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

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

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Transcript of Proceedings
Public Inquiry Hearing,
held at the Winnipeg Convention Centre,
375 York Avenue, Winnipeg, Manitoba

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TUESDAY, MARCH 12, 2013

APPEARANCES

MS. S. WALSH, Commission Counsel
MS. K. MCCANDLESS, Associate Commission Counsel
MR. R. MASCARENHAS, Associate Commission Counsel

MR. G. MCKINNON and **MR. S. PAUL,** for Department of Family Services and Labour

MR. T. RAY, for Manitoba Government and General Employees Union

MR. K. SAXBERG and **MR. S. SCARCELLO,** for 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

MR. H. KHAN and **MR. J. BENSON,** for Intertribal Child and Family Services

MR. J. GINDIN and **MR. D. IRELAND,** for Mr. Nelson Draper Steve Sinclair**,** and Ms. Kimberly-Ann Edwards

MR. J. FUNKE and **MS. J. SAUNDERS,** for Assembly of Manitoba Chiefs and Southern Chiefs Organization Inc.

MR. W. GANGE and **MS. K. BOMBACK**, for DOE #1, DOE #2, DOE #3 and DOE #4

MR. A. LADYKA, for Ms. Jan Christianson-Wood

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MARCH 12, 2013

PROCEEDINGS CONTINUED FROM MARCH 11, 2013

THE COMMISSIONER: Two motions are before me. The first is a motion filed on behalf of witnesses identified as DOE #1, DOE #2, DOE #3 and DOE #4. The relief sought in the first motion is for an order, one, that I prohibit any form of publishing, broadcasting or otherwise communicating by television, internet, radio, in print or by any other means the name, face or identity of witnesses DOE #1, DOE #2, DOE #3 and DOE #4.

Two, that I order that DOE #1, DOE #2, DOE #3 and DOE #4 provide their testimony by means of video conferencing, the video portion of which shall be visible only to me and the audio portion of which shall be audible in the hearing room.

And three, that the witnesses be referred to, for the purpose of this hearing, as DOE #1, DOE #2, DOE #3 and DOE #4.

After filing the motion for a publication ban on behalf of DOES #1, #2, #3 and #4, counsel for DOE #3 filed a further motion to have DOE #3 declared a source of referral, SOR, in the context of this inquiry, along with a request for a publication ban with respect to DOE #3's testimony in the same form as requested in the first

motion.

The two motions are opposed by Intertribal Child and Family Services, ICFS, and the Assembly of Manitoba Chiefs and the Southern Chiefs Organization, AMC/SCO.

ICFS has filed affidavit evidence in response and counsel for ICFS conducted a cross-examination on the affidavit of DOE #3. Counsel for the AMC/SCO attended the cross-examination. The transcript of the cross-examination has been filed with the Commission.

ICFS and AMC/SCO have filed briefs in opposition to the two motions filed. The media group has not taken any position with respect to the two motions before me.

Each of DOES #1, #2, #3 and #4 has provided direct evidence in support of the first motion. In their affidavits they set out the concerns they have should their identity be made known when they are called to testify in this inquiry. The affidavit evidence is as follows:

(a) Affidavit of DOE #1

DOE #1 is the son of Wes McKay. He testified at the criminal trial of Wes McKay and Samantha Kematch. DOE #1 was 12 years old at the time that he observed Phoenix Sinclair with Wes McKay and Samantha Kematch. DOE #1 found testifying at the criminal trial very stressful. Following the arrest of Wes McKay for the murder of Phoenix Sinclair, he experienced harassment from people who knew he was a

child of Wes McKay. DOE #1 is currently employed and no one connected with his employment is aware that he is related to Wes McKay. DOE #1 states that he has serious concerns that his mental health, physical health and safety may be affected if he has to testify at the inquiry without a publication ban.

(b) Affidavit of DOE #2

DOE #2 is a child of Wes McKay and testified at the criminal trial of Wes McKay and Samantha Kematch. As his counsel, Mr. Gange, mentioned in his oral submissions, DOE #2 is a brother of DOE #1. DOE #2 was 14 years old at the time that he observed Phoenix Sinclair with Wes McKay and Samantha Kematch. DOE #2 found testifying at the criminal trial very stressful. Like DOE #1, DOE #2 has always said that he experienced harassment from people who knew he was a child of Wes McKay. DOE #2 is currently attending school and his evidence is that no one connected with his schooling is aware that he is related to Wes McKay. DOE #2 believes that his mental health, physical health and safety may be affected if he has to testify at this inquiry without a publication ban.

