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

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

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Ruling on Publication Ban

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Thursday, July 12, 2012

Appearances

Ms. S. Walsh **Ms. K. Mccandless**	Commission Counsel Associate Commission Counsel
Mr. G. Mckinnon	Department of Family Services and Consumer Affairs (now known as the Department of Family Services and Labour)
G. Smorang, Q.C.	Manitoba Government and General Employees' Union
Mr. K. Saxberg	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	Intertribal Child and Family Services
Mr. J. Gindin **Mr. D. Ireland**	Ms. Kimberly-Ann Edwards and Mr. Nelson Draper Steve Sinclair
Mr. J. Funke **Ms. J. Saunders**	Assembly of Manitoba Chiefs and Southern Chiefs Organization Inc.
Mr. G. Juliano **Ms. M. Versace**	University of Manitoba, Faculty of Social Work
Ms. V. Rachlis	SOR #1, SOR #2, SOR #4, PHN and TM
Mr. S. Paul	SOR #3
Mr. W. Gange	SOR #5, SOR #6 and SOR #7
Mr. J. Kroft **Ms. B. Chisick**	Canadian Broadcasting Corporation, CTV Winnipeg, Global Winnipeg and Winnipeg Free Press

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I. Introduction

1. The applicants, Manitoba Government and General Employees' Union (MGEU), 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 (Authorities/ANCR), and Intertribal Child and Family Services (ICFS), are parties with full standing in this inquiry. They have filed motions seeking publication bans for certain witnesses at the public hearings of this inquiry. While each of MGEU, Authorities/ANCR, and ICFS filed their own motions, at the conclusion of oral submissions on these motions, the applicants reached a consensus as to the specific relief they have sought. The applicants have asked for:

> An order prohibiting any form of publishing, broadcasting, or otherwise communicating by television, internet, radio, in print or any other means the name and/or image of any witness who is or was a social worker, and the name of any social worker identified in documents produced at the inquiry.

2. MGEU and ICFS also asked, in the alternative, that I grant an order prohibiting video or audio recording or broadcasting of testimony of social workers at the inquiry.

3. The Commission's media and communications protocol, which has applied to date, provides that in the absence of any orders restricting access, this inquiry's hearings will be open

to the public. Audio and video recording and broadcasting of the inquiry's proceedings, including live streaming, will be permitted.

4. The applicants' primary concern is that the public receiving information about this inquiry through the media not learn the name or see the image of a witness to whom the requested order would apply. In argument, counsel for the MGEU acknowledged that, if I were to grant the order it seeks, it would not be possible to prevent members of the public in attendance at the hearings from discussing or otherwise communicating the name of a witness called at the hearing.

5. In addition to the motions brought by the applicants, a number of other motions were brought, which I will address later in these reasons.

6. The applicants' motions are opposed by: a media consortium comprised of Canadian Broadcasting Corporation, CTV Winnipeg, Global Winnipeg, and The Winnipeg Free Press (the Media Group); by Ms. Kimberly-Ann Edwards and Mr. Nelson Draper Steve Sinclair (Edwards and Sinclair), who together have full party standing in this inquiry; and by Assembly of Manitoba Chiefs and Southern Chiefs' Organization Inc. (AMC/SCO), who each have a grant of intervenor standing in this inquiry, but who are represented by the same counsel.

7. The University of Manitoba, an intervenor in this inquiry, has made submissions in support of the applicants' motions.

8. It is accepted among all counsel on these motions that the appropriate analysis for me to apply in determining whether or not to grant the orders sought is *Dagenais/Mentuck*. Considerable will be said later in this decision about the application of this analysis.

9. The position of the applicants, in summary, is that a publication ban is necessary to protect the functioning of the child welfare system and the best interests of children. The position of those who opposed these motions is that the evidence does not establish that a publication ban is necessary to prevent a risk to the system or to children because no risk has been established, and that the nature of a public inquiry requires full disclosure.

II. The Evidence Filed by the Applicants and Respondents

A. General

10. A number of affidavits were filed by the applicants and by the Media Group on these motions. Cross-examinations on some of those affidavits have also taken place.

11. The Media Group filed a number of motions to strike portions of some of the affidavits filed by the applicants, and in one case, to strike the entire affidavit of Evelyn Wotherspoon, a witness brought forward by the MGEU. I have considered the motions brought by the Media Group, however, for the purposes of this application I have decided to consider all of the evidence filed. That said, whether the evidence filed meets the evidentiary requirements of the *Dagenais/Mentuck* analysis is another question altogether, and is the central question on these motions, which I will review later in these reasons.

12. Provided below is an overview of the affidavit evidence filed.

B. By the Applicants

1. MGEU

(a) Affidavit of Janet Kehler affirmed June 27, 2011

13. Ms. Kehler is a staff representative with MGEU and has held this position since 2006. She was previously employed in child welfare. In her first affidavit, she states that the social workers are strongly opposed to any television cameras used to broadcast their identity and testimony due to concerns about privacy, safety in the workplace, stress, morale, and the potential deterrence of other social workers coming forward to give evidence.

14. Ms. Kehler also states that publication would impact on social workers' ability to provide protection and services to children and families. She states that social workers deal with high risk and potentially violent situations, and that they often receive threats of violence and death threats. Since Phoenix's death came to light, stress is high and morale is low among social workers. Some clients of social workers have mentioned Phoenix in the course of speaking with the social workers.

15. Ms. Kehler also states that there are personal privacy implications in publishing workers' names, and that social workers attempt to make the nature of their work as private as possible. If identified, Ms. Kehler states that:

- Families may attempt to avoid social workers
- Families may incorrectly assume that their worker was responsible for Phoenix's death

- There is a potential for lack of cooperation by collateral agencies upon which social workers rely

16. She further states that there are policy reasons to protect the privacy of workers, found in s.75 of *The Child and Family Services Act*, and notes that there are restrictions on disclosure of information and identity of any person involved in child welfare proceedings.

(b) Affidavit of Janet Kehler affirmed April 4, 2012

17. Ms. Kehler's second affidavit attaches articles from online news reports, along with comments left by individuals in response to those articles, some of which are very critical of the MGEU and/or social workers. Ms. Kehler states that the media have allowed comments on their websites that are sensational.

18. Ms. Kehler states that she is concerned that social workers who testify may be unfairly painted with the same brush. She is extremely concerned for the safety and well-being of the workers involved in the more contentious and sensitive aspects of Phoenix Sinclair's file. She states that many workers do not recall the services that they provided; therefore, they cannot provide explanations for their actions and it is unfair that they might be criticized.

(c) Affidavit of Evelyn Wotherspoon sworn April 13, 2012

19. Ms. Wotherspoon has a BSW in Social Work and an MSW in Social Work (Clinical Social Work, Family Therapy). She is currently in private practice as a clinical consultant, as a Specialist in Infant Mental Health. She provided an opinion to counsel for the MGEU, which is attached to her affidavit. She states that she would be hard pressed to give an example of substantial improvements resulting from a fatality inquiry. If the real objective of the inquiry is

to prevent future tragedies, exposing front-line professionals to public censure is not the way to do it. She states that it will have a chilling effect on professionals.

20. The MGEU also filed an affidavit from Elizabeth McLeod. Ms. McLeod is the President of the Manitoba Institute of Registered Social Workers (MIRSW) and has held this position since June 2010. She is employed in Brandon, Manitoba, as a Manager in the Child and Adolescent Treatment Centre. Ms. McLeod states that confidentiality is a core practice of social work. The Board of the MIRSW passed a motion to support the MGEU's motion to prohibit the media from identifying social workers. Identifying social workers would interfere with their ability to provide anonymous service, and might serve to identify an individual as someone receiving services from a social worker if the fact that a person is a social worker is made known.

2. *Authorities/ANCR*

(a) Affidavit of Bruce Rivers sworn/affirmed March 30, 2012

21. Mr. Rivers holds an MSW. He was employed as the Executive Director of the Children's Aid Society of Toronto (Toronto CAS) from 1988 to 2004. He is now the Executive Director of Covenant House Toronto.

22. Mr. Rivers' evidence is that Toronto CAS was directly involved with approximately six to eight coroner's inquests that occurred in Ontario in the mid to late-1990s. There were other inquests that occurred around that time, as well as the Child Mortality Task Force, all of which resulted in major reform to Ontario's child welfare system. There was increased public attention around that time, the result of which was reactive response from the public and an increase in the

number of referrals to child welfare agencies based on suspicion. There was also the result of a dramatic spike in the number of children in care and a shortfall of foster parents and caregivers.

23. Mr. Rivers states that the increased public attention resulted in a pattern of staff leaving child welfare, moving out of province or moving to other employment in which they perceived there to be less risk. There was difficulty retaining staff at Toronto CAS, particularly at the intake/investigative level. The public attention on the child welfare system sent a "chill" through Toronto CAS, which then suffered from higher workloads and increased paperwork.

24. As a result of the public scrutiny and attention accompanied by the inquests, and the consequential policy shifts, a number of unintended consequences were suffered by the Toronto CAS and the child welfare system as a whole, and those consequences were detrimental. He states that similar things occurred in British Columbia after the Gove Inquiry; it led to a spike in the number of children apprehended.

(b) Affidavit of Cheryl Regehr sworn/affirmed March 30, 2012

25. Ms. Regehr is the Vice-Provost of Academic Programs for the University of Toronto, and a professor in the Factor-Intenwash Faculty of Social Work. She holds an MSW, and a PhD in the field of Social Work.

26. Her program of research has two components: (1) competency in professional practice; and (2) examining aspects of recovery from trauma in diverse populations, including child welfare workers. She has researched public inquiries into child welfare. Ms. Regehr has also studied the impact of post-mortem inquiries on paramedics, firefighters and police officers.

