

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

MOTION BRIEF OF INTERTRIBAL CHILD AND FAMILY SERVICES (ICFS)

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PART I – LIST OF DOCUMENTS TO BE RELIED UPON

1. Affidavit of Shirley Cochrane, affirmed April 3, 2012 (**Tab 1**);
2. Order in Council No. 89/2011, March 23, 2011 (**Tab 2**);
3. Order of Chief Justice Joyal, 21 October, 2011 (**Tab 3**);
4. Affidavit of Janet Kehler, affirmed June 27, 2011, (filed by the Manitoba Government Employee’s Union (“MGEU”));
5. Affidavit of Evelyn Wotherspoon, sworn March 29, 2012 (filed by the MGEU);
6. Affidavit of Elizabeth McLeod, sworn April 3, 2012 (filed by the MGEU);
7. Affidavit of Bruce Rivers, sworn/affirmed March 30, 2012 (filed by the Authorities and ANCR);
8. Affidavit of Cheryl Regehr, sworn/affirmed March 30, 2012 (filed by the Authorities and ANCR).

PART II – LIST OF AUTHORITIES TO BE RELIED UPON

- Tab 4** *The Child and Family Services Act*, C.C.S.M. c. C80, [excerpt only];
- Tab 5** *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41 (CanLII);
- Tab 6** *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 (CanLII);
- Tab 7** *Toronto Star Newspaper Ltd. v. Ontario*, 2012 ONCJ 27 (CanLII);
- Tab 8** *Episcopal Corporation of the Diocese of Alexandria-Cornwall v. Cornwall Public Inquiry*, 2007 ONCA 20 (CanLII) [excerpt only];
- Tab 9** *Amended Rules of Procedure and Practice*, Rule 43;
- Tab 10** *Fatality Inquiries Act*, C.C.S.M. c. F52, [excerpt only];
- Tab 11** *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3.;
- Tab 12** *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4 (CanLII); and
- Tab 13** *Infant (Re)*, 1981 CanLII 605 (BC SC).

PART III – POINTS TO BE ARGUED

OVERVIEW

1. Intertribal Child and Family Services (“ICFS”) is seeking an order limiting the publication of the names and physical appearances of all of its workers testifying or mentioned during the Commission of Inquiry on the Circumstances Surrounding the Death of Phoenix Sinclair (“Inquiry”).
2. It is in the best interests of children and families involved, or potentially involved, the child and family services system (“CFS system”) necessitates the granting of this order. Publication of the names or physical appearances of CFS workers will put children and families at risk.
3. ICFS is seeking a very limited restriction on the *publication* of workers names and physical appearances. A restriction on the publication of the names of workers will not impede in any way the Inquiry proceedings or the evidence presented through them during the Inquiry hearings.
4. ICFS is secondly seeking an order redacting from the Inquiry disclosure documents, the names and identifying information of children, children’s family members, foster parents and sources of referrals that are not relevant to the Inquiry. This information is otherwise protected by the confidentiality provisions of the *Child and Family Services Act* (“*CFS Act*”) and their rights to privacy should be respected. As those names of not relevant to the Inquiry, redaction will have no impact on the Inquiry proceedings.

5. ICFS is lastly seeking an order prohibiting the “live” broadcasting of the Inquiry for the reason that names of individuals otherwise protected under the confidentiality provisions may be accidentally mentioned during the Inquiry proceedings. “Live” broadcasting would make moot any attempt to subsequently restrict the publication of those names.

6. For the purpose of avoiding unnecessary duplication, this brief is filed in addition to the legal arguments already submitted by the MGEU. ICFS will also be referring to the MGEU’s brief during the oral hearings.

FACTS

7. ICFS relies on the facts as set out in the affidavit of Shirley Cochrane, affirmed April 3, 2012, and of the documents relied upon, set out above.

ISSUES

8. ICFS raises the following questions:
 - a. Whether the best interests of children necessitate a limited restriction on the publication of the names and physical appearances of ICFS workers testifying during the Inquiry?
 - b. Whether the names of children and their family members, foster parents, sources of referrals as well as identifying information for any of the mentioned-persons that are not relevant to the Inquiry, should be redacted prior to being introduced into evidence during the Inquiry?
 - c. Whether “live” broadcasting of the Inquiry, in any form, should be prohibited?

WRITTEN ARGUMENTS

A. Whether the best interests of children necessitate a limited restriction on the publication of the names and physical appearances of social workers testifying during the Inquiry?

9. ICFS submits that there exists a serious risk that children will be at risk if the names and physical appearances of social workers are published. Primary consideration must be given to the best interests of the child when determining whether or not to grant the limited restriction on publication sought by the Applicant. Given the evidence establishing the increased risk of harm to children, and in the context of the *Child and Family Services Act*, C.C.S.M. c. C80 (the “*CFS Act*”) and its strict confidentiality provisions, the best interests of the child necessitates the granting of the order sought.

