

Citation: The Southern First Nations Network of  
Care et al. v. The Honourable Edward Hughes,  
2012 MBCA 99

Date: 20121022  
Docket: AI 12-30-07838

**IN THE COURT OF APPEAL OF MANITOBA**

*Coram:* Chief Justice Richard J. Scott  
Madam Justice Freda M. Steel  
Madam Justice Barbara M. Hamilton

***BETWEEN:***

<b><i>THE SOUTHERN FIRST NATIONS</i></b>	)	<b><i>K. M. Saxberg and</i></b>
<b><i>NETWORK OF CARE, THE GENERAL</i></b>	)	<b><i>S. C. Scarcello</i></b>
<b><i>CHILD AND FAMILY SERVICES</i></b>	)	<b><i>for the Appellants</i></b>
<b><i>AUTHORITY, THE FIRST NATIONS OF</i></b>	)	
<b><i>NORTHERN MANITOBA CHILD AND</i></b>	)	<b><i>S. M. Walsh and</i></b>
<b><i>FAMILY SERVICES AUTHORITY and</i></b>	)	<b><i>S. Ruel</i></b>
<b><i>CHILD AND FAMILY SERVICES ALL</i></b>	)	<b><i>for the Respondent</i></b>
<b><i>NATIONS COORDINATED RESPONSE</i></b>	)	
<b><i>NETWORK</i></b>	)	<b><i>J. J. Gindin and</i></b>
<b><i>(THE "AUTHORITIES AND ANCR")</i></b>	)	<b><i>D. A. Ireland</i></b>
	)	<b><i>for the Intervenors N. Sinclair</i></b>
<b><i>Appellants</i></b>	)	<b><i>and K. Edwards</i></b>
	)	
<b><i>- and -</i></b>	)	<b><i>R. D. Buchwald and</i></b>
	)	<b><i>N. D. M. Hamilton</i></b>
<b><i>THE HONOURABLE EDWARD HUGHES,</i></b>	)	<b><i>for the Intervenor D. De Gale</i></b>
<b><i>in his capacity as Commissioner under</i></b>	)	
<b><i>The Manitoba Evidence Act and as appointed</i></b>	)	<b><i>Appeal heard:</i></b>
<b><i>pursuant to Order in Council No. 89-2011,</i></b>	)	<b><i>October 9, 2012</i></b>
<b><i>dated the 23<sup>rd</sup> day of March, 2011</i></b>	)	
	)	<b><i>Judgment delivered:</i></b>
<b><i>Respondent</i></b>	)	<b><i>October 22, 2012</i></b>

**STEEL J.A.**

**Introduction**

1           This appeal comes before the court as a stated case by The Honourable Edward Hughes, the Commissioner appointed to conduct a Commission of Inquiry into the circumstances surrounding the brief life and tragic death of Phoenix Sinclair (the Commission). After the Commissioner declined the appellants' request to state a case to the Court of Appeal regarding his refusal to order the disclosure of the transcribed witness interviews by Commission counsel (the transcripts), the appellants obtained an order from a judge of this court directing the Commissioner to state a case on the following two questions (see *The Southern First Nations Network of Care et al. v. The Honourable Edward Hughes*, 2012 MBCA 83):

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

2           The Commissioner consequently prepared a stated case with respect

to these two questions.

### **The Parties and the Intervenors**

3           The appellants, The Southern First Nations Network of Care, The General Child and Family Services Authority, The First Nations of Northern Manitoba Child and Family Services Authority (the Authorities) and the Child and Family Services All Nations Coordinated Response Network (the ANCR), are agencies involved in child protection and care throughout Manitoba and have standing before the Commission as parties. The appellants argue that disclosure of the transcripts is required pursuant to the Commission's own Rules of Procedure and Practice and pursuant to the principles of natural justice and procedural fairness.

4           The respondent, as noted above, is the Commissioner appointed to conduct the Commission of Inquiry, whose decision refusing to order the disclosure of the transcripts brings the issue before this court.

5           The intervenors Nelson Draper Steve Sinclair (Steve Sinclair) and Kimberly-Ann Edwards have standing before the Commission as parties and support the appellants' request for disclosure of the transcripts. Steve Sinclair is the natural father of Phoenix Sinclair, and Kimberly-Ann Edwards was a principal caregiver to Phoenix Sinclair during much of her short life. The intervenor Debbie De Gale is expected to be a witness at the Commission and objects to disclosure of the transcript of her interview with Commission counsel.

## Background

6           On March 23, 2011, the Lieutenant Governor in Council issued Order in Council No. 89/2011 (the OIC) appointing the respondent as Commissioner for the Commission. The OIC was issued pursuant to s. 83 of *The Manitoba Evidence Act*, C.C.S.M., c. E150 (the *MEA*). Among other tasks, the Commissioner is required to inquire into and report on the following matters (para. 1 of the OIC):

(a) the child welfare services provided or not provided to Phoenix Sinclair and her family under *The Child and Family Services Act*;

(b) any other circumstances, apart from the delivery of child welfare services, directly related to the death of Phoenix Sinclair; and

(c) why the death of Phoenix Sinclair remained undiscovered for several months.

7           The Commissioner is also to make such recommendations as are considered appropriate to better protect children in Manitoba (para. 2 of the OIC).

8           Paragraph 4 of the OIC allows the Commissioner to “consider any court transcripts and similar documents, which are not subject to a legal claim of privilege, and may give them any weight” as he wishes, “including accepting them as conclusive.”

9           Paragraph 9 of the OIC allows the Commissioner, or his counsel, to interview any persons connected with the matter. It states as follows:

Before public hearings take place, the commissioner may interview any person connected with the matters referred to in paragraph 1. On the commissioner's behalf, interviews may be conducted by counsel for the commissioner, either alone or in the commissioner's presence. If conducted alone, counsel must give the commissioner a transcript or a report of each interview. The commissioner may, in his discretion, rely on the evidence gathered in this manner.