27. She has published a paper entitled "Inquiries into Deaths of Children in Care: The Impact on Child Welfare Workers and their Organization", in *Children and Youth Services Review*, Vol. 24, No.11, pp.641-644. The paper was based on qualitative and quantitative research. The participants said the inquiry process was highly stressful, and media attention intensified the distress of the workers subject to the review. The degree of media coverage of a critical event was significantly associated with the level of post-traumatic stress symptoms in the workers.

28. Among the articles referred to by Ms. Regehr is an academic article written by David Chenot entitled "The Vicious Cycle: Recurrent Interactions Among the Media, Politicians, the Public and Child Welfare Services Organizations" *Journal of Public Child Welfare*, 5, 167-184, where he points to media coverage creating a heightened sense of fear, dread and danger about the safety of children and a subsequent climate of mistrust concerning child welfare agencies in the eyes of the public. In a 2011 article by Gerald Cradock entitled "Thinking Goudge" (*Current Sociology*, Vol. 59(3)), it is said that while "naming and shaming" professionals in child welfare may provide benefits, its effects on individuals and the profession can be corrosive.

29. Ms. Regehr also refers to: a 2009 article about a high profile case in Ireland where a newspaper provided contact information for workers, and there were threats made against those workers; and a 2005 article on child welfare in the US that concludes that the cycle of media attention, inquiries and policy reform does not improve services.

30. Ms. Regehr concludes that there is strong support from research that media coverage produces a variety of negative outcomes: distress in workers, decreased commitment to the job; and negative impacts on the personal lives of workers and their families.

3. ICFS

(a) Affidavit of Shirley Cochrane affirmed April 3, 2012

31. Ms. Cochrane is the Executive Director of ICFS, which is located in Fisher River, and has been in this position since 1994. She has been employed in the child welfare system for 24 years.

32. Ms. Cochrane states that ICFS provided brief and routine service to Phoenix Sinclair's stepbrothers. Phoenix Sinclair was not in the care of ICFS at any time prior to or at the time of her death. Notwithstanding this fact, ICFS received criticism from the public, and comments from clients, that ICFS was responsible for Phoenix's death. The impact of Phoenix's death was immediate and harsh on the Fisher River community.

33. Ms. Cochrane states that her staff have concerns that the public will not trust ICFS, that clients will become resistant to ICFS during apprehensions, and publicity will impact ICFS' staff ability to maintain relationships with families.

34. Ms. Cochrane states that media articles on the inquiry have made her concerned for staff safety. After pre-hearing interviews conducted by Commission counsel, one ICFS employee required assistance home and one needed time off work. She says that this was the case notwithstanding that Commission counsel was consistently courteous to the witnesses.

35. ICFS workers are often subject to threats of violence, have been physically assaulted, and fear an increased risk if they are identified because families will associate them with Phoenix.

36. Ms. Cochrane states that it is important for workers to build relationships with families, collaterals, the community, and foster parents. She is concerned that if workers are identified, these relationships will be undermined because the community members will assume that the workers are responsible for Phoenix's death. Sources of referral are essential to protecting children, and foster placement is essential to the child welfare system.

37. Ms. Cochrane further states that privacy and confidentiality are at the heart of the child welfare system. Ensuring privacy is an important factor in attracting and retaining social workers. Ms. Cochrane believes that ICFS would have difficulty hiring staff if there was a possibility that their names could be published.

C. By the University of Manitoba

(a) Affidavit of Gwendolyn M. Gosek sworn April 4, 2012

38. The University of Manitoba has filed an affidavit from Ms. Gosek in support of the MGEU's motion. Ms. Gosek holds a BSW, an MSW and is currently a PhD student in the field of Social Work. She is a faculty member in the Faculty of Social Work at the University of Manitoba. As part of her academic research and studies, she has reviewed a number of articles relating to child protection workers and the stresses they encounter.

39. Ms. Gosek's affidavit states that studies have shown that social workers choose their profession based on a desire to help others. The field of child welfare has evolved into a complex environment that demands well-educated, highly skilled and committed workers. Social workers perform their duties in a highly stressful environment, and the end result of their working conditions is a work environment that is crisis-oriented. She states that in recent

decades, there has been a change in legislation, policies and practices resulting in a shift to a narrow focus on protecting children from severe abuse and neglect.

40. Ms. Gosek states that high turnover rates have been an ongoing concern and burnout and stress are the number one reason that child welfare workers leave employment. She states that the research shows that a child welfare inquiry becomes all-consuming as the workers review and question every aspect of the process. During the inquiry process, workers are re-exposed to trauma stimuli. Other child welfare staff undergo scrutiny of their agency and feel guilt by association. The media tend to sensationalize traumatic events. During the process of an inquest, the social work profession is under intense siege resulting in degradation to its image and a lack of public support.

41. Ms. Gosek states that a review of the literature supports the need to preserve anonymity. Publication of names would only serve to intensify negative outcomes for child welfare professionals.

42. The Media Group filed a motion to strike portions of Ms. Gosek's affidavit, however, in oral submissions counsel for the Media Group did acknowledge that Ms. Gosek's evidence was an example of evidence from a "true expert in the field."

D. By the Respondents

1. The Media Group

43. The Media Group have filed affidavits in opposition to the applicants' motions. The respondents, Edwards and Sinclair, and AMC/SCO have not filed any affidavits in response.

(a) Affidavit of Michael Bear sworn May 11, 2012

44. Mr. Bear is the Chief of Staff for the Southern Chiefs Organization Inc. He was Executive Director of Southeast Child and Family Services (SECFS) from 2004 to 2008. He was Deputy Children's Advocate for Manitoba from 1999 to 2004, and from 1993 to 1999 was a case worker for Cree Nation Child and Family Services.

45. Mr. Bear states that SECFS implemented staff photo identification for all staff, for introduction to clients and collaterals. He believes that all CFS workers in the field are required to carry photo ID cards. Social workers in small communities and on reserve are typically known as such to the people in the community. He states that agencies must always take precautions with clients in the field. Attempting to keep staff identity unknown was not a useful risk management tool. He cannot recall any physical attack on staff of SECFS while he was employed as Executive Director.

46. Mr. Bear states that during his term as Executive Director of SECFS, Tracia Owen, a First Nations youth from a community within SECFS jurisdiction, committed suicide while in care. There was a public inquest as a result, and Mr. Bear and other staff testified. There was no order restricting publication at the Owen Inquest. Mr. Bear attached the report of Judge John Guy on the Inquest as an Exhibit to his affidavit.

47. Mr. Bear states that he did not perceive any negative impact of the inquest process on the ability of his staff to continue to provide services.

(b) Affidavit of Shavonne Hastings sworn May 10, 2012

48. Ms. Hastings is Director of Operations for Nisichawayasihk Cree Nation Family and Community Wellness Centre (NCN CFS) for Winnipeg and Brandon, and has held that position since 2009. She was employed as a social worker for Winnipeg CFS from 2001 to 2005, and did intake and front line protection work. As Director of NCN CFS, she oversees a staff which includes nine social workers.

49. In all agencies in which she has been associated, social workers were issued photo identification, indicating the worker's name and agency. Social workers in small communities and on reserve are typically known as such to the community. In Winnipeg, social workers are typically assigned to a particular area and are often known to the community in that area. Often these workers do not need to identify as such because they are already recognized as social workers by the community.

50. Ms. Hastings states that yelling, harsh language and risk of violence are common in apprehension situations. She has not been involved with and is not aware of any situation where knowledge of a worker's identity in advance made any material difference in a volatile situation. She is aware of one instance where there was a safety concern on the part of the agency/worker, and in such a case, the agency has security measures it can implement. She has never been physically assaulted in the course of her work.

51. Ms. Hastings states that CFS agencies have policies in place to manage the risk of violent behavior. Where she has worked, social workers attend in teams of two where they have a concern about risk. If there is cause for concern, workers may attend with police officers. It is

the job of a social worker to deal with potentially volatile individuals, and this can be managed with good training and appropriate policies.

52. Ms. Hastings states that she has no expectation that she will exercise her functions without the public knowing who she is. In Manitoba, agencies have established "critical incident teams" whose role it is to assist and counsel workers who face difficult situations.

(c) Affidavit of Allison Lamontange sworn May 22, 2012

53. Ms. Lamontagne is a legal assistant employed by the firm representing the Media Group. Ms. Lamontagne attaches the following to one of her affidavits:

- A list of names of all registered social workers, found on the MIRSW website;
- A list of names of ICFS workers, from the ICFS website;
- A list of names of Central Manitoba CFS workers, from the CMCFS website;
- A list of names of Peguis CFS workers, from the Peguis CFS website; and
- A list of names of Sandy Bay CFS workers, from the Sandy Bay CFS website.

(d) Affidavit of Cecil Rosner sworn May 9, 2012

54. Mr. Rosner is the Managing Editor of CBC Manitoba, and has held this position since 2004. He oversees the news and journalism conducted by CBC in Manitoba. Mr. Rosner sets out a number of public inquiries and inquests in Manitoba where professional witnesses, social workers among them in some cases, have testified without a publication ban, including the following:

- The Sophia Schmidt Inquest
- The Patrick Redhead Inquest
- The Tracia Owen Inquest
- The Taman Inquiry
- The Driskell Inquiry
- The Inquest into Pediatric Cardiac Surgery in Manitoba

55. Mr. Rosner deposes that social workers testified without a restriction on publication in the Schmidt Inquest, the Redhead Inquest, and the Owen Inquest. Mr. Rosner also cites examples from inquests and inquiries outside of Manitoba where identities of professional witnesses were made known.

56. Mr. Rosner also states that in Manitoba, the Taman Inquiry, the Sophonow Inquiry, the Driskell Inquiry, and the Aboriginal Justice Inquiry had video feeds. He states that the practice of permitting video coverage of public inquiries is not unique to Manitoba, and cites a number of examples from out of province, most recently, the Missing Women's Inquiry in British Columbia.

