

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

**MOTION BROUGHT BY:** The General Child and Family Services Authority, First Nations of Northern Manitoba Child and Family Services Authority, First Nations of Southern Manitoba Child and Family Services Authority, and Child and Family All Nation Coordinated Response Network,  
(the "Applicants")

**DECISION**

1. The Applicants request that I make an order:
  1. Compelling Commission Counsel to provide the Transcripts of witness interviews (the "Transcripts") conducted by the Commission to the parties and intervenors to this Inquiry upon request;
  2. In the alternative, allowing witnesses who consent to the release of their Transcripts to provide them to the parties and intervenors to this Inquiry upon request;
  3. That the parties and intervenors who request and receive the Transcripts undertake to use the Transcripts only for the purposes of this Inquiry and to return the Transcripts to the Commission within seven days of the Commissioner releasing his final Report;
  4. Such other orders as the Commissioner deems appropriate.
  
2. My initial interest was to learn the history and origin of the Transcripts of which the Applicants seek possession. In the brief filed in support, the following references appear:

- ...
3. Commission Counsel has interviewed an unknown number of individuals. Exactly who was interviewed and what was said in the interviews have been audio recorded and it is also understood that Transcripts have been prepared for the great majority of these interviews.
- ...

5. Commission Counsel has indicated that she will be providing "Summaries" of the witness interviews for disclosure to the parties and intervenors. However, Commission Counsel has refused to disclose or allow access to the witness interview Transcripts (the "Transcripts"). Furthermore, these Summaries will only be provided for individuals whom Commission Counsel determines she will call as witnesses at the public hearings of the Inquiry.

...

3. Early in counsel's presentation, I sought his concurrence to have Commission Counsel place on the record the history and origin of the Transcripts that he was seeking. Her response was lengthy but bears repeating in full. Before I do that, it is useful to reproduce and briefly comment on the Commission's Amended Rules of Procedure and Practice that are recorded under the heading "Witness Interviews and Disclosure". They are numbers 21 to 29.

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.

These Rules were adopted after a full review and acceptance of them by all counsel, including counsel for the Applicants.

4. The remarks of Commission Counsel are as follows:

MS. WALSH: The rule starting at rule 21 ... Deal with witness interviews and disclosure. So 21 provides:

Commission counsel may interview persons believed to have information or documents bearing on the subject-matter of the Inquiry. [and] The Commissioner may choose whether or not to attend an interview.

Twenty-two:

Persons interviewed by Commission counsel may choose to have legal counsel present during the interview, but are not required to do so.

THE COMMISSIONER: With, with respect to rule 21, I have not been present for any interviews.

MS. WALSH: That's correct.

And with respect to rule 22, many of the witnesses who we interviewed did not have counsel present, as was their choice. They were all advised of the option to have counsel and many of them chose not to.

Rule 23 provides:

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 ...

That's called the 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.

And paragraph 24 provides that:

The summary of a witness' expected testimony cannot be used for the purpose of cross-examination on a prior inconsistent statement.

So as this rule -- as the heading indicates, this rule relates to the disclosure, that is, with respect to pre-hearing interviews that are conducted, what disclosure will parties and intervenors receive of those interviews.

And I take a moment, Mr. Commissioner, and I'm going to give you the full process of how we proceeded, but I want to take a moment to indicate that the purpose of these interviews was not to create a transcript for disclosure. The purpose of the interviews was to inform the Commission as to its investigation in order to allow Commission counsel to marshal the evidence that would allow you to fulfill your mandate. And the process that we chose of how to conduct the interviews was done purposefully with an eye to ensuring that witnesses would feel comfortable and candid in speaking with us, and that is why the interviews were not conducted formally under oath or affirmation and there was never, in any situation, a formal court reporter present in the hearing room.

So initially, in terms of -- and, and with respect to these rules, Mr. Commissioner, as you know, the rules were circulated to all of the potential applicants for standing prior to the standing hearings and then at the standing hearings counsel for applicants made submissions to you, or had the opportunity to make submissions to you with respect to the content of those rules, and on the second day of the standing hearings, having taken into account those submissions, the rules were settled and agreed upon and you gave an order on June 29, 2011 confirming that agreement.