10 The full OIC is attached hereto as Schedule A.

11 Commission counsel was appointed on April 15, 2011, to assist the Commissioner, and applications for standing were granted on June 29, 2011. The Commission's Rules of Procedure and Practice (Commission Rules) were prepared by Commission counsel in consultation with the Commissioner, and all parties and intervenors were invited to review the proposed Commission Rules and make submissions prior to their issuance. After hearing submissions and comments, and with the parties' consent, the Commission Rules were issued on June 29, 2011. They were further amended on August 23, 2011, to deal with the procedure on motions before the Commissioner.

12 For the purpose of this stated case, the relevant provisions of the Commission Rules are as follows:

3. In these Rules:

(i) "Commission counsel" refers to counsel appointed by the Commissioner and retained by the Government of Manitoba to act as Commission counsel, and includes any associate counsel or junior counsel appointed by "Commission counsel" with the approval of the Commissioner and under the authority of Commission counsel's retainer;

(ii) the term “documents” is intended to have a broad meaning, and includes the following forms: written, electronic, audiotape, videotape, digital reproductions, photographs, maps, graphs, microfiche and any data and information recorded or stored by means of any device;

(iii) “intervenor” refers to a person granted status as an intervenor by the Commissioner pursuant to paragraph 9;

(iv) “party” refers to a person granted full or partial standing as a party by the Commissioner pursuant to paragraph 8; and

(v) “person” means an individual, group, government, agency or other entity.

16. The Commissioner may consider any court transcripts and similar documents, which are not subject to a legal claim of privilege, and may give them any weight, including accepting them as conclusive.

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

23. If Commission counsel determines that a person who has been interviewed should be called as a witness in the public hearings referred to in paragraph 2, Commission counsel will prepare a summary of the witness’ expected testimony, based on the interview (“Summary”). Commission counsel will provide a copy of the Summary to the witness before he or she testifies in the hearing. After the Summary has been provided to the witness, copies shall be disclosed to the parties and intervenors having an interest in the subject matter of the witness’ evidence, on their undertaking to use it only for the purposes of the Inquiry, and on the terms described in paragraphs 27 and 28 below.

24. The Summary of a witness’ expected testimony cannot be used

for the purpose of cross-examination on a prior inconsistent statement.

25. Pursuant to section 9 of Order in Council 89/2011, if Commission counsel determines that it is not necessary for a person who has been interviewed to be called as a witness, or if the person interviewed is not otherwise able to be called to testify at the public hearings referred to in paragraph 2, Commission Counsel may tender the Summary to the Commissioner at the hearing, and the Commissioner may consider the information in the Summary when making his final findings, conclusions and recommendations.

26. Unless the Commission orders otherwise, all relevant non-privileged documents in the possession of the Commission shall be disclosed to the parties and intervenors at a time reasonably in advance of the witness interviews and/or public hearings or within a reasonable time of the documents becoming available to the Commission.

13           On December 2, 2011, a court order was obtained which allowed the Commissioner and his counsel to obtain confidential child welfare records for the purpose of the Commission. After reviewing those records for relevance, and redacting certain information, the records were subsequently released to the parties and intervenors.

14           Commission counsel proceeded to interview potential witnesses in order to prepare for the public hearings. The method initially followed, as discussed with counsel for the parties, was that Commission counsel would take handwritten notes of the interviews with the witnesses. However, it quickly became apparent that the note-taking procedure was too time-consuming, so other methods were tried. Secretarial staff were assigned to take notes instead, but this too did not work well. In the end, Commission counsel used an audio recording machine to record all remaining interviews,

and the recordings were then transcribed. These recorded interviews were informal; there was no court reporter present, nor were the witnesses under oath during the interview.

15 Whether the interviews were recorded by handwritten notes or by machine, all witnesses were advised that the interviews were for the purpose of informing Commission counsel of their evidence in order to prepare for the hearing. Witnesses were given assurances that the notes, recordings or transcriptions of the recordings were for the use of Commission staff only, although a summary of their evidence would be prepared, shown to them and then circulated to the parties and intervenors, as required by Commission Rule 23.

16 In fact, Commission counsel first sent the handwritten notes and/or transcripts to the witnesses or their counsel so that they could review them and suggest changes or additions. Some witnesses were asked to confirm the accuracy of the handwritten notes and/or transcripts. After receiving feedback, Commission counsel then prepared witness summaries, which were sent to the witnesses (or their counsel if they had one) for any suggested changes or additions. For the most part, suggested changes were incorporated into the final versions of the summaries, which were then provided to the parties and intervenors.

17 In March or April 2012, prior to receiving summaries of the witnesses' interviews, the appellants first became aware that Commission counsel were recording the interviews and having the recordings transcribed, and they requested production of the transcripts. Commission counsel

declined.

18 On June 29, 2012, Commission counsel began to distribute witness summaries to parties and intervenors. Seventy-seven witness summaries had been distributed as of September 13, 2012, representing the vast majority of witnesses expected to testify in the first phase of the Inquiry.

19 On July 4, 2012, the appellants filed a motion with the Commissioner for an order compelling Commission counsel to disclose the transcripts or, alternatively, for an order allowing willing witnesses to disclose their own interview transcripts to the parties and intervenors.

20 The motion was heard by the Commissioner on July 24, 2012. The appellants argued that they were entitled to disclosure of the transcripts on two grounds: (1) by virtue of Rule 26 of the Commission Rules, which provides that all relevant and non-privileged documents in the possession of the Commission are to be disclosed; and (2) by virtue of the principles of natural justice and procedural fairness. Commission counsel opposed the motion. On August 1, 2012, the Commissioner issued a decision denying the appellants' request. See Commission of Inquiry into the Circumstances Surrounding the Death of Phoenix Sinclair, *Commissioner's Decision on Preliminary Motion re Witness Interview Transcripts* (August 1, 2012), online: [http://phoenixsinclairinquiry.ca/pdf/commissioner\\_decision.pdf](http://phoenixsinclairinquiry.ca/pdf/commissioner_decision.pdf) (last accessed October 18, 2012).

