

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

**ORDER**

**HEREBY ORDER** that the Rules of Procedure and Practice  
are amended in the form attached hereto as Schedule "A".

Dated: August 23<sup>rd</sup>, 2011

BY THE COMMISSIONER



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The Honourable Edward (Ted) N. Hughes

## **SCHEDULE “A”**

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

#### **AMENDED RULES OF PROCEDURE AND PRACTICE**

##### **PART I: GENERAL**

1. The Commission's mandate, established by Order-in-Council No. 89/2011, is:
  - To inquire into the circumstances surrounding the death of Phoenix Sinclair and, in particular, to inquire into:
    - the child welfare services provided or not provided to Phoenix Sinclair and her family under *The Child and Family Services Act*;
    - any other circumstances, apart from the delivery of child welfare services, directly related to the death of Phoenix Sinclair; and
    - why the death of Phoenix Sinclair remained undiscovered for several months.
2. Public hearings will be convened in Winnipeg at the Winnipeg Convention Centre, 375 York Avenue, Winnipeg, Manitoba at a date and time to be finalized by the Commissioner.
3. In these Rules:
  - (i) “Commission counsel” refers to counsel appointed by the Commissioner and retained by the Government of Manitoba to act as Commission counsel, and includes any associate counsel or junior counsel appointed by “Commission counsel” with the approval of the Commissioner and under the authority of Commission counsel’s retainer;

- (ii) the term “documents” is intended to have a broad meaning, and includes the following forms: written, electronic, audiotape, videotape, digital reproductions, photographs, maps, graphs, microfiche and any data and information recorded or stored by means of any device;
  - (iii) “intervenor” refers to a person granted status as an intervenor by the Commissioner pursuant to paragraph 9;
  - (iv) “party” refers to a person granted full or partial standing as a party by the Commissioner pursuant to paragraph 8; and
  - (v) “person” means an individual, group, government, agency or other entity.
4. All parties, intervenors, witnesses and their counsel shall be deemed to undertake to adhere to these Rules, and may raise any issue of non-compliance with the Commissioner.
  5. The Commissioner shall deal with a breach of these Rules as he sees fit including, but not restricted to, revoking the standing of a party or intervenor, and imposing restrictions on the further participation in or attendance at the hearings by any party, intervenor, counsel, individual or member of the media.
  6. The Commissioner may amend these Rules or dispense with compliance with them as he deems necessary to fulfill his mandate and to ensure that the Inquiry is thorough, fair and timely.

## **PART II: STANDING**

7. Commission counsel, who will assist the Commissioner to ensure the orderly conduct of the Inquiry, shall have standing throughout the Inquiry. Commission counsel have the primary responsibility for representing the public interest at the Inquiry, including the responsibility to ensure that all matters that bear upon the public interest are brought to the Commissioner’s attention.

8. A person may be granted full or partial standing as a party by the Commissioner if the Commissioner is satisfied that the person has a direct and substantial interest in all or a part of the subject matter of the Inquiry.
9. A person may be granted intervenor standing by the Commissioner if the Commissioner is satisfied that the person does not have a direct and substantial interest but has a genuine and demonstrated concern about the issues raised in the Inquiry mandate and has a particular perspective or expertise that may assist the Commissioner.
10. The Commissioner will determine on what terms a party or intervenor may participate in the Inquiry, and the nature and extent of such participation.
11. The Commissioner may direct that a number of applicants share in a single grant of standing.
12. Applicants for standing will be required to provide written submissions explaining why they qualify for standing, and how they propose to contribute to the Inquiry. Applicants for standing will also be given an opportunity to appear in person before the Commissioner in order to explain why standing ought to be granted to them.
13. As provided for in Part III (Evidence), counsel representing a witness who is called to testify before the Commission may participate during the hearing of that witness' evidence without the necessity of applying for standing.

### **PART III: EVIDENCE**

#### **A. General**

14. The Commissioner may receive any evidence that he considers to be helpful in fulfilling his mandate whether or not such evidence would be admissible in a court of law.

15. The Commissioner may give the reviews listed in Section 3 of Order in Council No. 89/2011 any weight, including accepting them as conclusive.
16. The Commissioner may consider any court transcripts and similar documents, which are not subject to a legal claim of privilege, and may give them any weight, including accepting them as conclusive.

## **B. Preparation of Documentary Evidence**

17. All parties granted standing under Part II of these Rules shall, as soon as possible after being granted standing, produce to the Commission true copies of all documents in their possession or control having any bearing on the subject-matter of the Inquiry. Upon the request of Commission counsel, parties shall also provide originals of relevant documents in their possession or control for inspection.
18. Upon the request of Commission counsel, any intervenor granted standing under Part II of these Rules shall, as soon as possible after being granted standing, produce to the Commission true copies of all documents in their possession or control having any bearing on the subject-matter of the Inquiry. Upon the request of Commission counsel, intervenors shall also provide originals of relevant documents in their possession or control for inspection.
19. All documents received by the Commission will be treated by the Commission as confidential, unless and until they are made part of the public record or the Commissioner otherwise directs. This does not preclude Commission counsel from producing a document to a potential witness prior to the witness giving his or her testimony, as part of Commission counsel's investigation, nor does it preclude Commission counsel from disclosing such documents to the parties and intervenors to this Inquiry, pursuant to and subject to the terms and limitations described in paragraphs 27 and 28 below.