And so I think it's important to recognize that, in terms of process, our process has to be guided principally, in an inquiry, by fairness, and fairness is demonstrated, in large measure, by expectations. So the expectations in this case are based on two things. One, the rules, and the process for formulating those rules is as I've described, and the rules indicate -- they don't talk about, about how we will document our own internal investigations but they do indicate that with respect to disclosure, so that all counsel are put on the same footing with respect to evidence that will be adduced at the hearing, any witness who will be called to testify, a summary

of their evidence will be prepared and circulated to all counsel for parties and intervenors, and that's precisely the process we followed.

So, that's the first form of expectation that, to date, has been met.

The second way that expectations were created in this case with respect to fairness was by the assurance that you have made reference to, given by Commission counsel, whether by me or my colleague, Mr. Olson, to each and every witness prior to their asking -- prior to their being asked to open their mouths and say anything to us, the assurance that however their interview was documented, whether it was -- and I'll come back to this, whether it was by notes or by a recording which was sent out for transcription, that documentation was being made for internal purposes only. It would be shown to them so that they could make sure that they had answered accurately to see whether they needed to add anything, whether they wanted to clarify anything. And what we then told the counsel was that if -- or the witnesses, was that if we determined that we would want to call them to testify, then in accordance with our rules that I just read to you, we would prepare a summary of their evidence and that summary would be shown to them and then circulated to all counsel for parties and intervenors.

Now, and I'm going to, in a minute, I'm going to read to you some samples from the notes and recordings that we made of that assurance, so you can see what, what it was specifically that was said and what all the counsel present have heard me or my colleague say repeatedly.

So in terms of process of, of documenting the interviews, originally we thought, consistent with, quite frankly, what Commissioner Goudge did in his inquiry, we thought, well, the best way to keep matters informal, as I said, we didn't have people under oath, and what we thought was we would use the services of an associate counsel, such as my colleague, Mr. Globerman, to take notes of the interviews, and that's how we started. And we said, and I will give you an example of the assurance in a minute, but we gave the same assurance, that the notes were being prepared for internal Commission purposes, they'd be shown to the witness and/or their counsel, but they wouldn't be circulated and what would be circulated would be a summary of the witness' evidence if we determined they would be called to testify.

We soon determined that --

THE COMMISSIONER: Did they, did they see both the notes and the summary if you were going to call them?

MS. WALSH: Yes. Yes, the summaries have, have only been recently prepared. And yes, the summaries are all sent to the witness first. And our practice is we send them to the witness or their counsel, we tell them they have a week and then they're being sent out to all the other counsel.

And I can tell you that to date, 49 summaries have been sent to all counsel. There are 34 summaries which remain, that will be sent out by August 3rd. Then there are still eight interviews which have yet to take place, and so those interviews, the summaries of those interviews will be circulated to counsel before the end of August.

THE COMMISSIONER: And are those all phase one witnesses?

MS. WALSH: Not all of them. The, the majority of them are, but not every single one of them.

So in terms of the process, I'm going to tell you -- so in terms of the process, we started with, with associate counsel taking notes and we found that because of the size of this undertaking, and in order to make sure that we began the public hearings on a timely basis, it wasn't a good use of associate counsel's time to sit and take notes. There were many other tasks that we needed them to do. So then our office hired secretarial staff to sit and take notes. And what we determined -- and in most cases -- originally they were just taking notes and then they began to record the interviews and they took notes. And what we found is, because these secretaries were not familiar with the evidence, it was difficult for them to keep up with the note-taking and so then they had to go back and look at the -- listen to the audio form and, and type it up. So we determined that we really didn't need to have anyone present in the room. We were mindful of, of matters of delay, and so we thought the best thing would be to simply record the interview, no court reporter present, and send out the recording to be transcribed. And the Transcripts that come back from those interviews are not Transcripts in the normal legal sense. There's no court reporter present, so for instance there's no indication as to when something may be said on or off the record. We try to indicate who's speaking but it isn't always apparent to the transcriber. But these are for internal Commission purposes and we know what's being said, but they're not formal Transcripts in that sense.