*Commissioner's Decision on Disclosure of Transcripts*

21 With respect to the appellants' argument that Commission Rule 26

required disclosure of the transcripts, the Commissioner determined that Commission Rule 26 concerned documents received by the Commission, rather than documents created by the Commission for its own internal purposes. The Commissioner was of the view that Commission Rules 21-24 exclusively addressed how information obtained through the pre-hearing interview process would be disclosed.

22 With respect to the appellants' argument that disclosure of the witness interview transcripts was required pursuant to the principles of natural justice and procedural fairness, the Commissioner indicated that he saw no breach of fairness. In his view, it was clear that Commission counsel used the recording and transcription process in place of the note-taking process so as to more efficiently prepare the summaries required by Commission Rule 23. He also noted that the Commission Rules were adopted with the participation and concurrence of all parties and intervenors, and was of the view that it was understood by all that the method of acquainting parties and intervenors with the anticipated evidence would be accomplished by the preparation and delivery of summaries.

23 Furthermore, since Commission counsel had given all potential witnesses the assurance that the interview transcripts would not be distributed to the parties or intervenors, the Commissioner concluded that it would be unfair to Commission counsel and those potential witnesses to order the distribution of the interview transcripts to the parties and intervenors. In his view, this would bring the credibility of the Commission into question and might impede candour when the witnesses testified.

24 The Commissioner also rejected the contention that disclosure of the transcripts was mandated by this court's decision in *Hudson Bay Mining and Smelting Co. v. Cummings, P.C.J.*, 2006 MBCA 98, 208 Man.R. (2d) 75, distinguishing the case on the following bases:

1. that the *Hudson Bay* decision concerned an inquest and not a public inquiry, and that there were considerable differences between the two, especially with respect to the latitude and discretion in determining their own process, rules and procedures;
2. in *Hudson Bay* there was no indication that summaries or "will says" were ever offered or provided to counsel or parties with standing; and
3. in *Hudson Bay* there was no evidence that the comments of witnesses were made with the expectation that they would be kept confidential.

## Analysis

### **Question One: Do the Commission's Amended Rules of Procedure and Practice require the disclosure of witness interview transcripts to the Parties and Intervenors?**

25 The relevant OIC provisions and Commission Rules are set out above, and include OIC paras. 4 and 9, and Commission Rules 21, 23-26.

26 It is the position of the appellants that the Commission Rules require the disclosure of the transcripts. They submit that Commission Rule 26 requires that all relevant non-privileged documents in the possession of the

Commission be disclosed to the parties and intervenors and that the transcripts are “documents” within the definition of documents in Commission Rule 3(ii).

27           It is the position of the Commissioner that deference should be accorded to an administrative body’s interpretation of its own enabling legislation and applicable subordinate enactments and rules with which it has particular familiarity; consequently, the standard of review for his interpretation of the Commission Rules is reasonableness. He submits that his conclusion that Commission Rule 26 did not cover the transcripts and that Rules 21-24 exclusively addressed the disclosure of information obtained through the pre-hearing interview process was a reasonable interpretation of the Commission Rules.

28           I agree with the Commissioner that the standard of review is one of reasonableness and that the Commissioner is entitled to considerable deference in the interpretation of the Commission Rules. See *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7 at para. 26, [2011] 1 S.C.R. 160; *Anderson et al. v. Manitoba et al.*, 2010 MBCA 113 at para. 66, 262 Man.R. (2d) 96; *Darcis et al. v. Manitoba et al.*, 2012 MBCA 49 at paras. 31-36, 280 Man.R. (2d) 160; and *Alberta (Information and Privacy Commissioner) v. Alberta Teachers’ Association*, 2011 SCC 61 at paras. 30, 34, [2011] 3 S.C.R. 654.

29           In his decision, the Commissioner explained why he had come to the conclusion that Commission Rule 26 was not applicable, and why Commission Rule 23 did not include disclosure of the interview transcripts.

He explained (at para. 16):

.... ... Rule 26 was put in place to cover documents received by the Commission and not documents created by it or for its own internal purposes. Rules 21 to 24 exclusively address the disclosure of information obtained through the pre-hearing interview process. The reference to documents in Rule 26 is to information received by the Commission in writing or similar form and not information created by the Commission for its own internal purposes.

30 I find that the Commissioner's decision to the effect that Rule 26 does not apply to the transcripts is a reasonable interpretation. Consequently, I would answer "No" to the question:

Do the Commission's Amended Rules of Procedure and Practice require the disclosure of witness interview transcripts to the Parties and Intervenors?

For the same reasons, Commission Rule 16 would not be applicable to the transcripts, as argued by the intervenors Steve Sinclair and Edwards.

**Question Two: Do the principles of natural justice and procedural fairness require the disclosure of witness interview transcripts to the Parties and Intervenors?**

31 It is the position of the appellants that the principles of natural justice and procedural fairness require the disclosure of the transcripts. They submit that the content of procedural fairness is contextual and dependent upon the nature of the particular hearing. They argue that the process followed by a commission of inquiry bears strong similarities to the judicial

process and, further, that the importance of the Commission's recommendations and the possible effect on reputations require a high degree of procedural fairness.

32           They argue that the parties and intervenors did not agree to a process whereby the transcripts would be prepared but not disclosed to the parties, resulting in only Commission counsel being able to use the transcripts to prepare for the hearings. They also assert that the witness summaries are inadequate in that they do not provide the detail necessary for the parties and intervenors to prepare adequately for the hearings; in the result, they do not meet the high level of procedural fairness required. They are entitled, they say, to the "best evidence," namely, the transcripts.

33           The Commissioner agrees that the content of procedural fairness is indeed contextual and dependent upon the nature of the particular hearing, but argues that the contextual factors in this case indicate that a much lower level of procedural fairness is required than that proposed by the appellants. In this regard, the Commissioner submits that commissions of inquiry are quite different from judicial decision-making, as commissions of inquiry do not come to legal determinations, are investigatory in nature, and are given wide latitude with respect to the establishment of their own process and procedures.