III. Positions of the Applicants and Respondents

A. The Applicants

1. MGEU

57. The MGEU argues that there are legislative and policy reasons for protecting the identity of social workers and cites the procedure provided for by statute for child protection proceedings as an example. The MGEU argues that publication would have a "serious and detrimental impact" on social workers' ability to perform their day-to-day functions.

58. The MGEU argues that social workers perform their duties in dangerous situations and often receive threats. Since Phoenix's death was discovered in 2006, social workers have suffered public scrutiny and criticism and some have been criticized by clients who have referenced the Phoenix Sinclair tragedy.

59. The MGEU argues that social workers attempt to keep their work as private as possible. If they are recognized, it is possible that they will face greater aggression or negative attitudes from families due to the misperception that they were responsible for or involved in Phoenix's death. Publication of social workers' names or images will make their work more difficult in terms of building trust with children and families. This will make it harder for social workers to do their jobs and consequently, children will be at risk.

60. The MGEU argues that child protection proceedings are closed to the public, and this reflects a policy reason for keeping information confidential. In the case of *CBC v. Manitoba (Attorney General)*, 2008 MBCA, the Court of Appeal denied the CBC access to child and family services records filed as exhibits in an inquest. MGEU has taken the position that

inquests and inquiries have the same fundamental principles and goals and in oral submissions placed much reliance on the *CBC v. Manitoba (Attorney General)* decision.

61. The MGEU further argues that it is seeking a minimal restriction on the freedom of expression. Counsel for the MGEU argued that there would be no effect on the public hearings themselves if I were to grant the order it seeks. Counsel argued that the risks to the child welfare system and to children will be reduced by such an order, as it will reduce the magnitude of public discussion and blame placed on social workers.

62. Counsel for MGEU argued that the media is primarily interested in the sensationalization of stories and the laying of blame on social workers. He argued that this Commission has the power to decide whether the best interests of children are served by not allowing the social workers who will be called as witnesses in this inquiry to be "pilloried" in the media.

2. *Authorities/ANCR*

63. The Authorities/ANCR argue that, based on the evidence of Ms. Regehr, media attention to a child death review intensifies distress suffered by workers and causes staff to leave the field of child protection. As well, it may cause workers to err on the side of caution, causing a spike in the number of children admitted into care, as was the case in Ontario during the time period referenced by Mr. Rivers in his affidavit. Increased negative media attention causes difficulty in the recruitment and retention of child welfare staff. A publication ban will serve to mitigate these consequences because it will reduce the sensationalistic aspect of the media coverage.

64. The Authorities/ANCR further argue that they have serious concerns about the sensational media coverage of the inquiry on the child welfare system. Media coverage of child

death reviews often involves sensationalistic stories and media are usually very critical. This creates a "vicious cycle" in which the work becomes restrictive and employees become angry and frustrated at what they cannot do to serve clients.

65. Counsel for the Authorities/ANCR argued that this Commission is a "derivative" of child protection proceedings. It is argued that because the *Dagenais/Mentuck* analysis is contextual, and the context of this inquiry is child welfare matters, this inquiry must do everything it can to maintain confidentiality.

66. Counsel for the Authorities/ANCR argued that the order sought is "extremely minimal" and that in terms of the Commission's work, there is "zero restriction". It is argued that a publication ban will be less deleterious than would be publication of names and images. Further, each social worker will be in the hearing room for all present to see and hear. Counsel for the Authorities/ANCR argues that the reason why anonymity of social workers is so important is because there is expert evidence showing that in other jurisdictions, inquiries attract sensational media coverage. When the media "name and shame" social workers, this radiates distress throughout the child welfare system, which then leads to direct harm to children. The reason that a publication ban will reduce a risk to children is because there will not be this radiated distress, which creates a chill on the child welfare system.

3. ICFS

67. ICFS argues that publication of the names of social workers will put children and families at risk. ICFS argues that the media do not have unfettered access to court documents or unrestricted publication of court proceedings, and that generally the provisions of *The Child and Family Services Act*, C.C.S.M. c.C80 require confidentiality.

68. ICFS further argues that to publish the names/identities of social workers would pose a "serious risk to the child and family services system" because:

- The public would be hesitant to contact child protection workers known to have been involved with Phoenix Sinclair, or to expose themselves to the stigma of being involved with the child and family services system.

- Families currently involved with child welfare agencies would become withdrawn and resistant to cooperation with those agencies.

- Child and family services agencies will suffer in their abilities to recruit and retain qualified social workers.

- Social workers' job performance will suffer due to stress, low morale and increased apprehensions of children.

- The risk of violence when apprehending children would increase.

69. Counsel for ICFS argued that there has been a misconception among some members of the public that ICFS was somehow responsible for Phoenix Sinclair's death. ICFS does not want the name and a face of a social worker to be associated with that misconception.

70. It is argued on behalf of ICFS that a ban on publication of names of social workers would not hinder the inquiry's mandate, and that the determining factor when applying the *Dagenais/Mentuck* analysis is "the best interests of the child."

B. The University of Manitoba

71. The University of Manitoba is not an applicant on these motions but is supportive of the relief sought by those who have brought the applications. The affidavit of Ms. Gosek provides that social workers encounter many stresses on the job, which is derived from a number of factors: high caseloads, high turnover, traumatic events and the risk of personal violence. Inquiries and inquests are a source of stress. The position of the University is that this inquiry can accomplish its mandate without adding to the stress that social workers already experience.

C. The Respondents

1. The Media Group

72. The Media Group relies on the "open court principle" as articulated by the Supreme Court of Canada cases of *Re Vancouver Sun*, 2004 SCC 3 (para.25), and *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 (para.85). It is argued that openness takes on a special importance in the context of a public inquiry.

73. It is argued that, on the evidence adduced by the applicants, at best, the applicants have proved that media coverage of the death of a child and a subsequent inquiry are factors that are connected with or that have been shown to be connected with negative outcomes in previous instances. To the extent that the applicants have concerns about negative outcomes as a result of the inquiry, the Commissioner can ensure fairness in the hearings, and can ensure that the witnesses have the opportunity to present full and accurate information.

74. The Media Group argues, in making reference to much of the evidence filed in support of these applications, that the issue on this motion is not whether the Government was correct in

establishing this public inquiry; the issue is whether the applicants have demonstrated that the publication of their identities will cause serious and unavoidable harm to the administration of justice that outweighs the damage caused by the interference with s.2(b) *Charter* rights. Counsel for the Media Group argued that what the applicants want to do is control the tone and content of the public discussion of this inquiry.

75. The Media Group points out that professional witnesses are regularly named in inquests; therefore, s.75(2) of *The Child and Family Services Act* (which has been cited by the applicants as a policy reason for non-publication) cannot have been intended as a policy statement that social workers should not be identified. Section 75(2) provides as follows:

> **Reporting not to identify persons involved**
>
> 75(2) No press, radio or television report of a proceeding under Part II, III or V shall disclose the name of any person involved in the proceedings as a party or a witness or disclose any information likely to identify any such person.

76. The *CBC v. Manitoba (Attorney General)* case upon which the applicants rely involved an inquest in which professional witnesses, including social workers, were named.

77. It is acknowledged by the Media Group that front line workers provide services in circumstances where there can be a risk of violence; however, there is no evidence to support what has been described as "speculation" that publication of names of social workers would increase any risk to safety. There is evidence that an inquiry into a child death can cause stress to the professionals involved. The Media Group argues that there is no evidence that publication of identities of those individuals had any material impact on the stress.

78. The Media Group has argued that identity is not a "mere detail," and that identities are particularly important when dealing with public servants exercising state power. In oral submissions, counsel for the Media Group pointed to the evidence from the cross-examination on the affidavit of Ms. Gosek as support for the argument that background and identity are important to put into context the information that is being provided. In *Episcopal Corporation of the Diocese of Alexandria-Cornwall v. Cornwall Public Inquiry*, 2007 CarswellOnt 112 (Ont.C.A.), the Court of Appeal upheld the Commissioner's refusal to grant a publication ban on the identity of a witness, on the basis that the witness' name was relevant to the mandate of the inquiry.

79. The Media Group further argues that the evidence adduced shows that social worker stress and job performance depend on a multitude of factors; there is no evidence connecting the risks identified by the applicants with the publication of identities or showing that publication of that information has ever had significant systemic consequences.

2. Edwards and Sinclair

80. Edwards and Sinclair argue that a publication ban would be contrary to the public interest. Their counsel argues that this inquiry should be public in every sense of the word. A climate of unnecessary secrecy in the inquiry will foster feelings of public resentment and distrust. They submit that the determination of the motions comes down to one question: Does the evidence clearly demonstrate that the health and safety of Manitoba children will be placed at increased risk if the names and faces of social workers are published by the media?

81. Edwards and Sinclair argue that there is no evidence of such a risk; and that the applicants have sought to establish the risk through conjecture and second hand anonymous

evidence. The degree of difficulty and inherent risk in the social work profession remains regardless of whether or not these witnesses are identified. They also argue that the open court principle is magnified when evidence is given at a public inquiry; that while counsel for the Authorities/ANCR has argued that the status quo in child welfare matters is confidentiality, the status quo in public inquiries is publicity. The death of Phoenix Sinclair cries out for transparency and public scrutiny.

3. AMC/SCO

82. AMC/SCO argue in their brief, and in oral submissions, that ultimately it is the public that has an obligation to ensure that services are provided to children and families in a manner that promotes the safety, security, well-being and best interests of children. As a result, the public must be fully informed. In order to ensure the full and proper accountability of the child welfare system, it is essential that the public be able to make a thorough, fair and informed evaluation of the manner in which services are provided.

