



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

COMMISSIONER: E.N. (TED) HUGHES, O.C., Q.C., LL.D (HON)

August 8, 2012

DELIVERED VIA COURIER

Mr. Shawn C. Scarcello
D'Arcy & Deacon LLP
2200 – One Lombard Place
WINNIPEG MB R3B 0X7

Dear Mr. Scarcello:

Re: Phoenix Sinclair Inquiry
Request for Stated Case

I have for reply your letter of August 3, 2012, which I view as an application under Section 95(1) of *The Manitoba Evidence Act* C.C.S.M. c. E150 (the "Act"). All subsections of Section 95 have relevance so I record the section in full:

Stated case for Court of Appeal

95(1) Where the validity of a commission issued under this Part or the jurisdiction of a commissioner appointed thereby or the validity of any decision, order, direction, or other act, of a commissioner appointed under this Part, is called into question by any person affected, the commissioners, upon the request of that person, shall state a case in writing to The Court of Appeal setting forth the material facts, and the decision of the court thereon is final and binding.

Order directing stated case

95(2) Where the commissioners refuse to state a case, any person affected may apply to a judge of the court for an order directing the commissioners to do so.

Proceedings stayed until case determined

95(3) Pending the decision of the stated case no further proceedings shall be taken by the commission.

The request you make is that I state a case addressing what you describe as "the following three issues":

1. Did an apprehension of bias exist with respect to the Commissioner hearing and determining the Authorities and ANCR's motion requesting the disclosure of witness interview transcripts when Commission Counsel had taken an oppositional position on the record?

2. Do the Commission's Amended Rules of Procedure and Practice require the disclosure of witness interview transcripts to the Parties and Intervenors?
3. Do the principles of natural justice and procedural fairness require the disclosure of witness interview transcripts to the Parties and Intervenors?

I recorded my views with respect to issues #2 and #3 in my written decision of August 1, 2012 and my reasons for rejection of your request for disclosure of what became known at the July 24, 2012 oral hearing as "the Transcripts" are fully recited in it. I rejected the apprehension of bias (issue #1) during the course of your oral submission on July 24th. Our discussion of that day has been transcribed and is available.

This is the second occasion during the course of this Inquiry that I have been asked to state a case. On the previous occasion I declined the request made of me and the applicant, the M.G.E.U., a party with standing, applied to a Justice of the Manitoba Court of Appeal under Section 95(2) of the *Act* for an order directing me to state a case. The decision of Freedman J.A. can be found at 2012 MBCA 12 (*M.G.E.U. vs Hughes*). My responsibility in deciding the application you have now brought before me is clearly defined by Freedman J.A. in paragraphs 42 and 44 of his decision. They read as follows:

42. The object and purpose of s. 95(1) is to provide a mechanism whereby persons affected by a commission may question the commission's validity and jurisdiction, or decisions, orders, directions or acts of the commissioner. In responding, the commissioner is entitled to evaluate the request for the stated case and to exercise judgment on its justifiability. To deny the commissioner that exercise of judgment would render him or her a mere automaton. That surely cannot be what was intended. Some evaluation of the justifiability of the request for a stated case is necessary.
44. Applying the principles consistently stated in the jurisprudence, and considering the object of the statutory provisions and "the effect of ruling one way or the other" (*Blueberry* at para. 42), I am satisfied that the word "shall" in s. 95(1) should not be construed as mandatory, but as directory. Thus, the commissioner may refuse to state a case, in which event the person affected has the recourse provided by s. 95(2). That recourse has been sought in this case.

Freedman J.A. also addressed the responsibility of a Justice of the Court who is called upon to decide an application brought under Section 95(2) of the *Act* for an order directing a Commissioner to state a case. He expressed his views in paragraphs 47 to 56. The content of all of them are of importance but of particular relevance at this time are paragraphs 47, 48 and 56 which read:

47. The AG responded that the role of the judge under s. 95(2) "cannot be to simply 'rubber stamp' the request of the affected party" and that the judge acts as a "gatekeeper". While leave is not required, the AG argues that the judge's role is like that of a chambers judge in a case where leave is required, determining whether it should be granted. That judge would typically consider whether the legal issue raised was important, and whether the applicant had made out a *prima facie* case.

48. In my view, the AG is correct. A stated case may be a form of appeal, but this particular stated case would come into being entirely through the operation of s. 95 of the Act. The Act must be read purposively. Just as the commissioner is entitled to evaluate the request for a stated case, for the reasons explained above, including the effect of s. 95(3), so, too, is the judge entitled to conduct such an evaluation. It would be anomalous, and incorrect, to find that the judge faced with a motion under s. 95(2) has less discretion and room for the exercise of judgment than a commissioner has when faced with a request under s. 95(2).
56. Thus, in my opinion, the role of the judge on an application such as this is to determine two matters. First, the judge determines if the applicant for the stated case has shown that the matter proposed to be determined is of some importance, warranting the attention of the court. If the work of a commission is to be suspended, that should only occur if the issue raised meets that standard. Second, the judge determines if the applicant has shown that the case it proposes be heard by the full court is an arguable case that has a reasonable prospect of success. Weak cases with little chance of success should not be sent for a hearing with the consequential suspension of the proceedings of a commission.