34           Furthermore, the Commissioner argues that, although reputational interests may be affected, the level of procedural fairness must be balanced

with other important considerations, including efficiency and cost-effectiveness, so as to complete the Commission's important public mandate in a timely, but fair, manner. Finally, the Commissioner submits that since it was the expectation of all that only summaries of the witness interviews would be disclosed, the Commission's choice in determining the method of recording witness interviews should be respected. The Commissioner, therefore, submits that the disclosure procedures in this instance were consistent with the most stringent of disclosure standards required in proceedings such as this, and that, therefore, the requirements of procedural fairness have been more than met.

35 I agree that it is not correct terminology to discuss the duty of procedural fairness in terms of the standard of review analysis. See *2127423 Manitoba Ltd. v. Unicity Taxi Ltd. et al.*, 2012 MBCA 75 at para. 11, 280 Man.R. (2d) 292. Whether procedures are fair depends on the circumstances of the case. Therefore, instead of discussing the standard of review, the court must ascertain whether the Commission's procedures are procedurally fair in light of the five well-established *Baker* factors, which explain the content of the duty of procedural fairness. See *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817. In *Friesen (Brian Neil) Dental Corp. et al. v. Director of Companies Office (Man.) et al.*, 2011 MBCA 20, 262 Man.R. (2d) 197, the five *Baker* factors were described as (at para. 75):

1. the nature of the decision being made and process followed in making it;
2. the nature of the statutory scheme and the terms of the statute

pursuant to which the body operates;

3. the importance of the decision to the individual or individuals affected;

4. the legitimate expectations of the person challenging the decision; and

5. the choices of procedure made by the agency itself.

36 Also see *Hudson Bay* at para. 95. It should be noted that, as stated in *Baker*, these five factors are not exhaustive.

37 The court must examine these factors not abstractly, but based on the actual facts in this case. As all counsel agreed, the factors are contextual and dependent upon the nature of the particular hearing. See *Baker* at para. 21, *Unicity Taxi* at para. 15, and *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159 at 181-82.

38 As well, the level of disclosure required by the duty of procedural fairness varies along a spectrum, depending on a consideration of the five factors outlined above. In this regard, see Sara Blake, *Administrative Law in Canada*, 5th ed. (Markham: LexisNexis Canada Inc., 2011), where she states (at p. 37):

The extent of disclosure varies along a spectrum. At one end is simply a requirement that the person be told verbally the gist of the factual subject and the nature of the decision to be made. Further along the spectrum is the requirement to give advance written notice of the nature of the decision to be made and the key facts upon which it will be based. To that requirement may be added the requirement to disclose the evidence to be presented to the decision maker. At the far end of the spectrum, the party may be entitled to review all relevant information (except privileged material)

including material which will not be submitted to the decision maker.

39           Balancing all of these factors in the context of this case, I would answer question two in the negative as well. For the reasons that follow, I conclude that procedural fairness, in this instance, is satisfied by the provision of detailed, meaningful summaries of the witnesses' evidence and, therefore, the disclosure of the transcripts is not required. I note that, in addition to the summary of an individual witness's expected evidence, Commission counsel included a list of documents likely to be referenced in that witness's examination-in-chief. Furthermore, at the request of some counsel, Commission counsel has identified the specific page numbers of documents which are likely to be referred to by a particular witness.

40           The parties never expected to receive more than summaries of the witness's evidence. They were fully involved in the development of the Commission Rules and made no objection to the disclosure being provided by way of summaries.

41           It is true that it was initially contemplated that junior Commission counsel would take notes of the witnesses' interviews and use those notes to produce summaries. As this turned out to be administratively impractical, the change was made to tape the interviews and then prepare transcripts.

42           In my opinion, whether junior Commission counsel took notes of an interview, an assistant took shorthand, or a verbatim transcript was recorded is irrelevant to the central issue of the parties' legitimate expectations. They always expected to receive summaries of the expected testimony of the

witnesses, and this is what happened.

43 The request for only the transcripts is puzzling. If the summaries are not sufficient, why are the parties not also requesting the handwritten notes taken before audio taping was instituted? Besides the 85 interviews documented by transcribed recordings totalling 11,762 pages, there are 80 interviews documented by notes totalling 1,141 pages (41 interviews were recorded, but never transcribed).

44 However, as readily conceded by Commission counsel, it is critical that the summary be not only adequate, but meaningful. Similar to a “will say” statement in criminal matters, the summary must set out the anticipated evidence of the witness. It must be sufficiently detailed to allow counsel for the parties to prepare their lines of questioning, keeping in mind that the Commission Rules do not permit counsel to cross-examine on the summaries. Indeed, in his book *The Law of Public Inquiries in Canada* (Toronto: Thomson Reuters Canada Ltd., 2010), one of the counsel for the Commission, Simon Ruel, equates summaries with “will says” or “statements of anticipated evidence.” He states (at p. 73):

The rules of procedure of commissions of inquiry will typically allow the advance sharing of summaries or statements of anticipated evidence or will says with the parties with standing. ....

[emphasis added]

45 An example of the rationale for detailed summaries is described in an article by Commissioner Justice Dennis O’Connor, “The Role of Commission Counsel in a Public Inquiry” (2003) 22: Advocates’ Soc. J. 9

(QL) (at paras. 18-19):

.... ... [T]here is a huge advantage to having commission counsel thoroughly interview the witnesses and prepare very detailed witness statements for two reasons. First, there should be no surprises to others who are involved in the process. The proceeding is entirely investigatory and not adversarial. Nothing is gained by surprise, and there is a danger of unfairness if witnesses are examined on areas in the evidence for the first time in the midst of the public hearing. Because of the media attention that often accompanies a public inquiry, the potential for unfairly damaging a witness's reputation must always be kept in mind.

The second reason that witnesses should be thoroughly interviewed and detailed witness statements prepared is that doing so will likely significantly shorten the time taken in the actual hearings. When it is understood in advance what a witness's evidence is likely to be, the examinations of commission counsel and the cross-examiners tend to get to the point much more quickly.