83. AMC/SCO also argue that First Nations people have unique rights and responsibilities with respect to the delivery of child welfare services. They must be afforded an opportunity to examine the circumstances under which the services to Phoenix Sinclair and her family were delivered. They need to be able to make a full, fair and informed evaluation of the testimony tendered at the inquiry, and a publication ban and a restriction on recording and broadcasting will limit that opportunity to those who can attend the hearing room.

84. AMC/SCO point out in their brief that the applicants have not provided evidence pertaining to the respective personal circumstances of each of the potential witnesses sought to be covered by the publication ban. The grounds upon which the applicants rely in support of a

ban cannot be asserted in the abstract, but must be supported by particularized grounds relating to the risks sought to be avoided. They say that the evidence filed fails to meet the rigourous standard required by the authorities. The social workers called to testify in this inquiry will be required to sacrifice their own privacy interests, as would any other witness in an open court proceeding. In this case, however, they are being called in furtherance of their duties as public servants, and as such they are ultimately accountable to the public. Concealing the identity of social workers would only serve to invite further mistrust among the public and would undermine the legitimacy of the inquiry.

IV. Analysis

A. The Law

1. The Nature and Purpose of Public Inquiries

85. S. Ruel notes at page 97 of his text, *The Law of Public Inquiries in Canada*, (Toronto: Thomson Reuters Canada Limited, 2010), that as a starting point, unless the publicity of proceedings is mandated under legislation, a government may create an inquiry that will not be public or will only be partially public. However, once an inquiry is created with no specified limitation on publicity, as is the case here, the inquiry should presumptively proceed in public. That said, the general power of the Commissioner to control his proceedings will include the discretionary authority to make appropriate orders where necessary to protect the rights of those affected by the inquiry, including ordering an *in camera* hearing, a publication ban, or other

confidentiality order.[1] Such confidentiality measures will need to be carefully tailored and restricted as much as possible in order to preserve the freedom of the press.[2]

86. E. Ratushny points out, in his text, *The Conduct of Public Inquiries* at page 331 (Toronto: Irwin Law Inc., 2009) that the very nature and purpose of an inquiry lends even greater weight to the presumption of openness in relation to the administration of justice which has been reinforced by the principle of freedom of expression under the *Charter*.

87. Justice Cory's decision in *Phillips v. Nova Scotia (Commissioner, Public Inquiries Act)*, 1995 CarswellNS 15 (S.C.C.), is often cited for its commentary on the nature and purpose of inquiries. In that case, the inquiry at issue was the Westray Inquiry, which was called after an explosion caused the death of 26 miners. The Nova Scotia government had ordered an inquiry immediately after the incident. Concerns arose because criminal proceedings were ongoing at the time of the inquiry. The issue before the Supreme Court of Canada became whether a stay of proceedings ought to be ordered with respect to the inquiry while the criminal proceedings against two former managers were ongoing. A majority of the Supreme Court of Canada, in a judgment written by Sopinka J., allowed the appeal from the Court of Appeal's decision ordering a stay of proceedings. Perhaps the most quoted passages from that decision are from Cory J.'s concurring reasons, at paragraphs 73 to 75, which highlight the public importance of inquiries:

> One of the primary functions of public inquiries is fact-finding. They are often convened, in the wake of public shock, horror, disillusionment, or scepticism, in order to uncover "the truth". Inquiries are, like the judiciary, independent; unlike the judiciary, they are often endowed with wide-ranging investigative powers. In following their mandates, commissions of inquiry are, ideally, free from partisan loyalties and better able than Parliament or the legislatures to take a long-term view of the problem presented. Cynics decry public inquiries as a means used by

[1] Ruel, p.98
[2] Ruel, pp. 101-102, 104

the government to postpone acting in circumstances which often call for speedy action. Yet, these inquiries can and do fulfil an important function in Canadian society. In times of public questioning, stress and concern they provide the means for Canadians to be apprised of the conditions pertaining to a worrisome community problem and to be a part of the recommendations that are aimed at resolving the problem. Both the status and high public respect for the commissioner and the open and public nature of the hearing help to restore public confidence in not only the institution or situation investigated but also in the process of government as a whole. They are an excellent means of informing and educating concerned members of the public.

This important characteristic was commented upon by Ontario Supreme Court Justice S. Grange following his inquiry into infant deaths at the Toronto Hospital for Sick Children:

> I remember once thinking egotistically that all the evidence, all the antics, had only one aim: to convince the commissioner who, after all, eventually wrote the report. But I soon discovered my error. They are not just inquiries; they are *public* inquiries ... I realized that there was another purpose to the inquiry just as important as one man's solution to the mystery and that was to inform the public. Merely presenting the evidence in public, evidence which had hitherto been given only in private, served that purpose. The public has a special interest, a right to know and a right to form its opinion as it goes along.

(S.G.M. Grange "How Should Lawyers and the Legal Profession Adapt?" in A. Paul Pross, Innis Christie and John A. Yogis, eds., *Commissions of Inquiry* (Toronto: Carswell, 1990), 151, at pp.154-55.)

The public inquiry has been even more broadly characterized as serving a particular "social function" within our democratic culture:

... a commission ... has certain things to say to government but it also has an effect on perceptions, attitudes and behaviour. Its general way of looking at things is probably more important in the long run than its specific recommendations. It is the general approach towards a social problem that determines the way in which a society responds to it. There is much more than law and governmental action involved in the social response to a problem. The attitudes and responses of individuals at the various places at which they effect the problem are of profound importance.

What gives an inquiry of this kind its social function is that it becomes, whether it likes it or not, part of this ongoing social process. There is action and interaction ... Thus this instrument, supposedly merely an extension of Parliament, may have

a dimension which passes beyond the political process into the social sphere. The phenomenon is changing even while the inquiry is in progress. The decision to institute an inquiry of this kind is a decision not only to release an investigative technique but a form of social influence as well.

(Gerald E. Le Dain, "The Role of the Public Inquiry in our Constitutional System", in J. Ziegel (ed.) *Law and Social Change* (1973) 79, at p. 85.) [emphasis added]

88. And, Cory J., at paragraph 128:

Open hearings function as a means of restoring the public confidence in the affected industry and in the regulations pertaining to it and their enforcement. As well, it can serve as a type of healing therapy for a community shocked and angered by a tragedy. It can channel the natural desire to assign blame and exact retribution into a constructive exercise providing recommendations for reform and improvement. In the wake of the Sick Children Hospital Inquiry conducted by Justice Grange it was written:

> Imagine that the public had no access to the proceedings of the lengthy and costly Grange Inquiry into the deaths of babies at Toronto's Sick Children's Hospital, and was informed at the end of its vague conclusion that some babies had been killed by an unknown or unnamed individual. Such a conclusion to the state's failure to solve a string of murders deeply troubling to the population, after extensive investigation, prosecution and inquiry procedures, would have been entirely unacceptable. The Grange Inquiry was open, however, and one of the virtues of the exercise in openness was that the public became privy to the problems the state faced in trying to solve the mysterious deaths and could assess the efficacy of the state's actions. Where different phases of the proceedings are closed or where information about them is censored, the public's ability to judge the functioning of the system, rate the government's performance and call for change is effectively removed. [Footnote omitted.]
>
> (Jamie Cameron, "Comment: The Constitutional Domestication of our Courts — Openness and Publicity in Judicial Proceedings under the Charter" in *The Media, the Courts and the Charter*, Philip Anisman and Allen M. Linden, eds. (Toronto: Carswell, 1986), 331, at pp.340-41.)

2. The Open Court Principle

89. The principles to be applied in determining whether to restrict public or media access to the inquiry arise out of cases interpreting the "open court" principle. The long-standing open court principle is reflected in s.2(b) of the *Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11, which provides:

> **2.** Everyone has the following fundamental freedoms:
>
> ...
>
> *(b)* freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication

90. There is a significant amount of jurisprudence from the Supreme Court of Canada on the open court principle. In *Vancouver Sun, Re*, *supra*, at paragraphs 23 to 26, Iacobucci and Arbour JJ. stressed its importance:

> This Court has emphasized on many occasions that the "open court principle" is a hallmark of a democratic society and applies to all judicial proceedings: *MacIntyre v. Nova Scotia (Attorney General)*, [1982] 1 S.C.R. 175, (S.C.C.), at p. 187; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 (S.C.C.), at paras. 21-22; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 (S.C.C.). "Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over-emphasized": *Edmonton Journal*, *supra*, at p. 1336.
>
> The open court principle has long been recognized as a cornerstone of the common law: *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, *supra*, at para. 21. The right of public access to the courts is "one of principle ... turning, not on convenience, but on necessity": *Scott v. Scott*, [1913] A.C. 417, (U.K. H.L.), *per* Viscount Haldane L.C., at p. 438. Justice is not a cloistered value": *Ambard v. Attorney General for Trinidad & Tobago*, [1936] A.C. 322 (Trinidad & Tobago P.C.), *per* Lord Atkin, at p. 335. "[P]ublicity is the very soul of justice. It is the keenest spur to exertion, and the surest of all guards

against improbity": J.H. Burton, ed., *Benthamiana or, Select Extracts from the Works of Jeremy Bentham* (1843), p. 115.

> Public access to the courts guarantees the integrity of judicial processes by demonstrating "that justice is administered in a non-arbitrary manner, according to the rule of law": *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, *supra*, at para. 22. Openness is necessary to maintain the independence and impartiality of courts. It is integral to public confidence in the justice system and the public's understanding of the administration of justice. Moreover, openness is a principal component of the legitimacy of the judicial process and why the parties and the public at large abide by the decisions of courts.
>
> The open court principle is inextricably linked to the freedom of expression protected by s.2(b) of the *Charter* and advances the core values therein: *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, *supra*, at para. 17. The freedom of the press to report on judicial proceedings is a core value. Equally, the right of the public to receive information is also protected by the constitutional guarantee of freedom of expression: *Ford c. Québec (Procureur général)*, [1988] 2 S.C.R. 712, (S.C.C.); *Edmonton Journal, supra*, at pp. 1339-40. The press plays a vital role in being the conduit through which the public receives that information regarding the operation of public institutions: *Edmonton Journal*, *supra*, at pp. 1339-40. Consequently, the open court principle, to put it mildly, is not to be lightly interfered with.