I have decided to decline your request that I state a case to go before a panel of the Court of Appeal of Manitoba. I will recite my reasons for arriving at that decision but I wish to record that in reaching my decision I was both mindful and appreciative of the availability to you of the process provided for in Section 95(2) of the Act.

Your application requires me to carry out an evaluation of the justifiability of your request. I see that as requiring me to make a determination of "whether the legal issue" raised by the you is "important" and whether you have "made out a *prima facie* case" that warrants me stating the case requested by you. To put it another way, have you shown that the issue you have raised "is of some importance" and that the case you propose be heard by the full Court "is an arguable case that has a reasonable chance of success"?

A consequence of me stating the case you have requested, whether on my own decision at this time or subsequently as the result of an order under Section 95(2) that I do so, is that once the case is stated "no further proceedings shall be taken by the commission" pending the decision of a full panel of the Court of Appeal (Section 95(3) of the Act). Freedman J.A. made it clear that the effect of that consequence is properly a matter for my consideration as I make the evaluation required of me. It is a very serious consequence when seen in the light of the fact that, after 16 months of preparatory work this Commission is scheduled to commence hearing the evidence of the first of an anticipated approximately 91 witnesses on September 5, 2012, and that it is expected that the presenting of evidence will continue for several months following commencement.

After giving due consideration to the submissions before me on July 24th, I did not have difficulty in reaching the decision I made that day, a decision which is now brought forward for a new evaluation in the form of the question posed in issue # 1. In response to your application for disclosure of "the Transcripts", Commission Counsel filed a written brief outlining her actions pertaining to their history and origin. At the July 24th hearing, I invited her to speak to the matter. As I understand it, it is with respect to the content of her written brief and her remarks expanding on it that you assert that a reasonable apprehension of bias exists. After, correctly I believe, stating the test with respect to an allegation of apprehension of bias, you expressed the view that a reasonable person with the information available pertaining to the actions of Commission Counsel in responding to your motion requesting disclosure of "the Transcripts",

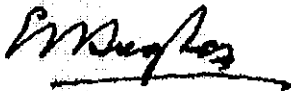
would conclude that there is a real likelihood or probability of bias and that I would not decide fairly the matters that the governing Order-in-Council require of me. I do not agree with you. It was my view on July 24th and continues to be today, that in interviewing potential witnesses in the manner that she did and informing the hearing in both written and oral form with respect to the details, Commission Counsel was performing her duties as expected of her and in accordance with the Commission's Amended Rules of Procedure and Practice. It is my belief that an informed person viewing the matter realistically and practically and having thought the matter through would see it exactly in that way, and the thought that this Commission of Inquiry would not therefore carry out its assignment fairly would not even enter that informed person's mind. That addresses the question asked in issue #1.

I did not have difficulty in reaching the conclusions recorded in my August 1st decision declining the disclosure of "the Transcripts" that are the subject of the questions you ask in issues #2 and #3. For the reasons I expressed on August 1st and continue to hold today, I see no reasonable basis for the making of an order of disclosure as referenced in issues #2 and #3. That is to say, in my judgment neither the Commission's Amended Rules of Procedure and Practice nor the principles of natural justice and procedural fairness require the disclosure of "the Transcripts".

The firmness with which I held the views I have referenced in the preceding two paragraphs on July 24th and August 1st and continue to hold today, precludes a decision from me that the request you make in your letter of August 3rd is justifiable. It is my firm belief that it is not. I cannot see, for reasons I have expressed in spoken and written form, that you have a substantive argument that would have a reasonable chance of success before a full panel of the Court of Appeal. Therefore, I decline your request, very much bearing in mind as I do so the provisions of Section 95(3) of the Act.

Assuming you receive instructions to proceed with the process available to you under Section 95(2) of the Act, I express the hope there will be little delay in you doing so. As I alluded to earlier, if you take that step, I will take comfort in knowing that a Justice of the Manitoba Court of Appeal will have the final say on whether I must state the case you have requested. It is an uncomfortable position for me to be in but as Freedman J.A. said, I am not required to make the decision requested of me as "a mere automaton". I have followed that instruction in arriving at my decision.

Yours truly,



E.N. (Ted) Hughes,
Commissioner

cc: Counsel for all Parties with Standing or intervenor Status