The media does not have an absolute right to publication of the Inquiry proceedings.

10. It is settled law that the media does not have an unfettered right of access to court documents or unrestricted publication of court proceedings.

The CFS Act, s. 75 at Tab 4;

Toronto Star Newspapers Ltd. v. Ontario, 2005 SCC 41 (CanLII) [hereinafter “*Toronto Star (2005)*”] at Tab 5;

Sierra Club of Canada v. Canada (Minister of Finance), 2002 SCC 41 (CanLII) [hereinafter “*Sierra Club*”] at Tab 6;

Toronto Star Newspaper Ltd. v. Ontario, 2012 ONCJ 27 (CanLII) [hereinafter “*Toronto Star (2012)*”] at Tab 7.

11. The media equally does not have such unfettered rights at a public Inquiry.

Episcopal Corporation of the Diocese of Alexandria-Cornwall v. Cornwall Public Inquiry, 2007 ONCA 20 (CanLII) [hereinafter “Cornwall Inquiry”] at Tab 8.

12. ICFS submits that the Commissioner may, where necessary and in the interests of the administration of justice, make any order restricting the publication of evidence tendered during the Inquiry.

Amended Rules of Procedure and Practice, Rule 43 at Tab 9

The Dagenais/Mentuck test is the appropriate test.

13. The proper test in determining whether the Commissioner should grant a limited restriction on publication is the *Dagenais/Mentuck* test.

Cornwall Inquiry, Supra, at paragraph 50.

14. The *Dagenais/Mentuck* test provides that discretionary action to limit freedom of expression in relation to judicial proceedings encompasses a broad variety of interests and that a publication ban should only be ordered when:

- (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
- (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

Toronto Star (2005), Supra, at paragraph 26.

15. Three important elements are subsumed under the “necessity” branch:
- a. The risk in question must be a serious risk well grounded in the evidence;
 - b. The phrase “proper administration of justice” must be carefully interpreted so as not to allow the concealment of an excessive amount of information;
 - c. The test requires the judge ordering the ban to consider not only whether reasonable alternatives are available, but also to restrict the ban as far as possible without sacrificing the prevention of the risk.

Sierra Club, Supra, paragraph 46.

16. The proper administration of justice will not necessarily involve *Charter* rights, and the ability to invoke the *Charter* is not a necessary condition for a publication ban to be granted. The test is flexible and contextual; it also allows for the possibility of a publication ban where interests other than the administration of justice are involved.

Sierra Club, Supra, paragraph 47.

17. The onus lies on the party seeking to displace the general rule of openness.

The Dagenais/Mentuck test must be applied in the context of the Child and Family Services Act

18. ICFS submits that the context of CFS proceedings should be considered in determining the issues now before the Commissioner.

19. The CFS system operates under the protection of confidentiality.

20. CFS documents, including child protection files, are confidential and cannot be released without a court order.

CFS Act, Supra, s. 76(3)

21. Sealed records cannot be opened by the agency in custody of those records and can only be unsealed by court order.

CFS Act, Supra, s. 76(14)

22. Sources of referral (those reporting child protection concerns to a CFS agency) are kept confidential.

CFS Act, Supra, s. 18.1(2)

23. Court proceedings are not subject to the strict rules of evidence and there is no discovery of documents in CFS matters.

CFS Act, Supra, ss.32(3) & 36

24. Reports prepared under s.4 of *CFS Act* are confidential, as are reports prepared under s.10 of the *Fatality Inquiries Act*.

CFS Act, Supra, s. 76(3) & Fatality Inquiries Act, C.C.S.M. c. F52 at Tab 10, s.10(3)

25. All child protection proceedings under the *CFS Act* are subject to very strict publication restrictions. While the media may attend Court proceedings, publication of names of children, parents, family members and workers is restricted.

CFS Act, Supra, ss. 75 & 76

26. ICFS submits that the purpose and need for confidentiality is apparent and requires little explanation. It is in the best interests of the children and families to respect and protect the privacy of all parties involved. Confidentiality and privacy ensures that resources are focused on the needs of the children and families.

27. Social workers are hired with the understanding that their privacy will be protected and that they can focus their attention and energies to fulfilling the goals of the *CFS Act*.

Affidavit of Shirley Cochrane at Tab 1, paragraph 44.

28. This Inquiry is a complete break from the traditional rules of confidentiality and privacy as well as the rules of disclosure of evidence in CFS matters.

29. ICFS accordingly submits that the contextual approach in applying the *Dagenais/Mentuck* test lends to a more restrictive approach to media publication and that diversion from the existing rules and practice with respect to disclosure and publication should be minimized.