So, that's the process. We started with an associate lawyer taking notes. We moved to a secretary taking notes; a secretary taking notes with an audio recording; a pure audio recording sent out to be transcribed and returned to us, always mindful, Mr. Commissioner, of matters of timing. And in fairness, whether it was merely notes that were taken or a transcript made from the audio recording, we provided that documentation of the interview to the witness and, if they had a lawyer, to their lawyer, as I said, so that they could see what it was they said, if they had wanted to add something, if they wanted to clarify something. We thought that was the fairest way to proceed. But they were told that those were only for their own look, for their own view and for our internal purposes, and they signed a confidentiality undertaking that said that they would not discuss with anyone any of the information that they received during communications with the Commission. And Commission -- and each counsel signed an undertaking saying they would not disclose any information they learned other than to their own client. So, that's what we have.

And what I'm advised is, we have a total of 1118 pages of interview notes and 9200 pages of the notes that are transcribed from the audio.

THE COMMISSIONER: What are those figures again?

MS. WALSH: So 1118 pages of transcribed notes and 9,279 pages of typed Transcripts from the audio recordings. So we have a total number of pages of 10,397.

And with respect to your question, yes, Mr. Commissioner, we have four, sometimes five, lawyers in our office who've been reviewing, split up, divided up the task of reviewing those pages to create the summaries. And the summaries, again --

THE COMMISSIONER: Was that the next step when -- you've, you've told me that you sent them to counsel or to the --

MS. WALSH: Witness.

THE COMMISSIONER: -- interviewee, if he or she didn't have counsel.

MS. WALSH: Right.

THE COMMISSIONER: And asked them to respond, and any changes or additions, and then I'm interested in knowing exactly what was your next step once that process was completed.



Then the next step was to create a summary of their evidence if we determined, upon reviewing their evidence and in the context of all the investigation in its entirety, if we determined that a given witness was going to be called to testify, then we prepared -- one of the five of us prepared a summary of their evidence, which then was sent to the witness or their counsel, and then a week later distributed to all counsel for parties and intervenors. So all counsel for parties and intervenors will receive summaries of every single witness whose evidence we expect to call at the hearing. And the, the summaries are fairly detailed. We were careful to ensure that if there was anything that differed, for example, from what was in the documents that were disclosed relating to that witness, that that be included in the summaries.

The purpose of the summaries is to ensure that everyone is advised as to the nature of the evidence so that to the extent possible there won't be surprises, and that's the intention of the rule, that's the purpose of the rule that relates to these summaries, and that's precisely the process that's been followed. And the summaries also indicate the disclosure numbers of the documents that are likely to be referred to by the witness in their evidence.

And in many instances, when we have sent a summary to counsel, they have made additions, things they think are something that we should add, and we include them, so that the summaries are as fulsome as possible.

Now, in terms of -- I wanted to give you some examples of the assurance that was given to witnesses at the outset of their interviews. And what I'd like to do is take a minute, because this is one of the main reasons that I have objected to disclosing the Transcripts. So I want to take a minute, I've given -- I have examples of assurances that were given and documented in the various forms that we documented the interviews over time.

So here is an example of interview notes that were taken by associate counsel who indicates:

Explanation of Commission's mandate, explanation of note-taking reporting. Only for Commission's internal purposes. Notes will be used to make a summary and the summary will be disclosed to parties and their counsel. The summaries can't be used for cross-examination. We will get a copy of the notes to you and you will have a chance to review them and sign off on them.

So that's an example of an assurance that's documented by way of an associate counsel taking notes.

Then I have an example of the recording and documentation when we had a secretary taking notes and recording by way of audio. So I speak and I say:

We create notes, I'm not calling it a transcript because it's not intended to be verbatim.

