here's the level that the media
9 thinks that the evidence is going to rise to in terms of
10 the conduct of social workers.

11 THE COMMISSIONER: Yeah.

12 MR. SAXBERG: When I say "thinks", this is the
13 premise that they're working from. And it's on the second
14 page of this article and it's very, very small font.

15 THE COMMISSIONER: Yes. It's highlighted.

16 MR. SAXBERG: Right. And I'm going to start just
17 above the highlight:

18

19 "In fact, it remains a mystery why
20 social workers are not supporting
21 the inquiry into Phoenix's death.
22 Rather than an opportunity to use
23 social workers as scapegoats, this
24 inquiry will reveal how much
25 social workers attempt to do with

1 ... scarce resources provided to
2 them. [The] inquiry will reveal
3 the suffocating caseloads, the
4 trauma they suffer from watching
5 parents abuse their children and
6 the sadness that comes when they
7 realize the number of those
8 children who are sentenced to
9 lives of abuse and dysfunction
10 because that's the only life they
11 know.

12 Yes, it will also eventually
13 reveal those who failed in the
14 performance of their duties or who
15 allowed the pressures of the job
16 to justify a lack of humanity."

17
18 They're expecting to hear the evidence rise to
19 the level where they hear that social workers somehow lost
20 their humanity in this case. That's what they're
21 expecting. That's why they want names, that's why they
22 think that it's important for people -- for the names to be
23 put forward because someone's got to be answerable.

24 The problem is, you aren't going to hear any of
25 that evidence, Mr. Commissioner because none over that

1 happened. There, there's a difference between this inquiry
2 and the other major inquiries that have happened recently
3 in Manitoba, and it's this, and it's stated in our brief.

4 But I see Mr. Kroft rising.

5 MR. KROFT: Mr. Commissioner, I'm, I'm seeking
6 some direction. I, of course, don't represent a party. I,
7 like you, I suppose, have no information about what did or
8 didn't happen. I have no expectations of anything bad or
9 good and have no way of knowing any of that until you
10 conduct a public hearing.

11 My friend has been giving a lot of evidence about
12 what happened in, in a proceeding where I'm going to have
13 to respond. I hadn't expected that we were going to be
14 getting into the details of what happened to Phoenix
15 Sinclair, what was right or what wasn't.

16 THE COMMISSIONER: I don't think that's the, what
17 -- all these things certainly have not been proven in front
18 of me.

19 MR. KROFT: And, and I'm just wondering where
20 that goes and whether I need to be going through an
21 evidentiary process to find out whether I need to answer
22 some of these statements that, at this point, I have no way
23 of verifying.

24 THE COMMISSIONER: I, I would think not.

25 MR. SAXBERG: And I'm not giving evidence. What,

1 what I'm doing is saying one of the important factors for
2 you, in determining whether or not it's important for an
3 identity of a social worker to be made public, one of the
4 most important factors, probably the most important factor
5 at the end of the day, is going to be, what did they do, or
6 what did they -- or what was it that they didn't do?
7 Should they be answerable in the public by virtue of the
8 inquiry's exposé function? Should they be answerable?
9 Should their name be out there? Should they be allowed
10 this media treatment? And what I'm suggesting is that the
11 media, in its coverage, has made these assumptions that the
12 conduct is such that social workers lost their humanity in
13 delivering services, that --

14 THE COMMISSIONER: Well, that's what's written
15 there but that hasn't been proved in this forum.

16 MR. SAXBERG: No. What I'm, what I'm suggesting
17 is that the assumption of the media and the reason they
18 want the identity is because they think that there are
19 going to be workers that, that, that committed misconduct
20 at that extreme of a level and therefore they need to
21 answer for it.

22 THE COMMISSIONER: Well, that's, that's your
23 opinion of what you take out of what they've written.

24 MR. SAXBERG: Right. And there are numerous
25 examples of that within the media coverage so far and

1 within the response by the public to media coverage. What
2 I'm suggesting to you is, it's, it, it is the only thing
3 that I can think of that is the good that would come out of
4 lifting confidentiality, and if you're doing the
5 Dagenais/Mentuck test and you're deciding is there a
6 positive to come from lifting the confidentiality, only
7 positive that can come is if someone needs to be answerable
8 for their conduct. But you don't know yet, at this point,
9 whether there's anybody like that, and I'm telling you
10 there isn't but you don't have to take, take my, my word
11 for it. You'll see it as the evidence is presented. I'm
12 saying that the media has got it wrong, that there's --
13 these are presumptions that aren't there. This is -- the
14 uniqueness about this inquiry that we spoke of in our
15 brief, and I'll take you to it at tab 12, the uniqueness of
16 this inquiry compared to other inquiries, as I said, an
17 inquiry, one of its purposes -- well, all other inquiries
18 that have occurred in Manitoba never had the purpose of
19 protecting children. They, they did not have that function
20 at all. They had the regular inquiry objective of exposé.
21 And what they're investigating, we cite two examples here.
22 One is the Taman Inquiry, a very recent high profile
23 inquiry in Manitoba.

24 This is, if you're looking at the brief, it's tab
25 12, paragraph 40. And in the Taman Inquiry, the conduct

1 of --

2 THE COMMISSIONER: What -- tab 12, page what?

3 MR. SAXBERG: Tab 12 of the --

4 THE COMMISSIONER: Yes, I have it.

5 MR. SAXBERG: -- selected documents, paragraph
6 40, which is page 15.

7 THE COMMISSIONER: Yes.

8 MR. SAXBERG: At paragraph 40: The conduct of
9 professional witnesses in other recent Manitoba inquiries
10 was directly related to the event which resulted in the
11 calling of the inquiry. For example, in the Taman Inquiry
12 police constable Derek Harvey-Zenk rear-ended and killed
13 Crystal Taman. Harvey-Zenk was charged with impaired
14 driving causing death, refusing a breathalyzer test,
15 dangerous operation of a motor vehicle causing death and
16 criminal negligence. Plea bargain was struck wherein he
17 pled guilty to dangerous driving, a lesser charge, and the
18 charges were dropped. There was a public outcry and plea,
19 over the plea resolution and allegations that the
20 investigation that led to that were botched. Professional
21 witnesses were directly responsible for the botched
22 investigation and they were answered to call.