(c) Affidavit of DOE #3

DOE #3 is the mother of DOE #1 and DOE #2. She was in a common-law relationship with Wes McKay for approximately seven years. DOE #3 testified at the

criminal trial of Wes McKay and Samantha Kematch, which she found very stressful as she was concerned about possible retribution that might result to her because of her testimony. DOE #3 states, like DOE #1 and DOE #2, that following the arrest of Wes McKay for the murder of Phoenix Sinclair, she experienced instances of bullying and harassment from people that knew of her relationship to Wes McKay. DOE #3 is currently employed and no one at her place of employment is aware of her relationship to Wes McKay. She is very concerned about the health and safety of DOE #1 and DOE #2 as they suffer, from time to time, from anxiety and depression. DOE #3 also states that she has serious concerns that her mental health, physical health and safety may be affected if she has to testify at the inquiry without the protection of a publication ban.

In cross-examination on her affidavit conducted by Mr. Khan, counsel for ICFS, DOE #3 gave evidence that she is concerned about the possibility of losing her job if her employer was to learn of her former relationship with Karl Wesley McKay.

(d) The affidavit of DOE #4

DOE #4 is a child of Wes McKay and has four children under the age of 10 who do not know that their grandfather was convicted of the murder of Phoenix Sinclair. DOE #4 does not wish to have this information

made known to them at this time. DOE #4 further states:

> "When Wes McKay was charged with the murder of Phoenix Sinclair I experienced harassment from people who knew that Wes McKay was my father. As a result, I do not tell people that I am a child of Wes McKay."

As well, at paragraphs 6 and 7 of the affidavit, she states:

> "I have very, very serious concerns that if I am identified during my testimony at the inquiry, my children will experience instances of harassment, bullying, verbal and physical assaults. I require a publication ban to protect my own safety and to prevent my children from being put at risk as a result of my appearance at the inquiry."

There is also before me the affidavit of Kalyn Bomback. In support of the second motion for a declaration that DOE #3 is a source of referral, counsel for DOE #3 has filed the affidavit of Kalyn Bomback, a lawyer employed by his firm. The affidavit attaches an excerpt of a document which is a record of a phone call that DOE #3 made to a Child and Family Services worker employed by ICFS on March 6, 2006. The document references DOE #3 as the "referral source" and identifies that the issue presented by DOE #3 to the ICFS worker was the physical abuse of a five-year-old female.

There is also before me the affidavit evidence filed by ICFS, being the affidavit of Bobbie Rachelle Lee, filed in opposition to the two motions. The affidavit attaches a number of exhibits, including news reports created at the time of the criminal proceedings against Karl Wesley McKay and Samantha Kematch. Those news reports refer to DOES #1, #2 and #3 by name. Ms. Lee's affidavit also attaches an excerpt of DOE #3's testimony at the criminal proceedings and records of a phone call that DOE #3 made to the Winnipeg Police Service on March the 6th, 2006 in which DOE #3 advised the police that her sons may have witnessed a murder that occurred on the Fisher River Reserve.

I now return to the arguments advanced by the

applicants and respondents on the two motions before me. In his brief and in oral argument, counsel for DOES #1, #2, #3 and #4 has argued on behalf of his clients that a publication ban is necessary to protect his clients' own safety and wellbeing. He argues that his clients have legitimate concerns that revealing their identity in the context of these proceedings will subject them to certain risks.

In the context of the application to have DOE #3 declared a source of referral, counsel has also argued that the evidence shows that DOE #3 is, in fact, an SOR and ought to have been identified as such early in the course of the inquiry. Counsel for DOE #3 further argues that because DOE #3 is an SOR, she is entitled to certain protections pursuant to the Child and Family Services Act, CCSM Chapter 80, which I will discuss in further detail later in these reasons.

Counsel for ICFS focuses his client's main opposition to these motions on an argument that the matters are res judicata. The doctrine of res judicata generally holds that a litigant is estopped from bringing forth an issue or cause of action on a matter that has already been decided in a previous proceeding. Counsel for ICFS clarified that his argument with respect to res judicata was not applicable to DOE #4.