91. Cory J., in *Edmonton Journal v. Alberta (Attorney General), supra*, at paragraph 85, commented on the importance of the role that the media play in allowing the public to access court proceedings:

> ...It is exceedingly difficult for many, if not most, people to attend a court trial. Neither working couples nor mothers or fathers house-bound with young children would find it possible to attend court. Those who cannot attend rely in large measure upon the press to inform them about court proceedings - the nature of the evidence that was called, the arguments presented, the comments made by the trial judge - in order to know not only what rights they may have, but how their problems might be dealt with in court. It is only through the press that most individuals can really learn of what is transpiring in the courts. They as "listeners" or readers have a right to receive this information. Only then can they make an assessment of the institution. Discussion of court cases and constructive criticism of court proceedings is dependent upon the receipt by the public of

> information as to what transpired in court. Practically speaking, this information can only be obtained from the newspapers or other media.

92. Most recently, in *Canadian Broadcasting Corporation v. Canada (Attorney General)*, 2011 SCC 2, Deschamps J., for the Supreme Court of Canada, commented at paragraphs 1 to 2 of the decision:

> The open court principle is of crucial importance in a democratic society. It ensures that citizens have access to the courts and can, as a result, comment on how courts operate and on proceedings that take place in them. Public access to the courts also guarantees the integrity of the judicial process inasmuch as the transparency that flows from access ensures that justice is rendered in a manner that is not arbitrary, but is in accordance with the rule of law.
>
> The right to freedom of expression is just as fundamental in our society as the open court principle. It fosters democratic discourse, truth finding and self-fulfillment. Freedom of the press has always been an embodiment of freedom of expression. It is also the main vehicle for informing the public about court proceedings. In this sense, freedom of the press is essential to the open court principle...

93. It is against this backdrop, and paying particular attention to Cory J.'s comments in *Phillips*, *supra*, that an open inquiry can serve as a type of healing therapy for a community shocked and angered by a tragedy and affording the opportunity for the formulation of constructive recommendations, in this instance, to better protect Manitoba children, that any order restricting access to this inquiry must be considered.

3. The Dagenais/Mentuck Analysis

94. 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 SCC 41, para. 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.

95. The *Dagenais/Mentuck* analysis provides that a publication ban may only be ordered when:

> i. 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
>
> ii. 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 to a fair trial, and the efficacy of the administration of justice.[3]

96. 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. Paragraph 34 of *R. v. Mentuck* makes clear the type of evidence that is required in order to displace the general rule:

> ...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 and 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.

97. The court in *R. v. Mentuck* recognized that there may be cases that raise interests 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 SCC 41). In the motions before me, the

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[3] *Dagenais v. Canadian Broadcasting Corp.*, 1994 SCC 102, para. 77; *R. v. Mentuck*, 2001 SCC 76, para. 32.

applicants argue that the "serious risk" sought to be prevented relates to the best interests of children and the functioning of the child welfare system.

98. The applicants must demonstrate that disclosure of information sought to be suppressed would "subvert the ends of justice or unduly impair its proper administration" (*Toronto Star Newspapers Ltd. v. Ontario*, *supra*, para.4). The evidentiary basis must establish a very serious risk (*Toronto Star*, *supra*, para.10). The open court principle is to be displaced only where social values of superordinate importance require protection: *MacIntyre v. Nova Scotia (Attorney General)*, [1982] 1 S.C.R. 175, pp.186-187.

99. The *Dagenais/Mentuck* analysis is meant to be applied in a "flexible and contextual manner": (*Toronto Star, supra*, para.8).

100. As noted by Dardi J. in *X. v. Y.*, 2011 BCSC 943, at paragraph 22, "the authorities establish that the standard is not one of mere convenience or expediency; in order to displace the public interest in an open-court process, an applicant must provide cogent evidence to support the alleged necessity for anonymity."

101. Counsel for the Authorities/ANCR argued in oral submissions that due to the subject matter of this inquiry, the onus should be reversed in this case. That is, that due to the fact that this inquiry will examine the child welfare system, in which they say the "status quo" is confidentiality, the onus should be on the media to show why disclosure is necessary, rather than on the applicants to show why a restriction on openness is necessary. I disagree. The onus and standard in this case has been clearly stated by the Supreme Court in *R. v. Mentuck*, and I have not been pointed to any authority that would indicate otherwise.

102. Further, on October 21, 2011, the Commission obtained an order from the Court of Queen's Bench of Manitoba, pursuant to s.76(3) and s.76(14) of *The Child and Family Services Act*, C.C.S.M. c.C80, requiring disclosure and production to the Commission of all relevant documents created under that *Act*. The order clearly states that the Commission may enter the documents, and the information contained in those documents, into evidence at the public phase of the hearing, in accordance with any order I might make.

103. Counsel for the applicants, and in particular, counsel for the MGEU and Authorities/ANCR relied heavily on the decision of the Manitoba Court of Appeal in *Canadian Broadcasting Corp. v. Manitoba (Attorney General)*, *supra*, in their oral submissions. I wish to make some comments on that decision. That case involved an application by the media for access to certain Child and Family Services records, which had been entered as exhibits at in inquest pursuant to *The Fatality Inquiries Act*, C.C.S.M. c.F52. The inquest judge in that case denied the media's application for access. This decision is distinguishable from the matter before me on a number of grounds. First, we are here dealing with a public inquiry, not an inquest. There are significant differences between these two proceedings, which was noted most recently by Freedman J.A. in *M.G.E.U. v. Hughes*, 2012 MBCA 16 (In Chambers). Secondly, the motions before me relate to a requested ban on naming social workers in the media, not on the issue of access to Child and Family Services documents. I note that the names of professionals, including social workers, were published in the report which arose out of the inquest at issue in the *Canadian Broadcasting Corp. v. Manitoba (Attorney General)* decision. As I noted above, the Commission has obtained an order from the Court of Queen's Bench permitting the use by the Commission of documents and the information therein. Finally, it is clear from that decision that the Manitoba Court of Appeal endorsed the application of the *Dagenais/Mentuck* analysis in determining whether

to grant access to the documents at issue - which militates against the argument that there should be some sort of reverse onus in this case. At paragraph 38, R.J. Scott C.J.M. stated:

> As the Supreme Court noted in *Dagenais* itself, "publication bans should not always be seen as a clash between two titans - freedom of expression for the media versus the right to a fair trial for the accused" (p.881); rather, it is a question of determining firstly whether a ban of some sort is necessary to guard the fairness of the trial and, if so, to strike the right balance "between the salutary and deleterious effects of a publication ban" (at p.884), keeping in mind that there should be as minimal an interference as possible with the public's right to know what is going on with their courts.

4. *The "Best Interests of the Child"*

104. Counsel for ICFS remarked that in the case of *Winnipeg Child and Family Services v. K.L.W.*, [2000] 2 S.C.R. 519 it was held that the apprehension of a child violates a parent's s.7 *Charter* rights. Counsel says that notwithstanding that that is the case, the courts in child protection matters are not bound by the strict rules of evidence and procedure. Actual proof of harm is not required when the best interests of children are engaged. What this demonstrates is a heightened importance placed on the best interests of the child and the obligation of the courts to protect children from harm.

105. I have every regard for the provisions of *The Child and Family Services Act*, C.C.S.M. c.C80, and what it stands for. There can be no doubt that the best interests of children and the protection of children are values of superordinate importance in our society. I also take into account, however, the clear principles set out in *Dagenais/Mentuck* and subsequent cases, including the comments by R.J. Scott C.J.M. in *Canadian Broadcasting Corp. v. Manitoba (Attorney General), supra.* The *Dagenais/Mentuck* analysis involves a balancing exercise. It also requires that the reality of the risk be well-grounded in evidence. This is the evidentiary

standard upon which I must assess the applicants' motions; I decline to relax the evidentiary standard in these circumstances.

V. Application of the *Dagenais/Mentuck* Analysis to these Motions

A. Analysis of the First Branch to the Motions

1. General

106. An initial question to be decided on these motions is whether the evidence filed by the applicants has established that a publication ban on the name and image of social workers is necessary in order to prevent a serious risk to child welfare system or the best interests of children, because reasonable alternative measures will not prevent the risk.

107. The applicants have identified concerns about: risks to the safety of workers in the course of performing their duties and the consequent impact on the child welfare system; a general concern about the effect that the inquiry will have on the system; and privacy concerns of the witnesses, as the risks sought to be avoided by a publication ban. If there was evidence of serious risks to personal safety that would be caused by publication of the identities of social workers, those types of risks would likely meet the threshold of a "serious risk" contained in *Dagenais/Mentuck*. The same would likely be the case if publication was shown to cause a serious risk to the functioning of the child welfare system or harm to the best interests of children.

108. The key question is whether or not the evidence demonstrates that there are such risks. Of note is the fact that no social worker who will be called to testify has provided direct evidence on these applications. I will assess the risks by category.

2. The Risks

(a) Privacy Risk

109. An assertion of a privacy interest generally will not be sufficient to justify a ban. If that were the case, any person who would prefer not to be named in the media would be entitled to a publication ban on the basis of a general right to privacy. In order to succeed in obtaining an order for anonymity in the media due to a risk to privacy interests, the applicants would need to show some serious risk as a result of identification over and above discomfort or embarrassment.

110. What the authorities suggest is that the fear that a witness or party might be subjected to, for example, embarrassment, will not trump the right of the public and media to have access to information. Some greater risk is required in order to justify restricting s.2(b) rights.