And this was March 9, 2012:

We take notes of every witness who's interviewed. We type them up, we send them to the witness for the witness to verify, make sure that we've got everything accurate. Make any changes you want. You'll get that from our office and then you send it back.

The witness says: Okay. I go on:

Those notes are internal for the Commission's purposes only. They're not going to be shared with anyone. If we determine that your evidence is evidence that we will make sure of, then we send a summary of your evidence to all of the lawyers for the parties and intervenors. And if you are called to testify, that summary would not be able to be used by a lawyer as a means of cross-examination. They couldn't say, you know, use it as a prior statement, like says, this says you said this and now today you're saying something different. So it's, again, just for -- so the notes are just for internal purposes for us. And if we prepare a summary, the summary does go to counsel but, again, it's just to make sure that everybody knows what the evidence is that we're calling.

Then I have an example of the assurance given to, in fact, one of Mr. Gindin's clients, and this was an instance where notes were taken by a secretary and there was an audio recorded. And so I start off:

Thank you very much for coming in.

I said a few preliminary things:

I am Commission counsel, my colleague is associate, senior associate Commission counsel. I act in the public interest so I don't represent anyone's point of view, and it's my job to get all of the evidence, wherever it comes from, whatever it looks like, out in front of the public, in front of the Commissioner, so that he can make some findings, some comments, a lot of comments, on what happened to Phoenix, and then make some recommendations so that we can try to prevent it from happening again.

Witness says: Okay. All right. I go on:

To better protect Manitoba children. You'll see there's a little speaker here. Our discussion today is being recorded. It's only for our internal purposes so that you can see Annette [is our clerical person] is also taking notes, and that's also just for our internal purposes. And when I say that, I mean that no other lawyers, even, well, other than your own lawyer, is entitled to see these notes or listen to this tape.

The witness says: All right. I go on:

Once the notes are typed up, they'll be sent to your lawyer for you to look at and make sure that we got it right, make any changes. You can sign them, say yes, this is an accurate, you know, copy of what I said. I'm not calling it a transcript because we're not saying it's word for word accurate.

Witness says: Yeah. I say:

And then you send it back to us and then we've got it for our internal purposes. Ultimately, we'll prepare a summary of what every witness who we're going to call to testify at the public hearings is going to say, so that would include you, okay, and then that summary is what's sent to all the other lawyers so they see that, and your lawyer will get a summary of what everybody else is saying.

And then finally, Mr. Commissioner, an example of what I said to a witness who was actually interviewed by video conference. Her lawyer was in the room. And it was purely recorded; there was no clerk or a lawyer taking notes. So I start off, and I say:

A bit of an explanation: There is a certain amount of repetition, which all the lawyers will attest to. I'm Commission counsel to the inquiry and my role is to adduce all the evidence, whatever it is, wherever it comes from, whatever perspective it comes from, for the benefit of the Commissioner, Ted Hughes, and the benefit of the public. So I don't have a specific perspective, I'm just fact-finding, and in the course of doing that I am interviewing just about everybody who touched or had contact with the family of Phoenix Sinclair, her father, her mother. And so as you know, your name comes up in the file through a brief interaction, and I wanted to ask you about that interaction. In terms of this process, this interview is being transcribed but only for our, that is, the Commission's internal purposes, so no one else will see it except for you and your lawyer and the staff at this Commission. The witness says, okay. If we determine that we need to call you to testify or that we will, in some way, rely on your evidence, then we will prepare a summary of your interview from today and send it out to all the counsel. If you do testify, that summary could not be used for the purposes of cross-examining you, so it couldn't be used as what we call a prior inconsistent statement. In other words, we're not -- you're not being sworn today and there isn't that level of formality.

So I think that answers the question that you asked --

THE COMMISSIONER: Yes.