Counsel for ICFS has also argued that DOES #1, #2, #3, #4 have failed to meet the legal test establishing the basis for a publication ban. He argued that the identity of DOES #1, #2, #3 and #4 is already known as a result of their testimony at the criminal trial. Counsel for ICFS further argued that DOE #3 is not an SOR or informant as defined in the Child and Family Services Act.

Counsel for AMC/SCO supported the submission of counsel for ICFS and placed great emphasis on his position that DOE #3 is not a source of referral under the Child and Family Services Act.

I will address each of these points in turn but will begin by addressing the argument that has been advanced that these matters a res judicata.

The doctrine of res judicata is described by the Manitoba Court of Appeal in Glenko Enterprises v. Keller, 2008 M.B.C.A. 24, and I quote:

> "Res judicata has two distinct forms: issue estoppel and cause of action estoppel. Donald J. Lange, in his leading text, The Doctrine of Res Judicata in Canada, 2nd ed. (Markham: LexisNexis Canada Inc., 2004),

> explains the differences (at pp. 1-2):
>
> .... issue estoppel means that a litigant is estopped because the issue has clearly been decided in the previous proceedings, and cause of action estoppel means that a litigant is estopped because the cause has passed into a matter adjudged in the previous proceeding."

ICFS argues that DOES #1, #2 and #3 are estopped from bringing their motion based upon the application of the issue estoppel form of res judicata.

In Glenko, the Manitoba Court of Appeal held that in order for issue estoppel to apply, the following three requirements must be satisfied:

> "(1) the same question has been decided in both actions;
>
> (2) the judicial decision which is said to create the estoppel was final; and
>
> (3) the parties to the judicial

> decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised ..."

ICFS argues that all three requirements for issue estoppel have been satisfied with respect to the publication ban. ICFS' argument is that my ruling on redactions dated December 2, 2011 dealt with the same matter that I am being asked to decide in this motion for a publication ban by DOES #1, #2 and #3. Essentially, they argued the same question has been decided in both actions.

The purpose of my ruling on redactions on December the 2nd, 2011, was to deal with certain classes or categories of information that ought to be redacted prior to having the documents distributed internally amongst counsel for the parties and intervenors in this Commission. This was not a determination of what information was to ultimately make its way into the public record. This is further evidenced by the fact that subsequent to my ruling on redactions I received and adjudicated upon motions for publication bans brought by some of the parties to this inquiry, which I heard in July of 2012 and for which I gave a ruling on July 12th, 2012. This included a motion for a publication ban on the identity of social workers brought

by counsel for them.

These previous publication ban motions were requests for a ban on any form of publication or broadcasting of the identity of any social worker called to testify as a witness in the public hearing phase of the inquiry. This was a separate process which dealt with a different question than that dealt with in my ruling on redactions. ICFS' argument, therefore, fails to note the distinction between the two separate processes.

Counsel for ICFS also argued that either one or both of my rulings on redactions of December 2, 2011 and my adjudication of July 11, 2012 on these earlier motions amount to a final decision which was meant to be conclusive and applied to the inquiry proceedings. They also argue that the applicants had an opportunity to apply for a form of a confidential status at any time of my ruling on redactions and the publication ban hearing and they failed to do so.

Mr. Gange, in his submissions, argued that the matter could not have been decided because none of DOES #1, #2 and #3 made any application for a publication ban either in July of 2012 or at any other time. I agree with counsel for the applicants. No application for confidentiality was brought on behalf of DOES #1, #2 and #3 in regards to either my ruling on redactions or my ruling on publication

ban. The matter was, therefore, not adjudicated nor was a decision given. As such, it cannot be said that the matter was decided and it follows that no final determination could have been made. For these reasons, I find that the doctrine of res judicata does not apply to the motion for a publication ban brought by the applicants.

The respondent also argues that res judicata applies to the motion by DOE #3 in which she seeks to be declared a source of referral. For reasons set out below, I do not need to rule on that issue.

I now turn to the arguments advanced by the applicants and respondents on the substantive issues in these motions, first with respect to the motion for a publication ban brought on behalf of DOES #1, #2, #3 and #4 and then to the motion declaring DOE #3 an SOR and the relief sought as a result of it.