Risk to children is a serious risk to the proper administration of justice

30. The first step of the *Dagenais/Mentuck* test requires that the order sought is “necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk.”

***Sierra Club, Supra*, at paragraph 58.**

31. The phrase “risk to the administration of justice” in the *Dagenais/Mentuck* test is interpreted broadly and includes the “risk to the administration of the child and family services system”. The “risk to the administration of the child and family services system” in the case at hand relates to ensuring the protection and the best interests of children.

Sierra Club, Supra.

32. The evidence before this Inquiry clearly demonstrates a serious risk to administration of the child and family services system. The affidavit material provides a plethora of risks that all impact the protection and the best interests of children, which include:

- a. The general public, which plays an integral role by reporting children in need of protection to CFS Agencies and by providing foster homes or other services to CFS Agencies, will be resistant to contact workers known to have been involved with Phoenix Sinclair or to expose themselves to the stigma of being involved in or supporting the CFS system;
- b. Families currently involved with witnesses will become withdrawn and resistant to cooperation with CFS Agencies;
- c. CFS Agencies will suffer in their ability to recruit and retain qualified social workers;
- d. The ability of CFS workers to perform their jobs will suffer due to stress, morale, and the perceived need to prevent such a case from happening again by apprehending children in circumstances when best practices would not require apprehension;
- e. An increase of the risks of violence when apprehending children, which would place both social workers and children at risk.

Affidavit of Shirley Cochrane, affirmed April 3, 2012, at paragraphs 21, 23, & 32 – 46;

Affidavit of Janet Kehler, affirmed June 27, 2011, at paragraphs 17, 18, 23, 24, 32 – 38, 45 – 46, & 48;

Affidavit of Evelyn Wotherspoon, sworn March 29, 2012, at the last paragraph of page 3 and the first paragraph of page 4 of Exhibit “B”;

Affidavit of Elizabeth McLeod, sworn April 3, 2012, at paragraphs 10 – 11, & 16;

Affidavit of Bruce Rivers, sworn/affirmed March 30, 2012, at paragraphs 17 – 20, 23 – 26, & 30;

Affidavit of Cheryl Regehr, sworn/affirmed March 30, 2012, at paragraphs 11 – 14, 20, 23 – 27, 30, 32 – 34;

Intertribal is seeking only very minimal restriction on reporting on the Inquiry

33. ICFS submits that there exist no alternative measures to the restriction on publication sought by ICFS.

34. It is submitted that the restriction on publication is very minimal and will not impact Inquiry proceedings or the substantive evidence available to the public. ICFS is only seeking that the names and physical appearances of its workers be omitted from any publication. Publicizing the names of workers is not necessary to fulfill the Inquiry’s mandate; the evidence will be entered uninhibited and complete.

35. The rights of the press and will not be impaired more than is necessary. The preservation of public access and public accountability will be maintained. The media and members of the public will be able to attend the Inquiry and observe

the testimony of social workers. There is no restriction on interviews or to exhibits apart from the redactions sought. The transcript of social workers' testimony will be available to the public through the Inquiry website. It is only the names of the social workers that cannot be published.

The salutary effects of the order sought outweigh its deleterious effects

36. ICFS submits that the salutary effects of granting the order sought outweigh its deleterious effects. The predominant salutary effects are that the administration of the child and family services system will be promoted and the risks to children will be reduced. The deleterious effect is a very minimal restriction on the right of the media to publish the names and appearances of social workers; the names of workers will still be known to all members of the public who attend the Inquiry hearings, they simply will not be published by the media. There is no effect on access to evidence relevant that will be introduced through social workers – the public will have full access to the details surrounding the death of Phoenix Sinclair.

The best interests of children must be given primary consideration when applying the *Dagenais/Mentuck* test.

37. The determining factor when applying the *Dagenais/Mentuck* test is the best interests of the child. Pursuant to Article 3 of the *United Nations Convention on*

the Rights of the Child (“*Convention*”), to which Canada is a signatory, this Inquiry must consider the best interests of the child in making its decision on this motion:

Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

Convention on the Rights of the Child, Can. T.S. 1992 No. 3. at Tab 10

38. The “best interests of the child”, as defined in the *Convention*, is an established legal principle and is codified in the *CFS Act*. While the protection of children is a universally accepted goal, the best interests of the child do not always trump other considerations; the weight given to the best interests of the child is dependent on the circumstances of each case.

Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General), 2004 SCC 4 at Tab 11, at paragraph s 7-12;

CFS Act, section 2.

39. This matter at hand is clearly an action concerning children. Paragraph 2 of the Order in Council establishing this Inquiry requires the Commissioner to make recommendations for the better protection of children in Manitoba. ICFS’ motion for a limited restriction on publication is for the protection of children. Accordingly, the Commissioner must consider the best interests of the child in making his decision.