5. In preparing for the hearing, it is apparent that Commission Counsel followed the procedure outlined in the Rules reproduced above. I was not in attendance at any of the interviews and I have left it to Commission Counsel to marshal the evidence and be ready to proceed on opening day, September 5, 2012. We now know the detail of how she has gone about her task. As I understand it, the Transcripts that the Applicants seek are the transcribed

pages of witness interviews in those instances where the interviews were recorded on an audio recording machine without the presence of a court reporter (counsel has advised his request does not relate to notes made by associate counsel nor secretarial staff). Thus, these documents are not transcripts as that term is generally understood in legal proceedings. One of the other significant differences is that the interviews were not conducted under oath or affirmation.

6. As a result of the explanation given by Commission Counsel, it is now clear as to the history and origin of the Transcripts sought by the Applicants. Let me summarize what I believe to be the significant details of the practice and procedure followed by Commission Counsel.

- 1) She conducted pre-hearing interviews with persons who were thought to be in a position to contribute, as a witness to the work of the Commission. Where represented by counsel, counsel was invited to attend;
- 2) The interviews were conducted in an environment of comfort for the interviewee where he or she would be encouraged to speak candidly and to that end, the interviews were not carried out under oath or affirmation nor in the presence of a court reporter; and
- 3) An assurance was given to each witness that:
  - a) the recording of what they would say, would, once transcribed, be used for internal purposes only. The clarity of the assurance given is amply recorded in the remarks of Commission Counsel;
  - b) they would be given the opportunity to review the transcribed document so as to clarify or add to what had been recorded; and
  - c) Commission Counsel would then prepare a summary of the anticipated evidence of the witness and it would first be shown to the witness and then circulated to all counsel for parties and intervenors.

7. As well as the foregoing procedure followed by Commission Counsel embracing the requirements of Rule 23, it accords with accepted practice at public inquiries as reported on by Simon Ruel in his text *The Law of Public Inquiries in Canada* at pages 72 and 73 where he says:

The power to issue a summons to compel the appearance of witnesses and the production of documents does not allow compelling witnesses to attend preliminary or preparation interviews with commission counsel or investigators. Such interviews can only be voluntary. Interviews should be conducted in the presence of counsel for the witness, if represented. An unrepresented witness who may be subject to allegations or findings or misconduct should be advised that he may wish to retain the services of counsel.

Typically, interview notes would be made and transformed into statements or summaries of anticipated evidence or will says for those witnesses that would be called to testify. It is common practice to share those statements with witnesses for review and comments before finalization. Witness interviews may also be recorded and transcribed. Affidavits may also be prepared based on interviews for evidentiary purposes. Those options are at the discretion of the commissioner.

...

The rules of procedure of commissions of inquiry will typically provide that parties with standing will be given advanced access to documents collected by the commission. Not all documents disclosed to a commission will be shared in advance. Discretion is left with commission staff to screen the documents and to communicate only those documents that are relevant to the mandate of the inquiry. Advanced access to documents will permit an efficient representation of parties' interests, avoid surprises and facilitate the overall functioning of the commission.

...

The rules of procedure of commissions of inquiry will typically allow the advance sharing of summaries or statements of anticipated evidence or will says with the parties with standing. Again, the disclosure of witness statements would be made upon the parties' and their counsels' signature of an undertaking of confidentiality.

Such sharing of summaries has occurred here and undertakings of confidentiality were obtained by Commission Counsel from all counsel receiving the summaries.

8. The Applicants base their entitlement to the Transcripts on two grounds:

1) That Rule 26 of the Commission's Rules of Procedure and Practice require disclosure; and

2) The principles of natural justice and procedural fairness require disclosure.

9. I will, in reverse order, reference the submissions of counsel with respect to these grounds.

10. Counsel for the Applicants places great emphasis on Hudson Bay Mining and Smelting Co. v. Cummings P.C.J., 2006 MBCA 98 in advancing the second of the two grounds. In oral submission he said as recorded at pages 68 to 70 of the transcript of the Commission proceedings on July 24, 2012:

MR. SCARCELLO: I hear you, and I just would like to point out, not sure if you've read the Manitoba Court of Appeal decision, the Hudson Bay v. Cummings decision. It's already dealt with this exact matter, where our Court of Appeal ruled that, there's an inquest, and the inquest counsel, counsel witness -- did witness interviews and certain promises of confidentiality were made to the witnesses, and after it was found out there were transcripts of these witness interviews, a motion was made to receive them. The Court of Appeal decided that those were relevant non-privileged documents and that they had to be disclosed. And that case is, of course, inquest, but it's, it's directly only point to this matter. It was a [sic] inquest into the death of a young man, and inquest judge was tasked with determining the circumstances surrounding this young man's death and then the judge was to make recommendations to ensure that a similar occurrence doesn't happen in the future. Is exactly what terms of reference, an order of council for this matter, are dealing with and it's those terms of reference that determine what is relevant in a proceeding. So we are bound by stare decisis in this decision in Manitoba.

THE COMMISSIONER: But that was relation to an inquest, which the rules of procedure with respect to which are, in the main, provided by statute, I think, whereas we're not governed by statute insofar as the procedure that, that takes place at a public inquiry. Isn't there a difference, and didn't Mr. Justice Freedman point that out in the occasion that this matter was already before him as a member of the Court of Appeal?

MR. SCARCELLO: The Hudson Bay decision they were disclosed pursuant to requirements of natural justice and procedural fairness. They are relevant non-privileged documents and they should therefore be disclosed, not in accordance with the rules. And I'll point out that that decision makes many comments about the commonalities between inquests and inquiries instead of distinguishing them. It's in our initial July 5th brief. Tab 3 is the Hudson Bay decision. If I could have you turn to page 13. There's a highlighted section right at the bottom. It's a footnote from Justice Steel where she states:

"Fundamentally though, a public inquiry, like an inquest, is concerned with being a fair, fact-finding process, ..."

And that's what we're here today dealing with, is, is making sure this is a fair fact-finding process. And if you compare those two decisions, they both have exact same terms of reference and the same goals.

And at pages 81 and 82:

Now, the principles of natural justice and procedural fairness obviously apply to this proceeding. Supreme Court of Canada has, has said as much, our Court of Appeal has said as much. There's no issue there. We all know that. The issue is how much?

Now, you've received our position that we need full disclosure of all relevant documents, and I've explained to you why, that for you to meet your mandate you need to be able to hear our unique perspective on all of the evidence. But furthermore, if we, as parties with standing, we have a direct and substantial interest in the subject matter of this proceeding, if we're to be given all the procedural rights that we are entitled to, we have to receive full disclosure so we can participate meaningfully.

If the -- if all that is going to happen here is that the perspective of Commission counsel and her identification of what's relevant is put



before you, then our participation at this stage is meaningless.

THE COMMISSIONER: Is what?

MR. SCARCELLO: Is meaningless, because we don't get to put our eyes on the documents. We're denied our right to fully participate in this matter.

Now, set out in the brief, I'm not going to go through it in any great detail, but there's factors that you are to look at in determining how much disclosure should occur in order to be procedurally fair, and that's all before you. I'll point out this, like I said before, the Hudson Bay decision from the Manitoba Court of Appeal is directly on point; the same mandate was there, the same purpose of preventing a similar death in the future was there, and they determined that all relevant non-privileged documents, which included witness interview transcripts, had to be disclosed.

11. It is my belief that the foregoing recitations from counsel's oral submission fairly represents the basis on which he asserts that principles of natural justice and procedural fairness require disclosure of the Transcripts.

12. With respect to counsel's reliance on the first ground advanced by him, he points to and relies on Rule 26. He sees the Transcripts as being relevant and non-privileged documents in the possession of the Commission that must be disclosed to the parties and intervenors. Again referencing the Hudson Bay and Cummings decision counsel says at page 70:

If the documents are relevant and non-privileged in the inquest decision, they are as well here.

Now, to get into the details of why they're relevant, of course they're relevant. The Order in Council, at section 9, directs and allows the Commission and its counsel to interview witnesses in accordance with section 1 of the Order in Council which sets out the mandate of this inquiry. So any information that comes out of those interviews is clearly relevant because it is only within the confines and jurisdiction of this inquest (sic) as determined by section 1.