My analysis of the substantive arguments in the motion filed by DOES #1, #2, #3 and #4 for a publication ban requires that I conduct what has become known as the Dagenais/Mentuck analysis.

In my ruling on publication bans of July 12th, 2012, I set out the legal test that applies in the case of a request for a publication ban as follows, and I quote:

> The Supreme Court of Canada has

> held that the Dagenais/Mentuck analysis applies to all discretionary orders that limit freedom of expression and freedom of the press in relation to legal proceedings, Toronto Star Newspapers Ltd. v. Ontario 2005 S.C.C. 41, paragraph. 7.

The applicants and respondents to these motions have agreed that this is the analysis to be applied by me in adjudicating on the relief requested by the applicants. The Dagenais/Mentuck analysis provides that a publication ban may only be ordered when

(1) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonable alternative measures will not prevent the risk; and

(2) 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 rights to free expression, the right to a fair trial and the efficacy of the administration of justice.

I went on to say in my July ruling as follows:

> "In R. v. Mentuck it was recognized that the test should be applied in a case-specific manner. R. v. Mentuck is also clear as to the evidentiary standard in applications such as those before me. The onus lies on the party seeking to displace the general rule of openness. There must be a convincing evidentiary basis for issuing a ban. Paragraphs 34 of R. v. Mentuck makes clear the type of evidence that is required in order to displace the general rule:"

And the court in that instance said this:

> "...One required element is that the risk in question be a serious one or, as Lamer C.J. put it at p. 878 in Dagenais, a 'real substantial' risk. That is, it must be a risk the reality of which is well-grounded in the

> evidence. It must also be a risk that poses a serious threat to the proper administration of justice. In other words, it is a serious danger sought to be avoided that is required, not a substantial benefit or advantage to the administration of justice sought to be obtained."

The court, in R. v. Mentuck recognized that there may be cases that raise interest other than the administration of justice for which a similar approach would be used, see, e.g., Sierra Club of Canada v. Canada (Minister of Finance), 2002 S.C.C. 41.

All counsel appearing here are in agreement that the Dagenais/Mentuck is the appropriate analysis to apply in determining whether DOES #1 to #4 ought to be granted the publication bans they seek. The Dagenais/Mentuck analysis is meant to be applied in a flexible and contextual manner.

In considering the context in which each of DOES #1, #2, #3 and #4 will be called to give evidence, I would note that these individuals are not being called to give evidence about work performed in the course of a public

duty, unlike the social workers who applied for a publication ban in July of 2012. DOES #1, #2, #3 and #4 are being called to testify in their personal capacities as a result of their familial association with Karl Wesley McKay. DOE #1 and DOE #2 were children during the time they saw Karl McKay and Samantha Kematch interact with Phoenix Sinclair.

I also note that in contrast with the evidence that was tendered on behalf of the social workers in their application for a publication ban last July, each of DOES #1, #2, #3 and #4 has provided their own firsthand affidavit evidence in support of their motion. The nature of this evidence was summarized by their counsel in his brief as follows:

> "2. The four witnesses all have a connection with Wes McKay. Three are his children. One is a former common-law spouse. Certain of the witnesses may provide evidence that comments to a limited extent upon the child welfare system. The main purpose of their evidence will be, however, to comment upon the relationship of Phoenix

> Sinclair with Wes McKay and Samantha Kematch. It is expected that their evidence will help the Commissioner appreciate to a greater degree the life of Phoenix Sinclair during the final few months of her life.
>
> 3. The application is brought by all of the witnesses with respect to their own safety and well-being. In addition, witness DOE #4 brings the application as a result of a parent's concern to protect their own children."

Each of these witnesses has raised a concern about health and safety risks resulting from publication of their identities in the context of this inquiry. DOE #4 has raised a concern about potential risk to her children. I accept that as stated in paragraph 111 of my ruling on publication bans of July 12th, 2012 that where there is significant evidence of a potential for harm arising out of the publication of a witness' identity, a publication ban may be ordered. See R. v. Morin 1997 Carswell Ontario 400. A risk to personal health or safety is the type of "serious

risk" sufficient to fulfill the first branch of the Dagenais/Mentuck analysis.