46 In oral argument, Commission counsel indicated that counsel for the appellants did not request more detailed summaries before the motion for disclosure, now before this court, was commenced. Notwithstanding, Commission counsel Ms Walsh advised that if the summaries already provided were not sufficiently detailed, she was willing to work with counsel for the appellants and the intervenors to provide further information, but no such request had yet been made. Nor had the issue been presented squarely to the Commissioner, other than in the context of their motion requesting disclosure of all the transcripts. Moreover, Commission counsel argued, while this court was told in argument that the summaries lacked sufficient detail, no particulars of that lack of detail were provided. Therefore, Commission counsel argued, a decision that the summaries are

not sufficient to fulfill the duty of procedural fairness in this case is not only premature, but also speculative.

47 This court has already noted that the utilization of the summary disclosure process assumes sufficient detail is provided to fulfill the requirements outlined in the quote from Commissioner O'Connor. Having so decided, it is not for this court to oversee the conduct of the Inquiry by determining the degree of detail that must be provided in each and every summary. That is for the Commissioner to decide on a case-by-case basis. He is entitled to significant deference regarding his process. While the Commission's procedures must, of course, be procedurally fair, as a general rule, a tribunal is the master of its own procedure and is entitled to streamline its disclosure procedures in keeping with its objective to expedite the hearing process. See *Clifford v. Ontario (Attorney General)* (2008), 90 O.R. (3d) 742 at para. 10 (Div. Ct.), rev'd on other grounds 2009 ONCA 670, 98 O.R. (3d) 210).

48 In addition, questions remain as to the relevance of all the material being requested. Given the wide-ranging nature of the interviews, it is expected that parts of the interviews will not be pertinent to the Inquiry. Nor, it would seem, has a decision been made that all of the witnesses interviewed will be called at the Inquiry. For example, in its factum, the appellants refer to transcripts that Commission counsel conducted "with prospective witnesses."

49 The appellants rely heavily on the case of *Hudson Bay*. They argue that this Inquiry is on all fours with *Hudson Bay* and, therefore, disclosure of

the transcripts is mandated here, as it was there.

50           The issue in *Hudson Bay* was whether transcripts of interviews conducted by Crown counsel in preparation for an inquest under *The Fatality Inquiries Act*, C.C.S.M., c. F52 (the *FIA*), were privileged and, if not, whether disclosure of the transcripts was required. In that decision, the court determined that the transcripts were not privileged, and that the standard of procedural fairness required in an inquest required disclosure to the parties with standing in the factual circumstances of that case.

51           I do not agree that our decision here is governed by *Hudson Bay* for several reasons.

52           First, the *Hudson Bay* case involved an inquest. This is a public inquiry. While *Hudson Bay* notes that some of the goals of the two are similar and that both are concerned with being fair fact-finding processes, differences were also explained. In particular, in *Hudson Bay*, the court stated, “unlike inquests, inquiries are not limited to merely death-related matters” (at para. 38), and further stated (at n. 1):

Public inquiries are a different matter, although they may have some goals similar to inquests. .... For the most part, the [Canadian public inquiries] legislation permits inquiries into broad matters of public concern. ....

53           These differences are evident when comparing the legislation. The legislation governing inquests is the *FIA*; the relevant legislation for commissions of inquiry is contained in Part V (ss. 83-96) of the *MEA*. Neither *Act* provides detailed procedural rules. However, it is clear that

there is a difference in the scope of the investigation required in each case.

54 Under the *FIA*, inquests are assigned to a judge who must determine the material circumstances of the death, including the cause, manner and circumstances of the death, the identity and age of the deceased, and the date, time and place of death. The judge is not required to do anything more, although he or she may recommend changes in provincial programs, policies, legislation or practices if he or she is of the opinion that such changes could reduce the likelihood of similar deaths (s. 33(1)).

55 Under the *MEA*, on the other hand, a commission of inquiry is assigned to an independent commissioner to inquire into those defined matters which the Lieutenant Governor in Council believes to be of sufficient public importance and which are not otherwise regulated (s. 83(1)). A commissioner's particular mandate and powers are granted by way of a specific Order in Council. This endows the commission with a broad mandate and allows commissioners a wide discretion within the terms of reference regarding the scope of inquiry, and the process to be followed. This difference in scope and authority impacts on the balance between procedural fairness and effectiveness. The public interest is not served by inquiries that take years to complete.

56 More crucial than the difference in legislation are the factual differences. In *Hudson Bay*, no summaries of the interviews by Crown counsel were provided or offered to the other parties. There had been no discussion as to rules in this regard. There were no assurances given directly to the witnesses in *Hudson Bay* that the transcripts were for internal

purposes only. There was no agreement in *Hudson Bay* that the transcripts or summaries would not be used for cross-examination purposes.

57 As to relevance, in the *Hudson Bay* case, the transcripts at issue related to witnesses that Crown counsel had already decided were going to testify. There were concerns about conflicting evidence and an evidentiary vacuum in some instances.

58 Also significant is the difference in scope between this Inquiry and the *Hudson Bay* inquest. In *Hudson Bay*, a total of 23 witnesses testified, but at the time the motion for the transcripts was brought, 12 witnesses had already testified. The question of statutorily confidential information did not arise nor was the necessity to redact material raised. The transcripts in question were ready and there were no summaries prepared or contemplated. One of the reasons that the transcripts were ordered to be produced was that it was more expeditious than the preparation of summaries at that point in the inquest. In fact, as stated (at para. 110):

Although counsel for [Manitoba's Workplace Safety & Health Division (Mines Branch)] indicated she would be satisfied with "will says," someone would have to review all the transcripts and prepare the "will says." I do not believe that is an expeditious way to proceed in this particular case. "Will says" can be produced if the evidence is not available in a convenient format (that is, there are privileged parts to it) (see **Johal** [*R. v. Johal*, [1995] B.C.J. No. 1271 (S.C.) (QL)], at paras. 7-10). Here, I have already held that the entire interview is not privileged and the interviews have already been transcribed. Therefore, I believe that the appropriate remedy would be for the inquest judge to order disclosure of the actual transcripts. It may be otherwise in different circumstances. The order of disclosure may be subject to such terms and conditions as may be agreed upon by the parties and, if necessary, ordered by the

inquest judge.