Furthermore, if summaries are being prepared referencing the transcripts, the original document is obviously relevant.

He adds at page 72:

The only thing that can prevent a relevant document from being produced to the parties at this inquiry is if it's covered by some form of privilege.

Counsel has advanced reasons why no privilege exists with respect to the disclosure of the Transcripts and concludes at page 81:

So privilege cannot apply for these documents, in no way, shape or form, and they're clearly relevant. Therefore, in accordance with the rules that require the disclosure of relevant non-privileged documents, they should be disclosed.

and at page 89:

We're saying that transcripts are relevant non-privileged information and we are entitled to receive them in accordance with rule 26.

See, rule 23 deals with the creation of Commission counsel. Rule 26 deals with the actual information.

13. Addressing the second ground advanced by the Applicants, I decline to make an order compelling Commission Counsel to provide the Transcripts of the witness interviews conducted by her to the parties and intervenors in this Inquiry. I see no breach of the principles of natural justice and procedural fairness. Of prime importance is the context within which the Transcripts were prepared and what in fact they are, notwithstanding the descriptive name that has been given to them. Commission Counsel chose the process, as she was entitled to do, in order to be in compliance with Rule 23. She knew that for each witness to be called to testify, she had to prepare and circulate, as provided for in the Rule, a summary of the witness' expected testimony based on Commission Counsel's interview with that person. Ultimately, she found transcription of her conversation with the interviewees to be the most efficient way of allowing for the preparation of the summaries. It was understood from the day the Rules were adopted, with full participation and concurrence of counsel, that the preparation and delivery of summaries would be the method of acquainting all parties and intervenors of the evidence it was anticipated the witnesses would give. After listening to Commission Counsel in the hearing room last week, it

is apparent that she has done exactly what was expected of her. In my view, the Applicants have been denied nothing that the principles of natural justice and procedural fairness entitle them to.

14. Commission Counsel has explained her reasons for giving all potential witnesses the assurance that the Transcripts would be retained in confidence. Each person interviewed was made aware of Commission Counsel's responsibility to prepare and circulate a summary of what the witness was expected to communicate at the public session. In my judgment, the assurance given by Commission Counsel was an entirely reasonable and understandable one and it would be grossly unfair to her, as it would be to those given the assurance, for me to now order the distribution of the Transcripts to all parties and intervenors. To do so would, at least to those interviewed, bring the credibility of this Inquiry into question and could very well result in far less communication and candidness when the witness takes the stand, believing that he or she had been deceived by Commission Counsel.

15. Further, I do not agree that *Hudson Bay v. Cummings* is, as counsel suggests "on point" and that it reached a result that I am either required or ought to follow.

Firstly, in the *Hudson Bay v. Cummings* the proceeding being considered by the Court of Appeal was an inquest and not a public inquiry. The differences between a public inquiry and an inquest are considerable. That was made quite clear by Freedman J.A. of the Manitoba Court of Appeal when an issue relating to this Inquiry was before him earlier this year. See *M.G.E.U. v. Hughes*, 2012 MBCA 16. A commission of inquiry has much more latitude and discretion in determining the process that the commission is going to follow. The commissioner can create his own rules for the hearings and "is the master of his own procedure. [He] is not required to adopt the procedural rules of the civil court system in order to achieve fairness. Tribunals are not courts, and are fully entitled to streamline their disclosure procedures in keeping with their objective to provide a timely and cost-effective adjudication of the rights of the parties." (*Clifford vs. Ontario (Attorney*

General) (2008) 90 OR (3d) 742 at paragraph 10). Conversely, an inquest conducted pursuant to *The Fatality Inquiries Act* is prescribed narrowly by statute, and the presiding judge who hears evidence in a formal courtroom, does not have the discretion to formulate his own rules in the way that a commissioner of a public inquiry is able to do.

Secondly, in the *Hudson Bay v. Cummings* case there is no indication that summaries or will say statements were ever offered or provided to counsel of the parties with standing. In my view, the provision for the summaries in this public inquiry negates the need for the production of transcripts. While in the *Hudson Bay v. Cummings* case the court ordered the disclosure of transcripts that were ready and available, it noted in paragraph 10 that different circumstances could indicate a different result.