20. Any party or intervenor required to produce a document or documents pursuant to paragraphs 17 or 18 of these Rules or pursuant to a subpoena or summons issued pursuant to s. 88(1) of the *Manitoba Evidence Act* and who claims privilege over any such document shall produce a list of the documents over which privilege is claimed stating the basis and reasons for the claim of privilege.

### **C. Witness Interviews and Disclosure**

21. Commission counsel may interview persons believed to have information or documents bearing on the subject-matter of the Inquiry. The Commissioner may choose whether or not to attend an interview.
22. Persons interviewed by Commission counsel may choose to have legal counsel present during the interview, but are not required to do so.
23. If Commission counsel determines that a person who has been interviewed should be called as a witness in the public hearings referred to in paragraph 2, Commission counsel will prepare a summary of the witness' expected testimony, based on the interview ("Summary"). Commission counsel will provide a copy of the Summary to the witness before he or she testifies in the hearing. After the Summary has been provided to the witness, copies shall be disclosed to the parties and intervenors having an interest in the subject matter of the witness' evidence, on their undertaking to use it only for the purposes of the Inquiry, and on the terms described in paragraphs 27 and 28 below.
24. The Summary of a witness' expected testimony cannot be used for the purpose of cross-examination on a prior inconsistent statement.
25. Pursuant to section 9 of Order in Council 89/2011, if Commission counsel determines that it is not necessary for a person who has been interviewed to be called as a witness, or if the person interviewed is not otherwise able to be called to testify at the public hearings referred to in paragraph 2,

- Commission Counsel may tender the Summary to the Commissioner at the hearing, and the Commissioner may consider the information in the Summary when making his final findings, conclusions and recommendations.
26. Unless the Commission orders otherwise, all relevant non-privileged documents in the possession of the Commission shall be disclosed to the parties and intervenors at a time reasonably in advance of the witness interviews and/or public hearings or within a reasonable time of the documents becoming available to the Commission.
  27. Before documents are provided to a party, intervenor or witness by the Commission, he or she must undertake to use the documents only for the purposes of the Inquiry and to keep their contents confidential unless and until those documents have been admitted into evidence during a public phase of the Inquiry, and to abide by such other restrictions on disclosure and dissemination that the Commission considers appropriate.
  28. All documents provided by the Commission of Inquiry to the parties, intervenors and witnesses that have not been admitted into evidence during a public phase of the Inquiry, and all copies made of such documents, are to be returned to the Commission, in the case of witnesses on completion of their testimony, and in the case of parties and intervenors within seven days of the Commissioner issuing his final Report.
  29. The Commission may, upon application, release any party, intervenor or counsel in whole or in part from the provisions of an undertaking regarding the use or disclosure of documents or information.

#### **D. Witnesses**

30. Witnesses who testify will give their evidence under oath or upon affirmation.

31. Witnesses are entitled to have their own counsel present while they testify. Counsel for a witness who is not a party or intervenor has standing in the Inquiry for the purposes of that witness' testimony, and may examine the witness as provided in these Rules.
32. Witnesses may be called to give evidence in the Inquiry more than once.
33. Where he considers it advisable, the Commissioner may issue a summons or subpoena pursuant to s. 88(1) of the *Manitoba Evidence Act* requiring a witness to give evidence on oath or affirmation and/or to produce documents or other things.
34. Parties and intervenors are requested to advise Commission counsel of the names, addresses and telephone numbers of all witnesses they wish to have called and, if possible, to provide summaries of the information the witnesses may have.

#### **E. Oral Examinations**

35. The order of examination of a witness will ordinarily be as follows, subject to paragraph 36, below:
  - (a) Commission counsel will examine the witness. Except as otherwise directed by the Commissioner, Commission counsel may adduce evidence from a witness by way of both leading and non-leading questions;
  - (b) The parties who have been granted standing to do so will then have an opportunity to cross-examine the witness to the extent of their interest. If these parties are unable to agree on the order of cross-examination, this will be determined by the Commissioner;
  - (c) Subject to paragraph 36, counsel for the witness will examine the witness last, regardless of whether or not counsel is also representing another party;
  - (d) Commission counsel will then have the right to re-examine the witness. Except as otherwise directed by the Commissioner, Commission counsel may adduce evidence from a witness during re-examination by way of both leading and non-leading questions.