111. 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. In *R. v. Morin*, 1997 CarswellOnt 400 (Ont. C.A.), for example, the issue was whether the name of Guy Paul Morin's prison cellmate ought to be made public during the course of the inquiry established to review the proceedings against Mr. Morin. The cellmate's identity had been concealed at trial and the Commissioner for the inquiry ruled that he was bound by the continued publication ban. Mr. Morin applied to have the publication ban lifted. The Ontario Court of Appeal dismissed the application. The Court referred to the reasons of the trial judge in Mr. Morin's second trial, for the imposition of the ban, at paragraphs 8 to 11:

> The trial judge summarized the evidence of Mr. X, in part, as follows:
>
> > ...[X] returned to work a day after testifying at Mr. Morin's trial in January of 1986. On that day his assistant foreman threatened to

> kill [X] if [X] attempted to speak to him…Upon returning to work, he was subjected to constant harassment by fellow Hydro employees, some of whom he had known while in jail, ending only with the termination of his Hydro employment in May of 1988…
>
> …
>
> In January of 1988, [X], because of this continuing pressure, reported to the emergency division of Oshawa Hospital… According to [X], Dr. Khan, who did not testify, diagnosed his condition as a nervous breakdown.
>
> …

Donnelly J. quoted with approval from *R. v. McArthur* (1984), 13 C.C.C. (3d) 152 (Ont. H.C.) (per Dupont J.), as follows:

> The court is not here dealing with an application for the exclusion of the press and or the public from the courtroom. This trial is to proceed in a usual public manner with one exception being that requested in the application, and which is restricted to the issue of whether the identity of certain of the witnesses to be called should be kept from the public knowledge for the reasons outlined earlier. This case must be distinguished from those where the court is asked to restrain publication of names where not to do so would create embarrassment, humiliation, or even financial loss. Under most of such circumstances, the rights of complete public disclosure is paramount.
>
> …
>
> The real effect of the publication of [X]'s identity following his testimony was to jeopardize his safety. His experience went far beyond embarrassment and humiliation.

112. The Court of Appeal weighed the competing interests in the case and found that the right of the public to be fully informed about the criminal prosecution of Mr. Morin and the inquiry proceedings was complete save and except the cellmate's identity, which amounted to a minimal impairment to the inquiry.

113. Although the evidence filed by MGEU provides that social workers attempt to keep their work as private as possible, the evidence filed by the media shows that the names of many social workers can be found on CFS agency websites, and Jewish CFS posts photographs of its workers as well.

114. While child protection proceedings under s.75 of *The Child and Family Services Act*, C.C.S.M. c.C80, are closed to the public and witnesses are not named, this inquiry is not a child protection proceeding. If s.75(2) was indicative of a general policy to keep the identity of social workers private, which has been argued by the applicants, the identities of social workers would never be made known in other proceedings. It is clear that is not the case. There is evidence from the Media Group showing that social workers and other professional witnesses have been identified in the context of inquests under *The Fatality Inquiries Act*, C.C.S.M., c.F52. Indeed, the fact that social workers have been identified in inquests was conceded by counsel for the Authorities/ANCR in argument.

115. In her affidavit, Shirley Cochrane also gave evidence that privacy and confidentiality are important to the child welfare system. In the cross-examination on her affidavit by counsel for the Media Group, she acknowledged that her community (Fisher River) knows the social workers who are part of the community. She also acknowledged that her agency posts the names and positions of its staff on a public website.

116. The evidence filed by the Media Group on the issue of privacy indicates that many social workers carry photo identification, and in small communities and reserves, child protection workers are generally known to the community. In the cross-examination on her affidavit, Janet Kehler said that when she affirmed her affidavit (in which she discussed social workers

attempting to keep the nature of their work as private as possible), she was not aware that some child welfare agencies posted names and positions of workers on their websites.

117. The nature of the evidence that the social workers will be called to give relates to the services they provided to Phoenix Sinclair and her family. The evidence adduced by the Media Group relating to the wide availability on the Internet about staff of child welfare agencies does not appear to establish that social workers are entitled to privacy generally as a result of their professional status. Rather, it appears that the fact that a person is employed as a social worker can be accessed publicly, via the Internet, for some agencies.

118. This fact, combined with the role of social workers in this inquiry, which will be to (1) speak about the services they provided in their professional capacity as public servants; and (2) to assist in making recommendations to improve the child welfare system, weighs against finding that they are entitled to anonymity in the media on the basis of a privacy interest.

(b) Personal Safety Risk

119. The evidence filed in these motions indicates that there are risks involved in child protection work. In order to justify a publication ban on the identity of social workers called to testify at the inquiry, the applicants would need to demonstrate not that their work is inherently dangerous or risky, but rather that naming the social workers who provided services to Phoenix Sinclair and her family will create a risk to their safety that could not be otherwise managed with reasonable measures.

120. In her affidavit, Shavonne Hastings gave evidence that there is a risk of violence in apprehension situations, which must be managed. Where there are safety concerns in the context

of provision of child welfare services, the agency has security measures it can implement. In the cross-examination on her affidavit by counsel for ICFS, her evidence was that she has always had the understanding that should anything have "gone wrong" on her case load, as a public servant, she would be accountable for a decision that she had made. She recalled approximately 10 occasions in the course of her work where there have been safety concerns, involving threats, including threats of violence on a couple of occasions. She had heard of one occasion where a worker had been physically assaulted when attending at the home of a client along with four police officers.

121. There has been no direct evidence from any of the applicants that would make the necessary link between identifying social workers in the media and increased risks to their personal safety. The case law indicates that there would need to be much stronger and more direct evidence of risks to personal safety than what has been filed in order to justify a publication ban on that basis. There is evidence filed by the applicants which speaks generally to social workers being concerned about their safety, but there is no evidence of specific incidents or statistics pointing to an increased risk to safety as a result of publicity. The nature of the evidence that has been offered is that some families have referenced the Phoenix Sinclair tragedy to some social workers in the course of their dealings with those families. Again, I would note that no direct evidence was offered by any individual social worker being called to testify in this inquiry as to his or her personal circumstances.

122. The comments of Iacobucci J., in *R. v. Mentuck, supra*, are of assistance in understanding the degree of risk that is required in order to justify an indefinite ban on publicizing identity. In that case, the Supreme Court of Canada unanimously upheld a publication ban on the names of police officers who were involved in undercover operations at the time, because it would

compromise those current operations. The ban was to last for a period of one year. The Court declined to allow the publication ban to last indefinitely, with Iacobucci J. commenting for the Court at paragraph 58:

> I disagree, however, with the appellant's request that the ban be made indefinite. As a general matter, it is not desirable for this, or any, Court to enter the business of permanently concealing information in the absence of a compelling reason to do so. The appellant suggests that the officers would be in physical danger if their identities were ever revealed. This is not a substantial enough risk to justify permanent concealment. All police officers are subject to the possibility of retributive violence from criminals they have apprehended and other persons who bear them grudges or ill-will. In rare cases, this may result in tragic events, and while all efforts must be deployed to prevent such consequences, a free and democratic society does not react by creating a force of anonymous and unaccountable police. I do not find that these officers are at a substantially greater risk than other police officers. Given a showing on the record of a future case that a specific group of officers indeed suffers a grave and long-term risk to life and limb, a permanent or extended ban would be considered.

123. Without any convincing or specific evidence of an increased safety risk to the social workers resulting from publication of their names in the media, I cannot accept that there is a serious risk to the personal safety of any worker that would necessitate anonymity in the media.

(c) Systemic Risks

124. Bruce Regehr and Cheryl Rivers both gave evidence in their affidavits indicating that the public scrutiny arising as a result of a child death review has negative effects on social workers, and links child death reviews with problems of retention of social workers in the field of child protection work, and with increased apprehensions. Janet Kehler and Shirley Cochrane gave evidence to the effect that social workers will suffer from stress and morale issues as a result of publicity.

125. It may be the case that public inquiries into child deaths have some negative consequences on the child welfare system. However, in order to justify a publication ban on the names of social workers, the applicants would need to demonstrate that the publication of workers' names and images in the media will cause a serious risk to the child welfare system or the best interests of children that could not otherwise be managed with reasonable measures.

126. None of the affidavits filed by the applicants provide evidence making the necessary link between the publication of workers' identities and a risk to the system. It appears therefore to be speculative to say that publication of names causes a risk, whether to the administration of justice, or some other important interest.

127. On the issue of harm to the system, in the cross-examination on Ms. Kehler's affidavit by counsel for Edwards and Sinclair, Ms. Kehler gave evidence that would indicate that the risks that are cited by the applicants have already manifested themselves. For example, stress has already increased among workers, as a result of publications in the media in which no workers were named. Part of the stress was the result of all workers being painted with the same brush, and part of the stress was from the fact that a child had died.

128. In the cross-examination on the affidavit of Ms. Gosek by counsel for the Media Group, Ms. Gosek's evidence was that a number of articles talk about inquiries, but they do not address directly the issue of restricting publication as a remedy for social worker stress. In response to questions in cross-examination by counsel for Edwards and Sinclair, Ms. Gosek agreed that there are many reasons for the turnover rate in child protection work.

129. The applicants have adduced evidence in this case, including social science evidence, indicating that inquiries have some negative effects. However, that evidence does not make the

necessary link between identification of social workers in the media and a serious risk to the child welfare system or the best interests of children.

(d) Conclusion

130. The evidence adduced by the applicants, including the social science and expert evidence, does not show that publication of names or images of social workers in the media: (1) will subject them to greater personal safety risk than if they were anonymous in the media; or (2) will cause a serious risk to the child welfare system or to the best interests of children.

131. On the initial question of whether the evidence filed establishes that a publication ban is required to prevent a serious risk to the child welfare system or to the best interests of children, I do not find that any such risk has been established. The link I have referred to is not there.