59 In contrast, this is a wide-ranging public inquiry with three separate phases. There have been approximately 154 potential witnesses interviewed. Some potential witnesses have been interviewed more than once and some interviews were conducted in group settings. A total of 46,000 pages of material have already been reviewed line by line to delete confidential information and disclosed. The transcripts in dispute constitute another 11,000 pages, representing 85 interviews, which, Commission counsel argues, would, if disclosed, have to be reviewed line by line to delete confidential information before they could be released. We were told that at least 77 summaries have already been prepared.

60 Besides relying on the *Hudson Bay* case itself, the appellants also submit that both the *Driskell Inquiry* (Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell, *Report* (Winnipeg: The Commission, 2007) online: <http://www.driskellinquiry.ca/index.html> (last accessed October 18, 2012)) and the *Taman Inquiry* (Commission of Inquiry into the Investigation and Prosecution of Derek Harvey-Zenk, *Report* (Winnipeg: Department of Justice, 2008) online: <http://www.tamaninquiry.ca/> (last accessed October 18, 2012)) felt bound by this court's *Hudson Bay* decision and, consequently, allowed for the disclosure of pre-hearing witness interview transcripts.

61 The *Driskell Inquiry* rules of procedure (accessible online: <http://www.driskellinquiry.ca/pdf/rulesprocedurepractice.pdf>, last accessed October 18, 2012) were finalized April 4, 2006, prior to the release of the

*Hudson Bay* decision (released September 15, 2006). The *Taman Inquiry* rules of procedure (accessible online: [http://www.tamaninquiry.ca/pdf/taman-rules\\_of\\_procedure\\_and\\_practice.pdf](http://www.tamaninquiry.ca/pdf/taman-rules_of_procedure_and_practice.pdf), last accessed October 18, 2012) were finalized after *Hudson Bay* was decided. However, in the initial proceedings before the Taman Commissioner, Taman Commission counsel indicated that the rules of procedure were modelled on those used in other commissions of inquiry, and adapted somewhat from the *Driskell Inquiry*.

62           Interestingly, the rules of the *Driskell Inquiry* and the *Taman Inquiry* allowed commission counsel a choice of disclosing the witness transcript or a summary. If the witness was to be called, the rules stated that “Commission counsel will prepare a statement of the witness’s anticipated evidence or a transcript of their interview,” and it would be provided to the witness for review and then disclosed to the parties. If the witness was not going to be called, then the rules stated that “Commission counsel will provide the parties with a transcript of the interview, if available, or a summary of the relevant information provided by that person.”

63           Next, the appellants argue that, at the very least, those witnesses who consent could have their transcripts released to the rest of the parties. They submit that as professional witnesses, they can be trusted to delete any confidential information that is contained in their own transcripts. However, I do not think it is appropriate for Commission counsel to delegate that duty. By order dated December 2, 2011, Chief Justice Joyal of the Court of Queen’s Bench determined that the Commissioner and Commission staff could make use of statutorily confidential records and the information contained therein for the purposes of the Inquiry, including disclosing and

communicating the information to the parties and intervenors on such terms as would be determined by the Commissioner. By the terms of this order, therefore, it is the Commission's responsibility alone to determine what records and information will be disclosed to the parties and intervenors.

64 After receiving written submissions from the parties and intervenors with standing, the Commissioner ruled that the following redactions should be made to the records and the information contained therein: the identification of informants providing information to child welfare authorities about child protection and safety matters; the identity of children who were under 18 years of age; and the names of foster parents or other individuals, if their identities are irrelevant to the Commission's mandate. See Commission of Inquiry into the Circumstances Surrounding the Death of Phoenix Sinclair, *Ruling on Redactions* (December 2, 2011), online: [http://phoenixsinclairinquiry.ca/rulings/ruling\\_redactions.pdf](http://phoenixsinclairinquiry.ca/rulings/ruling_redactions.pdf) (last accessed October 18, 2012).

65 As submitted by Commission counsel, the transcripts can be expected to contain some of the confidential information redacted from the documents because some of it will be information about that which the witnesses have personal knowledge. In recounting their experiences during the informal witness interviews and on the understanding that the interview was for internal Commission purposes only, it is readily understandable that discussion would ensue relating to irrelevant facts as well as and references to persons unconnected to the mandate of the inquiry. Moreover, inevitably there were informants in this case whose identity it would not be in the public interest to disclose.

66 While the Commissioner is not permitted to express any conclusion or recommendation about the civil or criminal liability of any person (para. 5 of the OIC), the Commissioner is entitled to make findings of misconduct pursuant to Commission Rules 47-49. A finding of misconduct carries with it potential personal and professional consequences. This is especially so given the brutal murder of this young child which has rightly attracted wide public attention.

67 I do not wish to minimize the emotional, mental and reputational impact this matter has had on the parties and intervenors. “Persons involved in public inquires, even if they are not the primary subject of examination, may become victims of ‘collateral damage’” (Ruel at p. 131).

68 In this regard, the following comments of Cory J. in *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System)*, [1997] 3 S.C.R. 440 are pertinent (at para. 55):

The findings of fact and the conclusions of the commissioner may well have an adverse effect upon a witness or a party to the inquiry. .... It is true that the findings of a commissioner cannot result in either penal or civil consequences for a witness. .... Nonetheless, procedural fairness is essential for the findings of commissions may damage the reputation of a witness. For most, a good reputation is their most highly prized attribute. It follows that it is essential that procedural fairness be demonstrated in the hearings of the commission.

69 To that end, I agree with counsel for the appellants that a significant degree of procedural fairness is owed to those who are called to testify because of the potential impact on the witnesses’ reputations and careers.