36. Counsel for a witness may apply to the Commissioner for permission to present that witness' evidence-in-chief. If permission is granted, the witness will be examined in the following order:
- (a) Counsel will examine the witness in accordance with the normal rules governing the examination of one's own witness in court proceedings, unless otherwise directed by the Commissioner;
  - (b) Commission counsel will then be entitled to examine the witness. Commission counsel may adduce evidence from a witness by way of both leading and non-leading questions;
  - (c) The other parties with standing will be in entitled to cross-examine the witness, as provided for in paragraph 35(b);
  - (d) Counsel for the witness will then be entitled to re-examine the witness;
  - (e) Commission counsel will then be entitled to conduct a final re-examination of the witness, as provided for in paragraph 35(d).
37. Counsel will be governed by section 4.04(2) of the Law Society of Manitoba's Code of Professional Conduct regarding communication with witnesses giving evidence.
38. Once Commission counsel has indicated that they will not be calling a particular witness to testify at the public hearings, a party may apply to the Commissioner and request that the witness be called to give evidence. If the Commissioner is satisfied that the witness' testimony is needed, the Commissioner may direct Commission counsel to call the witness (in which case paragraph 35 applies) or may allow the requesting party to call the witness and adduce his or her evidence in chief (in which case paragraph 36 applies, with suitable modifications).

#### **F. Use of Documents at Hearings**

39. Copies of all documents received by Commission counsel from the Government of Manitoba, including copies of documents received from

Government departments, agencies and other bodies established under the authority of the Manitoba Legislature, as well as copies of transcripts of proceedings before any Court or Commission of Inquiry, shall be presumed to be authentic, unless a party objecting demonstrates on a balance of probabilities that they are not authentic, and original documents need not be produced.

40. Before a witness testifies at the Inquiry, Commission counsel may, where practicable and appropriate, provide the witness and the parties with a binder or a list of those documents that are likely to be referred to during that witness' testimony.
41. No document shall be used in cross-examination or otherwise unless:
  - (a) copies of the document have been provided to Commission counsel in a timely manner pursuant to paragraphs 17 and 18; or
  - (b) leave of the Commissioner has been granted.

#### **G. Access to Hearings and to the Evidence**

42. Subject to paragraph 43, the hearings referred to in paragraph 2 will ordinarily be open to the public.
43. Where the Commissioner is of the opinion that it is necessary in the interests of the maintenance of order or the proper administration of justice to exclude all or any members of the public from the hearing room, he may, after hearing submissions from interested parties, direct that portions of the hearing be held in the absence of the public or on such terms and conditions as he may direct.
44. Applications from witnesses or parties to hold any part of the hearing in the absence of all or any members of the public should be made in writing to the Commission at the earliest possible opportunity.

45. The transcripts and exhibits from the public hearings will be made available as soon as practicable for public viewing. Transcripts will be posted on the Commission's web site as soon as is reasonably practicable.
46. Transcripts of any portions of the hearing that are held in the absence of the public pursuant to paragraph 43 will be made available for public viewing on such terms as the Commissioner may direct if, after hearing the evidence and any submissions, the Commissioner concludes that it is in the public interest to release the transcripts.

#### **PART IV: NOTICES REGARDING ALLEGED MISCONDUCT**

47. The Commissioner will not make a finding of misconduct on the part of any person unless the person or, if the person is deceased, his or her estate has had reasonable notice of the substance of the alleged misconduct and has been allowed full opportunity during the Inquiry to be heard in person or by counsel.
48. Any notices of alleged misconduct will be delivered on a confidential basis to the person to whom the allegations of misconduct refer.
49. Pursuant to Section 5 of Order in Council 89/2011, the Commissioner must perform his duties without expressing any conclusion or recommendation about the civil or criminal liability of any person.

#### **PART V: PROCEDURES ON MOTIONS**

51. Three copies of the motion materials shall be filed with the Commission Office.
52. The notice of motion shall be served on any party, intervenor or person who will be affected by the order sought.

53. Evidence on a motion may be given by affidavit. Where a party to the motion has served every affidavit on which the party intends to rely, the party may cross-examine the deponent of any affidavit served by a party who is adverse in interest on the motion.
54. A party who has cross-examined on an affidavit filed by an adverse party shall not subsequently file an affidavit for use at the hearing without leave or consent, and the Commissioner shall grant leave, on such terms as are just, where he is satisfied that the party ought to be permitted to respond to a matter raised on the cross-examination with evidence in the form of an affidavit.
55. The right to cross-examine shall be exercised with reasonable diligence, and the Commissioner may refuse an adjournment of a motion for the purpose of cross-examination where the party seeking the adjournment has failed to act with reasonable diligence.
56. A party who cross-examines on an affidavit shall:
- (a) order copies of the transcript for the Commission and the party being examined; and
  - (b) file a copy of the transcript with the Commission.