132. Therefore, the request by the applicants for an order prohibiting any form of publishing, broadcasting, or otherwise communicating by television, internet, radio in print or any other means the name and/or image of any witness who is or was a social worker, and the name of any social worker identified in documents produced at the inquiry, is denied.

B. Analysis of the Second Branch to the Motions

1. General

133. If there was sufficient evidence to establish a risk to the child welfare system or the best interests of children, in accordance with the first branch of *Dagenais/Mentuck*, the analysis would move to an examination of whether 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 and the efficacy of the administration of justice. I have not found such a "serious risk" but I nonetheless thought it useful to make the following observations and record my views with respect to them.

2. *The Salutary and Deleterious Effects*

134. Part of the balancing exercise required by *Dagenais/Mentuck* requires assessing the value of revealing the social workers' identities. In the context of an inquiry, there is an even greater presumption of openness because one of the goals of an inquiry is "provide the means for Canadians to be apprised of the conditions pertaining to a worrisome community problem and to be a part of the recommendations that are aimed at resolving the problem" (per Cory J. in *Phillips, supra*, para.73).

135. The salutary effects of a publication ban would arguably be that the privacy of the social workers remains intact. To the extent that there might be evidence that does not reflect well on the work of a particular social worker (although I make no such finding at this stage), that social worker might not suffer the same embarrassment or effect on his or her reputation as would be the case if his or her identity is revealed. The applicants have argued that the ban will have a salutary effect on the child welfare system and the best interests of children, but I have found no evidence in that regard.

136. The applicants have argued that what they are seeking amounts to a "minimal" restriction on the freedom of expression. That is because the Commission will hear evidence from witnesses and any person attending the hearing room will see the witnesses.

137. Of importance is that in this inquiry, the public will be educated about a system which is often shrouded in secrecy. Central to this inquiry is the question of why a young child was dead for nine months before the authorities (child welfare and others) became aware. Exactly who played a role in Phoenix's life, through the provision of child welfare services and otherwise, is not a trivial part of Phoenix's story.

138. In addition, there has been evidence filed by the applicants, and which has come out in cross-examinations, showing that some members of the public have been under a misapprehension as to which individuals or agencies provided services to Phoenix and her family. This is particularly the case with respect to the evidence of Shirley Cochrane. There has been a concern noted in the evidence filed that all social workers will be "painted with the same brush" in this inquiry. In my view, if the identity of the social workers who had actual involvement with Phoenix remains confidential, it will not serve to clear up any of those misconceptions. Concealing their identities could, in fact, serve to perpetuate them. And, while a ban might help to protect the privacy of an individual worker who might be viewed unfavourably by the public, there would continue to be a risk that any child protection worker could be painted with that same brush when the particular worker is not identified. I find that the identity of social workers who will testify is valuable information to the inquiry, and to the public.

139. Ms. Kehler provided evidence that some social workers may be reluctant to come forward to assist this Commission if they know that their names will be published in the media. The expectation of this Commission is that as both professionals and public servants, all social workers called to testify will fulfill the duties and responsibilities that rest with them in those respective capacities.

140. The public hearings of this inquiry will be run in such a way as to ensure fairness to all of the witnesses, in order to ensure that full and accurate information is provided to this Commission and to the public. The comments of R.J. Sharpe J.A. in the decision in *Episcopal Corp. of the Diocese of Alexandria-Cornwall v. Cornwall Public Inquiry Commissioner, supra,* at paragraph 16, are helpful in the context of this inquiry as they speak to the expectation on the ability of the public to understand the information that is provided to them. In that case, there was a request in an inquiry for a publication ban on the identity of a witness who had been acquitted of sexual abuse charges. The Commissioner had refused to grant a publication ban, a decision that was upheld on review by the Ontario Court of Appeal:

> The Commissioner had found that the employee had been the subject of media attention during and after his trial when his identity had been exposed to the public. At that time, the employee enjoyed his employer's support and the support of his parish. The Commissioner also found that the employee had failed to provide medical evidence to substantiate the detrimental effect he claimed disclosure of his identity would have on his health. The Commissioner found that one could not presume that the public would ignore reminders of the employee's acquittal and jump to unfair or unfounded conclusions about him. The Commissioner indicated that the appellant could object to evidence on the ground of relevance or ask for publication bans in relation to specific allegations not germane to the examination of the institutional response to the allegations.

141. Finally, I wish to comment on the efficacy of the requested ban. The nature of the ban requested by the social workers, if granted, would result in an inequality among members of the public in their access to information about the inquiry. That is, the social workers are not asking that the hearing room be closed to the public. Those members of the public who are able to attend will be able to learn the identity of the social workers and, as acknowledged by counsel for the MGEU, would be able to communicate what they learned in the hearing room, including

via the Internet. This in turn raises the question of whether the requested ban would be effective in any event (*Dagenais,* supra, paragraphs 93 to 94).

3. Conclusion

142. Even if I had found that a publication ban was necessary to prevent a serious risk to the child welfare system or to the best interests of children, which I have not, the evidence does not establish that the salutary effects of a publication ban would outweigh its deleterious effects in any event.

VI. Audio and Video Recording and Broadcasting in the Inquiry

A. The Position of MGEU and ICFS

143. The MGEU and ICFS have asked in their motions (in the alternative) for an order prohibiting audio and video recording and broadcasting of the testimony of social workers.

144. The MGEU sets out its position on cameras in inquiries at paragraphs 86 to 125 of its brief. The MGEU takes the position that there is no s.2(b) *Charter* right to audio and video recording and broadcasting of the inquiry, and relies heavily on the decision in *R. v. Pilarinos*, 2001 BCSC 1332. The MGEU further argues that it is not necessary for the media to have such access in order for the inquiry to fulfill its mandate.

B. The Position of the Respondents

The Media Group takes the position that to restrict the normal reporting practices typically available in inquiries amounts to an interference with the freedom of expression. AMC/SCO have

argued that to restrict media in the manner requested will limit the number of people who will be able to access the inquiry proceedings.

C. Analysis

145. *R. v. Pilarinos,* upon which the MGEU relies, is not consistent with the more recent case law on this issue. In particular, in the recent decision by the Supreme Court of Canada in *CBC v. AG (Canada), supra*, Deschamps J. found that filming in the hallways of courthouses, and audio broadcasting of court proceedings was "expressive activity" pursuant to s.2(b). The Media Group points out that there is evidence, from the cross-examination on the affidavit of Ms. Gosek, demonstrating that the ability to observe body language, tone of voice, and non-verbal cues is important to evaluating information that is being given. The Media Group points out that there is a long and established history of recording inquiry proceedings. The Media Group argues that to deviate from this practice would be a violation of the freedom of expression.

146. The MGEU relies on the decision of Preston Prov. J. in *Re Sinclair Inquest*, 2010 MBPC 18, in support of its position that there is no s.2(b) *Charter* right to televise this inquiry. That case involved an application by the media to televise an inquest under *The Fatality Inquiries Act*, C.C.S.M. c.F52, which is a sitting of the Provincial Court. Different considerations apply in deciding the issue of whether to televise court proceedings versus inquiry proceedings. As the Media Group notes in its brief, the difference in practice between public inquiries and court proceedings was noted by Preston Prov. J. in that case. In denying the application, the learned judge expressed the sentiment that he did not wish to turn the inquest into a "*de facto* inquiry," and relied, in part, on the distinction between inquests and inquiries in dismissing the media's application.

147. Freedman J.A., in *M.G.E.U. v. Hughes*, *supra*, also comments on the unique, and public, nature of this inquiry, at paragraphs 70 to 73:

> The Inquiry hearings will be held in public (subject to the respondent's ruling otherwise in any particular instance). The OIC, enacted pursuant to Part V of the *Act*, headed, "Respecting Commissioners Appointed for Public Inquiries," contemplates public hearings. In his statement announcing the plans to establish a commission of inquiry, the Premier stated, among other matters: "The public has a right to know how a child could go missing for nine months without it being noticed ...." The respondent's report will be for public consumption.
>
> In this case the AG "is strongly of the opinion that it is in the public interest to hold this inquiry." The LGIC has decided that the Inquiry's process and result should be subject to public scrutiny and exposure, although that is not a necessary aspect of an inquiry that might be constituted pursuant to s.83. I am satisfied that the LGIC may establish a public inquiry under s 83. The scale and scope of such an inquiry is not confined to a formal or judicial investigation, and is limited only by the provisions of s.83.
>
> The AG argued forcefully, and I think correctly, that this Inquiry under s.83 of the *Act* is intended to be of a different nature and scope than any review, investigation or inquest (or any combination thereof) that has been or that might be conducted pursuant to any other statute.
>
> The OIC imposes obligations on the respondent, as commissioner, going beyond those imposed on any person who might conduct any other review, investigation or inquest under the two statutes in question. The OIC is, as counsel said, "tailor-made" to suit the particular combination of factors that were felt to require public investigation and report. Those factors include some that must be dealt with at an inquest or an investigation under the *FIA*, some that must be dealt with in a review under *The Child and Family Services Act* and some that are not required to be dealt with under either of those statutes.

148. Given the foregoing, I accept that audio and video recording and broadcasting of this inquiry's proceedings is "expressive activity" protected by s.2(b) of the *Charter*. In determining whether or not to make an order prohibiting such activity the analysis to be applied is again *Dagenais/Mentuck*, taking into account the evidence filed by the parties as to the particular risks associated with recording and broadcasting workers' testimony. This analysis is always context-

specific, as noted earlier, and therefore in this case would need to take into account the function of public inquiries, as noted by Cory J. at paragraphs 73 to 75 of *Phillips, supra*, as noted above.