70 But there must be some balance. This is not a trial. The parties and intervenors are not entitled to perfection or even a *R. v. Stinchcombe*, [1995] 1 S.C.R. 754, level of disclosure, as mandated in criminal proceedings. Procedural fairness must be balanced with the need for an inquiry to be thorough, rigorous, expeditious, efficient, timely and effective in the public interest. Justice delayed is justice denied. I also agree with the statements of Justice Teitelbaum in *Chrétien v. Canada (Ex-Commissioner, Commission of Inquiry into the Sponsorship Program and Advertising Activities)*, 2008 FC 802, [2009] 2 F.C.R. 417 (at para. 54):

This is not to say, however, that the content of fairness is necessarily more stringent where there is a risk that one's reputation may be negatively affected. As I stated in *Addy v. Canada (Commission and Chairperson, Commission of Inquiry into the Deployment of Canadian Forces in Somalia)*, [1997] 3 F.C. 784 (T.D.) "the possible and purported damage to the applicants' reputations must not trump all other factors and interests" (*Addy*, at paragraph 50). In determining the standard of fairness, it is necessary to "balance the risks to an individual's reputation and the social interests in publication of a report" (*Addy*, at paragraph 61). Likewise, the risks to an individual's reputation must be balanced with the social interest in permitting the commission to conduct its inquiry and to inform and educate the public about the matter or conduct under review.

71 There is one essential undertaking that is the linchpin of this decision. In support of their argument that the transcripts should be disclosed, the appellants expressed great concern that the Commission Rules, together with para. 9 of the OIC, allow for summaries to be tendered as evidence without the need for calling the individual as a witness at the public hearing, and that the transcripts or reports of the interviews can be relied on by the

Commissioner in rendering his final report. So, for example, Rule 25 allows Commission counsel to “tender the Summary to the Commissioner at the hearing, and the Commissioner may consider the information in the Summary when making his final findings, conclusions and recommendations.”

72 In addition, para. 9 of the OIC states:

Before public hearings take place, the commissioner may interview any person connected with the matters referred to in paragraph 1. On the commissioner’s behalf, interviews may be conducted by counsel for the commissioner, either alone or in the commissioner’s presence. If conducted alone, counsel must give the commissioner a transcript or a report of each interview. The commissioner may, in his discretion, rely on the evidence gathered in this manner.

73 In response to this concern, two undertakings were given by Commission counsel, in the factum and in oral argument; that the Commissioner would not rely on the power given to him in para. 9 of the OIC and that, except for two witnesses whose evidence is uncontested, the Commission expects to call all witnesses to testify in person at the public hearings. For further clarity, in paras. 22-23 of the Commission’s factum it is stated that:

22. .... The Commission expects to call all witnesses to testify in person in public hearings, thus making the use of that Rule unnecessary. ....

23. The Commissioner has made clear that all witness evidence will be tendered in the public hearings. He will not be informed of that evidence in advance and will not consider transcriptions of pre-hearing interviews. ....

74 At the hearing of the stated case, one of the intervenors, Debbie De Gale, who argued against the disclosure of her interview transcript, asked to file an affidavit before the court as an addition to the stated case. This was opposed by counsel for the appellants. Counsel for the Commission took no position. After hearing argument, we reserved decision. Given these reasons, it is unnecessary to deal with the question of the admission of that affidavit.

75 In addition, given these reasons, it is unnecessary to deal with the issues of confidentiality and privilege raised by some of the parties and intervenors.

76 Finally, I would like to add a few comments regarding the role of all counsel in public inquiries. This is not intended as a criticism of any of the counsel in these proceedings, but rather to give guidance as to what this court expects from counsel going forward.

77 Rule 7 of the Commission Rules indicates that Commission counsel's role is to assist the Commissioner to ensure the orderly conduct of the Inquiry, and that Commission counsel will have the primary responsibility for representing the public interest at the Inquiry, including the responsibility to ensure that all matters that bear upon the public interest are brought to the Commissioner's attention. In the *Stevens Inquiry* (Commission of Inquiry into the Facts of Allegations of Conflict of Interest Concerning the Honourable Sinclair M. Stevens, *Report* (Ottawa: Minister of Supply and Services Canada, 1987)), Commissioner Parker addressed the proper role of

commission counsel in such proceedings, stating (as quoted in Ed Ratushny, *The Conduct of Public Inquiries: law, policy, and practice* (Toronto: Irwin Law Inc., 2009) at 220):

.... I am satisfied that his or her task is to ensure that all of the evidence, all of the issues, and all possible theories are brought forward to the Commission. In this context, counsel's obligation is most often described as the duty to be impartial.

78 In the *Toronto Computer Leasing Inquiry* (Toronto Computer Leasing Inquiry/Toronto External Contracts Inquiry, *Report* (Toronto: City of Toronto, 2005)), Commissioner Bellamy delineated the impartiality of commission counsel in this way in her ruling of October 15, 2003 (as quoted in Ratushny at pp. 221-22):

Impartiality on the part of commission counsel is not to be confused with a lack of rigour and vigilance in seeking the truth. Commission counsel must still act forcefully whenever necessary to overcome resistance that could obscure truth. This persistence is particularly important wherever the transparency of public inquiries motivates resistance on the part of those with something to hide. What makes commission counsel's role unique is that they must take into consideration the public interest, the interests of all parties, and furthermore, must explore conscientiously all plausible explanations and outcomes regardless of whose interests are advanced. We have now reached a point in the evolution of commission counsel's role where it can be confidently asserted that every task they undertake must be infused with impartiality inseparable in degree from that of the commissioner.

79 I agree with this view of the role of commission counsel. It is commission counsel who has the primary responsibility to vigorously and completely represent the public interest, including the interests, issues and

theories of all parties. In order to do so, commission counsel needs to foster effective communication with all of the parties to the Inquiry. By way of illustration, the parties may be able to shed light on information not initially thought to be relevant or suggest additional fields of inquiry. Conversely, commission counsel should ensure that relevant information is getting to the parties on a timely basis, and should be available to discuss issues with other counsel.

80 Parties granted standing in a commission of inquiry need to be aware of the wide scope of commission counsel’s mandate, and should be able to trust and rely upon commission counsel to fulfill that role. As stated by Ratushny (at p. 257):

.... The parties granted standing have a “substantial and direct interest” in some aspect(s) of the inquiry’s terms of reference. But commission counsel responsible for marshalling the evidence and managing the hearings represents the public interest with respect to all aspects. No other person has the same comprehensive and intimate knowledge of all of the evidence and witnesses and their interrelationships. ....