Based on the direct affidavit evidence before me, I find that there is a risk to the personal health and/or safety that could result from revealing the identities of DOES #1, #2, #3 and #4 to the public in the context of their inquiry testimony.

Each of the witnesses has given their own evidence that they have previously experienced instances of harassment as a result of their connection to Karl Wesley McKay. I find that their concerns that they might be subject to further instances should they be identified in this most public inquiry are legitimate. I further accept, as was suggested by counsel for the applicants in his oral submissions, that these four witnesses have been damaged by their association with Karl Wesley McKay and to subject them to publicity in this inquiry would be to victimize them further.

The second branch of the Dagenais/Mentuck analysis requires that I examine whether the salutary effects of a publication ban outweigh the deleterious effects on the rights and the interests of the parties and the public, including the effects on the rights of free expression and the efficacy of the administration of justice. The salutary effect of the ban being sought by

DOES #1, #2, #3 and #4 is a reduction in the potential risk to their health and safety, as previously identified. These individuals will also be able to carry on their daily lives, their employment and schooling without the stigma of being widely known as a relative of Karl Wesley McKay.

The potential deleterious effects of the bans sought are reduced by the fact that for each of these witnesses their specific relationship to Karl Wesley McKay and all aspects of their evidence, other than their identities, will be fully reported on. The only thing that the public will not see is these individuals' names and images. I disagree with the submissions of counsel for ICFS that this is an extreme ban. This evidence of DOES #1, #2, #3 and #4 will be fully reported on as will their familiar association with Karl Wesley McKay. I therefore find that the salutary effects of the publication ban outweigh any of its deleterious effects.

The law of this country as it is enacted and applied has, as it should, a tough side to it. That was displayed by the verdict of the jury and the sentencing by the trial judge that sent Karl Wesley McKay and Samantha Kematch to prison for the rest of their lives, denying them the liberty and the freedom enjoyed by law-abiding citizens. That same law, as it is enacted and applied, also has, as it should, a compassionate side. That I

believe has been displayed in the reasoning I have expressed in concluding that the two requirements of the Dagenais/Mentuck test have been met and satisfied, thus allowing me to grant, as I now do, a publication ban for each of DOES #1, #2, #3 and #4 on the terms requested in the first motion, terms that are deemed to include the points advanced yesterday by Mr. Kroft when addressing the inquiry as counsel on behalf of certain media outlets.

A consequence of what I have just ordered is that reference to the names of any of these individuals will need to be redacted from documents to be entered into evidence at the public hearings of this inquiry. Counsel for ICFS has pointed out that there are some instances in which the names of some of the individuals have already been entered in the public record at this inquiry. I would direct Commission counsel to ensure that those documents are redacted as well to reflect my decision.

Given my decision on the first motion, I do not find it necessary to make the determination as to whether DOE #3 is a source of referral. I make the following comment, however: The arguments advanced by ICFS and AMCO/SCO in opposition to this motion centred around the fact that at the time that DOE #3 made a telephone call to ICFS in March 2006, Phoenix was already unfortunately deceased. As I understand their argument, the protections

afforded to sources of referral as found in Section 18 of the Child and Family Services Act do not apply when a person makes a report to an agency about a child who is no longer alive. I do have a concern about interpreting the provisions of the Child and Family Services Act narrowly, given that part of the Commission's mandate is to inquire into why the death of Phoenix Sinclair remained undiscovered for nine months. It was seen that such a narrow interpretation would not serve to encourage reporting cases such as Phoenix's to the appropriate authorities. This may well be something that I will address when I make recommendations in my final report on these proceedings.

Commission counsel can now make the necessary arrangements to have DOES #1 to #4 testify in accordance with the procedure I have sanctioned today. The timetable for that to occur will be circulated to Commission counsel subsequent to the directions I will deliver at 2:00 p.m. tomorrow in this room on the conflict of interest issue that is before me for resolution.

So that completes the proceedings for today, I believe. Commission counsel, is there anything else?

MS. WALSH: No, Mr. Commissioner.

THE COMMISSIONER: All right. We'll stand adjourned, then, till two o'clock tomorrow when I'll deal

with the other matter, as just indicated.

(PROCEEDINGS ADJOURNED TO MARCH 13, 2012)