149. The Media Group has filed evidence showing that the majority of families that come in to contact with the child welfare system are First Nations families. They argue that because many of the people affected by this inquiry live in remote communities, access will be negatively affected if there is an order restricting audio and video broadcasting.

150. This issue was discussed in the case of *Aboriginal Peoples' Television Network v. Canada (Human Rights Commission)*, 2011 FC 810, a judicial review by Lutfy C.J. of the Federal Court of the refusal of the Canadian Human Rights Tribunal to allow a camera access to its proceedings. The proceedings in question involved a complaint filed by the Assembly of First Nations and the First Nations Child and Family Caring Society, alleging that the inequitable funding of child welfare services on First Nations reserves amounted to discrimination. The tribunal did touch on the aboriginal community's interest in being able to observe the proceedings and the barriers that would make it impossible for most members of the community to travel to Ottawa to observe the hearing, but then concluded that the exclusion of cameras from the hearing room was necessary to ensure that the publicity of the hearings would not undermine their integrity. Lutfy C.J. found that the tribunal's decision was made without regard to the evidence before it, and in sending it back for the tribunal's reconsideration, commented at paragraph 14:

> There was little affidavit evidence before the tribunal regarding any of the potential negative impacts of filming the proceedings. The Attorney General provided one affidavit from a Litigation Case Manager with the Department of Indian Affairs and Northern Development. Her affidavit stated that the government's witnesses had all "expressed concern" about their testimony being videoed and televised. Their primary concern was that if their testimony was taken out of context, it would portray them in a negative light and damage their working relationships with First Nations persons and agencies. None of the

> proposed witnesses expressed concern that their testimony would be affected by the presence of a camera, or otherwise expressed any concerns relating to the fairness of the hearing. None of the potential witnesses were named, and no evidence was provided directly from them regarding their concerns.

151. The concerns raised in that case are similar to the concerns expressed by Ms. Kehler in her affidavit, in which she explains the reasons why some social workers have concerns about their testimony being broadcast. However, as in *APTN, supra*, none of those social workers has provided any affidavit evidence to this inquiry regarding their concerns; those concerns have been expressed by way of hearsay evidence from Ms. Kehler. This is not a risk which is well-grounded in the evidence, which is what is required under *Dagenais/Mentuck.*

D. Conclusion

152. A public inquiry is meant to educate and inform the public and it follows that permitting broadcasting of the inquiry proceedings would serve to fulfill that aspect of the inquiry's mandate. Were I to restrict audio and video recording and broadcasting of the social workers' testimony in this inquiry, the result would be an inequality among members of the public in access to information about the proceedings. I cannot justify the requested restriction on media access in the absence of convincing evidence that broadcasting the testimony of social workers will cause a serious risk as required by *Dagenais/Mentuck.* I therefore decline to grant the relief requested in the alternative by MGEU and ICFS, for the same reasons I have declined to grant the primary relief sought.

VII. Other Motions

153. In addition to the motions filed by the applicants above, a number of other motions were filed. Included among these motions are motions filed on behalf of individuals identified by Commission Counsel as sources of referral/informants (SORs). The motions are as follows:

A. Department of Family Services and Labour ("the Department")

154. The Department has filed a motion seeking the following relief:

> That the Commission redact from documents produced at the inquiry the names and other identifying information of:
>
> a. Sources of Referral
>
> b. Minors, if their identity is irrelevant to the inquiry
>
> c. Foster parents

155. On December 2, 2011, after receiving written submissions from counsel for the parties and intervenors, I made my Ruling on Redaction which required that certain information be redacted from Commission Disclosure prior to distribution to the parties and intervenors to this inquiry. The Department's motion is essentially a request that that ruling be continued into the public phase of this inquiry, so that the documents entered into evidence at the inquiry contain the same redactions as have already been made by Commission counsel. No objection was made by any party or intervenor to the Department's motion in oral submissions, and as a result, and for the reasons set out in my December 2, 2011 ruling, I made the order requested at the time of counsel's presentation.

B. SOR #1, SOR #2, SOR #4, PHN and TM

156. A motion was filed by counsel for the Winnipeg Regional Health Authority (WRHA) on behalf of witnesses identified as SORs #1, #2, #4, as well as on behalf of two individual witnesses who are not identified as SORs, PHN and TM. The motion seeks the following relief:

1. An order redacting the names or other identifying information of SOR #1, #2, #4, PHN and TM from documents produced at the inquiry.

2. An order prohibiting any form of publishing, broadcasting, or otherwise communicating by television, internet, radio, print or any other means the names and other identifying information of SOR #1, #2, #4, PHN and TM.

3. That the Commissioner extend to the witnesses referred to above any other considerations regarding the comfort, safety, privacy that he determines ought to be reasonably extended to other witnesses at the inquiry.

157. In her oral submission, counsel for the WRHA asked that while the hearing room may be open to the public during the testimony of these witnesses, SORs #1, #2, and #4 not be referred to by name during the hearing. With respect to PHN and TM, she indicated that the relief sought by Authorities/ANCR, and ICFS would be appropriate.

C. SOR #3

158. A witness identified by Commission Counsel as SOR #3 filed a motion, through her counsel, for an order prohibiting 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 SOR #3. While the Notice of Motion filed also asked that all members of the public be excluded from the hearing room during the testimony of SOR #3, in oral submissions counsel for SOR #3 clarified that the public and the press may see the witness.

D. SOR #5, SOR #6, SOR #7

159. Counsel for witnesses identified by Commission Counsel filed a motion as SOR #5, SOR #6, and SOR #7, filed a motion for:

1. An order prohibiting any form of publication, broadcasting or otherwise communicating by television, internet, radio, print or any other means, the name, face, or identity of SOR #5 , SOR #6, and SOR #7; and

2. That the Commissioner exclude all members of the public from the hearing room during the testimony of SOR #5 and #6, or any other order the Commissioner may see fit to protect the identity of these witnesses.

E. Analysis

1. SOR #1, SOR #2, SOR #3, SOR #4, SOR #5, SOR #6, SOR #7

160. Each of these individuals has been identified by Commission Counsel as an informant/source of referral as that term is used in *The Child and Family Services Act*, C.C.S.M. c.C80, in the context of this inquiry, and none of these individuals has consented to the disclosure of their identity.

161. Section 18 of *The Child and Family Services Act*, C.C.S.M. c.C80 is a mandatory provision that applies to all members of society. It requires any person who has information that a child is in need of protection to report the information to an agency. Pursuant to s.18.1(2):

> 18.1(2) Except as required in the course of judicial proceedings, or with the written consent of the informant, no person shall disclose
>
> (a) the identity of an informant under subsection 18(1) or (1.1)
>
> (i) to the family of the child reported to be in need of protection, or
>
> (ii) to the person who is believed to have caused the child to be in need of protection; or
>
> (b) the identity of an informant under subsection 18(1.0.1) to the person who possessed or accessed the representation, material or recording that is or might be child pornography.

162. The Media Group is not taking issue with a publication ban on the identities of SORs, but does reserve its right to bring an application for publication of identity if the evidence reveals that a particular witness played a material role apart from being an SOR. None of the parties to this inquiry or on these motions has indicated any opposition to the motions brought by the SORs (subject to the qualification by the Media Group as above).

2. PHN and TM

163. Counsel for PHN and TM argues that the reasons for treating PHN and TM like the SORs are "no less compelling" than for the SORs. Those reasons flow from the "critical nature of the services PHN and TM provide." Affidavits from Regan Spencer and Linda Tjaden have been filed in support.

164. Ms. Spencer is the Director of Social Work at the Health Sciences Centre, where approximately 70 social workers report to her. The medical social workers in the Women's Health Program at HSC are aware of their professional duty to report concerns that a child may be in need of protection. Once those social workers make a report, they become "sources of referral" deserving of protection under *The Child and Family Services Act*, C.C.S.M. c.C80.

165. Ms. Tjaden is Director of Public Health for the WRHA. Public Health Nurses (PHNs) provide services to mothers and families in the pre-natal and post-partum period. Services are voluntary. Part of the services that the PHNs provide are home visits. Ms. Tjaden states that these visits are key. Sometimes the PHN will identify certain risk factors within the home, and they are aware of their legal duty to report any child protection concerns. TM provided supervision to the PHN in this case. Ms. Tjaden is concerned that publication has the potential to destabilize the critical trust relationship between PHNs and clients. Publication of the identities of the PHN and TM in this case could potentially jeopardize the protection afforded to SORs.

166. It is argued that with respect to PHN and TM, they work in positions where, due to the nature of their duties, they could be informants. Persons in their positions report child protection concerns with some frequency.

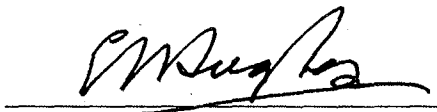
167. Counsel for PHN and TM has taken the position that as potential sources of referral, PHN and TM should be entitled to the same protections as SOR #1, #2 and #4.

F. Decision

168. I find that it is appropriate to grant to each of the SORs the relief they seek and therefore grant the orders sought by each of SOR #1, SOR #2, SOR #3, SOR #4, SOR #5, SOR #6, and SOR #7.

169. With respect to PHN and TM, there is no evidence that either of PHN or TM acted as informants/sources of referral in the particular circumstances to be examined in this inquiry. The argument that they might, due to the nature of their professional duties, become informants/sources of referral at some point and are therefore entitled to anonymity, is not persuasive, nor does it appear that any "serious risk" has been identified in the evidence to justify a publication ban as is required under *Dagenais/Mentuck*. By this logic, any person who may become a source of referral in the course of his or her professional duties should always be entitled to a publication ban based on the potential that he or she may report a child in need of protection at some point in the future - regardless of the reason why he or she is being called as a witness in a proceeding. I therefore decline to grant the relief sought by PHN and TM.

DATED at Winnipeg, Manitoba, this 12th day of July, 2012.



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