40. ICFS further submits that, in the case at hand, best interests of the child overrides all other relevant factors. The salutary effects of the very limited restriction on publication greatly outweigh the deleterious effects of the rights of the public. The evidence firmly establishes that the risk to children will be seriously elevated with the publication of workers' names. On the other hand, the freedom of the press and the rights of the public are only marginally curtailed. As discussed above, the public will have access to all relevant evidence tendered during the Inquiry; it is only the publication of the names and physical appearances of workers that will be restricted.

41. ICFS accordingly submits that the Commissioner should grant an order restricting the publication of the names and physical appearances of CFS workers testifying at the Inquiry and that such an order is appropriate in the circumstances of this case.

B. Whether the names of children and their family members, foster parents, sources of referrals as well as identifying information for any of the mentioned-persons that are not relevant to the Inquiry, should be redacted prior to being introduced into evidence during the Inquiry?

42. ICFS seeks an order that the names and identifying information of children and their family members, foster parents and sources of referrals that are not relevant to the Inquiry ("non-relevant information") be redacted from all documents to be tendered into evidence during the Inquiry.

43. The non-relevant information in question is confidential under s.76 of the *CFS Act* and is not otherwise disclosable to the public. The fact that this information is mingled with evidence that is relevant to the Inquiry does not remove the protection of confidentiality. The Commission remains bound to terms of the Order in Council, which are to inquire into the circumstances surrounding the death of Phoenix Sinclair.

**Order in Council at Tab 2, paragraph 1,
Order of Justice Joyal, 21 October, 2011 at Tab 3;
CFS Act, section 76(3);
Infant (Re), 1981 CanLII 605 (BC SC) at Tab 12.**

44. ICFS further submits that a child's breach of privacy is a serious risk to the proper administration of justice and the salutary effects of the privacy of the child greatly outweigh the deleterious effects on the rights and interests of the parties and the public.

Toronto Star (2012), Supra.

45. ICFS submits that the Commissioner, in his Ruling on Redactions, acknowledges the importance to maintain the confidentiality of both informants and of children who were 18 years of age or younger at the time a record was created.

Commissioner's Ruling on Redaction, December 2, 2012, pages 8-9.

46. ICFS submits that, in addition to redacting the names of children who were 18 years of age or younger at the time a record was created, all identifying

information and names of a child's family members, including parents and extended family members who are not relevant to the Inquiry, should also be redacted. Disclosure of those names serves no purpose to the Inquiry and could compromise an informant or the privacy of a child who was 18 years of age or younger at the time a record was made. The privacy rights and the confidentiality provisions provided under the *CFS Act* and the *Freedom of Information and Privacy Protection Act* C.C.S.M. c. F175, should, where practicable, be maintained.

C. Whether “live” broadcasting of the Inquiry, in any form, should be prohibited?

47. ICFS submits that “live” broadcasting of the Inquiry, in any form, hearings should be prohibited.

48. There is a real possibility that names of children, families, foster parents and sources of referrals not relevant to the Inquiry and otherwise subject to confidentiality provisions of *CFS Act*, will be disclosed during testimony. This disclosure may arise in direct response to questioning or out of error. In either event, names of individuals not relevant to the Inquiry and subject to the confidentiality provisions of the *CFS act* should not be published, for similar reasons as those in favour of redacting the Inquiry disclosure documents.

49. ICFS submits that the Inquiry should minimize exposure to this risk and accordingly not allow “live” broadcasting in order to make proper directions or orders not to publish those names, if and when they are accidentally mentioned during testimony. This is a minimal restriction to the media, which will in no way impede the public’s right to access to the Inquiry while protecting “innocent” parties with no connection to the subject matter of the Inquiry.

PART IV - CONCLUSION

50. ICFS is seeking a very limited restriction on the publication of the Inquiry proceedings. The risks to the administration of the child and family services system and specifically to the protection of children in Manitoba must be given primary consideration. The effect of the publication order sought is extremely minimal; public access and accountability will still be preserved with the granting of this order.
51. The names and identifying information of children who were 18 years of age or under the age of 18 at the time a document was created, the children's family members, foster parents, and sources of referrals, that are not relevant to the Inquiry, should be redacted from any documents entered as evidence during the Inquiry. Those names remain confidential under the *Child and Family Services Act*, and it is interests of preserving the child and family services system, that those names not become disclosed during the Inquiry.
52. "Live" broadcasting of the Inquiry hearings should be prohibited to avoid the publication of names of individuals (not relevant to the Inquiry) subject to the strict confidentiality provisions under the *Child and Family Services Act*. This is necessary to maintain the integrity of the child and family services system.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 4th DAY OF APRIL, 2012.

A handwritten signature in black ink, appearing to read 'Hafeez Khan' followed by a large, stylized flourish.

HAFEEZ KHAN / JAMES BENSON

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