81 Counsel for parties and intervenors with standing should endeavour to assist commission counsel by communicating any issues that are of concern to them and their clients. This will greatly assist commission counsel in effectively bringing forward the interests, issues and theories of all parties in the public interest. While the courts are available to remedy a breach of procedural fairness, it is important that counsel work together toward the common goal of facilitating the important work of a commission of inquiry.

82           An atmosphere of fairness, openness and cooperation among all parties will not only contribute to the smooth functioning of the hearings, but to the ultimate goal of this Inquiry, which is the better protection of and service to the children in care in the Province of Manitoba.

## Conclusion

83           Consequently, for the reasons given, I would answer the two questions in the stated case as follows:

1.   Do the Commission's Amended Rules of Procedure and Practice require the disclosure of witness interview transcripts to the Parties and Intervenors?

No.

2.   Do the principles of natural justice and procedural fairness require the disclosure of witness interview transcripts to the Parties and Intervenors?

No.

\_\_\_\_\_ J.A.

I agree: \_\_\_\_\_ C.J.M.

I agree: \_\_\_\_\_ J.A.

# Schedule A



## MANITOBA ORDER IN COUNCIL

DATE: March 23, 2011  
ORDER IN COUNCIL NO.: 89/2011  
RECOMMENDED BY: Minister of Justice

### ORDER

1. The Honourable Edward (Ted) N. Hughes, OC, QC, LL.D (Hon) is appointed as commissioner to inquire into the circumstances surrounding the death of Phoenix Sinclair and, in particular, to inquire into:
  - (a) the child welfare services provided or not provided to Phoenix Sinclair and her family under The Child and Family Services Act;
  - (b) any other circumstances, apart from the delivery of child welfare services, directly related to the death of Phoenix Sinclair; and
  - (c) why the death of Phoenix Sinclair remained undiscovered for several months.
2. The commissioner must report his findings on these matters and make such recommendations as he considers appropriate to better protect Manitoba children, having regard to the recommendations, as subsequently implemented, made in the reports done after the death of Phoenix Sinclair, set out in paragraph 3.
3. To avoid duplication in the conduct of the inquiry and to ensure recommendations relevant to the current state of child welfare services in Manitoba, the commissioner must consider the findings made in the following reviews and the manner in which their recommendations have been implemented. He may give the reviews any weight, including accepting them as conclusive:
  - (a) A Special Case Review in Regard To The Death Of Phoenix Sinclair, Andrew J. Koster and Billie Schibler (September, 2008)
  - (b) Investigation into the Services Provided to Phoenix Victoria Hope Sinclair, Department of Justice, Office of the Chief Medical Examiner (September 15, 2008)
  - (c) Strengthen The Commitment An External Review of the Child Welfare System, Michael Hardy, Billie Schibler and Irene Hamilton (September 28, 2008)
  - (d) "Honouring Their Spirit", The Child Death Review: A Report to the Minister of Family Services and Housing, Province of Manitoba, Billie Schibler and James H. Newton (September, 2008)
  - (e) Strengthening our Youth: Their Journey to Competence and Independence, A Report on Youth Leaving Manitoba's Child Welfare System, Billie Schibler, Children's Advocate, and Alice McEwan-Morris (November, 2008)
  - (f) Audit of the Child and Family Services Division, Pre-devolution Child in Care Processes and Practices, Carol Bellringer, Auditor General (December, 2008)
4. The commissioner may also consider any court transcripts and similar documents, which are not subject to a legal claim of privilege, and may give them any weight, including accepting them as conclusive.
5. The commissioner must perform his duties without expressing any conclusion or recommendation about civil or criminal liability of any person.
6. The commissioner must complete his inquiry and deliver a final report containing his findings, conclusions and recommendations to the Minister of Justice and Attorney

General by March 30, 2012. He may also give the Minister of Justice and Attorney General any interim reports that he considers appropriate to address urgent matters. All reports must be in a form appropriate for public release, but release is subject to The Freedom of Information and Protection of Privacy Act and other relevant laws.

7. Nothing in paragraph 1 limits the commissioner's right to request the Lieutenant Governor in Council to expand the terms of reference to cover any matter that he considers necessary as a result of information that comes to his attention during the course of the inquiry.
8. Government departments and agencies and other bodies established under the authority of the Manitoba Legislature must assist the commissioner to the fullest extent permitted by law.
9. Before public hearings take place, the commissioner may interview any person connected with the matters referred to in paragraph 1. On the commissioner's behalf, interviews may be conducted by counsel for the commissioner, either alone or in the commissioner's presence. If conducted alone, counsel must give the commissioner a transcript or a report of each interview. The commissioner may, in his discretion, rely on the evidence gathered in this manner.
10. The Minister of Finance may pay the following amounts from the Consolidated Fund, at the request of the Minister of Justice and Attorney General:
  - (a) travelling and other incidental expenses that the commissioner incurs conducting his inquiry;
  - (b) fees and salaries of any advisors and assistants employed or retained for the purpose of the inquiry;
  - (c) any other operational expenditures required to support the inquiry.
11. This Order is effective immediately.

#### **AUTHORITY**

Subsection 83(1) and section 96 of The Manitoba Evidence Act, C.C.S.M. c. E155, state in part:

##### **Appointment of commissioner**

83(1) Where the Lieutenant Governor in Council deems it expedient to cause inquiry to be made into and concerning any matter within the jurisdiction of the Legislature and connected with or affecting

...

(c) the administration of justice within the province;

...

(f) any matter which, in his opinion, is of sufficient public importance to justify an inquiry;

he may, if the inquiry is not otherwise regulated, appoint one or more commissioners to make the inquiry and to report thereon.

##### **Power to make rules**

96 The Lieutenant Governor in Council may make provision, either generally in regard to all commissions issued and inquiries held under this Part, or specially in regard to any such commission and inquiry, for

(a) the remuneration of commissioners and persons employed or engaged to assist in the inquiry, including witnesses;

(b) the payment of incidental and necessary expenses; and

(c) all such acts, matters, and things, as are necessary to enable complete effect to be given to every provision of this Part.