23 There was, there was a direct relationship to the
24 matter that caused the outcry here, the plea bargain and
25 the botched investigation. There's a direct relationship

1 between the witnesses that were called forward to answer
2 for what happened and, and the event that caused the public
3 outcry, the botched investigation. Okay.

4 In the Sophonow Inquiry, another major inquiry in
5 Manitoba in recent memory, Thomas Sophonow was wrongfully
6 convicted of the murder of Barbara Stoppel and here the
7 outcry related to the wrongful conviction, which was a
8 result of improper conduct with respect to the
9 investigation of the death and the prosecutorial misconduct
10 in the criminal proceedings. Again, direct, direct link
11 between those witnesses that had to testify and answer for
12 their acts and omissions in the event that caused the
13 public outcry. That's not the case here.

14 The event that causes the public outcry and shock
15 was the murder and torture, death by her parents, the, the
16 way that Phoenix Sinclair was treated, the nature of her
17 death and the fact that it wasn't discovered for nine
18 months. That's what, what brought about the public outcry
19 leading to the inquiry.

20 The work done by the CFS workers in this case is
21 not in any way directly related --

22 THE COMMISSIONER: Well, just a minute.

23 MR. SAXBERG: -- to that event.

24 THE COMMISSIONER: Just a minute. You're not
25 giving evidence. I've let you go an awful long way, but I

1 think you're really getting to an area that we're going to
2 hear from witnesses about and rather from you.

3 MR. SAXBERG: Right. And I appreciate that.
4 And, but the point of it was really this: Can you make
5 your decision right now on whether it's appropriate to lift
6 confidentiality? You're, you're, you're quite rightly
7 expressing to me, I can't, I -- you can't make a decision
8 on any of that. You haven't heard the evidence yet. You
9 don't know if the conduct rose to the level of social
10 workers losing their humanity or --

11 THE COMMISSIONER: I'm --

12 MR. SAXBERG: -- whether it was something minor.

13 THE COMMISSIONER: I'm going to make a decision
14 on the motions that are before me that call for an
15 answer.

16 MR. SAXBERG: And what I'm saying is, the --
17 either you -- if you're deciding the motion now, you're
18 deciding it -- and, and what I'm saying is that there's no
19 evidence that there is a compelling reason to disclose the
20 identity because the conduct was of such a level that it
21 demands it, and that's essentially what the media is saying
22 here. That's their entire argument. That's what the --
23 when I say "the media", I mean not the media lawyer but the
24 media coverage is saying the, the conduct, the work by, by
25 CFS was of such a level that it demands that these

1 individuals be answerable for it and we're -- what I'm
2 saying is there's no evidence of that. There is no
3 evidence of that. And you --

4 THE COMMISSIONER: Well, the, the inquiry will
5 tell whether there is or isn't.

6 MR. SAXBERG: Right. The inquiry will tell that.
7 So at this point --

8 THE COMMISSIONER: I mean, I can't, with all due
9 respect, I can't take your word for that. I've got to hear
10 the evidence.

11 MR. SAXBERG: And that's my point, is that you
12 have no evidence that the conduct by the social workers was
13 such that, that justice demands their names be made public.
14 You have none of that evidence. And, and that's the only
15 thing that would auger in favour of the media's request to
16 lift confidentiality, because lifting confidentiality,
17 according to all of these reports on media coverage of
18 child death reviews, results in negative consequences to
19 the child welfare system, so there better be some positive
20 gain from lifting that confidentiality. And what I'm
21 saying is the, the only evidence that would allow you to
22 form that conclusion would be if there had been evidence of
23 that kind of conduct.

24 Now, you can decide to maintain confidentiality
25 until there comes a point when it's, becomes -- where

1 evidence is before this Commission that on a case-by-case
2 basis that confidentiality that would otherwise be the
3 regular case, would otherwise be the status quo, ought to
4 be listed with respect to this particular witness because
5 of what was done or what wasn't done.

6 And one thing that we mention in our brief is, as
7 far as we know, there has not, there hasn't been a letter,
8 there hasn't been any indication that there will be an
9 allegation of misconduct by any in terms of these witnesses
10 that are going to testify. Hasn't, hasn't -- now, maybe
11 that's because there hasn't been -- the can-says haven't
12 been finalized yet and sent out to the parties, I don't
13 know. But all I know is none of the witnesses have been
14 told, we think, based on our interviews over these past
15 four or five months, that someone committed a misconduct.
16 We haven't seen that. That's one thing.

17 The other thing is, and I can tell you this,
18 and --

19 THE COMMISSIONER: Well, look, we're at the end
20 of the sitting day. Will you finish in a few minutes or
21 how long have you got to go?

22 MR. SAXBERG: Yeah, I think I have at least
23 another half an hour or hour.

24 THE COMMISSIONER: All right. Well, then I think
25 we'll not carry on with that under the commitment we have

1 to adjourn in the vicinity of 4:30, not with necessary
2 precision. But if you're going to be another half hour, I
3 think we'll let you have that half hour at 9:30 tomorrow
4 morning and we'll consider ourselves stand adjourned now
5 for today. Thank you.

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

7

8 (PROCEEDINGS ADJOURNED TO JULY 5, 2012)