Thirdly, the court in *Hudson Bay v. Cummings* noted that there was no evidence that the comments made to Crown counsel in the interviews were made with the expectation by those who were interviewed that they would be kept confidential. As we know, the very opposite occurred in the interviews conducted by Commission Counsel.

16. This brings me to a consideration of the reliance of the Applicants on Rule 26 as authority for its entitlement to a disclosure order with respect to the Transcripts. I said at the time and continue to be of the view that Rule 26 was put in place to cover documents received by the Commission and not documents created by it or for its own internal purposes. Rules 21 to 24 exclusively address the disclosure of information obtained through the pre-hearing interview process. The reference to documents in Rule 26 is to information received by the Commission in writing or similar form and not information created by the Commission for its own internal purposes.

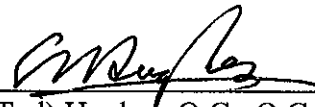
17. I appreciate that Rule 26 is prefaced with the words “Unless the Commission otherwise orders...”. Notwithstanding that at the time of the hearing I indicated I was prepared to invoke the use of that proviso, I have decided it is unnecessary to do so because of the conclusion I have reached and recorded in paragraph 16. For that reason Rule 26 is not a basis on which the Applicants are entitled to an order from me compelling Commission Counsel to provide the Transcripts to them and accordingly I decline the request to so order.

18. I also decline to make an order allowing witnesses who consent to the disclosure of the Transcripts to proceed to do so to other parties, intervenors or their counsel. Such an order would lift the confidentiality ban that each witness has agreed to in written form. In making my decision, I have been influenced by the following three factors which, when taken together, indicate to me that the principles of natural justice and procedural fairness will be best honoured and served by proceeding to the September 5, 2012 opening day of presentation of evidence on the basis understood by all parties and intervenors and agreed to by them at the time of the finalization of the Commission’s Amended Rules of Procedure and Practice. Those factors are:

- 1) The confusion that will arise for witnesses unrepresented by counsel, given the assurance communicated to them by Commission Counsel at the time of interview and also arising from the terms of the confidentiality undertaking signed by them;
- 2) The lack of consistency of disclosure, or perhaps better described as the unevenness that will arise from the fact that:
  - a) For about half of the interviews, no Transcripts exist; and
  - b) there is already an indication that some witnesses have expressed concerns about disclosure of their Transcripts; and
- 3) The time-consuming redaction process that each Transcript would have to undergo and which can only be carried out by a commitment of resources in the office of Commission Counsel.

18. The final matter for my attention is the position taken on the Applicants motion by counsel for Kim Edwards and Steve Sinclair who spoke in support of the application for disclosure of the Transcripts. His reason was unique to his situation. He has seen only two Transcripts, those of his two clients, whom he likely correctly described as having “the greatest personal interest but the least amount of information” of all participants. He points out that counsel for Manitoba Government Employees’ Union could have up to 35 Transcripts and counsel for the Department of Family Service and Labour could have up to 15. He describes it as being “unfair” that the amount of disclosure you get depends upon how many clients you have. I appreciate his point but I do not see it as reflecting unfairness. No counsel has seen or had possession of any Transcript other than that relating to his or her client. No counsel has seen the Transcript of the interview of anyone else’s client nor Transcripts relating to unrepresented witnesses. Presumably, each client has been in full and complete discussions with his or her own counsel and has fully communicated to counsel the evidence that he or she is in a position to contribute to the Inquiry. Counsel’s access to the client’s Transcript was for the purpose of determining whether any changes or additions were required before preparation of the summary. When all of these factors are taken into consideration, I do not see the presence of the unfairness of which counsel speaks even though his numbers appear to be correct.

DATED at Winnipeg, Manitoba, this 1<sup>st</sup> day of August, 2012.



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E.N. (Ted) Hughes, O.C., Q.C., LL.D (Hon)  
Commissioner